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Re: Ford Motor Company's responses to ODI safety defect
investigations PE85-05 and PE87-028 and ODI petition
analysis P85-24

Dear Sirs:

As you know, the National Highway Traffic Safety Administration (NHTSA) has been evaluating the adequacy of Ford Motor Company's (Ford) responses to information requests (IR) from the agency's Office of Defects Investigation (ODI) during ODI safety defect investigations PE85-05 and PE87-028 and ODI petition analysis P85-24. This letter responds to allegations from Jeffrey L. Fazio, Esq., counsel for plaintiffs in private litigation involving allegations that failure of the thick film ignition (TFI) module in various Ford vehicles led to stalling and/or ignition system failure (Howard et al. v. Ford Motor Company et al. (Cal. Superior Court, No. 763785-2)), that Ford's responses to all three ODI inquiries were inadequate, and to Ford's claims that its responses were appropriate.

I. Background

A. ODI's Inquiries

ODI opened three separate inquiries into stalling in Ford Motor Company vehicles between 1984 and 1987. Each of these inquiries was closed at the preliminary investigative stage, without being

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"elevated" to a more in-depth "engineering analysis."¹ As explained in more detail below, the scope of the three inquiries was not identical, and ODI asked different questions in each.

Investigation PE 85-05 (opened November 29, 1984; closed October 9, 1986) covered model year 1984 Tempo and Topaz vehicles of unspecified engine size. The "alleged defect" was "stalling." ODI's IR letter asked eight (8) questions. Of these, Question 2 asked Ford to "[f]urnish the number and copies of all owner reports or complaints received by Ford, or of which Ford is otherwise aware, pertaining to the subject problem on the subject vehicles." Question 3 requested Ford to provide "the number and copies of all other reports, complaints, studies, surveys, or investigations from all sources, either received or authorized by Ford, or of which Ford is otherwise aware, pertaining to the subject problem on the subject vehicles" and further specified that "the sources are to include, but not be limited to, all Ford personnel, suppliers, and field service representatives." Question 7 asked for copies of all service bulletins, dealer notices, engineering service letters or similar communications issued by Ford which pertain to the subject problem on the subject vehicles; and Question 8 asked Ford to "furnish [its] evaluation of the alleged problem as it relates to motor vehicle safety and state what action Ford intends to take."

Petition Analysis² P85-24 (petition dated May 24, 1985; petition denied November 26, 1985) covered 1984 and 1985 Ford full- and mid-sized cars with fuel-injected 3.8L and 5.0L engines. The alleged defect was stalling. ODI's IR letter asked seven (7) questions, but these did not include a question seeking "studies, surveys, or investigations."

¹ ODI conducts most of its investigations in stages. At all times relevant to this inquiry, there were three investigative stages: (1) the Preliminary Evaluation, or "PE;" (2) the Engineering Analysis, or "EA;" and (3) the "Case." Stages 2 and 3 have now been combined into a single stage, known as an EA. The depth of the analysis generally increases from the PE to the EA, and ODI's inquiries at the EA stage are usually more extensive than those during a PE.

² ODI conducts petition analyses (termed "P" or "DP") in response to petitions, filed by interested persons pursuant to 49 U.S.C. 30162(a)(2), that request that NHTSA begin a proceeding to issue an order under 49 U.S.C. § 30118(b) (i.e., to decide whether to require a manufacturer to conduct a recall to correct a safety-related defect.) P85-05 resulted from the filing of a petition by the Center for Auto Safety (CAS), requesting that NHTSA "investigate and order the recall of 1984 and 1985 Ford full- and mid-size cars with fuel injected 3.8 or 5.0 liter engines due to widespread stalling problems."

Investigation PE87-028 (opened May 26, 1987; closed January 21, 1988) covered all 1983-1986 model year Escort, Tempo, Mustang, LTD, Thunderbird, EXP, Cougar, Topaz, Capri, Merkur, Lynx and Marquis vehicles equipped with 1.6L or 2.3L engines.³ The alleged defects included "failure to start engine, poor engine performance, engine stalling." ODI's IR letter asked Ford three (3) questions. Question 2 stated:

Furnish the number and copies of all owner complaints, field reports, service and technical bulletins, studies, surveys, or investigations from all sources, either received or authorized by Ford, or of which Ford is aware, pertaining to the alleged defect. This should include information pertaining to the reports included with this letter. Separate the number and copies of owner complaints from other sources.

