IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SHAMELL SAMUEL-BASSETT on behalf of herself and all others similarly situated,	:	Nos. 22, 23 & 24 E.A.P. 2008
Appellee,	:	
v.	:	
KIA MOTORS AMERICA, INC.,	:	
Appellant.	:	

Appeal from the Orders of the Superior Court entered October 24, 2007 at Nos. 3048 & 3068 E.D.A. 2005, and on February 8, 2008, at No. 537 E.D.A. 2006, affirming the Orders of the Court of Common Pleas of Philadelphia County, dated September 17, 2004, December 28, 2006, January 11, 2006, and November 14, 2007, at No. 2199, January Term 2001

DEFINITIVE TEXT OF THE BRIEF OF APPELLEE, SHAMELL SAMUEL-BASSETT

FRANCIS & MAILMAN, P.C.
James A. Francis, Esq.
100 South Broad Street, 19th Floor
Philadelphia, PA 19110
(215) 735-8600

DONOVAN SEARLES, LLC
Michael D. Donovan, Esq.
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
(215) 732-6067

FELDMAN, SHEPHERD, WOHLGELERNTER, TANNER, WEINSTOCK & DODIG
Alan M. Feldman, Esq.
Edward S. Goldis, Esq.
1845 Walnut Street, 25th Floor
Philadelphia, PA 19103
(215) 567-8300

Attorneys for Appellee,
Shamell Samuel-Bassett and the Class

Dated: December 10, 2008

TABLE OF CONTENTS

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW 1

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED 2

COUNTER-STATEMENT OF THE CASE 3

A. FORM OF ACTION 3

B. THE CLASS CERTIFICATION PROCEEDINGS 5

C. CHRONOLOGICAL STATEMENT OF FACTS 9

D. THE SUPERIOR COURT'S OPINIONS 11

SUMMARY OF THE ARGUMENT 11

LEGAL ARGUMENT 14

I. THE TRIAL COURT PROPERLY CERTIFIED THE CLASS, AND KMA FAILED TO OFFER ANY EVIDENCE OR EVEN A MOTION TO SUPPORT DECERTIFICATION OF THE CLASS 14

A. KMA MIS-DESCRIBES ITS WARRANTY AND THE NATURE OF THE CASE 15

B. THE LOWER COURTS PROPERLY CERTIFIED THE CLASS 21

1. Commonality and Predominance 21

2. Individual Reliance Was Not And Is Not An Issue 29

3. Notice, Opportunity To Cure and Failure to Repair Were Established as Required by the MMWA 31

4. Consumer Established Classwide Damages and Causation...............33

5. KMA's Cases Are Off-Point And Actually Support Certification of This Class 36

C. TYPICALITY WAS ESTABLISHED 37

II. KMA'S DUE PROCESS ARGUMENT IS BASELESS 39

III. KMA HAS WAIVED ITS OTHER CLAIMS OF ERROR 48

IV. THE LOWER COURTS CORRECTLY AWARDED ENHANCED STATUTORY ATTORNEY FEES TO THE CLASS 49

A. THE LOWER COURTS FOLLOWED CONTROLLING PROCEDURE AND LAW 49

B. STATE LAW CONTROLS THE REASONABLENESS OF MMWA FEES 52

1. The "reasonableness" of attorney fees is a procedural matter controlled by Pennsylvania law 53

2. Controlling precedent applies state rules to the MMWA fee award 58

3. An MMWA class action meets the "exceptional case" standard 61

CONCLUSION 63

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES **Page(s)**

Allapattah Services, Inc. v. Exxon Corp,
157 F. Supp. 2d 1291 (S.D. Fla. 2001) 44

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997)....................4, 14, 46

Anthony v. General Motors Corp.,
33 Cal. App. 3d 699 (1973) 36

In re Appeal of Affected and Aggrieved Residents from the Adverse Action of the Supervisors of Whitpain Township,
325 Pa. Super. 8, 472 A.2d 619 (1984)....................50

Arlington Central School District v. Murphy,
548 U.S. 291 (2006)....................60

Arons v. New Jersey State Board of Education,
842 F.2d 58 (3d Cir. 1988)....................52, 54

Bell v. Beneficial Consumer Discount Co.,
465 Pa. 225, 348 A.2d 734 (1975) 1

Bell v. Farmers Insurance Exchange,
115 Cal. App. 4th 715 (Cal. App., 1st Dept. 2004) 44

Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining and Manufacturing Co.),
No. 02-7676, 2005 WL 736629 (E.D. Pa. Mar. 30, 2005) 24

Broussard v. Meineke Discount Muffler Shops, Inc.,
155 F.3d 331 (4th Cir. 1998) 48

Budinich v. Becton Dickinson and Co.,
486 U.S. 196, 108 S. Ct. 1717 (1988)....................13, 51, 52

Butler v. Kia Motors America, Inc.,
No. 03-25467-CA31 3

Matter of Cadillac V8-6-4 Class Action,
461 A.2d 736 (N.J. 1983)....................36

Carnegie v. Household Intern. Inc.,
376 F.3d 656 (7th Cir. 2004) 4

Caudill Seed and Warehouse Co. v. Prophet 21, Inc.,
123 F. Supp. 2d 826 (E.D. Pa. 2000) 38

Chin v. Chrysler Corp.,
182 F.R.D. 448 (D.N.J. 1998)...28

Chin v. Chrysler LLC,
538 F.3d 272 (3d Cir. 2008)..54

City of Burlington v. Dague,
505 U.S. 557 (1992)...54, 60, 62

Commonwealth v. Scatena,
481 A.2d 855 (Pa. Super. 1984), *rev'd on other grounds*, 508 Pa. 512, 498 A.2d 1314 (1985) 47

In re Continental Illinois Sec. Litigation,
962 F.2d 566 (7th Cir. 1992) 62

Croft v. P&W Foreign Car Service, Inc.,
557 A.2d 18 (Pa. Super. 1989)...56, 57, 58

D'Amelio v. Blue Cross of Lehigh Valley,
500 A.2d 1137 (Pa. Super. 1985)..1

Daffin v. Ford Motor Co.,
458 F.3d 549 (6th Cir. 2006) 4, 36

De Lage Landen Financial Services, Inc. v. Rozentsvit,
939 A.2d 915 (Pa. Super. 2007)...50

Debbs v. Chrysler Corp.,
810 A.2d 137 (Pa. Super. 2002)...1, 38

Delgozzo v. Kenny,
628 A.2d 1080 (N.J. Super. App. Div. 1993) 36

Deposit Guaranty National Bank v. Roper,
445 U.S. 326 (1980)...12

Dilliplaine v. Lehigh Valley Trust Co.,
457 Pa. 255, 322 A.2d 114 (1974) 15, 34

Eggleston v. Chicago Journeymen Plumbers,
657 F.2d 890 (7th Cir. 1981) 37

Eisen v. Carlisle and Jacquelin,
417 U.S. 156 (1974)..46

Florin v. Nationsbank, N.A.,
34 F.3d 560 (7th Cir. 1994) 61

In re Ford Motor Co. Ignition Switch Prod. Liability Litigation,
174 F.R.D. 332 (D.N.J. 1997)..28

In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,
55 F.3d 768 (3d Cir. 1995)..25, 33, 42, 47

General Motors Corp. v. Garza,
2005 Tex. App. LEXIS 532 (Tex. App. 2005) 30, 36

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975)..52

Goodman v. PPG Industrial, Inc.,
849 A.2d 1139 (Pa. Super. 2004), *aff'd*, 885 A.2d 982 (2005) 30

Gordon v. Ford Motor Corp.,
687 N.Y.S.2d 369 (N.Y. App. Div. 1999) 36

Hicks v. Kaufman and Broad Home Corp.,
89 Cal. App. 4th 908 (2001) 36

Hilao v. Estate of Ferdinand Marcos,
103 F.3d 767 (9th Cir. 1996) 46

Hoy v. Angelone,
554 Pa. 134, 720 A.2d 745 (1998) 1

Janicik v. Prudential Ins. Co. of America,
451 A.2d 451 (Pa. Super. 1982)...21, 37

Joseph v. General Motors Corp.,
109 F.R.D. 635 (D. Colo. 1986) 36

Keller v. Volkswagen of America, Inc.,
733 A.2d 642 (Pa. Super. 1999)...26

Krack v. Action Motors Corp.,
867 A.2d 86 (Conn. App. 2005) 59

Krebs v. United Refining Co.,
893 A.2d 776 (Pa. Super. 2006)....................56

Krock v. Chroust,
330 Pa. Super. 108, 478 A.2d 1376 (1984)....................41

In re Latex Gloves Products Liability Litigation,
134 F. Supp. 2d 415 (E.D. Pa. 2001)....................31, 32

Laudenberger v. Port Authority of Allegheny County,
496 Pa. 52, 436 A.2d 147 (1981)....................53

Leger v. Kia Motors America, Inc.,
No. CV-04-80522-Zloch (M.D. Fla. motion filed May 25, 2005)....................4

Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.,
171 F.3d 818 (3d Cir. 1999)....................29, 30

Little v. Kia Motors America, Inc.,
No. UNN-L-0800-01 (N.J. Super. Order entered Aug. 20, 2003)....................3

Long v. Trans World Airlines, Inc.,
761 F. Supp. 1320 (N.D. Ill. 1991)....................43

Lucchino v. Commonwealth,
570 Pa. 277, 809 A.2d 264 (2002)....................1

Luitweiler v. Northchester Corp.,
456 Pa. 530, 319 A.2d 899 (1974)....................37

Maize v. Atlantic Refining Co.,
352 Pa. 51, 41 A.2d 850 (1945)....................13, 40

Mathews v. Eldridge,
424 U.S. 319 (1976)....................45

McClendon v. Continental Group, Inc.,
872 F. Supp. 142 (D.N.J. 1994)....................62

McLean v. State,
482 A.2d 101 (Del. 1984)....................47

Middlesex County Ethics Committee v. Garden State Bar Association,
457 U.S. 423 (1982)....................52

Miller Electric Co. v. DeWeese,
589 Pa. 167, 907 A.2d 1051 (2006) 2, 13, 49, 50

Mydlach v. DaimlerChrysler Corp.,
875 N.E.2d 1047 (Ill. 2007) 19, 20

Naposki v. First National Bank of Atlanta,
2005 WL 1285716 (N.Y. App. Div. 2d May 31, 2005) 15

Nationwide Insurance Co. v. General Motors Corp.,
533 Pa. 423, 625 A.2d 1172 (1993) 12, 17, 18, 20

O'Keefe v. Mercedes-Benz USA, LLC,
214 F.R.D. 266 (E.D. Pa. 2002) 28

O'Keefe v. Mercedes-Benz U.S.A., LLC,
2003 WL 1826501 (E.D. Pa. Apr. 2, 2003) 36

O'Rourke v. Commonwealth,
566 Pa. 161, 778 A.2d 1194 (2001) 20

Old Forge School District v. Highmark Inc.,
592 Pa. 307, 924 A.2d 1205 (2007) 2, 13, 50

Pennsylvania v. Delaware Valley Citizens Council for Clean Air,
483 U.S. 711 (1987) 62

Pettway v. American Cast Iron Pipe Co.,
494 F.2d 211 (5th Cir.1974) 44

Phillips Petroleum v. Shutts,
472 U.S. 797 (1985) 46

Poli v. DaimlerChrysler Corp.,
793 A.2d 104 (N.J. Super. App. Div. 2002) 18, 19, 20

Price v. Chevrolet Motor Division of General Motors Corp.,
765 A.2d 800 (Pa. Super. 2000) 35

Rendine v. Pantzer,
141 N.J. 292, 661 A.2d 1202 (1995) 56

Reynolds v. Beneficial National Bank,
288 F.3d 277 (7th Cir. 2002) 15

Rodgers v. Lehighton Chrysler Plymouth,
No. 0202-4383, 2004 WL 5175412 (Phila. Com. Pl. Feb. 25, 2006) 59

Rollins, Inc. v. Butland,
951 So. 2d 860 (Fla. App. 2006) 47

Rosen v. Rosen,
520 Pa. 19, 549 A.2d 561 (1988) 50

Samuel-Bassett v. Kia Motors America, Inc.,
212 F.R.D. 271 (E.D. Pa. Dec. 13, 2002), *vacated for re-examination of federal jurisdiction*, 357 F.3d 392, 403 (3d Cir. 2004) .... passim

Sanneman v. Chrysler Corp.,
191 F.R.D. 441 (E.D. Pa. 2000) 28

Santiago v. Kia Motors America, Inc.,
No. 01 CC 01438 (Cal. Super. Order entered Mar. 24, 2004) 3

Sheldon v. Ford,
113 S.W.3d 839 (Tex. App. 2003) 28

Signora v. Liberty Travel Inc.,
886 A.2d 284 (Pa. Super. 2005) 55, 56

Skelton v. General Motors Corp.,
860 F.2d 250 (7th Cir. 1989) 56, 57

Smilow v. Southwestern Bell Mobile Systems, Inc.,
323 F.3d 32 (1st Cir. 2003) 47

Smith v. Sprint Commc'ns Corp.,
387 F.3d 612 (7th Cir. 2004) 15

Solebury Township v. Department of Environmental Protection,
593 Pa. 146, 928 A.2d 990 (2007) 55

State v. Otis Elevator Co.,
12 N.J. 1, 95 A.2d 715 (1953) 54

Stewart v. General Motors Corp.,
542 F.2d 445 (7th Cir.1976) 44

Straub v. Cherne Industries,
583 Pa. 608, 880 A.2d 561 (2005) 48

Strzakowlski v. General Motors Corp.,
No. 04-0474, 2005 WL 2001912 (D.N.J. Aug. 16, 2005) 27, 32

Thorogood v. Sears, Roebuck and Co.,
- F.3d. - 2008 WL 4709500 (7th Cir. Oct. 28, 2008).....................................34, 44, 47

United States v. City of Miami,
195 F.3d 1292 (11th Cir.1999) 44

Valentine v. Alameida,
143 Fed. Appx. 782, 784 (9th Cir. 2005)..47

Van Gemert v. The Boeing Co.,
553 F.2d 812 (2d Cir. 1977)...41

Walsh v. Ford Motor Co.,
627 F. Supp. 1519 (D.D.C. 1986) 14

Walsh v. Ford Motor Co.,
808 F.2d 1000 (D.C. Cir. 1986) 52, 59

Weismer by Weismer v. Beech-Nut Nutrition Corp.,
615 A.2d 428 (Pa. Super. 1992)..22

Weiss v. Mercedes-Benz of North America, Inc.,
899 F. Supp. 1297 (D.N.J.), *aff'd*, 66 F.3d 314 (3d Cir. 1995) 36

Zeno v. Ford Motor Co.,
238 F.R.D. 173 (W.D. Pa. 2006) 4, 36

STATUTES, RULES & REGULATIONS

Magnuson-Moss Warranty Act (“MMWA”), 15 U.S.C. § 2310(d) 5

15 U.S.C. § 2301(6) 14, 29, 30

15 U.S.C. § 2301...42

15 U.S.C. § 2310(d)(2) 59

15 U.S.C. § 2310(e) ....passim

15 U.S.C. § 2311(b)(1) 55

33 U.S.C. § 1365(d) 60

16 C.F.R. § 702.1 29

16 C.F.R. § 702.3 29

41 P.S. § 503 ....56, 57

41 Pa. C.S. § 503 58

42 Pa. C. S. § 2503(10) 49, 52

73 Pa. C.S. § 201-2(4) 5

13 Pa. C.S. §§ 2313, 2714 .... passim

Pa. R. App. P. 1701(a) 50

Pa. R. Civ. P. 1715 .... passim

Pa. R. Prof. Cond. 1.5(a) 61

Pa. R.C.P. No. 1716 61

Pa. R. Civ. P. 1715(d) 13, 60

Uniform Commercial Code § 2-313 20

UCC § 2-313 30

UCC § 2-607 (2003) 32

UCC § 2-714(1) 33, 42

LEGISLATIVE HISTORY

H.R. Rep. No. 93-1107, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7717-7718 ....14, 32

Sen. Rep. No. 93-151, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7709 59

TREATISES, BOOKS, LAW REVIEWS & RESTATEMENTS

3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.3 ....34, 44

3 Mary Ann Foran, *Williston on Sales* § 17-7 (5th ed. 1994) 29

10 *Newberg on Class Actions* § 10.12 (4th ed. 2002) 43

L. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations,* 83 B.U. L. Rev. 345 (2003) 18

Charles A. Heckman, *"Reliance" or "Common Honesty of Speech": The History of Interpretation of Section 2-313 of the Uniform Commercial Code,* 38 Case W. Res. L. Rev. 1 (1987-88) 29

C. Reitz, *Manufacturers' Warranties of Consumer Goods,* 75 Wash. U. L.Q. 357 (1997)....................18

Manual for Complex Litigation § 30.47 at 290-91 (3d ed. 2001)....................43

Restatement (Second) of Contracts § 235 at 211 (1979) 18

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

Plaintiff-Appellee ("Consumer") disagrees with the "scope and standard of review" set forth in the Brief of Appellant Kia Motors America, Inc. ("KMA"). *See* KMA Br. at 2. Substantial deference is given to the trial court's class certification decision, which is reviewed under the abuse of discretion standard. *See Bell v. Beneficial Consumer Discount Co.*, 465 Pa. 225, 235, 348 A.2d 734, 739 (1975).

