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IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

DOREEN BARROW, *et al.*, Plaintiffs v. VILLAGE OF NEW MIAMI, *et al.*, Defendants.	Case No. CV 2013 07 2047 ENTRY ON REMAND REAFFIRMING AND EXPLAINING REASONS FOR DECISION GRANTING CLASS CERTIFICATION

This matter came before the court following a decision from the Twelfth District Court of Appeals to remand this case on the issue of class certification so that the court could articulate its rationale for granting the motion for class certification within the parameters of *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, and *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 74 (1998).

Plaintiffs assert that the Village of New Miami's Ordinance 1917 ("the Ordinance") and the Village's Automated Speed Enforcement Program ("ASEP") violate the Ohio Constitution. The complaint seeks a declaratory judgment and preliminary and permanent injunctive relief halting the program and prohibiting New Miami from enforcing the Ordinance. Plaintiffs Dianne Woods and Michelle Johnson also seek restitution based on unjust enrichment on behalf of

themselves and all persons who have received "notices of liability" and have paid penalties, fees, or other charges under that program.

Following discovery and a two-hour oral argument, the court certified a class consisting of all persons who have received notices of liability under New Miami's ASEP. The court has considered the filings by the parties as well as the depositions filed in this matter. Following the same hearing, the court also granted summary judgment and permanent injunctive relief requested by plaintiffs on Counts I, II, and III of the Complaint.

In its April 2, 2014 entry granting class certification, the court divided the class into Subclass 1 and Subclass 2—the former consisting of all persons who have paid penalties, fees, and other charges imposed under the program, and the latter consisting of all persons who have received notices of liability but not yet paid any penalties, fees, and other charges. In the same entry, the court appointed Plaintiffs Woods and Johnson to serve as the representatives of Subclass 1, and Plaintiff Michele McGuire to serve as the representative of Subclass 2. The constitutional claims asserted by Woods and Johnson on behalf of Subclass 1 seek restitution of all penalties, fees, and other charges based on unjust enrichment. The constitutional claims asserted by McGuire on behalf of Subclass 2 seek injunctive and corresponding declaratory relief halting enforcement of the Ordinance and further implementation of New Miami's ASEP.

Defendants appealed this court's initial entry granting class certification. The court of appeals ruled that "the trial court appeared to summarily adopt the Plaintiffs' conclusions and failed to address any of the legal assertions to the contrary. Nor is there any articulation of a factual or legal analysis, and there is no discussion of relevant case law." Court of Appeals Decision, ¶ 25. The court of appeals remanded the issue of class certification "so that the trial court can articulate its rationale within the parameters of *Howland* [*supra*] and *Hamilton* [*supra*].

While this court is aware that a trial court is not required to make formal findings on every requirement with Civ. R. 23, we nonetheless must be given sufficient insight as to the trial court's thoroughness of considerations, or the depth of its analysis, required by the rule and relevant case law." *Id.* at ¶ 31.

In accordance with the court of appeals' directive, the court will explain in detail its reasons for granting class certification.

RELEVANT FACTUAL BACKGROUND

The Village of New Miami is in St. Clair Township located just north of the city of Hamilton. New Miami is less than one square mile in size (.95 square miles) and has a population of 2,249 people based on the 2010 United States Census Bureau. U.S. Route 127, a major north-south highway, runs through the Village and is the primary location where the speed cameras were located.

The ASEP was established by Ordinance 1917 adopted by the Village Council on July 5, 2012. On August 2, 2012 the Village entered into a contract with Maryland Optotraffic, LLC ("Optotraffic"), a private Maryland corporation, to operate the program. Optotraffic operates a nearly identical program in the Village of Elmwood in Hamilton County, Ohio. Under the contract, Optotraffic placed four speed cameras in New Miami. Optotraffic also maintains the equipment, sends out violation notices, and collects fines by check or through online payments. In exchange for this, Optotraffic receives 40% of all revenues received from the program. During the fifteen months the program was in operation over 10,000 violations were reported with more than an estimated one million dollars collected. (A *Journal-News* article dated March 8, 2014 actually places the number of speed citations issued under the ASEP in New Miami at 44,993 during the fifteen months.)

Under Section 77.02 of the ordinance, New Miami enacted a "civil enforcement program" for automated speed enforcement system violations. Instead of a speeding ticket being issued by a police officer, a civil "notice of liability" was sent to the vehicle's registered owner. Under Section 77.03 the owner of the vehicle was liable for a civil penalty imposed if the vehicle was operated at a speed in excess of the speed limit. The ordinance provided a limited number of defenses. In both commercial and privately owned vehicles, for the owner to avoid liability, the owner was required to provide the name and address of the person who was operating the vehicle. In the case of privately owned vehicles, the owner also had to provide a signed affidavit from the driver that the affiant (other than the owner) was driving the vehicle accompanied by payment of the civil penalty. Under Section 77.04(d) it is "prima facie evidence" that the owner was operating the vehicle at the time of the offense. The Village makes no attempt to determine who was the actual driver but places that burden on the owner.

