

1 STEVE W. BERMAN (*pro hac vice*)
2 CATHERINE Y.N. GANNON (*pro hac vice*)
3 TYLER WEAVER (*pro hac vice*)
4 CRAIG SPIEGEL (122000)
5 HAGENS BERMAN SOBOL SHAPIRO LLP
6 1918 Eighth Avenue, Suite 3300
7 Seattle, Washington 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslw.com
catherineg@hbsslw.com
tyler@hbsslw.com
craigs@hbsslw.com

8 ROLAND TELLIS (186269)
9 MARK PIFKO (228412)
10 BARON & BUDD, P.C.
11 15910 Ventura Boulevard, Suite 1600
12 Encino, California 91436
Telephone: (818) 839-2320
Facsimile: (818) 986-9698
rtellis@baronbudd.com
mpifko@baronbudd.com

13 *Plaintiffs' Interim Co-Lead Counsel*

ADAM J. LEVITT (*pro hac vice*)
JEFFREY A. ALMEIDA (*pro hac vice*)
KYLE MCGEE (*pro hac vice*)
GRANT & EISENHOFER P.A.
30 North LaSalle Street, Suite 1200
Chicago, Illinois 60602
Telephone: (312) 214-0000
Facsimile: (312) 214-0001
alevitt@gelaw.com
jalmeida@gelaw.com
kmcgee@gelaw.com

NICHOLAS E. CHIMICLES (*pro hac vice*)
BENJAMIN F. JOHNS (*pro hac vice*)
CHIMICLES & TIKELLIS LLP
One Haverford Centre
361 West Lancaster Avenue
Haverford, Pennsylvania 19041
Telephone: (610) 642-8500
Facsimile: (610) 649-3633
nick@chimicles.com
benjohns@chimicles.com

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

18 IN RE
19 MYFORD TOUCH CONSUMER
20 LITIGATION

Case No. 3:13-cv-03072-EMC

**PLAINTIFFS' OPPOSITION TO FORD
MOTOR COMPANY'S ADMINISTRA-
TIVE MOTION FOR LEAVE TO FILE
SURREPLY PURSUANT TO CIV. L.R.
7-11**

Judge: Hon. Edward M. Chen

21
22
23
24 **[REDACTED VERSION]**
25
26
27
28

1 Ford's motion for leave to file a proposed surreply and supplemental expert reports should be
2 denied.¹ Ford provides no valid basis for filing those documents, which in any event provide no
3 basis for the Court to deny the motion for class certification.

4 **A. Ford fails to show good cause for amending the scheduling order.**

5 Ford must show good cause to amend the scheduling order, but its motion does not mention,
6 let alone establish, such good cause. *See* Fed. R. Civ. P. 16(b)(4) (“A schedule may be modified
7 only for good cause and with the judge's consent.”). Ford incorrectly argues that leave to file a sur-
8 reply is “routinely granted when a movant presents new expert opinions, other new evidence, or
9 new arguments for the first time in its reply brief.” Mot. at 2. All of the cases cited by Ford are
10 inapposite, because the moving party in each of those cases submitted *unauthorized* new evidence
11 with a reply. Here, the stipulated order authorized Plaintiffs to submit expert rebuttal reports with
12 their reply brief in support of class certification. ECF No. 186. That order does not authorize Ford
13 to file a surreply or supplemental expert reports. If Ford had wanted the opportunity to respond to
14 those documents, it should have made that argument when the stipulation was entered. Now, Ford
15 must show good cause but fails even to discuss that controlling standard.

16 **B. Plaintiffs’ reply and rebuttal expert reports constitute proper rebuttal.**

17 Plaintiffs’ reply brief and rebuttal expert reports do not contain unauthorized new evidence,
18 as Ford contends. In *Kirola v. City & County of San Francisco*, 2010 U.S. Dist. LEXIS 7355
19 (N.D. Cal. Jan. 29, 2010), this Court allowed the plaintiffs to conduct site inspections, rejecting the
20 City’s position that the site inspections “ may not be properly characterized as needed for the rebut-
21 tal.” *Id.* at *6. This Court explained that “courts have permitted additional data to be used in a
22 rebuttal report so long as it is of the same subject matter.” *Id.* And this Court stated that “[r]ebuttal
23 disclosure is not automatically excluded solely because it includes evidence that was absent in the
24 original expert disclosure.” *Id.* As shown below, all of Plaintiffs’ expert rebuttal reports constitute
25 proper rebuttal testimony, so that Ford’s motion for leave should be denied.

