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January 18, 2007

BY OVERNIGHT DELIVERY

Honorable Ronald M. George
Chief Justice of California
Honorable Associate Justices
of the Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7303

Re: Request for Depublication
Daugherty v. American Honda Motor Co.
Cal. App. Case No. B186402

Dear Chief Justice George and Associate Justices:

Plaintiffs Elizabeth Daugherty, *et al.*, submit this letter in response to two issues raised by Defendant American Honda Motor Company ("Honda Letter") and by Ford Motor Company ("Ford Letter") in opposition to Plaintiffs' request for an order depublishing the Court of Appeal's decision in *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824 (2006).

In its letter, Honda tells the Court that it should not order the Court of Appeal's decision in *Daugherty* depublished because it did nothing more than apply law that was established long ago by many other appellate decisions. More specifically, Honda contends that "*Daugherty* analyzed and applied well-settled California law on the CLRA and UCL in a straightforward manner without altering, disregarding, ignoring or in any way disrupting existing California jurisprudence addressing these statutes." Honda goes on to state that

> *Daugherty* did not announce any "novel" rule with respect to the CLRA. Instead, *Daugherty* relied on the unremarkable and well-settled principle — announced over thirty years ago in *Outboard Marine v. Sup. Ct.*, 52 Cal. App. 3d 30 (1975) — that "the CLRA proscribes concealment of characteristics or quality 'contrary to that represented . . . .'"

But if *Daugherty* truly was nothing more than a reiteration of well-established law that was articulated 30 years ago in *Outboard Marine*, then the Court of Appeal should have declined Honda's publication request. *See* Rule Ct. 976(c) (prohibiting publication of Court of Appeal opinion unless it establishes a new rule of law, applies an existing rule

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to a set of significantly different facts, modifies/criticizes an existing rule, resolves or creates a conflict, involves a legal issues of continuing public interest, or makes a significant contribution to legal literature).

In fairness to the Court of Appeal, however, that was ***not*** what Honda argued when it made the request for publication last November. Indeed, when it urged the Court of Appeal to publish *Daugherty*, it asserted that the criteria set forth in Rule 976(c) had been met. According to Honda, the *Daugherty* decision resolved issues that had never been addressed by a California court, resolved a 30-year disagreement among practitioners about whether omissions are actionable under the CLRA, and provided an instructive analysis for the bench and bar regarding whether a manufacturer's concealment of a defect is actionable under the UCL — all in direct contradiction to what Honda tells this Court now:

> The Court's opinion resolves or clarifies several legal issues that frequently arise in consumer litigation in California. First, the Court's opinion decides, ***for the first time in California courts,*** the issue of whether an alleged "latent" defect, which manifests outside the term limits of a written warranty, may form the basis for a valid express warranty claim if the warrantor knew of a defect at the time of sale. . . .
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> Second, the Court's opinion in *Daugherty* provides clarification on the circumstances under which an omission is actionable under the Consumers Legal Remedies Act ("CLRA"). ***For years there has been disagreement among California consumer law practitioners as to whether, under*** **Outboard Marine v. Superior Court*, 52 Cal. App. 30 (1975), omissions are actionable under the CLRA***. Closely examining *Outboard Marine,* this Court found that an omission is actionable where it is "contrary to a representation actually made by a defendant," or where the omission is "of a fact the defendant was obliged to disclose." Op. at 12. Where there is no representation at all, and no duty to disclose the omitted information, an omission is not actionable under the CLRA. *Id.* at 12-14. Together with *Bardin v. DaimlerChrysler Corp.,* 136 Cal. App. 4th 1255 (2006), a recent decision of the Fourth District Court of Appeal, the *Daugherty* decision provides helpful guidance on the applicability of the CLRA to omissions. Because the Court's opinion interprets and explains *Outboard Marine, **a decision that has been frequently miscited over the years***, it is appropriate for publication.
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> Third, the Court's analysis of plaintiffs' Unfair Competition Law ("UCL") claim likewise is instructive to California courts and consumer law practitioners. The Court held that a "failure to disclose a fact one has no affirmative duty to disclose a fact one has no affirmative duty to disclose" under the "fraud" liability prong of the UCL. . . .

Letter from Honda's counsel, Wallace M. Allan, to Court of Appeal at 1-2 (November 3, 2006) (emphasis added; copy attached).

Put simply, Honda cannot have it both ways. Either the *Daugherty* decision was an unremarkable reiteration of extant law, as Honda tells this Court in its most recent letter; or it resolved disagreements that have been ongoing for more than 30 years over the proper application of that law, as it told the Court of Appeal last November. It cannot be both.

