IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WESLEY WON, *et al.*, individually and on behalf of all other similarly situated, Plaintiffs. v. GENERAL MOTORS LLC, Defendant.	Civil Action No. 2:19-cv-11044 Hon. David M. Lawson Magistrate Judge David R. Grand

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

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INTRODUCTION

Over 48 times in 40 pages GM uses a form of the word "different" to coax this Court to deny class certification. But GM's repetitious arguments can't hide how badly its 8L-equippied vehicles perform. GM admits warranty rates ranging from a *low* of 3.7% and 10.3% on sports cars in service only 36 months to 21.5% to 33% on pickups. ECF No. 245, PageID.16932. The 120-month estimates are 66% to 100%. ECF No. 175-3, PageID.6272. This vastly exceeds GM's own targets and what reasonable buyers would accept. Undeniably, GM knowingly sold the 8Ls with two design defects across all models. Customers did not bargain for such defective vehicles, and the evidence shows a blow to their resale value regardless of buyer preference, knowledge, or price paid. The Court should certify the classes.

ARGUMENT

I. ALL PURCHASERS OF THE CLASS VEHICLES HAVE CONSTITUTIONAL AND STATE LAW STANDING

A. Plaintiffs' Economic Injuries Suffice Under Article III

GM's standing argument comingles "no injury"/disappointment cases and those where economic harm was pled. ECF No. 245, PageID.16943-944. But where plaintiffs allege "actual economic harm (e.g., overpayment, loss in value, or loss of usefulness)," Article III is satisfied. *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007). That is because "monetary injury" is "a concrete injury in fact under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). *See also*

Siqueiros v. Gen. Motors LLC, 2021 WL 4061708, at *5 (N.D. Cal. Sept. 7, 2021) (denying decertification where overpayment alleged, per *TransUnion*). Here, all class members have standing to seek the quantified economic damages caused by GM hiding two design defects *present at the time of sale* that both inflated the market price or diminished the resale value of their vehicles. ECF No. 223, PageID.15452.

GM relies heavily on Eighth Circuit cases that have, at times, required every product to fail even where an overpayment is alleged. ECF No. 245, PageID.16942. Sometimes, the Eighth Circuit doesn't require this. *George v. Omega Flex, Inc.*, 874 F.3d 1031, 1032 (8th Cir. 2017) (finding standing where plaintiffs alleged paying more for gas tubing that may fail if hit by lightning). Sometimes, even GM's lawyers argue that "allegations of overpayment describe a classic economic injury . . . more than sufficient to demonstrate Article III standing." Tab 82, Def. Pet. for Review at 17, *George*, (No. 17-8024) (Aug. 7, 2017). The Sixth Circuit has been consistent. *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2013) (holding that even if the defective washers had yet to cause mold, economic harm like overpayment can "sufficiently establish[] injury for standing purposes."); *Hadley v. Chrysler Grp., LLC*, 624 F. App'x 374, 379 (6th Cir. 2015) ("The plaintiffs have failed to establish a concrete injury that can be redressed by a judgment in their favor. . . . they do not allege any facts in support of their diminished value claim[.]"). So has this Court:

> When a manufacturer sells a product that is defective, which causes consumers to be misled at the point of sale into paying more and getting less than they believed they were purchasing, the consumers suffer an injury in fact, even if that defect does not manifest itself in every individual unit.

In re FCA US LLC Monostable Elec. Gearshift Litig., 2017 WL 1382297, at *5 (E.D. Mich. Apr. 18, 2017) (Lawson, J.); *accord Crawford v. FCA US LLC*, 2021 WL 3603342, at *2 (E.D. Mich. Aug. 13, 2021); *Chapman v. Gen. Motors LLC*, 531 F. Supp. 3d 1257, 1275 (E.D. Mich. 2021). The recent decision cited by GM says nothing different. *Jones v. Lubrizol Advanced Materials, Inc.*, 2022 WL 286718, at *10 (N.D. Ohio Feb. 1, 2022) (striking class allegations as unlike *Whirlpool* a "price premium theory [ ] is not part of the case here."). GM's Article III argument fails.

GM also claims Plaintiffs' damage models rely on averages in violation of the Due Process Clause and the Rules Enabling Act. ECF No. 245, PageID.16945. Courts disagree. *In re MyFord Touch Consumer Litig.*, 2016 WL 7734558, at *17 (N.D. Cal. Sept. 14, 2016) (relying on *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016) to find averages permissible in damage calculations). Moreover, GM's own expert relies on "simply a presentation of the average values of each at-issue vehicle compared to its benchmarks." Tab 83, Hitt Dep. at 183:13-184:5.