26
27 ¹ Plaintiffs do not oppose a five-page surreply that solely addresses Plaintiffs’ argument that the
28 expert report of Ford’s expert, Dr. Wood, should be stricken under *Daubert* but ask that the Court
limit Ford’s surreply to that issue and not allow a supplemental supporting report by Dr. Wood.

1 **1. Dan Smith has not issued improper “new opinions.”**

2 Ford erroneously claims it is entitled to extra briefing and expert reports in part because Dan
 3 Smith allegedly created “new opinions” on rebuttal. Ford first incorrectly asserts that Mr. Smith
 4 never opined before his rebuttal report that MFT’s software architecture was [REDACTED]
 5 [REDACTED]. ECF No. 255-4 (“Obj.”) ¶ 1.a. Ford is wrong.
 6 Mr. Smith stated in his opening report that [REDACTED]
 7 [REDACTED] ECF No. 197-8, Ex. 9 (“Smith
 8 Rpt.”) ¶ 7. The defects discussed included that the Base Software was [REDACTED]
 9 [REDACTED]. *Id.* ¶¶ 137-138. Any question about Mr. Smith’s opinion was answered when
 10 he testified at his deposition, in response to direct questions on this point, that the Base Software is
 11 [REDACTED] Ex. A (“Smith Tr.”) at 90:24-91:13
 12 (emphasis added).² Following the deposition, Ford requested and received a list of documents Mr.
 13 Smith relied on for his opinion as to software architecture. Ex. B. And even if Mr. Smith had not
 14 made his opinion clear before, it is proper rebuttal to [REDACTED]
 15 [REDACTED] ECF No. 244, Ex. 7 (“Kelly Rpt.”) ¶ 4.a; *see also id.* ¶¶ 4.b, 156.

16 Ford also tries to exclude evidence that MFT’s architecture was [REDACTED] Obj. ¶ 1.a.
 17 (seeking to strike Smith Rpt. ¶¶ 23-53). But that evidence directly rebuts Dr. Kelly’s claim that Mr.
 18 Smith had no evidence that the architecture was [REDACTED] and Dr. Kelly’s claim that [REDACTED]
 19 [REDACTED] Kelly Rpt. ¶ 328. The same is true of Ford’s objections to
 20 Mr. Smith’s opinions that versions of the Base Software are [REDACTED] and that [REDACTED]
 21 [REDACTED] Obj. ¶¶ 1.b, 1.c. These rebut Dr. Kelly’s opinion
 22 that the software [REDACTED] Kelly Rpt. ¶¶ 4.a, 127-146.

23 Ford next erroneously argues that Mr. Smith’s rebuttal opinion on [REDACTED]
 24 [REDACTED] is new. Obj. ¶ 1.d. Mr. Smith’s opening report states that [REDACTED]
 25 [REDACTED] Smith Rpt. ¶¶ 127-129. This is consistent with his
 26 rebuttal testimony that Ford should have [REDACTED]

27
 28 ² Exhibits A-C are attached to the Declaration of Steve W. Berman in Support of Plaintiffs’
 Opposition to Ford’s Administrative Motion for Leave to File Surreply, filed concurrently herewith.

1 [REDACTED] ECF No. 248-4, Ex. 4 (“Smith Rebuttal”) ¶¶ 130, 162. His further state-
 2 ments rebut Dr. Kelly’s assertion that Mr. Smith’s opinions are inconsistent. *Id.* ¶¶ 158-161.³

3 Nor is there any “new opinion” about hardware design problems with rearview cameras.
 4 Obj. ¶ 1.c. Mr. Smith opined that [REDACTED]
 5 [REDACTED]. Smith Rpt. ¶¶ 103-104. There was extensive discussion of this issue at his
 6 deposition. Smith Tr. at 224:4-232:18. Ford also incorrectly claims that Mr. Smith’s opinion
 7 about [REDACTED]. Obj. ¶ 1.f. The opinions in his
 8 rebuttal report directly rebut specific items that Dr. Kelly raised in his report. Smith Rebuttal ¶¶
 9 71, 72, 74. Mr. Smith says Dr. Kelly is unpersuasive on those points. There is no new opinion.

