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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re: Land Rover LR3 Tire Wear Products Liability Litigation

This document relates to:

Gable v. Jaguar Land Rover North America, LLC, C.A. No. 8:07-376

Wolin v. Jaguar Land Rover North America, LLC, C.A. No. 8:07-627

Gomcsak v. Jaguar Land Rover North America, LLC, C.A. No. 8:07-1200

Case No. **09-MDL-2008 AG**

DEFENDANT JAGUAR LAND ROVER NORTH AMERICA, LLC'S SUPPLEMENTAL BRIEFING CONCERNING CLASS CERTIFICATION

Date: January 31, 2011
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Judge: Hon. Andrew J. Guilford
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INTRODUCTION

These cases are once again before the Court on plaintiffs' motions for class certification. Back in 2008, this Court refused to certify Plaintiff Wolin's and Plaintiff Gable's putative class claims based on allegations that their 2005 and 2006 model year LR3s experienced "uneven and premature" tire wear as a result of an unidentified "alignment geometry" defect.[1] Earlier this year, the Ninth Circuit reversed on a narrow ground, finding that this Court abused its discretion by (supposedly) imposing a strict manifestation requirement. But as with any reversal on discretionary grounds, the Court of Appeals recognized that it was this Court's duty as the trial court to determine here again whether the plaintiffs' claims can be certified once the improper manifestation requirement is set aside.

Had the Ninth Circuit stopped there and remanded the case on a bare slate, this Court's task would be simple enough. But the Ninth Circuit went on to address in dicta how certain hypothetical claims and facts might—or might not—warrant certification. As this Court recognized at its recent case management conference, even after "read[ing] and reread[ing] the opinion," the fundamental question of "what [the Ninth Circuit's opinion] means in this case" remains opaque. Indeed, it does. But there are other elements of the panel's decision that provide helpful—and concrete—guidance on how this Court should resolve the renewed class certification motion. In this memorandum, Land Rover presents a framework for implementing the panel's decision. Under that framework, this Court should again deny certifying plaintiffs' flawed class claims.

[1] While the parties previously briefed Plaintiff Gomcsak's motion for class certification, the Court deferred ruling on that motion.

The Ninth Circuit's Decision Regarding Tire Wear Claims

This Court's decision to deny certification of the class claims in *Wolin* and *Gable* was, as with all class-certification decisions, an exercise of the Court's discretion. The narrow question confronting the Ninth Circuit therefore was whether this Court abused that discretion. To answer that question, the panel necessarily examined the rationale that this Court articulated in denying certification. *See Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010) ("*Wolin*"). According to the Ninth Circuit, the reason certification was denied was because "Gable and Wolin did not *prove* that the defect manifested in a majority of the class's vehicles." *Id.* at 1173 (emphasis added). The panel concluded that this Court "erred" in relying on this manifestation theory, and accordingly "reverse[d] on this basis." *Id.* at 1174; *see also id.* at 1170. In other words, the Ninth Circuit faulted this Court for imposing a "threshold manifestation requirement" that it believed inappropriately blended the merits of the plaintiffs' claims with assessing whether they complied with the requirements of Rule 23. *Id.* at 1174.

In reaching that conclusion, the Ninth Circuit appears to have misunderstood the basis for this Court's reliance on the lack of any significant manifestation of the alleged defect or resulting tire wear. This Court did not hold that plaintiffs' claims could not be certified because they failed to prove the existence of any defect. Instead, the Court reasoned that the lack of "any credible evidence" of a significant manifestation rate underscored that individualized inquiries were necessary for two fundamental reasons: to distinguish between those vehicles that experienced uneven and premature wear from those that did not and, then, to determine whether any such cases of irregular tire wear

were caused by the alleged "alignment geometry" defect – or rather any of the array of alternative causes. Those individualized inquiries, this Court held, would necessarily overwhelm the resolution of any issues common to the class.

The Ninth Circuit nevertheless read this Court's decision as imposing a categorical manifestation bar, reversed, and remanded so that this Court could conduct the class certification analysis anew. But the Court of Appeals went out of its way to emphasize that, on remand, the plaintiffs' tire wear claims would be "particularly problematic . . . for class certification" because "individual factors may affect premature tire wear." *Id.* at 1173. The Ninth Circuit explained that, because "[t]ires deteriorate at different rates dependent on where and how they are driven," any "determination whether the defective alignment caused a given class member's tires to wear prematurely requires proof specific to that individual litigant." *Id.* at 1174. Thus, "[w]hether each proposed class member's tires wore out, and whether they wore out prematurely and as a result of the alleged alignment defect, are individual causation and injury issues that could make classwide adjudication inappropriate." *Id.* Accordingly, the Ninth Circuit held that any claim related to alleged "tire wear" "may not be amenable to class treatment." *Id.*

The Ninth Circuit's skepticism is well founded. Indeed, it is just the latest voice in a long and growing chorus to recognize that class actions involving wearable vehicle components, such as tires, are not amenable to class treatment. Recognizing the myriad causation factors inherent in these kinds of claims, a uniform line of authority has denied

certification of classes alleging a defective tire design,[2] a defective wheel lock-up condition,[3] a defective front-end suspension system,[4] a defective engine component,[5] a defective paint primer,[6] a defective ignition switch,[7] and a defective brake "system."[8] Importantly, no court—not one—has ever certified class claims involving tire wear. Nor has any court anywhere certified class claims involving a purported vehicle alignment defect.[9]

This Court's task on remand is therefore straightforward when it comes to assessing the suitability of a tire-wear class. Applying settled precedent and the guidance from the Ninth Circuit, this Court should hold—once again—that plaintiffs' tire wear claims cannot be certified under Rule 23. *See Wolin* at 1174 (observing that tire wear

[2] *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-21 (7th Cir. 2002); *Frosini* v. *Bridgestone Firestone N. Am. Tire, LLC*, No. CV 05-0578 CAS, 2007 WL 2781656, at *15 (C.D. Cal. Aug. 24, 2007).

[3] *See Barbarin* v. *General Motors Corp.*, Civ. A. No. 84-0888 (TPJ), 1993 WL 765821, at *3 (D.D.C. Sept. 22, 1993).

[4] *See Lewis* v. *Ford Motor Co.*, 263 F.R.D. 252, 263 (W.D. Pa. 2009).

[5] *See Cox House Moving, Inc.* v. *Ford Motor Co.*, CA No. 7:06-1218-HMH, 2006 WL 3230757, at *5 (D.S.C. Nov. 6, 2006).

[6] *See In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998); *Sanneman* v. *Chrysler Corp.*, 191 F.R.D. 441, 449 (E.D. Pa. 2000).

[7] *See In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 344-346 (D.N.J. 1997).

[8] *See Kia Motors Am. Corp.* v. *Butler*, 985 So. 2d 1133, 1141 (Fla. Dist. Ct. App. 2008).

[9] To be clear, Land Rover does not contend that vehicle defect claims are categorically barred from class treatment, and Land Rover did not purport to make such an argument to the Ninth Circuit in *Wolin*. *See* 617 F.3d at 1173. Rather, as courts have uniformly concluded, issues involving *wearable* vehicle parts are particularly unsuited for class treatment. In *Butler*, for example, the court rejected plaintiffs' effort to certify a class comprised of Kia vehicle owners based on a "brake system design defect that causes premature wear of the front brakes," concluding that individual issues predominated over common ones and that a class action was not a superior mechanism to resolve plaintiffs' claims. 985 So. 2d at 1134. As here, the plaintiffs in that case asserted that "whether there is a defect" and "whether Kia is responsible for that purported defect" were issues common to the class. *Id.* at 1137. But the Court rejected that abstract formulation of common issues, explaining that numerous individual inquiries were required to determine whether the alleged defect caused "the need for a particular repair." *Id.* at 1140.

claims "may not be amendable to class treatment" but finding "the district court *still* must address the [Rule 23 issues]") (emphasis added). Land Rover has previously demonstrated that plaintiffs' tire wear claims do not meet the Rule 23 requirements. So as not to overburden the Court, this "supplemental" filing only summarizes here the principal failings, while incorporating Land Rover's earlier class certification submissions by reference.

Plaintiffs' Tire Wear Claims Are Wholly Incompatible With Rule 23

The most glaring failing with plaintiffs' tire wear claims is one that is common to all other cases involving wearable motor vehicle parts involving substantial individual use factors: Any common questions are dwarfed by idiosyncratic questions unique to each plaintiff. The heavily fact-bound inquiries needed to resolve claims about tire wear hinge to such a profound degree on the peculiarities of each individual plaintiff that there is no meaningful way to try the case on a classwide basis. This is most evident when it comes to establishing causation: In order to obtain relief, each plaintiff must prove that the tire wear that he or she has experienced was *caused by* the alleged defect. That task is simply not amenable to common proof. Instead, it demands an exhaustive inquiry into, among other things, each putative class member's vehicle, service and maintenance records, individual driving practices, and the scores of other potential causes of irregular tire wear. Indeed, as this Court previously recognized, the case-by-case investigations required simply to determine whether a particular owner's vehicle experienced uneven *and* premature tire wear caused specifically—and exclusively—by the alleged defect alone defeats the benefits of class treatment. Because the types and rates of tire wear are so

varied and can be caused by so many individualized factors, adjudication by representative action, as the Ninth Circuit explained, is effectively foreclosed in a tire wear case.[10]

But causation is not the only place where plaintiffs' claims necessarily break down into individualized inquiries that make class treatment improper. Other case-by-case inquiries include:

- Plaintiffs' limited warranty claims require, among other things, individualized proof that each putative class member (1) manifested the alleged defect; (2) presented his or her vehicle for warranty coverage, (3) warranty coverage was denied, and (4) that the denial was improper – each element of which would entail case-by-case investigation of, *inter alia*, vehicle service records and vehicle condition. *See In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litig.*, No. 8:10ML 02151 JVS (FMOx), 2010 WL 4867562, at *24 (C.D. Cal. Nov. 30, 2010) (plaintiff may not "assert a claim for breach of express written warranty based on a latent defect that does not result in product failure during the warranty period") (internal quotation marks omitted).
- Plaintiffs' state consumer protection statute claims require each putative class member to prove, among other things: (1) breach of warranty (see above), (2) that he or she suffered an ascertainable loss, which involves determining (a) what amounts each class member paid for replacement tires, (b) what discounts each class member received from his or her dealer, the tire manufacturer, or other third party warrantor in the form of reimbursement, discounts, or "goodwill," and (c) other characteristics of each class member's vehicle when his or her tires were replaced. *See* JLRNACL ¶¶ 44-49; *see also, e.g., Butler*, 985 So. 2d at 1140.
- Plaintiffs' claims for unjust enrichment, as other courts have universally recognized, involve so many individualized considerations that class treatment is improper. *See* JLRNACL ¶¶ 60-66; *see also Rollins, Inc.* v. *Butland*, 951 So. 2d 860, 876-877 (Fla. Dist. Ct. App. 2006).

A class action is also not a superior vehicle for adjudicating the plaintiffs' tire wear

[10] Land Rover is not suggesting that tire-related cases could *never* be adjudicated on a classwide basis. It may be possible to certify a claim that a tire manufacturer used an improper compound or defective tread design, for example. But those are not the claims here and the tire claims here are not made against a tire manufacturer in any event.

claims. Class certification would trigger a virtually endless and colossally expensive venture. And all the frolics and detours this Court would have to take just to supervise these disparate claims—let alone try to resolve them—would subvert, rather than promote, Rule 23's core purpose of efficiently managing complex litigation. That is true despite the soothing assurances from plaintiffs that their "trial plan"—such that it is—would facilitate common proof. The reality is that plaintiffs' trial plan assumes "commonality" at a near-Himalayan level of abstraction. If ever put to practice, that "plan" would enmesh this Court in a trial so complex and so riddled with mini-trials that all any marginal gains in efficiency from classwide treatment would be lost.

