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ERIE COUNTY, OHIO**

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ERIE COUNTY, OHIO  
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BARBARA J. JOHNSON  
CLERK OF COURTS

CHARLES MILLER, et al.	:	Case No. 2004-CV-558
	:	
On their own behalf and on behalf of the class defined herein,	:	
	:	Judge Tygh M. Tone
Plaintiffs,	:	
	:	
vs.	:	
	:	<b><u>JUDGMENT ENTRY</u></b>
VOLKSWAGEN OF AMERICA, INC., et al.	:	
	:	
Defendants.	:	

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Plaintiffs Charles Miller and Vivian Miller are the owners of a 2002 Volkswagen Jetta. After parking the car in a church parking lot in the summer of 2004, the front bumper pulled away from the body of the car after it became caught on a concrete tire barrier. Although the car was still under the factory warranty, Mr. and Mrs. Miller were required to pay for the repairs because they were advised that the warranty did not cover that damage.

The Millers allege that this bumper damage is common in the Volkswagen Jetta for the model years 1999 – 2002 and that the vehicle is inherently defective. For the reasons that follow, this Court agrees that the type of damages sustained by the Miller’s Jetta is common and is an inherent defect. The Millers moved for the certification of a class of Volkswagen

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owners and lessors of Jetta model years 1999-2002 in Ohio who have had to pay the repair cost for front bumper damage incurred in the same manner. The Millers have also moved for certification of a class of all present owners or lessors of Volkswagen Jettas, model years 1999 through 2002, seeking declaratory or injunctive relief. For the reasons explained below, Plaintiffs' motion for class certification under Civ. R. 23(B)(3) is granted and certification under Civ. R. 23(B)(2) is denied at this time.

### **FINDINGS OF FACT**

This Court makes these findings of fact based upon the testimony and evidence presented at a class action hearing conducted on March 8<sup>th</sup> and 9<sup>th</sup>, 2007. Plaintiffs originally filed a motion for class certification on September 2, 2004. Defendants moved for a hearing on class certification. The trial court initially certified the class without a hearing on December 27, 2004. Defendants appealed that certification decision and the Court of Appeals of Ohio Sixth Appellate District, Erie County, remanded the matter for further proceedings consistent with its Decision and Judgment Entry of April 7, 2006. This Judgment Entry is in conformity with the Remand Order.

This Court finds that Charles and Vivian Miller are the owners of a 2002 Volkswagen Jetta. (Transcript of Hearing March 8 & 9, 2007 [hereinafter "Trans."]at 19). The Ground Clearance listed for that Jetta is 5.1". (Plaintiffs' Ex. 3). This is the identical ground clearance as listed for the 1999 Jetta. (Trans. at 35, 204-205, Plaintiffs' Ex. 4). While it was

sought by the Plaintiffs, Defendants did not provide the technical data for the 2000 and 2001 Jetta model years. (Trans. at 209). In the absence of any evidence to the contrary, this Court will presume that there are no significant differences in the ground-to-underbody measurements of all of the class vehicles for model years 1999 through 2002.

The written New Vehicle Warranty applicable to Plaintiffs' 2002 Jetta and all 2002 class vehicles is effective for 48 months or 50,000 miles. (Plaintiffs' Ex. 3). Counsel for Defendant Volkswagen of America, Inc. (hereinafter referred to as "Defendant" or "Volkswagen") represented at the hearing that the class vehicles for model years 1999, 2000, and 2001 have New Car Warranties which are effective for 24 months or 24,000 miles. This fact has been confirmed, as to the 1999 vehicles, but no evidence was presented by Volkswagen as to the other model years, although requested by Plaintiffs in discovery. (Trans. at 210-211). The express warranty language for coverage in each of these warranties is identical, irrespective of the differences in the length of the warranty. (Trans. at 210). The evidence also shows that the implied warranties are limited in duration to the period of the written warranties. (Defendant's Ex. F).

While Volkswagen does not usually cover the type of damage sustained by the Millers under the Jetta warranty, it sometimes offers a one-time goodwill payment to a customer that registers a complaint with

Volkswagen. (Trans. at 204, Plaintiffs' Ex. 9). Mr. and Mrs. Miller paid for the repair to their car without the assistance of Volkswagen. (Trans. at 33).

Concrete tire stops or tire barriers are used to prevent cars from parking in certain areas. (Trans. at 166). When a car pulls all the way up to the barrier, this defines where the car is to make a final stop. (Trans. at 196). Volkswagen's expert, Joseph Schaller, testified that the range in height is usually between four to nine inches for a curb and four to six and a half inches for a concrete barrier. (Trans. at 171-172). This height range has been consistent for curbs and barriers for the 33 years Mr. Schaller has been a civil engineer. (Trans. at 176). Defendant demonstrated that, in particular, there are concrete wheel stops in the areas around Sandusky, Ohio and Cleveland, Ohio which are six inches in height. (Trans. at 223, 233, Defendant Exhibits A-1 through A-44). This Court finds that six-inch concrete wheel stops could be found in virtually all geographic areas throughout Ohio.

Plaintiffs' expert witness, David R. McLellan, former Chief Engineer of the Corvette for General Motors Corporation from 1975 through 1992, testified that he examined and tested the 2002 Volkswagen Jetta owned by the Millers. (Trans. at 120-121, 124). Mr. McLellan measured the clearance under the vehicle and determined that the plastic under-tray of the car would come into contact with a six-inch tire stop several inches forward of

where the barrier would act as a wheel stop when the car was driven to the barrier. (Trans. at 128).

Mr. McLellan conducted additional testing on the Miller's Jetta to determine how the car had been damaged. (Trans. at 128-130). Mr. McLellan concluded that, due to the design of the Jetta, the plastic pieces under the engine sump of the vehicle are trapped between the engine sump and the tire barrier, with the co-efficient of friction high enough between the pieces that the plastic parts literally stick on the barrier and pull away from the car when it is backed away from the wheel stop. (Trans. at 134). Mr. McLellan concluded, to a reasonable degree of engineering certainty, that the action of backing away from the tire stop, after the plastic parts had become trapped between the barrier and the engine, is the source of the damage, not the act of pulling up to the tire barrier and parking the car. (Trans. at 134).

Mr. McLellan also testified that in his engineering experience, it was a well recognized design requirement for the automotive industry, as far back as at least 1981 or 1982, that a car must be capable of driving up to a six inch concrete wheel stop or tire barrier without causing damage. (Trans. at 124). Volkswagen offered no testimony to the contrary and the Court accepts the testimony of McLellan for this purpose. The Miller's Jetta was driven up to a tire barrier by Mr. McLellan on only one occasion and the car came apart when it was placed in reverse. (Trans. at 135). Mr. McLellan

testified, again without opposing expert testimony, that the damage that occurred to the Volkswagen Jetta was the result of a design defect. (Trans. at 138). This design defect is present on every Volkswagen Jetta for the model years between 1999 and 2002 and the damage will result when the car is driven all the way up to a tire barrier of six inches or higher. (Trans. at 134-135).

Mr. McLellan's engineering design group at General Motors utilized an aluminum skid bar in the manufacture of a low clearance car, which prevented this type of damage from occurring to that vehicle. (Trans. at 131-132). This could have been done for the Jetta at a cost of approximately \$20 to \$30. (Trans. at 133). Mr. McLellan testified that if the Volkswagen Jetta had been designed and engineered with an underbody protection system, such as the aluminum skid bar used by General Motors, the damage to these vehicles would not have occurred. (Trans. at 138-139).

Volkswagen's expert was a civil engineer whose testimony recounted the results of some research and observations about the various types and heights of curbs and wheel stops in use (Trans. at 166-172). In contrast to the testimony of Volkswagen's expert, Plaintiffs' expert specifically testified that since before 1984, automotive designers recognized the need to protect a car from front-end damage from a six-inch wheel barrier (Trans. at 123-124). Mr. McLellan tested the Miller's vehicle and described the underlying

cause of damage in detail in his expert report (Plaintiffs' Ex. 8). This exhibit was admitted into evidence at the conclusion of Mr. McLellan's testimony, without objection (Trans. at 161-162). This Court has reviewed the exhibit and incorporates its findings herein, by reference.

Volkswagen presented sales figures for Volkswagen Jettas in the model years 1999 through 2002 at 549,255 nationwide. 17,500 of these sales were in the state of Ohio. (Trans. at 219). Plaintiffs presented a compilation of data received from Volkswagen indicating the number of calls or letters received by Volkswagen from customers or dealers seeking assistance with the cost of repairs for bumper repairs. (Plaintiffs' Ex. 9). Volkswagen has documented at least 1,496 complaints of similar bumper separation damages for the Jettas in these same model years. (Trans. at 201-203; Plaintiffs' Ex. 9). The separation of the front bumper from the body of the vehicle is a common occurrence for Volkswagen Jettas in the model years 1999 through 2002, as shown by Plaintiffs' Exhibit 9. Volkswagen's data shows that Volkswagen sometimes reimbursed the dealers or owners for the costs of the bumper repairs, but almost universally treated these damages as an "outside influence" and did not pay the cost of the repairs. (Trans. at 204; Plaintiffs' Ex. 9). Many of the customers contacting Volkswagen for assistance did so because they had previously paid for a similar repair one or more times without initially reporting the incident of damages. (Plaintiffs' Ex. 9).

This Court notes that Defendant, Volkswagen of America, has not fully complied with Plaintiffs' relevant discovery requests. Plaintiffs provided evidence in the form of an affidavit documenting Plaintiffs' efforts to procure the requested information over the past two and a half years. This Court had previously granted a motion to compel discovery filed by Plaintiffs ordering that certain information be provided, yet some of the discovery sought remains outstanding. While this Court notes this fact, it need not take this into consideration in arriving at this decision.

### **DISCUSSION OF THE LAW**

This Court may certify a class where doing so would comply with both Ohio Civ. R. 23(A) and at least one subsection of Civ. R. 23(B). Civ. R. 23(A) requires that four elements be satisfied before an action may be maintained as a class action: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class, *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67; *Baughman v. State Farm Mut. Ins. Co.* (2000), 88 Ohio St.3d 480. Under Civ. R. 23(B)(2), Plaintiffs must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole". In

addition, or alternatively, Plaintiffs must establish that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Civ. R. 23(B)(3). The Plaintiffs have proved all of these elements.

Plaintiffs must prove by a preponderance of the evidence that class certification is appropriate. “[A]ny doubts a trial court may have as to whether the elements of class certification have been met should be resolved in favor of upholding the class.”

*Baughman*, 88 Ohio St.3d at 487. As one court has stated:

Without the class action device, many actionable wrongs would go uncorrected and persons affected thereby unrecompensed. In essence, the class action device is a bona fide method for redressing violations of the . . . laws and for compelling compliance with their mandates. Accordingly, the interests of justice require that in a doubtful case, . . . any error, if there is to be one, should be committed in favor of allowing the class action.

*Explin v. Hirschi* (10<sup>th</sup> Cir. 1968), 402 F.2d 94, 101, *cert. denied*, (1969), 394 U.S. 938.

Plaintiffs have defined two putative classes: Class A consists of all individuals and entities who currently own or lease a 1999, 2000, 2001, or 2002 Volkswagen Jetta in Ohio. Class B is defined as all individuals and entities in Ohio who purchased, leased or acquired a 1999, 2000, 2001 or 2002 Volkswagen Jetta and who incurred expenses not covered or

reimbursed by Volkswagen or Volkswagen Dealers, when the vehicle suffered damage to the front bumper assembly within the applicable limitations period as a result of contact with a wheel stop or curb. Plaintiffs assert that all of the conditions favoring class certification are present for these proposed classes. Volkswagen claims that Plaintiffs have failed to establish numerosity, commonality, typicality, or predominance. The Court addresses these arguments in turn.

