NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VINCENT LUPPINO, CLIFF STERN and NOEL J. SPIEGEL, individually and on behalf of all others similarly situated, Plaintiffs, v. MERCEDEZ-BENZ, USA, LLC, Defendant.	Civil Action No.: 09-5582 (JLL) **OPINION**

LINARES, District Judge.

This matter comes before the Court by way of Vincent Luppino, Cliff Stern, and Noel J. Spiegel (collectively, "Plaintiffs'") Renewed Motion for Class Certification. (ECF No. 422, "Pls.' Mov. Br."). This Motion has been the subject of extensive briefing from both parties. (See ECF Nos. 422, 429, 439, 445). Pursuant to Federal Rule of Civil Procedure 78(a), the Court held oral argument on this matter on October 26, 2015. Although this Court asked the parties whether experts would be presented at the hearing, Plaintiffs and MBUSA agreed that neither side would produce experts. After careful consideration of the arguments raised in the parties' respective briefs as well as the arguments presented during the October 26, 2015 hearing, and for the reasons set forth below, this Court denies Plaintiffs' Motion for Class Certification.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs Vincent Luppino, Cliff Stern, and Noel J. Spiegel are New Jersey residents who purchased or leased at least one of Defendant Mercedes-Benz, USA, LLC's ("MBUSA" or "Defendant") passenger-vehicles from the years 2006 through the present. (ECF No. 342,

Corrected Sixth Amended Complaint, "Compl." at 33-48). Defendant MBUSA is a luxury car distributor responsible for marketing and distributing vehicles manufactured by the Daimler Group ("Daimler").

Plaintiffs allege that Wheels on the putative class vehicles "PCVs" suffer from a "uniform defect; specifically, that they are overly susceptible to fail particularly when paired with low-profile tires that leave little cushion between the Wheels and the road." (Pls.' Mov. Br. at 7). In support of this claim, Plaintiffs offer the expert testimony of, among others, metallurgist Dr. David J. Duquette and licensed professional engineer Mr. Robert A. Russell, who after visual examination of discarded Wheels that Plaintiffs subpoenaed from three Mercedes-Benz dealerships, determined that this defect results in a crack along the radius of the Wheels. (Pls.' Mov. Br. at 7-8, 13-14). According to Plaintiffs' expert Dr. Duquette, "[w]hen the crack length exceeds the width of the bead seat of the tire the crack is essentially a free path for air to escape from the interior of the tire/rim. At that point the Wheel becomes unusable (because the tire paired with that Wheel will no longer hold air." (Pls.' Mov. Br. at 20, Ex. 2, "Duquette Rep." at 15).

Plaintiffs further allege that MBUSA was aware of this defect but failed to disclose same to their consumers and refused to replace damaged Wheels in violation of their written warranties. (Pls.' Mov. Br. at 2-6). Plaintiffs state that "[a]ll of the vehicles are sold with the same Warranty," which provides that MBUSA "will make any repairs or replacements necessary, to correct defects in material or workmanship arising during the warranty period." (Pls.' Mov. Br. at 6) (quoting Ex. 21).

Accordingly, Plaintiffs assert claims of breach of express warranty, breach of the implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act, and breach of the

New Jersey Consumer Fraud Act. (Compl. at 51-54). Notably, Plaintiffs do not allege any products liability claims or claims otherwise based exclusively upon the alleged defect.

In late December 2014, Plaintiffs filed a motion seeking to certify a class while Defendant simultaneously filed its opposition to said certification motion. (ECF Nos. 352, 356). Subsequently, three *Daubert* motions were filed by the Parties (one by Plaintiffs and two by Defendant) seeking to exclude, at the class certification stage, the opinions and testimony of various experts who offered opinions relevant to class certification inquiries. (ECF Nos. 361, 366, 395). Thus, Plaintiffs' December 2015 motion for class certification was administratively terminated pending the outcome of the *Daubert* motions.

This Court issued an Opinion on all pending *Daubert* motions on June 29, 2015, which granted in part and denied in part one of the motions, while denying the remaining motions. The Court afforded Plaintiffs thirty (30) days to "appropriately alter and refile their class certification motion in accordance with [the aforementioned] Opinion." (ECF No. 17). On July 30, 2015, Plaintiffs filed the Renewed Motion for Class Certification and supporting motion, presently before this Court. (ECF No. 421).

Plaintiffs seek certification "on behalf of individuals who purchased/leased a Mercedes-Benz passenger vehicle, Model Year 2006 to present, in any state (or, in the alternative, in the State of New Jersey), equipped with 17, 18, or 19-inch aluminum-cast-alloy wheels (hereinafter "Wheels")). (Pls.' Mov. Br. at 1). Specifically, "Plaintiffs seek certification under Federal Rule of Civil Procedure 23(c)(4) with respect to the issue of liability, with damages to be calculated later through an appropriate Special Master or other claims process deemed suitable by this Court." (Id. at 1). Defendant opposes this Motion. (ECF No. 429, "Defs.' Opp. Br.").

LEGAL STANDARD

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). Federal Rule of Civil Procedure 23, as well as interpretive case law, govern a court's class certification analysis. "Class certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *In re Hydrogen Peroxide Antitrust Litigation,* 552 F.3d 305, 309 (3d Cir.2008) (quoting *Gen Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 161 (1982)). To meet the prerequisites of Rule 23, a plaintiff must establish that the four requirements of Rule 23(a)—namely, numerosity, commonality, typicality, and adequacy of representation—have been met. *See* Fed. R. Civ. P. 23(a); *see also Hydrogen Peroxide*, 552 F.3d at 309, n.6. Courts have also impugned the requirement that the class be ascertainable. *See, e.g., Carrera v. Bayer Corp.*, 727 F.3d 300, 306-07 (3d Cir. 2013); *see also Byrd v. Aaron's Inc.*, 784 F.3d 154, 161-62 (3d Cir. 2015).

Additionally, a Plaintiff seeking class certification must show that the requirements of Rule 23(b)(1), (2), or (3) have been met. Fed. R. Civ. P. 23(b); *see also Hydrogen Peroxide,* 552 F.3d at 309 n. 6. Rule 23(b)(3), the basis for certification here, requires that, in addition to meeting the requirements of Rule 23(a), a plaintiff also establish "that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see also Hydrogen Peroxide,* 552 F.3d at 310. Courts refer to the additional requirements of Rule 23(b)(3) as the "predominance" and "superiority" requirements.

Finally, if a Plaintiff satisfies the requirements of Rule 23(a) and (b), a plaintiff may seek certification, under Rule 23(c)(4) as to particular issues. Fed. R. Civ. P. 23(c)(4); *see also Comcast v. Behrend*, 133 S. Ct. 1426, 1435, n.6 (2013) ("[A] class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.").

Moreover, "'[c]ertification calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met.'" *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 484 (3d Cir. 2015) (quoting *Hydrogen Peroxide*, 552 F.3d at 307). When determining whether these requirements have been met, "the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties." *Hydrogen Peroxide*, 552 F.3d at 307. "This is true even if the class certification inquiry overlaps with the merits of the causes of action." *Id.* A court's "factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence." *Id.*

DISCUSSION

A. Preliminary Matter

At the outset, the Court finds it necessary to clearly define the class to which Plaintiffs are seeking certification. As Plaintiffs' counsel conceded at oral argument, Plaintiffs' briefing was unclear as to the type of class that Plaintiffs are asking this Court to certify. (Oct. 26, 2015, Oral Argument Transcript, "Tr." at 4:24-5:2). Specifically, it was unclear from the record whether Plaintiffs are seeking certification on the issue of Defendant's liability, with damages to be tried separately, or on the issue of the existence of a defect. *Compare* Pls.' Mov. Br. at 1 (requesting certification "with respect to the issue of Mercedes' liability") *with* Pls.' Reply Br. at 7 ("MBUSA also argues that the type of radial fatigue cracking present in a large number of Mercedes-Benz

wheels can occur after a substantial impact is imparted to the inboard bead seat. While Plaintiffs disagree, *that is the liability issue to be tried.*").