Section 77.05 imposes a civil penalty upon the owner of the vehicle if the vehicle is recorded by the speed camera violating the speed limit. If an owner fails to respond in a timely manner to a "notice of liability" under this section, the owner waives his right to contest his liability.

Section 77.07 provides the owner with his rights to appeal a notice of liability. An owner can either provide the name of the driver as previously discussed or can file a "written notice of request for review" within 20 calendar days after the issuance of the notice of liability. The hearing shall be before a hearing officer appointed by New Miami. Under Section 77.07(a)(3)(A), the village has established a "prima facie" case by introducing a certified copy of the notice of liability with the recorded image produced by the automated speed enforcement system. This section provides four affirmative defenses that can be asserted at a hearing. Two

defenses are that the vehicle or plates were stolen or that photo was illegible. The other two defenses are only available to an owner if that owner provides the name and address of the person who was operating the vehicle or had custody and control of the vehicle.

Under the New Miami ordinance, there is no right to discovery, no right to subpoena witnesses, and no right of confrontation. The Ohio Rules of Evidence, the Ohio Rules of Civil Procedure, and the Ohio Traffic Rules do not apply. If an owner wishes to appeal a decision of the Hearing Officer, that person must file an appeal to the Butler County Court of Common Pleas pursuant to R.C. 2506 and pay the court costs, which are three times more than the fine.[1]

REASONS FOR GRANTING CLASS CERTIFICATION

Under Civ. R. 23, certification of a class is proper when the following prerequisites are satisfied:

1. An identifiable class exists;
2. The class representatives are members of the class;
3. The class is so numerous that joinder is impracticable;
4. The litigation involves at least a single common issue of law or fact;
5. The claims of the class representatives are typical of the claims of the class;
6. The class representatives and the class counsel will adequately protect the interests of the class; and
7. The proposed class satisfies at least one of the provisions of Civ. R. 23(B).

Warner v. Waste Management, Inc., 36 Ohio St. 3d 91, 94-95, 521 N.E.2d 1091, 1095 (1988).

[1] This Court previously found that the ASEP violates the due process guarantees of the Ohio Constitution. *See* March 11, 2014 Entry. The Court incorporates the relevant portions of the March 11, 2014 Entry in this Entry.

Defendants do not contest that the proposed class is sufficiently identifiable, that it is too numerous for joinder to be practicable, and that proposed class counsel possess the experience and qualifications necessary to represent the class adequately. The court reaffirms its finding that these requirements are satisfied.

A. <u>The Class Representatives Have Standing To Represent The Proposed Class.</u>

Defendants contend that the appointed class representatives of Subclass 1 (Woods and Johnson) and Subclass 2 (McGuire) lack standing to represent the class, whether on the claim of unnamed class members for restitution of fines and other charges paid based on unjust enrichment (Subclass 1) or on the claim of unnamed class members for injunctive and declaratory relief halting New Miami's automated speed enforcement program (Subclass 2). Defendants argue that, due to defenses such as res judicata and failure to exhaust administrative remedies, Woods, Johnson, and McGuire lack standing. In making these arguments, defendants fail to distinguish between asking a court to resolve merits defenses and the minimal threshold "class membership" prerequisite, which class representatives must satisfy to possess standing to represent a class.

As noted above, the second prerequisite that must be satisfied under Civ. R. 23 is that the class representatives are members of the class. *See Warner*, 36 Ohio St.3d at 94-95. In *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 74, 694 N.E.2d 442 (1998), the Supreme Court defined the "class membership" prerequisite as follows:

> The class membership prerequisite requires only that "the representative have proper standing. In order to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent."

(Citation omitted.) Thus, "standing to sue as a class representative" has its own particular definition for class action purposes under *Hamilton*: "the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent." *Id.* As framed by *Hamilton,* this is a threshold requirement for measuring whether a plaintiff has the proper standing to act in a representative capacity.

In their opposition to class certification and their argument before this court, defendants mistakenly relied on cases addressing res judicata and failure to exhaust administrative remedies as merits issues. These cases, which discussed standing outside the class action context, are inapposite. This court is bound to apply *Hamilton's* definition of "standing to sue as a class representative." The court may not use the second prerequisite as an excuse to delve into a merits issue at the class certification stage. *See Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶¶ 42-43, citing *Ojalvo v. Board of Trustees*, 12 Ohio St.3d 230, 233 (1984).

