GIBSON, DUNN & CRUTCHER LLP
A Registered Limited Liability Partnership
Including Professional Corporations
333 South Grand Avenue
Los Angeles, California 90071-3197

TELEPHONE: (213) 229-7000
FACSIMILE: (213) 229-7520

FACSIMILE TRANSMISSION INFORMATION

January 2, 2007

TO: **See distribution list immediately below**

FROM: Christopher Chorba Room: LA-5351 Direct Dial: (213) 229-7396

Our File Number: T 30091-00198 Fax: (213) 229-6396 Email: CChorba@gibsondunn.com

TOTAL NUMBER OF PAGES, INCLUDING COVER LETTER: 8

☞ **If you do not receive all the pages transmitted, please contact the facsimile operator immediately at telephone number (213) 229-7180.**

Fax Operator: _____

SPECIAL INSTRUCTIONS/MESSAGE:

DISTRIBUTION LIST

ROBINS, KAPLAN, MILLER & CIRESI L.L.P. Steven D. Archer David Martinez 2049 Century Park East, Suite 3700 Los Angeles, CA 90067-3211 Tel: (310) 552-0130 Fax: (310) 229-5800	FAZIO MICHELETTI LLP Jeffrey L. Fazio Dina E. Micheletti 4900 Hopyard Road, Suite 290 Pleasanton, CA 94588-7100 Tel: (925) 469-2424 Fax: (925) 369-0344
LEVY RAM & OLSON LLP Michael F. Ram 639 Front Street, Fourth Floor San Francisco, CA 94111 Tel: (415) 433-4949 Fax: (415) 433-7311	THE STURDEVANT LAW FIRM, P.C. James C. Sturdevant Monique Olivier 475 Sansome Street, Suite 1750 San Francisco, CA 94111 Tel: (415) 477-2410 Fax: (415) 477-2420

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

333 South Grand Avenue Los Angeles, California 90071-3197
(213) 229-7000
www.gibsondunn.com

TBourous@gibsondunn.com

January 2, 2007

Direct Dial
(213) 229-7804

Fax No.
(213) 229-6804

Client No.
T 30091-00198

VIA HAND DELIVERY

Honorable Ronald M. George
Chief Justice of the State of California
and the Honorable Associate Justices
of the Supreme Court of California
300 South Spring Street
Floor 2
Los Angeles, California 90021

Re: Response to Request for Depublication of *Daugherty v. American Honda Motor Co.* (Supreme Court Case No. S148931; Ct. App. Case No. B186402)

Dear Chief Justice George and Associate Justices:

Ford Motor Company ("Ford") respectfully opposes plaintiffs' letter request, dated December 21, 2006, that this Court direct depublication of the Court of Appeal's unanimous opinion in the above-referenced case. Ford respectfully submits that the opinion was correctly decided and satisfies the standards for publication of appellate opinions.

As one of the world's largest manufacturers of automobiles, Ford is frequently the target of lawsuits that seek to impose liability based on alleged defects in the design and manufacture of its products. Ford is currently defending a similar class action suit brought by several plaintiffs who are represented by the same counsel representing the plaintiffs in *Daugherty* and the counsel that submitted a separate depublication request on behalf of Consumers for Auto Reliability ("CARS") and Safety and the Consumer Federation of California ("CFC"). *See Snyder v. Ford Motor Co.*, No. 06-0497, 2006 U.S. Dist. LEXIS 63646 (N.D. Cal. Aug. 24, 2006). In that case, the plaintiffs allege various causes of action based on an alleged "latent defect" in the ignition lock of certain Ford model vehicles. Continued publication of the Court of Appeal's well-reasoned decision in *Daugherty* would aid the federal court in assessing whether the plaintiff states a claim for relief under California law.

Despite their cries that continued publication of the *Daugherty* decision threatens to overturn long-standing principles of California's consumer protection law, plaintiffs and their supporters neglect to mention the fundamental and fatal defect underlying their claims: **none of the vehicles owned by the plaintiffs exhibited a malfunction during the warranty period.** *See Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 827-29 (2006). Indeed, as the Court of Appeal observed, seven of the eleven vehicles at issue in *Daugherty* exhibited no malfunction whatsoever. *Id.* at 829. The CARS/CFC request acknowledges that these "bad facts" "are not especially compelling," particularly because several of the named plaintiffs received "many times the warranted life out of their vehicles without failure of the oil seal." (CARS/CFC Req., Dec. 21, 2006, at 4.)