At oral argument, Plaintiffs' counsel conceded that "it's essentially the same to try the liability or the issue." (Id. at 35:19-20). Ultimately, Plaintiffs' counsel represented that they are "happy to try just the single issue of defect." (Id. at 35:21-22). While the Court is cognizant of Defense counsel's objection to certification of the defect issue alone because "that is not what the motion says" and it "is not due process," (Tr. at 45:7-12) the Court finds these due process concerns unsubstantiated in light of the fact that the parties' briefing of (b)(3) liability with damages severed is inclusive of briefing on the (b)(3) liability of a (c)(4) issue class on the issue of a design defect. Moreover, this Court is well within its discretion to "define[] the parameters of the class definition" as such, even absent Plaintiffs' concession to try the sole issue of defect. *Reyes*, 802 F.3d at 494 (quoting Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1898 (2014)). Accordingly, the Court will consider the appropriateness of (b)(3) certification of a (c)(4) issue class as to the existence of a uniform design defect.

B. Ascertainability

"Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria." *Marcus v. BMW of North America,* LLC, 687 F.3d 583, 593 (3d Cir. 2012); *see also Carrera*, 727 F.3d at 306. This requirement "takes a forward-looking view of the administration of the Rule 23(b)(3) class-action device in practice." *Byrd*, 784 F.3d at 162. Specifically, the ascertainability requirement functions to ensure that class members can be identified such that proper notice may be given pursuant to Rule 23(c)(2)(B) and

"protect[s] defendants by ensuring that those persons ultimately bound by the final judgment could be clearly identified." *Id.* at 162, n. 5.

The Third Circuit recently provided clear guidance to a district court determining whether a proposed class is ascertainable, stating: "The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd*, 784 F.3d at 163 (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 249, 355 (3d Cir. 2013)). The Circuit Court noted that "[t]he ascertainability requirement consists of nothing more than these two inquiries." *Byrd*, 784 F.3d at 163. A plaintiff is not required to "identify all class members at class certification" to satisfy the ascertainability requirement, *id.*; rather, a plaintiff need only show that "class members *can* be identified" *Carrera*, 727 F.3d at 308, n. 2 (emphasis added)).

Here, there is little dispute that the class is "defined with reference to objective criteria." *Byrd*, 784 F.3d at 163. The class is defined with reference to objective criteria where it includes individuals who purchased or leased a Mercedes-Benz passenger Vehicle from 2006 through the present, consisting of 17, 18, or 19 inch aluminum, cast-alloy Wheels that were originally manufactured by Daimler. (Pls.' Mov. Br. at 1). Thus, the first factor identified in *Byrd* is satisfied.

Defendant argues that the second prong, the requirement that there exist "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition," *Byrd*, 784 F.3d at 163, is not met in this case. (Def's. Opp. Br. at 7-9). Specifically, Defendant explains that at any time after purchasing or leasing an MBUSA vehicle, a class member could have had a wheel replaced with one that was not originally manufactured by Daimler, that is not made of aluminum cast-alloy, or that is 16 or 20 inches and thereby excluded

from the class definition. (Id.). According to Defendant, MBUSA records do not track these post-sale changes. (Id. at 7-9). Thus, unless individual class members presented their defective wheels at the claims processing stage, Defendant contends that MBUSA would have no way of challenging class members' assertions that they are members of the class, resulting in "'serious due process implications.'" (Id. at 9 (quoting *Marcus*, 687 F.3d at 594)).

The Third Circuit has addressed an ascertainability challenge in a very similar context. *See Marcus*, 687 F.3d at 592-94. In *Marcus*, the Circuit found a putative class of car owners who had Bridgestone Run-Flat Tires that had gone flat and been replaced was not ascertainable. *Marcus*, 687 F.3d at 593. The Circuit credited the same argument made by MBUSA here that "not every car that comes onto a dealership lot with Bridgestone RFTs necessarily leaves the lot with the same tires." *Id.* at 593. Moreover, the Third Circuit recognized that even if BMW's records identified the class vehicles, the company's records would not identify which tires "'have gone flat and been replaced', as the class definition requires." *Id.* at 594.

The Court provided that "[i]f Marcus attempts to certify a class on remand, the District Court—adjusting the class definition as needed—must resolve the critical issue of whether the defendant's records can ascertain class members, and, if not, whether there is a reliable, administratively feasible alternative." *Id.* at 594. The Court warned that "simply having potential class members submit affidavits that that their Bridgestone RFTs have gone flat and been replaced may not be 'proper or just.'" *Id.* Indeed, the Court stated that requiring defendants "to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications." *Id.* In *Byrd v. Aaron's Inc.*, the most recent case out of this Circuit detailing the ascertainability requirement, the Court expressly upheld its rationale and findings in *Marcus*. *See Byrd*, 784 F.3d at 163.

Based on the above facts, Defendant relies upon *Marcus* and argues that the putative class is not ascertainable. (Def's. Opp. Br. at 7-9). Plaintiff responds that *Marcus* is distinguishable from this case because unlike in *Marcus*, where the class was defined in terms of individuals who had purchased the allegedly defective tires, whose tires had gone flat, and who had replaced their tires, here, the class definition is limited to individuals who purchased or leased vehicles with the allegedly defective tires, without a showing of additional elements. (Pls.' Reply Br. at 2, n. 2). The extent to which original wheels were altered in any way after they were sold or leased, according to Plaintiffs, "is an irrelevant red herring" because "[t]he issue is whether the cars were equipped with the subject wheels when the vehicles were sold or leased." (Id.). The Court finds these arguments by Plaintiff unavailing in light of the fact that MBUSA is entitled to argue, as a defense at the claims damages processing stage, that a putative class member should not recover because his or her wheels were not of the kind that the jury found to be defective.

Plaintiff also argues that "[w]hile MBUSA might technically not have records showing what wheels were sold on a particular vehicle, its dealers do, and MBUSA readily has access to those records." (Pl's. Reply Br. at 2). Plaintiff further attempts to undermine MBUSA's argument that its records are insufficient to identify class members where MBUSA has provided "detailed records concerning recent purchases or leases by the named Plaintiffs, including the year and model of the vehicle, which wheels it was equipped with, whether wheel-and-tire insurance was purchased, and even which warning labels appeared on the vehicle." (Pls.' Reply Br. at 1-2). In response, Defendant contends that its findings as to the three named class members does not suggest that it will be administratively feasible to ascertain all class members because Defendant was only able to ascertain the wheels belonging to the named Plaintiffs here after "significant discovery, which led to individual inquiries for records of third-party, independent dealers."

(Def's. Opp. Br. at 9, n.4). The Court credits Defendant's argument that repeating the same inquiry for every putative class member would be too burdensome. Indeed, such a process is necessarily at odds with a policy objective behind the ascertainability requirement to "remove[] administrative burdens that were 'incongruous with the efficiencies expected in a class action.'" *Byrd*, 784 F.3d at 162, n. 5 (quoting *Marcus*, 687 F.3d at 593)).

In light of the Defendant's representations, which this Court finds credible, that MBUSA does not have sufficient records by which to identify any wheels that were altered by a third-party (i.e., a non-MBUSA dealership) after sale or lease, the issue then becomes whether Plaintiff has presented enough evidence to show that there exists an administratively feasible method to identify class members such that MBUSA is not required to merely rely upon the putative class members' "say so." *See Marcus*, 687 F.3d at 594 (requiring the district court to "resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative").