Perhaps recognizing the fatal indeterminacy of their trial plan, plaintiffs have now tacked to a new course. As they see things, all the individual inquiries that plague their claims suddenly vanish by simply recasting their grievance as one grounded in a prayer for "diminution in the value." *See* Dec. 6, 2010 Hr'g Tr. at 14 (plaintiffs' counsel arguing that "Ninth Circuit has identified diminution in value as a claim that is quite amenable to class treatment."). But the plaintiffs' diminution in value theory is based on an egregious misreading of the Ninth Circuit's decision. It is also demonstrably wrong on the merits. Every court to consider the same "diminution of value" question at class certification has squarely rejected the theory; this Court should not precipitate a split in federal authority on this question.

But the biggest problem with the plaintiffs' diminution in value theory is that it does nothing to mitigate the principal flaw with all the other theories the plaintiffs have pressed: It injects still more case-by-case inquiries into the mix. That is because, in order

to prove that the alleged defect caused diminution in the value of his or her vehicle, each class member would still have to show causation and injury on a case-by-case basis, including:

- What was the vehicle's value at the time of purchase, whether new from a dealer or as a used vehicle in a secondary market?
- Did the owner attempt to sell the vehicle to a third party?
- When did the owner learn of the vehicle's allege defect and consequential diminution in value?
- Was the proposed or actual purchaser aware of the alleged defect and how did this affect his or her offer to purchase the vehicle?
- Was there a reduction in price offered or paid for the vehicle as a result of the alleged defect?
- What *other* bases or factors were used to determine the subsequent sale or offer price? (*E.g.*, What condition was the vehicle in when it was sold?)

But the problems run deeper still. Limiting the class claims to diminution in vehicle value based on the existence of a latent defect would require vastly narrowing the scope of the putative class – and render it even less ascertainable. Lessees would be excluded from the class, because the leasing terms and residual price were negotiated between the customer and an independent dealer, both of whom were allegedly misled by Land Rover as to the "value" of the vehicle as of the time the lease was made. Similarly, anyone who acquired the vehicle after the filing of this lawsuit and plaintiffs' counsel's publication thereof, would likely have factored any alleged incremental maintenance costs into the purchase price and therefore could not be said to have suffered any "loss" caused by Land Rover. And original owners who sold their vehicles before public dissemination of a potential impact on a small number of vehicles, would have received every penny they were otherwise entitled to.

The problem with plaintiffs' putative class is that it covers *all* owners, lessees, and

intermediate owners, without any requirement of ascertainable loss or injury. This is the exact same problem the court found fatal to certification in *Lewis v. Ford Motor*. There, the federal district court concluded that:

> [N]o such losses are incorporated in the class description which merely requires the member to have purchased or leased a Ford-250 or -350 vehicle from a Pennsylvania dealership. Thus, membership in the class does not, under the current definition, require the consumer to show either (1) he lost money when he sold or traded in his vehicle because of the front end oscillation, (2) his vehicle has an ascertainable diminished price as a result of the oscillation, or (3) he was forced to pay for the cost of repairing his vehicle when the oscillation defect occurred outside the warranty period, an obvious type of ascertainable loss never mentioned in the Complaint.
>
> Under the current definition, any purchaser or lessee of a Class Vehicle would be presumed a member of the class. Therefore, to determine if a particular class member suffered an ascertainable loss, the Court would need to inquire into the individual circumstances of the purchase or lease, whether the vehicle experienced the Oscillation Defect, whether the consumer paid for repairs, and/or whether when he traded or sold the vehicle, he received a lower price as a result of the Oscillation Defect. Such a detailed factual analysis would be an unconscionable use of the court's time and makes this case unsuitable for class treatment. Certification should be denied where "[d]etermining membership in the class would essentially require a mini-hearing on the merits of each case."

Lewis, 263 F.R.D. at 264 (citing & quoting *Forman* v. *Data Transfer*, 164 F.R.D. 400, 403 (E.D. Pa. 1995)).

For all of these reasons, and as set forth in the Rule 23 analysis below, the Court should follow the settled rule and decline to certify any tire wear class or any class purporting to seek damages related to tire wear.

Nor May Plaintiffs Certify An "Alignment Geometry" Defect Class

While the Ninth Circuit effectively foreclosed plaintiffs' tire wear claims – which the parties and this Court had understood to be the gravamen of plaintiffs' lawsuits until now – the panel hypothesized one claim that might be amenable to classwide proof: a claim based on allegations of a *uniform* manufacturing or design defect in the alignment

"geometry" of the LR3 vehicles. *See Wolin*, 617 F.3d at 1173. According to plaintiffs' counsel, the Ninth Circuit's musings mean that this Court must certify some sort of class. *See* Dec. 6, 2010 Hr'g Tr. at 12-13.

Not so. Although a hypothetical *uniform* manufacturing defect in the alignment "geometry" might well give rise to a proper class action, this Court's Rule 23 analysis does not turn on hypotheticals; it turns on facts. If the plaintiffs can demonstrate that there is—in fact—a *uniform* defect in the alignment "geometry," then this Court may certify a class for that narrow claim. But that, of course, is not something plaintiffs can do—which is why they never pursued a uniform alignment defect theory during the first four years of this case. And as we explain further below, the voluminous class discovery amassed by the parties offers no evidence of any mythical *uniform* defect in the alignment "geometry."

But plaintiffs insist that this Court need not bother with actual facts in resolving its class-certification motion. As they see things, the Ninth Circuit required this Court to look only to the allegations in the complaint. And because the plaintiffs allege there that the vehicles suffered from a "uniform" defect, this Court has no choice but to certify a class for that claim.

Wrong again. Nowhere did the panel direct this Court to focus monomaniacally on the bare allegations in the complaint. And for good reason: Binding Ninth Circuit and Supreme Court precedent squarely holds that the district court must rigorously probe behind the pleadings to assess compliance with Rule 23's requirements. Plaintiffs' counsel simply reads far too much into the Ninth Circuit's dicta. Applying an abuse of

discretion standard, the Ninth Circuit only rejected what it understood to be the basis of this Court's denial of class certification. While it offered dicta that went further than that holding, the Ninth Circuit did not purport to divest this Court of its independent and core responsibility to perform the "searching inquiry" and "rigorous analysis" to determine whether the plaintiffs' claims comport with Rule 23's requirements. Nor could it. After all, a three-judge panel has no authority to overrule a decision by the en banc court, and the en banc court in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), expressly rejected the rule that class-certification should be tethered to the allegations in the complaint. As the en banc court held: "[The] rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied . . . will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims." *Id.* at 594.

It is therefore no surprise that the Ninth Circuit's decision never *holds* that this Court should accept the plaintiffs' allegations of uniform defect on faith. What that court *did* hold was far more modest; all it did was reverse solely on the basis that "the district court erred when it required Gable and Wolin to show that a majority of proposed class members' vehicles manifested the results of the defect" and remanded to this Court to address "the remaining class issues." 617 F.3d at 1174. The limited nature of the panel's decision is also clear from the fact that, although it noted that certain common issues seemed to "predominate," it did not actually assess whether those issues predominated *over* individual issues – a determination that the Ninth Circuit has held the district court is required to make under the Rule 23(b)(3) predominance inquiry. *See In re Wells Fargo*

Home Mortgage Overtime Pay Litig., 571 F.3d 953, 958 (9th Cir. 2009).

Even if there were some doubt about whether the Ninth Circuit took it upon itself to determine some Rule 23 requirements as a matter of law in the first instance – which it did not – the panel clearly left aspects of the class certification decision for this Court to resolve. Thus, the Ninth Circuit explicitly left the question of superiority in this Court's full discretion by directing it to address problems of manageability and administration, on remand. *See id.*

Ultimately, whether the Court undertakes a full Rule 23 analysis, or simply confines itself to assessing whether a class action is a superior vehicle for resolving plaintiffs' alignment claims, the result is the same. There are simply too many fact-bound individualized inquiries to effectively, efficiently, or responsibly, adjudicate these claims on a representative basis. First and foremost, looking behind the plaintiffs' bare allegations – which the Ninth Circuit did not do, but this Court must – it is obvious that individualized issues trump any conceivable common issues. This Court does not have to look far to reach this conclusion, for the plaintiffs have put forward no evidence of any common defect that would make this case amenable to class treatment. They have not identified the alleged "alignment geometry" defect, nor presented any evidence that any such defect afflicts more than a miniscule number of class vehicles.

Nor could they. Despite years of intensive discovery, plaintiffs have been content to insist that there is an *admitted* "non-conformity or design flaw" in the LR3s that "*pertains* to the 'alignment geometry.'" *Gable* Compl. ¶ 10; *Wolin* Compl. ¶ 10; *Gomcsak* Compl. ¶ 10; Plaintiff Gables' Proposed Findings of Fact & Conclusions of Law

in Support of Motion for Class Certification ("PGFOF") ¶ 12. These claims, plaintiffs assert, are ostensibly derived from Land Rover's own Technical Service Bulletin ("TSB"). *Id.* But the TSB plainly does not identify any *uniform* defect – let alone a defect of any vintage. *See* Defendant Jaguar Land Rover North America LLC's Amended Proposed Findings of Fact & Conclusions of Law in Support of its Opposition to Plaintiff's Motion for Class Certification, filed July 23, 2008, Wolin Dkt. # 70 ("JLRNAFF"), Ex. 42 at LRNA 503. Nor has Land Rover ever admitted – nor is there a scintilla of evidence – that there is a uniform problem. Instead, the TSB alerts dealer technicians that *some* customers may—or may not—show up with irregularly worn tires that may—or may not—be attributable to misalignment. What type of misalignment, how that misalignment occurred and whether such misalignment *caused* the improper tire wear, is for the technician to determine on a case-by-case basis. The TSB simply indicates that "***certain*** vehicles ***may*** experience ***some*** bushing settlement during early vehicle life . . . [that] ***may*** alter the geometry settings outside of normal tolerance, which ***may*** in turn increase tire wear." *Id.* at LRNA 503 (emphases added).[11]

The plaintiffs' apparent insistence that there must be a defect common to all LR3s "alignment geometry" because the TSB "applies" to all vehicles ignores that the TSB, like any generalized advisory, aimed to provide dealer technicians with information relevant to an isolated condition that may affect some—not all—LR3s. Lest there be any doubt about this, the TSB expressly states that "[t]his situation is ***not*** experienced on all vehicles" and

[11] As explained in further detail below, "bushing settlement" occurs when small, energy-absorbing rubber suspension joint pieces (or "bushings") first become weight-bearing in the vehicle assembly process, and the suspension system adjusts to absorb the additional weight. *See* JLRNAFF, Ex. 1 (Declaration of G. Sherrey) at ¶¶ 27, 29 & 31 (hereinafter "Sherrey Dec.").

that any misalignment condition "may be attributed to ***other factors***." *Id.* (emphases added). The TSB, in other words, does not identify any purported "defect" in the alignment or anywhere else on any vehicle, let alone all of them. It simply advises dealers that if customers present with a particular type of tire wear, then one of the underlying causes may be the "settling" of an adjustable component in the suspension system – but it could also be one of hundreds of other causes.

Plaintiffs have offered nothing more than this solitary document to support their *uniform* "alignment defect" theory. Their proffered "tire" expert, Robert Wozniak, did not study or offer any opinion on the nature of any alleged alignment defect. He was not asked to determine the cause of plaintiffs' tire wear and therefore offered no opinions on the locus of any "alignment defect," such as whether it existed in the vehicle design, its suspension components, the "bushing," the initial factory alignment settings, or some other aspect of the design and manufacturing processes. *See* JLRNAFF, Ex. 11 (Deposition of R. Wozniak ("Wozniak Dep.")) at 175:25 ("I don't know what the defect is."). Additionally, he repeatedly admitted that not all MY '05 and '06 LR3s will experience a misalignment condition, let alone misalignment directly attributable to excessive bush settlement. *See* Wozniak Dep. 189:13-17, 191:19-192:16, 196:18-24 & 221:13-222:2. The most he offered, which was not based on any scientific study, investigation, or analysis, was that certain LR3s have an "alignment geometry defect" that is some (unidentified) problem with the suspension that causes "the rear axles to go to a toe-out position." Gomcsak Class Cert. Opp, Ex. 14 (Second Deposition of R. Wozniak ("Wozniak Sec. Dep.") at 39:7-21.