"The lower court's order granting or denying class certification will not be disturbed on appeal unless the court neglected to consider the requirements of the rules or abused its discretion in applying them." *D'Amelio v. Blue Cross of Lehigh Valley*, 500 A.2d 1137, 1141 (Pa. Super. 1985) (citations omitted). "It is the strong and oft-repeated policy of this Commonwealth that, in applying the rules for class certification, decisions should be made liberally and in favor of maintaining a class action." *Debbs v. Chrysler Corp.*, 810 A.2d 137, 153 (Pa. Super. 2002) (citations omitted). Thus, only a clear abuse of discretion will justify reversal of a class certification decision.

With respect to entry of judgment on the jury's verdict, an abuse of discretion may be found only where the appellant proves that a judgment is manifestly unreasonable, arbitrary or capricious; that it fails to apply the law; that it was motivated by partiality, prejudice, bias or ill-will; or that it lacks such support as to be clearly erroneous. *See Hoy v. Angelone*, 554 Pa. 134, 148, 720 A.2d 745, 752 (1998). This same standard applies to review of a trial court's award of statutory attorney fees. *Lucchino v. Commonwealth,* 570 Pa. 277, 809 A.2d 264 (2002) ("Appellate review of a trial court's order awarding attorney fees to a litigant is limited solely to determining whether the trial court palpably abused its discretion in making the fee award.").

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Did the lower courts abuse their class certification discretion where KMA admitted, among other things: (a) that it promised all Class members a Sephia that was "free from defects in materials or workmanship;" (b) that the brake systems shared the same basic design; (c) that the brake components were interchangeable from year to year; (d) that it knew the design could not meet minimum brake wear expectations in the U.S.; and (e) that it had provided a brake repair coupon to about 5% of consumers who had had three (3) or more brake repairs?

> Suggested Answer: **No.** Substantial common evidence established that KMA delivered to all Class members a Sephia that was not "free from defects in materials or workmanship." The jury correctly found – and KMA does not dispute – that the warranty's limited repair and replacement remedy had "failed of its essential purpose," because the fundamental design defect could not be "cured," *i.e.* fixed.

2. Did the lower courts abuse their discretion in entering a class judgment where overwhelming common evidence established a model-wide brake design defect that could not be cured, and the jury found KMA had promised but failed to deliver (and could not deliver) a car "free from defects in materials or workmanship"?

> Suggested Answer: **No**. The common evidence, including expert testimony and KMA's own tests and documents, established (and the jury found) that the Sephia's brakes were defectively designed and could not be fixed without a repositioned axle and larger rotors.

3. Did KMA waive its arguments concerning (a) certification of the express warranty and MMWA claims; (b) entry of judgment for the Class; (c) objection to the form of the verdict; (d) alleged violation of its due process rights; and (e) decertification?

> Suggested Answer: **Yes**. KMA failed below to raise or preserve arguments (a)-(e).

4. Did the lower courts abuse their discretion in awarding attorney fees as a separate matter in accordance with *Miller Electric Co. v. DeWeese*, 589 Pa. 167, 176, 907 A.2d 1051, 1057 (2006) and *Old Forge School District v. Highmark Inc.*, 592 Pa. 307, 317, 924 A.2d 1205, 1211 (2007)?

> Suggested Answer: **No**. The lower courts followed controlling procedures and law.

5. Did the lower courts abuse their discretion in awarding reasonable class action attorney fees authorized by a federal statute which adopts and does not preempt state court rules?

Suggested Answer: **No**. The MMWA, unlike other federal fee-shifting statutes, shifts to the losing defendant "the aggregate amount" of costs, fees and expenses "reasonably incurred" by the consumer class. The reasonableness of the Class fee is a matter of procedure to be determined under state rules and public policies. The MMWA incorporates (and does not preempt) state contingent fee rules, procedures and multipliers in cases tried before state courts.

COUNTER-STATEMENT OF THE CASE

A. FORM OF ACTION

This is one of several consumer class actions against KMA based upon a braking system defect in its Sephia automobile. Every trial court that has examined the issue has certified a statewide consumer warranty class concerning the claims. *See* R.92a, *Little v. Kia Motors America, Inc*., No. UNN-L-0800-01 (N.J. Super. Order entered Aug. 20, 2003) ("*Little*") (New Jersey statewide class certified); Supp. R.598a, *Santiago v. Kia Motors America, Inc*., No. 01 CC 01438 (Cal. Super. Order entered Apr. 24, 2004) ("*Santiago*") (California statewide class certified) and Supp. R.603a (Order entered Oct. 11, 2005, certifying 47-state class for settlement); *Butler v. Kia Motors America, Inc.,* No. 03-25467-CA31 (Fla. 11th Cir. (Dade County) (Apr. 15, 2005) ("*Butler*") (Florida statewide class certified), *reversed but appeal pending,* No. 3D05-1145 (Fla. Dist. Ct. App. - 3rd, June 11, 2008), *petition filed at* No. SC 08-1342 (Fla. filed July 30, 2008).[1]

In fact, before this case was remanded to the Philadelphia Court of Common Pleas, the United States District Court for the Eastern District of Pennsylvania had certified a Pennsylvania statewide consumer warranty class. *Samuel-Bassett v. Kia Motors America, Inc.*, 212 F.R.D. 271 (E.D. Pa. Dec. 13, 2002) (certifying Pennsylvania class), *vacated for re-examination of federal*

---

[1] Like the *Little, Santiago,* and *Butler* cases before the state courts of New Jersey, California and Florida, this case is confined to a statewide class covering Sephias sold in the Commonwealth of Pennsylvania. Other proposed class actions concerning the Sephia brakes had been pending in the federal court of North Carolina and the state courts of Illinois and Tennessee, but these cases were settled and released in connection with the 47-state class action settlement entered into by KMA in *Santiago.* Supp. R.603a, 10/11/05 Order and 10/3/05 Notice. The attorneys in this case were not involved in any of the cases settled in connection with the 47-state class action settlement negotiated by KMA.

jurisdiction, 357 F.3d 392, 403 (3d Cir. 2004).[2] The federal court's decision, like the trial court's decision here after remand, found that the common brake design defect claims were appropriate for class certification. *See* 212 F.R.D. at 276-283.

Apart from these decisions, KMA also has conceded on multiple occasions that class certification of the claims was appropriate. First, as noted by the federal district court, KMA admitted the existence of a class by implementing a "Brake Coupon Program" that provided a free brake repair to a limited subset of the Class members. *See Samuel-Bassett*, 212 F.R.D. at 282; *see also* R.3086a-88a, 3089a-90a, NT 5/24/05 at 32-38, 43-45 (describing program). Second, as noted by the trial court in its post-trial decision,[3] KMA itself filed a Motion for Certification of a "Temporary" Class in the federal action entitled *Leger v. Kia Motors America, Inc.*, No. CV-04-80522-Zloch (M.D. Fla. motion filed May 25, 2005), in which it admitted that class certification was appropriate. Supp. R.634a at 2. Because the United States Supreme Court has held that a settlement class may not be certified unless it can be certified for litigation purposes, *Amchem Products*, *Inc. v. Windsor,* 521 U.S. 591, 619-620 (1997), KMA was (and is) judicially estopped from arguing here (or in any court) that class certification was improper.[4] Third, KMA stipulated to class certification of a 47-state class – not including Pennsylvania,

---

[2] Many other courts have certified similar class actions as well. *See, e.g.*, *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553-554 (6th Cir. 2006) (affirming certification of nationwide class alleging defective throttle assembly); *Zeno v. Ford Motor Co.*, 238 F.R.D. 173, 198-199 (W.D. Pa. 2006) (certifying state-wide class of truck purchasers who allegedly did not receive an upgraded radiator); Supp. R.687a, *Ecker v. Ford Motor Co.*, No. BC 278 074 (Cal. Super. Ct., Los Angeles, Cty., Feb. 2, 2007) (certifying state-wide class of 2000-2001 Ford Focus purchasers alleging defective braking system caused "premature and excessive wear of brake pads and rotors").

[3] KMA Br. App. C (Post-Trial Op. at 4-5).

[4] *See Carnegie v. Household Intern. Inc.*, 376 F.3d 656, 664 (7th Cir. 2004) (where the defendant has stipulated to class certification for settlement purposes but the settlement is disapproved, that defendant is nonetheless judicially estopped from challenging certification on the merits).

New Jersey and Florida – for settlement purposes in the California *Santiago* case. Supp. R.603a, 10/11/05 Order and 10/3/05 Notice. Fourth, KMA has not requested in this appeal to reverse certification of the classwide jury verdict in its favor on the implied warranty claim. Because KMA cynically seeks the benefit of classwide *res judicata* while it simultaneously denounces the same class certification decision, its attacks on the lower courts should be viewed with utmost skepticism.

B. THE CLASS CERTIFICATION PROCEEDINGS

Consumer alleged and proved at class certification and at trial that Kia Sephias contain a systemic heat dissipation defect that causes their brake pads and rotors to prematurely wear, warp and require replacement, typically within the first 9,000 miles.[5] Consumer asserted express and implied warranty claims and violations of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2310(d), and the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. C.S. § 201-2(4)(xiv). The evidence presented to both the federal district court and the trial court proved that KMA had been aware of the brake system defect since the Sephia's introduction into the Pennsylvania marketplace in 1997, but failed to disclose publicly what it described internally as "a known product problem" (Supp. R.711a, NT 5/23/05 a.m. at 33). It was not until January 2002, one year after the filing of this lawsuit, that KMA

[5] Consumer originally filed a Class Action Complaint in the Court of Common Pleas of Philadelphia County on January 16, 2001. KMA removed the case to federal court. On May 9, 2001, the federal court denied Consumer's motion for remand. By Memorandum Opinion dated December 13, 2002, District Judge Curtis Joyner granted class certification. *Samuel-Bassett v. Kia Motors America, Inc.*, 212 F.R.D. 271. KMA then petitioned to appeal pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. The Third Circuit granted the petition, but then requested briefing on the issue of subject matter jurisdiction and the propriety of KMA's removal. On February 5, 2004, the Third Circuit expressed doubt about the existence of federal jurisdiction and directed the district court to reexamine the issue upon remand. 357 F.3d at 403. Upon return to the federal district court, the parties stipulated to, and the district court so ordered, a remand to state court.

"voluntarily" initiated a brake coupon program for consumers who had had three (3) or more Sephia brake repairs. R.129a, Class Cert. Mot. at Exh. 2, App. Exh. S. Prior to this coupon, KMA maintained the Sephia's brakes were wear items not covered under warranty. From time to time, KMA would replace some pads and rotors under warranty for consumers who were aggressive enough to demand replacement. With the brake coupon program, KMA expressly recognized that a model-wide brake-wear defect existed for the 1997-2000 Sephias.

At class certification and at trial, Consumer established that the Sephias contained a uniform brake system defect that substantially affected their use, value, and safety. *See* R.12a; 31a, KMA Br. App. A, at 3-4, 9/21/04; KMA Br. App. C, 12/28/06. Specifically, the material and design of the pads and rotors were unable to dissipate heat, a natural consequence of braking, causing the brakes to wear and warp prematurely and abnormally. *Id.* In addition to the manifestation of the defect through heat-related abnormal wear and more frequent than normal repairs and replacements, the Sephias also exhibited brake judder and vibration. *Id.* According to Consumer's expert engineering testimony, the heat dissipation problem was a result of the defective design of the brake system so that substandard brake life existed in ***all*** Sephias. R.244a, 148a-149a, NT 5/19/05 a.m. at 107-108; NT 7/15/04 at 132-133 (King). As KMA's Senior Vice President of Fixed Operations admitted, "there was a known product problem" with "the brakes and their longevity," because the brakes were wearing out long before the "industry" standard of "20 to 25,000 miles." Supp. R.706a; NT 5/23/05 a.m. pp. 15-31 (Sawyer).

KMA also admitted that the same written warranty had been delivered to all Pennsylvania purchasers and lessees of Kia Sephias for the 1997-2000 model years. R.328a, P-2, Supp. R.712a-843a, P-25 (1997-2000 Warranties). KMA warranted that the Sephias were equipped with a standard functional brake system that was "**free from defects in materials or**

workmanship," including design. *Id*. The express warranty provided to all Class members promised the same "Basic Warranty Coverage":

> Kia Motors America, Inc. warrants that your new Kia Vehicle is free from defects in material or workmanship, subject to the following terms and conditions.
>
> * * * * *
>
> except as limited or excluded below, all components of your new KMA Vehicle are covered for 36 months or 36,000 miles, whichever comes first, from the earlier date of either retail delivery or first use of the KMA vehicle.

R.121a, 123a, 125a, 127a, 328a (Exhs. P-2; P-25). Despite this warranty and KMA's long-standing knowledge of the brake design defect, KMA required Consumer and Class members to pay for brake repairs and replacements. R.264a, NT 5/24/05 a.m. p.65 (Pearce). Those repairs and replacements, however, would simply install another set of defective components on consumers' cars, thus resulting in further costs of approximately double the amount ordinarily incurred with a non-defective brake system. NT 5/19/05 p.m. pp.22-26 (King)**.**

The trial court (and the federal district court) received and considered extensive documentary and testimonial evidence developed by the parties over the course of many months of discovery. There can be little doubt that the trial court (like the federal district court) considered this evidence and the parties' arguments concerning its significance. In fact, the lower courts cited the following facts, nearly all of which were and are undisputed:

- there is only one automobile model at issue;
- the braking system was manufactured in such a way that the parts were fully interchangeable from one model year to the next;
- there is no evidence to suggest Sephia drivers stop and go more than drivers of other vehicles, *i.e.*, that individual driver habits could not account for the extraordinary number of brake system problems;
- KMA was aware that there were ongoing problems with the Sephia's braking system arising from the design of the brake pads and rotors by virtue of the parts sales history;

- KMA issued multiple Technical Service Bulletins ("TSBs") concerning the brake system problem;

- KMA made ongoing but unsuccessful efforts to redesign and improve the brake pads and rotors to try to achieve a minimal useful life;

- KMA instituted a brake coupon program for the benefit of a subset of Class members to address the problems; and,

- KMA acknowledged an unprecedented number of warranty claims arising from a defective brake system.

See KMA Br. App. A (Tr. Op. 9/21/04 at 16-17); *see also* 212 F.R.D. at 277-283 (same). Based on these findings of fact and others, the lower courts determined that a consumer warranty class should be certified. *Id.* Following certification, an approved form of Notice of Pendency was sent to all members of the Class based on KMA's electronic warranty records. *See* R.156a, Tr. Order 11/9/04, Dkt. 11/10/04.[6]

Following extensive pre-trial proceedings, the trial of this class action began on May 16, 2005. A common, predominating issue at trial on the merits – decided by the jury – was whether the Sephia's brake system design was defective because the system could not dissipate heat adequately, which necessarily resulted in "abnormal," premature brake wear. *See* R.937a. Another common, predominating question decided by the jury was KMA's uniform defense that "judder, pulsation, and unacceptably short pad wear life" are "common brake conditions" that are not "'defects' as that term is understood in the automotive industry." R.265a-272a, 297a: NT 5/24/05 a.m. 84-105 & p.m. 4-100 (Bowman).