### **I. NUMEROSITY**

Civ. R. 23(A)(1) requires that the class be “so numerous that joinder is impracticable.” In construing the numerosity requirement, courts have not specified numerical limits. *Pyles v. Johnson* (2001), 143 Ohio App.3d 720; *Basile v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (S.D. Ohio 1985), 105 F.R.D. 506. This determination must be made on a case-by-case basis. *Warner v. Waster Management, Inc.* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091. “Joinder is more likely to be impracticable if the class members can be assumed to lack the ability or motivation to institute individual actions. For example, if [a] class member’s individual claims involve only a small amount of damages, class members would be unlikely to file separate actions. Courts have concluded that joinder is impracticable in such circumstances.” *Hamilton*, 82 Ohio St.3d at 75 (quoting 5 Moore’s Federal Practice (3 Ed. 1997) 23-71, Section 23.22[5]).

There is no set number which equates with impracticability in all cases, but a presumption of numerosity has developed at the 40-member level:

. . . In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.

1 H. Newberg & A. Conte, *Newberg On Class Actions* § 3.05 at 3-25 (3<sup>rd</sup> ed. 1992).

If the exact size of the class is unknown “[t]he court is entitled to make common sense assumptions in order to support a finding of numerosity.” *Peterson v. H & R. Block Tax Servs., Inc.* (N.D. Ill 1997), 174 F.R.D. 87, 81.

In this case, Volkswagen has documented the sale of 17,500 Jettas in the state of Ohio during the proposed class period. Volkswagen’s records show that at least 1,496 of the owners of Jettas made a formal complaint to Volkswagen about the bumper damage, either in writing or by contacting Volkswagen at a toll free number. Many of these complaints asserted that this was not the first occurrence. Volkswagen’s compilation of a sub-category of this data (Defendants’ Exs. J & K), documents that at least eighteen of these known and documented complaints were received from Ohio residents. This Court is convinced that these exhibits do not include every incident of bumper separation that has occurred in Ohio. For example, Mr. and Mrs. Miller are not on any lists, nor would any other Ohio

Jetta owner who, like the Millers, did not file a formal complaint with Volkswagen. Indeed, there is nothing to show that Volkswagen made any attempt to try to identify the extent of the front bumper problem nor to provide any relief despite the fact that it knew that the problem was very extensive.

This Court concludes that every 1999-2002 Volkswagen Jetta that pulls fully up to a tire barrier that is approximately six inches or higher will incur like damage to that of the Plaintiffs. With the large number of Jettas present in Ohio and the probability of damage certain under these conditions, this Court concludes that numerosity is clearly satisfied. Accordingly, Plaintiffs have shown that the class is sufficiently large so that joinder would be impracticable.

## **II. COMMONALITY**

The commonality requirement is satisfied if the court finds "a common nucleus of operative facts." *Pyles*, 143 Ohio App. 3d 720. *Miles v. N.J. Motors* (1972), 32 Ohio App. 2d 350, 291 N.S.2d 758, 763-64. The provision of Ohio Civ. R. 23(A)(2) does not require that all questions of law or fact raised in the dispute be common to all parties. *Marks v. C.P. Chemicola Co.* (1987), 31 Ohio St. 3d 200. If there is a common nucleus of operative facts, or a common liability issue, then the rule is satisfied. *Id.* The commonality bar is, in fact, quite low. *Lowe v. Sun Refining & Marketing Co.* (1992), 75 Ohio App.3d 563, 570, 597 N.E.2d 1189; *Arenson*

*v. Whitehall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659, 663 (N.D. Ill. 1996) (“Plaintiffs need only show that there is . . . one question of law or fact common to the class to satisfy the commonality requirement.”).

The manner in which the damage is caused to these vehicles is a common element in which each class member shares. Plaintiffs and the proposed class in this case have the same fact pattern. Identical theories of the instrumentality of the damage are applicable to the Millers as those that relate to the entire class. Volkswagen’s assertion that Plaintiffs no longer seek to include as class members persons whose vehicles incurred damages as a result of contact with a curb makes no sense when compared to the totality of the record in the evidentiary hearing. It is clear to this Court that the evidence presented is applicable to all tire barriers that are used to define a parking place, whether that barrier is a concrete wheel stop or a curb.

Volkswagen points out that although the written warranty period for the 2002 Jetta is longer than that of the 1999 through 2001 Jettas, the terms of the warranty coverage for all the vehicles is the same. Volkswagen argues that the Jettas are damaged as a result of a “collision” and that a collision is excluded from the warranty. However the evidence warrants the Court’s determination that the type of contact described by the Plaintiffs and Plaintiffs’ expert is not a “collision.” The Millers have asserted an additional claim for breach of implied warranty; in other words, for the implied

warranty of merchantability, which this Court finds to apply to the facts of this case.