Essentially, it sought the same information as was requested separately in questions 2 and 3 of the PE85-05 IR.

B. The Brownlee Declaration

NHTSA's present inquiry followed plaintiffs' filing of the "Declaration of Michael B. Brownlee in Support of Motion for Class Certification" on July 27, 1997, in the Howard litigation. Mr. Brownlee served as NHTSA's Associate Administrator for Safety Assurance (1995-1997) and as ODI Director (1987-1991). Although he was not ODI Director at the time of Ford's submissions in PE85-05 and PE85-24, he asserted in his declaration that, in his view, Ford had been "less than candid" in those responses and had improperly failed to submit 17 documents in response to ODI's information requests in those investigations.⁴ Mr. Brownlee asserted further that he believed that the information in these 17 documents was "material to both [inquiries] because it identified a common cause of stalling in vehicles equipped with the TFI module," and that "had that information been in hand," and had he been ODI Director, "[he] would not have closed either investigation without appropriate resolution." Dec., ¶18.

³ ODI defined the "subject vehicles" in this investigation to encompass those covered by Ford's April 1987 "Owner Notification Program MS0" (i.e., a "service" recall that offered a free replacement TFI module to the owners of the covered vehicles but did not state that it was intended to correct a safety-related defect.)

⁴ Mr. Brownlee's declaration did not address Ford's submissions in PE87-028. He explained that, under DOT's regulations governing employee and former employee testimony (49 CFR Part 9), he is prevented from testifying about that investigation because he participated directly in it while serving as the ODI Director. Dec., ¶ 3.

On September 11, 1997, Ford issued a statement denying that it had withheld any relevant information and requesting that NHTSA resolve the controversy.

C. The documents at issue

A list of the 17 documents and letter codes assigned to them follows.

- a. Memorandum of April 13, 1982 (Brownlee declaration, paragraph 16a, Exhibit H)⁵.
- b. Memorandum of April 29, 1982 (paragraph 16b, Exhibit I).
- c. Memorandum of April 30, 1982 (paragraph 16c, Exhibit J).
- d. Ford technical service bulletin of November 15, 1983 (paragraph 16d, Exhibit K).
- e. Document dated July 18, 1985 (paragraph 16e, Exhibit L).
- f. Memorandum dated July 23, 1985 (paragraph 16f, Exhibit M).
- g. Document dated August 14, 1985 (paragraph 16g, Exhibit N).
- h. Memorandum dated January 21, 1986 (paragraph 16h, Exhibit O).
- i. Memorandum dated March 25, 1986 (paragraph 16i, Exhibit P).
- j. Ford technical service bulletin dated June 5, 1986 (paragraph 16j, Exhibit Q).
- k. Memorandum dated June 20, 1986 (paragraph 16k, Exhibit R).
- l. Document dated June 23, 1986 (paragraph 16l, Exhibit S).
- m. Memorandum dated July 28, 1986 (paragraph 16m, Exhibit T).

⁵ All subsequent references in this document to "Paragraph 16__, Exhibit ___" are to the Brownlee declaration.

- n. Document entitled "Deviation Request," dated August 26, 1986 (paragraph 16n, Exhibit U).
- o. Document entitled "Thick Film Ignition Module 5/50 Warranty Review," dated November 3, 1986 (paragraph 16o, Exhibit V).
- p. Document entitled "Thick Film Ignition Module 5/50 Warranty Review," dated November 4, 1986 (paragraph 16o, Exhibit W).
- q. Document entitled "Thick Film Ignition Module 5/50 Warranty Review," dated November 5, 1986 (paragraph 16o, Exhibit X).