Indeed, at this point, the court is bound to adhere to the law of the case on the class membership/standing prerequisite that was established by the court of appeals in its decision. In relevant part, the court of appeals decision states:

> After reviewing the record, we find that the subclass Plaintiffs have standing to act as representatives because they have an action for the claimed relief. The subclass Plaintiffs also possess the same interests and have suffered the same injury shared by all members of the class that they seek to represent. We are not asked at this stage of the case whether the subclass Plaintiffs have a successful defense to the liability for speeding, nor are we asked whether the Plaintiffs' assertion that the Ordinance is unconditional has merit. Instead, we are only required to determine whether these representatives have an action for the relief sought. The record indicates that Plaintiffs Diane Woods and Michelle Johnson have standing to represent Subclass One because they were subject to the Ordinance and have paid the same penalties, fees, or other charges that others did under the Ordinance. Both Woods and Johnson hope to be reimbursed for the penalties they have incurred. New Miami suggests that Woods and Johnson lack

> standing because they have already paid the penalties, thus failing to avail themselves of the administrative hearing process. Despite the fact that Woods and Johnson chose to pay the fine and forego the administrative hearing process, Woods and Johnson have nonetheless been required to pay penalties because of the Ordinance and the manner in which New Miami chose to implement the speed enforcement program. The argument espoused by New Miami indirectly asks this court to decide the merits of whether the speed enforcement program offers adequate due process protections and the like. New Miami's argument requires us to determine first that the Ordinance's administrative hearing and appellate process is valid and would meet the due process rights of motorists who have been accused of speeding. However, such a finding would foreclose the Plaintiffs' arguments that the administrative body (and later appellate process) had no authority to proceed or to establish liability in the way set forth by the Ordinance. Similarly, we find that Subclass Two representative Michele McGuire also has standing. McGuire was sent a Notice of Liability but did not timely receive it because she had moved. Once McGuire received the Notice of Liability at her new address, the time to request an administrative hearing had passed and she was denied her request for a hearing as being untimely. New Miami now asserts that McGuire lacks standing because she failed to timely request a hearing, and like Johnson and Woods, has failed to exhaust the administrative process. Again, we disagree and find that McGuire has standing. The record indicates that McGuire possesses the same interest and has suffered the same injury as others in that she has been accused of speeding and must answer the Notice of Liability in an administrative proceeding that may deprive her of protections otherwise applicable in the municipal court system. While McGuire has not paid any fines or penalties, she nonetheless is subject to penalties for speeding just as any other member of the class – regardless of whether that member has paid the penalty yet. McGuire, like all members of the class, is subject to the Ordinance and the processes set forth pursuant to the speed enforcement program. McGuire, as a class representative and member, can now assert her claim that she should not have been subject to the Ordinance because it is unconstitutional, and that fact remains true whether or not McGuire has since paid the penalty.

Court of Appeals Decision, ¶¶ 12-16.[2] Accordingly, as the court of appeals held, Plaintiffs Diane Woods and Michelle Johnson have standing to assert the claims of Subclass 1, and Plaintiff Michele McGuire has standing to assert the claims of proposed Subclass 2.

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[2] The Ohio Supreme Court's recent decision in *Walker v. City of Toledo*, 2014-Ohio-5461, does not change this analysis. *Walker* does not change the long-standing precedents that a question on the merits, which is essentially the argument made by the defendants, should not be addressed at the class certification stage. *Stammco,* at ¶¶ 42-43, *citing Ojalvo,* 12 Ohio St.3d at 233. *Walker* also does not change the long-standing rule that a party is not required to exhaust administrative remedies before that party can pursue a facial challenge to the constitutionality of an

B. All Requirements of Civ. R. 23(A) Have Been Met.

As noted, defendants do not contest "numerosity" under Civ. R. 23(A)(1) or the adequacy of class counsel under Civ. R. 23(A)(4), but they contend that every other requirement under Civ. R. 23(A) is missing. The court disagrees and for the following reasons finds that all of the Civ. R. 23(A) requirements are satisfied.

1. "Commonality" is satisfied.

Civil Rule 23(A)(2) requires that the class's claims have common questions of law or fact. Because plaintiffs are proposing two subclasses, commonality is judged as to each. Civ. R. 23(C)(4)(b). Each question of law or fact need not be common to each member of the class or, in this instance, subclass; nor is complete identity of all claims required. *Hamilton*, 82 Ohio St.3d, at 77. "If there is a common nucleus of operative facts, or a common liability issue, the rule is satisfied." *Id.* One common issue of law or fact suffices to satisfy "commonality." *Id.*; *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, Case No. 10-4188, 2013 WL 3746205, *10 (6th Cir., July 18, 2013) ("there need be only one common question to certify a class").

In their class certification motion, plaintiffs listed common issues of law or fact, including the following:

- whether, pursuant to R.C. §2720.02, plaintiffs are entitled to a declaration that the Ordinance in invalid and unenforceable;

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ordinance. *Fairview General Hosp. v. Fletcher*, 63 Ohio St. 3d 146, 149 (1992); *Buckeye Quality Care Centers, Inc.*, 48 Ohio App.3d 150, 154, 548 (10th Dist. 1988).