In the final analysis, the Millers' claim for breach of express warranty is no different from that of any other vehicle in the class that would have been under warranty at the time it was damaged. The Millers' additional claim for breach of implied warranty is also identical for all class members.

Volkswagen argues that the differences in the reason the Millers purchased their Jetta, or how much cargo or the number of passengers that the Millers customarily carried underscores the individuality of the Millers' claim. However, this Court finds there are sufficient essential questions of both law and fact to clearly satisfy the commonality requirement of Civ. R. 23(A)(2).

### **III. TYPICALITY**

The requirement of typicality serves the purpose of protecting absent class members and promoting the economy of class actions by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class. *Baughman*, 88 Ohio St. 3d at 484 (citing 5 Moore's Federal Practice (3 Ed. 1977)( 23-92 to 23-93, Section 23.23[1])). Typicality is satisfied when the named plaintiffs are found to be in a situation identical to that of the putative class members. *Marks*, 31 Ohio St. 3d at 202. Also, "the defenses or claims of the class representative must be typical of the defenses or claims of the class members. They need not be identical."

*Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 64.

“Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff’s injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.” *Baughman*, 88 Ohio St. 3d at 484.

Typicality is also met where there is no express conflict between class representatives and the class. *Hamilton*, 82 Ohio St. 3d at 67; *Warner*, 36 Ohio St. 3d at 98. Plaintiffs argue that their claims are not only typical to those of the putative class, but that they are identical. Volkswagen, however, asserts that any right to recovery for each potential class member depends upon facts entirely unique to the time, place, and circumstances of each occurrence of bumper separation. Volkswagen cites to the decision of

*Volkswagen of America, Inc. v. Sugarman*, 909 So.2d 923 (Fla. 3rd Dist. Ct. App. 2005), a decision which this Court has fully and carefully reviewed and considered, but which this Court declines to follow because of the evidence presented in this case and the law applicable in the State of Ohio.

The Court recognizes that a named plaintiff who might be subject to unique defenses should fail the typicality requirement. *Robles v. Corporate Receivables, Inc.* (N.D. Ill. 2004), 220 F.R.D. 306, 309. (“The presence of defenses peculiar to the named plaintiff class or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiffs’ representative.”) (internal quotation marks and citations omitted). However, those elements described by defendants as destroying the typicality of Millers’ claims do not apply to Plaintiffs’ proof of facts. The defenses listed by Volkswagen, such as contributory negligence, lack of privity and statute of limitations are not unique to the Millers and these can each be addressed by this Court at a later time. The manner in which the Jettas were designed and constructed is the cause of the certain damage under the specified circumstances. The Millers are members of the class they seek to represent. For these reasons, the Court finds that Plaintiffs satisfy the typicality requirement in spite of the individual characteristics of time, place, or operator’s conduct.

#### **IV. ADEQUACY OF REPRESENTATION**

This requirement is divided into two components: (1) consideration of the adequacy of the representative, and (2) the adequacy of counsel. *Warner*, 36 Ohio St. 3d at 98; *Pyles*, 143 Ohio App.3d at 735. Taking the later inquiry first, Plaintiffs' counsel is extremely familiar with complex civil and class litigation. Plaintiffs' counsel has established a reputation, in this Court and in numerous courts throughout Ohio, for competency, experience, and skill in class actions. Plaintiffs' counsel has diligently pursued this present litigation for almost three years. Volkswagen has not challenged class counsel's adequacy, and this Court, under Civ. R. 23(A)(4), finds class counsel to be more than adequate.