The plaintiffs' vague allusions to an unspecified alignment geometry defect ignores the complexity of the LR3's suspension system, the interplay of numerous factors that influence a vehicle's alignment, and even the undisputed fact that vehicles in the putative class were manufactured with a number of different—that is, *not* uniform—factory alignment settings and could have been given multiple different in-service adjustments. Given the innumerable variables and causes that can lead to a vehicle's rear alignment to exhibit a toe-out condition, individual vehicle inspections and service history analysis would be required to determine whether the alleged—but unspecified—defect caused each putative class member's alleged misalignment. Needless to say, that is a daunting task under any circumstances and is only made more difficult (if not impossible) in the absence of any identified alleged defect. That is because, unlike in some cases where the plaintiffs allege that a vehicle part or design is defective, plaintiffs here do not identify any common vehicle part or system that is allegedly defective. Instead, their *claim* is based on the *result* of the alleged (but unknown) defect – premature and uneven tire wear – which itself is a by-product of innumerable different, and often overlapping factors. Consequently, to adjudicate an "alignment" defect case, each putative class member's vehicle and its service/usage history would have to be inspected to analyze, among other things:

- The vehicle's initial manufacturing geometry settings and subsequent adjustments (the vehicles in the class were subjected to at least three different initial alignment settings and an equal number of in-service alignment adjustments – putting aside routine realignments necessitated by years of driving);
- The measurement of any "settlement" or "creep" in the rear bush's location or adjoining suspension arm;
- The vehicle's alignment readings before and after each tire replacement;

- Examination of vehicle service records to determine whether its suspension system and wheels were properly maintained, subjected to worn or failed suspension parts, improper servicing, etc.
- Examination of driving history, because misalignment and resulting tire wear can be caused by road surface condition (curb strikes, speed bumps, potholes), temperature, driving style (hard cornering, braking, accidents), etc.

These are not even all of the individual considerations that would have to be undertaken in order for the plaintiffs to make out the Ninth Circuit's hypothetical alignment defect case. Their limited warranty, state consumer protection statute, and unjust enrichment claims, whether viewed as related to tire wear or an alignment defect, also all involve case-by-case inquiries that make class treatment inappropriate. And as with the plaintiffs' tire wear claims, focusing on diminution in value does not alleviate the individualized proof problems; it creates more.

Like their tire wear claims, a class action is also not a superior means to resolve plaintiffs' alignment-related claims. The inevitable parade of mini-trials is neither more fair nor more efficient than other available ways to redress the plaintiffs' alignment-related claims. The plaintiffs' generic trial plan does not attempt to address these problems, but the Court must do so: This Court must put forward, at this stage, a workable plan for such mass litigation to proceed.

The named plaintiffs are also not typical of the putative class they intend to represent. None of the plaintiffs' vehicles ever experienced the loosely characterized alignment geometry condition of which the class complains. Certainly none suffered an ascertainable loss caused by a defect in the vehicle's "alignment geometry."

Accordingly, the Court should decline to certify any tire wear and alignment

classes in these cases. The Ninth Circuit ordered this Court to consider whether plaintiffs could make an alternative class certification showing based on a far narrower claim related to "alignment geometry." As it turns out, that claim is riddled with the same kind of individualized inquiries as the tire claims on which they have focused until now and similarly should not be certified.

ARGUMENT

I. Consistent With The Ninth Circuit's Ruling, Plaintiffs' Tire Wear Claims Fail To Meet Critical Rule 23 Requirements.

As Land Rover has previously explained, and this Court correctly concluded, application of Rule 23 makes clear that plaintiffs' tire wear claims cannot be certified for class treatment. But to the extent that the Ninth Circuit indicated that the Court should amplify its reasoning, *see Wolin*, 617 F.3d at 1174, Land Rover here summarizes and incorporates by reference its previous submissions outlining the fatal problems with certifying any such claims. [12]

[12] *See* Defendant Jaguar Land Rover North America LLC's Memorandum of Points and Authorities in Opposition to Plaintiff Gable's Motion for Class Certification, filed March 14, 2008, Dkt. # 34 ("Gable Class Cert. Opp."); Declaration of K. Willen in Support of Opposition to Plaintiff Gable's Motion for Class Certification, Dkt. # 34-29; Defendant Jaguar Land Rover North America LLC's Memorandum of Points and Authorities in Opposition to Plaintiff Wolin's Motion for Class Certification, filed March 14, 2008, Dkt. # 39 ("Wolin Class Cert. Opp.") Declaration of K. Willen in Support of Opposition to Plaintiff Wolin's Motion for Class Certification, Dkt. # 39-34; Defendant Jaguar Land Rover North America LLC's Memorandum of Points and Authorities in Opposition to Plaintiff Gomcsak's Motion for Class Certification, filed August 15, 2008, Dkt. # 39 ("Gomcsak Class Cert. Opp."); Declaration of K. Willen in Support of Opposition to Plaintiff Gomcsak's Motion for Class Certification, Dkt. # 40; Declaration of J. Daws in Support of Opposition to Plaintiff Gomcsak's Motion for Class Certification, Dkt. # 41; JLRNAFF. JLRNA's proposed findings of fact are cited as "JLRNAFF ¶ __" and its proposed conclusions of law are cited as "JLRNACL ¶ __."

A. The Court Must Conduct A Rigorous Analysis To Determine Whether Plaintiffs' Tire Wear Claims Meet The Rule 23 Requirements.

To secure certification, a party must demonstrate that the proposed class meets all four requirements of Rule 23(a) and at least one requirement of Rule 23(b). *See* Fed. R. Civ. P. 23(a)-(b); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997). In reviewing whether these Rule 23 requirements are met, the Court must conduct a "searching inquiry" and "rigorous analysis." *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160-161 (1982); *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 581 (9th Cir. 2010) (en banc) ("[D]istrict courts are not only at liberty to, but *must*, perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied.") (emphasis added). This means that "[a] district court's analysis will often . . . require looking behind the pleadings, even to issues overlapping with the merits of the underlying claims." *Dukes*, 603 F.3d at 581-582; *see also id.* at 590-594.

The Ninth Circuit in *Wolin* took issue with this Court's reliance on a "manifestation threshold requirement" as a ruling that, on the merits, the plaintiffs could not prove the existence of any defect with their LR3s. *See* 617 F.3d at 1173-74. But the Ninth Circuit seems to have misunderstood that, in pointing out that there was no "credible evidence" in the record that a significant percentage of vehicles would ever manifest the problem, this Court was merely holding that the plaintiffs could not satisfy Rule 23(b)(3)'s requirement that issues common to the class predominate over individual issues. This Court was not requiring that any particular – even a single – plaintiff *prove* the merits of his or her case at class certification. Rather, it pointed to the obvious fact that given the lack of any significant incidence rate, the class would quickly devolve into

endless individualized mini-trials to determine whose vehicles manifested uneven and premature tire wear, whether it was caused by the alleged defect (or rather the dozens of individualized use, environmental and servicing causes), and any damages suffered by particular class members.

But whatever may be said for the Ninth Circuit's parsing of this Court's decision, the Appeals Court most certainly did not purport to relieve this Court of the responsibility to "probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160-161. Instead, the Ninth Circuit, relying on *Daffin* v. *Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006), believed that the District Court's consideration of the record evidence bearing on manifestation of the alleged defect crossed from probing "claims of compliance with Rule 23" into resolving "stand-alone merits issues." *Dukes*, 603 F.3d at 582. While *Daffin*, 458 F.3d at 553, and *Wolin*, 617 F.3d at 1173-74, seemingly rejected the latter approach, the Ninth Circuit, sitting *en banc*, recently confirmed that the former inquiry is not only appropriate, but required: "[T]he district court *must* analyze underlying facts and legal issues going to the certification questions *regardless of any overlap with the merits*." *Dukes*, 603 F.3d at 585-586 (emphasis added); *see also id.* at 594.[13]

[13] During the case management conference held on December 6, 2010, Land Rover urged this Court to delay ruling on class certification in these cases until after the United States Supreme Court has heard and decided *Dukes* v. *Wal-Mart Stores, Inc.*, because of the likelihood that its decision would provide far-reaching guidance that would inform this Court's review in these cases. In the event this Court is inclined to follow the *Daffin* framework rather than *Dukes*, Land Rover strongly reiterates its request that the Court await the Supreme Court's decision in *Dukes* before issuing a final decision on class certification in these cases. Under either formulation, however, certification of a tire wear class, or any class seeking damages for tire wear, would be highly "problematic." *Wolin*, 617 F.3d at 1173.

Under the "searching" and "rigorous" review required of the Court on class certification, it is clear that the plaintiffs' tire wear claims do not meet critical Rule 23 requirements.

B. Common Questions Do Not Predominate Over Individualized Issues For Plaintiffs' Tire Wear Claims.

In order to certify a class under Rule 23(b)(3), as plaintiffs propose, the Court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This requirement obligates the Court "to determine whether common issues constitute such a significant aspect of the action that there is a clear justification for handling the dispute on a representative rather than on an individual basis." *Blackwell* v. *SkyWest Airlines, Inc.*, 245 F.R.D. 453, 467 (S.D. Cal. 2007) (internal quotation marks & citation omitted). Even where common issues are present, "a class action is improper where an individual class member would be compelled to try numerous and substantial issues to establish his or her right to recover individually, after liability to the class is established." *O'Connor* v. *Boeing N. Am., Inc.*, 197 F.R.D. 404, 415 (C.D. Cal. 2000) (internal quotation marks & citation omitted). The plaintiffs bear the burden of demonstrating compliance with Rule 23's requirements, *Amchem Prods., Inc.*, 521 U.S. at 614, and as Land Rover has previously explained, they have failed to carry that burden because, among other reasons, individual issues involved in their tire wear claims clearly predominate over common ones. *See* JLRNACL ¶¶ 6-73.

Mixed Class. Under a line of established precedent, class treatment is inappropriate when the putative class involves both members who experienced a flaw and

those who never did. The reason, of course, is that individualized inquiries are required simply to determine preliminary membership in the class.[14] Notwithstanding that proof of having actually suffered a defect is a key element of the plaintiffs' causes of action,[15] the uncontroverted evidence here demonstrates that the vast majority of LR3 owners and lessees will never experience any uneven and premature tire wear. *See* JLRNACL ¶17; JLRNAFF ¶¶ 237-245; Gomcsak Class Cert. Opp. at 8-11; *see also* JLRNAFF, Ex. 42, at LRNA 503-504; Gable Class Cert. Opp., Ex. 5, at LRNA 94; JLRNAFF, Ex. 45, at LRUK 6363-6365; Sherrey Dec. ¶¶ 39-40; JLRNAFF, Ex. 10 (Declaration of J. Daws ("Daws

[14] *See, e.g.*, *Feinstein* v. *Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (a "mixed class" situation "does not lend itself to class treatment."); *Bishop* v. *Saab Auto. A.B. & Saab Cars USA, Inc.*, No. CV 95-0721 JGD (JRX), 1996 WL 33150020, at *5 (C.D. Cal. Feb. 16, 1996) (denying certification on "similar 'tendency to fail' theories"); *Barbarin*, 1993 WL 765821, at *2 (dismissing breach of warranty claims of plaintiffs who purchased cars with an alleged tendency for "premature rear wheel lock-ups" but who had never actually experienced the problem); *Am. Suzuki Motor Corp.* v. *Super. Ct.*, 37 Cal. App. 4th 1291, 1298-99 (1995) (finding trial court erred in certifying mixed manifested/unmanifested defect class when "the vast majority of [vehicles] 'did what they were supposed to do for as long as they were supposed to do it' . . . To hold otherwise would, in effect, contemplate indemnity for a potential injury that never, in fact, materialized") (citation omitted); *Butler*, 985 So. 2d at 1139 (decertifying a class, stating that the trial judge had "deviated from the majority of jurisdictions, which consistently have denied class recovery [in automobile defect cases involving both manifested and unmanifested defects]"); *cf. Briehl* v. *Gen. Motors Corp.*, 172 F.3d 623, 627 (8th Cir. 1999) (dismissing class claim in ABS brake malfunction case when plaintiff failed to allege that brakes in fact malfunctioned or failed).

