CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE
No. G030633

MARIA SANTIAGO, *et al.*,

Plaintiffs/Respondents,

vs.

KIA MOTORS AMERICA, INC.,

Defendant/Appellant.

Appeal from the Superior Court of the
State of California for the County of Orange
The Honorable Stuart T. Waldrip
Judicial Council Coordination Proceeding No. 4187

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BRIEF OF CENTER FOR AUTO SAFETY, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Unfair competition case.
(See Bus. Prof. Code, 17209 and Cal. Rules of Court, rule 15(e).)

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QUESTIONS PRESENTED

The Center for Auto Safety addresses the following questions in this brief:

1) Did the trial court err in denying Defendants motion to abstain from claims made by Plaintiffs, arising from alleged motor vehicle safety concerns, on the basis of preemption?

2) Did the trial court err in denying Defendants motion to stay all non-warranty based causes of action on the basis of primary jurisdiction?[1]

INTRODUCTION

In this appeal, appellant Kia Motors of America attempts to leverage a typical consumer fraud class complaint into a radical alteration of established preemption doctrine governing motor vehicle safety claims. Plaintiffs' complaint primarily asserted that Kia engaged in false advertising and misrepresentation when it knowingly marketed the Kia Sephia, which had a faulty brake system. In one paragraph of one of the claims, Plaintiffs mentioned the Motor Vehicle Safety Act ("Safety Act") and the National Highway Traffic Safety Administration ("NHTSA" or the "Secretary") As a remedy, Plaintiffs sought the typical panoply of remedies in consumer fraud actions: reimbursement, restitution, actual damages, punitive damages, injunctive relief, and costs and attorneys fees. (App. 16-22.) Plaintiffs once requested a repair and retrofit program. (App. 19.) Based upon these two statements, Kia requested that the Court stay or abstain

[1] There are also two procedural issues on which we take no position: Was Kia's appeal premature?; and is Kia's appeal of the denial of the motion for abstention properly before the Court? *See infra* at p. 13, n. 4.

from considering all of Plaintiffs' non-warranty based causes of action, even those that did not address the Safety Act or NHTSA, or request a repair or retrofit.

Kia focuses on these two statements in an attempt to radically rework the preemption doctrine set forth by the Supreme Court in Safety Act cases. In particular, Kia attempts to argue that "all safety related claims" are preempted, notwithstanding the Supreme Court's holding that a "significant number" of such cases survive preemption. (*Geier v. American Honda Motor Co., Inc.,* (2000) 529 U.S. 861, 868.) Kia further requests that this Court create a new form of conflict preemption for instances in which defendants can conceive of a "potential conflict," this in direct contravention of the Supreme Court's recent holdings requiring an "actual conflict" before preemption can occur.

Alternatively, Kia uses the doctrine of primary jurisdiction to argue that all of Plaintiffs non-warranty based claims should be stayed pending referral to NHTSA for a determination of the issues in this case. However, NHTSA, short on resources, has not issued any of the determinations that Kia allegedly seeks in over 10 years. Thus any deferral to NHTSA will result only in the waste of the time and resources of the courts, NHTSA, and the parties, while yielding no tangible results. Instead of enduring the diversions and distractions advocated by Kia, this Court should allow this case to follow the normal course of litigation, under the watchful eye of the trial court.

STATEMENT OF THE CASE

A. The Safety Act and NHTSA Investigations

Congress enacted the Safety Act in response to the deaths and injuries resulting from unsafe vehicles. *(See* S. Rep. No. 89-1301, 89th Cong., 2d Sess., 1-2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2709-10; H.R. Rep. No. 89-1776, 89th Cong., 2d Sess. 10-11 (1966).) The Act's sole stated purpose is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." (49 U.S.C. § 30101. *See also Motor Vehicle Mfrs. Ass'n v. State Farm*, (1983) 463 U.S. 29, 55 ["Congress intended safety to be the pre-eminent factor under the Act."].)

The Safety Act provided NHTSA with the discretionary authority to investigate and remedy allegations that "a vehicle contains a defect related to motor vehicle safety or does not comply with any applicable motor vehicle safety standard." (49 U.S.C. 30118(a).)

NHTSA investigations are generally prompted by consumer complaints, Technical Service Bulletins (TSBs) and other notices of possible safety defects. NHTSA winnows these sources down to a small number of investigations, a handful of determinations, and even fewer remedial orders.

> NHTSA's process for documenting evidence and identifying a possible defect in motor vehicles and motor vehicle equipment begins with screening information received in the Office of Defects Investigation ("ODI"), which is a division of NHTSA. Information received and screened in ODI includes complaints submitted by consumers through (1) NHTSA's toll-free hotline, (2) NHTSA's website, and (3) traditional letters. ODI personnel enter these complaints

> into a complaint database, which analysts in the Trend and Analysis Division ("TAD") of ODI routinely monitor to identify potential defect trends. These three sources of complaints (phone, website, and mail) generate at least 50,000 complaints per year. Other sources of information received and reviewed by TAD include reports from consumer groups, accident investigation teams, other governmental agencies, sources under contract to NHTSA, manufacturer technical service bulletins (submitted on a regular basis), automotive periodicals, manufacturer recalls, research reports, and reports from state and local police agencies. . . .
>
> If screening by TAD analysts identifies a safety-related trend or a catastrophic failure, then the appropriate investigative division within ODI (either the Vehicle Control Division or the Vehicle Integrity Division) is notified. This notification represents the first phase of an official investigation and is known as the "Preliminary Evaluation" ("PE"). A PE can also be opened as a result of a petition analysis, which is the process ODI uses to analyze individual petitions, usually from consumer agencies, for product defects.

(McDonald, *Judicial Review of NHTSA Ordered Recalls*, (2001) 47 Wayne L. Rev. 1301, 1314-1316.) NHTSA also conducts investigations termed "engineering analyses" which often go into a higher level of detail and last longer. (*Id.)*

Many NHTSA investigations are based upon Technical Service Bulletins that manufacturers send to dealers. Under the Safety Act manufacturers must provide NHTSA with a copy of every TSB it sends to its dealers. (49 U.S.C. § 30166(f).) NHTSA requires submission of a TSB to the agency within "five working days after the end of the month in which it was issued." 49 CFR § 579.5(d). The purpose of a TSB is to alert NHTSA to "the existence or correction of any defect in vehicles." (Conf. Rept. No. 1919, 89th Cong., 2d Sess. 21 (1966).) NHTSA screens such TSB's to determine whether to open a defect investigation. (McDonald *supra* p. 4 at 1315.)

The Safety Act provides that individuals or groups may submit a petition requesting a safety defect investigation. Even though such defect petitions are often submitted by consumer groups experienced in vehicle defect issues (McDonald, *supra* p. 4 at 1315), the defect petition is ineffective in prompting either an investigation or a recall: of the 89 defect petitions submitted from 1991 through 2001 only 20 have been granted, resulting in only 5 voluntary recalls. (*See* West Group, *Automobile Design Liability* 3d, §§ 10:183-184 (2003).)

In addition, the Safety Act provides for two stages in NHTSA's decision making process regarding alleged safety defects. Section 30118(a) governs the first stage, generally referred to as the "initial determination." (*See* 49 C.F.R. §554.10). It provides that "if through testing, inspection, investigation . . . or otherwise, the Secretary determines that any motor vehicle . . . contains a defect which relates to motor vehicle safety," the Secretary shall immediately notify the manufacturer and publish notice of the determination in the Federal Register. (49 U.S.C. 30118(b).) As the District of Columbia Circuit noted, "All that follows the initial determination is notification to the manufacturer, publication of a notice in the Federal Register, and an opportunity for the manufacturer to present data and arguments." (*Center for Auto Safety v. Lewis* (D.C. App. 1982) 685 F.2d 656, 662.) If the Secretary, through NHTSA, issues an initial determination, it is only a "tentative, initial determination." *(Id.)* No sanctions or remedies result from an initial determination. Moreover, the public and persons

petitioning the Agency, have no effective right to judicial review regarding the Agency's failure to pursue an initial investigation or failure to find a defect. (*Id*. at 659.)

If the Secretary conducts an initial investigation, and if the Secretary makes an initial determination that a defect exists, the process moves to the second stage, generally referred to as the "final determination." (*see* 49 C.F.R. §554.11.) In this second stage the Secretary must afford the manufacturer "an opportunity to present data, views, and arguments to establish that there is no defect. . . . " (49 U.S.C. 30118(b)(1).) As with an initial determination, the public and any petitioners have no right to judicial review over the failure of the Agency to issue a final determination. (*Center for Auto Safety v. Dole,* (D.C. Cir. 1988) 846 F.2d 1532.) [2]

"If the Secretary [makes a final decision] under paragraph (1) . . . that the vehicle or equipment contains the" defect, the Secretary shall order the manufacturer to provide notice to the owners, purchasers and dealers, and remedy the defect. (49 U.S.C. 30118(b)(2).) However, upon application of the manufacturer, "the Secretary shall exempt the manufacturer [from the notification and recall provisions] if the Secretary decides a defect or noncompliance is inconsequential to motor vehicle safety." (49 U.S.C. 30118(d) and 30120(h).) If a remedy is required, the manufacturer may elect one of the three statutory remedial measures: repairing the vehicle; replacing the vehicle with an identical or reasonably equivalent vehicle; or, refunding the vehicle purchase price,

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[2] Since the decision in *Dole*, NHTSA has changed the regulations to make it even more difficult to appeal from such decisions. (*See* 49 C.F.R. § 552.8.)

less a reasonable allowance for depreciation. (49 U.S.C. 30120(a).)