The Court finds that here, Plaintiff has not presented "an administratively feasible" method to identify class members. *Id.* Plaintiff would rely upon state motor vehicle registration data, MBUSA's records and the records from its dealers, as well as class member affidavits. (Pls.' Reply Br. at 3). While the combination of MBUSA and dealership records would likely show whether a class member purchased or leased a putative class vehicle with the allegedly defective wheels, neither of those records combined, nor state motor vehicle databases would reveal whether a putative class member had his or her wheel replaced with non-original equipment wheels or wheels otherwise falling outside of the class. Thus, the only evidence that a putative class member would have that his or her wheels were in fact included in the class definition would be an affidavit from the class member. Absent the putative class member presenting his or her damaged wheel at

the claims processing stage, Defendant would not have the ability to challenge the putative class member's "say so." Accordingly, just as the Third Circuit in *Marcus* found such due process concerns were implicated where BMW would have been required to rely on the class members' "say so" that they are part of the class, this Court finds serious due process concerns where Plaintiffs have not presented sufficient evidence through which affidavits of putative class members could be verified.

Accordingly, it is the finding of this Court that Plaintiffs have failed to satisfy the ascertainability requirement by a preponderance of the evidence. Notwithstanding this finding, for the sake of the parties and the sake of completion, the Court will proceed to consider the remaining elements of class certification.

C. Numerosity

A putative class may only be certified if it "is so numerous that joinder of all member is impracticable." Fed. R. Civ. P. 23(a)(1). "[G]enerally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the [numerosity] prong has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Plaintiffs have represented that there are about 1.6 million individuals in the putative class (Pls.' Mov. Br. at 8-9) and MBUSA has not contested this point. Accordingly, this Court finds that the first requirement of class action certification is met.

D. Commonality

Under Rule 23(a)(2), commonality is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Not all claims or facts must be common to all class members; "[a] putative class satisfies Rule 23(a)'s commonality requirement if 'the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.'"

Rodriguez v. Nat'l City Bank, 726 F.3d 372, 382 (3d Cir. 2013) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994); *see also Dukes*, 131 S. Ct. at 2556 ("For purposes of Rule 23(a)(2), even a single common question will do.").

Plaintiff asserts that the commonality requirement is easily satisfied here because there are numerous common questions, such as whether the wheels suffer from a uniform design defect. (Pls.' Mov. Br. at 9). Defendant contends that commonality is not met in this case because "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation" *Dukes*, 131 S. Ct. at 2552. (Def's. Opp. Br. at 10). Defendant's argument that commonality is not met mirrors its arguments that Plaintiffs have failed to satisfy the (b)(3) predominance requirement because they cannot present common evidence of a design defect. (Id. at 27-34).

Indeed, it is customary in Rule 23(b)(3) class actions for courts to jointly apply the Rule 23(a)(2) commonality requirement and the Rule 23(b)(3) predominance test. *See, e.g., Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 148 (3d Cir. 2008). The Third Circuit has approved this approach. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004) ("[T]he rule 23(b)(3) predominance requirement, which is far more demanding, incorporates the Rule 23(a) commonality requirement. Accordingly, we analyze the two factors together, with a particular focus on the predominance requirement.").

To that end, because, as discussed in Part G, *supra*, the Court finds that Plaintiffs have not submitted sufficient common evidence whereby a jury could make a determination as to the existence of a design defect, the Court also finds that commonality is not satisfied.

E. Typicality

Plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so to assure that the absentees' interests will be fairly represented." *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). Moreover, "[i]f a plaintiff's claim arises from the same event, practice or course of conduct that gives rises to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class. *Marcus*, 687 F.3d at 598 (citing *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992)).

Plaintiffs state that their claims are typical of the other Class members' claims because the alleged defect is uniform to all class members' vehicles, the terms of MBUSA's warranties are nearly identical across all class members, MBUSA concealed the defect from all class members, and MBUSA's conduct provides the common basis for Plaintiffs' New Jersey Consumer Fraud Act claim. (Pls.' Mov. Br. at 9).

By contrast, Defendant argues that "Plaintiffs are 'neither typical nor adequate' because they are 'subject to unique defense[s] that [are] likely to become a major focus of the litigation.'" (Def's. Opp. Br. at 37) (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006)). However, the examples of individual defenses provided by Defendant do not defeat typicality in this case.

First, Defendant's claim that Plaintiffs are atypical because they purchased Wheels after initiating this lawsuit are distilled by Plaintiffs' argument that they purchased Wheels believing

the defect to have been cured. (Pls.' Reply Br. at 15). Second, the same argument advanced by Defendant that Plaintiffs are not typical of the class as they represent only a few of the possible permutations and combinations of vehicles, wheels, tires, etc., has been rejected by the Third Circuit, in cases where, as here, the wrongful conduct was alleged to be uniform across product type. *Marcus*, 687 F.3d at 599. In *Marcus*, the Circuit Court noted that "[w]hen a class includes purchasers of a variety of different products, a named plaintiff that purchases only one type of product satisfies the typicality requirement if the alleged misrepresentations or omissions apply uniformly across the different product types." *Id.* Here, Plaintiffs allege that Defendant's wrongful conduct, namely, the failure to inform class members of a defect in Wheel design and failing to cover damage to Wheels under warranty are uniform across all product, was uniform across all product types. (Pls.' Reply Br. at 16). Finally, typicality is not defeated where, according to Defendant, "the testing of plaintiffs' *own* Wheels [by Plaintiffs' former experts] found no defect." (Def's. Opp. Br. at 37). As Plaintiffs explain, the assignment given to its former experts "was limited to metallurgical testing." (See Pls.' Mov. Br at 9). "Thus, MBUSA's argument that these three found no defect, when they were just confirming that the metal was what it was purported to be, is, at best, misplaced." (Id.).

For the above-reasons, this Court finds that Plaintiffs have satisfied the typicality and adequacy requirements.

F. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties [must] fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Courts consider the following two factors in their analysis as to adequacy of representation: "(1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiff must not

have interests antagonistic to those of the class." *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F. Supp. 450, 519 (D.N.J. 1997) (citing *Hoxworth*, 980 F.2d at 923).

Defendants neither question Plaintiffs' attorneys' qualifications nor argue that Plaintiffs' interests are antagonistic to those of the class. (See Def's. Opp. Br. at 37-38). Instead, they suggest that Plaintiffs are inadequate representatives because they failed to disclose their "repeated, subsequent purchases in discovery." (Def's. Br. at 37-38). Given Plaintiffs' representations that these non-disclosures were inadvertent (Pls.' Reply Br. at 15), and in light of the fact that this argument does not suggest that the Plaintiffs have interests antagonistic to the class that would undermine their representation of absent class members, this Court is not persuaded that Plaintiffs are inadequate representatives. Accordingly, Plaintiffs satisfy Rule 23(a)(4)'s adequacy requirement.

G. Predominance

Rule 23(b)(3) requires Plaintiffs to show, by a preponderance of the evidence, that "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 predominance requirement 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Marcus*, 687 F.3d at, 600 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). "What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551 (internal quotations omitted) (emphasis in original). To that end, a plaintiff seeking Rule 23(b)(3) certification must show that the elements

of the legal claim are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Hydrogen Peroxide,* 552 F.3d at 311.

Where a plaintiff seeks (b)(3) class certification of an issue class under Rule 23(c)(4), as opposed to certification of an entire claim or set of claims, the predominance analysis becomes somewhat opaque. Specifically, Courts disagree over the extent to which the existence of a request for (c)(4) issue certification alters a plaintiff's obligation to meet the predominance requirement of Rule 23(b)(3). *See Gates v. Rohm and Haas Co.*, 655 F.3d 255, 272 (3d. Cir 2011); *see also Romero v. Allstate Ins. Co.*, 52 F. Supp. 3d 715, 724 (E.D. Pa. 2014) ("The interplay between the requirements for class certification under Rule 23(a) and (b) and the recognition of issue class under Rule 23(c)(4) 'is a difficult matter that has generated divergent interpretations among the court.'") (quoting *Gates*, 655 F.3d at 273); *see also* Patricia Bronte, et. al., *'Carving at the Joint": The Precise Function of Rule 23(c)(4)*, 62 DEPAUL L. REV. 745 (2013) (discussing the circuit split on this issue); *see also* § 4:43 Class Treatment of Particular Issues or Claims under Rule 23(c)(4)—Issue Certification. McLaughlin on Class Actions (11th ed.) (same).