[15] JLRNACL ¶¶ 13-16; *see Cole v. General Motors Corp.*, 484 F.3d 717, 729 (5th Cir. 2007) ("[M]any jurisdictions do not permit the recovery of economic loss in vehicle defect cases where the vehicle has performed satisfactorily and has never manifested the alleged defect."); *Briehl*, 172 F.3d at 627-28 ("Where, as in this case, a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies."); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997) ("It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own."); *see also Lewis*, 263 F.R.D. at 263-64; *In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 460 (D. N.J. 1998); *Bishop*, 1996 WL 33150020, at *5; *Feinstein*, 535 F. Supp. at 603.

Dec.") ¶¶ 9, 23-24, 35-38. [16]

Because only a tiny fraction of owners and lessees have experienced—or ever will experience—this putative defect, an individualized inquiry would be required to determine whether each and every putative class member is, in fact, a class member. Here are some, though not all, of the vehicle-by-vehicle inquiries this Court would need to ask and answer in order to resolve this threshold task:

- Determining whether each class member's vehicle experienced *uneven* tire wear, which requires analysis of (1) each tire's tread depth measurements and (2) the location of those tires on the vehicle, even though many plaintiffs (including the named plaintiffs) discarded their tires years ago without recording any of the necessary measurements. *See* JLRNACL ¶ 18; JLRNAFF ¶¶ 104-07, 149, 179 & 331-332.
- Determining whether each class member's LR3 experienced *premature* tire wear, which requires analysis of (1) each tire's tread depth measurements; (2) the vehicle mileage at which the tire(s) were installed; and (3) the vehicle mileage at which the tire(s) wore down to 2/32" of remaining usable tread. *See* JLRNACL ¶ 18; JLRNAFF ¶¶ 91, 131 & 140.
- Determining whether each class member's vehicle experienced a toe-out alignment condition on the rear axle, which requires analysis of the vehicle's alignment readings. *See* JLRNACL ¶ 18; JLRNAFF ¶¶ 47, 50-52, 63 & 65.

Determining whether the alleged defect with the plaintiffs' vehicles has occurred on a particular vehicle involves an array of individualized inquiries that, as the Court has previously recognized, underscores the unsuitability of plaintiffs' claims for class treatment. *See* JLRNACL ¶ 10.

[16] Plaintiffs' attempt to paint this as a much broader problem with the LR3 by highlighting an email referring to increased demand for replacement tires. *Gable* Mot. for Class Cert. n. 7 (citing "'five-fold' increase in demand for replacement tires"). Of course, this email thread discusses higher than anticipated demand for tire wear replacement. It says nothing about the incidence of "uneven and premature" tire wear or irregular wear resulting from the purported alignment geometry condition. Moreover, even if true, a "five-fold increase" provides no meaningful estimation of the incidence rate of the alleged defect in this case because there is no evidence in the record of the baseline or *anticipated* demand.

Causation. Even assuming class membership could be determined, a more daunting challenge awaits. As noted above, courts have uniformly declined to certify classes involving wearable vehicle parts, such as tires, because of the complexity and individual use factors inherent in determining the *cause* of any particular wear pattern. *See supra* at 4 & nn.2-8. This case is no different. In order to determine the *cause* of any class member's alleged uneven and/or premature tire wear requires consideration of a host of individual factors, including:

- The historical location of those tires on the vehicle;
- The vehicle mileage at which the tire(s) were installed;
- The vehicle mileage at which the tire(s) wore down to 2/32" of tread;
- The vehicle's alignment settings at the time of any tire replacement and intermediate servicing, including realignment servicing;
- Consideration of other potential causes of uneven tire wear, such as improper vehicle maintenance (*e.g.*, under/over inflation, tire rotation practices, individual driving habits, accidents, curb strikes, improper alignment settings by dealer personnel, road surface and conditions, temperature, and tire composition and design.) *See* JLRNACL ¶ 24; JLRNAFF ¶¶ 107, 140, 149, 175 & 179; Gomcsak Class Cert. Opp. at 14; and
- The condition and servicing of the dozens of suspension components that support the drive-train and alignment systems that, if worn our or damaged, may lead to irregular tire wear. JLRNACL ¶¶ 23-24; JLRNACL ¶¶ 62, 64 & 158.

None of the assessments necessary to determine the cause of a class member's alleged uneven and premature wear could be made without a case-by-case detailed inspection of each putative class member's vehicle, service history, and driving habits. These fact-intensive individualized inquiries predominate over whatever common issues may otherwise exist. This too is reason alone to deny certification. *See* JLRNACL ¶¶ 19-32.

Plaintiffs' Limited Warranty Claim. Under what the Ninth Circuit incorrectly

characterized as Land Rover's alleged "Tire Warranty," "[e]xcessive wear that is inconsistent with normal use *may* be acceptable under warranty only if it has been *caused by* a manufacturing defect elsewhere on the vehicle." JLRNAFF, Ex. 10, at LRNA 00005968 (emphasis added).[17] Thus, establishing any claim under this "warranty" involves a host of these same individualized causal considerations. As the Ninth Circuit held, the plaintiffs' "[c]laims for breach of the Tire Warranty do not easily satisfy the predominance test" because "[a] determination whether the defective alignment caused a given class member's tires to wear prematurely requires proof specific to that individual litigant." *Wolin*, 617 F.3d at 1174. That court recognized that "tires deteriorate at different rates depending on where and how they are driven," which means that "[w]hether each proposed class member's tires wore out, and whether they wore out prematurely and as a result of the alleged alignment defect, are individual causation and injury issues that could make classwide adjudication inappropriate." *Id.* Hence, it is clear that the Ninth Circuit recognized that plaintiffs' claims under the "Tire Warranty" involve individualized issues that overwhelm any common issues.[18]

Moreover, there are significant problems with the plaintiffs' tire wear claims even

[17] The Ninth Circuit characterized Land Rover's internal Policies and Procedures Manual ("PPM") as a "Tire Warranty." 617 F.3d at 1174. But the PPM is not a warranty at all; instead, it sets the company's internal policy for addressing situations that fall *outside* of its limited warranty. JLRNAFF ¶¶ 167-168. Land Rover does not, in fact, provide any "Tire Warranty." JLRNAFF ¶¶ 164-165. To the contrary, tires are expressly excluded from its limited warranty. JLRNAFF ¶ 165 (limited warranty "covers any factory-supplied component of the Land Rover vehicle that is defective during the basic warranty period, *with the exception of tires and other wear parts.*") (citing & quoting JLRNAFF, Ex. 19, at LRNA 00000562) (emphasis added).

[18] After all, Land Rover's own process for determining whether a plaintiff should receive reimbursement for tires – before the first service bulletin issued in October 2006 and afterwards – depended upon a highly-detailed, individualized vehicle inspection to determine whether the tires were wearing in a particular pattern and whether, in light of the vehicle history and current alignment condition, that wear was potentially associated with an alignment defect.

beyond those mentioned by the Ninth Circuit. Importantly, in order to recover on any breach of warranty claims, each putative class member must satisfy the contractual requirement of presentment – that is, each class member must demonstrate that he or she provided notice to the manufacturer that he or she sought repairs of their vehicle under warranty. *See In re Toyota Motor Corp.*, 2010 WL 4867562, at *23-25 ("Plaintiffs who neither sought repairs pursuant to the recalls nor sought repairs for [sudden unintended acceleration]-related issues may not pursue a claim for breach of express warranty based on the written warranty."); *see also Stearns* v. *Select Comfort Retail Corp.*, No. 08-2746, 2010 WL 2898284, at *20 (N.D. Cal. July 21, 2010) ("The express warranty claims involve elements that are individual to each purported class member, such as the provision of notice, an opportunity to cure, and reliance."); *Porcell* v. *Lincoln Wood Prods., Inc.*, 713 F. Supp. 2d 1305, 1316 (D.N.M. 2010) ("notice presents a question in which individual questions of fact will predominate"); *Cohen* v. *Implant Innovations, Inc.*, 259 F.R.D. 617, 625 (S.D. Fla. 2008) ("[E]ach putative class member must demonstrate that he or she gave the required notice of the breach to Defendant within a reasonable time . . . ; clearly, this is an individualized factual inquiry, as some potential class members may have provided timely notice, while others may have provided untimely notice of Defendant's alleged breach or no notice at all"). Thus, no class member can advance any warranty claim without a case-by-case inquiry into whether or not the vehicle was timely presented to Land Rover for repair under warranty, whether warranty coverage was denied, and whether the denial was justified. All those inquiries, in turn, would require individualized considerations of each vehicle's service records and vehicle condition, to

name just a few of the fact-bound issues plaguing this theory. *See* JLRNACL ¶ 38(b).

And determining whether Land Rover's limited warranty failed of its essential purpose – as each plaintiff must also prove – also involves numerous individualized considerations, including: whether Land Rover was given a reasonable opportunity to address the issue (which would include consideration of why and for how long a class member left his or her vehicle for service); whether Land Rover was able to conform the vehicle to the limited warranty; and whether repairs were made within a reasonable time and after a reasonable number of attempts. *See* JLRNACL ¶¶ 38(c).

Plaintiffs' State Law Consumer Protection Claims. Individualized issues also pervade the plaintiffs' claims under state consumer protection statutes, making them inappropriate for class treatment. In the first instance, to the extent that plaintiffs' consumer protection claims are based on Land Rover's alleged warranty violations, the plaintiffs must demonstrate, on a case-by-case basis, that Land Rover actually breached its limited warranty, as described above. *See* JLRNACL ¶¶ 41-43.

Plaintiffs are also required to prove that they have suffered actual damages caused by a statutorily prohibited practice. *See* JLRNACL ¶¶ 44-45. Yet, many of the putative class members have clearly suffered *no* injury because they have experienced no defect with their vehicles. And many others that required new tires, allegedly because of an "alignment" defect, have been fully reimbursed, whether from Land Rover, their individual dealers, the tire manufacturer (*e.g.*, Goodyear), factory "good will" programs, or in-kind compensation. *See* JLRNACL ¶ 46; JLRNAFF ¶¶ 237-247. Accordingly, each putative class member will be required to establish, on a case-by-case basis, any losses,

and that such losses were caused by the alleged defect. *See* JLRNACL ¶ 47.[19]

Furthermore, several of the plaintiffs' apparent consumer protection claims are categorically barred from class treatment. Plaintiff Gable's apparent claims under the Michigan Consumer Protection Act ("MCPA"), for example, simply cannot be advanced on a classwide basis. *See* JLRNACL ¶¶ 69-74; Gable Class Cert. Opp. at 28-30. And Plaintiff Gomcsak cannot maintain any action under the Ohio Consumer Sales Practices Act ("OCSPA") because Land Rover did not have prior notice from the state Attorney General that the challenged conduct was actionable under that statute. *See* Gomcsak Class Cert. Opp. at 16-18.

Additional individualized issues plague Plaintiff Gable's MCPA claim. Under the MCPA, each putative class member must demonstrate that any misrepresentation or omission by Land Rover was "material." *See* JLRNACL ¶¶ 50. But there are many idiosyncratic and individualized reasons why a putative class member purchased a LR3; indeed, Plaintiff Gable and Wolin purchased their vehicles for vastly different reasons, none of which had to do with the consumer's expectations about tire wear or vehicle maintenance costs. *See* JLRNACL ¶¶ 51-56. (Nor have Plaintiff Wolin or Gable identified any alleged misrepresentation or omission by JLRNA.) And under Michigan law, each putative class member would have to demonstrate, on a case-by-case basis, whether his or her vehicle was used "primarily" for personal – instead of business – use. *See* JLRNACL ¶¶ 67-68.