An order issued under section 30118(b) is not self-enforcing. If the manufacturer fails or refuses to comply, the agency may seek enforcement by requesting that the United States Attorney General, or the appropriate United States Attorney, bring a civil action against the manufacturer pursuant to 49 U.S.C. § 30163. In such a civil action, the manufacturer is entitled to a trial *de novo* at which the government bears the burden of proving, by a preponderance of the evidence, that the vehicle contains a defect and that the defect is safety-related. (*See United States v. General Motors Corp.*, (D.C. App. 1975) 518 F.2d 420, 426.) In a complicated case, the trial and appeal alone may last well over four years and involve huge expenditures of time and money. *(Center for Auto Safety v. Lewis*, 685 F.2d at 662- 663; *see also* Schwartz and Adler, *Product Recalls: A Remedy in Need of Repair*, (1984) 34 Case W. Res. L. Rev. 401, 415, n. 91 ["NHTSA's litigated cases have taken from 67 to 86 months to complete."])

Unfortunately, NHTSA suffers from severe underfunding that inhibits its investigatory and remedial functions. As the Court in *Center for Auto Safety v. Lewis,* explained, one single investigation was such a drain on NHTSA's resources "that the conduct of additional safety defects investigations was impaired." (685 F.2d at 663.) NHTSA has gone so far as to highlight that "allocation of agency resources" is a factor in decisions to grant or deny defect petitions. (49 C.F.R. 552.8.) Similarly, NHTSA closes its response to virtually every defect petition stating "in vew of the need to allocate and

prioritize NHTSA's limited resources to best accomplish the agency's safety mission, the petition is denied." *(See* e.g., 64 Fed. Reg. 30100 (1999).)

At least in part because of funding problems, the initial investigations can be very lengthy, lasting up to seven years. (*In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.* (E.D. Pa. June 7, 1993 MDL No. 961) 1993 U.S. Dist. LEXIS 7660 at * 8; *see also Center for Auto Safety v. Lewis,* 685 F.2d at 659 [initial investigation involving Ford transmissions "lasted over two and one-half years."]; *Chin v. Chrysler Corp.* (D.N.J. 1998) 182 F.R.D. 448, 452 [on going NHTSA investigation for over two years].)

NHTSA has also not made any significant safety defect determinations in the last 12 years. From 1991 through 2001, NHTSA made but **two** initial determinations (one of which was later with drawn)(*see* 60 Fed. Reg. 13752 (1995)). (*See also* Engineering Analysis Report and Initial Decision, EA00-023: Firestone Wilderness AT Tires (October 2001) [available at http://www.nhtsa.dot.gov/hot/Firestone/firestonereport.pdf].) During this time, NHTSA made **no** final determinations, and issued **no** orders for remedial action.

Similarly, funding problems inhibit NHTSA's ability to pursue litigation when a manufacturer indicates that it will challenge the agency's decision. (*Center for Auto Safety v. Lewis*, 685 F.2d at 662.) And manufacturers often appeal any NHTSA determinations and orders for remedies. This appeal process can stretch the proceedings out to as long as ten years. (*See United States v. General Motors Corp.*, (D.C. App.) 561

F.2d 923, *cert. denied* (1977) 434 U.S. 1033; *United States v. General Motors Corp.*, (1977) 565 F.2d 754, 759 n.13 [investigation opened in November 1967].)

NHTSA is not the only authority statutorily enabled to determine whether a "safety defect" exists under the Safety Act. The Safety Act mandates that the manufacturer itself had a duty to provide notification and a remedy if it finds a "safety defect" in its vehicles. (49 U.S.C. § 30118(c).) The "notification and remedy duty arises when a manufacturer actually determines, or should have determined, that its vehicles contain a safety- related defect. In other words, a manufacturer cannot evade the notification and remedy duty by failing to conclude sua sponte that a safety-related defect or noncompliance exists." (McDonald, *supra* p. 4 at 1312-1313.) Moreover, the Department of Justice can pursue litigation based on a "safety defect," even if no proceedings have been initiated or completed by NHTSA. (*See United States v. General Motors Corp.* (D.D.C. 1987) 656 F. Supp. 1555 (D.C. Cir. 1988) aff'd 841 F.2d 400.)

B. Motor Vehicle Recalls

Initially, the Safety Act did not grant NHTSA the authority to require remedies at the manufacturer's expense. In response to controversy regarding manufacturer recalls, Congress amended the Safety Act in 1974 to empower NHTSA to require that the manufacturer either repair the defect, replace the vehicle, or refund the purchase price. (McDonald, *supra* p. 4, at 1310-1312.) However, after these amendments, manufacturers retained the right to conduct voluntary recalls.

Motor vehicle recalls existed long before the Safety Act was enacted. Most of these recalls were initiated voluntarily by manufacturers. One of the first documented recalls was a recall of a 1903 Packard. (Schwartz, *supra* p. 7 at 403, n.6.) Prior to the enactment of the remedial provision of the Safety Act in 1974, courts had found a duty to recall defective products. (Dix W. Noel, *Manufacturer's Negligence of Design or Directions for Use of Product,* (1962) 71 Yale L.J. 816, 826 [("There is no doubt that [a duty to recall] exists when it develops that the original design is clearly defective."]; *Braniff Airways v. Curtiss-Wright Corp.,* 411 F.2d 451, 453 (2nd Cir.), *cert. denied,* (1969) 369 U.S. 959; *Comstock v. General Motors,* (1959) 99 N.W.2d 627, 634.)

A manufacturer that conducts a voluntary recall is under "no obligation to comply with the remedial provisions of the Act or NHTSA's regulations." *(United States v. General Motors* (D.C.Cir. 1998) 841 F.2d 400, 416, 417.) Thus, NHTSA has no jurisdiction to enforce any NHTSA standards with respect to a manufacturer's voluntary recall. (*Id.)* Conversely, a voluntary recall by the manufacturer has no impact on NHTSA's ability to require that a manufacturer remedy a safety defect where NHTSA makes a final determination.[3]

As NHTSA itself explains, "Most decisions to recall and remedy safety defects on new vehicles are made voluntarily by manufacturers prior to any involvement by

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[3] However, under the Safety Act, NHTSA cannot require a recall as a remedy. Rather the manufacturer can choose from the three statutory remedies available under the Safety Act: repair, replacement, or refund.

NHTSA." (*Motor Vehicle Defect and Recall Campaigns*, DOT HS 808 795, (October 1998) [available at http://www-odi.nhtsa.dot.gov/cars/problems/recalls /recallprocess.cfm][Found under heading "Do Manufacturers Ever Make Defect Determinations and Initiate Recalls Without a Government Order."]) Thus, in practice, "most disputes over the existence of a safety-related defect or noncompliance are resolved through voluntary recalls. Indeed, during the thirty- three year period from the Vehicle Safety Act's birth in 1966 through 1999 automobile manufacturers conducted over seventy-two hundred vehicle recalls." (McDonald, *supra*. p. 4, at 1318.) Of the seventy two hundred vehicle recalls from 1966 through 1999, fewer than 10 were compelled by NHTSA under section 30118(b) or its predecessor. The remaining recalls were conducted voluntarily by the manufacturers. Of these, "nearly 80% of recalls are conducted without any NHTSA involvement. The remaining 20%, again conducted voluntarily, are 'NHTSA-influenced.'" (*Id.* at 1318, n. 82 [citations omitted].)

In addition to voluntary recalls, manufacturers frequently conduct service campaigns where they notify owners of the defect and advise them to bring the vehicles into the dealer for a free repair. (*See Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1017-18.) NHTSA will often close an investigation without even a voluntary safety recall because the service campaign eliminates the defect which is the basis for the investigation. (*See Id.*)

Facts of this Case and Procedural History

The underlying Complaint (filed June 1, 2001) was brought against Kia on behalf of the Plaintiffs and all owners and lessees of 1997-2000 Kia Sephia model automobiles and on behalf of the general public. (App. 1-25.) Plaintiffs challenge Kia's unlawful and unfair business practices and false advertising concerning the Sephia's braking system.

Plaintiffs allege that the braking system is faulty, causing excessive heat in the braking system components. (Compl Par. 1, App. 3.) This extreme heat causes premature wear in the brake pads and warping of the rotors. (*Id.)* As a result, the Kia suffers from, *inter alia*, a loud grinding noise and excessive shaking when braking. (*Id.)* To avoid these problems, Sephia owners must prematurely and repeatedly replace the vehicles' brake pads and rotors. *(Id.)*

Plaintiffs allege that Kia knew of this defect. (Compl. Par.s 2-4, App. 3-4.) Nonetheless, Kia knowingly marketed the Sephia to the Plaintiffs and the general public as an affordably priced, yet well-made, reliable, and safe vehicle, with, among other features, a properly functioning braking system. (*Id.*)

Plaintiffs stated four causes of action: (i) breach of express warranty; (ii) unlawful, unfair and fraudulent business acts and practices; (iii) untrue and misleading advertising; and (iv) violation of the Consumers Legal Remedies Act.[4] (App. 16-22.) Paragraph 62, in

[4] In this appeal, Kia has not challenged the Plaintiffs' ability to proceed with the breach of express warranty claim.

the second cause of action, contained one of the only mentions of NHTSA or the Safety Act in the 95 paragraph complaint. (App.17-18; *see also* App. 11 and App. 15.) And Plaintiffs' third and fourth causes of action, did not mention NHTSA or the Safety Act at all. (App.19-22.)