The other issue Plaintiffs wish to address is one that Ford raised in its letter. There, Ford implies that the firms who are representing Plaintiffs and one of the *amici* that is supporting their position (the Consumers for Automotive Reliability and Safety ("CARS") and the Consumer Federation of California ("CFC")) have banded together in an effort to resuscitate another case they are prosecuting in federal court, *Snyder v. Ford Motor Co.*, No. 06-0497 (N.D. Cal.). According to Ford,

> [c]ontinued publication of *Daugherty* is necessary and appropriate to allow the courts to efficiently resolve similar claims. Ford is involved in similar federal litigation brought by many of the same counsel for plaintiffs (and their supporters) in *Daugherty.* Having lost before the Superior Court and the Court of Appeal, this counsel now seeks depublication of the decision in an attempt to compel the federal court to adjudicate the issue anew (and, they hope, in a manner inconsistent with *Daugherty*).

Ford Letter at 4.

Ford has it partly right. My firm (Fazio | Micheletti LLP) does represent the Plaintiffs in *Snyder*. Moreover, my firm became involved in the present case after the Court of Appeal published its decision, and our concern about its impact on other actions is one of the principal reasons we decided to do so.

Beyond that, however, Ford's argument is simply misleading. Contrary to Ford's suggestion, counsel for the CARS and CFC (Lieff Cabraser Heimann & Bernstein LLP) does not represent the plaintiffs (or anyone else) in *Snyder*. Indeed, the ***only*** other firm that is representing parties in both cases is Honda's counsel, O'Melveny & Myers LLP, which is also serving as Ford's counsel in *Snyder*.

And although Ford tells the Court that the plaintiffs in *Snyder* are attempting to use *Daugherty* to "adjudicate the issues anew," the only party to that case that has stated any intention to file a motion based on *Daugherty* is Ford. After announcing on its website that the *Daugherty* decision means that, in California, "a manufacturer is not liable for an alleged defect that the manufacturer knows of at the time of sale, if the product functions normally within the express warranty period," Ford's counsel advised

the court in *Snyder* that it intends to move for judgment on the pleadings based on *Daugherty*.[1]

Indeed, *Snyder* is a particularly apt example of the kind of case that manufacturers will attempt to dismiss with the *Daugherty* decision if it remains binding precedent. In *Snyder*, the plaintiffs alleged that Ford knew that the ignition locks it installed in hundreds of thousands of its Focus economy cars (model years 200-2006) were defective before it began selling the first Focus in the 2000 model year. Plaintiffs have also alleged that Ford knew that the majority of these locks would fail outside of warranty (often shortly after the warranty expires).

As news reports have indicated, consumers throughout the United States have complained that their Focus ignition locks have frozen unexpectedly as a result of the defect, which makes it impossible to start the vehicle's engine, and impossible to shut it off if it was running when the malfunction occurred. *See, e.g.*, http://cbs5.com/-investigates/local_story_041015136.html; http://abclocal.go.com/kgo/story?section=-7on_your_side&id=4738647; http://www.wjla.com/news/stories/0706/347339.html. As the same reports make clear, however, Ford has not only refused to recall and replace the ignition locks in these vehicles (which can cost more than $500 to replace), it has continued to sell the Focus with the defective locks, and it provides the same locks to its dealers for use as replacements when they fail.

Apparently, Ford now believes that *Daugherty* will enable it to do so with impunity. That is precisely the reason *Daugherty* should be depublished. Although they imply that *Daugherty* has not created a significant change in the law, both Ford and Honda are already attempting to use that decision as a basis for arguing in trial courts that the change is not only significant, but significant enough to warrant outright dismissal of cases involving clear violations of consumers' rights.

That position not only flies in the face of the CLRA and its legislative history, but decades of jurisprudence that has enabled the courts to adjudicate claims like those presented here in the context of an individual case or in the context of a class action. *See, e.g., Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (explaining common issues that are properly resolved on behalf of a class of consumers who unwittingly purchased or leased vehicles that Ford knew were defective when sold or leased). *Daugherty* marks a significant, and plainly erroneous, departure from this body of law.

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[1] Ford answered the *Snyder* complaint in October 2006 after the court resolved Ford's motion for a more definite statement, which is the only non-discovery motion that has been filed in that case.

At bottom, Honda was much closer to the truth when it told the Court of Appeal that the *Daugherty* decision would resolve a "disagreement among California consumer law practitioners as to whether, under *Outboard Marine v. Superior Court* . . . ." The problem, however, is that the disagreement stemmed from defendants like Ford arguing unsuccessfully that manufacturers cannot be held liable under the CLRA because that statute prohibits only affirmative misrepresentations, not omissions or outright concealment. *Daugherty* marks the first time in more than 30 years in which an appellate court has agreed with that argument. As Plaintiffs have explained, the Court of Appeal's resolution of that issue, and many others, was erroneous.

Daugherty did not meet the criteria for publication when Honda urged the Court of Appeal to publish it, and that fact is even more evident when examined in light of the arguments Honda now offers this Court. Regardless of which of its contradictory arguments Honda chooses to focus on, however, Plaintiffs respectfully submit that the decision in *Daugherty* should never have been published.

Very truly yours,

Jeffrey L. Fazio