B. The Common Economic Harms Suffice for State Law Claims

The same evidence of overpayment and diminished value distinguishes this case from state law decisions involving unmanifested defects. ECF No. 245,

PageID.16943. This makes sense as the manifest defect rule holds that "it would be manifestly unfair to require a manufacturer to become, in essence, an indemnifier for a loss that may never occur." *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 127 (N.Y. App. Div. 2002). But this policy argument presumes no economic injury occurred. *Id.* at 128 ("Moreover, plaintiffs do not allege that any seat has failed, been retrofitted or repaired, nor have plaintiffs attempted to sell, or sold an automobile at a financial loss because of the alleged defect."). Misapplying the rule incentivizes manufacturers (like GM) to hide known defects to wait out warranties. Tab 84, Bulloch Dep. 267:16-271:2. Thus, courts that have closely read *Frank* have concluded that the New York Court of Appeals would likely permit claims based on a reduced value. *Nuwer v. FCA US LLC*, 2021 WL 6133271, at *7 (S.D. Fla. Mar. 30, 2021); *see also Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 292–93 (Md. 2007).

The same is true for other key states. *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 3920353, at *26–27 (S.D.N.Y. July 15, 2016) (rejecting *Kia Motors Am. Corp. v. Butler* as indicative of Florida law and finding FDUTPA claim made based on economic harm). GM also misstates Illinois law, relying on a Y2K decision where no harm was alleged. *Yu v. Int'l Bus. Mach. Corp.*, 732 N.E.2d 1173 (Ill. App. Ct. 2000). *See Jamison v. Summer Infant (USA), Inc.*, 778 F. Supp. 2d 900, 911 (N.D. Ill. 2011) (ICFA claim established even though monitors did not fail yet where plaintiff alleged overpayment). *Gordon v. Sig Sauer, Inc.*, 2020 WL 4783186,

at *10 (S.D. Tex. Apr. 20, 2020) (warranty claim stated where pistols with long life and active resale market may (but had not yet) drop-fired); *Click v. Gen. Motors LLC*, 2020 WL 3118577, at *12 (S.D. Tex. Mar. 27, 2020) (allegations that defect immediately manifests as early as engine's first operation sufficed for warranty claim). As GM was told, "there is no legal or logical ground to bar Plaintiffs' recovery if they can prove that they suffered economic loss." *In re Gen. Motors LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 276-77 (S.D.N.Y. 2018).

Daffin is also instructive. The court affirmed predominance regardless of "whether there has been actual accelerator sticking because . . . Ford delivered a good that did not conform to Ford's written warranty." *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006). But "if the district court determines that the express warranty is limited to defects that manifest themselves within the warranty period [it] may consider at that point whether to modify or decertify the class." *Id.* Here, if the Court determines a class member belongs to a state that requires a Shudder or Shift Defect "manifest"—i.e., a warranty claim—it can redefine that state subclass as such, and GM's warranty database readily permits a claims administrator to ascertain who made such a claim. *See, e.g.*, ECF No. 200-3, Wachs Rept. Ex. E.

C. Eatherton Suffered a Cognizable Injury.

GM is wrong that Mr. Eatherton lacks standing because he bought his car after March 1, 2019. ECF No. 245, PageID.16941. While he purchased *used* after the

breakpoint for the replacement transmission fluid, his vehicle was made before that date, and still had the old ATF. Plaintiffs ask the Court to revise the class definition to "used purchasers/current owners who purchased in [State] Class Vehicles from authorized GM dealers **manufactured** before March 1, 2019." Rule 23(c)(1)(C) permits this change, and it does not affect any of GM's other arguments.

II. COMMON FACT AND LEGAL QUESTIONS PREDOMINATE

A. Differences in Car Design or Claims Rates Do Not Predominate Over the Common Design Defects Admitted by GM

GM dwells on the number of models and model years at issue and differences in claims rates. ECF No 245, PageID.16948-9. But the 8L transmissions shared a common design that had two common problems (Shudder and Shift Quality) across all MY15-MY19 8L models as shown by GM's investigative reviews, ECF Nos. 177-3, 174-5; service proposals, ECF Nos. 204-13, 206-13; and service bulletins, ECF No. 200-15; Tab 85, 16-NA-361.pdf. While the warranty rates differ some between model and model years, they are all the highest levels of GM's scale. ECF Nos. 174-5 at 1; ECF No. 174-7 at 1, 46. Nor would this be the first case where two distinct design defects proceed together in a class trial. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (affirming class certification of class that included washers that may cause mold and had a defective control unit).

This is not like the panoramic sunroof case cited by GM, where the warranty claims were small and differed due to materials and roof sizes. *Beaty v. Ford Motor*

Co., 2021 WL 3109661, at *11 (W.D. Wash. July 22, 2021). Here, the Shudder Defect was so extreme that when it dropped 10-fold after GM switched to a new ATF, GM's Max Burgman turned it into a teaching tool. Tab 86, PX128. Rather than *Beaty*, this case resembles *Quackenbush v. Am. Honda Motor Co., Inc.*, 2021 WL 6116949, at *1 (N.D. Cal. Dec. 27, 2021). There, despite multiple investigations over many models and design changes, a rattling defect persisted. Honda, like GM, argued its design changes over the years precluded class treatment, relying on *Beaty* and *Grodzitsky*. *Id.* The court rejected this argument, noting that the overall design remained "fundamentally the same" and the defect remained unfixed. *Id.* at *5.

GM also emphasizes differing descriptions of the Defects. ECF No. 245, PageID.16949-950. GM itself lumped many descriptions into shift quality during its investigations. *See, e.g.*, Tab 87, PX73; Tab 88, PX74. Individual diagnoses for the Defects are either non-existent or non-serious. For Shudder, GM abandoned requiring picometers in August 2019. ECF No. 200-15. For Shift, GM "field service engineers" simply give a 1-10 estimate. ECF No. 202-3, PageID.11059-62. Unlike cases involving subjective interpretations of heat or self-cleaning ovens, ECF No. 245, PageID.16950, here there are design defects connected to warranty codes.

B. Differences in Purchaser Experience, Preference, or Knowledge Do Not Defeat Class

Digging into the bin of speculative and specious differences, GM grasps on to individual experiences, preferences, and buyer GM's knowledge. ECF No. 245,

PageID.16951-957. But under Plaintiffs' price premium theory, "A class member's subjective sophistication or knowledge is irrelevant because the liability inquiry states objective elements. And the fact of resale is immaterial because the injury occurred when class members paid a price premium at the time of lease or purchase." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 990 (11th Cir. 2016). GM also claims class cannot proceed with uninjured class members, erroneously relying on antitrust decisions with purchasers that undeniably did not pay the fixed price. ECF No. 245, PageID.16945. Equally inapt is *Schell v. Volkswagen*, 2022 WL 187841 (9th Cir. 2022), where a clear divide emerged when the market learned of VW's cheat devices, and those who sold before then suffered no harm. While GM claims no buyers sought a discount due to transmission problems, ECF No. 245, PageID.16940, its own witness admitted the poor reputation cost GM money selling previously leased 8Ls vehicles. ECF No. 223, PageID.15459.

Trying to avoid objective assessments of materiality, GM needlessly discusses subjective customer preferences. ECF No. 245, PageID.16955. But "materiality to a reasonable consumer does not mean it has to be material to every consumer." *In re McCormick & Co. Pepper Prods. Mktg. & Sales Pracs. Litig.*, 422 F. Supp. 3d 194, 255 (D.D.C. 2019). And whether a reasonable consumer would have bought a car with a known defect is an "objective inquir[y] 'susceptible to generalized, class-wide proof.'" *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 334 F.R.D. 96, 113

(E.D. Mich. 2019). Plaintiffs already proffered common proof (survey evidence) showing that the Defects mattered to reasonable consumers. ECF No. 223, PageID.15450–51, 15459–60. As for safety issues, while GM claims by fiat that none exist, ECF No. 245, PageID.16931, this "represents the key common question, and . . . it remains subject to resolution in one fell swoop." *Quackenbush*, 2021 WL 6116949, at *5.

Finally, as to knowledge, there is no evidence that any "plaintiff knows the truth behind a fraudulent misrepresentation or omission" and bought anyway. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 609 (3d Cir. 2012). GM kept what it knew about the Defects "GM Confidential", and no bulletin or online forum shared the truth. ECF No. 223, PageID.15458. The president of Cadillac (Johan de Nysschen) complained "we don't have fixes" but "we are telling customers it's 'normal,' there is no problem." Tab 89, GM000336176 at 2. GM simply speculates buyers "could have learned of the alleged 8-speed transmissions issues from various sources"—like a 2018 Florida lawsuit. ECF No. 245, PageID.16929, 16956. That is not enough. *Khoday v. Symantec Corp.*, 2014 WL 1281600, at *27 (D. Minn. Mar. 13, 2014) ("[S]heer conjecture that class members 'must have' discovered [the omissions] is insufficient to defeat Plaintiffs' showing of predominance when there is no admissible evidence to support Defendants' assertions.").