[19] Because the amount of any reimbursement, discount, or goodwill contribution from the dealer, Land Rover, tire manufacturer, or other third-party was often based on overall vehicle characteristics, customer loyalty, and other individualized factors, a detailed examination of each transaction is required. *See* JLRNAFF ¶¶ 258-263, 296 & 498-99.

Similarly, under the OCSPA, Plaintiff Gomcsak, and every single putative class member in Ohio, must demonstrate that a material misrepresentation or omission by Land Rover affected her purchase decision. *See* Gomcsak Class Cert. Opp. at 19. This requires individual inquiries into when and what representations were made and if and how they were relied upon by each putative class member. *See id.* There are myriad reasons why a putative class member purchased an LR3, and many may happily trade reduced tire life for some of the vehicle's other unique features, such as superior handling or luxury styling. *See id.* at 19-20.

Diminished Value. To the extent that the plaintiffs would attempt to circumvent the individual issues required to prove that the alleged defect caused their injuries by focusing on alleged diminution in the value of their vehicles based on the alleged defect, that strategy does not alleviate the problems of individualized proof inherent in their claims. That is because each class member's claim for the diminution in value of his or her vehicle based on the alleged defect also involves individualized inquiries into causation and injury.[20] In particular, each putative class member would have to show a

[20] *See Snow* v. *Atofina Chems., Inc.*, No. 01-72648, 2006 WL 1008002, at *7 (E.D. Mich. Mar. 31, 2006) ("To the extent that Plaintiffs intended to limit this class to those who have suffered a diminution in the market value of their real property, the Court finds that the individual proofs required to establish such a claim predominate over any common issues of law or fact. Courts consistently decline to certify a class when individual issues of causation, injury and damage outnumber the common issues."); *Montgomery* v. *New Piper Aircraft, Inc.*, 209 F.R.D. 221, 230 (S.D. Fla. 2002) ("Proof of damages is required for recovery under FDUTPA. Under FDUTPA, recoverable damages are limited to the market value diminution caused by the deceptive trade practice. Like causation, individual damage issues preclude predominance.") (internal citations omitted); *Butler*, 985 So. 2d at 1140 (classwide proof on diminution of value inappropriate under Florida law); *O'Connor* v. *Boeing N. Am., Inc.*, 180 F.R.D. 359, 383 (C.D. Cal. 1997) (denying class certification; "individual proximate cause issues permeate a diminution in value analysis"); *Bradford* v. *Union Pac. R.R. Co.*, No. 05-CV-4075, 2007 WL 2893650, at *11 (W.D. Ark. Sept. 28, 2007) (same).

sale or attempted sale of the vehicle. This inquiry alone would require individualized inquiry to determine, among other things:

- Whether each putative class member owns or leased his or her vehicle (all leases on 2005 and 2006 LR3s have now expired);
- The value of the vehicle at the time of the proposed or actual sale based on its overall condition and characteristics;
- Whether the seller knew of the alleged defect;
- Whether the buyer or proposed buyer knew of the alleged defect and how he or she adjusted the offer price as a result;
- Whether the final transaction price or last offer was adversely impacted by the alleged defect; and
- Whether any other factors affected the final sales price or offer price.

See JLRNACL ¶ 59(a); *see also Lewis*, 263 F.R.D. at 264. As the court in *Snow*, succinctly noted in a similar case, "[t]his would start hundreds, or thousands of individual mini-trials on complex causation and damages issues, while the only benefit of a class could be that the ruling of several common, but not particularly daunting issues, would be made applicable to the entire class." 2006 WL 1008002, at *6.

Unjust Enrichment. The existence of a limited written warranty forecloses the plaintiffs' recovery under an unjust enrichment theory under the laws of Florida, Michigan, and Ohio. *See* JLRNACL ¶¶ 60-66. But even putting that issue aside, plaintiffs' unjust enrichment claims are not suitable for class treatment because of the individualized inquiries required to make them out. For example, unjust enrichment claims are intertwined with individualized considerations of liability and damages under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). *See* JLRNACL ¶ 64. As other courts have concluded, the case-by-case inquiries involved in resolving those issues make class treatment inappropriate. *See Rollins, Inc.*, 951 So. 2d at 876-77

(holding "individual issues concerning liability and damages that make class certification on the FDUTPA damages claim inappropriate would also predominate in a trial of the contract and unjust enrichment claims"); *Hutson* v. *Rexall Sundown, Inc.*, 837 So. 2d 1090, 1093 (Fla. Dist. Ct. App. 2003) (finding that class members' "claims under FDUTPA and for unjust enrichment depend upon resolutions of predominant individualized fact issues" because an "individualized fact[ual] inquiry" would be required to determine the actual knowledge of each class member); *see also Chesner* v. *Stewart Title Guar. Co.*, No. 1:06CV00476, 2008 WL 553773, at *14 (N.D. Ohio Jan. 23, 20082008) (holding "certification of Plaintiffs' unjust enrichment claim is untenable" because of individualized inquiries involved); *Am. Ass'n of Retired Persons* v. *Nat'l Sur. Corp.*, No. 98-820589-CZ, 2001 WL 1530348, at *12 (Mich. Cir. Ct. Oct. 23, 2001) ("Simply put, the unjust enrichment claim could not be resolved, at least favorably to plaintiffs, on a class action basis.)[21]

C. A Class Action Is Not A Superior Vehicle For Resolving Plaintiffs' Tire Wear Claims.

In order to certify any tire wear class, the Court has to conclude "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A class action is not a superior dispute resolution mechanism "[i]f each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually." *Zinser* v. *Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001). That is the case here.

[21] Plaintiffs also cannot make out an unjust enrichment claim because they cannot demonstrate that they conferred any direct benefit on Land Rover. *See* JLRNACL ¶¶ 61-63; Gomcsak Cert. Opp. at 21-22.

As discussed above, and as recognized by the Ninth Circuit, the plaintiffs' tire wear claims require resolution of innumerable individualized issues that make the class instrument an inferior, unfair, and inefficient method for adjudicating the controversy. *See supra* at 20-30. Other federal courts have uniformly recognized that the class mechanism is not a superior dispute resolution mechanism in automobile-wear cases like this one because inherently individualized inquiries " 'w[ould] not advance the efficiency and economy of litigation which is a principal purpose of the procedure.' " *Cox House Moving, Inc.*, 2006 WL 3230757, at *9 (citation omitted).[22]

Nor is such an administrative quagmire necessary for the plaintiffs to redress their tire wear claims. The plaintiffs may bring their tire wear claims as individual actions, and they also may litigate their claims in small claims court. *See* JLRNACL ¶ 78.[23]

D. The Class Is Unmanageable Under Plaintiffs' Proposed Trial Plan.

The plaintiffs also have failed to carry their burden to show that a tire wear class is

[22] *See also In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1018-19 (holding that "litigation [wa]s not manageable as a class action even on a statewide basis" because tires were recalled at different times and "may well have differed in their propensity to fail"); *Sanneman*, 191 F.R.D. at 455 (reasoning that "because * * * a number of 'mini-trials' would be imperative, the costs associated with a class action would be very high" as "this case would quickly devolve into an unmanageable morass of divergent legal and factual issues"); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. at 220-225 (holding that, because the case did "not involve a single failure event or a simple, fungible product," "[e]ven if it were appropriate to fragment a core liability trial on Ford's conduct from minitrials on causation, reliance, damages and affirmative defenses [remaining problems] would seem to defeat the purported economies of class treatment").

[23] The Ninth Circuit stated, without citation, that Land Rover does not dispute that individuals have not filed individual actions alleging claims similar to those advanced by these plaintiffs. *See* 617 F.3d at 1176. Land Rover most certainly contests that point, however, as countless plaintiffs have named it as a defendant in individual actions advancing breach of warranty and consumer protection/fraud type claims with equal, if not lesser dollar values at stake. Several of these cases have involved claims specifically related to the alignment/suspension system and/or irregular tire wear. *See, e.g.*, *Van Pelt* v. *Land Rover North Am., Inc.*, Case No. 150045 (Ca. Sup Ct. filed Jan. 31, 2007) (alleging breach of warranty based on premature and uneven tire wear, excessive noise, rough ride, and unsafe tire condition) (courtesy copy supplied to chambers).

manageable or to establish a workable plan to address the massive obstacles to certification of such a class. *See* Fed. R. Civ. P. 23(b)(3)(D) (court must consider "the likely difficulties in managing a class action."). Plaintiffs blithely ignore the manageability problems inherent in these cases, conclusorily stating that "this case *easily* can be tried and adjudicated as a class action." Gable Class Cert. Mot. at 22 (emphasis added). But plaintiffs' soothing assurances of smooth sailing are no substitute for an actual plan. The closest they ever get to offering a plan is when they suggest that "trial of this action be bifurcated into (1) a liability phase (including a determination of injunctive relief) and (2) a damages phase." *Id.* But that is not a plan; that is a generic division of proof. What plaintiffs must do—but have not because they cannot—is offer a concrete plan that offers this Court some assurance that it can meaningfully evaluate and resolve these claims on a classwide basis—while at the same time preserving the fundamental due process rights of the defendant.[24]

As the Ninth Circuit has made clear, the Court cannot defer consideration of these practical challenges to the manageability of plaintiffs' proposed class until some future date. *See Zinser*, 253 F.3d at 1189 (explaining a class cannot be certified without "a suitable and realistic plan for trial of the class claims") (citation omitted); *see also* Fed. R. Civ. P. 23(c)(1)(A) Advisory Committee Note (recognizing the "critical need [] to determine how the case will be tried" at the class certification stage). Indeed, Rule

[24] Land Rover's due process rights would be violated if the plaintiffs were allowed to prove manifestation, causation, breach, injury, and unjust enrichment on a class basis because each of those inquiries involves individualized proof. *See* JLRNACL ¶¶ 104-106. Allowing plaintiffs to prove diminution in value on a class basis would also violate Land Rover's due process rights because any diminution in value would have to be established on a transaction-by-transaction basis. *See id.* ¶ 108.

23(c)(1)(B) now requires that "[a]n order that certifies a class action must define the class and the class claims, issues, or defenses." Fed. R. Civ. P. 23(c)(1)(B).[25] Thus, in the absence of a workable trial plan, this Court must deny certification. *See In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. at 219-21 (rejecting plaintiffs' proposed trial plan where plan did not alleviate manageability problems concerning the need for individualized determination of causation of class members' paint problems, as well as reliance and affirmative defenses); *see also Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 487 (C.D. Cal. 2008) (decertifying class, noting that "[t]he Court has broad discretion to manage class action practice, but this does not relieve a party of its responsibilities to articulate a clear trial plan").

E. The Plaintiffs Are Not Typical And Adequate Representatives Of Any Putative Tire Wear Class.

In order to serve as a class representative, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). That is, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *E. Tex. Motor Freight Sys. Inc.* v. *Rodriquez*, 431 U.S. 395, 403 (1977) (internal quotation marks omitted); *see also Hanon* v. *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Here, however, the named plaintiffs do not meet the key typicality requirement.

[25] *See Wachtel* v. *Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 187-88 (3d Cir. 2006) (interpreting rule to require certification order that "include[s] (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis"); *Nafar* v. *Hollywood Tanning Sys., Inc.*, 339 F. App'x 216, 219-20 (3d Cir. 2009) (vacating district court's class certification decision in part because the opinion and order did not contain a complete list of claims, issues, and defenses that could be tried on a classwide basis, as required by Rule 23(c) and explained in *Wachtel*).