D. The Special Order

Because Mr. Brownlee's allegations appeared to raise serious issues concerning the integrity of NHTSA's defect investigation process, NHTSA issued a Special Order to Ford on September 23, 1997. In that Special Order, the agency directed Ford to answer the following two questions with respect to each of the above-referenced 17 documents:

1. Did Ford provide the document to NHTSA during the course of any of the ODI investigations? If so, identify the investigation(s) during which the document was provided and the date(s) on which it was provided and state the Bates page number(s) (if any) at which the document is located in the NHTSA public file for each investigation or the date of any confidentiality request(s) filed by Ford in connection with its submission of the document.
2. If Ford did not provide the document to NHTSA during the course of one or more of the ODI investigations, state the reason(s) for the omission(s).

Ford responded to the Special Order by telefax on October 6, 1997, with a 12-page cover letter (with attachments) from Mr. Logel and a 73-page response signed by Mr. L.W. Camp, Director, Automotive Safety Office (ASO), Environmental and Safety Engineering, Ford Motor Company. Mr. Logel amended this submission slightly, by letter of October 7, 1997 transmitting the "hard copy" of Mr. Camp's notarized affidavit. Rebuttals, further responses, and supplements were submitted, as follows:

October 21, 1997: Letter from Mr. Fazio
Undated, unsigned Reply Memorandum, with attachments,
enclosed with Mr. Fazio's letter of October 21, 1997
October 21, 1997: Another letter from Mr. Fazio, with
attachment

October 23, 1997: Letter from Clarence Ditlow, Executive Director, Center for Auto Safety,⁶ with attachments

November 25, 1997: Letter from Mr. Logel

December 19, 1997: Letter from Mr. Logel

December 22, 1997: Letter from Mr. Logel

January 4, 1998: Letter from Mr. Fazio

January 5, 1998: Letter from Mr. Fazio, with attachments

January 30, 1998: Letter from Mr. Fazio

February 8, 1998: Letter from Mr. Fazio, with enclosed videotape

February 11, 1998: Letter from Mr. Fazio re the videotape, with transcript excerpts and recall notices

February 13, 1998: Letter from Mr. Fazio, with transcripts of depositions excerpted on the videotape

April 7, 1998: Deposition transcript supplied by Mr. Brownlee

April 9, 1998: Letter from Mr. Logel

All of these materials have been placed in the public file for PE87-028.

II. The Scope of the IR's

A. Meaning of "studies, surveys, or investigations"

A fundamental issue in this analysis concerns the meaning of the term "studies, surveys, or investigations." In both PE85-05 (at Question 3) and PE87-028 (at Question 2) ODI requested that Ford provide "the number and copies of all other reports, complaints, studies, surveys, or investigations from all sources, either received or authorized by Ford, or of which Ford is otherwise aware, pertaining to the subject problem on the subject vehicles." ODI did not separately define the terms "study, survey, or investigation" in either IR.

In Ford's response to the Special Order, the Company construed the term "studies" very narrowly. Ford contended that the term included only those studies that are associated with individual owner complaints and field reports,⁷ as opposed to more general

⁶ Mr. Ditlow has appeared as an expert witness on behalf of the plaintiffs in the Howard litigation.

⁷ For convenience, the remainder of this document will use the term "studies" to encompass the terms "studies, surveys, or investigations." While the terms are not precisely synonyms, in this context the other two terms do not expand the scope of the IRs.

⁸ The term "field reports" includes reports from manufacturers' field representatives on attempts to resolve
(continued...)

analyses and studies. Further, the company asserted that ODI staff was aware that Ford historically has interpreted ODI's PE IRs in this way. Logel letter of October 7, 1997, at p. 5; see also Logel letter of December 22, 1997, at p. 3.

Mr. Fazio's reply did not explicitly attempt to define the terms, but argued that Ford's definition defies "common sense and a rudimentary understanding of the English language" By necessary implication, however, his claim that Ford was required to provide all 17 of the documents is premised on the notion that the documents (other than the service bulletins, which ODI requested separately in all three IRs) fall within the meaning of at least one of those terms.

NHTSA believes that Ford's narrow interpretation of the term "studies" lacks merit. First, Ford's limitation of covered "studies" to those associated with individual owner complaints and field reports is incorrectly narrow. In both IR's the adjective "all" precedes (and thereby modifies) the nouns "studies, surveys, [and] investigations." The word "all" means "the whole of . . ." (Random House Compact Unabridged Dictionary, Special Second Edition, 1996); "the whole number, quantity or amount; Totality." (Webster's Third New International Dictionary of the English Language Unabridged (1967)). In light of ODI's use of this broadly inclusive adjective, Ford should not have assigned such a restricted meaning to the phrase.