For example, some circuits permit certification of a (c)(4) issue class "only when the cause of action, taken as a whole, meets the predominance requirement," whereas "[o]thers have allowed certification of issue classes even if common questions do not predominate for the cause of action as a whole." *Gates*, 655 F.3d at 272 (citing to decisions of the Fifth and Second Circuits, respectively); *see also Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 200 n. 25 (3d Cir. 2009). The Third Circuit has declined to follow either course, and instead has provided a list of factors that a court should consider in determining the propriety of certification of an issue class. *See Gates*, 655 F.3d at 273-74. The Court addresses the propriety of issue certification below.

That said, before this Court can opine on the utility of the (c)(4) issue certification device in this case, it should at the very least be satisfied that if this case were to proceed to trial, Plaintiffs would be able to offer common evidence of the alleged design defect. If Plaintiffs cannot offer common evidence relating to the alleged design defect, then Plaintiffs cannot be said to have satisfied the predominance requirement under even the most lenient standard, and issue certification would therefore be inappropriate.

1. Burden of Proof at Certification Stage

The parties disagree as to Plaintiffs' burden of proof at this stage of the litigation. Plaintiffs phrase the relevant inquiry before the Court as "*not* whether the Wheels are, in fact, defective, but whether the issue of whether the Wheels are defective can be established by common proof." (Pls.' Mov. Br. at 15; *see also* Tr. at 15:5-9). Defendant, on the other hand, asserts that "plaintiffs need to prove at this stage that there is, in fact, a common defect that can be proven with common evidence." (Tr. at 45:16-18). The parties further dispute this Court's obligation to consider the testimony of their experts at the certification stage. At oral argument, Plaintiffs' counsel stated: "[T]he question is: Does the jury believe [the experts], not your Honor. That is credibility." (Tr. at 24:15-17). By contrast, Defendant contends that where, as here, competing expert testimony is involved, it is the Court's duty to make a credibility determination as to those experts. (Tr. at 43:12-14).

The Third Circuit recently clarified a plaintiff's burden and the Court's obligations with regards to the predominance inquiry. *See Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. 2015). As discussed above, a district court must conduct a "rigorous analysis" as to each requirement of class certification. *See, e.g., id.* at 484. Particularly with regards to the predominance inquiry, the court must consider "'the available evidence and the method or methods by which plaintiffs

propose to use the evidence to prove [their claims] at trial.'" *Reyes*, 803 F.3d at 484 (quoting *Hydrogen Peroxoide*, 552 F.3d at 312). "The law does not permit a district court to only consider and analyze the most significant evidence. Rather, the trial court must consider '*all* relevant evidence and arguments, including relevant expert testimony of the parties,' [unless there is a reason to reject that testimony]. *Id.* at 495 (alterations in original) (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

The *Reyes* Court warned against a district court "hold[ing] a plaintiff seeking class certification to a higher standard of proof than proof by a preponderance of the evidence." *Id.* at 485. The Court further advised that "'the Rules and our case law have consistently made clear that plaintiffs need not actually establish the validity of claims at the certification stage.'" *Id.* (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 306 (3d Cir. 2011)). Rather, the relevant inquiry is whether common evidence as to the class can be presented to prove an element of the claim. *See id.* at 492 ("Thus, as Reyes contends, '[u]ltimately, the question is the extent to which fraud can be shown to have been committed on the class by common evidence."); *see also Hydrogen Peroxide*, 552. F3d at 311-312 ("Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact," but rather "to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members").

Reyes, however, did not articulate a new standard for a plaintiff's burden at the class certification stage. Indeed, the facts of *Reyes* demonstrate the rudimentary nature of its holding. In *Reyes*, the Third Circuit found that the district court made several material errors at the class certification stage, including relying solely on one piece of evidence, ignoring relevant expert testimony, and confusing the distinction between fact witnesses and expert witnesses. *Reyes*, 802

F.3d at 495-96. Faced with such material errors, the *Reyes* Court rearticulated the familiar standard that district courts must consider all relevant evidence, making factual determinations by a preponderance of the evidence. *Id.* at 485, 495; *see also Marcus*, 687 F.3d at 596 (noting that district courts must make factual determinations by a preponderance of the evidence); *Hydrogen Peroxide*, 552 F.3d at 307 (same). *Reyes* did not suggest that district courts should refrain from their rigorous analysis of the evidence, nor did it suggest that courts should discount the significance of expert testimony. To the contrary, the *Reyes* Court admonished the district court for finding one piece of evidence dispositive and subsequently failing to review expert testimony in light of its clear relevance to the case. *Reyes*, 802 F.3d at 496 ("The District Court merely focused on high return rates, without more . . . [and] also failed to confront Reyes' experts' arguments on the importance of the return rates"). Thus, *Reyes* fits comfortably in the *Marcus* and *Hydrogen Peroxide* line of cases and does not alter the plaintiff's burden at the class certification stage, nor the court's continuing obligation to consider all relevant evidence bearing on an element of certification.

Accordingly, as discussed above, a court is required to "resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on the elements of the cause of action." *Hydrogen Peroxide*, 552 F.3d at 307; *see also Marcus*, 687 F.3d at 591 (same). Where, as here, parties to a class certification motion present expert testimony and reports bearing on a certification requirement—namely, whether Plaintiffs can show a defect by common evidence—the Court's analysis may require a weighing of the competing expert testimony and a subsequent credibility determination. *See Hydrogen Peroxide*, 552 F.3d at 305 ("The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony

at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."); *see also Marcus*, 687 F.3d at 602-603 (reiterating the Court's duty to weigh conflicting expert testimony relevant to the predominance issue, and finding that the district court did not abuse its discretion in finding plaintiff's expert's opinion about the similarity of the suspect tires "to be more persuasive than the opinion put forth by [the defendant].").

Thus, the ultimate inquiry is whether Plaintiffs have presented evidence that is accepted as credible by this Court, and that "is sufficient to conclude that there is 'actual, not presumed, conformance'" with the predominance requirement. *Reyes*, 802 F.3d at 487 (quoting *Marcus*, 687 F.3d at 591)). This Court must "consider the entire record" in determining whether the proffered evidence supports Plaintiffs' design defect theory. *Id.* at 492.

Accordingly, and in light of the standard outlined by the Third Circuit in *In re Hydrogen Peroxide*, *Marcus*, and, most recently, in *Reyes*, the Court's predominance analysis will proceed as follows. First, the Court will consider the documentary proof that Plaintiffs intend to use to show a common defect. Second, the Court will consider the expert testimony offered by both parties, and to the extent that the experts' testimony bears upon the predominance inquiry, the Court will conduct a credibility determination as to the experts. *See Marcus*, 687 F.3d at 601-03; *Hydrogen Peroxide*, 522 F.3d at 307, 322-24. Finally, the Court will consider the expert testimony that it determines to be credible, in combination with Plaintiffs' documentary proofs, to determine whether Plaintiffs have presented sufficient common evidence by which a reasonably jury could find a uniform design defect by a preponderance of the evidence. *See Reyes*, 802 F.3d at 487.

2. Documentary Evidence

In addition to offering the testimony and reports of their experts, discussed in detail below, Plaintiffs offer MBUSA's internal documentation as common evidence of a uniform design defect. (Pls.' Mov. Br. at 2-4). Specifically, Plaintiffs have attached to their papers a number of electronic communications among MBUSA personnel, Daimler, and MBUSA's dealers, acknowledging the practical limitations of the MBUSA Wheel and tire combination and recognizing the existence of cracks in the Wheels. (Pls.' Mov. Br. at 2-3).