- whether the administrative procedures and process used by the Village of New Miami violate the Ohio Constitution's guarantee of "due course of law" by not providing an opportunity for those who receive a notice of liability to be heard at a meaningful time and in a meaningful manner;

- whether the Village has been unjustly enriched by virtue of collecting and retaining the penalties, fees, and other charges that have been paid by Plaintiffs Woods and Johnson and the subclass they seek to represent;

- whether equity requires that the Village be ordered to disgorge all such payments made to it by Plaintiffs Woods and Johnson and the members of Subclass 1; and

- whether interest on such amounts is also due Plaintiffs Woods and Johnson and the members of Subclass 1.

Plaintiffs' Memorandum in Support, pp. 16-17. Defendants have not disputed the commonality of any of these issues.

On behalf of proposed Subclass 1, Woods and Johnson seek repayment of all penalties and other charges paid by those who received notices of liability under New Miami's automated speed enforcement program. For commonality purposes, the restitution claims of all Subclass 1 members derive from a common nucleus of operative fact: all of the penalties, fees, and other charges paid by all class members in Subclass 1 emanate from the same unlawful and unconstitutional practice, procedure, and course of conduct — *i.e.*, the Village's enactment and attempted enforcement of Ordinance 1917 through its ASEP, under which, in violation of the vehicle owner's due process rights, the owner must provide the name and address of the person who was operating the vehicle and a signed affidavit from the driver admitting he or she was driving; the owner is forced to contest liability in a hearing before a hearing officer appointed by New Miami without any right to discovery, right to subpoena witnesses, and right of confrontation and at which the Ohio Rules of Evidence, the Ohio Rules of Civil Procedure, and the Ohio Traffic Rules do not apply; the affirmative defenses that can be asserted at a hearing are

limited; and if an owner wishes to appeal a decision of the hearing officer, that person must file an appeal to the Butler County Court of Common Pleas pursuant to R.C. § 2506 and must pay court costs totaling three times the amount of the fine. Having all been compelled to pay fines pursuant to this unconstitutional ordinance and enforcement program, all Subclass 1 members' claims involve common issues of law and fact.

Likewise, the claims for declaratory and injunctive relief of all Subclass 2 members also derive from the same common nucleus of operative fact, namely the Village's enactment and attempted enforcement of Ordinance 1917 through its ASEP, under which, in violation of the vehicle owner's due process rights, the owner must provide the name and address of the person who was operating the vehicle and a signed affidavit from the driver admitting he or she was driving; the owner is forced to contest liability in a hearing before a hearing officer appointed by New Miami without any right to discovery, right to subpoena witnesses, and right of confrontation and at which the Ohio Rules of Evidence, the Ohio Rules of Civil Procedure, and the Ohio Traffic Rules do not apply; the affirmative defenses that can be asserted at a hearing are limited; and if an owner wishes to appeal a decision of the hearing officer, that person must file an appeal to the Butler County Court of Common Pleas pursuant to R.C. § 2506 and must pay court costs totaling three times the amount of the fine. Because they are all subject to the same unconstitutional ordinance and process, all Subclass 2 members' claims involve common issues of law and fact.

Based on the issues common to the claims of all members of Subclass 1 and to the claims of all members of Subclass 2, the "commonality" requirement is satisfied as to both subclasses.

Defendants' contention that plaintiffs cannot satisfy Civ. R. 23(A)(2) appears to be grounded in "commonality" as explained by the United States Supreme Court in *Wal-Mart*

Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011). Defendants rely on the *Wal-Mart* decision, as if the class in the instant case were in any way comparable to the one rejected in *Wal-Mart*. In *Wal-Mart*, the company challenged certification of a class comprising about one and a half million members, current and former female employees of Wal-Mart who alleged that the discretion exercised by their local supervisors over pay and promotion matters violated Title VII by discriminating against women. Wal-Mart is the nation's largest private employer, operating four types of retail stores throughout the country: discount stores, "supercenters," neighborhood markets, and "Sam's Clubs." Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people.

The class rejected in *Wal-Mart* bears no resemblance to the one in this case. Indeed, the class in this case is the antithesis of the one rejected in *Wal-Mart*, in that the class claims asserted here have what those in *Wal-Mart* lacked: common contentions capable of classwide resolution. When one applies the features of "commonality" found lacking in *Wal-Mart* to the subclasses here, it becomes clear that this case represents a classic example of "commonality" as envisioned by the Supreme Court.

According to *Wal-Mart*, for the "commonality" requirement to be satisfied, the claims of the named plaintiffs and the members of the proposed class (viewing each subclass distinctly) "must depend on a common contention … of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. As the Sixth Circuit has observed, "This inquiry focuses on whether a class action will generate

common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool*, 2013 WL 3746205, at *9.