All parties were aware of the trial court's intention to have the jury resolve both liability and damages issues on a class-wide basis. In fact, the trial court invited counsel to review and

---

[6] The class members who received notice of the class action were and are all Sephia purchasers or lessees as reflected in KMA's own warranty records. Dkt. 11/10/04 Order Directing Mailed Notice To Class Members.

comment upon a proposed verdict form. NT 5/25/05 p.m. at 28, *et seq*. Two weeks after the commencement of trial, on May 27, 2005, the jury rendered a verdict finding that KMA had breached its express warranty to the Class and that the amount of damages "sustained by *each class member* . . . as a result of defendant's breach" was "$600." *See* R.326a, Jury Verdict Form (emphasis added). Based upon the parties' stipulation that the number of Class members was 9,402 after accounting for opt-outs, the trial court, in the presence of the jury and without objection, recorded a Class verdict of $5,641,200 (*i.e.*, 9,402 x $600).[7]

C. CHRONOLOGICAL STATEMENT OF FACTS

In its brief, KMA ignores or distorts the substantial evidence presented at trial which supports the jury's verdict. Consumer will highlight just a few proven facts avoided by KMA, and otherwise rely upon the careful review of the testimony and evidence contained in the trial court's Rule 1925(a) Opinion of December 28, 2006. KMA Br. App. C. The trial evidence at a minimum established the following:

- The existence of a serious and chronic problem with premature wear of brake system components that was confirmed by KMA's own records, and admitted by KMA's own top executives. Timothy McCurdy, KMA's Director of Technical Operations and corporate designee, frankly admitted to an "ongoing issue" with the brake system, and his frustration at Kia Motor Corporation's (KMA's parent corporation) inability to provide brake pads and rotors which met the expectations of American consumers. R.205a, 209a-211a; NT 5/18/05 p.m. at 4, 16-18, 70-73.

- Lee Sawyer, KMA's Senior Vice President of Fixed Operations, described the chronic issue of premature wear of brake components as "a known product problem." He also admitted that brake pads should typically last "20/25,000 miles," and rotors "50,000-75,000 miles." NT 5/23/05 a.m. at 23-31.

---

[7] KMA plainly knew before trial that class-wide damages evidence would be introduced by Consumer's two expert witnesses who had provided reports to KMA many months earlier. In fact, KMA did not object at or before trial to the introduction of class damages evidence. Therefore, KMA's after-the-fact construction of the trial court's Order of May 16, 2005, concerning post-verdict claims proceedings, is neither reasonable nor credible.

● KMA's Vice President of Parts and Service, Donald Pearce, explained that the "warranty claim rate" is a mathematical calculation of the percentage of total claims versus the total number of vehicles sold. R. 262a, NT 5/24/05 a.m. at 56. The unprecedented brake system claim rates for the Kia Sephia were 91% for the '97 model year, 154% for the '98 model year and 97.9% for the '99 model year.

● Despite minor tweaks in production materials and methods, every Kia Sephia for the model years 1997-2000 shared the same brake system design. R.225a, NT 5/18/05 p.m. at 78. KMA's corporate designee, Mr. McCurdy, agreed that for the brake systems on all Sephias, "everything is interchangeable. There is nothing that doesn't fit an earlier car or an earlier car won't fit a later car." *Id*.

● The KMA warranty provided to every Class member promised that the Sephia was "free from defects in material or workmanship." *See* R.328a, Kia Sephia New Vehicle Warranty. According to Mr. Pearce, because pads and rotors are "wear items" not normally covered under the warranty, the frequent replacement of brake components under the warranty could only have occurred if those parts were "defective." R.264a, NT 5/24/05 a.m. at 66.

● KMA's Brake Coupon Program, offering one free brake repair only to those Sephia owners who had had three (3) or more warranty brake repairs, was a recognition of both the ongoing brake system problem, and the specific class of affected vehicles (1997-2000 model year Sephias, the same as the Class defined in this class action). *See* R.129a, Brake Coupon Program Documents.

● Plaintiff's engineering expert, R. Scott King, testified that frequent replacement of pads and rotors was an inevitable consequence of the defective design of the brake system of the Sephia. R.244a, NT 5/19/05 a.m. at 107. Mr. King quantified class damages as $1,005 per consumer by reasonably calculating Class member losses based on KMA's business records. *See* R.247a.

● The trial court's charge to the jury included instructions on liability, causation and damages, a review of the questions on the verdict form, and a description of the purpose of the class action device. KMA's trial counsel expressly affirmed that KMA had no objection to any portion of the charge. R.313a-314a; NT 5/25/05 p.m. at 70-71.

D. THE SUPERIOR COURT'S OPINIONS

KMA filed two appeals from the trial court's decisions: one from the verdict and merits judgment; the other from the award of costs, expenses and attorney fees as authorized by the Magnuson-Moss Warranty Act (MMWA) and state law. In its Rule 1925(b) statement, KMA did not identify any perceived or real difference between the express and implied warranty claims with respect to class certification. Nor did KMA claim it had preserved or made any objection to the trial court's express warranty jury instruction, or to the trial court's molding of the verdict pursuant to Pa. R. Civ. P. 1715. Because of these waivers, and because KMA uniformly promised all Class members a Sephia "free from defects in materials or workmanship" but uniformly delivered to all Class members a Sephia with a defectively designed brake system that could not be "cured" (*i.e.* fixed), the Superior Court affirmed.

The Superior Court remanded the lower court's cost, expense and fee award for a supplemental Rule 1925(a) opinion from the trial court. In light of that supplemental opinion and the accompanying findings of fact and conclusions of law, the Superior Court also affirmed.

SUMMARY OF THE ARGUMENT

KMA's appeal to this Court mischaracterizes, distorts and otherwise dissembles the facts, record, issues and decisions considered by the courts and jury below. The trial court supervised, managed and conducted a model consumer class action trial that resolved – on the merits – thousands of relatively small claims that could not have been pursued by individual consumers of the economy-class Sephia. The Supreme Court of the United States has recognized that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445

U.S. 326, 339 (1980). The lower courts committed no error – and certainly did not abuse their discretion – in initially certifying the Class, conducting the class trial, and then affirming the classwide judgment both in favor of and against the Class.

On appeal, KMA implausibly contends the lower courts "*presumed* class certification was appropriate." KMA Br. at 12 (emphasis in original). But KMA has not identified and cannot identify any place in the record or any aspect of the lower courts' rulings that "presumed" any fact or element pertinent to class certification. In fact, the lower courts scrupulously analyzed and applied each of the class certification requirements. *See* KMA Br. App. A, C, E.

KMA also mistakenly argues (for the first time on appeal) that express warranty claims are not susceptible to class treatment. Apart from waiver, KMA overlooks its admission that it provided the same written warranty to every Class member. That uniform written warranty promised the Sephia was "free from defects in materials or workmanship." R.597a (Tr. Op. at 1). The common evidence established, and the lower courts and jury found, that KMA uniformly breached this express promise because all the Sephias it delivered had a defectively designed braking system that could not adequately dissipate heat. The lower courts and jury further found – based again on common evidence – that the design defect could not be "cured" (*i.e.* fixed), because larger rotors and a repositioned axle were required to evacuate friction heat, a natural consequence of braking. Thus, uniform proof of KMA's breach was established, as the breach necessarily occurred when KMA delivered the non-conforming, defective Sephia to each Class member. *See Nationwide Ins. Co. v. General Motors Corp.*, 533 Pa. 423, 433 & 439, 625 A.2d 1172, 1177 & 1180 (1993) (a classic warranty that the goods conform to the promise is breached upon delivery of the non-conforming product); 13 Pa. C.S. §§ 2313, 2714.

KMA either misunderstands or conveniently misstates (after-the-fact) the meaning of the May 16, 2005 Order denying its motion for bifurcation. This case was tried on a class basis and defended on a class basis. The "Jury Verdict Special Interrogatories" specifically asked (i) whether KMA breached its warranty on the cars "purchased *by the class*" and (ii) the amount of damages, if any, "sustained by *each class member*." Under Pa. R. Civ. P. 1715(d), the trial court properly molded this verdict to specify who was bound by the class judgment. The trial court took the plain meaning of the verdict, $600 for "each class member," and multiplied it by the stipulated number of Class members remaining after opt-outs, 9,402, to equal $5,561,200. *See Maize v. Atlantic Refining Co.*, 352 Pa. 51, 61, 41 A.2d 850, 855 (1945) ("[w]here the intention of the jury is plain, the court may mould the verdict into form according to the requirements of the law"). Nothing in the May 16 Order altered the trial's course or amounted to an abuse of discretion.

As for the Class's attorney fees, the lower courts followed controlling appellate jurisdiction and procedure in treating the fee petition as a "separate matter" following entry of the merits judgment. *See Old Forge School District v. Highmark Inc.*, 592 Pa. 307, 924 A.2d 1205 (2007); *Miller Electric Co. v. DeWeese*, 589 Pa. 167, 907 A.2d 1051 (2006). The federal statute authorizing the award does not conflict with or preempt these state jurisdictional principles and procedures. *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717, 1721 (1988). The federal statute here, unlike other federal fee-shifting statutes, adopts and incorporates state standards governing reasonable attorney fees. It also measures fees from the Class's perspective, shifting to the defendant the "aggregate amount" of the "expenses (including attorney fees)" "reasonably incurred" by the Class. Because Pennsylvania procedures and attorney fee policies required consideration of the contingent nature of the fee, the lower

courts properly awarded a fee enhancement to the Class based on the state standards. Again, nothing in the federal law conflicts with or preempts these state standards for a class case tried in state court.

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY CERTIFIED THE CLASS, AND KMA FAILED TO OFFER ANY EVIDENCE OR EVEN A MOTION TO SUPPORT DECERTIFICATION OF THE CLASS.

Both Congress and the United States Supreme Court have recognized that the strictest test for class certification – predominance of the common questions – is "a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). *See* 15 U.S.C. § 2310(e) (authorizing consumer warranty class actions, and excepting them from pre-suit notice and opportunity to cure until the class is certified).[8] In this regard, Congress specified in the MMWA that all written warranties in consumer transactions are to be considered "part of the basis of the bargain" in order to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." *See* 15 U.S.C. § 2301(6) (defining "written warranty") and § 2302(a) (requiring clear and conspicuous warranty disclosures); *see also* H.R. Rep. No. 93-1107, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7717-7718 (to comply with the MMWA, written warranties must become "part of the basis of the bargain").

Despite this recognition that consumer product warranty claims are particularly suitable for representative litigation, KMA argues the lower courts erred in certifying the Class. For support, KMA mis-describes the nature of its uniform written warranty, the facts and law

---

[8] *See Walsh v. Ford Motor Co.*, 627 F. Supp. 1519, 1522 (D.D.C. 1986) (notice and opportunity to cure are modified under the MMWA and do not apply until class representation is decided).

applicable to commonality and predominance, the significance of its warranty repair statistics, the uniformity of its internal design studies (*e.g.* Exh. P-16) and memoranda (*e.g.* Exhs. P-7 & P-44), and its admission that the matter was properly certified for settlement purposes for all claims for 47 other states (excluding Pennsylvania, New Jersey and Florida). [9]

A. KMA MIS-DESCRIBES ITS WARRANTY AND THE NATURE OF THE CASE.

KMA first contends the lower courts erred in certifying the breach of express warranty claim. KMA's brief, however, fails to cite any portion of the record where it objected to or singled-out the express and written warranty claims as distinct from the implied warranty claim for class certification purposes. KMA does not point to any specific error in the class certification opinion, or to any part of the record in which KMA raised the alleged error. In fact, KMA contested class certification below as to all claims, obviously hoping as a matter of strategy to obtain the same *res judicata* benefit it now claims for the implied warranty claim. As a result, KMA has waived all the alleged errors it has asserted after-the-fact in this Court. *See Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974).

Apart from waiver, KMA's argument is premised upon a mis-description of its warranty. The trial court's post-trial opinion correctly quotes the warranty: "'Kia Motors America, Inc.

---

[9] As alluded to in the trial court's Rule 1925(a) Opinion (KMA Br. App. C), KMA had embarked on a "reverse auction" settlement strategy in which it had attempted to pick-off and release the claims of the Pennsylvania Class through litigation pending in other fora. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (describing "reverse auction" tactic). To protect the interests of the Pennsylvania class, Consumer's counsel traveled to California and Florida to attend a mandatory mediation and an attempted settlement hearing in federal court in which the Pennsylvania claims potentially would have been released for inadequate coupon consideration. Consumer's counsel were successful in protecting the Pennsylvania class. *See, e.g.*, *Smith v. Sprint Commc'ns Corp.*, 387 F.3d 612 (7th Cir. 2004) (rejecting proposed nationwide class action settlement that would preempt and release more advanced state class actions); *Naposki v. First Nat'l Bank of Atlanta*, 2005 WL 1285716 (N.Y. App. Div. 2d May 31, 2005) (awarding $5,000 in sanctions against defense counsel for failing to advise appellate court of competing class action and settlement in California).

warrants that your new Kia Vehicle is free from defects in material or workmanship, subject to the following terms and conditions: . . . Except as limited or excluded below, all components of your new Kia Vehicle are covered for 36 months or 36,000 miles, whichever comes first. . . .'" KMA App. C (Tr. Op. p.1); *see also* R.328a (Exhs. P-2 & P-25a-c). The jury found – based on overwhelming common evidence – that KMA breached this promise by delivering to each Class member a Kia vehicle that was not "free from defects in material or workmanship," because the brake system was defectively designed. KMA App. C (Tr. Op. p.1). The Superior Court likewise concluded: "Based on the evidence, it is clear that the brakes on all 1995-2001 Kia Sephias were defective. Regardless of whether an individual class member had his or her brakes repaired under warranty by Kia, all class members were entitled to have good brakes on their cars that did not require repeated trips to the dealership for replacement in order to avoid brake failure." KMA App. E (Super. Op. p.3). In other words, the jury and the lower courts found that KMA uniformly promised a defect-free car but instead uniformly delivered to each Class member a Sephia with a defectively designed braking system.

In this Court, KMA argues for the first time that its uniform warranty did not promise a defect-free product. It says, on the contrary, that "the express warranty . . . did not guarantee that the vehicle would be perfect. Rather, KMA's express warranty was a traditional 'repair and replacement' warranty." KMA Br. at 5. As noted, however, KMA did not raise this argument in the lower courts or before the jury and, therefore, has waived it. Besides, the jury implicitly rejected the argument by finding that the Sephias were defective, and that KMA had breached "its express warranty on the cars purchased by the class." R. 326a (Jury Verdict Form p.1).

More specifically, KMA does not and cannot dispute the common evidence of the model-wide design defect underpinning the jury's verdict. It says instead that even if the Sephias were

defective, the warranties were not breached until KMA failed "to correct the problem" without charge. *See* KMA Br. at 5. The jury rejected this point as well, specifically finding that KMA "fail[ed] to remedy the common defect without charge after being given a reasonable time to cure the problem." R. 326a (Jury Verdict Form p.1). This finding was based on undisputed evidence that KMA could not design a brake system to correct the defect without repositioning the Sephia's axle and employing larger rotors, which KMA could only do with a whole new car model having larger wheels and a different axle that it introduced in 2001 – the renamed Spectra. *See* R.255a, NT 5/23/05 p.m. at 21 (Sohn). Therefore, both factual premises underlying KMA's appellate arguments were rejected categorically by the jury based on common, classwide evidence.

Even if the verdict did not foreclose KMA's belated arguments, a controlling decision of this Court – cited and followed by many other courts and authorities since – disproves KMA's baseless assertion that its warranty was a "traditional" repair or replace warranty. *See* KMA Br. at 5.