Second, Ford's construction is inconsistent with the sentence structure of ODI's questions, which request production of a variety of categories of documents (including reports, studies, surveys, investigations, etc.) in the disjunctive, and without any suggestion of limitation to documents that are related in any way to any other documents. Thus, the scope of ODI's request for copies of "all other . . . studies . . . from all sources . . . received or authorized by Ford or of which Ford is otherwise aware . . ." (emphasis supplied) clearly includes more documents than those that are associated with consumer complaints. This is plainly the case in the IR for PE85-05, in which ODI separated its request for complaint data and its request for studies into two separate questions. A similar analysis also applies to the IR for PE87-028, in which ODI combined the two requests into a single question.

¹ (...continued)
customer complaints or service problems, which frequently include a vehicle inspection.

Moreover, Ford's assertion that the company historically has limited its responses to requests in ODI PE IR's for "studies" to those documents that are associated with owner complaints and field reports is incorrect. ODI has reviewed 59 of Ford's responses to PE IR's between November 1984 and October, 1989. 53 of these PE IR's included the relevant question concerning "studies." ODI found that 16 of Ford's responses included studies or investigations of a more general nature.¹ Thus, at best, the company's practice in this regard can be described as inconsistent.

Ford's attempt (Camp response, pp. 5-7) to buttress its argument by suggesting that a broader construction of the term "studies" in the context of PE IR's would be contrary to "NHTSA's own policies and practices" also lacks merit. While it is true that the 1991 version of "ODI Procedures" referenced by Ford indicates that a PE is designed to "screen problems quickly," and sets forth standard IR questions to achieve that purpose, the document explicitly permits the use of additional (i.e., non-standard) IR questions. The variations among the texts of the three IR's under review show that this practice occurs frequently. Moreover, the document is neither an agency regulation which binds ODI nor one upon which regulated parties can rely. Rather, it is merely a procedural guidance document for ODI staff engineers and investigators.

Mr. Fazio suggests that Ford was required to submit every document in its possession that was relevant to the general subject matter of any of ODI's inquiries. The approach that he advocates is incorrectly broad. The scope of every information request is defined both by its introductory definitions of the subject vehicle(s) and the alleged defect(s), and by the texts of the questions themselves. Thus, the meaning of the term "studies," as used in these IR questions, must be viewed in the context of the applicable IR's introductory definitions, as well as the dictionary definition of the term.

The dictionary defines the noun "study" as "research or a detailed examination and analysis of a subject," or "a written account of such research, examination or analysis" (Random House Compact Unabridged Dictionary, *supra*, definitions 5 and 6), or "a careful examination or analysis of a phenomenon, development, or question, usually within a limited area of investigation" (Webster's Third New International Dictionary, *supra*, definition 2(c)(1)). Thus, ODI construes requests for "studies pertaining to the alleged defect" in PE IRs such as these to include reports on research into and examinations and analyses of actual

¹ NHTSA notes that, in the early 1990s, Ford started putting a statement that it was not providing more general studies into some but not all of its IR responses.

manifestations of the alleged defect in vehicles that have been sold to consumers. This may be compared with information requests by NHTSA's Research and Development or Safety Performance Standards offices, which may be interested in theoretical analyses or research on concept cars or prototype vehicles.

B. Supplementation of responses

Mr. Fazio also appears to believe (see Brownlee declaration at ¶ 16p; see also chart attached to undated reply memorandum, at p. 6 (discussing document N)) that Ford had a duty to supplement its IR response in PE85-05 to include documents that were prepared after the company completed its IR response but before ODI closed the investigation. That belief apparently is derived from 49 CFR 510.10(a)(2), entitled "Supplementation of responses to process," contained in NHTSA's regulations governing "Information Gathering Powers," 49 CFR Part 510. Although 49 CFR 510.10(a) provides that, in general, there is no duty to supplement any response if the information provided was complete and accurate at the time it was given to NHTSA, subsection (a)(2) requires reasonable amendment of a prior response to process if the entity "to whom the process is addressed" obtains knowledge that the response either was incorrect when it was made or that, although it was correct when made, it ". . . is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Subsection 510.10(b) provides that the requirement to supplement set forth in subsection (a) terminates when the enforcement action to which the process pertained is closed.