In *Wal-Mart*, the Supreme Court held that the claims of the proposed class lacked "commonality" because there was no way for the class members' vastly different claims to generate common answers. In that case, the plaintiffs desired "to sue about literally millions of employment decisions at once," *Wal-Mart*, 131 S. Ct. at 2552, without identifying any "'specific employment practice'" common to every class member's claim, "much less one that ties all their 1.5 million claims together." *Id.* at 2555-56. In contrast, this action targets a single uniform practice—*i.e.*, that defendants have enacted and enforced an unconstitutional ordinance and process affecting all class members. Because that ties together every claim of every class member in this case—whether they be part of Subclass 1 or Subclass 2—the class action principles articulated in *Wal-Mart* strongly support this court's finding that "commonality" exists here.[3]

2. "Typicality" and "adequacy of representation" are satisfied.

Because defendants address "typicality" and "adequacy of representation" together, the court will do likewise. In its April 2, 2014 entry, the court found as follows with respect to these prerequisites:

> [T]he claims of the class representatives are typical of the other class members' claims in that the same practices and process that gave rise to the representatives' claims also gave rise to the claims of the other class and subclass members, all of their claims are based on the same legal theories, and no express conflict exists between the class representatives and the other class (and subclass) members; [and] the class representatives will adequately protect the interests of the class and

[3] See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012), cert. denied, 133 S. Ct. 338 (2012) (reversing denial of class certification where uniform policies were challenged: "Therefore challenging those policies in a class action is not forbidden by the Wal–Mart decision; rather that decision helps (as the district judge sensed) to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls.").

each subclass in that their interests align with and are not antagonistic to those of the other class members …

Under Civ. R. 23(A)(3), typicality exists if the representative's claim arises from the same practice that gave rise to the claims of other class members and if his and their claims are based on the same legal theory. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 485 (2000). A named plaintiff's claim is typical of the claims of the class if it arises from the same event, practice, and/or course of conduct that gives rise to the claims of other class members, and if the named plaintiff's claims are based on the same legal theories as the other class members. *Id.* Typicality is satisfied even if the claims of the class representative are not identical to the claims of the class. *Id.* A trial court commits error if it demands that the class members be identically situated. *Id.* at 484. When no express conflict exists between the class representatives and the class, the typicality requirement has been met. *Hamilton*, at 77; *Warner*, at 98. Under Civ. R. 23(A)(4), a class representative is adequate as long as his interest is not antagonistic to those of the other class members. *Marks v. C.P. Chem. Co.*, 31 Ohio St. 3d 200, 203 (1987); *Hamilton*, at 77-78.

Defendants assert that Woods and Johnson have a "conflict of interest" in representing all other members of Subclass 1 because they paid the penalties. Because all members of Subclass 1 paid their penalties and would face the same defenses as Wood and Johnson for having done so, there is no conflict of interest. Nor does the fact that not every Subclass 1 member paid the same amount—whether due to receiving multiple liability notices or incurring extra charges for paying online versus by check—create a conflict of interest between Woods and Johnson and the rest of Subclass 1. The fact that Woods and Johnson, for example, might stand to recover $X while other members of Subclass 1 might stand to recover more than $X does not give Woods

and Johnson an interest antagonistic to those other class members under Civ. R. 23(A)(4). *Marks*, at 203; *Hamilton*, at 77-78. And the mere fact that Subclass 1 members had more than one option upon receiving liability notices does not destroy typicality. The key to typicality and adequacy of representation in this case is that every Subclass 1 member has the same alleged injury, mandating the same alleged remedy (restitution based on unjust enrichment), and that every Subclass 2 member was subject to the same allegedly unconstitutional process and asserts the same remedy for it (injunctive/declaratory relief halting the ASEP).

The claims asserted by Plaintiffs Woods and Johnson involve the same theory (restitution) as those of all other members of Subclass 1 and arise out of the same allegedly unconstitutional practices and procedures, and the claims asserted by Plaintiff McGuire involve the same legal theories as those of all other members of Subclass 2 and arise out of the same unconstitutional practices and procedures. Plaintiffs uniformly challenge as deprivations of due process that the owner must provide the name and address of the person who was operating the vehicle and a signed affidavit from the driver admitting he or she was driving; that the owner is forced to contest liability in a hearing before a hearing officer appointed by New Miami without any right to discovery, right to subpoena witnesses, and right of confrontation and at which the Ohio Rules of Evidence, the Ohio Rules of Civil Procedure, and the Ohio Traffic Rules do not apply; that the affirmative defenses that can be asserted at a hearing are limited; and that, if an owner wishes to appeal a decision of the Hearing Officer, that person must file an appeal to the Butler County Court of Common Pleas pursuant to R.C. § 2506 and must pay court costs totaling three times the amount of the fine.

