

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JASON COUNTS et al.,

Plaintiffs,

Case No. 1:16-cv-12541

v.

Honorable Thomas L. Ludington
United States District Judge

GENERAL MOTORS, LLC and
ROBERT BOSCH LLC,

Defendants.

**ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT AND DIRECTING SUPPLEMENTAL BRIEFING**

In this false-advertising case, Plaintiffs' Motion for Preliminary Approval of Class Action Settlement will be denied.

On August 1, 2022, Plaintiffs filed a motion for class certification, appointment of class representatives, and appointment of class counsel for *litigation purposes* against Defendant GM, proposing three different arrangements:

1. Certifying both a Rule 23(b)(3) multi-state consumer-protection class and a Rule 23(b)(3) multi-state fraudulent-concealment class.
2. Certifying Rule 23(b)(3) classes for each of the 21 states with laws at issue.
3. Certifying a Rule 23(c)(4) "class action with respect to particular issues" of the laws of each of the states at issue.

ECF No. 446 at PageID.39543–48.

However, on February 13, 2023, Plaintiffs filed a motion for preliminary approval of a class-action settlement, proposing a different class definition for *settlement purposes* with Defendant Bosch: "all current and former owners or lessees of Class Vehicles in the United States, including territories of the United States." ECF No. 474 at PageID.42019–20.

As a threshold matter Plaintiffs’ Motion for Preliminary Approval must be denied. Plaintiffs’ Article III standing rests on their alleged economic harm. *Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 678, 695 (E.D. Mich. 2022) (“Plaintiffs have only alleged economic injuries.”). Obviously, any “current and former owners” who did not *pay* for their cars could not have “*overpaid* for their cars.” *Id.* at *6 (emphasis added). Because it affords relief to nonparties without Article III standing, the class definition is too broad for preliminary approval. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (“Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring))); *accord Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 529 (6th Cir. 2015) (Cook, J., dissenting) (“[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant.” (alteration in original) (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009))). And “the district court may only grant or deny preliminary approval; it may not modify or rewrite the proposed settlement.” *Moeller v. Wk. Pubs., Inc.*, No. 1:22-CV-10666, 2022 WL 17718416, at *2 (E.D. Mich. Dec. 15, 2022) (citing *In re Flint Water Cases*, 499 F. Supp. 3d 399, 409 (E.D. Mich. 2021)); *accord Strano v. Kiplinger Wash. Eds., Inc.*, No. 1:21-CV-12987, 2022 WL 17718414, at *2 (E.D. Mich. Dec. 15, 2022) (same).

And Plaintiffs will be directed to submit supplemental briefing on five issues. First, though Plaintiffs need not exclude anyone from their proposed classes, they have not explained why the usual exclusions are not present. *E.g.*, *Young v. Nationwide Mut. Ins.*, 693 F.3d 532, 536 n.1 (6th Cir. 2012) (excluding presiding judges and their families, defendant and its subsidiaries and lawyers, and people who opt out); *In re Domestic Drywall Antitrust Litig.*, No. 2:13-MD-02437, 2018 WL 999149, at *5–6 (E.D. Pa. Feb. 21, 2018) (same plus “heirs or assigns of any Defendant,

any federal governmental entities and instrumentalities of the federal government, . . . and judicial staff, and any juror assigned to the Action”). Second, Plaintiffs have not addressed potential dissonance regarding Class Vehicles purchased (1) new or used, or (2) from private seller, auction, dealer, or General Motors. That is, must a Class Vehicle be purchased new or used or from a particular source to warrant relief? *See Counts v. Gen. Motors, LLC*, No. 1:16-CV-12541, 2022 WL 2079757, at *6 (E.D. Mich. June 9, 2022) (holding that “Plaintiffs’ injury would likely be redressed by their requested relief” only if “[t]hey overpaid for their cars”). Third, Plaintiffs have not addressed whether any subclasses would be apt under the circumstances. *See* FED. R. CIV. P. 23(c)(1)(B), (5). Fourth, Plaintiffs have not addressed why they have proposed conflicting class definitions. Fifth, Plaintiffs have not addressed whether the law permits this Court to certify a class definition for settlement purposes against one codefendant and a different class definition for litigation purposes against another codefendant.

Accordingly, it is **ORDERED** that Plaintiffs’ Motion for Preliminary Approval of Proposed Class Settlement, ECF No. 474, is **DENIED WITHOUT PREJUDICE**.

Further, it is **ORDERED** that the Parties are **DIRECTED** to submit supplemental briefing, **on or before May 1, 2023**, addressing the following questions:

1. Should anyone be excluded from Plaintiffs’ proposed classes?
2. Must a putative class member purchase a Class Vehicle new or used or from a particular source to warrant relief?
3. Are any subclasses apt under the circumstances?
4. Why have Plaintiffs proposed conflicting class definitions?
5. Does the law permit this Court to certify a class definition for settlement purposes against one defendant and a different class definition for litigation purposes against a codefendant?

This is not a final order and does not close the above-captioned case.

Dated: April 10, 2023

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge