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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE  
MYFORD TOUCH CONSUMER  
LITIGATION

Case No. [13-cv-03072-EMC](#)

**ORDER RE PROPOSED SETTLEMENT**

Docket No. 437

Having reviewed the motion for preliminary approval, the Court finds the proposed settlement problematic and has serious concerns whether it can be approved, even preliminarily, as “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). In their motion, Plaintiffs have disregarded this Court’s guidelines. *See* Northern District of California’s Procedural Guidance for Class Action Settlements (“N.D. Cal Guidelines”), available at <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>. The Court will convene a status conference on **Monday, June 11, 2018 at 2:30 p.m.** to discuss the issues enumerated below. The parties shall also be prepared to propose new trial dates.

**1. Maximum Value of Claims:** Plaintiffs offer no estimate of the “potential recovery if plaintiffs were to prevail on each of their claims.” N.D. Cal Guidelines, Preliminary Approval ¶ 1.d. Plaintiffs failed to submit any such estimate, including an explanation of any assumptions, evidence, or other reasoning used to reach such an estimate (*i.e.*, estimated size of class, maximum and minimum value of class claims, etc.). The Court cannot evaluate the fairness of the settlement without understanding the maximum likely verdict value of the claims asserted.

**2. Software Upgrades:** Plaintiffs represent that the settlement will offer class members “equitable relief” in the form of a “free” upgrade to version 3.10 or later of the

1 MyFordTouch (MFT) software. However, Plaintiffs have not submitted any information about the  
 2 value of this upgrade, such as the normal cost to consumers, if any, to request the upgrade. *See*  
 3 N.D. Cal. Guidelines, Preliminary Approval ¶ 1(d) (motion should address “[t]he likely recovery  
 4 per plaintiff under the terms of the settlement”). More fundamentally, Plaintiffs offer no  
 5 information about whether MFT v. 3.10 resolves the defects they alleged in this case, or what they  
 6 have done to evaluate its performance. Finally, the proposed settlement also provides that “for  
 7 one year after installation of the MFT software update . . . Authorized Ford Dealers will address  
 8 any software problems . . . by confirming that the most current compatible update of the MFT  
 9 software (version 3.10 or later) is correctly installed and working properly.” Proposed Settlement  
 10 § II.A.2 at 18. What does this mean? Does this provision require Ford to do anything beyond  
 11 make software updates available for 1 year after the upgrade to v. 3.10? What happens if v. 3.10  
 12 does not cure all defects?

13 **3. Estimated Monetary Value of Settlement:** The proposed settlement provides  
 14 three mutually exclusive options for monetary relief. Class members can either receive  
 15 compensation for MFT Software Repairs, reimbursement for Post-Warranty Repair Costs, or  
 16 compensation for Unsatisfactory MFT Performance. *See* Proposed Settlement § II.B at 18-19.  
 17 Plaintiffs offer no estimate of the aggregate value to the class of these options: *e.g.*, how many  
 18 class members are expected to recover under each category?<sup>1</sup> There is no estimate of the total  
 19 likely recovery, including in particular the expected response rate of class members in submitting  
 20 claims given the relatively onerous claims process. To be clear, it appears there is no settlement  
 21 fund and no guaranteed minimum payout in settlement; is that correct?

22 **4. Claims Requirement:** The settlement requires each class member to submit a  
 23 claim with varying documentation requirements depending on the type of claim. However, the  
 24 Court was under the impression that Ford had records sufficient to identify at least some eligible  
 25 claims. For example, Ford has records of MFT Software Repair requests. Ford may also have

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26  
 27 <sup>1</sup> Ford earlier estimated that 69.8% of the California and Washington class members never sought  
 28 any repairs, approximately 20% sought 1 repair, approximately 5% sought two repairs, and  
 approximately 2% sought 3 repairs. *See* Docket No. 399. It is unclear what percentage sought  
 repairs in the other certified classes.

1 records of Post-Warranty Repairs conducted at its authorized dealers. Is there a reason these  
 2 known class members with valid claims must submit a form? Are there any other categories of  
 3 claimants who can be identified through Ford's records?

4 Also, can the process still be streamlined for these "known" eligible claims by relaxing the  
 5 documentation requirements for them?

6 **5. Timeline for Claims and Final Approval Hearing:** Under the proposed  
 7 schedule, claims will not be submitted until *after* the Court grants final approval of the Settlement  
 8 and hears Class Counsel's motion for attorneys' fees and costs and service awards. The open  
 9 claims process means the Court will be asked to rule on the fairness of the settlement with no or  
 10 little information about the total number of claims filed and deemed valid, and thus no concrete  
 11 information about the total value of the settlement actually realized by the Class. How can the  
 12 Court evaluate whether the settlement is fair, reasonable, and adequate if it does not have that  
 13 information? Moreover, how can the Court evaluate the reasonableness of Class Counsel's fee  
 14 award without any information about the concrete benefits actually received by the Class? How is  
 15 the Court supposed to apply the 25% benchmark where there is no identified common fund? Why  
 16 shouldn't the Court defer final approval (assuming preliminary approval is granted) until after the  
 17 claims process is completed?

18 **6. Differential Treatment of Class Members and Required Repair Attempts:**  
 19 Plaintiffs should explain why a monetary recovery of \$100-500 is limited to class members who  
 20 proactively sought an MFT Software Repair. The only class claim requiring proof of attempted  
 21 repairs was breach of express warranty for the California and Washington classes. The remaining  
 22 class claims did not, including breach of implied warranty (California, Massachusetts, New Jersey,  
 23 North Carolina, Ohio, Virginia), negligence (Ohio), California's Unfair Competition Law and  
 24 Song-Beverly Act, and Massachusetts' Consumer Protection Act. Although Plaintiffs assert that  
 25 their allocation scheme is "rationally based on a Class Members' level of dissatisfaction with the  
 26 MFT system and the time and energy the Class Member employed in a good-faith effort to resolve  
 27 MFT problems," Mot. at 16, those factors appear unrelated to the theory of damages advanced in  
 28 this litigation. *Cf. True v. Am. Honda Motor Co.*, 749 F.Supp.2d 1052, 1067-68 (C.D. Cal. 2010)

1 (finding proposed settlement unfair where class members were not treated differently because  
 2 they had different legal claims or suffered greater damages, but only because “they were moved to  
 3 complain”). How is the proposed allocation scheme fair, reasonable, and equitable?

4 **7. Unsatisfactory MFT Performance:** A class member who neither seeks  
 5 compensation for MFT Software Repairs or Reimbursement of Post-Warranty Repairs may only  
 6 seek a payment of \$35 if they attest that they experienced at least two instances of “Unsatisfactory  
 7 MFT Performance.” How did the parties arrive at a \$35 valuation and the requirement that there  
 8 be *two* unsatisfactory experiences? How is this settlement formula related to the damages sought  
 9 in litigation? Additionally, is there a reason to require a claimant seeking this relief to submit a  
 10 physical signature rather than an electronic attestation?

11 **8. Discount Option:** Claimants who sought at least one MFT Software Repair will  
 12 have the option to choose between a \$100-500 cash payment or a \$200-\$1,000 “discount” off the  
 13 value of a future purchase of a Ford or Lincoln vehicle equipped with the newer SYNC 3  
 14 information and entertainment system. The “discount” appears to constitute or be akin to a  
 15 “coupon settlement” under the Class Action Fairness Act of 2005. *See* 28 U.S.C. § 1712; *In re*  
 16 *Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 951 (9th Cir. 2015) (explaining that coupon  
 17 settlements are subjected to heightened scrutiny because they “involve a discount . . . on class  
 18 members’ purchases from the settling defendant” and “require class members to hand over more  
 19 of their own money before they can take advantage of the coupon, and they often are only valid  
 20 for select products or purchases”). Why shouldn’t this coupon option be subject to heightened  
 21 scrutiny?

22 **9. Litigation Risk:** Although Plaintiffs have identified litigation risks in their papers,  
 23 *See* Docket No. 19-20, they have not explained how they evaluated those risks. For example,  
 24 Plaintiffs note their trial theory hinged on showing that all versions of MFT, up to and including  
 25 version 3.6, were defective, and that a jury could find that software version 3.6 alleviated the MFT  
 26 defects to an extent they no longer impaired the safety, reliability, or operability of the Class  
 27 Vehicles. But, Plaintiffs offer no explanation of how substantial this risk was. What is the  
 28 evidence that MFT v. 3.6 resolved the defects? What is Plaintiffs’ contrary evidence?

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**10. Negotiation of Attorneys' Fees:** The parties shall submit declarations under penalty of perjury from counsel explaining the negotiation process with respect to attorneys' fees in relation to class member benefits. How did the parties arrive at the maximum figure of \$22 million in attorneys' fees, to be paid to Class Counsel by Ford if the Court approves an application? Were attorneys' fees negotiated simultaneously with class member benefits?

**11. Validation of Claims:** Under the claims process, Ford's total liability is contingent on the number of claims filed and deemed valid. Moreover, Ford will cover the costs of and apparently supervise the claim administration process. Ford thus has a financial incentive to minimize administration costs and the number of valid claims. The Proposed Settlement does not provide (or guarantee) that Class Counsel will play any role whatsoever in supervising claims administration or safeguarding class members' interests throughout the claims process to ensure that the process is fair. The Settlement merely provides that Class Counsel will be notified when a claim is rejected. The parties have not addressed how this Court can be assured that the claims process is fair and the number of valid claims is maximized in light of the lack of incentive by either party to maximize the number of claims.

**IT IS SO ORDERED.**

Dated: June 7, 2018

  
EDWARD M. CHEN  
United States District Judge