Defendants' attempt to depict varying fact patterns within each subclass incorrectly assumes that typicality requires that the class representatives' claims be identical to the claims of

the class. Defendants confuse the claims in this case that the ASEP fails to provide adequate due process to all motorists – which is part of this case – with the hypothetical claim that a particular driver was not actually speeding – which is not part of this case.[4] Moreover, as noted, under *Baughman,* the claims do not have to be identical, and a court commits error if it demands that the class members be identically situated. *Baughman*, 88 Ohio St.3d at 484-85. As the Supreme Court stated in *Baughman*, "'when it is alleged that the same unlawful conduct was directed at or affected both the name plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.'" *Id.* at 485, quoting 1 Newberg on Class Actions (3d ed. 1992), pp. 3-74 to 3-77. None of the potentially varying fact patterns posited by defendants constitutes an "express conflict between the class representatives and the class" sufficient to defeat typicality or to render the representatives inadequate. *Hamilton*, 82 Ohio St.3d at 77. Nor do any of those potentially varying fact patterns demonstrate that a proposed class representative has any interest antagonistic to those of the other class members. *Marks*, 31 Ohio St. 3d at 203; *Hamilton*, 82 Ohio St.3d at 77-78. Thus, the "typicality" and "adequacy of representation" requirements have been met.

B. Civ. R. 23(B) Also Is Satisfied.

The final class action prerequisite is that the court must find that at least one of the requirements of Civ. R. 23(B) has been met.

A trial court must find that at least one of the requirements of Rule 23(B) has been met before a class may be certified. In the April 2, 2014 Entry, this court stated that

> the proposed class meets the requirements for certification under Civil Rule 23(B)(2) in that defendants' conduct has been based on an automated speed enforcement program and policies and practices thereunder that are applicable to

[4] The former is a facial challenge.

> the entire class, plaintiffs seek qualifying injunctive, declaratory, and equitable relief on behalf of each subclass and the class and each subclass possess the requisite cohesiveness.

April 2, 2014 Entry at 3.

Certification under Civ. R. 23(B)(2) is proper whenever "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Supreme Court has stated that, if the classwide relief sought is of the type that supports a Civ. R. 23(B)(2) class action, the case ordinarily should be certified under that provision of the rule and any incidental aspects should be certified under Civ. R. 23(B)(3). *Hamilton*, at 87.

Satisfying Civ. R. 23(B)(2) entails fulfilling two requirements: (1) the proposed class's claim primarily seeks injunctive relief, and (2) the proposed class is cohesive. *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2010-Ohio-5847, ¶ 13.

The first of these requirements is met inasmuch as plaintiffs seek restitution on behalf of proposed Subclass 1 and injunctive and corresponding declaratory relief on behalf of proposed Subclass 2. Defendants essentially point to the difference between Subclass 1 (paid) and Subclass 2 (unpaid) as evidence of lack of cohesiveness. This analysis misses the mark. As with the other Civ. R. 23 requirements, when subclasses are requested, suitability for certification under Civ. R. 23(B)(2) is judged as to each subclass individually. *See* Civ. R. 23(C)(4)(b). As such, the relevant questions are whether the relief sought on behalf of Subclass 1 (restitution) constitutes equitable relief applicable to all members of that subclass, and whether the relief sought on behalf of Subclass 2 (injunctive/declaratory relief) constitutes equitable relief applicable to all members of that subclass. Defendants do not dispute that, under Ohio Supreme Court jurisprudence, the form of restitution sought on behalf of Subclass 1 constitutes equitable

relief, rather than damages. *See Santos v. Ohio BWC*, 101 Ohio St.3d 74, 2004-Ohio-441, ¶ 17 (a suit that seeks the return of funds wrongfully collected by a governmental entity is brought in equity); *Ohio Hospital Assn v. Ohio Dept. of Human Services*, 62 Ohio St.3d 97, 105, 579 N.E.2d 695 (1991) (same). Because the equitable relief sought for all Subclass 1 members is uniform in that it applies equally to all members of that subclass—regardless of amount variations due to Subclass 1 members because, for example, some paid online and others by check, and some received one notice of liability and others received more—the relief sought on behalf of Subclass 1 satisfies the first Civ. R. 23(B)(2)'s requirement as to that subclass. Likewise, the fact that the injunctive/declaratory relief sought on behalf of Subclass 2 applies uniformly to all members of that subclass satisfies the first Civ. R. 23(B)(2) requirement as to that subclass as well.