Mr. Logel's December 22, 1997 letter to the agency argued (at p. 12) that Ford was not required to supplement its response to the PE85-05 IR, because the document cited by Mr. Fazio was not responsive to the PE85-05 IR and did not call into question statements in the company's response to that IR. Recently, in deposition testimony, Mr. Camp reiterated that position. Howard v. Ford, SUDA, transcript of deposition of Louis Camp, March 19, 1998, pp. 176-177.

NHTSA has construed section 510(a) as applying only to information requests that have been issued in the form of compulsory process, i.e., general or special orders or subpoenas. Although Part 510 is entitled "Information Gathering Powers," its actual provisions are concerned exclusively with compulsory process. See 49 CFR 510.3 et seq. Moreover, while ODI could require manufacturers to supplement responses to IRs, the IRs at issue here did not direct Ford to do so.

III. Analysis of Whether the Documents Were Within the Scope of the Information Requests

There are 17 identified documents at issue in this matter, previously designated as Exhibits a-q to the NHTSA Special Order and the Ford response, and as Exhibits H-X to the Brownlee declaration.¹⁰ As explained more fully below, Ford did provide two (2) of the 17 documents (documents D and J) to ODI during PE87-028. After reviewing the remaining 15 documents in light of the above-described definition of the term "studies," NHTSA has concluded that five (5) (documents L, M, O, P and Q) were within the scope of PE87-028 and Ford should have produced them during that investigation. The remaining ten (10) documents were not within the scope of any of the IRs.

In addition, NHTSA has concluded that Ford should have furnished document D in its responses to the IRs in both PE85-05 and PE85-024.

A. Documents that were covered by one or more of the PE IRs

1. Service bulletins

Documents D and J are both "service bulletins" that contain explicit references to the TFI module. Document D, dated November 15, 1983, covers "No start -- Intermittent Run -- All Engines with TFI." In addition to addressing other vehicles, it specifically pertains to MY 1984 Tempo and Topaz vehicles (i.e., subject vehicles of PE85-05), and to MY 1984 LTD, T-Bird, Crown Victoria, Marquis, Grand Marquis, Lincoln, Mark, and Continental vehicles (i.e., subject vehicles of PE85-24). However, although Ford provided document D to NHTSA in response to PE87-028, the company failed to furnish the document in response to the IRs for PE85-05 or PE85-24.

Ford provided document J to ODI during PE87-028. This document was prepared on June 5, 1986, after Ford had completed its responses to PE85-05 and PE85-24. Thus, for reasons explained above, NHTSA has concluded that Ford was not required to provide this document in response to the earlier IRs.

In its response to the Special Order, Ford pointed out that it furnished both of the service bulletins to ODI as part of required monthly submissions that the company makes to the

¹⁰ The documents are referred to hereinafter by the identification letter (now in upper case) assigned to them in NHTSA's Special Order. Ford used NHTSA's identification scheme in its Response to the Special Order and supplemental documents, and Mr. Fazio adopted the same nomenclature in his submission of January 5, 1998.

agency, pursuant to 49 CFR 573.8. That regulation requires manufacturers to furnish to NHTSA "a copy of all notices, bulletins and other communications . . . sent to more than one distributor, [or] dealer . . . regarding any defect in its vehicles" However, NHTSA strongly disagrees with Ford's implicit argument that its submission of relevant requested documents in a routine mailing excuses its failure to submit such documents in response to a specific question in an investigatory IR. Both question 7 of the PE85-05 IR and question 5 of the P85-05 IR explicitly required the production of service bulletins related to the alleged defect.