In *Nationwide Ins. Co. v. General Motors Corp.*, 533 Pa. 423, 625 A.2d 1172 (1993) – a controlling case KMA fails to discuss or even cite – this Court considered the difference between "a classic warranty," which promises that the product conforms to a particular quality or condition (*e.g.* free from defects), and a "repair or replace" warranty, which promises only a limited remedy to fix the product if any defect later arises. *See id.* at 433-434 (majority) & 437 (dissent); 625 A.2d at 1177-1178 (majority) & 1179 (dissent). The "classic warranty" makes a promise about the quality of the good; whereas the "repair or replace" warranty makes a promise only about the warrantor's post-sale duty to remedy. This Court and the dissent agreed in *Nationwide* that the wording of the warranty determines its nature, with the majority holding that

"any difficulty interpreting the agreement must be resolved in favor of the non-drafting party." *Id*. at 432, 625 A.2d at 1177 (citations omitted). This Court and the dissent also agreed that "a classic warranty" would be breached upon delivery of the non-conforming good. *See id*. at 427 & 438 (dissent), 625 A.2d at 1176 & 1180 (dissent). The majority and the dissent disagreed only as to the significance, for statute of limitations purposes, of a Chevrolet warranty's wording, which did not make any promise about the quality or condition of the car but instead promised to "cover[] any repairs and needed adjustments to correct defects in material or workmanship." *See id*. at 429 & 439 (dissent), 625 A.2d at 1175 & 1180 (dissent).

Since the *Nationwide* decision, courts and commentators throughout the country have followed this Court's analytical lead. In examining warranties and extended warranties in the automotive industry, the authorities have noted important differences between a warranty, like KMA's, that promises the product is "free from defects in material or workmanship," and a remedy warranty or agreement, like those used by General Motors and Chrysler, that promises only to "repair or replace" any defective component if and when a defect arises.[10]

For example, in *Poli v. DaimlerChrysler Corp.*, 793 A.2d 104 (N.J. Super. App. Div. 2002), the New Jersey Appellate Division considered a "7 year, 70,000 mile" power-train warranty that "'cover[ed] the cost of all parts and labor needed to repair or adjust any Chrysler supplied item . . . that proves defective in material, workmanship or factory preparation.'" *Id*. at 107 (quoting Chrysler warranty). The court rejected Chrysler's argument that this extended warranty "was an ordinary sales warranty" that required the consumer to bring a claim within four (4) years after delivery. *Id*. at 108. The court agreed with this Court's analysis in

[10] *See* L. Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B.U.L.Rev. 345 (2003); C. Reitz, *Manufacturers' Warranties of Consumer Goods*, 75 Wash. U.L.Q. 357 (1997); Restatement (Second) of Contracts § 235 at 211 (1979).

Nationwide, holding that Chrysler's language provided only a remedial repair promise for future performance, not a defect-free promise, so the statute of limitations did not start running until the consumer discovered the defect. *See id*. at 109 (*citing and quoting Nationwide*, 625 A.2d at 1173, 1176-78).

The Supreme Court of Illinois in *Mydlach v. DaimlerChrysler Corp.*, 875 N.E.2d 1047 (Ill. 2007), followed this Court's *Nationwide* analysis as well. *See id*. at 1060, *citing Nationwide*, 533 Pa. 434, 625 A.2d at 1178. As in *Poli*, the Chrysler warranty in *Mydlach* did not make any promise "related to the quality or description of the goods at tender." *See id*. at 1058. Instead, it "'cover[ed] the cost of all parts and labor needed to repair any item on your vehicle . . . that's defective in material, workmanship, or factory preparation.'" *Id*. at 1051 (quoting Chrysler warranty). The court explained that this type of repair promise would be breached only upon the warrantor's failure to repair. *See id*. at 1058. By contrast, "an express warranty, for purposes of the UCC, obligates the seller to deliver goods that conform to the affirmation, promise, description, sample or model. If a seller delivers conforming goods, the warranty is satisfied. If the seller delivers nonconforming goods, the warranty is breached at that time. Even if the buyer is unaware that the goods, as delivered, do not conform . . . the warranty has been breached." *Id*. Because the Chrysler warranty, like the Chevrolet warranty in *Nationwide*, did not promise a vehicle free from defects at delivery, the consumer's action for breach did not accrue until Chrysler failed to repair the car. *See id.* at 1061.

KMA recognized below (but has ignored on appeal here) that the KMA warranty is a "classic warranty" that differs from the "repair or replace" warranties used by other car manufacturers. This is not surprising because the evidence at trial showed (and KMA's trial counsel even argued) that KMA was a new entrant to the American car market, with the Sephia

being the first car it introduced through its new dealer network. Supp. R.844a, NT 5/17/05 p.m. 34-35 (KMA Opening). Being a new competitor with a limited dealer network, KMA's uniform written warranty naturally was broader, providing a direct promise about the quality of the Sephia: "your new Kia Vehicle is free from defects in material or workmanship." This language was and is absent from the Chrysler warranties in *Poli* and *Mydlach* and the Chevrolet warranty in *Nationwide*. Under *Nationwide* (including the dissent in that case), and all of the many authorities that have followed *Nationwide*, KMA's warranty language promised a defect-free car, making it a classic express warranty within the meaning of Uniform Commercial Code § 2-313 (codified as 13 Pa. C.S. § 2313). *See Nationwide*, 533 Pa. at 427, 433, 625 A.2d at 1174, 1177; *Poli*, 793 A.2d at 109-112; *Mydlach*, 875 N.E.2d at 1058.

Contrary to KMA's after-the-fact appellate argument, KMA agreed at trial to the jury instruction concerning its express warranty: "When a seller states a fact or makes a promise, the seller has created an expressed [sic] warranty that the car conforms to that statement or promise. A description by the seller about the goods that he or she sells creates an expressed [sic] warranty that the goods sold, the car, conform to the description." Supp. R.846a NT 5/26/05 at 45, lines 4-11 (Jury Charge). This instruction comported with this Court's legal analysis in *Nationwide*. More significantly, the instruction would have made no sense if, as KMA now contends, the KMA warranty made no promise "about the goods." Because KMA did not object to this instruction, and has not objected on appeal to the instruction, it was well within the jury's role to decide – as it did – that KMA uniformly promised to all Class members a defect-free Sephia but uniformly delivered to all Class members a Sephia having a braking system defect.[11]

[11] It cannot be gainsaid that the meaning of KMA's express warranty also was a common, predominating question suitable for class treatment and decision. Whether KMA promised a defect-free car to each class member was, in fact, decided by the jury, as KMA was free to argue

In light of these facts and the applicable law, including *Nationwide* and its progeny, the lower courts were entirely correct to conclude that "all class members were entitled to have good brakes on their cars that did not require repeated trips to the dealership for replacement." KMA App. E (Super. Ct. Op. at 3). These facts and law also refute KMA's concocted appellate argument – unpreserved in the courts below and unsupported by any pertinent authority – that a breach of express warranty claim does not and cannot ever accrue upon delivery of the defective product. *See* KMA Br. at 16. In fact, as *Nationwide* and the Uniform Commercial Code make clear, a classic "express warranty" which makes a promise about the goods (*i.e.* they are free from defects) is breached upon delivery if, as here, the goods do not conform to that promise. This is exactly what the Class proved below and what the jury found based on the common design-defect evidence.

B. THE LOWER COURTS PROPERLY CERTIFIED THE CLASS.

1. Commonality And Predominance

KMA agrees in its brief that class treatment is proper where "'proof as to one claimant would be proof as to all.'" KMA Br. at 15 (quoting *Cook v. Highland Water and Sewer Auth.*, 108 Pa. Cmwlth. 222, 231-232, 530 A.2d 499, 504 (1987)). The proceedings below comported with this standard in all respects.

As the trial court correctly noted, common questions exist where class members' legal grievances arise out of the "same practice or course of conduct" on the part of the class opponent. *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451, 457 (Pa. Super. 1982). In examining commonality, a court should focus on the cause of injury and not the amount of

---

it never made such a promise. Because KMA did not introduce any evidence of a different promise, and because "it is not the function of the appellate court to find facts," *O'Rourke v. Commonwealth*, 566 Pa. 161, 179 n.6, 778 A.2d 1194, 1199 n.6 (2001), the jury's conclusion on this point may not be disturbed.

alleged damages. "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." *Weismer by Weismer v. Beech-Nut Nutrition Corp.*, 615 A.2d 428, 431 (Pa. Super. 1992).

At class certification, the trial court correctly found that commonality was met because Consumer's and the Class's theory of liability was centered on a common grievance: that KMA knowingly sold one automobile model, the Sephia, with a uniformly defective braking system, which KMA unsuccessfully attempted to remedy in a uniform manner. Consumer's generalized proof included, among other things, expert testimony, admissions from KMA's own corporate designees, warranty claims statistics generated by KMA's own warranty department, KMA business records identifying the heat dissipation defect as the cause of the brake problems, and the concession by KMA's own expert that if the alleged defect concerns the design of the same component parts, one does not have to examine every vehicle to know that each has a defect. R.152a-153a, NT Vol. II, 7/16/04, at 35-36 (cross Newsock).

The trial court, like the federal district court prior to remand,[12] relied on KMA's own warranty statistics as *prima facie* proof that all model year 1997-2000 Sephias exhibited a premature wear defect for class certification purposes. *See* KMA Br. App. C, Tr. Op. 9/17/04 at 8-9 ("Improvement was achieved in the 2000 model but warranty statistics still demonstrated that 36% of all vehicles required brake warranty repair in the first year, and 15% in the second. This data clearly indicates a systemic brake problem, identified by plaintiffs as related to a design defect causing inadequate heat dissipation from the front brakes"); *see also* R.143a-145a, NT Vol. I, 7/15/04 at 60-62 (KMA attorney describing KMA's own warranty statistics); R.256a, 424a, NT 5/23/05 p.m. at 50, P-23 (41.8% claims rate for Sephia vs. 6% rate for Sportage).

---

[12] *Samuel-Bassett*, 212 F.R.D. 271.

Besides these facts, Consumer also introduced extensive evidence and generalized proof establishing that KMA itself treated the premature brake wear as a model-wide problem. Consumer pointed to the admission of KMA's corporate designee and Director of Technical Operations, Timothy McCurdy, who agreed that for the brake systems on all Sephias ". . . everything is interchangeable. There is nothing that doesn't fit an earlier car or an earlier car won't fit a later car." R.204a, NT 5/18/05 p.m. at 3. Consumer also offered the testimony of the brake engineer from Kia Motors Corp. ("KMC"), Y.S. Sohn, who admitted at trial and at class certification as follows:

Q. Before 2001 the brake system had a particular design; am I right?
A. **Yes.**
Q. There was a major change in that design for model year 2001, correct?
A. **Are you talking about for 2000?**
Q. For the model year 2001.
A. **Yes, yes, yes.**
Q. The disc, I believe, got larger
A. **Yes.**
Q. And the axle was repositioned; correct?
A. **Yes.**
Q. Okay. Before those changes, would it have been technically difficult from an engineering standpoint to increase brake longevity?
A. **I believe it would have been difficult.**

R.255a, NT 5/23/05 p.m. at 21, admitted by stipulation at 7/16/04. Consumer further introduced the so-called "F-1 Field Fix" documents (P-16), in which KMC attempted model-wide revisions to the Sephia brake system in 2001 to address the premature wear, noise and vibration defects of all Sephias. R.256a, NT 5/23/05 p.m. at 50. These critical documents conceded that "heat dissipation performance . . . caused premature wear and judder problems." R.405a (P-16 "Field Fix Solutions").

Consumer then referred to the so-called Brake Coupon Program in which KMA provided free brake repairs to a limited subset of Class members who had three (3) or more warranty brake

repairs. While KMA argues now that individual examination of each vehicle and each consumer was necessary to find a defect, for its self-defined brake coupon class KMA replaced all components free of charge without any inspection and without regard to the particular driver's habits or the particular iteration of brake components on the car. *See* R.258a-259a, NT 5/24/05 a.m. at 33-39 & Exhs. P-27 and P-28 (cross of Michelle Cameron); *see also* R.129a, Class Cert. Exh. S, 7/16/04 (same as Exh. P-27). Finally, Consumer offered the opinion testimony of her engineering expert, R. Scott King, who opined that "In my opinion the data was clear that there was a systemic or vehicle wide problem with the braking system resulting in premature wear. . . . The underlying design of that braking system remained constant. There were tweaks or modifications as evidenced by various TSBs, but generally underlying design remained the same. It was constant from throughout 1997 all through 2001 prior to this Field Fix." R.244a, NT 5/19/05 a.m. at 107-108; *see also* R.148a-149a, NT 7/15/04 at 132-133 (same).

KMA did not object to the admission of this common evidence. Nor did KMA cite to any evidence purporting to rebut Consumer's generalized proof. In the absence of any such citation or argument, it is difficult for Consumer (and certainly the Court) to assess the merit of KMA's dissembling appellate argument. Regardless, the jury and the trial court were well within their discretion to reject KMA's contention that each Sephia vehicle was so different in design as to preclude classwide adjudication of the issues. In fact, the finding of commonality is implicit in the jury's verdict, and there is no basis to overturn that finding in view of the very substantial evidence of a uniform defective design at delivery. *See Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining and Mfg. Co.)*, No. 02-7676, 2005 WL 736629 at *9-*10 (E.D. Pa. Mar. 30, 2005) (jury verdict in suit between competitors precluded re-litigation of both

explicit and implicit issues decided by the jury in a subsequent consumer class action alleging similar claims).

KMA's brief contends that "manifestation" of the defect was a critical element that was not established by generalized proof at class certification or at trial. Yet, the undisputed evidence was that every car in the certified class manifested the defect, and that the defect resulted in inadequate dissipation of heat, a natural consequence of braking. *See* R.147a, NT Vol. I, 7/15/04, at 105 ("each and every vehicle throughout that range [1997-2000] has that defect"). The particular driving habits and experiences of individual Class members were (and are) irrelevant to liability here, both as a matter of fact, *see* R.152a-153a, NT Vol. II, 7/16/04, at 35-36 (cross of KMA expert Roger Newsock), and as a matter of warranty law. *See* 13 Pa. C.S. § 2714 (buyer's damages for breach on accepted goods are determined at time of acceptance and may be measured by any reasonable means); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 815-817 (3d Cir. 1995) (holding that the cost of repairs and replacements in the ordinary course of events is a proper measure of class damages). In other words, the un-dissipated heat that caused abnormal degradation of the brakes was measurable and, therefore, manifest because all Sephias had the same defective components, which were interchangeable. Indeed, KMA's own business records measured, tested and admitted this model-wide manifestation. R.405a (P-16).

In contrast with the cases KMA cites, this case was not about individual driver "experiences" or even the failure-prone characteristics of the Sephia. Instead, the case was tried based upon a design defect that necessarily resulted in premature, abnormal wear. The proof was

overwhelming and essentially un-rebutted that every car in the Class manifested the design defect.[13]

In its brief, KMA misinterprets the warranty repair data. Consumer referred to the data at trial and at class certification to confirm a model-wide defect, as KMA's executives had testified that only defective brakes would be repaired or replaced under the warranty. *See* R.264a, NT 5/24/05 a.m. at 66. KMA has used the data on appeal to contend it complied with the warranty, and to argue the absence of a warranty claim proves the absence of a brake defect. But these are false conclusions, as the data, correctly interpreted, do not support KMA's inferences. The lower courts and the jury rejected KMA's contentions as logically flawed and insufficient to overcome Consumer's evidence that the Sephia's brake problems were so much greater than those for the Sportage, Kia's only other vehicle, that a model-wide defect was apparent from the warranty data. R.120a, Class Cert. A-6, Exh. L (only 6% claims rate for Sportage brake system).

For example, KMA posits on appeal that its warranty statistics showed KMA's compliance with its "repair and replacement" obligation. KMA Br. at 34. But whether these statistics and other business records proved a recurring problem, a breach, or KMA's compliance was a question for the jury. *See Keller v. Volkswagen of America, Inc.*, 733 A.2d 642, 648 (Pa. Super. 1999). More importantly, KMA made the strategic choice in the lower courts **not** to argue its compliance with the warranty, contending instead that the statistics showed the brakes were not defective. KMA obviously recognized (but has forgotten on appeal to this Court) that the records showed KMA was in fact replacing one set of defective brake components with

---

[13] KMA relies upon the Affidavit of Neil Barbalato to contend there were changes made to the Sephia. *See* KMA Br. at 27. As explained by the trial court and at trial, all of those changes were minor modifications to materials. The braking system, as KMC engineer Y.S. Sohn testified, was not redesigned to accommodate a larger rotor and a re-positioned venting design until the Spectra model in 2001. R.255a, NT 5/23/05 p.m. at 21 (also admitted at 7/16/04 hearing).

another set of equally defective components. For example, the 2001 business records showed the following "striking" claim percentages for each model year: 1997 – "91.8%"; 1998 – "154.1%"; 1999 – "97.9%." R.241a-242a, NT 5/19/05 a.m. at 96-98; R.263a, NT 5/24/05 a.m. at 59. Thus, any argument by KMA at trial that these statistics "proved" its compliance actually would have established Consumer's deceptive conduct claim. *See, e.g.*, *Strzakowlski v. Gen. Motors Corp.*, No. 04-0474, 2005 WL 2001912 at *5 (D.N.J. Aug. 16, 2005) (use of the limited remedy to falsely represent that the car has been repaired to a conforming condition or "to further mislead consumers by hiding detectable manifestations of the defect until after the warranty period" constitutes a consumer fraud act violation).