The second requirement for certification under Civ. R. 23(B)(2) is that the proposed class must be cohesive. *Wilson*, at ¶ 13. This requirement is satisfied as to both Subclass 1 and Subclass 2, viewed individually. The fact that all ticketed owners/drivers ensnared by the New Miami ASEP would naturally have individualized stories to tell at a hypothetical hearing does not come close to the lack of cohesiveness found in the *Wilson*, on which defendants chiefly rely, particularly given the common foundation on which all Subclass 1 and Subclass 2 claims rest.[5] In *Wilson*, the plaintiffs, members of unions within the Northwestern Ohio Building and Construction Trades Council, were all employed at various times by contractors at the Brush Wellman Elmore plant from the 1950s through the 1990s. The Brush Wellman Elmore plant produced beryllium alloy for use in industrial applications. The plaintiffs allege that they were exposed to beryllium dust and fumes that were generated by manufacture of the alloy. Beryllium

[5] The individual stores are not relevant to a facial constitutional challenge, in any event.

exposure can cause a lung ailment called chronic beryllium disease and other ailments. Some individuals may never show symptoms or develop any disease, while others can have serious impairments or even die as a result of their exposure. The complaint in that case alleged causes of action for negligence, strict liability in tort, statutory product liability, and engagement in ultra-hazardous activities. Specifically within the negligence claim, the plaintiffs alleged that Brush Wellman had failed to properly control and contain the beryllium, failed to train the plaintiffs and proposed class members, failed to provide a safe place of employment, failed to monitor working conditions, and failed to warn the plaintiffs and proposed class members of the dangers of beryllium. The complaint sought a medical-screening program to detect beryllium sensitivity as well as punitive damages. Individual questions identified by the trial court in that case included whether Brush Wellman owed a duty, whether there was a breach of that duty, whether the statute-of-limitations defense applied, and questions of contributory negligence. The members of the proposed class in *Wilson* spanned 46 years, multiple contractors, and multiple locations within the plant, and were estimated by the parties to number between 4,000 and 7,000. The Supreme Court concluded that, under these circumstances, the proposed class lacked the necessary cohesiveness, an issue overlooked by the court of appeals. The Supreme Court thus held that the trial court did not abuse its discretion in denying class certification.

For purposes of cohesiveness in the instant case, it does not matter that, if all class members were to be provided hearings in accordance with the Ohio Constitution, the defenses or mitigating circumstances they might offer could differ — e.g., some might contend someone else was driving their vehicle, while others might contend the measured speed was inaccurate. What makes each subclass cohesive for Civ. R. 23(B)(2) purposes is that — unlike the situation in *Wilson*, in which thousands of employees with disparate jobs working different shifts in different

parts of the plant over a 46-year span suffered a variety of exposures, some manifesting themselves as injuries and some not — the members of Subclass 1 and Subclass 2 in this case assert the same constitutional grounds for relief (*i.e.*, that Defendants' procedures deny them due process as described above) and granting them the relief requested (i.e., restitution of paid fines in the case of Subclass 1 and injunctive/declaratory relief halting New Miami's ASEP in the case of Subclass 2) would resolve the claims of all of them at once. This is the essence of cohesiveness. Thus, the second requirement for certification under Civ. R. 23(B)(2) is met.

Defendants' remaining argument against certifying Subclass 1 under Civ. R. 23(B)(2) focuses again on the alleged lack of standing of Plaintiffs Woods and Johnson. Def. Opp. at 22. But as stated above and in the court of appeals' decision, Woods and Johnson have standing to represent Subclass 1.[6]

Defendants' remaining argument against certifying proposed Subclass 2 is equally meritless. Because in their view "Subclass 2 members will not all share the same alleged due process injury," Defendants contend that "a single injunction or declaratory judgment would not provide relief to 'all members' of Subclass 2 or 'none of them.'" Def. Opp. at 21, quoting *Wal-Mart*, 131 S.Ct. at 2557. This argument erroneously equates "harm" with "relief," as if certification under Civ. R. 23(B)(2) depends on the nature of the harm the defendant's conduct inflicts on the class members. Rather, it depends on whether injunctive, equitable or declaratory relief is appropriate as to the whole class — or, in this instance, the entirety of Subclass 2 — given the defendant's conduct. The requested injunction halting enforcement of the Ordinance and the Village's automated speed enforcement program will provide relief to every member of

[6] Even if Woods and Johnson could not represent Subclass 1, under *Baughman* that would not be a reason to deny certification; it would only be a reason to add a substitute class representative to represent Subclass 1. *Baughman*, 88 Ohio St.3d at 487.

Subclass 2. Parenthetically, applying the same standard to Subclass 1 yields a similar answer: the requested restitution will provide relief to every member of Subclass 1. Thus, for the reasons articulated above, the restitution sought on behalf of Subclass 1 and the injunction sought on behalf of Subclass 2 fit the sort of relief that makes Civ. R. 23(B)(2) certification proper.