For remedies, Plaintiffs sought, restitution and actual damages (including monies spent on the cost of the premature replacement of brake pads and rotors), disgorgement and restitution of defendants' ill gotten monies, and direct and consequential damages (calculated as the cost of repairing and retrofitting the Kia brake systems at issue, plus out-of-pocket costs associated with obtaining repair and retrofit, as well as compensation for the diminution in value of the vehicles.) (App. 22.) Plaintiffs also sought injunctive relief, including a requirement that Kia stop making the false and deceptive statements to the public. (App. 19-22.) Plaintiffs further requested an "order from the Court requiring that Kia implement a full repair and retrofit program of all defective brake systems in the Kia vehicles at issue." (App 19.) Finally, Plaintiffs sought payment of costs and attorneys fees, and exemplary and punitive damages. (App.19-22.)

The issues in this appeal arise from two motions made by Kia before the trial court. First, Kia moved to have the court abstain from claims made by Plaintiffs arising from alleged motor vehicle safety concerns. (App. 73-84.) Kia asserts that this motion covers all of Plaintiffs non-warranty based claims. (Reply Br. at 22.) Second, Kia moved to stay all of Plaintiffs non-warranty based actions on the basis of the primary jurisdiction

of the NHTSA. (App. 85-105.) The trial court denied Kia's motions finding "no evidence of current NHTSA proceedings," and finding that safety was not the main focus of Plaintiffs claims. (App.439). Rather, the court found that the issues revolved around statutory schemes and violations of the law of California and other jurisdictions. *(Id.)* Kia thereafter filed a writ of appeal contesting the trial court's denial of Kia's motion to stay Plaintiffs' non-warranty based actions. (App. 25.)[5]

PLAINTIFFS' CLAIMS ARE NOT IMPLIEDLY PREEMPTED

A. General Preemption Principles

As the Supreme Court reaffirmed in *Medtronic v. Lohr*, a party seeking preemption of state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action." ((1996) 518 U.S. 470, 485; *see also Silkwood v. Kerr-McGee, Corp.* (1984) 464 U.S. 238, 255 [The burden of demonstrating preemption rests with the defendant.]) In all preemption cases, a court must start with an assumption "that the States' historic police powers cannot be superseded by a Federal Act unless that is Congress' clear and manifest purpose." *(Id.* [citation omitted.]) These are not empty platitudes; they stem from and protect our

[5] Kia's notice of appeal indicates that it also appeals from the trial court's order denying Kia's abstention motion. However, Kia concedes that there is no statutory authority that suggests the denial of this abstention motion is appealable. (Opposition of Defendant KMA to Motion To Dismiss Appeal at 2, n.4.)

Constitutional system of federalism. *(See, e.g., Jones v. Rath Packing*, (1977) 430 U.S. 519, 525 [the presumption against preemption "provides assurance that 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts."][citation omitted].)

This presumption is especially strong where, as in this case, preemption would displace the historic power of the states to protect the health and safety of their citizens. *(See Medtronic*, 518 U.S. at 485.) Thus, the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (*Id.* at 475 [*quoting Metropolitan Life Ins. Co. v. Massachusetts*, (1985) 471 U. S. 724, 756 [internal quotation marks omitted].) The California Courts have specifically found that such a presumption against preemption is appropriate when addressing vehicle safety claims under the Safety Act. *(Ketchum v. Hyundai Motor Co.* (1996) 49 Cal. App. 4th 1672*,* 1679.)

Courts have found that state-law claims are preempted in three situations. First, express preemption may be found where Congress has explicitly stated in the statute that state law claims are preempted. (*Medtronic,* 518 U.S. at 484-485.) Second, in the absence of express language indicating an intent to preempt state law claims, implied "field preemption" may be found where "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *(Id.* [quotations omitted].) Such an intent is often inferred from the

existence of a "comprehensive regulatory scheme." (*Geier* 529 U.S. at 884.) Third, preemption may be found where state law "actually conflicts" with federal law. (*Geier* 529 U.S. at 874.) Once it is determinated that the particular state law is preempted by federal law, that state law is "without effect." (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.)

B. Preemption Cases Involving the Safety Act

The Supreme Court has applied the normal rules of conflict preemption analysis in two Safety Act cases in the last decade. In both, the Court found that plaintiffs' cause of action must actually conflict with a specific "safety standard" for preemption to occur.

In *Freightliner Corp. v. Myrick*, the Supreme Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the Safety Act in the absence of an applicable federal safety standard. ((1995) 514 U.S. 280.) In 1974, NHTSA (or its predecessor) had promulgated a rule – Standard 121 – that required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit in *Paccar, Inc. v. NHTSA*. ((9th Cir. 1978) 573 F.2d 632, 641.) In response, NHTSA added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." (*Freightline*r 514 U.S. at 285.)

Defendant argued that the plaintiffs' claims for negligent failure to install antilock brakes were preempted by the Safety Act. (*Id.*) Addressing defendant's express

preemption argument, the Court held that, "the Act's preemption clause applies **only** 'whenever a Federal motor vehicle safety standard ... is in effect' with respect to 'the same aspect of performance' regulated by a state standard." (*Id.* at 286 [emphasis added][quoting *15 U.S.C. § 1392*(d), recodified at 49 U.S.C. § 30103(b)].) The Court ruled that because there was "simply no minimum, objective standard stated at all," the express preemption clause did not apply. (*Id.)* Further, since no federal standards existed, the Court did not reach the question on whether the savings clause, 1397(k), recodified at § 30103(b), "saved" the plaintiffs' claims from preemption. *(Id.* at 287 n. 3.) Therefore the Court applied normal preemption analysis to defendants argument that the claims were impliedly preempt. (*Id.* at 287-289.)

The Court then moved to defendant's implied preemption arguments. Initially, the Court declined to find any field preemption. (*Id.* at 287.) The Court further held that the lack of federal "standards" was fatal to Defendants' argument that plaintiffs claims were otherwise impliedly pre-empted. "First, it is not impossible for petitioners to comply with both federal and state law **because there is simply no federal standard for a private party to comply with**." (*Id.* at 289 [emphasis added].) Second, the Court found that plaintiffs' lawsuit did not "frustrate 'the accomplishment and execution of the full purposes and objectives of Congress.' In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. . . . A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist." (*Id.* at 289-290 [citations omitted].)

In *Geier*, the Supreme Court addressed the alternative situation, where a specific federal Safety Standard was in effect and was applicable to the same aspect of performance raised by plaintiff's common law state action. (529 U.S. 861.) In *Geier*, plaintiff was injured while driving a car that was not equipped with airbags. *(Id.* at 864-865.) Plaintiff sued defendants for failure to install airbags in the car. (*Id.)* At the time, Federal Motor Vehicle Safety Standard 208 governed the installation of airbags in cars. *(Id.*)

The Supreme Court focused on whether the plaintiff's claims actually conflicted with an existing federal safety standard, FMVSS 208. As the Court explained, "Conflict preemption . . .turns on the identification of an 'actual conflict.'" *(Id.* at 884.) Accordingly, the Court focused on both the existence of a specific safety standard, as required by *Freightliner*, and the presence of an "actual conflict." This dual requirement is exemplified in "the basic question" before the Court, "whether a common-law 'no airbag' action . . . ***actually conflicts*** with [**Federal Motor Vehicle Safety Standard**] 208." (*Id.* at 874 [emphasis added.]) To determine whether there was an actual conflict with FMVSS 208, the Court spent the majority of the opinion thoroughly examining the language and history of the FMVSS 208, and its relationship to the plaintiff's cause of action. (*Id.* at 874-886.) The Court's entire analysis is consistent with its prior holding in *Freightliner*, that there must be a Federal Safety Standard that creates a conflict to justify preemption.

C. No Preemption Exists Under Established Preemption Analysis

The parties in this case have addressed the issue of whether the Plaintiffs claims are preempted by conflict preemption principles. (Resp. Br. at 13; Reply Br. at 18.) The question of conflict preemption is resolved by looking to the Supreme Court case that directly addressed the matter: *Freightliner*. *Freightliner* was unequivocal: for conflict preemption to exist there must be a safety standard with which the Plaintiffs' claims conflict. Here, Kia has cited not a single safety standard or regulation that is even tangentially related to Plaintiffs' claims. Because no safety standards apply, there is nothing with which Plaintiffs' claims will "actually conflict" and therefore those claims are not preempted.

1. Plaintiffs' Claims are Not Impliedly Preempted as No Actual Conflict With Any Safety Standard Exists

Conflict preemption exists in two circumstances: impossibility, where "it is impossible for a private party to comply with both state and federal law;" or frustration of purpose, "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' (*Crosby v. National Foreign Trade Council*, (2000) 530 U.S. 363, 372-373 [*quoting Hines v. Davidowitz*, (1941) 312 U.S. 52, 66-67].) Under either standard, the fundamental analysis is the same. (*Geie*r 529 U.S. at 874.)

Although Kia argues that Plaintiffs' actions are preempted due to impossibility,

Kia cites no safety standard that will be implicated by Plaintiffs' actions. Thus Kia's argument runs headlong into the explicit holding of *Freightliner*: "**it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with**." (514 U.S. at 289 [emphasis added].) This holding is dispositive and dooms Kia's impossibility claim.

Similarly, Kia's argument that there is conflict preemption under the frustration of purpose doctrine cannot withstand the Supreme Court's holding in *Freightliner* that "In the absence of a promulgated safety standard . . . A finding of liability against petitioners would undermine no federal objectives or purposes . . . since none exist." (*Id*. at 289-290 [citations omitted].) Thus, the direct holdings of the Supreme Court in *Freightliner* preclude any conflict preemption here.

In any event, conflict preemption requires an "actual conflict" with an existing federal regulation. (*Geier*, *infra* at 22-24.) Here there is simply no specific federal standard or regulation that conflicts with this action. NHTSA has issued no regulations or standards applicable to the same aspect of performance at issue here; NHTSA has taken no action with respect to the Kia brakes; and NHTSA has opened no investigation into the Kia brake question. Kia's preemption argument is entirely speculative and does not meet the requirement that there be an "actual conflict" with a "specific federal safety standard" for preemption to attach.