Ford also claimed that document D was not responsive to the earlier IRs, both because document D did not use the term "stalling" (Camp response, p. 20) and because the scope of the document allegedly was limited to the practice by service personnel of using the TFI module as a "handle" during the course of repairs (Camp response, p. 19; see also Logel cover letter of October 7, 1997, p. 6). While it is true that the alleged defects in PE85-05 and P85-24 were defined as "stalling," whereas the PE87-028 IR defined the defect to include "failure to start engine, poor engine performance, engine stalling," NHTSA disagrees with Ford's claim that this document was not responsive to the two earlier inquiries. First, document D is specifically addressed to "intermittent run," a concept which necessarily includes engine stopping (i.e., stalling) as well as running. Second, Question 7 of the PE85-05 IR requested copies of service bulletins "which pertain to the subject problem on the subject vehicles" (emphasis supplied.) Because the ordinary meaning of the phrase "which pertain to," like that of "relating to," is broad, the scope of this question is expansive. C.f. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992). Third, only the last sentence of document D is addressed to the service practice cited by Ford. The remainder of the document speaks more generally about the TFI module and describes this issue as a "customer concern."

The agency has concluded that Ford should have supplied document D in response to the IRs in both PE85-05 and P85-024.

2. Warranty studies

a. MY 1984 projections

Documents L and M, which date from June and July, 1986, respectively (i.e., after Ford had completed its responses to PE85-05 and P85-024), contain 5 year/50,000 mile (5/50) warranty projections for MY 1984 passenger cars. The projections in document L (a handwritten compilation of projections and data concerning "84MY Pass. Car") were based on actual 30 months-in-service (MIS) warranty data from California, and those in document M (entitled "TFI 5/50 Warranty,") were based on 32 MIS

California data. The documents analyze early warranty indicators and contain forecasts of future warranty performance. They project warranty rates as high as 98 R/100¹¹ and 99 R/100 for certain 1.6L engines and 68 R/100 for certain 2.3L engines. Document M also contains a narrative "problem description" and a list of "corrective actions" taken and of steps taken to verify the effectiveness of those corrective actions, as well as graphs of warranty performance trends and plots of projected failure rates.

In its response to the Special Order, Ford argued that ODI typically does not request warranty information during PE's and makes specific requests for warranty information when it wants such information at the PE stage. NHTSA notes that ODI explicitly sought warranty information in question 5 of the PE88-05 IR, but agrees that ODI normally does not expressly ask for warranty information until the EA stage. However, the stage at which ODI requests warranty data is not relevant to the pending inquiry, since ODI's explicit requests for warranty data typically seek actual warranty data and warranty codes. The warranty information contained in documents L and M is information of a different kind. These documents contain projections that are derived from actual historical warranty experience. Thus, these documents constitute "studies" that pertain to the alleged defect, as defined above.

Ford also stated that it provided related materials that discussed these projections in response to the PE87-028 IR, referencing its report entitled Field Action Evaluation Paper (the "NAPPRC Report"¹²), dated January 26, 1987. However, although some of the information contained in documents L and M also can be found in this report, that fact does not excuse Ford's failure to submit documents L and M. Unless a document request explicitly provides otherwise, ODI expects manufacturers to submit all documents in their possession (including drafts) that are covered by a request, subject to validly documented claims of privilege. Manufacturers may not "pick and choose" among relevant documents within the scope of an inquiry.

NHTSA has concluded that Ford should have provided documents L and M in response to the PE87-028 IR. The analyses and information contained in the documents are based on actual warranty performance reports covering MY 1984 passenger cars in

¹¹ In this context, R/100 means the failure rate per 100 vehicles.

¹² The NAPPRC was Ford's North American Policy Program Review Committee. Its purpose was to consider proposals on a variety of issues and make recommendations to management on appropriate field actions.

service. Because these documents report on reliable computerized analyses of actual performance data¹³, they qualify as "studies" as defined above.

b. MY 1984/1985 Analyses

Documents O, P, and Q are three successive versions, ranging in length from 13 pages (document O) to 39 pages (document P), prepared between November 3-5, 1986, of a document entitled "Thick Film Ignition Module 5/50 Warranty Review." Document P, the second and longest version, contains a variety of charts and graphs and an attachment containing the details of a customer survey. The charts and graphs were omitted from document O but presented in document Q; the attachment was omitted from both documents O and Q. Some, but not all, of the information contained in these documents also was contained in the NAPPRC Report discussed above, which Ford did provide to ODI in response to PE87-028. Each of these documents was prepared after PE85-05 was closed and PE85-24 was denied. However, they were in existence at the time Ford responded to the IR in PE87-028.