In one e-mail, an MBUSA senior engineer informed an MBUSA employee that he had been [redacted] (Pls.' Mov. Br. at 2, citing Ex. 4). In another e-mail, a Daimler employee asked MBUSA whether customers were [redacted] (Pls.' Mov. Br. at 3-4, citing Ex. 10). Plaintiffs further rely on notes taken by an MBUSA senior engineer, Noah Yanowitz, during an MBUSA program which stated that [redacted] (Pls.' Mov. Br. at 4, Ex. 11).

Further, Plaintiffs heavily rely upon a 2009 memorandum sent by MBUSA to its dealerships. (Pls.' Mov. Br. at 4, citing Ex. 12). The memorandum contains a picture of a cracked Wheel and states: "Service information: Radial crack in light alloy disk wheel." *Id.* Specifically, the bulletin, which is said to apply to "all" models, notifies dealers:

> Low section tires are being used increasingly. In the process both the tire and rim are significantly more sensitive to mechanical damage due to the lower side wall height particularly in combination with too low tire inflation pressure. In the event of a puncture (driving over a corresponding obstacle) the rim flange is possibly deformed plastically or pre-damaged so that either a radial crack occurs immediately or only occurs later due to the operating load.

The significance of these admissions made by Defendant's own employees and engineers should not be overlooked. Indeed, such admissions that cracking exists are certainly helpful to Plaintiffs' design defect theory. That said, this Court finds that a determination of the cause of the cracking—that is, whether the radial cracks are in fact caused by a defect as opposed to some other factor such as operator misuse—requires input from experts. *See, e.g., Reyes*, 802 F.3d at 489 (noting that the predominance inquiry is "often done with the assistance of experts"); *Henry v. St. Croix Alumnia, L.L.C.*, 572 F. App'x 114, 120 (3d Cir. 2014) (unpublished) (noting "the general requirement of expert testimony on causation in a complex, toxic tort case"); *Dymnioski v. Crown Equipment Corp.*, No. 11–3696, 2013 WL 2297035, at *7 (D.N.J. May 24, 2013) ("Courts in the District of New Jersey have found that expert testimony is required in a design defect case where the allegedly defective product involves 'a complex instrumentality.'") (quoting *Kolokowski v. Crown Equipment Corp.*, Civ. No. 05-4257, 2009 WL 2857957, at *4 (D.N.J. Aug. 27, 2009))). Indeed, Plaintiffs' own expert has testified that determining "whether impact damage to a wheel was caused by a small road hazard or something else," would require a "very long and arduous task." (Def.'s Opp. Br. at 23, citing Ex. B, Russell Dep. Tr. at 113:23-114:6). In other words, Plaintiffs cannot meet the predominance requirement without substantiating expert testimony suggesting that the cracks acknowledged by MBUSA are in fact caused by the design defect alleged.

To that end, this Court will now evaluate the parties' competing expert testimony to determine the extent that the testimony bears on Plaintiffs' ability to present common evidence of a defect.

3. Analysis of Competing Expert Testimony

To be clear, the question before this Court is whether Plaintiff's experts' testimony presents common proof of a defect as to the class as a whole. As discussed above, that this analysis will undoubtedly overlap with the merits of the defect issue and will similarly "implicate the 'credibility'" of the experts—two inquiries usually reserved for the jury—does not negate this Court's duty to rigorously analyze the parties' competing expert testimony. *See Hydrogen Peroxide*, 552 F.3d at 324.

i. Nature of the Alleged Defect

The experts' ability to testify as to a common defect must be considered with an eye toward the precise nature of the defect alleged. Plaintiffs have stated that "the defect is in the Wheels' design." (Pls.' Reply Br. at 9). At oral argument, this Court pressed Plaintiff's counsel for an explanation as to the factors that are considered as part of the Wheels' "design":

THE COURT:	[I]s it just the Wheel itself that we're going to be dealing with, or is it **a system's problem**, the Wheel, plus the tire, plus the load, because **that is the design, right**? **The design includes all of those thing**."
MR. CECCHI:	That's correct, Judge. That's the correct - -
THE COURT:	It is just not the fact in the way it looks. It is the fact that it is designed to be used with a particular type of wheel on a particular type of car, right, with certain load requirements, et cetera?
MR. CECCHI:	Correct.
THE COURT:	It is a whole system.
MR. CECCHI:	And the way it is designed uniformly suffers from the same common defect, according to our experts[.]

(Tr. at 9:22-10:11) (emphasis added).

Bearing in mind that Plaintiffs allege a defective design, which implicates the entire system of the vehicle, this Court will now consider the competing expert testimony.

ii. Plaintiffs' Experts' Opinions

Plaintiffs contend that their "experts have conducted tests on the Wheels and have issued reports demonstrating how the existence of design defects in the Wheels can be proven through common evidence and concluding that such defects have left all of the Wheels at issue in this litigation susceptible to failure under normal driving conditions." (Pls.' Mov. Br. at 14).

The opinions of Plaintiffs' experts are based on a review of 797 discarded Wheels which were collected from three Mercedes-Benz dealerships in New Jersey over a three-year period. (Pls.' Mov. Br, Ex. 22 ("Russel Report") at 7, 22; Ex. 2 ("Duquette Report") at 5). Robert Russell, a mechanical engineer retained by Plaintiffs, visually examined each of the 797 wheels, and determined that approximately 30% of the discarded wheels had a crack visible to the unaided eye. (Russell Report at 5). Russell identified 75 different descriptions of type of damage, finding a radial crack in 201 Wheels, no visible damage in 101 Wheels, and 158 bent or out of shape wheels. (Pls.' Mov. Br., Ex. 39, ("Lucas Report") at 5 (summarizing Russell's findings)). Russell also documented that the Wheels came from 17 countries of origin and 51 manufacturers. (Id. at 5-6).

Russell further analyzed a subset of 50 wheels, which were selected by Plaintiffs' statistical expert, James Lucas. This subset is composed of 25 wheels selected from the 75 wheel subset that Russell "considered more interesting following his examination of all wheels," and an additional 25 wheels from the remaining population obtained from the New Jersey dealerships. (Lucas Report at 4). Using a laser scanner, Russel took three-dimensional measurements of each of the 50 wheels in order to quantify the amount of damage to the wheels. Russell admits in his Report that "of the wheels inspected there were a number of obvious large catastrophic events," but states that "[o]n the other hand, it seemed to me that there was an unexpectedly large number of wheels that showed little if any visual damage except for radial rim cracking, primarily on the inboard rim flange." (Russell Report at 22-23).

The gravamen of Russell's findings is that "[t]he tire/wheel system is more vulnerable to initial damage and experiences a greater effect when there is any damage." (Russell Report at 14). Specifically, "[t]he reduction in clearance between the wheel rim and the road surface requires necessarily stiffer tires, and results in substantially increased vulnerability of the tire and wheel package to damage. The net result of these reduced tire thickness packages is to transform normal road irregularities into damaging driving events." (Id. at 8). Russell observes that "the radial rim cracking was observed in wheels of various sizes and styles of wheels. It was not limited to a single design or manufacturing source." (Id. at 6).

Plaintiffs' expert metallurgist, Dr. David Duquette, also examined the 50-wheel subset in order to determine the root cause of the cracks that had been observed. He performed a "visual examination," identifying 17 wheels, or 34%, with visual cracks, consistent with Russell's visual inspection of the 797 wheels. (Duquette Report at 5). Duquette then selected 8 wheels with "cracks visible to the unaided eye" to perform more detailed testing. (Duquette Report at 6). Based on his investigation, Dr. Duquette attributed the radial and circumferential cracking he observed as resulting from "the inherently low ductility of the alloy used to fabricate the wheels in combination with the design geometry of the wheel flanges and wheel wells." (Duquette Report at 6). Ultimately, Dr. Duquette opines that the radial cracks, which were "observed independent of wheel design, date of manufacture, or country of manufacture" are "clearly and unequivocally fatigue cracks," that occur over a period of time, due to normal cyclic loading, as opposed to cracks resulting from one or a few loading events/driver error." (Duquette Report at 19-21).