D. There Is No Support for Kia's Attempts to Radically Alter the Scope of Federal Preemption

Kia attempts to avoid the "ordinary preemption principles" that require an "actual conflict" between a "specific" federal requirement (or, in Safety Act cases, a federal safety standard) and the state cause of action. Instead, Kia requests that this Court radically alter accepted preemption doctrine. Yet the Supreme Court in *Geier* rejected such an attempt, explaining, "In a word, ordinary preemption principles apply. We would not further complicate the law with complex new doctrine." (*Geier* 529 U.S. at 874 [citations omitted].)

1. Kia's Claim that "All Safety Based" Causes of Action Are Preempted Has No Basis in Law and Is Directly Contrary to the Holdings of the Supreme Court

Kia's argument sweeps so broadly that it is almost impossible to imagine a case raising vehicle safety that would not be preempted. For example, in its Reply Brief, Kia asserts that there is "Preemption of Plaintiffs' 'safety-based' statutory claims due to the Safety Act." (Reply Br. at 5.) Kia also apparently argues that any safety defect would be "completely covered by the Safety Act and its regulations." (Reply Br. at 2, n.2.)

Kia has been unable to cite a single case that supports the application of preemption simply because a cause of action is based on a safety defect. Although Kia rests its argument primarily on *Firestone*, even this questionable decision did not sweep so broadly. *(In re Bridgestone/Firestone Inc.,* (S.D. Ind. 2001) 153 F. Supp. 2d 935.)

Rather, in *Firestone*, the court only found preempted plaintiffs' requests for a recall, the court allowed all of the plaintiffs' safety-based causes of action to go forward. (*Id.* at 937-938.) Thus, Kia has no support for its attempt to radically rework preemption doctrine in motor vehicle cases.

In fact, all the authority is directly contrary to Kia's position. The Supreme Court has on several occasions recognized the vitality of "safety based" causes of action. (*Geier* 529 U.S. at 868 [recognizing that "there are some significant number" of safety based liability cases that are not preempted]; *Freightliner* 514 U.S. at 283.) Similarly, California Courts have long held that safety defect claims are not preempted by the Safety Act or its regulations. *(Ketchum v. Hyundia Motor Co.* (1996) 49 Cal. App. 4th 1672, 1678-1680; *Buccery v. General Motors Corp*. (1976) 60 Cal. App. 3d 533, 540-541.) Finally, the Ninth Circuit has held that a class settlement in a motor vehicle defect case, covered by the Safety Act, may obligate a manufacturer to "make vehicles safe." (*Hanlon* 150 F.3d at 1027 [settlement approved by the court "obligates Chrysler to make the minivans safe."]; *cf Amchem Products Inc. v. Windsor* (1997) 521 U.S. 591 [class settlements must meet all class action and jurisdictional requirements.])

There "are thousands of state and federal tort cases brought each year alleging an automobile design or safety defect that are decided in the courts and not by the National Highway Safety and Transportation Board." (*Ryan v. Chemlawn* (7th Cir. 1991) 935 F.2d 129, 132.) Preemption has never been applied to such causes of action simply because they are based on "safety defect," and Kia's attempt to rewrite federal preemption

doctrine must be rejected.

2. Kia's Attempt to Introduce a New Form of Conflict Preemption, the "Potential for Conflict," Has No Basis in Law or Policy

Recognizing the lack of any applicable federal safety standard or regulation, Kia does not argue that Plaintiffs' claims actually conflict with any specific federal regulation or standard. Rather, Kia argues that there is a "potential for conflict" that justifies preemption. (Opening Br. at 13.)

Even if one were to ignore the direct holding of the Supreme Court in *Freightliner*, conflict preemption requires a specific federal statute or regulation with which plaintiffs suit actually conflicts. The Supreme Court has repeatedly held that conflict preemption requires the existence of a specific federal statute or regulation with which state law will conflict. *(Medtronic* 518 U.S. at 492, 494 [The Supreme Court upheld the lower court's conclusion that the plaintiffs' "defective design claims were not pre-empted because the [federal] requirements with which the company had to comply were not sufficiently concrete to constitute a pre-empting federal requirement."] *Kent v. DaimlerChrysler Corp.* (N.D. Cal. 2002) 200 F.Supp.2d 1208, 1215 ["*Geier*, *International Paper*, and *Kalo Brick* are all founded on the same base: a specific conflict will be required to trigger conflict preemption."]) Thus, in *Spreitsma v. Mercury Marine,* the Court recently refused to find conflict preemption where the agency took no action. (537 U.S. __, 123 S. Ct. 518; *see also Freightliner* 514 U.S. 280 [same].)

Further, the conflict must be "actual," not speculative or general. Thus, "Conflict

preemption . . .turns on the identification of an 'actual conflict.'" (*Geier* 529 U.S. at 884). As the Supreme Court has explained, **"the existence of a hypothetical or potential conflict is insufficient to warrant pre-emption**." (*Rice v. Williams Co.* (1982) 458 U.S. 654, 659 [emphasis added].) Similarly, in both *Spreistma* and *Freightliner,* the Supreme Court rejected preemption defenses even though the federal government was contemplating regulations that may have created a conflict. *(See Freightliner* 514 U.S. at 285-286 ["Although NHTSA has developed new . . . standards, to this day it still has not taken final action to reinstate a safety standard."]; *Spreitsma* 537 U.S. ___, 123 S. Ct. at 525-526 [The agency had published a notice of proposed rule making and indicated that the issue raised by plaintiffs would "be addressed in 'subsequent regulatory projects . . .'"].) Thus, put in the terminology used here, the Supreme Court rejected preemption where the agency was investigating the same issues raised by the plaintiffs, but the agency had not yet made a determination on the issues.

At least two California courts have rejected arguments by defendants that a potential conflict can support preemption. In *Consumer Justice Center v. Olympian Labs, Inc.*, plaintiffs filed a complaint under the California's unfair competition law against the makers and distributors of two over-the-counter dietary supplements, and sought injunctions to remove the products from the market altogether, or alternatively to change the advertising of the products, and to have all the profits made from the products disgorged. ((2002) 99 Cal. App. 4th 1056, 1058.)

The *Olympian* Defendants sought preemption based on the Federal Trade Commission Act and the Food, Drug, and Cosmetic Act. This Court found that under the Food, Drug, and Cosmetic Act, the "Federal Trade Commission has the power to obtain injunctive relief regulating the advertising of dietary supplements." *(Id.* at 1059.) This Court then addressed a hypothetical situation almost identical to the one advanced by Kia here: that "Theoretically at least, the Commission might seek to enforce a uniform label (or disclaimer) on dietary supplements claiming to aid weight loss (or alleviate herpes infections, or whatever), and those uniform labeling requirements might conflict with injunctive relief granted by a California trial court in the case before us." *(Id*. at 1062.) As here, defendants argued that this theoretical conflict gave rise to implied conflict preemption. (*Id*. at 1061-1062.) Applying the newly-issued *Geier* decision, the *Olympian* court roundly rejected defendants' preemption argument:

> preemption cannot be based on a belief in phantoms, i.e., speculation. Since the Federal Trade Commission has ***not now*** made any regulations (or taken any action with which the present litigation might conflict) there is no conflict preemption.

(Id. at 1062 [emphasis in original].)

Similarly, the District Court in *Kent* addressed a speculative argument like that advanced by Kia here.

> Defendant asserts that Plaintiffs' claims give rise to conflict preemption because of the "prospect" of conflict between this judicial proceeding and the NHTSA investigation. Motion to Dismiss at 9. A "prospect" of conflict, however, is not sufficient to give rise to preemption based on frustration of purpose. As the Court's decisions in International Paper, Kalo Brick, and Geier demonstrate, in order to constitute an actual conflict, the state law at issue must conflict with the intent of

Congress in a specific and concrete way.

(200 F. Supp. 2d at 1217.)

Moreover, in every Supreme Court case cited by the parties here, some **specific, conflicting** federal permit, statute, or regulation **actually existed**: in *Geier*, the Court focused on whether plaintiffs claims "**actually conflict[ed]** with FMVSS 208," (529 U.S. at 874); in *Int'l Paper Co. v. Ouellette,* New York state had **already issued** a specific permit, that gave rise to the preemption, ((1987) 479 U.S. 481, 498, n. 18); and, in *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.,* a federal permit allowing the closure of a rail line **had been issued**. ((1981) 450 U.S. 311, 324.) By contrast, where no specific regulation or ruling existed, the Courts have refused to find conflict preemption. *(See Freightliner, Spreitsma, Olympian, and Kent,* discussed *supra* pp. 22-25.) Finally, even the plain definition of "actual" precludes a "potential" conflict, as "actual" is defined as "Existing and **not merely potential** or possible." (AMERICAN HERITAGE COLLEGE DICTIONARY (3d Ed. 2000) at 14 [emphasis added].)

In sum, a current actual conflict with a specific federal statute or regulation is essential to the entire structure of preemption analysis. Without a specific federal statute or regulation, the entire analytical framework for determining preemption disappears, and courts will be left to decipher mystifying "potential conflict" arguments like the one advanced by Kia here. For the reasons stated above, that position must be rejected.

3. The Potential Conflict Advanced by Kia Could Not Exist Under the Safety Act Because NHTSA Has No Authority to Order Recalls, and Manufacturers Can Voluntarily Recall Vehicles With No Involvement of, or Impact on, NHTSA

Even if Kia could obtain preemption based on potential conflict – which as previously explained, it cannot – that argument would get Kia nowhere here because of Kia's fundamental misunderstanding of the Safety Act and NHTSA's role under that Act. Under the Safety Act, NHTSA cannot order a manufacturer to conduct a recall. All that NHTSA can do is make a finding that a safety defect exists, require notification of the defect, and then require the manufacturer to take one of three statutory remedial measures. It is left to the manufacturer to choose which remedial measure to take: repair, replacement, or refund. Thus, it is the manufacturer that chooses whether a recall will be undertaken. The manufacturer's choice to undertake a recall cannot be considered an administrative order that would create a conflict.