Logically, while each warranty repair provided according to KMA's statistics was evidence of a defective condition and a manifest, recurring brake problem, it was not evidence that the warranty repair restored the car to a conforming, defect-free condition. In fact, KMA's own internal business records, its astronomical warranty claims rates, its Brake Coupon Program, and its redesign of the braking system for the 2001 Spectra model all proved, as the jury found, that KMA did not and could not repair the Sephia to a conforming condition for any member of the Class. Hence, Consumer's proof of her own claims based on this generalized evidence necessarily proved the claims of all Class members, which satisfies the very standard KMA posits for a proper class action.

As both lower courts correctly recognized, one of the common, predominating merits questions was whether KMA met its express promise (warranty) that the Sephias were "free from defects in materials or workmanship." R.328a, Exhs. P-2 & P-25a-c. KMA's own engineering witness, Y.S. Sohn, admitted that design is part of "workmanship," and KMA does not argue otherwise. R.254a, NT 5/23/05 p.m. at 18-20 (Sohn). Thus, to the extent Consumer proved the

Sephia's braking system had a defective design, she necessarily proved that KMA had delivered a non-conforming car to each Class member in breach of its express warranty. Had Consumer's proof failed, KMA would have had a binding judgment against the whole Class that the brakes were not defectively designed. Because this decision could have gone either way, the lower courts committed no error (and certainly did not abuse their discretion) in certifying the matter for class adjudication.

Another predominating issue at trial was whether, as a result of a design defect, the Sephia's brakes wore abnormally and prematurely. This question was predominant because KMA had said its written warranty excluded coverage for "normal wear and tear," which was the basis on which KMA denied multiple covered brake repairs to Consumer and the members of the Class. R.264a, NT 5/24/05 a.m. p.65 (Pearce). At class certification, however, KMA's own expert (Roger Newsock) admitted that with a design defect each vehicle produced with the same design will have the same defect. R.152a-153a, NT Vol. II, 7/16/04, at 35-36 (cross). In other words, if one Sephia had a defectively designed braking system, they all did. Thus, both the design-defect claim and the brakes' abnormal, premature wear characteristics were proper issues for common, generalized proof at the class trial.[14]

2. Individual Reliance Was Not And Is Not An Issue.

KMA misreads case law and again conflates two very distinct legal principles in its brief. Proof of individual reliance is not and was not required in this consumer warranty class action.

---

[14] In the lower courts, KMA relied on the cases of *Sanneman v. Chrysler Corp.,* 191 F.R.D. 441 (E.D. Pa. 2000); *Sheldon v. Ford*, 113 S.W.3d. 839 (Tex. App. 2003); *Chin v. Chrysler Corp.,* 182 F.R.D. 448 (D.N.J. 1998); and *In re Ford Motor Co. Ignition Switch Prod. Liability Litigation*, 174 F.R.D. 332 (D.N.J. 1997). These cases are so different from the facts here that they actually support rather than undermine the lower courts' decisions. *See O'Keefe v. Mercedes-Benz USA, LLC,* 214 F.R.D. 266, 292 (E.D. Pa. 2002), *citing Samuel-Bassett v. Kia Motors America, Inc.,* 212 F.R.D. at 272.

Pennsylvania's version of the Uniform Commercial Code, like that of other states, expressly shifts the burden of transactional causation (reliance) in the context of express warranties. Comment 3 to 13 Pa. C.S.A. § 2313 explains the important difference between the "basis of the bargain" test and the pre-Code "reliance" test:

> In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; ***hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.***

Id. (emphasis added). Under the MMWA, KMA also was required to deliver its warranty to each consumer in the Class and to reference it on the window sticker or other nearby place when selling or leasing the Sephia. *See* 16 C.F.R. § 702.3. To comply with the MMWA, the warranty had to be "part of the basis of the bargain." 15 U.S.C. § 2301 and 16 C.F.R. § 702.1. Thus, the burden was on KMA to show affirmatively that its express warranty was not part of the bargain or did not cover the defective condition alleged by Consumer and the Class. *See Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.,* 171 F.3d 818, 825 & n.7 (3d Cir. 1999) (reliance is only relevant if the warrantor first "has proven non-belief" by the consumer on the alleged promise or affirmation).[15]

Here, KMA did not dispute and cannot dispute that it delivered a written warranty promising the Sephia was "free from defects in material or workmanship" to each Class member. *See*, *e.g.*, R.256a, 328a, NT 5/23/05 p.m. at 50, 53, Exhs. P-2 & P-25 (copies of warranties). This fact established that the warranty promise was "part of the basis of the bargain," which in turn required KMA to prove (implausibly) that Class members did not rely on the new car

---

[15] *See generally* 3 Mary Ann Foran, *Williston on Sales* § 17-7 (5th ed. 1994); Charles A. Heckman, *"Reliance" or "Common Honesty of Speech": The History of Interpretation of Section 2-313 of the Uniform Commercial Code*, 38 Case W. Res. L. Rev. 1 (1987-88).

warranty. *See Liberty Lincoln-Mercury, Inc.,* 171 F.3d at 825 ("the focus is not on any particular language at a particular point in time but whether the seller's actions or language when viewed in light of his relationship with the buyer were fairly regarded as part of the contract to purchase the good."); 15 U.S.C. § 2301. KMA did not offer any proof that Sephia purchasers disregarded the new car warranty. Indeed, Congress enacted the MMWA in part to counteract the legalistic fiction asserted by KMA in its brief on appeal. Hence, KMA is simply wrong as a matter of law and fact that reliance was or is an issue in the context of this express warranty case.

Again, the cases relied upon by KMA are off-point because they all concern a non-issue in this case, namely whether an express consumer warranty even existed. In *Goodman v. PPG Indus., Inc.*, unlike here, there was no warranty given to the consumers at all. *See Goodman v. PPG Indus., Inc.*, 849 A.2d 1139, 1242 (Pa. Super. 2004), *aff'd*, 885 A.2d 982 (2005). Instead, the question was whether an undisclosed warranty between a preservative supplier and the original equipment manufacturer could provide third party benefits derivatively to the ultimate consumers. Here, by contrast, Consumer and the Class directly sued the warranty provider, KMA, which admitted that it provided a uniform written warranty to each Class member.

In *General Motors Corp. v. Garza*, 2005 Tex. App. LEXIS 532, at *15-*16 (Tex. App. 2005), the court failed to consider the mandatory "basis of the bargain" requirements of the MMWA and the pertinent comments to UCC § 2-313. Moreover, as this Court in *Nationwide* observed, the General Motors "repair and replace" warranty language in *Garza* is far different from the language used in KMA's "classic warranty." Therefore, KMA's insistence that individual reliance barred certification of this consumer warranty class (which is expressly contemplated by the MMWA's specific class action provision, 15 U.S.C. 2310(d)) is without merit.

3. Notice, Opportunity To Cure and Failure To Repair Were Established as Required by the MMWA.

Nor is there support for KMA's assertion that each individual Class member was required to notify KMA of the brake defect. Initially, there is no dispute that KMA received ample notice. The proof at trial established that since 1995 KMA received thousands of consumer complaints and warranty claims concerning the poor performance of the Sephia's brakes. R.115a, 118a, 120a, 139a (Class Hearing Exhs. I, J, L, W). Further, KMA's own studies, records (including the warranty repair statistics), and testing of the Sephia revealed a systemic brake defect that was causing abnormally premature brake pad and rotor wear. This notice provided KMA with eight (8) years before trial to remedy the systemic defect. Beyond this, proof of individual notice was not required. *See In re Latex Gloves Prods. Liability Litig.*, 134 F. Supp. 2d 415, 422 (E.D. Pa. 2001).[16]

---

[16] In *In re Latex Gloves*, the defendants argued that the notice of the breach was insufficient because it was not given until the filing of the lawsuit. The court, referring once again to the UCC (*see also* Official Comment 4 to 13 Pa. C.S.A. § 2607), described what constitutes reasonable notice:

> What is a reasonable time for taking any action depends on the nature, purpose, and circumstances of such action. The notice condition is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy. The policies behind requiring notification have been stated as: (1) opening the way for settlement through negotiations between all parties; and (2) minimizing the possibility of prejudice to the seller by allowing ample opportunity to cure the defect, inspect the goods, investigate the claim, or do whatever may be necessary to properly defend or minimize damages while the facts are fresh in the minds of the parties. Our Court of Appeals has recognized that prejudice to the seller caused by the delay is also a relevant consideration.
> …Defendants have not shown prejudice, and the lack of prejudice is best manifested by the vigorous and thorough defense presented. Where more than one inference may be drawn from undisputed facts, or the facts are disputed, the timeliness and sufficiency of a notice of breach of warranty are questions for the jury to resolve. In these circumstances, the issue must be submitted to a fact-finder.

The reasoning in *In re Latex Gloves* is consistent with Pennsylvania law. The rule is different for non-commercial consumers. As stated in Comment 4 to UCC § 2-607 (2003), "the requirement of notification is meant to defeat commercial bad faith, not to deprive a good faith consumer of a remedy." *See also* 13 Pa. C.S.A. § 2-607 Official Comment 4 (same). Consumer's generalized proof demonstrated that KMA had ample notice of the design defect in all Sephias and, despite several efforts to do so, was unable to cure the defect. As a result, the adequacy of notice was a question of fact for the jury, and KMA failed to offer any proof that it would have cured the brake defect (which it could not do given the car's design) had it received individual notice. *See In re Latex Gloves*, 134 F. Supp. 2d at 423 (notice is a jury question); *see also Strzakowlski*, 2005 WL 2001912 at *3-*4 (same, citing cases).

More importantly, Section 2310(e) of the MMWA, 15 U.S.C. § 2310(e), modifies the notice requirement in a consumer warranty class action. The section requires notification by the class representative ***only*** after the class has been certified by a court: "In the case of such a class action . . . brought under subsection (d) of this section for breach of any written or implied warranty . . . , such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class." *Id.*; *see also* H.R. Rep. 93-1107, 1974 U.S.C.C.A.N. at 7724-7725 ("The class action may be brought but may only be carried to the point of establishing the representative capacity of the named plaintiff until those named plaintiffs afford the defendant the opportunity to cure the breach while notifying him they are acting on behalf of the class."). Here, Consumer notified KMA of the defect on behalf of herself and the Class, and defense counsel wisely withdrew a motion during trial that

---

In re Latex Gloves, 134 F. Supp. 2d at 423 (internal citations and quotations omitted).

contended otherwise. R.306a-307a, NT 5/25/05 p.m. at 26-27 ("The Court: Are you withdrawing your motion for nonsuit? Mr. McClure: I shall, Your Honor.").

4. Consumer Established Classwide Damages And Causation.

KMA's argument concerning damages and causation highlights a material difference between pre-trial certification and its post-trial reexamination. The Court's perspective on the issue necessarily changes from a plaintiff asserting that the class mechanism should be used in a future trial to a defendant asserting that a completed trial was improper. The question post-trial is not whether a class action trial would be "unmanageable," because the trial has occurred already. Instead, the question after trial is whether generalized proof was fairly presented and confronted by the parties at trial.

On this issue, KMA's brief simply ignores Consumer's evidence of class member losses in the ordinary course calculated in a reasonable manner as specified by UCC section 2-714: "$1,005" per Class member set forth by Mr. King. R.247a, NT 5/19/05 p.m., at 26. This evidence was a proper measure of damages under 13 Pa. C.S. § 2714, because "special circumstances" showed that KMA could not repair the defect to a conforming condition, making it appropriate to "recover as damages for [the] nonconformity the loss resulting in the ordinary course of events from the seller's breach as determined ***in any manner*** which is reasonable." *Id.* (emphasis added); *see also In re Gen. Motors*, 55 F.3d at 816-817 (this "alternative measure of damages" . . . "has the advantage of avoiding the speculative exercise of ascertaining the hypothetical value of defect-free trucks.").

KMA was free to confront, but failed to object, to this evidence, apparently recognizing that it was a reasonable calculation of class member losses based on KMA's own records. *See In re Gen. Motors*, 55 F.3d at 816-817 (the cost of repair and replacement for class members in the

ordinary course is one way of measuring class damages); *Thorogood v. Sears, Roebuck and Co.*, – F.3d. – , 2008 WL 4709500, *5 (7th Cir. Oct. 28, 2008) (awarding "an amount equal to an estimate of the average damages [each class member] had sustained would be a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs"), *citing* 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.3, p. 480 (4th ed. 2002).

KMA had a full and fair opportunity to contradict its own generalized records showing the Sephia's brakes to be wearing out twice as fast as normal – at about 9,300 miles (R.244a) – and warranty repair statistics showing twice as many Sephia brake replacements as would be required for a non-defective system. R.247a. KMA did not argue below, and has not argued on appeal, that measuring damages this way – based on the warrantor's own business records – was or is "unreasonable" under 13 Pa. C.S. § 2714(1).[17] Further, the fact that the jury evaluated damages at about 60% of the expert's reasonable calculation of "the loss resulting in the ordinary course of events," shows conclusively that KMA had a full and fair opportunity to confront the evidence. KMA not only failed to preserve the issue by timely objecting, but also failed to show that its business records could not provide a reasonable basis on which Class member losses could be calculated. Given these facts and KMA's waiver, neither the trial court nor the Superior Court committed any abuse of discretion.

On causation, Mr. King also provided extensive common proof, the vast majority of which was confirmed by KMA's own employee witnesses, including Mr. Pearce and Mr.

---

[17] KMA did not object to Mr. King's testimony about class member losses and, therefore, has waived any objection to this evidence. *See Dilliplaine*, 457 Pa. at 257-258, 322 A.2d at 116-117.

McCurdy, both of whom agreed that heat causes wear, noise and vibration. While KMA's substitute expert[18] disagreed with the opinions of KMA's own employees and KMA's own engineering documents (P-16), the jury was well within its role to reject Mr. Bowman's speculation and accept the causation testimony of Mr. King and the KMA employees. KMA's baseless implication that separate mini-trials would be needed in this case, *see* KMA Br. at 29, has already been disproved by the jury verdict based on Consumer's classwide proof. The jury correctly rejected KMA's assertion that road salt or debris could be intervening causes and Mr. Bowman's contention that abnormal wear is not a "defect" within the automotive industry lexicon. Because KMA had a full and fair opportunity to confront all this common design and causation evidence, there is no basis upon which certification or the verdict should be reversed.

KMA's cited causation cases are off-point. *Price v. Chevrolet Motor Div. of Gen. Motors Corp.,* 765 A.2d 800 (Pa. Super. 2000), actually reinforces the wisdom of the trial court's certification decision. The standard applicable when a consumer chooses to prove her case solely by circumstantial evidence is not relevant where, as here, the consumer has offered generalized, direct proof – through the manufacturer's own business records, testimony, data and tests and through expert testimony – of a classwide design defect which has caused and continues to cause a loss resulting in the ordinary course of events as determined in a "reasonable manner" pursuant to 13 Pa. C.S. § 2714.

5. KMA's Cases Are Off-Point And Actually Support Certification of This Class.

KMA urges this Court to rely upon decisions from other courts in Texas and elsewhere without so much as mentioning the other virtually identical class decisions involving the

[18] KMA originally relied on engineering expert Roger Newsock at the class certification stage. For trial, KMA retained a new engineering expert, Bruce Bowman.

Sephia's brakes. For example, KMA cites *General Motors Corp. v. Garza*, 2005 Tex. App. LEXIS 532, and *Gordon v. Ford Motor Corp.*, 687 N.Y.S.2d 369, 370 (N.Y. App. Div. 1999), as precluding certification of car defect claims "where individual experiences and circumstances differ." KMA Br. at 23. But the warranties in *Garza* and *Gordon* were different from KMA's. Moreover, the consumers in those cases did not allege premature brake wear due to heat from a defective design. They alleged instead a brake "deficiency" limited to the symptoms of shaking and vibrating, which are subjective and can vary based on individual perceptions. Here, by contrast, the abnormal heat and wear were objectively measurable (by micrometer and heat studies reflected in KMA's own records) on all Sephias and, therefore, manifest for all Class members.[19] Hence, KMA's cases are off-point.