To summarize, Plaintiffs' experts opine that radial cracks observed on the discarded wheels they examined are attributable to a design defect rather than any driver error. The experts further agree that these defects occur regardless of the variations in the wheels. Thus, Plaintiffs contend

that the testimony of their experts can be said to be applicable to all of the putative class vehicles, amounting to "common evidence" demanded of the predominance requirement.

iii. Defendant's Experts' Opinions

Defendant and its experts contend that contrary to the conclusions of their Reports, Plaintiffs' experts cannot offer the necessary class-wide proof to show a universal design defect. (Def's. Opp. Br. at 9-19). Defendant's experts contend that radial cracks do not occur under normal driving conditions absent a precipitating impact (Def.'s Opp. Br. at 9-17), and that in any event, "determining the root cause of any given wheel damage requires individual inspection and potentially testing of each wheel." (Archibald Report at 4).

Mr. Ken Archibald, Defendant's expert engineer, performed fatigue testing, in compliance with industry standard, on four different wheels. (Def's. Opp. Br., Thibodaux Decl., Ex. B, ("Archibald Report")). After testing two wheels under Society of Automotive Engineers ("SAE") approved testing, he concluded that "despite the wheels experiencing an excessive number of cycles at 2.5 times the rated load for the wheel . . . neither wheel developed a radial crack . . . ." (Archibald Report at 44). Mr. Archibald likewise concludes that "[n]o fatigue cracks initiated in the [MBUSA] wheels, with and without permanent deformation, even when exposed to five times the SAE J 2562 minimum amounts of cycles." (Id. at 47).

Similarly, based upon his experience and understanding of published documents, Mr. Richard Gundlach, a metallurgical engineer retained by Defendant, asserts that "radial cracks at the inner rim flange result from measurable impact damage; depending on a variety of circumstances (e.g., severity of impact, angle of impact, number of contact points, vehicle use)" and that "[d]etermining the type, degree, and circumstances of a particular impact requires

individual investigation." (Id. at 24). Thus, Mr. Gundlach contends that common evidence cannot be used to establish proof of a design defect.

Mr. Gundlach also refutes Dr. Duquettes' opinion that the alloy used in MBUSA's wheels is inappropriate, noting that the alloy is widely accepted in the United States as one of the best alloys available for manufacture of aluminum wheels. Moreover, Mr. Gundlach states that "[b]ecause there are multiple manufacturers for wheels for use on [MB] vehicles at several locations throughout the world, the composition of A356-T6 can vary . . . such that it would be incorrect to say that the alloy is the 'same' for every wheel." (Id. at 21).

Finally, Defendant's expert statistician, Laurentius Marias, opines that it would amount to statistical error to extrapolate Plaintiffs' findings of the 797 discarded Wheels to the entire population of putative class vehicles. (Def's. Opp. Br., Ex. E ("Marias Report") at 4). Specifically, Mr. Marias contends that "random sampling from the actual population of interest (here the Class wheels) is essential for drawing statistically valid conclusions about the population." (Marias Report at 6). Here, the 797 wheels cannot be said to be a representative sample of the entire population where these wheels "all have in common that their former owners chose, for individual reasons unknown to plaintiffs or to MBUSA, to replace and discard them." (Id. at 3).

iv. Discussion

All experts agree that the alleged defect implicates more than the particular Wheels at issue; indeed, the defect implicates various components of the vehicle's "systems." (Tr. at 9:22-10:11). Dr. Duquette testified that the defect arises as a "systems problem," which implicates the "vehicle, the wheel, and the tire that's put on that wheel." (Duquette Dep. Tr. at 127:17-128:10). Mr. Russell's Report similarly states that the "condition is a general design flaw. It is a flaw of the vehicle design specification for Tire/Wheel assembly as a system not the individual components."

(Russell Report at 10). Yet, the opinions of Plaintiffs' experts are based strictly on a review of the discarded Wheels, without any information as to the systems on which each Wheel was placed. Specifically, Plaintiffs' experts had no knowledge of such factors as the vehicle the wheels were attached to, the mileage placed on the wheels, the road conditions on which the vehicles were driven, whether the vehicles were damaged in an accident, the average load placed on the vehicles, the tire attached to the wheels, the vehicles' suspensions, any accident history, or, perhaps most significantly, why the wheels were discarded by their owners.

Thus, in order to present evidence of a uniform defect, Plaintiffs experts would have had to have considered the impact that the numerous system's variables would have on the existence of a defect. Or, alternatively, and at a minimum, "given the conflicting evidence, Plaintiff[s] would presumably have to prove at trial that the differences in each model were immaterial, which suggests that class treatment is inappropriate." *Landen v. Electrolux*, Civ. No. 13-1033, 2014 WL 2980977, at *1 (C.D. Cal. July 1, 2014). The opinions of Plaintiffs' experts do not convince this Court that the system variables not considered, as well as the accident and other history of the vehicles, is immaterial to the defect analysis.

The Court also has strong reservations concerning the validity of the statistical sample on which Plaintiffs' experts' opinions are based. First, Plaintiffs' experts never examined Wheels that were in-service; rather, Mr. Russell and Dr. Duquette examined wheels which had been discarded by the vehicle operators for reasons unknown to any experts. (See Russell Dep. Tr. 144:25-145:1 ("Please understand I don't know the things that are in service.")). Accordingly, the subset of 50 out of the 797 discarded wheels chosen by Plaintiffs' statistician for further investigation, which is comprised in part of wheels that Mr. Russell "considered more interesting" than others, would seem to be a biased sampling. Thus, this Court agrees with Defendant's

statistician, Dr. Laurentius Marias, that "there is no statistically or scientifically valid basis for extrapolating the prevalence of cracks found in plaintiffs' sampling of the 797 discarded wheels to the entire population of Class wheels." (Def's. Opp. Br, Ex. E "Marias Report).

Having weighed the competing expert testimony and having agreed with Defendant and its experts that Plaintiffs' experts cannot offer common evidence of a uniform design defect with regards to the numerous systems at issue, the Court must now determine whether Plaintiffs have nonetheless met the predominance requirement.

Plaintiffs assert that several cases out of the Sixth and Seventh Circuits compel a finding of predominance in this case. (Tr. at 41:6-7) (Plaintiffs' counsel citing to *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013) and *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013) (collectively, "*Whirlpool* class actions") as well as *Pella Corp. et. al. v. Saltzman, et. al*, 606 F.3d 391 (7th Cir. 2010)). As an initial matter, the Court notes that the standard at class certification applied by each circuit varies significantly. *See, e.g., Byrd*, 784 F.3d at 161, n. 4 (explaining that Circuits apply the ascertainability analysis differently); *see also Gates*, 655 F.3d at 272 (discussing a circuit split over (c)(4) issue certification). Here, while the opinions of the Sixth and Seventh Circuits are binding on this Court to the extent they are not inconsistent with Third Circuit precedent, the Third Circuit rulings discussed above compel our finding that predominance has not been met in this case.

That said, this Court finds that the evidence presented by the successful plaintiffs in the cases cited by Plaintiffs was more compelling than that offered by Plaintiffs in this case. In *Butler* and *Whirlpool*, the Seventh and Sixth Circuits, respectively, held that a putative class of washing machine owners could be certified on the issue of whether the machines experienced a defect that

caused mold growth in the machines. In *Whirlpool*, defendant argued that predominance was not met where "the [machines] were built on [two] different platforms, representing twenty-one different models over a period of nine model years," and that as a result, "plaintiffs must prove liability as to each separate model." 722 F.3d at 849. The Sixth Circuit rejected this argument upon finding that "[p]lantiffs' evidence—some of which comes directly from internal documents authored by Whirlpool's own Lead Engineer of Advanced Chemistry Technology, Andrew Hardaway—confirms that the two platforms are nearly identical, the design issues concerned various models, and most of the differences in models were related to aesthetics, not design." *Id.* at 854. Indeed, internal documentation by the Lead Engineer stated: "As both a biologist and a chemist this problem is very troubling in that we are fooling ourselves if we think that we can eliminate mold and bacteria when our HA wash platforms are the ideal environment for molds and bacterial to flourish." *Id.* at 848. As to Whirlpool's claim that predominance was not met because customer laundry habits could contribute to mold growth, the Court recognized that the company's "own documents confirmed that its design engineers knew the mold problem occurred *despite variations in consumer laundry habits and despite remedial efforts undertaken by consumers and service technicians to ameliorate the mold problem.*" *Id.* at 854 (emphasis added).