Further, manufacturers can, and have, conducted voluntary recalls and service campaigns since long before passage of the Safety Act without any involvement of NHTSA. Such voluntary recalls do not have to comply with the Safety Act, and NHTSA has no authority over manufacturers in voluntary recall cases unless it institutes defect proceedings. Conversely, any voluntary recall by a manufacturer does not legally limit NHTSA's authority to make a final defect determination and order a defect notification or require a remedy through a *de novo* court proceeding. Thus, the Safety Act allows for independent recalls, none of which has a legal effect upon the others. Any court order

requiring such an independent action would not interfere with NHTSA's authority, any more than have the thousands of voluntary recalls performed by manufacturers over the last thirty years.

4. Kia's Citation to a Regulatory Scheme Cannot Support Preemption

Kia cites the allegedly "comprehensive" federal regulatory scheme to support their argument for "potential conflict" preemption. (Opening Br. at 9.) In doing so Kia again attempts to rework the entire federal preemption scheme in direct contravention of the Supreme Court's decisions in the preemption arena.

In asserting that the federal regulatory scheme warrants preemption Kia fails to point to any specific statement of preemptive intent. Yet, such a statement of preemptive intent is necessary under Kia's theory. As the Supreme Court most recently explained:

> the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace all state law in a particular area.

(*Geier* 529 U.S. at 884.)

In *Hillsborough County v. Auto Med. Labs*, the Supreme Court explained why the simple existence of "comprehensive" regulations is insufficient to support preemption.

> We are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

((1985) 471 U.S. 714, 717.)

In the Safety Act, the only statement of preemptive intent even arguably applicable to motor vehicle safety is set forth in section 30103(b). This preemption provision does not even mention the regulatory scheme that Kia relies on here and is not even close to the "specific statement of preemptive intent" necessary for preemption based on an administrative scheme. Thus, the Supreme Court, and Courts in this state, have refused to find any preemption based on the volume and complexity of regulations under the Safety Act. *(Freightliner* 514 U.S. at 286 [Declining to find field preemption and holding that in enacting the Safety Act Congress did **not** intend "to centralize all authority over the regulated area in one decision maker: the Federal Government".]; *Buccery* 60 Cal. App. 3d at 541.) Because there is no specific statement of legislative intent that any regulatory scheme under the Safety Act preempt state law, Kia's reliance on such a scheme for preemption must fail.

Here, even if the administrative scheme could, in the abstract, create preemption, the Safety Act has a specific savings clause that precludes any such preemption. Section 30103 of the Safety Act explicitly provides that non-federal actions are allowed in recall cases, thereby precluding field preemption:

> (d) Warranty obligations and additional legal rights and remedies. Sections 30117(b), 30118-30121, 30166(f), and 30167(a) and (b) of this title do not establish or affect a warranty obligation under a law of the United States or a State. A remedy under those sections and sections 30161 and 30162 of this title is in addition to other rights and remedies under other laws of the United States or a State.

Contrary to Kia's argument, this savings provision explicitly refers to the very provision of the Safety Act that governs recalls, Section 30118. The intent of this language is clear: that the existence of a remedy under the statutory sections governing recalls by NHTSA, is in addition to any other rights and remedies under other laws of the United States or a State. (*See Farakas v. Bridgestone Firestone*, (W.D. Ky. 2000) 113 F.Supp. 2d 1107 [Section 30103(d) covers recalls].) In any event, this preemption clause cannot provide the specific statement of intent to displace all state law necessary for preemption based on the volume and complexity of an administrative scheme.[6]

Kia's citation to *Oullette* is entirely misplaced as Kia misses the significant distinction between *Oullette* and the instant case: in *Oullette* the Court focused on a conflict between the rights of two states. (479 U.S. at 481, 491, 497-499.) Thus, the Court addressed whether a **state issued permit** created preemption. (*Id.* at 490-491, n.6.) As the Court later explained, there is a significant distinction between a state issued permit, addressed in *Oullette,* and a permit issued by a federal administrative agency. (*Arkansas v. Oklahoma* (1992) 503 U.S. 91, 100.)

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[6] It is also instructive that Section 30103(b)(2) of the Safety Act grants states the right to enforce safety standards, which includes the right to require remedies. Thus, even when there exists a federal safety standard that applies to a given aspect of vehicle performance, and therefore only uniform state standards are allowed, the states may still enforce these state standards. Accordingly, even in the most restrictive portion of the statute, Congress evinced an intent that the Safety Act "supplement" and not supplant state law and procedure. *(See Buccery* at 541 [In enacting the Safety Act, "Congress felt that federal regulations should be supplementary to the common law of products liability."]) No less of a conclusion can be reached here.

Further, the *Oullette* Court was addressing an entirely different statute with entirely different goals. As the Court explained, in "light of [the] pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act." *(Id.* at 492.; *see also Motor Vehicle Mfr. Assoc. v. Abrams* (2nd Cir. 1990) 899 F.2d 1315, 1320 [*Oullette* unique as it "involved regulation of matters of peculiarly federal concern."]) The Supreme Court has found just the opposite in respect to the Safety Act. (*Geier* 529 U.S. at 868 [recognizing the "significant number of common-law liability cases" existing apart from the Safety Act.]; *Freightliner* 514 U.S. at 286.)

In any event, the dispute before the *Oullette* Court arose not from a hypothetical agency action, but from a real and tangible state issued permit. (479 U.S. at 498, n. 18.) Even then, the Court did not find preemption of all state causes of action. To the contrary, it found that individuals could bring state causes of action in the state in which the plant was located. (*Id.* at 497-498.)

The sole case upon which Kia relies for its novel assertion that a comprehensive scheme can give rise to conflict preemption is *Firestone.* [7] (153 F. Supp. 2d 935.) In that case, plaintiffs were seeking a "recall, buy back, and or replacement of the tires" and were seeking a preliminary injunction for the "an immediate safety recall, replacement, or

[7] None of the other cases on which Kia relies found preemption of Plaintiffs' claims, rather they all involved other methods used by the Courts to manage the cases before them. *(See infra* at 52-54.)

refund, at defendants expense." (*Id.* at 937-938.) Thus the court was faced with a cause of action, the injunction, based entirely upon a request for a "court-ordered recall." (*Id.* at 948.) Moreover, the Firestone controversy was well underway by the time the court ruled on July 27, 2001: NHTSA was nearing the conclusion of an investigation "unprecedented in its technical complexity" that it had opened in May of 2000 (*see* Statement of M. Jackson, Depty Scty of Transportation before Subcomm. on Telecom., Trade, and Cons. Prot., and Oversight and Investig. of the Comm. on Energy and Comm., H.R., (June 19, 2001) at p. 2 [available at http://www.nhtsa.dot.gov/hot/Firestone/DOTState.html.]); Firestone had recalled over 14 million tires in August of 2000 and Ford had replaced approximately 13 million tires in May of 2001 (*id.*); and, Congress had held hearings on the Firestone controversy and had considered and passed amendments to the Safety Act specifically addressing some of the issues raised in the Firestone controversy. (P.L. 106-414.) Recognizing this unprecedented federal action, the court emphasized the desire to avoid interference with "the progress of decision-making at the agency." *(Id.* at 946.)

By contrast, in this case, Plaintiffs have not based a cause of action solely on a request for a recall. Rather, they made a single reference to a request for a retrofit in one paragraph in one claim in their complaint. Further, the trial court here explicitly considered the grounds raised in *Firestone* and found "no evidence of current NHTSA proceedings." (App. 439.)(*See Spreitsma* 537 U.S. ____, 123 S. Ct. 518 [lack of agency action or regulation was not preemptive]; *Freightliner*, 514 U.S. 280 [same]; *Kent* 200 F.

Supp. 2d at 1217-1218 [same].)

Finally, even a NHTSA investigation does not necessarily preempt a pending state law claim, regardless of whether plaintiffs request remedies in the form of a "recall." For example, in *Olympian* this Court rejected preemption and recognized that a Court ordered remedy "would likely be consistent" with any remedy ordered by the Agency. (99 Cal. App. 4th at 1062.) Similarly, in *Hanlon* the plaintiffs' class claim, a NHTSA investigation, and a voluntary service campaign all proceeded contemporaneously. (150 F.3d at 1017-1019.) No conflict arose and the Ninth Circuit approved a class settlement which included court approved notice to over 3 million class members of the defects in the vehicle and the right to a remedy. (*Id.*)

Thus, even the existence of a NHTSA investigation would not preempt Plaintiffs' claims as there would be no actual conflict with the purpose of the Safety Act. Rather, to the extent safety was involved, both the NHTSA investigation and Plaintiffs' claims would seek the same thing, to improve public safety.

5. Kia's Faulty Attempt to Invoke Uniformity Over Safety Cannot Support Kia's New Preemption Standard

The primary objective of the Safety Act is explicit: "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." (49 U.S.C. 30101.) That safety is the preeminent objective of the Safety Act is indisputable. (*Freightliner* 514 U.S. at 287; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 55; *Geier* 529 U.S. at 928-930; Resp. Br. at 10.)

Kia does not even attempt to argue that the claims here would obstruct the safety

purposes of the Act. Rather, Kia focuses solely on the supposed federal goal of uniformity. However, the entire history and structure of the Safety Act demonstrates that Congress chose safety over uniformity as the goal of the statute.