---

[19] Besides, scores of other cases have certified classes similar to that certified below. *See, e.g., Daffin v. Ford Motor Co.*, 458 F.3d at 553-554 (defective throttle assembly); *Zeno v. Ford Motor Co.*, 238 F.R.D. at 198-199 (certifying state-wide class of truck purchasers who allegedly did not receive an upgraded radiator); *Ecker v. Ford Motor Co.*, No. BC 278 074 (Cal. Super. Ct., Los Angeles, Cty., Feb. 2, 2007) (certifying state-wide class of 2000-2001 Ford Focus purchasers alleging defective braking system caused "premature and excessive wear of brake pads and rotors"); *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal. App. 4th 908, 918 (2001) (common questions predominated with respect to warranty claims concerning concrete foundations; existence of common inherent defect was question of fact common to the class); *Delgozzo v. Kenny,* 628 A.2d 1080, 1092, 1093 (N.J. Super. App. Div. 1993) (although certification of a nationwide class was problematic, the trial court should have certified a state-wide class of consumers who alleged a common defect in a single model of a product sold by the defendant); *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986) (common issues predominated concerning defects in the V8-6-4 engine of 1981 Cadillacs); *Matter of Cadillac V8-6-4 Class Action*, 461 A.2d 736 (N.J. 1983) (court certified statewide class of purchasers of automobiles with certain engine); *Anthony v. Gen. Motors Corp.*, 33 Cal. App. 3d 699, 704-705 (1973) (class action seeking replacement of defective truck wheels is "exactly the sort of common issue for which class actions were designed"); *Weiss v. Mercedes-Benz of North America, Inc.*, 899 F. Supp. 1297 (D.N.J.), *aff'd*, 66 F.3d 314 (3d Cir. 1995) (class certified alleging premature tire wear on all S-class models and then case settled); *O'Keefe v. Mercedes-Benz U.S.A., LLC*, 2003 WL 1826501 (E.D. Pa. Apr. 2, 2003) (settlement class certified for claims alleging "premature bearings wear" for all models with "Flexible Service System").

C. Typicality Was Established.

The typicality requirement is intended to ensure the class representative's position on common issues is sufficiently aligned with the absent class members so that pursuit of her own interests also advances those of the class. *Janicik*, 451 A.2d at 457; *accord Luitweiler v. Northchester Corp.*, 456 Pa. 530, 534, 319 A.2d 899, 902 (1974). As other courts have observed, "it is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether 'the representative parties will fairly and adequately protect the interests of the class,' ... it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house." *Eggleston v. Chicago Journeymen Plumbers,* 657 F.2d 890, 895 (7th Cir. 1981).

After a favorable class verdict, the Court's perspective on typicality once again changes from a plaintiff asserting that the class mechanism should be used in a future trial to a defendant asserting that a completed trial was improper. Where, as here, the representative alleges and proves a common pattern of wrongdoing, and presents the same evidence based on the same legal theories, courts hold the typicality requirement to be satisfied. *See Janicik*, 451 A.2d at 457.

In this case, it is beyond any legitimate dispute that Consumer and her claims were and are typical of the Class. Consumer purchased a 2000 Kia Sephia with the brake system defect. Her vehicle came with KMA's standard "New Vehicle Warranty," which is the exact same warranty every other consumer of a Sephia received. She claimed and proved that the brake system contained a design defect that prevented adequate dissipation of heat and caused premature brake wear. This is the same claim every member of the Class had and has. Because

Consumer had the latest model of the Sephia in the Class, and because all of the brake components were interchangeable from model year to model year, she was ideally suited to present both her claim and the Class's claim as to the ineffectiveness of the "*design changes*" KMA allegedly attempted to correct the design defect. *See* KMA Br. at 24 (citing R.140a, Barbalato Affidavit). In contrast with *Debbs*, 810 A.2d at 161, where a retrofit cure had been implemented for some class members, Consumer's proof established that KMA had not replaced (and could not replace) the brake system of all Class member cars with a non-defective system. Therefore, proof of Consumer's claims necessarily proved the same claims of each of the Class members, and *vice versa*.

Consumer also proved for herself and the Class that KMA did not meet its warranty promise because it replaced defective parts with equally defective parts, and therefore still failed to deliver a conforming Sephia that was "free from defects in material or workmanship." In fact, based on the Jury Charge on this issue and the verdict's answer to Question 3, the jury clearly found that KMA's limited repair and replace remedy had "failed of its essential purpose" within the meaning of 13 Pa. C.S. § 2719(a) & (b). *See Caudill Seed and Warehouse Co. v. Prophet 21, Inc.,* 123 F. Supp. 2d 826, 829-833 (E.D. Pa. 2000). By advocating this position, Consumer undoubtedly advanced the interests of the Class and, therefore, was typical within in the meaning of Rule 1702(3).

KMA's arguments against typicality are at best disingenuous. Apparently, KMA wants the benefit of the Class verdict in its favor on the implied warranty claim, but still argues to the contrary that typicality was lacking for the other class claims. KMA cannot have it both ways. Consumer cannot be "typical" for one warranty claim but "atypical" for the other. After all, typicality asks whether the representative is aligned with the Class, and KMA admitted

alignment in its argument to the jury. *See* NT 5/25/05 p.m. at 73, 110. It also admitted typicality in its settlement of the 47-state class. Accordingly, KMA has not sustained (and cannot sustain) its heavy appellate burden on this issue either.[20]

The discussion of this Court's decision in *Nationwide*, *supra* pp. 17-20, definitively rebuts all of KMA's mistaken arguments under the heading "The Superior Court's Errors On Class Certification," at pages 25-27 of KMA's Brief. The Superior Court clearly understood that KMA's warranty promised a defect-free Sephia which KMA uniformly breached by failing to deliver a conforming car to all Class members. KMA never raised below the after-the-fact misconstruction of its warranty it has raised on appeal here. Therefore, KMA has failed again to meet its appellate burden.

II. KMA'S DUE PROCESS ARGUMENT IS BASELESS.

Nowhere is KMA's distortion of the record more pronounced than in its portrayal of the trial court's post-verdict proceedings. Reading KMA's brief in a vacuum leaves the impression this case was tried on an individual basis for Ms Bassett's claim alone, with a modest $600 award for her then transformed into a 5.6 million dollar verdict by a maverick judge. Such an event would understandably trigger appellate scrutiny, but it is a far cry from what actually happened.

The record is crystal clear that this case was tried on a class basis and defended on a class basis. The jury entered a verdict for the Class, not a verdict for Ms. Samuel-Bassett that the trial

[20] KMA has not challenged the trial court's ruling that class certification was (and is) the most fair and efficient method for determining the claims in this case, as required by Pa. R. Civ. P. 1708(a)(2)-(7). KMA therefore concedes that class members would not have any real access to justice as guaranteed by the Pennsylvania Constitution in the absence of class certification. KMA thus admits that this action was one where "in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate action." Pa. R. Civ. P. 1708(a)(6). Given this concession, the attack on class certification here must be rejected.

court then transformed into an award for other Class members. KMA selectively cites bits and pieces of the record prior to trial, but never cites the most conclusive evidence as to what type of verdict was entered in this case – the Jury Verdict Special Interrogatories (to which KMA did not object, discussed *infra*). They unequivocally demonstrate the fiction of KMA's arguments:

> Question No. 1:
>
> Did defendant breach its express warranty on the cars purchased *by the class*?
>
> ***
>
> Question No. 5:
>
> State the amount of damages if any, sustained *by each Class member*:
>
> b) For repair expenses, reasonably incurred, as a result of defendant's breach of warranty.

R.326a, 5/27/05 (Jury Interrogatories)(emphasis added).

Nowhere do the Jury Interrogatories reference Ms. Samuel-Bassett by name, by "Plaintiff" or otherwise. Rather, they distinctly indicate for liability (Question 1) and for damages (Question 5) under the express warranty claim that the jury's verdict would be and was rendered in favor of each Class member. KMA can point to no evidence the jury meant to enter an award in favor Ms. Samuel-Bassett alone.

The only molding performed by the trial court was to take the amount of each Class member's damages ($600) and multiply it by the number of stipulated Class members remaining after opt-outs (9,402) to reach the total judgment ($5,641,200). This modest adjustment is drastically different than the frolic KMA describes, and was solidly within the court's power. *See Maize v. Atlantic Refining Co.*, 352 Pa. 51, 61, 41 A.2d 850, 855 (1945) ("[w]here the intention of the jury is plain, the court may mould the verdict into form according to the requirements of the law"). In fact, Rule 1715(d) expressly required the trial court to enter this form of verdict, so as to bind all Class members. *See* Pa. R. Civ. P. 1715(d) (requiring court to specify who is bound by the judgment). More importantly, KMA does not contend, nor can it contend, that the form of verdict entered by the Court fails to bind all Class members on the

implied warranty claim decided in KMA's favor. Hence, KMA cynically criticizes the trial court while failing to disclose the *res judicata* benefit it seeks to retain against the whole Class on that claim.

Even if molding the verdict to render the total class judgment pursuant to Rule 1715(d) could be criticized, because KMA failed to object to the trial court's action, its has waived any claim of error on appeal. The waiver doctrine clearly applies to a party's failure to object to the trial court's molding of a verdict. *Krock v. Chroust*, 330 Pa. Super. 108, 478 A.2d 1376 (1984).

In addition, the lynchpin of KMA's argument is its contorted reading of the May 16 Order, in which the trial court *denied* KMA's motion to bifurcate before the start of trial. According to KMA's novel theory, the mere fact that a trial court contemplates claims proceedings following a class trial automatically undermines the class certification ruling. KMA cites no authority for this proposition, because none exists. To the contrary, it is squarely consistent with class action practice that where a verdict has been returned in favor of a plaintiff-class, a claims proceeding may follow in which individual class members either affirm their identities or file proofs of claim to establish their entitlement to recover. *See Van Gemert v. The Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977) (following a class damages award of $3,289,359, court found that the amount would be distributed to all class members who were identified and filed proofs of claim).[21] When class damages are awarded, as here, it is often typical for courts and parties to have class members affirm, for example, that they purchased the car (or product)

[21] The issue in *Van Gemert* was not whether class members would have to submit proofs of claim following trial (that issue was clear). Rather, the question was whether the class members would also receive a pro rata share of any unclaimed funds, which is irrelevant here.

"other than for purposes of resale," which is required by the MMWA and many other consumer protection laws.[22]

The trial court's anticipation of such a claims process at the time of KMA's bifurcation motion was neither inconsistent with the record nor contrary to the certification ruling. When the court ruled on bifurcation, it understood that individual Class members still would be entitled to pursue their individual claims under the UTPCPL, which the court had not certified for class treatment. Further, the court had under advisement Consumer's motion for equitable and declaratory relief, which if granted, would have entitled each Class member to elect either damages or equitable relief. As such, anticipating that Class members might be requested at a later date to elect between monetary damages and equitable relief, or to prove individual UTPCPL claims, the court indicated that claims proceedings would be adopted after trial (which could have been as simple as having each Class member check a box to elect damages or equitable relief or affirm that he or she purchased the Sephia "other than for purposes of resale").

As it happens, Consumer presented at trial generalized proof as to the amount of repair expenses reasonably incurred by each Class member, which the jury evaluated at $600 per Class member. *See In Re Gen. Motors*, 55 F. 3d at 815-817 (citing and quoting UCC § 2-714(1) and holding that reasonably calculated repair and replacement costs are a valid basis for proof of class damages). KMA never objected to the admission of this generalized proof, and any argument it may have had has been waived. Because such generalized proof had been presented, the parties understandably and expressly agreed to the Jury Interrogatories, which asked the jury to award an amount of damage for "**each class member**." Again, KMA never objected to this

---

[22] 15 U.S.C. § 2301 (defining "consumer" as a "buyer (other than for purposes of resale)").

question, thereby waiving the *post-hoc* argument it now asserts with respect to the May 16 Order.

Since the King testimony and the Jury Interrogatories make it clear that Consumer did present proof of damages as to all Class members, and that a Class verdict was reached by the jury, it appears KMA's real argument is that Consumer should not have been *permitted* to prove damages in the aggregate per Class member. KMA does not describe its objection this way because, in addition to being factually wrong and clearly waived, such proof is precisely what is permitted in a class action.[23] To be sure, Consumer also could have presented an aggregate amount of damages, but this was unnecessary because KMA had agreed to the per member verdict. Because the trial court ultimately denied further equitable relief, claims proceedings following this appeal are in fact unnecessary, but that does not alter the propriety of the May 16 Order.

It is, of course, well-settled that a class representative may prove damages on behalf of a class in the aggregate. *Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1327 (N.D. Ill. 1991). "Once a class has been certified, a defendant has no right to an individualized determination of damages for each plaintiff." *Id.* In federal cases, where certification requires an even higher standard of proof, federal trial and appellate courts regularly enter or approve of

---

[23] All the authorities, including leading class action treatises, consider elementary claims proceedings, if needed, to be part of the class certification process *after* classwide damages have been awarded at trial. *See* 10 *Newberg on Class Actions* § 10.12 (4th ed. 2002). *See also Manual for Complex Litigation* § 30.47 at 290-91 (3d ed. 2001). The logic of such a process is sound. It makes the most efficient use of judicial resources, while allowing for a simplified processing of claims because "a lesser standard of proof may be applied without jeopardizing the defendant's due process rights, the defendant having been given full opportunity to challenge damages on a class basis at trial." 10 *Newberg on Class Actions* § 10.12 at 507. Further, where a defendant prevails at trial, there are no damages to apportion and, thus, no resources expended. KMA thus distorts the plain meaning of the May 16 Order to fabricate an objection where none exists.

lump sum judgments for the aggregate amount of compensatory damages suffered by all class members. *See, e.g.*, *Allapattah Servs., Inc. v. Exxon Corp*, 157 F. Supp. 2d 1291 (S.D. Fla. 2001). Moreover, courts consistently have approved of reasonable estimates of class member damages in cases such as this one. *See*, *e.g.*, *Thorogood v. Sears, Roebuck and Co*., – F.3d. – , 2008 WL 4709500, *5 (7th Cir. Oct. 28, 2008) (awarding "an amount equal to an estimate of the average damages [each class member] had sustained would be a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs"), *citing* 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.3, p. 480 (4th ed.2002); *see also id.,* § 10.5; *Stewart v. General Motors Corp.,* 542 F.2d 445, 452-53 (7th Cir.1976); *United States v. City of Miami,* 195 F.3d 1292, 1299-1300 (11th Cir.1999); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 259-63 (5th Cir.1974); *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 750-752 (Cal. App., 1st Dept. 2004).

Even more dubious is KMA's suggestion that it somehow relied to its detriment on the May 16 Order to holster its proof and arguments presumably until "evidentiary" claim proceedings took place. KMA has not pointed to any specific prejudice it suffered or to any evidence it withheld but would have presented, nor can it. It has not identified any testimony or document it would have sought to introduce or arguments it would have made had the court not entered the Order. Rather, KMA agreed to Jury Interrogatory Number 5, and thus it clearly contemplated that the jury would be considering damages as to each Class member and, in turn, for the entire Class remaining after opt-outs.

The suggestion that the May 16 Order led KMA to believe it was somehow trying only Consumer's individual warranty claim until the trial court molded the verdict is belied by the statements of KMA's own trial counsel. In his opening statement, he said:

> "The only issue is whether or not [Ms. Bassett's] experience was common *across the class*." And what Mr. Bowman [KMA's expert] will tell you is that noise, premature wear and judder, the three things of which *the class complains*, are all caused by three different things."