Here, while Plaintiffs have directed this Court to internal documents discussing the cracked wheels, these documents, in and of themselves, do not provide sufficient common evidence from which a reasonable jury could find a design defect existing across all permutations and combinations of putative class vehicles. Indeed, unlike *Whirlpool* where internal documents show an admission of the defect by company engineers, here, the documents, [redacted] cannot in and of themselves be said to be evidence of a common defect that effects all systems at issue. In the 2009 bulletin from MBUSA to its dealers indicating

that "all" models experienced cracking, MBUSA stated: "In the case of the damage mentioned it is *not a material fault although this is mistakenly assumed.* The damage mentioned is not to be attended to by the manufacturer but *is clearly attributable to external influences*." (Pls.' Mov. Br. at 4, Ex. 12) (emphasis added). Moreover, unlike in *Whirlpool*, here, there is no evidence that all Wheels are equally susceptible to damage, or that the design of the Wheels, as opposed to driver use, is indisputably the cause of the radial cracks. Indeed, as MBUSA states, and Plaintiffs do not dispute, "[f]or over 200 [of the 600] types of Wheels, there were *no* aftermarket sales in New Jersey for any reason—much less a 'defect.'" (Def's. Opp. Br. at 18).

The Seventh Circuit case of *Pella Corp. v. Saltzman*, also relied upon by Plaintiffs, is similarly distinguishable from this case. 606 F.3d 391. There, Seventh Circuit affirmed the district court's certification of a (b)(3) nationwide class of purchasers of aluminum-clad casement windows produced by defendant manufacturer. *Id.* Plaintiff sought certification on, among other issues, "whether the windows suffer from a single, inherent design defect leading to wood rot." *Id.* at 393. In affirming the district court's finding that predominance had been met, the Circuit explained that one concern in certifying a consumer class action "is the risk of error in having complex issues that have enormous consequences decided by one trier of fact rather than letting a consensus emerge from multiple trials." *Id.* at 393-94. With regards to the allegedly defective windows, the Circuit recognized that this risk of error was not implicated in the case before it because "[t]his is not a case where the issues are so complex." *Id.* at 394. Accordingly, where "the accuracy of the resolution of those issues [was] unlikely to be enhanced by repeated proceedings," the Circuit held that it made sense to resolve the issues through a class action, as opposed to through individual litigation. *Id.* (quotations omitted). The Circuit determined that "issues of causation and damages issues, such as whether that defect caused the damage to a

particular window and how much the design contributed to the rot, will be handled individually." *Id.* at 395.[1]

Unlike in *Pella* where the alleged defect was not particularly complex, here, the record in this case, involving the reports and deposition testimony of numerous experts at the top of their respective fields, indicates that the issue of the design defect is extremely complicated. Thus, the rationale that the Seventh Circuit applied in affirming the district court's certification of a (b)(3) class on the issue of a design defect cannot be suitably applied to this context.

Accordingly, for the reasons stated above, this Court finds that Plaintiffs would not be able to offer common evidence from which a reasonable jury could find the existence of a design defect. That said, this Court will nonetheless consider whether, under the Third Circuit standard outlined in *Gates v. Rohm and Haas Co.*, issue certification would be appropriate in this case.

H. Rule 23(c)(4)—Propriety of Certifying an Issue Class as to the Existence of a Defect

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained with respect to particular issues." Fed. R. Civ. P. 23(c)(4). "[A] court's decision to exercise its discretion under Rule 23(c)(4), like any other certification determination under Rule 23, must be supported by rigorous analysis." *Hohider v. United Parcel Serv. Inc.*, 574 F.3d 169, 200-01 (3d Cir. 2009). Specifically, the court is required to "conduct[] a rigorous analysis on the effect 'partial certification would have on the class action going forward.'" *Gates*, 655 F.3d at 273 (quoting

[1] The Seventh Circuit also rejected defendant's argument that proximate causation precluded certification. *Id.* at 394. The Circuit explained that proximate cause, although an individual issue, is one that could be adjudicated at the individual claims processing stage. *Id.* While Plaintiffs offer the same argument here, as discussed in Section H, below, the Third Circuit's ruling in *Gates v. Rohm and Haas Co.*, is dispositive of the significance of the proximate cause determination in this case. *See* 655 F.3d 255 (3d Cir. 2011)

Hohider, 574 F.3d at 202)). If resolution of the defect issue would leave "significant and complex questions unanswered," then issue certification would be improper. *Id.*

Here, Plaintiffs seek certification under Rule 23(c)(4) "with respect to the issue of [whether a defect exists],[2] so that damages can later be calculated through a Special Master or other claims process that the Court determines is best suited for this case." (Pls.' Mov. Br. at 1). Stated differently, Plaintiffs are seeking a jury determination as to whether or not the wheels suffer from a defect. If a jury were to return a finding of "no defect," then "the case is over, and individual questions as to each Class member's Wheels will not arise." (Pls.' Mov. Br. at 13). If, however, a jury were to find the existence of a defect, then individual members, having the benefit of the jury finding of "defect" would then be required to prove the remaining elements of the Plaintiffs' claims at a second phase of litigation.

Defendant argues that issue certification is improper in light of the Third Circuit's opinion in *Gates v. Rohm and Haas Co.* 655 F.3d 255. There, plaintiffs sought certification of an issue class on a property damage claim, based upon allegations that defendant chemical companies released a carcinogen at an industrial complex near their homes. *Gates*, 655 F.3d at 258. The district court declined to certify a class on the issue of whether the defendants in fact discharged the chemicals, reasoning that "both the fact of damages and the amount of damages 'would remain following the class-wide determination of any common issues,' and further that causation and extent of contamination would need to be determined by follow-up proceedings." *Gates*, 655 F.3d at 272. The Third Circuit affirmed. *Id.* at 272-74.

[2] *See* "Preliminary Matters," *infra* page 5.

In affirming, the Third Circuit identified the following factors that district courts should consider in determining whether issue certification is appropriate:

> [T]he type of claim(s) and issue(s) in question; the overall complexity of the case; the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives; the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy; the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s); the potential preclusive effect or lack thereof that resolution of the proposed issue class will have; the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues; the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others; and the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s).

Id. at 273. Further, the Third Circuit stated that to the extent the above factors militate towards a finding of certification of an issue class, the certifying court should "explain how class resolution of the issue(s) will fairly and efficiently advance the resolution of class members' claims, including resolution of remaining issues." *Id.* (citing Principles of the Law of Aggregate Litigation §§ 2.02(e)(10)).

Ultimately, in affirming the district court's denial of issue certification, the Circuit recognized the complexity of the claims and issues, and stated that a trial on whether the chemical was discharged and made its way into the class members' water supply "is unlikely to substantially aid resolution of the substantial issues on liability and causation." *Id.* at 274; *see also* § 4:43 Class Treatment of Particular Issues or Claims under Rule 23(c)(4)—Issue Certification. McLaughlin on Class Actions ("Although certification of a class under Rule 23(c)(4) limited to the determination of liability may be appropriately considered where anticipated problems in proving damages would outweigh the advantages of class certification, issue certification is not appropriate where the

determination of liability itself requires an individualized inquiry."). Thus, in light of *Gates*, this Court considers the above factors to determine whether certification of the defect issue would leave "significant and complex questions unanswered." To that end, the Court considers the elements of the causes of action alleged.