Nor does GM's evolving knowledge preclude class certification. ECF No.

245, PageID.16957. GM knew since Job One it was selling 8L vehicles with both Shudder and Shift Defects. ECF No. 245, PageID.15443-447. Further, if the jury finds relevant changes in GM's "evolving knowledge" impact liability, subclassing can "accommodate differences in the level of scienter at different times." *Hays v. Nissan N. Am., Inc.*, 2021 WL 912262, at *7 (W.D. Mo. Mar. 8, 2021).

C. Arbitration Clauses to Which GM Is Not a Signatory Cannot Predominate Over Common Issues

The hypothetical invocation of dealer arbitration clauses does not countermand class certification. First, GM waived arbitration as to the named plaintiffs or class members, having litigation without raising it for three years. *Solo v. United Parcel Serv. Co.*, 947 F.3d 968, 975 (6th Cir. 2020); *In re Cox Enters. Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112, 1118–20 (10th Cir. 2015). Second, "whether or not these arbitration agreements would bar certain of the proposed class members' claims . . . go[es] to individual defenses rather than certification." *Falberg v. Goldman Sachs Grp., Inc.*, 2022 WL 538146, at *10 (S.D.N.Y. Feb. 14, 2022); *see also Bouaphakeo*, 577 U.S. at 453 (confirming certification where central issues predominate even if affirmative defenses peculiar to some individual class members remain). And that "defense" is inchoate at best, more of "a type of forum-selection clause." *Hess v. Positive Energy Fleet, LLC*, 2021 WL 5492827, at *3 (E.D. Mich. Nov. 18, 2021). Whoever hears them, the claims exist, and class resolution could still benefit even those in arbitration. Third,

invocation of arbitration on the agreements GM cites should fail as GM is not a signatory. *E.g.*, ECF No. 245-58, PageID.19074, 19075, 19090. The Court may reject this common "defense" in one fell swoop. Or, if found viable, class members subject to arbitration can be handled at claims administration.

III. GM'S REMAINING ARGUMENTS LACK MERIT

Typicality and Adequacy: GM tersely argues a lack of typicality and adequacy by claiming Plaintiffs (and those who departed the case) had different vehicles, facts, and legal claims. ECF No. 245, PageID.16957. *Daffin* affirmed typicality is met when class representatives claim the same defect under the same theory. 458 F.3d at 552–53. And the number of class members who dropped reveals nothing about the adequacy of the *current* class representatives. GM cites to nongermane cases. *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 67 (S.D.N.Y. 2013) (denying a proposed copyright infringement class as uncertifiable by its very nature); *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 432 (6th Cir. 2009) (ERISA action affirming typicality where class members had different jobs, vocational skills, impairments, and disability review procedures).

Superiority & Manageability: In discussing the "differences in state law", GM mostly cites to cases where plaintiffs tried to apply one state law nationally as opposed to discrete states, resulting in a finding of no predominance. ECF No. 245, PageID.16958-61. Plaintiffs did not attempt that here. And to the extent some state

laws have higher standards on reliance or warranty notice, Plaintiffs already showed reliance can be inferred with material omissions, circumstantial evidence, or a common course of conduct. ECF No. 223, PageID.15463–69. Also, GM is wrong, "[r]eliance is not an element of a claim for damages under the FDUTPA." *Gundel v. AV Homes, Inc*., 290 So. 3d 1080, 1087 n. 5 (Fla. 2d DCA 2020). This Court previously rejected GM's argument about pre-suit notice based upon allegations that Plaintiffs presented their vehicles for repair. ECF No. 92, PageID.4196. If needed, a claims administrator can review warranty data to see who sought service.

Issue Certification: GM counters issue certification by repeating its arguments against certification generally. ECF No. 245, PageID.16964. GM does not explain why this Court's recent certification in *FCA* could not occur here. Trying the common issues, including economic harm, would materially advance the litigation and resolve the most expensive expert issues.

CONCLUSION

For the above reasons the Court should grant Plaintiffs' Motion.

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Respectfully Submitted,

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