In its response to the Special Order, Ford argued that it appropriately limited its response in PE87-028 to owner complaints and field reports and associated studies and service communications.¹⁴ NHTSA disagrees with Ford's assertion regarding the limited scope of the PE87-028 IR, for the reasons explained above.

Ford acknowledged (Camp response, p. 64) that the documents¹⁵ contain an analysis of warranty data and trends respecting TFI modules and a summary of engineering changes introduced to address those warranty trends, and that the documents refer to "possible customer service concerns that could be associated with

¹³ In the NAPPRC Report, Ford described the computer program, which it adopted in June, 1986, as one "that allowed for the first time the compilation of a reasonably reliable 5/50 . . . claim base." *Id.* at p. 1 ¶ 1.

¹⁴ Ford stated (Camp response at p. 68) that it submitted the NAPPRC Report in PE87-028 because it was a "service communication," but although service communications are attachments to the Report, that description does not apply to the text of the document. Moreover, under Ford's rationale, documents O, P, and Q would also be "service communications," since they were used to support the decision to conduct the campaign.

¹⁵ Ford's substantive response was addressed to Document Q, which is the latest of the three related documents. Ford incorporated its response to document Q by reference into its responses regarding documents O and P.

the cited warranty trends (e.g., stalling and no-start conditions)." Again, the company argued that ODI does not normally request warranty information during PE's, and requests such information specifically when it does want it. *Id.* at 64-65. Finally, Ford claimed that the NAPPRC Report "contains substantially all information from Document Q (and its predecessors) that was relevant to NHTSA's undertaking in No. PB87-028." *Id.* at 68.

NHTSA considers documents O-Q to be responsive to the PB87-028 IR, and has concluded that Ford should have provided all three documents in its response to that inquiry. The documents describe, in great detail, Ford's reported warranty repairs claim experience for failed TFI modules, including failure rates for "Tow-In" and "Quits on Road". They include cost estimates for continued warranty costs; cost estimates for reimbursing customers who had previously paid for repairs to their vehicles; and descriptions of the results of a customer survey. As explained above, these documents are not ordinary warranty data of the type that ODI requested in question 5 of PB85-05. These documents constitute "studies" within NHTSA's above-described definition because they are analyses of the service record of vehicles on the road, and of steps taken to address identified problems. Document P also contains a customer survey related to the alleged defect.

Ford has pointed to portions of the NAPPRC Report in which it discussed the expected TFI module lifespan in all of its MY 1984-85 vehicles, not just those covered by its "service campaign," and also discussed its testing of the TFI modules and its plans to improve the performance of TFI modules in later vehicles. Camp response at pp. 68-73. However, as stated above, although some of the information in documents O-Q also can be found in Ford's NAPPRC Report, that does not excuse Ford's failure to submit those documents in response to the IR. Moreover, the submitted document omits much of the information that is contained in documents O, P and Q.¹⁶

It is true that documents O-Q contain some information about vehicles that are beyond the scope of PB87-028. However, that is no excuse for failing to provide those documents in response to the PB87-028 IR.

¹⁶ Ford argued, at FN 2 to its December 22, 1997 letter, that when it submitted information indicating that it had made design modifications to the TFI module to address "thermal stress" issues, in response to Requests Nos. 6 and 7 in the PB85-24 IR for identification of all components necessary for engine function and for an accounting of all design changes affecting those components, NHTSA did not request any additional documents. However, this does not excuse Ford's failure to provide responsive documents that were called for in these IRs.

B. Documents that are not covered by one or more of the IR's

1. Documents that did not exist when Ford's responses were prepared

A number of the documents in question (documents L, M, N, O, P, and Q) did not exist until after Ford responded to both PE85-05 and P85-024. Obviously, Ford could not have submitted these documents before they were prepared. As explained above, NHTSA disagrees with Mr. Fazio's apparent belief that Ford had a duty to supplement its IR response in PE85-05 to include documents (such as documents O-Q) that were prepared after the company completed its IR response but before ODI closed the investigation.