In sum, because both requirements for Civ. R. 23(B)(2) certification are satisfied, the case should be certified under this subsection. *Hamilton*, 82 Ohio St.3d at 87.[7]

CONCLUSION

Based on the arguments presented in the parties' memoranda and at the hearing on February 25, 2014, and in light of the court of appeals' decision, the court reaffirms its decision

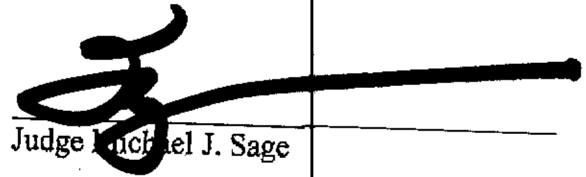
[7] It often is true that a case certifiable under Rule 23(B)(2) is equally suitable for certification under Rule 23(B)(1)(a). This case is no different. Rule 23(B)(1)(a) provides that class certification is proper "if separate actions by ... individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Defendants frame the Civ. R. 23(B)(1)(a) issue as follows: "if the Court denies class certification, there is no risk that incompatible judgments will be entered" because "[t]here is only one Administrative Hearing Officer for the Village of New Miami ...." Def. Opp. at 26. This misstates the inquiry required by Civ. R. 23(B)(1)(a). The hypothetical question that the court is required to pose is not whether there would be incompatible judgments if class certification were to be denied — which in this case would leave only the handful of claims brought by the proposed class representatives. Rather, the Court is required to pose this hypothetical question: if each of the individual class members in this case pursued a separate suit on his or her own behalf for restitution and injunctive and corresponding declaratory relief, is there a risk that varying results in such suits could create inconsistent adjudications, leaving the Village unable to comply with one judgment without violating the terms of another? Framed as such, the specter of thousands of individual actions challenging New Miami's ordinance and ASEP unquestionably would entail such a risk. Similarly, because classwide issues pertaining to each subclass predominate over individual issues, certification also would be appropriate under Civ. R. 23(B)(3). (Defendants do not address the issue of superiority under Civ. R. 23(B)(3).) Under this subsection of Rule 23, the proper inquiry is whether the issues common to class members' claims in this case predominate over any individualized issues essential to the same claims in this case. Common issues predominate when they "present a significant aspect of the case" and are "capable of resolution for all members in a single adjudication." *Marks*, 31 Ohio St.3d at 204. It is incontestable that the common issues enumerated above constitute a significant aspect of the claims being asserted on behalf of Subclass 1 and Subclass 2. *Id.* Defendants do not contend otherwise. Nor do defendants dispute that each of those common issues is capable of resolution in a single adjudication. *Id.* The fact that there might be different fact patterns among the various members of the class — e.g., that as noted above their individual circumstances might prompt them to make different arguments at administrative hearings on their respective notices of liability — does not diminish the significance of common issues such as the unconstitutionality of the ordinance or the propriety of equitable restitution; nor do class members' potentially different characteristics make these common issues any less susceptible to resolution in a single adjudication by this Court. Thus, Civ. R. 23(B)(3) predominance also is satisfied in this case. *In re Consol. Mortgage Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 10 ("While differences may exist as to particularized fact patterns, '[t]he mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class.'").

that class certification is appropriate in this case. Indeed, this case is a classic class action. For the reasons explained above, the court finds that all of the prerequisites for class certification are satisfied as to the class as a whole and as to each subclass. By way of summary, the court finds that an identifiable class exists; the class representatives are members of the class and of each subclass that they propose to represent and they possess the requisite standing in that they received "notices of liability" as part of New Miami's automated speed enforcement program and were all subject to its allegedly unconstitutional process; the class and each subclass are too numerous for joinder to be practicable; this litigation involves numerous common issues of law and fact as to each subclass; the claims of the class representatives are typical of the other class members' claims in that the same practices and process that gave rise to the representatives' claims also gave rise to the claims of the other class and subclass members, all of their claims are based on the same legal theories, and no express conflict exists between the class representatives and the other class (and subclass) members; the class representatives will adequately protect the interests of the class and each subclass in that their interests align with and are not antagonistic to those of the other class members; plaintiffs' attorneys will adequately protect the interests of the class; and the proposed class meets the requirements for certification under Civ. R. 23(B)(2) in that defendants' conduct has been based on the ASEP and the policies and practices thereunder, which are applicable to the entire class, plaintiffs seek qualifying injunctive, declaratory, and equitable relief on behalf of each subclass, and the class and each subclass possess the requisite cohesiveness.

ACCORDINGLY, IT IS HEREBY ORDERED AS FOLLOWS:

The court certifies this case as a class action under Civ. R. 23, specifically Civ. R. 23(B)(2), approves both of the subclasses, and appoints Plaintiffs Diane Woods and Michelle

Johnson as the representatives of Subclass 1, Plaintiff Michele McGuire as the representative of Subclass 2, and plaintiffs' attorneys as counsel to the class.



Judge Michael J. Sage

Date: 2/21, 2015