Plaintiffs allege a breach of express and implied warranties, breach of the Magnuson-Moss Warranty Act, and violation of the New Jersey Consumer Fraud Act ("NJCFA"). (Compl. at 51-54). Aside from a showing of defect, a plaintiff proving liability under each of these causes of action must satisfy the remaining elements of the claims.

For example, "[i]n an action based on breach of warranty, 'it is of course necessary to show . . . that the breach of warranty was the proximate cause of the loss sustained.'" *Marcus*, 687 F.3d at 604 (quoting N.J. Stat. Ann §12A:2-314 cmt. 13). To that end, "'an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense.'" *Id.* (quoting N.J. Stat. Ann §12A:2-314 cmt. 13). Thus, even if the Wheels were found to be defective, individual class members would still have to prove that this defect caused their damages. *See id.* ("Even 'defective' tires can go flat for reasons completely unrelated to their defects. Critically, to determine why a particular class member's [tire] has 'gone flat and been replaced' requires an individual examination of that class member's tire."); *see also Oscar v. BMW of N. Am., LLC*, 274 F.R.D. 498, 511 (S.D.N.Y. 2011) ("Plaintiff would have to demonstrate in each individual case that the tire punctured for reasons related to the defect, rather than for a reason that would cause any tire to fail."); *see also Pella Corp.*, 606 F.3d at 395 (recognizing that after a jury determination on the existence of a defect and defendant manufacturer's duty to disclose same, "[i]ssues of causation . . . such as whether that defect caused the damage to a particular window" would be left for individual determination.").

Additionally, to recover on a claim of breach of express warranty, class members would have to show that the defect manifested within the warranty period and that the class member presented her claim to MBUSA or its dealer for repair. And, to recover under Plaintiffs' theory of improper denial of warranty coverage, Plaintiff would be required to prove that the dealer improperly denied that coverage and that the claim was not otherwise paid for by a third party such as a wheel-and-tire insurer. These questions, particularly those relating to the improper denial of warranty coverage and the cause of the Wheel requiring replacement, would necessarily require the "claims processor," or an alternative arbiter that this Court would appoint, to delve into the same evidence presented at the trial stage—specifically, whether the Wheel was damaged on account of driver error, which is not covered under warranty, or whether the Wheel was damaged on account of the defect. This revisiting of evidence in the issue trial is a factor that the Third Circuit has found to militate against issue certification. *See Gates*, 655 F.3d at 273.

As to the New Jersey Consumer Fraud Act claims, a plaintiff must show (1) an unlawful practice by the defendant; (2) that the plaintiff suffered an ascertainable loss; and (3) "that the defendant's unlawful conduct . . . cause[ed] the plaintiff's ascertainable loss." *New Jersey Citizens Action v. Schering-Plough Corp.*, No. L-7838-01, 2012 WL 32344594 (N.J. Super. Ct. Law Div. May 12, 2002). Thus, even armed with a ruling of the existence of a defect, a class member seeking relief under the NJCFA must still show, *inter alia*, that he suffered an "ascertainable loss." *See Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 251 (2005) ("The mere fact that an automobile defect arises does not establish, in and of itself, an actual and ascertainable loss to the vehicle purchaser."). To prove "ascertainable loss," a class member "is not required to show monetary loss, but only that he purchased something and received 'less than what was promised.'" *Marcus*, 687 F.3d at 606 (quoting *Union Ink Co., Inc. v. AT&T Corp.*, 352 N.J. Super. 617 (N.J.

Super. Ct. App. Div. 2002). In *Marcus*, the Third Circuit recognized that "[t]he relevant issue . . . is whether the class members got less than what they expected." *Id.* Accordingly, as a prerequisite to meeting the "ascertainable loss" element, each class member would be required to show, and the Defendant would be permitted to challenge, the extent of the class member's knowledge of the alleged defect "prior to purchasing or leasing his or her car" as this knowledge "is highly relevant to whether that consumer can succeed on an NJCFA claim."[3] *Marcus*, 687 F.3d at 607.

As in *Gates*, where the Third Circuit affirmed the district court's findings that (b)(3) certification of a (c)(4) issue class was inappropriate where material and complex questions would be left unresolved after the trial on the defect issue, this Court finds that certification of an issue class would not materially advance the instant litigation. If the Court were to certify the issue class and the jury were to determine that there is a uniform design defect, a class member seeking to recover damages based upon the breach of warranty theories and the New Jersey Consumer Fraud Act would nonetheless have to meet the other elements of those causes of action. In this regard, a class member armed with a favorable ruling of the existence of a defect would nevertheless be required to make a number of proofs in order to prove liability and collect damages, which proofs are likely to overlap with those presented to a jury at the class level. Thus, the Court fails to see how certification of a (b)(3) class on the issue of liability would materially advance the class members' claims. *See Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 170 (S.D.N.Y. 2003) (denying issue certification as to a product defect and negligence action where the need for

[3] Plaintiffs, in their Moving Brief, rely upon the New Jersey case of *Varacallo v. Mass. Mut. Life Ins. Co.*, 322 N.J. Super. 31 (N.J. Super. Ct. App. Div. 2000) in arguing that "where a NJCFA plaintiff establishes a knowing omission of material information common to the class, a presumption or inference of reliance and causation arises and can be invoked to satisfy the requisite proof of causation necessary to establish the NJCFA claim on a classwide basis." (Pls.' Mov. Br. at 20). However, because the question before this Court is whether (b)(3) certification of a (c)(4) issue class as to the existence of a defect is appropriate, this Court need not address the applicability of the *Varacallo* principle in this case.

individual trials to determine actual liability and damages "retards the ability of the initial class-wide trial to materially further the litigation").

Other courts in this Circuit applying the *Gates* analysis have declined issue certification where, despite resolution of the issue proposed for certification, class members would still be required to prove the remaining elements of their claims. For example, in *Franco v. Connecticut General Life Ins. Co.*, the district court declined certification on the issue of whether the Ingeneix database was flawed, finding that certification would not have "materially advance[d] the liability issues at the core of Plaintiff's [ERISA] claims." 299 F.R.D. 417, 433 (2014) (Chesler, J.). The court reasoned that issue certification as to problems with the database "would not only leave critical remaining liability issues unanswered but also fail to achieve any efficiency in the resolution of class members' claims." *Id.* The court further noted that "[a] court would be required to conduct mini-trials to establish the elements of the ERISA claims for unpaid benefits and breach of fiduciary duty in light of the nuances of each plan's instructions to the administrator." *Id.* Accordingly, the district court declined to certify the proposed (c)(4) issue class. *Id.*; *see also Romero v. Allstate Ins. Co.*, 52 F. Supp. 3d 715, 725 (E.D. Pa. 2014) ("Applying the *Gates* factors enumerated by the Third Circuit to each of the questions presented by Plaintiffs yields the inescapable conclusion that certification would be unmanageable in this matter."); *see also Clark v. Prudential Ins. Co. of* America, 940 F. Supp. 2d 187, 194 (D.N.J. 2013) (Debevoise, J.) (considering *Gates* before holding that "the individualized issues which arise in the calculation of damages and damages in fact are so inextricably linked that bifurcation would be judicially inefficient.").

For the above reasons, this Court finds that certification of a (c)(4) issue class would not "fairly and efficiently advance the resolution of the class members' claims, including resolution of

remaining issues." *Gates*, 655 F.3d at 273. Thus, even if Plaintiffs could show this Court that they were capable of proving the design defect with common evidence, Plaintiffs' Motion for certification as to the (c)(4) issue class would fail under *Gates*.

CONCLUSION

For the reasons stated above, this Court denies Plaintiffs' Motion for Class Certification. An appropriate Order accompanies this Opinion.

DATED: December 22, 2015

JOSE L. LINARES
UNITED STATES DISTRICT JUDGE