10 Mr. Smith also did not state a new opinion that a [REDACTED]
 11 [REDACTED]. Obj. ¶ 1.g. His opening report defined a [REDACTED]
 12 [REDACTED] Smith Rpt. ¶ 31. At deposition, he testified about this
 13 precise issue, and clearly stated that [REDACTED]. Smith Tr. at 247:12-
 14 248:5. And there is no “new opinion” regarding a solution for a [REDACTED]. Obj.
 15 ¶ 1.h. Mr. Smith states that he identified a solution for the defect to rebut Dr. Kelly’s claim that
 16 Mr. Smith was speculating. Kelly Rpt. ¶ 234; Smith Rebuttal ¶¶ 75-85. And Mr. Smith’s opin-
 17 ion as to differences in how the Base Software performed rebuts Ford’s contention that [REDACTED]
 18 [REDACTED]
 19 Smith Rebuttal ¶ 205. It was not in his opening report but properly rebuts Ford’s assertions.⁴

20 **C. Mr. Boedeker’s and Dr. Arnold’s rebuttal reports do not contain improper “new
 21 evidence.”**

22 Ford incorrectly contends that Mr. Boedeker’s [REDACTED] is “new evi-
 23 dence.” Surreply at 7:19. Mr. Boedeker’s analysis properly rebuts Dr. Singer’s flawed conclusions
 24 by identifying and correcting the errors in Dr. Singer’s model. Ford contends that Mr. Boedeker’s

25 ³ Ford also claims ¶ 129 of Mr. Smith’s opening report describes [REDACTED]
 26 [REDACTED] Obj. ¶ 1.d. It says no such thing.

27 ⁴ Ford contends Mr. Smith mischaracterized Dr. Kelly’s positions on MISRA, Obj. ¶¶ 2.a, 2.b.,
 28 but they are reasonable interpretations of what Dr. Kelly said. *See, e.g.*, Ex. C (“Kelly Tr.”) at
 144:16-145:21 ([REDACTED]); Kelly Rpt. ¶¶ 319-320 (accusing Mr. Smith of
 [REDACTED]).

1 re-analysis of Dr. Singer’s regression is unreliable because he [REDACTED]
 2 [REDACTED] Surreply at 7:21. But that rebuttal testimony is not improper “new evidence” that
 3 allows Ford an opportunity to correct errors in Dr. Singer’s analysis. Mr. Boedeker’s criticisms
 4 relate to Dr. Singer having improperly [REDACTED],
 5 rather than making appropriate [REDACTED]
 6 [REDACTED] Accordingly, Mr. Boedeker did not make [REDACTED]
 7 [REDACTED] but rather showed that Dr. Singer’s errors affected the outcome of
 8 the analysis. That is entirely proper rebuttal testimony, not improper “new evidence.”

9 Similarly, Ford’s discussion of cases where Dr. Singer’s analysis was criticized by other
 10 courts is not authorized by L.R. 7-3(d). Those cases were decided before Ford filed its Opposition
 11 to class certification. Dr. Singer and Ford knew or should have known about those cases before he
 12 provided his expert report. Ford’s decision not to address those cases in its Opposition does not
 13 entitle it to a surreply. Ford also uses its proposed surreply to address *Tyson Foods, Inc. v. Boua-*
 14 *phakeo*, 136 S. Ct. 1036 (2016). But L.R. 7-3(d)(2) states that if a judicial opinion is published after
 15 an opposition is filed, counsel may only provide a copy of the opinion without comment.⁶

16 Finally, there is no basis for a surreply to respond to Dr. Arnold’s rebuttal report. In fact,
 17 Ford’s motion does not even mention Dr. Arnold. Nonetheless, Ford argues in its proposed surreply
 18 that “willingness to pay is the hallmark of economic price analysis.” Surreply at 6. Dr. Arnold
 19 disagrees, and in so arguing, Ford is not responding to “new” evidence but instead seeks to reargue
 20 its position and cite irrelevant new case law.⁷

22 ⁵ Dr. Singer also [REDACTED]
 23 [REDACTED]). Finally, Dr. Singer’s data [REDACTED]
 24 [REDACTED]

25 ⁶ Ford’s argument that *Tyson* is limited to an FLSA case where a defendant was required to , but
 26 did not, maintain records is incorrect. If *Tyson* were limited to FLSA cases, *Comcast* would be lim-
 27 ited to antitrust cases. And a “wrongdoer is not entitled to complain that [damages] cannot be
 28 measured with the [] precision that would be possible if the case, which he alone is responsible for
 making, were otherwise.” *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555,
 563 (1931) (cited by *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013)).

⁷ Ford’s proposed surreply discusses *Dzieciolowski v. DMAX Ltd.*, No. 2:15-cv-02443, ECF No.
 102 (C.D. Cal. Apr. 27, 2016), but L.R. 7-3(d)(2) does not allow comment on new opinions.