- The Safety Act sets *minimum* safety standards. (49 U.S.C. 30102(2))
- The Safety Act allows common law suits, even if the result is inconsistent with federal safety standards. *(Geier* 529 U.S. at 871.)
- The Safety Act allows states to regulate the field if NHTSA has not established any federal safety standards applicable to a given aspect of vehicle performance. (49 U.S.C. 30103(b).)
- The Safety Act allows Plaintiffs to pursue rights and remedies in addition to those provided in the Safety Act. (49 U.S.C. 30103.)
- The Safety Act "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *(Geier* 529 U.S. at 870.)

This statutory focus on safety can be contrasted with the one area in which there is an express goal of uniformity: when the federal government has issued a safety standard applicable to a particular aspect of vehicle performance. (49 U.S.C. 30103(b).) Yet even in that instance, the Supreme Court in *Geier* recognized that "occasional nonuniformity is a small price to pay" even though "a jury-imposed safety standard [may] actually conflict[] with a federal safety standard." (529 U.S. at 871.)

Most recently, in addressing the Federal Boat Safety Act, the Supreme Court again rebuffed defendant's arguments that the need for uniformity trumped the need for safety. (*Spreitsma* at 537 U.S. at ___, 123 S. Ct. at 530.) In *Spreitsma*, the FBSA explicitly adopted uniformity in manufacturing regulations as a goal. (*Id.*) Nonetheless, the Supreme Court rejected defendant's attempt to invoke uniformity to support preemption, holding that "the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting boating safety." *(Id*.)

Kia relies on two Safety Act cases in support of its uniformity argument: *Garcia v. Volvo Truck N.V.* (7th Cir. 1997) 112 F.3d 291 and *Harris v. Ford Motor Co.* (9th Cir. 1997) 110 F.3d 1410. Kia cites *Garcia* and *Harris* for the proposition that the express preemption clause makes "no distinction between positive enactments and common law" and therefore, "even common law claims cannot be sustained 'when they conflict with NHTSA standards.'" (Reply Br. at 13 - 14.) Putting aside that the express preemption clause does not apply here, *Geier* rejected the proposition, advanced in both these cases and put forth by Kia, that "the pre-emption provision, standing alone, appl[ied] to standards imposed in common-law tort actions." *(*529 U.S. at 868; *see also Id.* at 866 [citing *Harris* and rejecting the portion of *Harris* cited by Kia, that found "the Act's express pre-emption provision" preempted common law claims.]) Since the Supreme

Court rejected the very argument that Kia advances here, Kia is left with nothing to support its reliance on the primacy of uniformity as a statutory objective.

ASSERTION OF PRIMARY JURISDICTION IS INAPPROPRIATE

The doctrine of "primary jurisdiction" is inappropriate here because, quite simply, there is nothing that NHTSA can or should do. There is no safety "defect" alleged - only misleading and deceptive business practices. There is no need for any investigation, and there is no likelihood of any investigation or decision. Rather, if deferral to NHTSA is mandated, there is only likelihood for delay and a waste of the resources of the courts, NHTSA, and the parties.

A. The Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, but its enforcement requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. (*Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 390.) Primary jurisdiction is a flexible concept and numerous formulations have been offered by the courts. (*Id.* at 391.) Recently, this court set forth one such formulation: primary jurisdiction "is concerned with situations where an issue should be addressed by an administrative agency for its initial determination because there is a need for (1) uniformity of application of administrative regulations and uniformity of answers to

administrative questions, and (2) the expert and specialized knowledge of the relevant agency, i.e., the expertise that a regulatory agency can bring to a conflict." *(Cundiff* at 456-457.)

From the varying formulations, four central factors necessary for deferral to an administrative agency emerge. First, that the litigation involves an important issue on which the administrative agency will, or at least may likely, issue a determination. Second, that there is a need for uniformity in either the application of administrative regulations or the answer to administrative questions. Third, that the agency has expert and specialized knowledge, not within the province of the Courts, that is relevant and necessary to the resolution of the issues. Fourth, that deferral to the agency will conserve judicial and agency resources and will not work an unfairness on the litigants.

B. NHTSA Does Not Have Jurisdiction Over the Issues in This Case And Will Not Issue a Determination On Any Issues of Importance to the Parties in This Case

Kia asserts that primary jurisdiction is required here as NHTSA will make some determination relevant to the case. For primary jurisdiction to apply, the claims raised by Plaintiffs must fall within the jurisdiction of the agency. This Court has held it inappropriate to refer the parties' dispute to an administrative agency that has no jurisdiction to resolve that dispute in the first place. (*South Bay Creditors Trust v. General Motors Acceptance Corp.,* 69 Cal.App.4th 1068, 1083. [Such a referral would unduly give the defendants "an extra line of defense from lawsuits" and "only delay the

plaintiffs' right to a jury trial at needless cost to all parties."]; *see Miller v. Superior Court* (1996) 50 Cal.App.4th 1665; *Kemp v. Nissan Motor Corp.* (1997) 57 Cal.App.4th 1527.)

NHTSA's jurisdiction to issue a determination or remedial order in defect cases is limited to cases in which "passenger safety" is an issue. However, whether Kia Sephias are considered "safe" by any government standards or investigation conducted by NHTSA is of no moment to the Plaintiffs' §17200 action. Rather, since 17200 "imposes strict liability. It is not necessary to show that the defendant intended to injure anyone." *(State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1102.) Thus there is no need for a finding regarding a safety defect.

GM Pickup rejected a similar attempt at diversion by a defendant. (1993 U.S. Dist. LEXIS 7660.) There the plaintiffs had referred to safety in their complaint arising from defendant's placement of its fuel tanks outside its vehicle's frame rails. (*Id.* at *1-3.) Further, in *GM Pickup* the "plaintiffs in their amended class action complaint also sought injunctive relief in the form of a recall and/or retrofit." (*In re General Motors Corporation Pickup Truck Fuel Tank Litigation* (E.D. Pa. 1993) 846 F.Supp. 330, at 337 n.7 [approving class settlement] *rev'd.* (3rd Cir. 1995) 55 F.3d 768.)[8] Nonetheless, the court rejected GM's assertion that NHTSA possessed primary jurisdiction over the

[8] Kia's contrary contention that the GM case "did not involve a demand for a recall and retrofit" is incorrect. (Reply Br. at 20.)

plaintiffs' fraud, unfair trade practices, and other claims.

Because Plaintiffs claims in this action are not dependent on, or even aided by, any response that NHTSA could possibly give on the question of vehicle safety, NHTSA has no jurisdiction over any issue relevant to the case. In other words, whatever NHTSA could possibly decide would have no impact on this case.

Even if, theoretically, NHTSA could do something of relevance to the instant case, the fact is that it will not. There is no realistic possibility that NHTSA will make any determination or resolve any issue of moment to this litigation. The only determination of significance made by NHTSA is a final determination, all others are merely initial or advisory. Yet there have been no such final determinations in over 10 years. Moreover, any NHTSA final determination must withstand any court challenge by Defendant "applying whatever scope of review is appropriate," (*Southern California Chapter of Associated Builders & Contractors, Inc. v. California Apprenticeship Counsel* (1992) 4 Cal. 4th 422, 455) here *de novo* judicial review. (*U.S. v. General Motors* 518 F.2d 420.)

Thus, any deferral to NHTSA would be the ultimate in futility – wasting the time and assets of NHTSA, the parties and the courts, while leaving the courts with the need to re-determine the same issues *de novo*, even on the off chance that some determination is made by NHTSA.

C. Any Need for Uniformity in Administrative Regulations or Answers to Administrative Questions Will Not be Served by Referral to NHTSA

Uniformity refers to the need to promote consistency and uniformity in certain

areas of administrative policy. (*Kamp v. Nissan Motor Corp.*, 57 Cal.App.4th 1527, 1532-1533.) As the U.S. Supreme Court has long recognized, the primary jurisdiction doctrine was intended to reduce the potential for conflicting results and to promote uniformity in the application of administrative regulations. (*See Pennsylvania R.R. Co. v. Puritan Coal Mining Co.* (1915) 237 U.S. 121, 131-132.)

Key to the determination of whether a plaintiff's action threatens uniformity is whether that action challenges the administrative agency's regulations or other conduct. (*See Nader v. Allegheny Airlines Inc*. (1976) 426 U.S. 290 [where primary jurisdiction was improper because the plaintiff's suit did not challenge the reasonableness of the rates set by the Civil Aeronautics Board or any other practice approved by the agency]; *accord People v. Western Airlines, Inc.,* (1984) 155 Cal. App.3d 597, 599-600 [where this Court found that the same administrative agency lacked primary jurisdiction over §17200 claims for false and misleading advertisements that did not challenge the agency's regulations].)

As the parties have noted, the Court in *Kent* squarely addressed whether NHTSA's investigatory and remedial authority gave rise to a threat to uniformity. (200 F. Supp. 2d 1218-1219.) In *Kent,* the plaintiffs brought a putative class-action alleging breach of warranty and violation of state consumer protection statutes. The *Kent* court, however, declined to apply the primary jurisdiction doctrine to stay the case even though NHTSA was already investigating the very Grand Cherokee transmission problems alleged in the complaint. (*Id.* at 1210.) The Court explained

> because Defendant has not identified any specific conflict between this action and the on-going NHTSA investigation of the same problem, the need for "uniformity and consistency in the regulation of business" does not justify application of the doctrine of primary jurisdiction at this time

(*Id*. at 1218 [*citing Nader* 426 US at 303.])