The record evidence indisputably demonstrates that the named plaintiffs experienced types of tire wear that are different from what is alleged in the complaint (*i.e.*, "uneven and premature wear") – and different from each other. *See* JLRNACL ¶ 87(a)-(e); Gomcsak Class Cert. Opp. at 22-25. They also have very different vehicle maintenance histories. For example, Plaintiff Wolin's tires were chronically underinflated, which in and of itself causes wear patterns virtually indistinguishable from what plaintiffs' assert to be caused by an "alignment" defect. *See* JLRNACL ¶ 87(c). He also knowingly rotated his tires contrary to the LR3's recommended guidelines, which are specifically designed to offset any uneven tire wear. JLRNAFF ¶¶ 303-313.

The plaintiffs' alignment conditions also could not be more different; some presented with their wheels facing inward ("toe-in"), and others with tires pointed outward, or duck-footed ("toe-out"). *See* JLRNAFF ¶¶ 275-6 & 299. This is critical because "bush settlement" (one of the potential "defects" plaintiffs allude to, and described more fully below) occurs in only one direction (down) and, under the law of physics, that movement cannot cause a toe-in condition. Sherrey Dec. ¶ 29.

Furthermore, the named plaintiffs' alleged injuries also vary from those of putative class members. The named plaintiffs received different levels of reimbursement for tires and alignment. Some expended no out of pocket monies for their first set of replacement tires; others received prorated reimbursement (and now, apparently, complain that the pro rata formula was insufficient). JLRNAFF ¶¶ 279 & 295. Some of the named plaintiffs also received complimentary replacement tires on their second and third sets of tires; others received no compensation. And putative class members received compensation

from different entities, with some receiving reimbursements, discounts, and "good will" directly from Land Rover, others from the tire manufacturer (*e.g.*, Goodyear), and still others from their individual dealers. *See* JLRNACL ¶ 87(e); Gomcsak Class Cert. Opp. at 25. Some class members also received other forms of in-kind compensation from Land Rover on an ad-hoc basis when they complained vociferously enough about their particular situation. *See, e.g.*, JLRNAFF ¶ 499 (customer offered several goodwill accommodations, including money towards purchase of a new vehicle).

Because the plaintiffs' claims are substantially different from those of the class they purport to represent, they flunk the "typicality" requirement, whether the tire wear is considered the underlying defect or whether it is viewed as the measure of damages.

II. Plaintiffs Have Failed To Meet the Requirements To Certify Any Alignment Class.

While the Ninth Circuit made clear that the plaintiffs' tire wear claims could not proceed on a class basis, in dicta it left open the possibility that the plaintiffs could still certify claims based on a "uniform" alignment geometry defect. The alignment defect/tire wear distinction that the Ninth Circuit drew is puzzling because the plaintiffs have never drawn such a distinction themselves. That, of course, is because the distinction itself is essentially artificial. Plaintiffs' repeatedly allege that there is an *admitted* "non-conformity or design flaw" that "pertains to the 'alignment geometry.'" The source of these generic allegations, according to plaintiffs, is Land Rover's own TSB. But as revealed through exhaustive discovery and explained to the Court above and in earlier class certification briefing, the TSB does not identify any common defect – or any defect at all. *See* JLRNA, Ex. 42, at LRNA 503. Land Rover has never *admitted* – nor is there a

scintilla of evidence – that there is a uniform problem. Plaintiffs' own expert does not subscribe to this position. *See* JLRNAFF ¶ 56-57; Wozniak Dep. 176:20-177:13 ("Q. So in other words, you're not contending that, for example, the -- the factory alignment settings are themselves defective, right? * * * A. I am not contending that.") And once this baseless *allegation* is exposed, plaintiffs' claims – whether grounded in tire wear or an alignment defect – fundamentally fail for purposes of class certification because each involves substantial individualized fact-bound considerations. Under the rigorous analysis required of this Court, it is clear that, just like their tire wear claims, any alignment geometry defect claims similarly fail to comply with essential Rule 23's requirements.

A. Common Questions Do Not Predominate Over Individualized Issues For Plaintiffs' Alignment Claims.

1. Plaintiffs Have Failed To Identify Any Defect With The Alignment Of Their LR3s And There Is No Evidence That Would Support Common Class Treatment.

As with their tire wear claims, plaintiffs must show that common issues predominate over individual issues in order to certify an alignment class. But the plaintiffs have not yet attempted to make that showing here[26] – they do not even indentify, let alone offer evidence to support, any common alignment defect that would serve as a common issue in these cases. The failure to identify the single most important common

[26] As the Court recognized during the recent status conference, in *Wolin* the Ninth Circuit raised *sua sponte* issues that the parties and this Court previously had not addressed. *See* Dec. 6, 2010 Hr'g Tr. at 2. The plaintiffs have declined Land Rover's request to disclose whether they intend to continue to focus on tire wear claims, as they have up to this point, or shift to the hypothetical alignment-related issues identified by the Ninth Circuit. Land Rover assumes that, if the plaintiffs intend to pursue the latter course, they will do so on the existing record, as they also declined Land Rover's proposal to set class certification briefing after some additional limited discovery could be conducted on the issues raised by the Ninth Circuit. (Plaintiffs had agreed to a staggered supplemental briefing schedule so that Land Rover would have a full opportunity to respond to any new arguments; the Court, however, rejected the parties' proposal.)

issue – the existence *vel non* of a defect – alone signals that individual issues would predominate in these cases. And that critical failure to specify what it meant by "pertain[ing] to the 'alignment geometry' " – without more – is aggravated by the complexity of the LR3 suspension system, the countless external factors that can affect a vehicle's alignment, and the simple fact that the vehicles in the purported class were brought to market with different factory alignment settings and potentially subjected to different in-service adjustments.

a. The Plaintiffs Have Not Indentified Any Common Defect To Support Class Treatment.

The lack of any common issues binding the plaintiffs' putative class of LR3 owners is immediately obvious from their failure to put forward any evidence of a common defect. As the Ninth Circuit recognized, Plaintiffs allege that the tires on 2005 and 2006 MY LR3 "vehicles wear unevenly and prematurely because of a defect in the 'geometry' of the Vehicles." *Gable* Compl. ¶ 10; *Wolin* Compl. ¶ 10; *Gomcsak* Compl. ¶ 10. But despite four years of litigation, depositions of over a dozen witnesses, multiple rounds of expert discovery, and the review of hundreds of thousands of pages of Land Rover documents, plaintiffs still have not identified any specific alignment defect in the named plaintiffs' vehicles, let alone any *common* alignment defect.

The lack of any evidence of a common defect is clear from the testimony of the plaintiffs' proffered expert, Robert Wozniak, who focused on tire wear and did not study or offer any opinion on the nature of any alleged alignment defect. Wozniak Dep. 149:21-22 ("I was asked to look at tires, and I wasn't asked to determine the cause."). In fact, he did *not* opine that the alignment geometry settings for the LR3 are defective or improper,

id. at 176:20-177:13, did *not* opine that a vehicle is defective just because it falls out of its alignment specifications, *id.* at 197:16-23, and did *not* opine that a toe-out alignment condition is itself evidence of a defect, *see* Wozniak Sec. Dep. 74:5-9.

Mr. Wozniak's failure to offer any opinion regarding the existence of a common alignment defect on the LR3 is not surprising. After all, he did not do the work necessary to support an opinion about any alignment problem. Before his engagement in this action, Mr. Wozniak had never opined on alignment geometry and had no professional experience in suspension or any other aspect of vehicle design. Wozniak Dep. 9:3-10:17, 10:21-11:22 & 20:14-24. Throughout his involvement in this case, he did not disassemble any vehicles, perform any independent tests or research, or formulate any opinions on the suspension design or manufacturing settings of the alignment. *See* Wozniak Dep. 67:12-13.

Many of the tires that Mr. Wozniak examined, in fact, were detached from their vehicles, and no vehicle inspection was even possible. *See, e.g.*, *id.* at 48:25-49:4. Since the alignment geometry of a vehicle cannot be determined solely by examining the wear patterns on the tire – and in fact almost identical uneven tire war patterns can manifest from completely different geometry alignment settings[27] – analysis of a potential alignment defect cannot be carried out by examining tires detached from a vehicle. *See*

[27] Mr. Wozniak's own testimony in an Eastern District of California case, *O'Connor et al.* v. *General Motors Corp.*, Case No. 2:07-CV-00892FCD-GGH (E.D. Cal. filed May 10, 2007) proves this point. Mr. Wozniak concluded that "the excessive and premature inner edge tire tread wear that [he] observed" in *O'Connor* – the same type of wear he observed in this case – "is consistent with the [front] alignment geometry being in a *negative camber* condition," rather than negative toe condition he attributes the wear to here. Gomcsak Class. Cert. Opp., Ex. 27 (Declaration of R. Wozniak submitted in *O'Connor*) ¶ 10 (emphasis added).

Daws Dec. ¶¶ 20-21, 24 & 28; Wozniak Dep. 66:16-20 & 67:22-68:2. As a result, Mr. Wozniak could (and did) focus only on whether *tire wear* – not an alignment defect – could be proven with common facts. *See* Wozniak Dep. 152:25-153:4.[28]

Rather than put forward evidence of a defect, the plaintiffs consistently claim, without explanation, that "[t]he defect is a nonconformity or design flaw in the LR3 vehicles that causes premature and uneven tire wear, which [d]efendant has identified as a defect in the geometry of the vehicles," selectively parroting the reference to "geometry" from Land Rover's own TSB. *See* Ex. Pl. Resp. to Sp. Interrog. No. 3. In their proposed findings of fact, the plaintiffs assert that Land Rover has "acknowledged" a uniform defect. *See* PGFOF ¶ 12.

But Land Rover has never admitted there is a uniform defect that "pertains" to the alignment geometry and the TSB plainly does not identify any common defect – or any defect at all. *See* JLRNAFF, Ex. 42, at LRNA 503.[29] Instead, the TSB alerts dealer technicians that *some* customers *may* present with irregularly worn tires that *may* be attributable to misalignment. What type of misalignment and how that misalignment occurred (and is remedied), is for the technician to determine on a case-by-case basis. The TSB simply indicates that "***certain*** vehicles ***may*** experience some bushing settlement

[28] Wozniak did not even bother to measure the alignment settings on most of the eight (8) vehicles he "inspected." When alignment measurements were attempted, Wozniak employed unauthorized technicians who lacked the necessary equipment to obtain accurate measurements on air-suspension equipped vehicles like the LR3. JLRNAFF ¶¶ 427-30.

[29] Early in the investigation process, one Land Rover claims administrator employee referred to a specific tire wear issue as being caused by a "known factory defect" in order to explain to another employee why the tire replacement would be covered under warranty. *See* JLRNAFF ¶ 492. At no point did the employee suggest that what he imprecisely referred to as a "defect" was experienced on all – or even a specified subset – of Land Rover LR3 vehicles. Although plaintiffs' entire "uniform" factory defect theory rests on this so-called "admission," when they had an opportunity to depose its author, Alan Clarke, they declined to ask him a single substantive question about it. *Id.*

during early vehicle life . . . [that] ***may*** alter the geometry settings outside of normal tolerance, which ***may*** in turn increase tire wear." *Id.* (emphases added). The TSB even expressly notes that "[t]his situation is ***not*** experienced on all vehicles" and that "[t]oe sensitivity may be attributed to ***other factors***." *Id.* (emphases added). Thus, the plaintiffs cannot invoke the TSB to support an "alignment geometry defect," the existence of which they propose forming the critical common bond of the sprawling 50,000-plus member class.

b. Plaintiffs Cannot Demonstrate A Defect In Their LR3s' Alignment On A Class Basis.

While the plaintiffs have failed to offer evidence of an identifiable common defect with the alignment system of their LR3s, the sheer complexities involved in the LR3's suspension and alignment, and the interplay of the numerous internal and external factors that impact a vehicle's alignment, highlight that there is no "common" defect with the plaintiffs' vehicles. Even assuming that plaintiffs' vague allusions to the existence of an undefined "alignment geometry defect" passed muster, individual inquiries would be still required to determine whether any given plaintiff's vehicle had some defect in the alignment of his or her vehicle. Here's why.