1 **D. Dr. Rosenberg did not provide “new evidence” in his rebuttal report.**

2 Ford’s objections to Dr. Rosenberg’s rebuttal report are meritless. What Ford claims is
 3 “new” opinion is either contained in his original report or properly responds to the opinions of
 4 Ford’s expert, Dr. Wood. For example, Dr. Rosenberg’s initial report showed that [REDACTED]
 5 [REDACTED], and his rebuttal explained that all of
 6 them are [REDACTED] ECF No. 248-7, Ex. 6 (Rosenberg
 7 Rebuttal) at 7. Contrary to Ford’s contention, Dr. Rosenberg’s initial report did discuss [REDACTED]
 8 [REDACTED] See ECF No. 203-2, Ex. 8-Part
 9 1 (“Rosenberg Report”) at 67 (§ 4.1), 76 (§ 4.5). His opinions about the sufficiency of disclosures
 10 about MFT deficiencies is in response to Wood’s opinions about the same. And his rebuttal of the
 11 [REDACTED] is consistent with the points cited above and in
 12 his rebuttal report. See *id.* at 10, 14-15. In short, Dr. Rosenberg’s rebuttal report does not provide
 13 any basis to grant Ford’s motion for leave.

14 **E. Plaintiffs’ discussion of Dr. Taylor’s work does not support Ford’s motion.**

15 Ford claims that it should be allowed to file a surreply based on (1) a comment in a footnote
 16 in Plaintiffs’ reply brief on a peripheral issue concerning Ford’s expert, Dr. Taylor, and (2) Plain-
 17 tiffs’ submission of evidence demonstrating that Ford and Dr. Taylor were wrong that [REDACTED]
 18 [REDACTED] Mot. at 4. No reply brief is warranted on a side issue in a
 19 footnote, and the [REDACTED]

20 [REDACTED] As for Ford’s contention that Plaintiffs have “misstate[d]” the record as to Dr. Taylor, even
 21 Ford’s objections make clear that the full record is already before the Court to review. Obj. at 5.

22 **II. CONCLUSION**

23 Ford’s motion should be denied. But if the Court grants Ford’s motion to file a surreply and
 24 new expert opinions, Plaintiffs should be granted leave to file a five-page responsive brief and
 25 two-page expert declarations responsive to Ford’s proposed supplemental expert reports. Plaintiffs
 26 bear the burden in seeking class certification, and should be afforded the last word in briefing.

1 DATED: May 16, 2016

HAGENS BERMAN SOBOL SHAPIRO LLP

2 By: /s/ Steve W. Berman

3 Steve W. Berman (*pro hac vice*)

4 Catherine Y.N. Gannon (*pro hac vice*)

5 Tyler Weaver (*pro hac vice*)

6 Craig R. Spiegel (122000)

HAGENS BERMAN SOBOL SHAPIRO LLP

1918 Eighth Avenue, Suite 3300

Seattle, WA 98101

Telephone: (206) 623-7292

Facsimile: (206) 623-0594

E-mail: steve@hbsslaw.com

E-mail: catherineg@hbsslaw.com

E-mail: tyler@hbsslaw.com

E-mail: craigs@hbsslaw.com

Adam J. Levitt (*pro hac vice*)

Jeffrey A. Almeida (*pro hac vice*)

Kyle McGee (*pro hac vice*)

GRANT & EISENHOFER P.A.

30 North LaSalle Street, Suite 1200

Chicago, IL 60602

Telephone: (312) 214-0000

Facsimile: (312) 214-0001

E-mail: alevitt@gelaw.com

E-mail: jalmeida@gelaw.com

E-mail: kmcgee@gelaw.com

Roland Tellis (186269)

Mark Pifko (228412)

BARON & BUDD, P.C.

15910 Ventura Boulevard, Suite 1600

Encino, CA 91436

Telephone: (818) 839-2320

Facsimile: (818) 986-9698

E-mail: rtellis@baronbudd.com

E-mail: mpifko@baronbudd.com

Nicholas E. Chimicles (*pro hac vice*)

Benjamin F. Johns (*pro hac vice*)

CHIMICLES & TIKELLIS LLP

One Haverford Centre

361 West Lancaster Avenue

Haverford, Pennsylvania 19041

Telephone: (610) 642-8500

Facsimile: (610) 649-3633

E-mail: nick@chimicles.com

E-mail: benjohns@chimicles.com

Plaintiffs' Interim Co-Lead Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was filed electronically via the Court’s ECF system, on May 16, 2016. Notice of electronic filing will be sent to all parties by operation of the Court’s electronic filing system.

DATED: May 16, 2016

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Steve W. Berman
 STEVE W. BERMAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28