Confronted with these admittedly uncompelling and "bad" facts, the Court of Appeal reached a measured and well-reasoned opinion. It addressed each of the four claims against plaintiffs' contentions, and it affirmed the Superior Court's judgment of dismissal on several grounds. The court properly rejected the claim for breach of express warranty because, simply, the alleged defect manifested itself outside of the warranty's time or mileage limitations. *Daugherty*, 144 Cal. App. 4th at 830. The court surveyed the authorities cited by both parties, and it reached the unremarkable conclusion that a manufacturer cannot be held liable if it does not expressly promise or agree to repair "latent" defects discovered outside of the warranty period. *Id.* at 830-32.

The disposition of the remaining claims was equally reasoned and justified. The court affirmed the dismissal of plaintiffs' Magnuson-Moss Warranty Act (15 U.S.C. § 2301) claim because "failure to state a warranty claim under state law necessarily constituted a failure to state a claim under" the federal law. *Id.* at 833. The claim under the Consumer Legal Remedies Act (Cal. Civ. Code § 1770(a), the "CLRA") failed because, again, "[a]ll of plaintiffs' automobiles functioned as represented throughout their warranty periods, and indeed many still have experienced no malfunction." *Id.* at 834. The court rejected plaintiffs' attempt to extend the CLRA to the instant case, because there was no allegation that the manufacturer made any representation that was false or contradicted by any concealed fact. The court did not flatly preclude any CLRA claim predicated on a concealment; rather, "to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Id.* at 835. This decision is in line with the statutory language of the CLRA and interpretive precedent, including a recent case involving analogous facts. *Id.* (citing *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255 (2006)).

Finally, the court upheld the dismissal of the unfair competition law (Bus. & Prof. Code § 17200, the "UCL") claim because the underlying claims upon which plaintiffs predicated this cause of action also failed, the complaint did not allege facts upon which the court could conclude that reasonable consumers would be deceived by the potential failure of the engine to last beyond the warranty period, and "the failure to disclose a defect that might, or might not, shorten the effective life span of an automobile part that functions precisely as warranted

throughout the term of its express warranty cannot be characterized as causing a substantial injury to consumers." *Id.* at 837-39.

Plaintiffs' sole arguments for depublication are that: (1) the CLRA and UCL have a broad, remedial purpose; (2) the Court of Appeal's decision would encourage the deception of California consumers if it remained published; and (3) depublication is necessary to prevent other state and federal courts from "disposing of a host of valid California consumer protection cases that . . . are based on the same legal theories, but very different underlying facts." None of these arguments have merit.

First, while plaintiffs contend that the Court of Appeal construed the CLRA and UCL in contravention of legislative intent that these statutes "make it easier for consumers" to establish tort liability, they cannot reasonably argue that these statutes have no limits. (Pls.' Letter Requesting Depublication, Dec. 21, 2006 ("Pls.' Req."), at 1.) The trial court in *Daugherty*, which the Court of Appeal quoted with approval, expressed succinctly the need for reasonable limitations on liability in this context:

> Opening the door to plaintiffs' new theory of liability would change the landscape of warranty and product liability law in California. Failure of a product to last forever would become a "defect," a manufacturer would no longer be able to issue limited warranties, and product defect litigation would became as widespread as manufacturing itself.

Daugherty, 114 Cal. App. 4th at 829; *see also Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986) ("All parts will wear out sooner or later and thus have a limited effective life. . . . A rule that would make failure of a part actionable based on ['knowledge' that many parts will fail after the warranty period has expired] would render meaningless time/mileage limitations in warranty coverage."). There is no indication that the California Legislature intended the CLRA or UCL to extend so broadly as to alter the basic and express terms by which manufacturers and consumers do business in this State.

Second, plaintiffs do not offer any support for their conclusory statement that *Daugherty* "actually ***encourages*** manufacturers to deceive California consumers by enabling them to cut corners and hide material defects with impunity." (Pls.' Req., at 3.) The Court of Appeal already explained why this would not be the consequence of its decision: Honda made no representation of the vehicle's quality other than the terms of the express warranty, which therefore defined the consumers' expectations about the product. *Daugherty*, 144 Cal. App. 4th at 830.

Finally, plaintiffs' contention that depublication is necessary to prevent dismissal of similar claims in other state and federal courts actually demonstrates the need for continued publication of *Daugherty*, while also displaying a remarkable lack of faith in the judicial process.

Continued 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 Court of Appeal, this counsel now seeks depublication of the decision in an attempt to compel the federal court to adjudicate the issues anew (and, they hope, in a manner inconsistent with *Daugherty*). The need for published authority in California in this area also is evident from the Court of Appeal's citation to out-of-state authorities. *See id.* at 830-31 (citing *Alberti v. Gen. Motors Corp.*, 600 F. Supp. 1026 (D.D.C. 1985); *Abraham* and *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513 (D.D.C. 1984)).

The lower state and federal courts may be trusted to apply *Daugherty* in a principled fashion, and plaintiffs' unfounded fear that they may not is no reason to depublish this opinion. Such an act would deprive the lower courts of their duty – and the opportunity – to apply precedent in the first instance. To the extent these courts misapply precedent, the aggrieved parties may seek the same relief sought by the plaintiffs here: review by the Courts of Appeal, and, if necessary, by this Court.

For these reasons, Ford respectfully requests that this Court reject the requests for depublication.

Very truly yours,

Theodore J. Boutrous, Jr.

TJB/cc

cc: Attached Service List

100138233_1.DOC

CERTIFICATE OF SERVICE

I, Janet Faragher, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071-3197, in said County and State. On January 2, 2007, I served the following document:

RESPONDENT'S BRIEF

on the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service: **SEE ATTACHED SERVICE LIST.**

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☑ **BY FACSIMILE**: From facsimile number (213) 229-7520, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated above, pursuant to Rule 2.306. The facsimile machine I used complied with Rule 2.301(3) and no error was reported by the machine. Pursuant to Rule 2.306(g)(4), I caused the machine to print a transmission record of the transmission.

☑ I am employed in the office of Christopher Chorba, a member of the bar of this Court, and that the foregoing document was printed on recycled paper.

☑ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 2, 2007.

_____

Janet Faragher

SERVICE LIST

BY FACSIMILE AND FIRST-CLASS MAIL

COUNSEL FOR PLAINTIFFS-PETITIONERS	
ROBINS, KAPLAN, MILLER & CIRESI L.L.P. Steven D. Archer David Martinez 2049 Century Park East, Suite 3700 Los Angeles, CA 90067-3211 Tel: (310) 552-0130 Fax: (310) 229-5800	FAZIO MICHELETTI LLP Jeffrey L. Fazio Dina E. Micheletti 4900 Hopyard Road, Suite 290 Pleasanton, CA 94588-7100 Tel: (925) 469-2424 Fax: (925) 369-0344
LEVY RAM & OLSON LLP Michael F. Ram 639 Front Street, Fourth Floor San Francisco, CA 94111 Tel: (415) 433-4949 Fax: (415) 433-7311	THE STURDEVANT LAW FIRM, P.C. James C. Sturdevant Monique Olivier 475 Sansome Street, Suite 1750 San Francisco, CA 94111 Tel: (415) 477-2410 Fax: (415) 477-2420

BY FIRST-CLASS MAIL

COUNSEL FOR DEFENDANT/RESPONDENT AMERICAN HONDA MOTOR CO.	
O'MELVENY & MYERS LLP Wallace M. Allan Eric Y. Kizirian 400 South Hope Street Los Angeles, CA 90071	HONDA NORTH AMERICA, INC. John W. Alden, Jr. Of Counsel 700 Van Ness Avenue Torrance, CA 90501

COUNSEL FOR NONPARTIES REQUESTING DEPUBLICATION (CRC 8.1125(b)(2))	
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP Jonathan D. Selbin 780 Third Avenue, 48th Floor New York NY 10017-2024 Tel: 212-355-9500 Fax: 212-355-9592 *Counsel for Consumers for Auto Reliability and Safety (CARS) and Consumer Federation of California (CFC)*	GIRARD GIBBS LLP Eric H. Gibbs 601 California Street, 14th Floor San Francisco, CA 94108-2819 Tel: 415-981-4800 Fax: 415-981-4846 *Counsel for The Center for Auto Safety (CAS)*

RENDERING COURT (CRC 8.1125(b)(2))	
Office of the Clerk Court of Appeal for the State of California Second Appellate District, Division Two Ronald Reagan State Building 300 So. Spring St., 2nd Floor Los Angeles, CA 90013S	The Honorable Victoria G. Chaney Los Angeles County Superior Court Central District Central Civil West Courthouse 600 South Commonwealth Avenue Los Angeles, CA 90005

100138233_1 (2).DOC