The LR3's suspension system, like that of any vehicle, is responsible for ensuring passenger comfort, maintaining performance integrity, maximizing on-road and off-road versatility and functioning, and promoting tire life. Daws Dec. ¶¶ 20-21; Sherrey Dec. ¶¶ 9-10. These objectives are, from an engineering perspective, often in tension with one another: Improving along one metric (say, the ability to maintain superior traction while cornering at high speeds) often involves potentially diminishing its performance along

others (say, tire life). Sherrey Dec. ¶ 27. The suspension system of the LR3 is defined by more than 240 suspension system "targets" requiring the development of compatible body and power train components, and over 1,000 individual suspension component targets requiring integration of each component's individual dimensional, material, tolerance, environmental, and manufacturing aspects. Sherrey Dec. ¶ 9.

Suspension – or alignment – geometry is one parameter of the design of a suspension system and involves a series of angle measurements. Daws Dec. ¶ 10. The design goal for any vehicle is to maximize tire contact with the surface as the car drives down the road. Daws Dec. ¶ 21. Consequently, alignment settings on many vehicles, including the LR3, are expressed in "tolerance ranges" that surround the desired optimal tire angle. Sherrey Dec. ¶ 10; Daws Dec. ¶ 20. Because a vehicle in motion creates tremendous torque and stress on the wheels, they will naturally adjust from their position at standstill. *Id.* ¶¶ 5 & 21. Thus, when stationary, passenger vehicles and SUVs never have toe and camber settings different at neutral (*i.e.*, four perfectly vertical tires in parallel to each other and the frame of the vehicle), but are instead designed to target neutral when achieving cruising speed. *Id.*; Sherrey Dec. ¶ 11. [30]

A vehicle's alignment settings are set at the factory but change during the life of the vehicle. Daws Dec. ¶ 20; Sherrey Dec. ¶ 25. One factor that can impact alignment

[30] "Toe" is the directional angle a tire points relative to the forward direction of a vehicle. *Id.* "Negative toe," or "toe out," means the front of the tire is farther away from the center of the vehicle than the rear of that tire—or "duck-footed," because both tires on the same axel (*e.g.*, front or back) appear to be pointing away from the vehicle. *Id.* By contrast, "camber" is the measurement of the angle between the centerline of the tire and a line drawn vertical to the ground. JLRNAFF ¶ 37. That is, camber is the inward or outward tilt of the tire as compared to true vertical. *See id.* "Caster" is yet another important alignment geometry measurement, but is not implicated here and therefore discussed no further.

settings is known as "bush settlement" or "bush creep," which is not a defect but rather a phenomenon that naturally occurs in all vehicles to varying degrees. Sherrey Dec. ¶ 28. On the LR3, each wheel is connected to the frame using two upper and two lower arms, and "suspension bushings" are the joint pieces that connect the arms to the frame. *Id.* These small, energy-absorbing rubber bushings support the suspension system, control suspension movement and flexibility, support and maintain distribution of the load, and control vibration. *Id.* ¶ 27. The "stiffness" and location of the bushing impacts passenger comfort and vehicle performance inversely: the "stiffer" the bushing, the firmer the car will handle while traversing uneven terrain; at the same time, however, a "stiffer" bushing absorbs less vibration and results in a less comfortable ride.

During the assembly process, a vehicle first becomes weight-bearing when the body of the car is attached to the frame and at this point the suspension system adjusts slightly as the bush rubber absorbs the additional weight. *See id.* ¶¶ 27, 29 & 31. This compression of the bush is called "settlement" or "creep." The amount of any bush creep is a function of time after a vehicle becomes weight bearing, not the mileage a vehicle is driven. *See* JLRNA ¶ 180. Bush creep generally occurs during the early stages of the vehicle's production cycle, and its rate decreases exponentially over time, meaning that it is generally done "settling" before it reaches a customer. *See id.*

The extent of bush creep experienced by any particular customer may therefore be impacted by the amount of time that passes between when the frame becomes weight-bearing and when the vehicle has its alignment and headlight aim verified. If the bushing does not have enough time to "settle" before this alignment process occurs, settling *may*

continue post-production, and in extreme cases may cause the initial alignment settings to fall outside of recommended specification. Consequently, whether a vehicle was aligned at the end of the week or on a Monday, or before a holiday or after, alone can ultimately impact whether any particular vehicle suffers from excessive bush creep. Sherrey Dec. ¶¶ 31-32.

While alignment geometry change starts in the manufacturing process, geometry settings can also change as a result of an individual's driving habits including driving over/striking curbs or medians, involvement in an accident, driving through deep potholes, high speed driving, and hard cornering, acceleration, and braking. Sherrey Dec. ¶ 25; Daws Dec. ¶ 39; Wozniak Dep. 197:24-198:13. Alignment settings are also impacted by a particular vehicle's driving experience. For example, road surfaces with large expansion joints, potholes, pavement transitions, pitched slope roadways, and speed bumps can influence the development of misalignment, creating opportunities for factory-set specifications to slip or parts to deform. Daws Dec. ¶ 39. This is, of course, the everyday misalignment that all vehicle owners are all too familiar with. Although anticipated, when any of the tens of suspension components are no longer performing within an approved range, it will impact the vehicle's suspension settings. Daws Dec. ¶ 20; Sherrey Dec. ¶¶ 23, 25, 30 & 39.

It is also common for drivers to take in their vehicles for service to their alignment. A service professional may perform a realignment on a vehicle to address a customer's complaint (*e.g.*, that the vehicle is "pulling" or "drifting," the steering wheel is vibrating or misaligned, the tires are wearing, etc.). Sherrey Dec. ¶ 24. A realignment may also be

necessary in conjunction with other repairs (*e.g.*, tire replacement or worn suspension parts). *Id.* Though intending to fix an alignment problem, a technician may adjust the vehicle to suboptimal suspension settings if he/she employs incorrect specifications, faulty processes, and/or inadequate equipment. *Id.*[31] All of the many elements involved in the LR3's suspension and alignment, and the numerous factors that impact them, undermines the notion that there is a generalized "alignment geometry defect" that could be proven on a class basis, rather than through individual mini-trials.

c. Because The Vehicles In The Putative Class Have Different Factory Alignment Settings And Prescribed Adjustments, There Is Not A "Common" Design Or Manufacturing Defect That Could Be Established On A Classwide Basis.

Even beyond the individual factors that affect a vehicle's alignment discussed above, the vehicles at issue here – 2005 and 2006 LR3s – inherently have different original alignment specifications set by the manufacturer. As Land Rover has previously explained, in early production of the 2006 model year LR3, its engineers re-calibrated certain geometry settings at the production facility. *Id.* ¶¶ 33-37. The production alignment settings were altered twice between March and May 2006. *Id.* As a result, the purported class of MY 2005 and 2006 vehicles will have three different sets of production alignment specifications. In addition, Land Rover adopted three different in-service alignment adjustments under the TSB for vehicles that experienced severe toe-out misalignment or irregular tire wear (the recommended suspension settings for normally

[31] Technician error is particularly problematic in the LR3 because, among other reasons, many third-party service stations do not have the equipment necessary to properly set the LR3's alignment. *See* JLRNAFF ¶ 429 (explaining that non-Land Rover service centers do not have equipment to initiate the "tight tolerance" mode required for taking alignment readings and resetting geometry specifications according to the TSB).

operating vehicles remained unchanged from their original factory settings). *See* JLRNAFF ¶ 215. The fact that the vehicles in the putative class were brought to market with different alignment settings and provided different in-service adjustment instructions means that individualized inquiries would be necessary to determine the proper alignments setting for each putative class member's vehicle and the existence of a manufacturing or design defect could not be established on a class basis. [32]

2. Plaintiffs' Alignment Claims Require The Same Individualized Investigations As Their Tire Wear Claims.

The plaintiffs' failure to show that the vehicles at issue share any common alignment defect is reason enough to reject their certification bid. But many of the other fundamental problems with the other class claims plague this theory as well. After all, plaintiffs' alignment claims are nearly mirror images of their tire wear claims and involve all of the same individualized inquiries. Although the Ninth Circuit noted that certain common alignment-related issues seemed to "predominate," it had no occasion to, and did not, rigorously analyze plaintiffs' alignment claims against the Rule 23 requirements—including any consideration of whether common issues actually predominate *over* individual inquiries. This Court, however, is obligated to undertake that analysis. For that reason, we summarize below the individual inquiries that run through the plaintiffs'

[32] This stands in stark contrast to *Daffin*, where all of the class member vehicles – even over multiple model years – had the same allegedly defective *part* – a throttle body. *See Daffin*, 458 F.3d at 552 ("whether the throttle body is defective is common to all 1999 or 2000 Villager owners because they all have the same throttle body"); *see also id.* at 553-54 (repeatedly stressing that the class satisfied Rule 23 because class members' vehicles had the exact same throttle body component). In this case, the two model year LR3s at issue would have variations in processing through the WAHA facility (which changed repeatedly during the two production years at issue), as well as different factory alignment geometry settings and targeted in-service adjustments, and potential changes in suspension componentry caused by innumerable external factors – something plaintiffs have not even investigated in discovery.

alignment defect claims, which further demonstrate that common issues do not predominate over individual issues such that certification would be appropriate in these cases.

Mixed Class and Causation. As with plaintiffs' tire wear claims, there is no dispute that the alignment phenomenon described in the TSB does *not* affect all class member vehicles. *See* Wozniak Dep. 189:13-17, 191:19-192:16, 196:18-24 & 221:13-222:2; JLRNACL ¶ 17; JLRNAFF ¶¶ 237-245; Gomcsak Class Cert. Opp. at 8-11; *see supra* at 20-22. Accordingly, the Court would have to conduct a mini-trial for each class member to determine whether his or her vehicle had an alleged alignment defect, because:

- Only a fraction of the class vehicles will ever experience bush settlement resulting in a rear toe-out misalignment condition sufficient to cause uneven/premature tire wear. Wozniak Dep. 189:13-17, 191:19-192:16, 196:18-24 & 221:13-222:2. Whether the vehicle experienced a "toe-out" condition requires individualized inspection of (i) the vehicle's initial manufacturing geometry setting (determined only by the date of manufacture because the rear total toe manufacturing specifications changed multiple times during production of the MY 2006 LR3); (ii) the measurement of "settlement" or "creep" in the rear bush's location or adjoining suspension arm; and (iii) the vehicle's alignment readings at the time of tire replacement or other alignment servicing from date of sale to present. JLRNACL ¶ 18; JLRNAFF ¶¶ 47, 50-52 & 63.
- Determining whether each class member's LR3 experienced a toe-out condition due to bush settlement requires ruling out the many other potential causes of a toe-out condition or alignment change, such as, *inter alia*, curb strikes, hitting potholes, road conditions (*e.g.*, frequent driving on highly pitched roadways), worn suspension parts, improper initial alignment, improper service alignment, and vehicle accidents. JLRNACL ¶ 24; JLRNAFF ¶¶ 66-69, 71-75, 141, 151-53, 160, 167 & 170.

These individualized inquiries demonstrate that any adjudication based on plaintiffs' allegations of an alignment defect would quickly devolve into a trial of issues that vary from vehicle to vehicle and from plaintiff to plaintiff. JLRNACL11; JLRNACL

¶¶ 19-32.