A class representative is deemed adequate if his interest is not antagonistic to that of the other class members. *Marks*, 31 Ohio St. 3d at 200; *Vinci v. American Can Co.* (1984), 9 Ohio St. 3d 98. The Millers have suffered the same injury as all members of the proposed class. In the Court's view, the Miller's pursuit of their claims will prove the claims of the class members. Although Mr. and Mrs. Miller, like most consumers, possess little legal knowledge of the class action mechanism, Mrs. Miller testified that she was aware of the fact that they were representing a group of similarly situated individuals. So "long as a class representative's interests do not conflict with those of the proposed class, she need only have a marginal familiarity with the facts of her case and need not understand the larger

legal theories upon which her case is based.” *Randle v. GC Servs., L.P.*, (N.D Ill. 1998), 181 F.R.D. 602, 604. This Court concludes that Charles Miller and Vivian Miller are adequate class representatives.

Impliedly, Civ. R. 23 also requires that the definition of the class be unambiguous and that the class representatives be members of the class. *Warner*, 36 Ohio St. 3d at 96. The class definition, as hereinafter set forth, is unambiguous. The court finds that it will not encounter any insurmountable problems in determining which individuals are members of the class and that the Millers are members of the class, as hereinafter defined.

#### **V. CERTIFICATION UNDER CIV. R. 23(B)(3).**

A class is maintainable under Civ.R. 23(B)(3) when the court determines “that the common questions predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” This Court finds that both the “predominance” and “superiority” requirements are satisfied in this case.

##### **A. Predominance.**

Although there is an overlap between commonality and predominance, the requirement that common issues predominate over individual ones in a class certified under Civ. R. 23(B)(3) requires a more demanding analysis. “[T]he common questions must represent a significant aspect of the case

and they must be able to be resolved for all members of the class is a single adjudication.” *Schmidt v. Avco Corp.* (1984), 15 Ohio St. 3d 310, 313, 473 N.E. 2d 822.

Plaintiffs argue that the common nucleus of operative facts is the damage caused to the front bumper and front fascia of the vehicle as a result of the design of the Volkswagen Jetta and the components from which it is manufactured. Plaintiffs have shown through expert testimony that the damage is caused when the fascia is torn away from the body of the car while it is backing out of a parking space. The problem exists when the car is driven up to within a few inches of a concrete tire barrier or until the tires make actual contact. This is the normal operation by a driver of a motor vehicle when parking his or her car on the street or in a parking lot.

The type of damage sustained by the Plaintiffs is unlike the kind of damage that would result from a front-end collision with an immovable object and will be easily identifiable. All class members’ vehicles were damaged in this identical manner and all class members paid for the necessary repairs to their vehicles for which they should be reimbursed.

Volkswagen has a different view of the case. It argues that the predominance requirement cannot be met “[g]iven the markedly different nature of parking wheel stops throughout the state of Ohio . . . , as well as a myriad of other different factors unique to each circumstance, such as driver awareness, tire pressure, road conditions, and passenger load, which vary

from incident to incident". On Volkswagen's theory, individual issues predominate, which would require the Court to look at each incident to ascertain the reason the bumper pulled away from the car.

The Court believes that Volkswagen misunderstands the nature of the issues in this proceeding. The specific individual variables listed by Volkswagen need not be a consideration because of the proof that the design of the Jetta and the parts from which the underbody of the car are manufactured are the common elements of causation of the resulting damage. The question of whether the vehicle design is defective can be answered universally, and need not be answered on an individual-by-individual basis.

These individual variables mentioned may influence the amount of the damage, but this fact will not destroy predominance. "It is fundamental here that each member of the class [ ] may not be awarded the same amount of damages in the event [Defendants] are found liable. Nevertheless, the key fact is that the injuries sustained by the class flow from identical operative facts." *Vinci*, 9 Ohio St. 3d at 102.

#### **B. Superiority.**

Plaintiffs argue that the class mechanism is particularly appropriate in this instance because it will resolve all claims for all class members in one adjudication. Individuals are less likely to bring their own suits because they are unlikely to have the resources to retain counsel to pursue a small claim.

Volkswagen points out that the Millers were charged only \$60.99 as labor for the repair of their car. (Plaintiffs' Ex. 2). However, this fact underscores a reason for allowing this case to proceed as a class action. The cost of litigation vis-à-vis the size of the expected recovery makes individual lawsuits prohibitively expensive.

Volkswagen does not directly address the issue of superiority, instead arguing that it would be necessary to make separate factual determinations of the circumstances surrounding each incident of bumper separation for each class member. This Court has already determined that this individual analysis would not be needed. The type of damage caused will indicate that the front bumper fascia was pulled off the car and that the cause would be the act of backing away from the tire barrier after making contact with the object that was of such a height as to allow the plastic parts under the car to become trapped between the barrier and the engine.

This court finds that managing all of the claims of class members individually would be burdensome, costly and an inefficient use of time. A class action is superior to any other alternative for a fair and efficient adjudication of the issues in this case. The class, as defined in Plaintiffs' Class B is appropriately certified under Civ. R. 23(B)(3).

**VI. CLASS CERTIFICATION UNDER CIV. R. 23(B)(2).**

Plaintiffs also seek certification under Civ. R. 23(B)(2). Specifically, Plaintiffs have asked in their Complaint that the Court provide injunctive

relief and a declaration that Volkswagen be responsible for all costs of future repairs necessitated by the defective front bumper assembly for members of Class A. Plaintiffs have asserted causes of action for breach of express warranty and breach of implied warranty. Civ. R. 23(B)(2) authorizes class certification where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”

This Court may certify both an injunctive class and damages class in the same action when it is appropriate. See *Warner*, 36 Ohio St. 3d at 95 (holding that class actions may be certified under subsections (B)(2) and (B)(3)).

In this case, Volkswagen has acted on grounds generally applicable to the entire class. Each class member of the proposed Class A owns a Volkswagen vehicle that is designed in such a way that it will be damaged if the operator pulls it into a parking space with a tire stop or curb that is somewhere in the neighborhood of six inches high. However, this Court finds that certification of Class A is unnecessary as to injunctive relief.

Plaintiffs seek a declaration that Volkswagen is liable for future repairs necessitated due to the defect which this Court has found to exist. However, declaratory relief, as well as injunctive relief, are moot at this time in light of this decision and this Court’s continuing jurisdiction.

Defendants have raised the issue as to the propriety of certifying a class as to Cappo Management XV, Inc., dba Sandusky Motors and Victory Honda. There was no evidence presented as to them and therefore this Court's order of class certification is as to Volkswagen of America, Inc. only.

### **CONCLUSION**

This Court has conducted a rigorous analysis into whether the prerequisites of Civ. R. 23 have been satisfied, as required by the Ohio Supreme Court in *Howland v. Purdue Pharma L.P.* (2004), 104 Ohio St. 3d 584. As a result of the evidence and the rigorous analysis, this Court determines that this action should be certified as a class action.

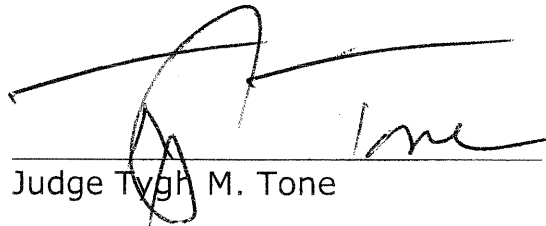
The Court recognizes that Volkswagen has engaged in a vigorous defense against class certification. In doing so, however, this Court also finds that Volkswagen has failed to comply with this Court's prior orders with regard to the discovery that has been propounded to them by Plaintiffs. Pursuant to Civ. R. 37(B)(2)(a), this Court has the discretion to deem those facts sought by Plaintiffs to be established for purposes of this action, but because of the evidence presented and the applicable law finds that the exercise of such discretion is unnecessary and therefore declines to do so at this time.

This Court finds Plaintiffs have established that the proposed class satisfies the requirements of Ohio Rule 23 for certification under Civ. R.

23(B)(3). Plaintiffs' motion for class certification of proposed Class B is granted.

Accordingly, the class that is hereby certified is defined as follows:

All individuals and entities in Ohio who purchased, leased or acquired a 1999, 2000, 2001 or 2002 Volkswagen Jetta and who incurred expenses not covered or reimbursed by Volkswagen, when the vehicle suffered damage causing the front bumper assembly to separate from the body of the car as a result of contact of the underbody of the vehicle with a wheel stop, tire barrier or curb, during the period of time wherein the New Car Warranty for that vehicle was in effect.



Judge Tygh M. Tone

Date: 7/19/07