As in *Kent*, here there is no threat to the uniformity of NHTSA regulations as the Plaintiffs have not challenged any NHTSA standard, regulation, or practice. Since Kia cannot point to a single regulation challenged by Plaintiffs, "it would be error . . . to even suggest that application of the doctrine of primary jurisdiction, and that prior resort to the administrative process, is a possibility." (*Kamp v. Nissan Motor Corp.*, 57 Cal. App. 4th 1527, 1533; *see also Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc*. (2000) 83 Cal. App. 4th 139, 142 [where the First District reversed the trial court's invocation of primary jurisdiction on behalf of a San Francisco's planning department, citing the lack of any threat to the uniform application of local planning ordinances where the plaintiff's §17200 claims were proceeding at law.])

Kia attempts to avoid the lack of a regulatory conflict by asserting that a court may issue a decision that may conflict with a determination that may be issued by NHTSA. However, as noted above, there is almost no likelihood that NHTSA will ever make a determination regarding the existence of a safety defect or issue a recall order under section 30118(2). Accordingly, there is no reasonable chance that there will be any agency decision that would give rise to a conflict.

Kia's assertion that Plaintiffs' claims "directly challenge NHTSA's power . . . to

order the notification and recall remedies provided by its regulations" is simply false. (Reply at 20.) Plaintiffs do not, nor could they, seek to prevent NHTSA from investigating the matter or from issuing a remedial order.

Here Plaintiffs' remedial requests primarily concentrate on recovering monies already spent by Plaintiffs and others on repairs, consequential damages from Kia's faulty brakes, the loss of value in the vehicles, exemplary and punitive damages, and costs and attorneys fees. Since Plaintiffs seek remedies primarily outside of the jurisdiction of NHTSA, these remedies simply cannot support an assertion of primary jurisdiction. *(Ryan* 935 F. 2d at 131 [Since the agency cannot provide the plaintiff with the damages she seeks, "we fail to understand what role the [agency] can play in this suit."]) Rather, "judicial economy will be better served by allowing the plaintiff[s] the opportunity to recover damages if [they] are entitled to any from the only forum that can provide them, the court." (*Id*. at 132.)

Even if Kia can contort a lone request for a repair into a request for a "recall," NHTSA remedies are cumulative, not exclusive. Importantly, the manufacturer can itself undertake a recall and notification campaign. And manufacturers undertake voluntary recalls on a routine basis.[9] A manufacturer that conducts a voluntary recall is under "no

[9] That NHTSA may on occasion influence manufacturers in recall cases, is no basis for the assertion of primary jurisdiction (or preemption). The Safety Act clearly contemplated that pressure to improve the safety of motor vehicles would be brought to bear by both NHTSA and state court litigation. (*Geier* 529 U.S. at 868-872.)

obligation to comply with the remedial provisions of the Act or NHTSA's regulations." *(U.S. v. General Motors*, 841 F.2d at 416, 417.) Conversely, any recall by the manufacturer will not affect NHTSA's ability to find a safety defect and require a remedy. Since manufacturers can perform a voluntarily recall, without input or approval from NHTSA, there is no reason that the manufacturer could not do the same thing as the result of a civil settlement or a court order. Thus, this Court has recognized that courts can issue orders that are "substantively consistent" with any order issued by an administrative agency. (*Olympian* 99 Cal. App. 4th at 1062.) And, in *Hanlon* no conflict existed when the following actions occurred contemporaneously: a manufacturer initiated voluntary service campaign, in agreement with NHTSA; a NHTSA investigation; a pending class action suit; and a resulting court ordered notice to over 3 million consumers. (150 F.3d at 1011.)

In the end, Kia seeks to pervert the Safety Act, arguing that NHTSA's remedial authority precludes all other remedial measures. However, there is no possible threat to uniformity, and Kia's attempt to again make from whole cloth a purely hypothetical conflict must be rejected.

D. NHTSA Does Not Have Expert Knowledge Over the Consumer Fraud Claims in This Action and Does Not Have Specialized Knowledge Over Any Other Potential Issues

Another factor is whether the relevant agency has some special expertise to deal with issues of fact not "within the conventional competence of the courts." (*Farmers*

Insurance Exchange v. Superior Court, 2 Cal.4th 377, 390.) Such specialized inquiries are not relevant to Plaintiffs' §17200 and fraud and misrepresentation causes of action. *(See Nader* 426 U.S. at 305-306 ["the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts" and not an administrative agency.]) And Kia has not even attempted to argue the contrary.

Rather, Kia once again bases its argument upon a mischaracterization of Plaintiffs' claims: that they are all safety related, and that a lone remedy request in one claim creates a basis for primary jurisdiction. As noted previously, both of these characterizations are incorrect and NHTSA has no specialized knowledge relevant to Plaintiffs primary claims of fraud and misrepresentation.

In any event, even if the issue of "safety" is implicated by Plaintiffs complaints, deferral to NHTSA is not warranted. The Safety Act itself recognizes that both the courts and NHTSA have sufficient expertise, or will gain it from parties and expert witnesses, to determine whether there is a safety defect as judicial review of NHTSA determinations of a safety defect are *de novo.*[10]

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[10] To the extent that additional information is needed to help it resolve the Plaintiffs' claims, or to affect the remedies they seek under §17200, these issues "can be readily addressed through percipient and expert witnesses at trial." (*South Bay Creditors Trust v. General Motors Acceptance Corp*, 69 Cal.App.4th 1068, 1083.) In short, any potential aid that NHTSA could even hypothetically lend, can already be gleaned from other available sources without the significant delay and expense associated with referring this matter to a federal government agency that otherwise has no expertise in the

Even outside of judicial review of NHTSA determinations, "there are thousands of state and federal tort cases brought each year alleging an automobile design or safety defect that are decided in the courts and not by the National Highway Safety and Transportation Board," (*Ryan* 935 F.2d at 132) and the vitality of these suits gained a ringing endorsement in *Geier*. The courts have handled these cases for the last thirty to forty years, and this capacity has not suddenly disappeared.

Similarly, under the Safety Act, NHTSA does not have exclusive authority to determine if a safety defect exists and has no authority to determine what is the appropriate remedy. First, the manufacturer alone is required to self determine if a safety defect exists. Second the manufacturer alone can perform a voluntary recall with no input from NHTSA, and manufacturers have performed these recalls thousands of times over the last 100 years. Third, the manufacturer alone can select the appropriate defect remedy – i.e., repair, replace or buyback. Fourth, the Attorney General can bring litigation against a manufacturer alleging a safety defect, and can request a court to restrain violations of the Safety Act, without relying on any NHTSA finding. (*United States v. General Motors* (D.D.C. 1983) 574 F.Supp 1047, 1049.) Certainly if the manufacturer is capable of determining whether a safety defect exists, and whether a recall is necessary, without any input from NHTSA, the Court can do the same with the assistance of the

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interpretation and application of California law. (*Id.*; *see also United States v. General Motors Corp.* (D.D.C. 1983) 574 F. Supp. 1047 [NHTSA expertise to be presented through one of the parties, the government]).

manufacturer and the Plaintiffs.

E. Any Referral to NHTSA Would Waste Judicial and Administrative Assets and Would be Unfair to the Litigants

Suffice it to say that the administrative detour requested by Kia can only lead to an unnecessary waste of both time and expense without the concomitant benefit of any appreciable judicial economy. This is particularly true here, as deferral would result in two judicial actions, not one.

Here Plaintiff brought both warranty and non-warranty claims. Kia has only moved to stay the non-warranty based claims. Even if Kia's motion for a stay is granted, the warranty based claims will continue to be litigated, and the non-warranty based claims will only be stayed pending review by NHTSA. Once NHTSA has completed its review, the litigation over the non-warranty based claims will resume. Given the likely delay if there is deferral to NHTSA, the litigation on the warranty based claims will be well underway and it will be difficult to rejoin the two cases. Thus there will be two judicial actions on essentially the same issues. One can hardly imagine a more futile use of the Court's time.

This waste is particularly acute as any perceived benefit to the judicial system is illusory, at best, because the deferral hinges on a "potential investigation" by NHTSA (an investigation likely never to occur.) (*See, e.g., Shernoff v. Superior Court* (1975) 44 Cal.App.3d 406, 408-409, [where the appellate court rejected the trial court's primary jurisdiction referral so the Insurance Commissioner could potentially be "given the first

opportunity" to act, even though the Commissioner clearly declined to do so.]) Indeed, since the "potential investigation" will likely remain only a "potential" one, the Court will not receive any assistance from an administrative determination of the issues which Kia holds out as the very justification for NHTSA's primary jurisdiction in the first place.

Similarly the lengthy delay while seeking the illusory determination by NHTSA mitigates against the application of primary jurisdiction. The length of time of the administrative process is an important factor in determining the application of primary jurisdiction. The D.C. Circuit in *Rorh Industries, Inc. v. Wash. Metro. Area Trans. Authority* explained: "While [the administrative] process struggles forward, plaintiff's case grows stale. Witnesses vanish, memories dim, and the record grows more distant and difficult to retrieve with every day." ((D.C. Cir. 1983) 720 F.2d 1319, 1326 [*cited favorably in Farmers Ins.* 2 Cal. 4th at 401-402.])

Thus, "whenever possible, courts should avoid duplicated or drawn-out proceedings; the efficient administration of justice demands it" (*id.* at 1327) and should appreciate that "rote deference to agency proceedings in such circumstances can force parties to unnecessarily travel roads equally long and expensive and available only to those with long purses." (*Id.*) And so Courts have refused to exert primary jurisdiction when administrative delay is anticipated. (*Roberts v. Chemlawn Corp.*, (N.D. Ill. 1989) 716 F. Supp 364, 366; *see Southern California Chapter of Associated Builders,* 4 Cal.4th 422, 455, [California Supreme Court found that considerations of expense and delay

"strongly support our decision to decline to invoke the doctrine of primary jurisdiction"]; and *South Bay Creditors Trust* 69 Cal.App.4th 1068, 1083, [where this Court similarly found that the San Diego Superior Court had abused its discretion in referring the case to an administrative agency, as doing so "would only delay the plaintiffs' right to a jury trial at needless cost to all parties."])