When the Ninth Circuit acknowledged that "individualized factors" rendered a tire wear class uncertifiable but surmised that such factors would "not affect whether the vehicles were sold with an alignment defect," *Wolin*, 617 F.3d at 1173, it accepted the plaintiffs' allegations that there was an alignment defect common to all vehicles in the class. But plaintiffs have failed to meet their burden of showing that there actually is a common alignment defect. For this reason, plaintiffs' case further differs from *Daffin*, 458 F.3d at 550, which the Ninth Circuit found instructive. In *Daffin*, the court held that plaintiffs could prove their claims on a classwide basis, even though some class members' vehicles had not manifested the alleged defect, because all class members' vehicles had the same defective throttle body assembly. *Id.* at 552-53. Consequently, the Court found that, whether or not the throttle body component had failed, the manufacturer could be ordered to repair or replace it under the vehicle's express warranty. *See id.*

But here, plaintiffs have not offered any evidence that their LR3 vehicles share any defective alignment part or other, generalized "defect." Instead, the vehicles were brought to market with three different alignment settings. Only vehicles that experienced a toe-out condition were provided in-service adjustments under the TSB (the remainder were serviced consistent with the original recommended settings), and Land Rover implemented three such adjustments under the TSB. Plaintiffs own expert admits that neither the factory settlings nor the in service adjustments were defective or improper. *See* Wozniak Dep. 176:20-177:13.

Thus, unlike in *Daffin* where there was a common defect, and a common cure,

there is no common defect to repair or replace in all of the plaintiffs' LR3s. As a result, it is not clear what remedy plaintiffs seek for the vast majority of class members who have not experienced an alignment condition traceable to rear toe sensitivity. For the few class members that have experienced the alignment geometry condition identified in the TSB, Land Rover has provided complimentary realignments under warranty. Unlike a single defective part that may be prone to failure, there is simply nothing defective about a vehicle's "geometry alignment" that has not yet come out of specification. JLRNAFF ¶¶ 56-57. Consequently, this case is in line with those the *Daffin* court specifically distinguished, where "different class members were exposed to different products such that *the uncommon issue of causation predominated* over the lesser shared issues." *Id.* at 554 (quoted in *Wolin*, 617 F.3d at 1174; emphasis added).

Rather than adhere to *Daffin*, this Court should follow *Lewis v. Ford Motor Company*, a recent case in which the court addressed allegations of a suspension defect that purportedly resulted in premature wear of other parts of the vehicle. 263 F.R.D. at 254. There, the court recognized that because ascertainable loss was required for a plaintiff to state a claim, and plaintiffs' class definition included *all* purchasers and lessees, "the Court would need to inquire into individual circumstances . . . to determine if a particular class member suffered an ascertainable loss." *Id.* at 253-54. The court explained that such individualized inquiries would include "whether the vehicle experienced the Oscillation Defect, whether the consumer paid for repairs, and/or whether when he traded or sold the vehicle, he received a lower price as a result of the Oscillation Defect." *Id.* at 254.

This Court would have to undertake the same individualized inquiries because injury or loss is required for plaintiffs to prove their claims. And because plaintiffs' purported classes include all purchasers and lessees, numerous individualized determinations would be necessary. As the court held in *Lewis*, "[s]uch a detailed factual analysis would be an unconscionable use of the court's time and makes this case unsuitable for class treatment." *Id.*; *see also id.* at 268 ("Clearly, if proof of the essential elements of the cause of action require individual treatment, then there cannot be a predominance of 'questions of law and fact common to the members of the class.' ") (citations omitted). As in *Lewis*, this Court should decline to be the first to certify a class based on nothing more than unsupported allegations of a common defective alignment.

Plaintiffs' Limited Warranty Claim. In addition to all of the individualized inquiries discussed above regarding tire wear to adjudicate a breach of warranty claim, a plaintiff must similarly prove Land Rover's limited warranty failed of its essential purpose. JLRNACL ¶¶ 14 & 33-40; Gomcsak Class Cert. Opp. at 12-16. As in the tire wear setting, this would require a case-by-case examination of whether the particular class member provided Land Rover with reasonable notice of the alleged alignment defect, whether that class member presented his/her vehicle to a facility authorized to perform warranty repairs, and whether Land Rover – given a reasonable opportunity – was able to conform the vehicle to the warranty within a reasonable amount of time and repair attempts. *See* JLRNACL ¶¶ 33-38.

Individual inquiry would also be required to identify any class member who paid for an alignment adjustment caused by the bush settlement condition at issue. Although

Land Rover prorated tire reimbursements, neither party disputes that Land Rover's warranty covered related realignments at no charge to the customer. All of the named plaintiffs have had their vehicles realigned multiple times, and it is reasonable to expect that nearly every 2005 and 2006 Model Year LR3 is also likely to have had multiple realignments and adjustments at this point.[33] These individualized issues would overwhelm any issues common to the class.

Plaintiffs' State Law Consumer Protection Claims. Plaintiffs' consumer protection claims also raise numerous issues that can only be resolved on an individualized basis, even if "limited" to a purported alignment defect class. First of all, to the extent that plaintiffs' consumer protection claims are predicated on an alleged breach of warranty, the plaintiffs must overcome the same hurdles to class treatment described above. *See supra* at 49-50; *see also* JLRNACL ¶¶ 41-43.

But even were plaintiffs' consumer protection allegations independent from their breach of warranty claims, plaintiffs must still demonstrate that they suffered damages as a result of a statutory violation. *See* JLRNACL ¶¶ 44-45. As explained earlier, *see supra* at 46, very few purported class members will have experienced the geometry alignment condition identified in plaintiffs' complaint and fewer still (if any) will have paid for any alignment necessitated by it. JLRNACL ¶ 46; JLRNAFF ¶¶ 237-240; *see also* JLRNAFF, Ex.42, at LRNA 503; *see also* JLRNAFF, Ex.53, at LRNA 507-510. Consequently,

[33] Only Plaintiff Gable allegedly paid for one of the several alignments performed on his vehicle. *See* JLRNAFF ¶ 279; *see also* JLRNAFF ¶¶ 295, 298 & 304; Gomcsak Class Cert. Opp. at 4. But his service history reflects many alignment repairs that were covered under warranty, and there is no evidence (or specific allegation) that his need for an alignment adjustment on the particular occasion on which he was charged was the result of excessive bush settlement and not one of the countless other reasons that vehicles require alignment work. *See surpa* at 40-44.

individualized inquiries will be required to determine, among other things, whether each plaintiff experienced a toe-out alignment condition, whether the condition was caused by bush settlement and not any of the other myriad factors that affect vehicle alignment, and whether that plaintiff made any payment for an alignment. *See* JLRNACL ¶¶ 46-47.

Any claim of misrepresentation or omission under the MCPA or OCSPA also requires individualized proof of a causal connection between the alleged material misrepresentation or omission and plaintiff's reliance thereon. JLRNACL ¶¶ 50-51, Gomcsak Class Cert. Opp. at 19-20. Determining such causal connection requires individual inquiry into both the materiality of the misrepresentation or omission and *each* purchaser's reliance on that information (or lack thereof) when purchasing the vehicle.[34]

Diminished Value. Just as with their tire wear claims, any effort by the plaintiffs to rely on a "diminution of value" theory as a way to circumvent the individualized considerations implicated by their alignment defect claims would actually have the effect of *increasing* their individualized proof problems. Each alignment class member would have to make the same showings as any putative member of a tire wear class described above to prove causation and damages. *See supra* at 28-29; JLRNACL ¶¶ 58-59; *see also*

[34] Additionally, the MCPA and OSCPA expressly provide that certain statutory claims cannot proceed as class actions. *See supra* at 26-28. Section 11(3) of the MCPA governs the particular circumstances under which a plaintiff "may bring a class action on behalf of persons residing or injured in this state," and provides that a private plaintiff can only pursue a class action in three defined circumstances. M.C.L.A. ¶ 445.911(3)(a)-(c) (*e.g.*, where the alleged offending conduct has already been declared an unlawful, unfair, or deceptive act by certain judicial bodies prior to the filing of the action); *see* JLRNACL ¶¶ 69-73. Meanwhile, a class action can only be maintained under the OSCPA if the defendant had sufficient prior notice that the alleged conduct was in fact unfair, deceptive, or unconscionable. *See* Gomcsak Class Cert. Opp. at 16-19. Because plaintiffs' motions for class certification utterly ignore and fail to satisfy these statutory qualifications, they should be denied.

Cansino v. *Yamaha Motor Corp., U.S.A.*, No. 3:04cv274, 2010 WL 2607251, at *11 (S.D. Ohio June 24, 2010); *Lewis*, 263 F.R.D. at 264.[35]

Unjust Enrichment. Plaintiffs' unjust enrichment claims related to the alleged alignment defect also involve individualized inquiries. *See supra* at 29-30; *see also* JLRNACL ¶¶ 60-66; Gomcsak Class Cert. Opp. at 20-22. Even if some plaintiff could demonstrate he/she paid money to Land Rover for an alignment repair (which they could not do because maintenance is performed by independent dealers and such work would be covered under warranty, in any event), he or she still would have to show that the alignment was necessitated by the alleged defect (which could only be proven on an individualized basis). The plaintiffs also would have to demonstrate, on a case-by-case basis, that Land Rover's retention of any benefit conferred was inequitable. JLRNACL ¶¶ 62-64; Gomcsak Class Cert. Opp. at 21-22.

B. A Class Action Is Not A Superior Vehicle For Resolving Plaintiffs' Alignment Claims.

Notwithstanding the Ninth Circuit's dicta that Rule 23's superiority requirement could be met in this case if the existence of a defect could be proven on a classwide basis, *see Wolin*, 617 F.3d at 1176, the above analysis makes clear that plaintiffs would be required to litigate numerous individual issues in these cases, including the purported common issue of whether his or her LR3 has the alleged "alignment geometry" defect. As with plaintiffs' tire wear claims, it is hard to fathom how resolution of all of these individual issues could be managed with any efficiency or fairness. The plaintiffs do not

[35] As noted above, class members who leased their vehicles could not state a diminution of value claim under the MCPA, which requires actual sale of the vehicle. JLRNACL ¶ 57.

help resolve this mystery. Their crude trial plan – simple bifurcation of liability and damages – proposes no procedures remotely grappling with the difficulties posed by the individual proof problems that pervade their claims. JLRNACL ¶¶ 83-85. Because plaintiffs have not – and cannot – articulate any meaningful plan for a classwide trial, the Court should deny certification.[36]

C. Plaintiffs Are Not Typical And Adequate Representatives Of Any Putative Alignment Class.

Apart from all the other flaws, plaintiffs' purported class action also fails for want of typicality. None of the named plaintiffs' vehicles exhibits the "geometry defect" of which the class complains and most, if not all, received complimentary alignment adjustments while under warranty. JLRNACL ¶ 87; JLRNAFF ¶¶ 87-89, 357-363 & 366-371; Gomcsak Class Cert. Opp. at 22-23. Land Rover therefore has obvious defenses to these named plaintiffs' claims that are based on facts specific to their vehicles, and they could not adequately represent any plaintiff who may actually have experienced the alleged geometry defect or expended out-of-pocket costs to cover a warrantable event.

* * *

The fact that plaintiffs claims, whether viewed as related to tires or alignment, fail to comply with the requirements of Rule 23 is not surprising. Owing to the same individualized inquiries that run throughout the plaintiffs' claims, no court has *ever* certified a tire wear or alignment defect class, or any issues involving wearable vehicle parts, for class treatment. The three cases that the plaintiffs have repeatedly cited to

[36] Should plaintiffs submit a revised trial plan in an attempt to correct these deficiencies, Land Rover reserves the right to respond.

support their bid for certification have either been vacated, *see Samuel-Bassett* v. *Kia Motors Am.*, 212 F.R.D. 271 (E.D. Pa. 2002), *vacated*, 357 F.3d 392 (3d Cir. 2004), or as this Court previously noted, have experssly recognized that claims involving cars and wearable vehicle parts like tires or an alignment in particular, are perfectly unsuitable for class treatment. *See Hicks* v. *Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 911-912 (2001); *Microsoft Corp.* v. *Manning*, 914 S.W.2d 602, 609 (Tex. App. 1995). This Court should decline to be the first to certify such claims.

CONCLUSION

For these reasons, as well as the reasons set forth in Land Rover's prior briefing, Land Rover respectfully requests that plaintiffs' motions for class certification in the *Gable*, *Wolin*, and *Gomcsak* cases be denied.

Respectfully submitted,

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