R.2574a, NT 05/17/05 p.m. at 48 (emphasis supplied). KMA's closing is even more definitive:

> "*This is a class action* and so Ms. Bassett doesn't stand here alone and she doesn't come into the courtroom alone. She made the decision to bring into this litigation *10,000 other people…*
>
> * * * * *
>
> "…if you believe that Ms. Samuel-Bassett has suffered a loss, if you believe that she has carried her burden of proving her loss *as well as the loss of the 10,000 members in the State of Pennsylvania of this Class…*"

R. 3528a, 3537a, NT 5/26/05 p.m. at 73, 110) (emphasis supplied). These remarks make it clear that KMA defended this class action as a class action. For it to suggest it altered its defense based on the possibility of claims proceedings is absurd.[24]

With respect to due process, Consumer agrees that the Constitution guarantees each litigant the opportunity "to present his case and have its merits fairly judged." *See* KMA Br. at 28 (citation omitted). But the Supreme Court has emphasized that due process applies to both parties, and often requires a balancing test to ensure that both sides have a fair and meaningful opportunity to be heard. *Mathews* v. *Eldridge*, 424 U.S. 319, 343-348 (1976). "'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time,

---

[24] As to the 9,402 class claimants, KMA's insinuation that it merely entered into an innocuous stipulation regarding the number of class members who received notice is wrong. KMA had agreed to numerosity at class certification, and knew full well who had received class notice (10,042) because its records were used for the mailing. *See* R. 13a, Dkt. 11/10/04 Order for Class Notice. In truth, KMA stipulated that 9,402 persons would be bound by the jury's decision, and KMA would certainly argue as much if any one of them attempted to bring an implied warranty claim against KMA in the future.

place and circumstances." *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 786 (9th Cir. 1996). In this respect, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *see Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985) (class actions are most appropriate where class members' claims would be "uneconomical to litigate individually").[25]

The courts below scrupulously guarded and balanced the due process rights of all parties. KMA defended this class action as a class action, steadfastly contending that the Sephia's braking system was not defective and that Class members did not sustain any damages. Consumer presented common classwide evidence that all Sephia purchasers received a defective car that KMA could not fix free of charge after having a reasonable opportunity to cure the defect. Consumer also proved classwide damages based on KMA's own records, which showed the frequency of Sephia brake repairs and the average useful life of the defective brake components (about 10,000 miles). *See* Exh. P-11 (LA City brake test showing Sephia brakes last about 9,300 miles). KMA did not argue below and has not argued on appeal that these losses

---

[25] *See also Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 186, 186, n.8 (1974) (Douglas, J., joined by Brennan, J. and Marshall, J., concurring) ("The class action is one of the few legal remedies the small claimant has against those who command the status quo…. The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all of our citizens…or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods. . . . When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy – or at least to deter – that conduct.") (internal citation and quotation marks omitted).

were not calculated in "a reasonable manner" as required by applicable law, 13 Pa. C.S. § 2714. *See In re Gen. Motors*, 55 F. 3d at 815-817.

In this regard, it is fundamental that business records are presumed to be reliable, that the use of business records negates the need for cross-examination, and that reliance on such records in litigation does not offend the Constitution. *See Valentine v. Alameida*, 143 Fed. Appx. 782, 784 (9th Cir. 2005) ("business records are generally considered sufficiently reliable to survive a Confrontation Clause challenge."); *accord Commonwealth v. Scatena*, 481 A.2d 855, 867 (Pa. Super. 1984) (reliance on business records does not violate due process), *rev'd on other grounds*, 508 Pa. 512, 498 A.2d 1314 (1985); *McLean v. State*, 482 A.2d 101, 105 (Del. 1984) (Under the business records exception, defendants have no due process right of confrontation due to their presumed reliability). Of necessity, the reasonable calculation of class member damages based on a class defendant's own business records is permissible in class cases. *See Thorogood v. Sears, Roebuck and Co*., – F.3d. – , 2008 WL 4709500, *5; *In re Gen. Motors*, 55 F. 3d at 815-817; *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 40 (1st Cir. 2003). Thus, Consumer's reliance on KMA's own business records to prove the Class's claims and losses in no way offended due process.

KMA has not identified any defense or due process right it was prevented from asserting at trial, nor can it. Significantly, none of the due process concerns identified in the cases cited by KMA was or is present in this case. For example, in *Rollins, Inc. v. Butland*, 951 So.2d 860, 874 (Fla. App. 2006) (KMA Br. at 29), the claims did not focus on a single breach of warranty, but instead on numerous alleged "misdeeds in inducing customers to choose Orkin for pest control services and in the performance or nonperformance of those services." 951 So.2d at 871. The claims for damages in *Rollins* were not based, as here, on the Uniform Commercial Code, 13 Pa.

C.S. §§ 2313 and 2714(1), for a defective component part, but instead on consequential losses due to termite damage.[26] Thus, in contrast with vastly variable consequential losses from termite damage, the Class claims here focused on common, predominating liability issues and common, predominating loss calculations. At a minimum, 9,402 separate trials would require each consumer individually to present the same evidence and loss calculation under § 2714, while KMA would offer the same defense, which is exactly what happened on a Class basis below.

III. KMA HAS WAIVED ITS OTHER CLAIMS OF ERROR.

KMA next argues that even if the Class was properly certified, the Class should have been decertified at trial. But KMA never requested any such relief at or before trial. Rule 227.1(b)(1) provides that post-trial relief may not be granted unless the relief was requested in pre-trial proceedings or by motion, objection or other appropriate method. Again, as this Court re-emphasized in *Straub*, the failure to comply with the requirements of Rule 227.1(b)(1) constitutes a waiver of the issue. *Straub v. Cherne Indus.*, 583 Pa. 608, 880 A.2d 561 (2005). Thus, having failed to move for decertification of the Class or otherwise taken steps to preserve this claim of error, KMA's decertification argument (like its other arguments) has been waived and cannot now be raised on appeal.[27]

---

[26] The *Rollins* court relied on *obiter dicta* from *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998), which involved multiple different versions of a franchise agreement, a non-opt-out class, and certain class member claims that were time-barred. Obviously, none of those facts is present here.

[27] KMA did not preserve the decertification or other issues by raising them for the first time in its post-trial motion. Pa. R. Civ. P. 1710(d) expressly provides that a certification decision may be "revoked, altered or amended" only ". . . ***before*** a decision on the merits." (Emphasis added). The reason for such a rule is glaringly apparent in this case, as KMA appears more than willing to accept the *res judicata* benefit as against the Class of the implied warranty verdict while simultaneously arguing that the express warranty verdict must be vacated. But the Rule 1710(d) requirement is designed to protect plaintiffs and defendants alike by preventing after-the-fact constriction of the verdict's preclusive effect. Therefore, KMA was required to move

IV. THE LOWER COURTS CORRECTLY AWARDED ENHANCED STATUTORY ATTORNEY FEES TO THE CLASS.

A. THE LOWER COURTS FOLLOWED CONTROLLING PROCEDURE AND LAW.

KMA next argues the certified Class waived its right to statutory costs and expenses (including attorney fees)[28] because the trial court allegedly lost jurisdiction to decide the fee petition after entry of the merits judgment on October 25, 2005. *See* KMA Br. at 31. KMA says that federal law, the MMWA, requires a state trial court to decide the fee petition, if at all, before judgment on the merits is entered pursuant to Pa. R. Civ. P. 227.4(1)(b). *Id.* at 32. These arguments are wrong, however, because the award of class costs, expenses and fees, though authorized by federal law, is a matter of jurisdiction and procedure controlled by state rules and policies, all of which treat the statutory fee application as a "separate matter" from the merits judgment.

As the trial court correctly noted, this Court considered and rejected an argument similar to KMA's in *Miller Electric Co. v. DeWeese*, 589 Pa. 167, 907 A.2d 1051 (2006). See KMA App. F & G (Tr. Op. 11/14/2007 at p. 16). As in this case, the petitioner in *Miller*, Birmingham, filed a praecipe to enter judgment pursuant to Pa. R. Civ. P. 227.4 after it prevailed on the merits but before the trial court had ruled on Birmingham's motion for attorney fees. After the trial court denied the fee motion, Birmingham appealed. The Superior Court quashed the appeal, holding that Birmingham was required to appeal from the favorable merits judgment entered earlier. This Court reversed, reasoning that an attorney's fee petition is "ancillary to the underlying action" and, therefore, is not disposed of by the entry of judgment on the merits. 589

---

for decertification before or during the trial. Because it failed to do so, it has waived all of its appellate arguments.

[28] Consumer and the Class moved for costs and expenses (including attorney fees) pursuant to 42 Pa. C. S. § 2503(10) (attorney fees when authorized by statute) and 15 U.S.C. § 2310(d)(2).

Pa. at 176, 907 A.2d at 1057. *See also Rosen v. Rosen*, 520 Pa. 19, 549 A.2d 561 (1988) (attorneys fees and costs are collateral or ancillary to the merits and do not divest the trial court of jurisdiction after an appeal has been filed pursuant to Rule 1701); *De Lage Landen Financial Services, Inc. v. Rozentsvit*, 939 A.2d 915, 924 (Pa. Super. 2007) (same).

In *Old Forge School District v. Highmark Inc.*, 592 Pa. 307, 924 A.2d 1205 (2007) – a case KMA also fails to cite or discuss – this Court likewise rejected a similar jurisdictional argument. The *Old Forge* appellants argued the trial court lost jurisdiction to decide a pending fee petition once the appeal on the merits had been filed. As with KMA here, the *Old Forge* appellants relied on the Superior Court's decision in *In re Appeal of Affected and Aggrieved Residents from the Adverse Action of the Supervisors of Whitpain Township*, 325 Pa. Super. 8, 472 A.2d 619 (1984). *See* KMA Br. at 33-34, citing *Whitpain Township*. This Court, relying on *Miller Electric*, rejected that argument and the reasoning underlying *Whitpain Township*. *See Old Forge*, 592 Pa. at 317, 924 A.2d at 1211.

The *Old Forge* Court explained that a pending attorneys' fee petition is a "separate 'matter'" from the merits judgment under Pa. R. App. P. 1701(a), so that a trial court does not lose jurisdiction to decide the petition when an appeal on the merits is filed. *Id*. The Court said: "a motion for attorney's fees under Section 2503 is connected to, but separate from, the underlying action. In this regard, the motion for attorney's fees [is] not disposed of when final judgment [is] entered in the underlying matter," and the lower court retains jurisdiction to address the motion. *See id.*, *citing Miller*, 589 Pa. at 176, 907 A.2d at 1057.

KMA attempts to distinguish *Miller* (and presumably *Old Forge*) by contending that *Miller* "is not an MMWA case." KMA Br. at 34 n.26. But the federal statutory authority for the fee award here, the MMWA, has no bearing on the procedural and jurisdictional propriety of the

lower courts' decisions. The trial and appellate jurisdiction of the state courts is controlled by this Court's rules and decisions, not federal law. Indeed, in *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717, 1721 (1988), the Supreme Court articulated the same rule for federal courts sitting in diversity, holding that federal appellate law (not state rules) controls the jurisdiction of the federal courts over all merits decisions and attorney fee decisions. As this Court reasoned in *Miller* and *Old Forge*, the Court in *Budinich* treated a fee petition as a separate matter and held for all cases in the federal courts "that a decision on the merits is a 'final decision' for purposes of [appeal] whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id*. at 202-203, 108 S. Ct. at 1722. The *Budinich* Court further held that this rule applied to **all** claims arising under **all** federal statutes, explaining that the "effect of an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them." *Id*. at 201, 108 S. Ct. at 1721.

Despite this clear holding, KMA contends that "[t]he plain and unambiguous language of the MMWA . . . requires that any fee award be entered 'as part of' the underlying judgment,'" which KMA contends is not true for the present fee award. KMA Br. at 32. This contention is wrong because it fails to address, distinguish or cite the decision in *Budinich*, even though the trial court expressly relied upon both *Miller* and *Budinich* in its fee decision. KMA Br. App. F. Because *Budinich* proves that Pennsylvania and federal law do not conflict on the issue, KMA has not shown, nor can it show, that the MMWA's language preempts or displaces the Pennsylvania jurisdictional law and procedure the lower courts followed. As in *Budinich* and *Miller*, the lower courts correctly addressed the fee issue as a "separate matter," and made the award part of the judgment just as all post-trial cost, expense and fee awards are added to final

judgments. *See*, *e.g.*, 42 Pa. C.S. § 2503(10) ("participants shall be entitled to a reasonable counsel fee as part of taxable costs . . . in such circumstances as may be specified by statute heretofore or hereafter enacted"); *see also Budinich*, 486 U.S. at 201, 108 S. Ct. at 1721 ("Many federal statutes providing for attorney's fees continue to specify that they are to be taxed and collected as 'costs'"). Hence, KMA has failed to meet its appellate burden on the "separate matter" issue.

B. STATE LAW CONTROLS THE REASONABLENESS OF MMWA FEES.

KMA does not dispute that the MMWA is an overlay on state contract and procedural law to provide additional consumer rights for violations of state warranty laws. *See Walsh v. Ford Motor Co.*, 808 F.2d 1000, 1012 & n.66 (D.C. Cir. 1986) (the MMWA "'added a new layer of federal warranty law to existing state warranty doctrines,' but for the most part did not supplant state law"). KMA also does not dispute that the state courts have the primary if not exclusive authority to regulate the practice of law before state courts, including the award of reasonable attorney fees in cases tried in state courts. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423 (1982) (the states historically have exercised strict control over the professional conduct of attorneys); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("the States have a compelling interest in the practice of professions within their boundaries, and . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions"); *Arons v. New Jersey State Bd. of Educ***.,** 842 F.2d 58, 62 (3d Cir. 1988) (nothing in the federal fee-shifting provisions displaces state control over the award of reasonable attorney fees).

Despite these principles, KMA contends that a fee enhancement for contingent risk is prohibited under federal fee-shifting statutes. KMA Br. at 34. With respect to the MMWA, this

argument is wrong for at least three (3) reasons: (1) the calculation of a "reasonable" attorney fee is a matter of procedure, not substance, and is controlled by the rules of the forum court; (2) unlike other federal fee-shifting statutes, the MMWA's text expressly imports the state-law fee-shifting rules of the forum – including the professional responsibility and class action fee rules – just as it imports the contract and warranty rules of that forum; and (3) an MMWA class action necessarily satisfies the "exceptional case" standard in which fee enhancements are appropriate under Supreme Court precedent.

1. The "reasonableness" of attorney fees is a procedural matter controlled by Pennsylvania law.

There is no dispute that the MMWA authorizes a court to exercise its discretion to award "reasonable" attorney fees and other expenses to a prevailing consumer. *See* 15 U.S.C. § 2310(d). The issue KMA raises is whether that exercise of discretion is procedural or substantive. If it is substantive, then federal law will preempt and displace conflicting Pennsylvania law governing attorney fees. If it is procedural, then Pennsylvania case law controls the state court's reasonableness determination and, in turn, its exercise of discretion. Curiously, KMA's brief fails to address this important distinction and, therefore, improperly applies federal case law that is limited, by its terms, only to fee decisions rendered by the federal courts.

Although unaddressed by KMA, controlling decisions by both this Court and the United States Court of Appeals for the Third Circuit hold that an attorney fee award, even where authorized by a federal fee-shifting provision, is a still a matter of procedure rather than substantive law. In *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 65, 436 A.2d 147, 154 (1981), this Court, agreeing with the New Jersey Supreme Court, noted that rules of civil procedure imposing costs, including attorneys fees, are a matter of procedure. *See also*

State v. Otis Elevator Co., 12 N.J. 1, 95 A.2d 715, 717 (1953) ("From the outset in New Jersey, following English precedents, the allowance of costs and counsel fees had been uniformly considered by the courts of this State to be a matter of procedure rather than of substantive law."). Likewise, in *Chin v. Chrysler LLC*, 538 F.3d 272 (3d Cir. 2008), the federal court of appeals held the award of attorney fees is procedural, so that the law of the forum applies even when a different substantive law may authorize the fee award. *See id*. at 279-280. The Third Circuit also has held that absent express preemptive language, federal fee-shifting provisions do not override or displace state rules controlling the award of reasonable attorney fees. *See Arons*, 842 F.2d at 62 (federal fee-shifting language does not preempt state rules governing attorney fees).[29]

Here, KMA relies on a federal decision, *City of Burlington v. Dague*, 505 U.S. 557, 561 (1992), to argue that an enhancement for contingency is not permitted under all federal fee-shifting statutes. But *Dague* was confined to federal-question cases pending only before the federal courts under exclusively federal statutes such as the Clean Water Act, the Solid Waste Disposal Act and the Clean Air Act. *See id*. at 560-565 ("enhancement for contingency is not permitted under the fee-shifting statutes ***at issue***" (emphasis added)). *Dague* did not address statutes, like the MMWA, that use different terms which import and depend upon state law, are subject to state procedural rules and interpretations, and contemplate variations based upon different state substantive and procedural rules, including different contract laws and different attorney fee decisions. *See id*.