In accord with these decisions, Courts have rejected requests to apply primary jurisdiction and refer cases to NHTSA under the Safety Act. As the court in *GM Fuel Tank* noted: "If the NHTSA proceedings were to continue, it could take several years for the process to conclude. If GM were to dispute a final determination by the NHTSA, the proceedings would take even longer to conclude since the government would have to sue GM in court to enforce a recall. One recent case concerning GM's X-car took approximately seven years to complete after NHTSA began its investigation." (*Id.* at *8.) Indeed, the Court in *GM Fuel Tank* ultimately held that a stay of the litigation pending a NHTSA investigation would substantially prejudice plaintiffs, stating: "the potential arises that staying the present action pending the completion of NHTSA proceedings could lead to many years of inactivity in the court system and deprive plaintiffs of a prompt resolution in this matter." (*Id.* at *9.)

The delay here will be extensive. As outlined above, the path to a NHTSA determination or remedy is long, with delays at each step.

- The petition process can take 120 days or more.[11]
- The initial investigation can take up to seven years, with such investigations frequently lasting more than two years.
- NHTSA must then hold a hearing and issue a final determination.
- The manufacturer can challenge this final decision *de novo* in Court, adding up to four years to the proceedings.
- Contested determination and appeals can stretch a case to 10 years.

How long must the Plaintiffs be expected to reasonably wait before NHTSA takes any action at all in this case, let alone adds any meaningful determination to the litigation? Six months? Twelve months? Two years? Seven years? Ten years? Such an indefinite delay cannot be justified given the nature of the claims made in this action. And this delay will be particularly futile here as the end of the long and expensive road will yield no result worthy of the trip.

Primary jurisdiction is also concerned with the preservation of agency assets. *(Rojo v. Klinger*, (1990) 52 Cal.3d 65.) It is no secret that NHTSA is understaffed and overworked, and that proceedings before that federal agency are notoriously protracted. Yet Kia asserts that "all safety related" claims involving motor vehicles must be referred to NHTSA for review. Kia would thus burden NHTSA with "tens of thousands" of

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[11] While Kia points to the petition process, the granting of a petition is only the beginning of the lengthy investigative process.

mandatory reviews, diverting NHTSA resources from ongoing activities, and the slow march of investigations would grind to a halt.[12] (*See supra* 7-8 [Discussion of D.C. Circuit and NHTSA rejecting attempts to compel investigations because such attempts would exhaust NHTSA resources and impair the ongoing NHTSA investigations.]) And so Kia's proposition would sacrifice the safety of the public in order to gain Defendants extra time while draining the resources of NHTSA and the Plaintiffs.

APPROPRIATE METHODS EXIST FOR THE COURTS TO MANAGE PLAINTIFFS' CLAIMS AND REMEDIAL REQUESTS

Finally, numerous mechanisms currently exist for the Courts to manage any potential difficulties involving Plaintiffs' claims. As the trial court noted, courts have significant discretion in awarding injunctive relief. (*See Chin* 182 F.R.D. at 464, n. 6 [Request for recall as injunctive relief may ultimately be rejected by the Court.]) As any of Plaintiffs' requested relief that even arguably raises a "recall" action is injunctive, the Court would be able to manage the provision of this relief in accord with any possible future investigations or remedial actions undertaken by NHTSA.[13] Further, here, unlike

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[12] Kia asserts that Plaintiffs must file a defect petition. The Safety Act **requires** that NHTSA answer these petitions within 120 days. (49 U.S.C. 30162.) While the overwhelming response is a rejection of the petitions, the process of answering petitions uses significant resources of NHTSA. (*Supra* 7-8.)

[13] There is currently no NHTSA investigation, and any such investigation will hardly come as a surprise to KIA. NHTSA is required to notify Kia as soon as a safety defect investigation is initiated. Given the lengthy investigations conducted by NHTSA, and the requirement that Kia be given official notice of an initial determination and a

in *Firestone*, Plaintiffs' claims are not dependent on any recall request and such relief is only one of many forms of relief requested by Plaintiff. Thus, Plaintiffs' liability claims, and their requests for other relief, must be addressed regardless of the ultimate disposition of any request for a recall. And since there is no request for a temporary injunction, any injunctive relief would only arise long into the case, after a finding of liability and likely after any finding on the need for class action relief. This provides more than sufficient opportunity for the Court to deal with any possible NHTSA investigation or remedial order.

Defendant cites a number of cases in which courts addressed potential recalls. (*See* Opening Br. at 15, n. 5, 25, n.9.) However, these cases only support that preemption is not the appropriate method by which to resolve the question of such injunctive relief. Rather, the availability of a recall is more appropriately considered when determining whether a class action is a suitable device for achieving the remedy sought. In *American Suzuki Corp. v. Superior Court,* the Court considered whether class certification was appropriate in a strict liability consumer class claim. ((1996) 37 Cal.App.4th 1291.) The Court explicitly avoided the issue of preemption, finding "the record in this case is inadequate with respect to the issue of implied preemption." (*Id.* at 1300, n. 5.) Instead the Court simply ruled that the class action device was not an appropriate method for

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right to provide testimony at a final determination hearing, Kia and the Court will have significant notice even in the unlikely event that NHTSA wishes to issue any determination or remedial order.

trying the case as the underlying cause of action could "be maintained by only a few members of the putative class." (*Id*. at 1301.) In *dicta,* the court responded to the Plaintiffs concern over the tragic consequences of the defect, and sought to assure Plaintiffs that the ruling did "not mean that their cry for consumer protection should go unheeded," noting that NHTSA had already considered prior petitions regarding the issue and could do so again. *(Id*. at 1299.) However, the Court's assurance that plaintiffs had another method to satisfy their concerns cannot be taken as a ruling that this method is exclusive.

The remaining decisions cited by Kia voice a consistent theme: that the availability of a NHTSA administrative remedy is best addressed when determining whether the class action "superiority" requirement has been met. *(In Re Ford Motor Co. Ignition Switch Prods. Liab. Litig*. (D.N.J. 1997) 174 F.R.D. 332, 353-353 ["Court has mentioned the availability of a NHTSA remedy issue **only** to demonstrate that issues such as those involved in this [] case are" more likely to be resolved outside of the class context][emphasis added]; *Chin* 182 F.R.D. at 464-465 [*quoting Ford Switch*, 174 F.R.D at 352]; *Walsh v. Ford Motor Co.* (D.D.C. 1990) 130 F.R.D. 260 at 266; *see also Ford Motor Co. v. Magill* (Fl. Ct. App. 1997) 698 So. 2d 1244, 1245 [reversing a class certification decision after NHTSA had "taken jurisdiction over [the] matter and negotiated recall mandates and extended warranties with which [the defendant] is complying."]) Further some of these courts recognized that the plaintiffs' claims were

not preempted by the administrative remedy, *(Ford Switch* 174 F.R.D. at 353 ["The court recognizes that the [Safety Act] and NHTSA itself do not in any way preempt a plaintiff right to bring common law claims"]) and none of these courts dismissed plaintiffs' claims entirely. *(Walsh* 130 F.R.D. at 266-267 [Finding that monetary damages were the more appropriate form of relief for the class]; *Ford Switch* 174 F.R.D. 332 [Court maintains control over coordinated discovery]; *Magill* 698 So. 2d at 1245 [plaintiffs individual claims remanded]; *Chinn* 182 F.R.D. at 464-465 [allowing plaintiffs to renew their certification motion if they reformulated their claims and allowing plaintiffs individual claims to continue.])

Similarly, even if a court were to issue an order that required some type of remedy parallel to that available to NHTSA, courts are fully equipped to ensure consistency. As this Court noted in *Olympian*, even assuming that both the Court and the administrative agency issued orders addressing the same subject, there would be no need for preemption as "the likely outcome is that any disclaimer sought by the Federal Trade Commission and any one imposed by a court in this case would be substantively consistent." (99 Cal. App. 4th at 1062; *see also Hanlon* 150 F. 3d at 1017-1019 [the relationship between any NHTSA action and the Court ordered relief was specifically addressed in the settlement agreement, and allowed for NHTSA to pursue any claims that it wished.])

These holdings highlight that there are other appropriate methods for dealing with the interplay between the administrative procedure and Plaintiffs' state court action.

Preemption and primary jurisdiction are instruments simply too blunt to carve out the claims and relief that Kia seeks excised here.

CONCLUSION

Kia here seeks to deny or delay California citizens one of their most fundamental rights: the right to a jury trial. Such a denial is not to be imposed lightly. Accordingly the Supreme Court and the Courts in this state have sought to establish clear, firm rules governing such denials. Yet Kia makes a mockery of the preemption rules, requesting a denial of the Plaintiff's right to a jury trial in clear contravention of the Supreme Court's rulings directly on the issues, and by adding an extra layer of complexity recently denounced by the Supreme Court.

Kia also seeks to remove almost any element of certainty from the analytical process used to determine preemption or primary jurisdiction. Instead of looking to an actual and tangible administrative regulation or decision, under Kia's view, the Courts and the parties will be required to determine preemption and primary jurisdiction based entirely on the speculation of one of the parties: speculation here that **if** NHTSA investigates the matter, and **if** NHTSA orders any action, and **if** the trial Court makes a ruling on the same issue, there **may** be a conflict. Such speculation simply cannot justify the deprivation and delay Kia seeks here, and the decision of the trial court should be affirmed.

Respectfully submitted

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