2. Documents that do not deal with subject vehicles

As explained above, each of the three IR's involved a differently-defined group of subject vehicles. NHTSA has concluded that the scope of each IR must be viewed as limited to documents that refer to the subject vehicles as defined therein. Thus, documents E and F, which refer to MY 1985-86 configuration vehicles, are beyond the scope of PE85-05, which covered only MY 1984 vehicles. Also, documents I, K, and N, which refer to MY 1987 vehicles, are beyond the scope of all three investigations; none covered vehicles produced after MY 1986.

3. Documents that are not "studies, surveys, or investigations"

Although documents A, B, and C were in existence before the issuance of all three IR's, these documents are not analyses of the performance of production vehicles. All three documents pertain to problematic pre-production tests that Ford concluded were invalid because the tested modules did not meet company specifications or because the test methodology, test equipment, or product specifications were faulty. Therefore, on the specific facts, NHTSA does not consider these documents to be covered by any of the information requests.

Documents E and F are analyses of "launch readiness" risk prior to the introduction of various MY 1985-86 vehicles. Although the documents report high temperatures during testing, NHTSA does not consider them to be "studies, surveys or investigations" within the meaning of the IR's because they do not report on the performance of on-the-road vehicles.

Document G is a one-page test summary, stating temperatures at the TFI base plate and at a "Hall Device", corrected to 110° F, covering 19 test vehicles of various makes, models, and model years. It does not mention failures or stalling. Therefore, NHTSA does not consider it to be responsive to any of the IR's.

Document H is a meeting schedule that does not discuss the substance of the scheduled meetings. Therefore, although it does list a schedule of meetings to study TFI-related issues, ODI does not consider this document to fall within the definition of "studies, surveys or investigations."

IV. Conclusion

After analyzing Ford's response to the Special Order, as well as the supplemental materials submitted by Mr. Fazio, CAS, and Ford, NHTSA has concluded that Ford should have submitted document D in PE85-05 and P85-024 (as well as in PE87-028), and documents L, M, O, P, and Q in PE87-028. These seven failures (six documents; one of which was responsive to two requests and five of which were responsive to one request) to submit documents could warrant the imposition of civil penalties. Because the applicable statute limits the maximum penalty to \$1,000 for "each failure or refusal . . . to perform an act required" (49 U.S.C. §30165(a)), the maximum penalty that could be imposed for Ford's failure to submit these documents arguably is only \$7,000. However, NHTSA has decided in its prosecutorial discretion not to pursue an action for civil penalties against Ford for these failures in consideration of the small size of the maximum penalty, the fact that the incomplete responses were provided quite some time ago, and potential defenses.

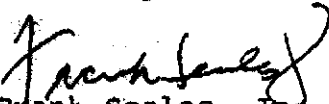
NHTSA has directed Ford to revise its approach to responding to ODI's IRs, and specifically to stop construing requests for "all studies, surveys, or investigations" as applying only to those that are associated with specific owner complaints and field reports. Manufacturers may not pick and choose among relevant documents that are within the scope of an ODI inquiry. NHTSA believes that Ford understands that NHTSA expects Ford to refrain in the future from reading IR specifications in a cramped manner.

Mr. Fazio is not seeking a recall order or asking NHTSA to reopen any of its previous investigations. Rather, he has asked the agency to issue findings with respect to Ford's responses to NHTSA's requests for information during the three inquiries. On the other hand, Ford has urged the agency to declare that receipt of the documents in question during the inquiries would not have led to a different result.

To resolve the question of whether NHTSA decision-makers would have reached different conclusions if they had seen the documents that Ford did not provide would require the agency to speculate about a contrary-to-fact hypothetical. This is particularly difficult in circumstances such as these, where the investigations have been closed for a long period of time, a recall is not sought and is beyond the eight-year period for free remedy provided in 49 U.S.C. § 30120(g), and the responsible officials have left the agency. Therefore, the agency will not re-evaluate its earlier decisions.

Nothing herein expresses any NHTSA view on the merits of plaintiffs' claims or Ford's defenses in the Howard litigation.

Sincerely,



Frank Seales, Jr.
Chief Counsel

cc: Mr. L.W. Camp
Director, Ford Automotive Safety Office