[29] Footnote 28 of KMA's Brief, KMA Br. at p. 35, cites the Supremacy Clause and argues that *City of Burlington v. Dague*, 505 U.S. 557 (1992), is "binding on all Pennsylvania state courts." But KMA fails to discuss or even cite the contrary post-*Dague* decisions of the federal courts in *Chin* and *Arons* discussed above.

In other words, while the fee-shifting statutes in *Dague* provided the exclusive law and procedure for federal fee shifting, the fee-shifting provided by the MMWA necessarily adopts state procedural and decisional law without preempting or displacing it. Indeed, the MMWA expressly saves this state law and procedure, providing: "Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." 15 U.S.C. § 2311(b)(1).

In *Solebury Township v. Department of Environmental Protection*, 593 Pa. 146, 928 A.2d 990 (2007), this Court emphasized Pennsylvania's strong public policy to justly compensate parties who incur attorney fees in instances in which statutory law provides for fee-shifting to the defendant. *See id*. at 170, 928 A.2d at 1004. This Court explained that while federal decisions concerning similar areas may be relevant to attorney fee decisions in the state courts, "federal standards that have not been incorporated into state statutes can only be supported to the extent that those standards are consistent with Pennsylvania public policy." *Id*. More specifically, this Court rejected the federal requirement that a formal judgment first be entered before an otherwise prevailing party would be entitled to request attorney fees under Pennsylvania law. *See id*. The Court held that the attorney fee discretion of state tribunals was broader than the narrow discretion provided to the federal courts in purely federal cases. *See id*.

Our Superior Court has recognized this broader attorney fee discretion as well. In a class action decision cited and relied upon by the courts below, *Signora v. Liberty Travel Inc.*, 886 A.2d 284 (Pa. Super. 2005), the Superior Court acknowledged but refused to follow a broad rule against contingency multipliers in statutory fee-shifting cases. *See* 886 A.2d at 293 & n.14 (approving 1.5 multiplier and distinguishing *City of Burlington v. Dague*, 505 U.S. 557

(1992)).[30] Referring to the factors outlined in Pa. R. Civ. P. 1716 governing class action attorney fees, the Superior Court held that "a court has the discretion to adjust the lodestar" in light of the quality of the legal services, the degree of success, the potential public benefit, and the potential inadequacy of the private fee arrangement, including the contingent nature of the representation. *Signora*, 886 A.2d at 293; *see also Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 257 (7th Cir. 1989) (same); *Croft v. P&W Foreign Car Service, Inc.*, 557 A.2d 18 (Pa. Super. 1989) (relying on factors in 41 P.S. § 503).

In exercising this discretion, the Superior Court explained in a later case that the lodestar may be adjusted where it would "promote the purposes of the specific statute involved." *Krebs v. United Refining Co.*, 893 A.2d 776, 788 (Pa. Super. 2006) (quotation marks and citation omitted). In *Croft*, a MMWA case, the Superior Court said trial judges should be guided by 41 P.S. § 503, which expressly considers "[t]he contingency or certainty of the compensation." 557 A.2d at 439, *citing* 41 P.S. § 503. Similarly, as a matter of state public policy, the New Jersey Supreme Court in *Rendine v. Pantzer*, 141 N.J. 292, 337-338, 661 A.2d 1202, 1229-1231 (1995) – like this Court in *Solebury* – disagreed with federal precedent, stating:

> We understand and carefully have evaluated the various objections advanced to contingency enhancements, including the often-repeated admonition that "[t]hese statues were not designed as a form of economic relief to improve the financial lot of [attorneys]." . . .. Both as a matter of economic reality and simple fairness, we have concluded that a counsel fee awarded under a fee-shifting statute cannot be "reasonable" unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to

---

[30] To be sure, the cross-appellants in *Signora* argued, and the Superior Court assumed, that enhancement for contingency is not permitted under federal fee-shifting statutes. *See* 886 A.2d at 293 & n.14, *citing Dague*. But the court did not specifically examine the pertinent statutory language or context of *Dague*, because it concluded the cross-appellants had not met their burden on the issue. As discussed above, *Dague* does not apply to a fee-shifting statute, like the MMWA, that borrows from, applies and saves state law rules, procedures and public policies. Moreover, the attorney fee language of the MMWA is far broader than the federal statutes the Supreme Court considered in *Dague*.

> reflect the actual risk that the attorney will not receive payment if the suit does not succeed.
>
> * * * * * *
>
> We are unpersuaded by Justice Scalia's suggestion in *Dague, supra,* that awarding contingency enhancement under a fee-shifting statute "would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail." . . .. In our view the case for contingency enhancement has nothing to do with the amount of time lawyers invest in losing cases. It rests on the desire to enable parties to compete for legal services in the private market. In that market, parties who can offer only fee awards contend with parties who can offer certain hourly payments and with parties who can offer contingent percentage fees from damage awards. To bid for services effectively, parties with only fee awards to offer must be able to pay market rates. They cannot do that when they are denied contingency enhancements because they cannot cover the nonpayment risk. A lawyer given a choice between an unenhanced hourly rate in a fee award case and an equal rate in a case where payment is certain will have a strong incentive to decline the fee award case.

Id. (citations omitted). The question, therefore, is whether Pennsylvania public policy applies through the MMWA so that both Rule 1716 and 41 P.S. § 503 still control the discretionary determination of a "reasonable" class fee by the Commonwealth's courts. The answer is YES.

In *Skelton v. Gen. Motors Corp.*, 860 F.2d 250 (7th Cir. 1989), a MMWA case, the court expressly held: "Even in cases in which the Magnuson-Moss Act is applicable to the fee award (as it would have been had the plaintiff class won a judgment against GM), the fee-shifting provision does not prevent the court from awarding risk multipliers." *Id*. 256-257. The court further explained that the "actual time expended" language in the statute does not "prevent courts from awarding fee enhancers." *Id*. at 257. Instead, the language "indicate[s] Congress' intent that attorneys' fees be computed on an hourly basis 'rather than being tied to any percentage of the recovery.'" *Id*. (quoting S. Rep. No. 986, 92d Cong., 1st Sess. 21, 117 Cong. Rec. 39614 (1971)). *See also Croft*, 557 A.2d at 20 (same, *citing* S. Rep. No. 151, 93d Cong., 1st Sess., pp. 23-24 (1973)). The court rejected the argument, repeated by KMA here, that the statute prohibits a multiplier: "Because a risk enhancer is applicable to the lodestar – it multiplies the lodestar by

a number representing the probability of loss – it is based on the number of hours the attorneys worked and not the size of plaintiffs' recovery. Thus a risk multiplier is 'based on actual time expended.'" *Id.* The court remanded with instructions that the trial court reconsider its denial of a .75 enhancement to the lodestar.

KMA argues that *Skelton* has been displaced by *Dague*. *See* KMA Br. at 35 n.29. But, as discussed above, *Dague* does not apply to a fee-shifting statute, like the MMWA, which uses far broader language (discussed below) and incorporates state law principles, procedures and rules of discretion. In accordance with *Solebury Township* and *Signora*, the question in this state MMWA case, in contrast with the exclusively federal claims in *Dague*, was whether a fee enhancement was necessary to ensure that competent class action counsel would be available to take and pursue to verdict and judgment small warranty claims on behalf of Pennsylvania consumers. As noted above, the Pennsylvania rules (Pa. R. Civ. P. 1716), public policies (41 Pa. C.S. § 503) and precedents (*Signora*; *Krebs; Croft*) have analyzed this question already and determined that a multiplier should be considered in all such cases. Nothing in *Dague* or the MMWA preempts Pennsylvania law and procedure governing "reasonable" class action attorney fees, and KMA has failed to cite (and cannot cite) any decision finding such a preemptive intent.

2. Controlling precedent applies state rules to the MMWA fee award.

KMA nonetheless contends that a state trial court's discretion is limited by federal law. But the MMWA's fee-shifting language suggests the exact opposite, providing that a successful consumer:

> may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action.

15 U.S.C. § 2310(d)(2). The purposes of this provision are manifold: (i) to ensure that consumers are able to obtain competent counsel to pursue their small-value claims, *see Krack v. Action Motors Corp.*, 867 A.2d 86, 92-93 (Conn. App. 2005) ("it is good public policy to encourage the prosecution of claims that, although small, are meritorious by awarding attorney's fees"); (ii) to make a prevailing consumer whole by not having his or her recovery diminished by amounts owed to counsel, *see Rodgers v. Lehighton Chrysler Plymouth*, No. 0202-4383, 2004 WL 5175412 (Phila. Com. Pl. Feb. 25, 2006) ("If courts were to award attorneys fees which did not adequately compensate counsel for their work, the poorest customers, able to purchase only the least expensive vehicles, would be hard pressed to find attorneys willing to aid them in seeking justice"); and (iii) to shift the risk of a fee award onto the breaching party to encourage prompt settlement and negate the competitive advantage over those who honor their warranties. *See*, *e.g.*, Sen. Rep. No. 93-151, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7709 ("It is difficult for a company to conform to high standards and practices if it has competitors who continue to reap greater profits by pursuing less honorable tactics").

There are several critical distinctions between this fee-shifting text in the MMWA and the narrower text of the federal statutes addressed in *Dague*. As noted, unlike other federal fee-shifting provisions, the MMWA adopts and incorporates state law and contemplates jurisdiction in both state and federal courts. *See Walsh*, 808 F.2d at 1012 & n.66. The MMWA also considers fees from the perspective of the prevailing "consumer," who is entitled to recover "a sum equal to the **aggregate** amount of cost and **expenses** (including attorneys fees based on actual time expended) determined by the court to have been **reasonably incurred by the plaintiff**." 15 U.S.C. § 2310(d)(2) (emphasis added). Because MMWA fees and expenses are awarded to the consumer, not to his or her attorneys, they are measured from the consumer's

perspective by the "aggregate amount" "reasonably incurred" by him or her. For class actions, the aggregate amount "reasonably incurred" by the Class necessarily includes the contingent-fee percentage required for Class counsel to pursue the case. This contingent-fee percentage also constitutes an "expense" to the consumers, as it is part of the "aggregate amount" necessary to have their claims pursued in the class context.

Other federal fee-shifting provisions, unlike the MMWA, do not specify "expenses," the "aggregate amount," or the perspective from which the awarded fees are to be measured. In *Dague*, for example, the federal pollution laws authorized a court only "'to award costs of litigation (including reasonable attorney . . . fees') to a 'prevailing or substantially prevailing party.'" *Dague*, 505 U.S. at 561-562, *quoting* 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). The statutes in *Dague* did not include the phrases "aggregate amount," "expenses," or "reasonably incurred by the plaintiff." *See id*. *See also Arlington Central School District v. Murphy*, 548 U.S. 291, 296 (2006) (indicating that the term "expenses" signals that all case-related expenditures are meant to be shifted to the losing defendant). These differences are significant, because they reflect Congress's intent not only to encourage private counsel to pursue MMWA claims (which is typical of federal fee-shifting provisions) but also to ensure that consumers are made whole and to shift the aggregate risk of fees to the breaching warrantor so it cannot gain a competitive advantage over honest market competitors. Hence, the MMWA differs from other federal fee-shifting laws, as it expressly provides for the shifting of all case expenses, including contingent fees "reasonably incurred" by the consumers or class of consumers.

Under Pa. R. Civ. P. 1716, 41 Pa. C.S. § 503 and pertinent precedent, a state court's class action fee discretion should account for the nature of the services, the amount of time expended,

the amounts involved, the results obtained, **and the contingent nature of the fee arrangement**. *See* Pa. R. Prof. Cond. 1.5(a) ("The factors to be considered in determining the propriety of a fee include the following: (1) whether the fee is fixed or contingent"). For class cases, the contingent fee incurred by the Class (and thereby shifted to the losing MMWA defendant) is determined by the court under Rule 1716. Nothing in the MMWA preempts these longstanding rules governing a state court's reasonableness discretion. On the contrary, the MMWA expressly makes these contingency rules part of the "aggregate amount" and the "expenses" "reasonably incurred" by the Class.

Based on these rules and procedures, the courts below determined that an enhancement "reasonably incurred" by the Class was .375 of the lodestar. This enhancement was based on substantial evidence, including the fact that this class action was taken to verdict, and the award, as enhanced, comported with typical contingent fee awards in common fund cases. *See* KMA App. F & G. Indeed, KMA admitted below that a percentage award from the class recovery would be appropriate under the MMWA and Pennsylvania law. *See* KMA Super. Ct. Br. p. 50, n.16 6/8/2007 ("Plaintiff's counsel would be entitled to seek an appropriate fee from their client – the Plaintiff class – pursuant to Pa. R.C.P. No. 1716."). Therefore, the lower courts were well within their "aggregate amount" discretion to shift to KMA the enhanced class action fee that was "reasonably incurred" by the Class.

3. An MMWA class action meets the "exceptional case" standard

In *Florin v. Nationsbank, N.A.*, 34 F.3d 560 (7th Cir. 1994), the court ruled that *Dague* has no application to class actions which result in a common fund. *Id*. at 564-565, *citing Skelton*, 860 F.2d 250. The court observed that in pre-*Dague* cases the Seventh Circuit had required a risk multiplier if the court found that counsel "'had no sure source of compensation for their

services' . . . . Moreover . . . 'the need for such an adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent.'" 34 F.3d at 555, *citing In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992).[31]

In *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), the Court, in a 4-1-4 decision, first indicated it would not permit contingency enhancements for typical statutory fee-shifting under federal statutes like the Clean Air Act. Justice White, writing for the plurality, said that "enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes." *Id*. at 727. In a majority holding joined in by Justice O'Connor, concurring in the judgment, Justice White explained that "payment for the time and effort involved – the lodestar – is presumed to be the reasonable fee authorized by the statute, and **enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification are readily apparent** and are supported by evidence in the record and specific findings by the courts." *Id*. at 728 (emphasis added); *see also id*. at 734 (O'Connor, J., concurring). In *Dague*, the Court "[a]dopt[ed] the position set forth in Justice WHITE's opinion in *Delaware Valley II*, 483 U.S. at 715-727." *Dague*, 505 U.S. at 567.

Here, the class action brought to verdict by Consumer clearly satisfies the "exceptional case" standard of *Delaware Valley II*. As all courts have recognized, class actions are

---

[31] In *McClendon v. Continental Group, Inc.*, 872 F. Supp. 142 (D.N.J. 1994) (agreeing with *Florin*), the court explained: "it is unlikely that attorneys will find sufficient incentive to bring even highly meritorious suits that are also complex, innovative, and lengthy if they will at best recover merely their regular hourly rates if they prevail, and nothing if they do not." *Id*. at 155-56. He further explained that class awards "are based on the equitable notion that those who have benefitted from the litigation should share in its costs." *Id*. Thus, a class action, as here, is completely different from the typical, individual fee-shifting case.

fundamentally different from the "usual" fee-shifting case, as they are all necessarily contingent. It is, therefore, "readily apparent" (and a matter of record) that this was a highly complex, difficult and prolonged litigation that has benefitted not only the named plaintiff but also more than 9,400 Pennsylvania consumers of KMA's defective product. In addition to the usual risks associated with all cases, Consumer and her counsel also confronted the extraordinary risk of having the class claims mooted by a reverse-auction settlement in another forum. From KMA's perspective, it also cannot be disputed that 9,400 individual cases would shift an exponentially higher cost to KMA than fees of just $430 per class member ($4,125,000/9,400). As a result, this class action is the "exceptional case" in which an enhancement multiplier was more than justified.

CONCLUSION

For all of the foregoing reasons, this Court should affirm.

Dated: December 10, 2008

Respectfully submitted,

DONOVAN SEARLES, LLC

Michael D. Donovan, Esq.

FRANCIS & MAILMAN, P.C.
James A. Francis, Esq.

FELDMAN, SHEPHERD, WOHLGELERNTER TANNER WEINSTOCK & DODIG
Alan M. Feldman, Esq.
Edward S. Goldis, Esq.

Attorneys for Consumer and the Class