UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MATTHEW OPHEIM *et al.*, Plaintiffs, v. VOLKSWAGEN AKTIENGESELLSCHAFT *et al.*, Defendants.	Case No.: 2:20-cv-02483-AME

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PLAINTIFFS' SERVICE AWARDS

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INTRODUCTION

This case is about an alleged defect in the timing chain system[1] of the Settlement Class Vehicles.[2] The defect can cause serious damage not only to the timing chain system itself but also to the engine.

On December 15, 2023,[3] this Court entered an Order: (i) preliminarily approving the Settlement between Plaintiffs,[4] on behalf of themselves and all others similarly situated, and Defendant Volkswagen Group of America, Inc. ("VWGoA" or "Defendant"), and (ii) conditionally certifying the following class for settlement purposes:

> All persons and entities who purchased or leased, in the United States or Puerto Rico, certain specific model year 2012 through 2015 Audi A4, A5, and Q5 vehicles that are designated individually by Vehicle Identification Number (VIN) in Exhibit 4 to the Settlement Agreement, which were imported and distributed by Volkswagen Group of America, Inc. for sale or lease in the United States and Puerto Rico (hereinafter "Settlement Class").

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[1] The timing chain system is comprised of, *inter alia*, the hydraulic chain tensioner, timing chain, chain sprockets, guide rails, and tensioning rail. *See* Amended Complaint ("Am. Compl.") at ¶ 3, ECF No. 29.

[2] All capitalized terms used throughout this brief shall have the meanings ascribed to them in the Settlement Agreement. ECF No. 164-2.

[3] Order Granting Preliminary Approval of Class Action Settlement, ECF No. 173.

[4] Matthew Opheim, Greta Opela, Kia Holyfield, Kenneth Eldridge, Carl Popolo, Ken Barton, Matthew Kieran Byrne, William Hendra, Madalen Tejada, Melissa Gallo, Saara Massahood, Robert Mills, Ivan Cugel, Kathy Madore, Kelley Morgan, and Michelle Vargas (collectively, "Plaintiffs").

Plaintiffs now seek approval of an award of attorneys' fees and reimbursement of expenses and class representative service awards.[5]

I. FACTUAL BACKGROUND

A. The Timing Chain System Defect in Settlement Class Vehicles

Plaintiffs allege that, for nearly a decade, VWGoA and its affiliates (collectively, "Defendants") have known that the timing chain system installed in the Settlement Class Vehicles is defective and likely to fail catastrophically, well before any service or maintenance should even be necessary. *See, e.g.*, Am. Compl. at ¶¶ 2, 4, 6-7, 111. Plaintiffs allege that the defect exposes consumers to significant monetary losses, and that Defendants concealed this information and represented that the Settlement Class Vehicles were safe, reliable, and fully protected by an extensive warranty, should there be any defects. *Id*.

According to Plaintiffs, the defective timing chain system creates substantial expense for Plaintiffs and members of the Settlement Class, with necessary repairs and replacement components running into the thousands of dollars. *Id*. at ¶¶ 12, 39, 76. Defendants have consistently maintained that the Settlement Class Vehicles are not defective, that the timing chain system functions safely and properly, and that

[5] Reference herein to Exhibits are to the documents attached to the Declaration of James E. Cecchi ("Cecchi Decl.") in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Plaintiffs' Service Awards, filed contemporaneously with this Brief.

the Class Vehicles were properly designed, manufactured, distributed, marketed, advertised, warranted, and sold. Defendants have maintained that no applicable warranties were breached, nor applicable statutes or common law duties violated.

B. The Action

This Settlement involves a class action lawsuit brought against Defendants in the District of New Jersey, on behalf of a nationwide class and state subclasses, covering all persons and entities who purchased or leased a Settlement Class Vehicle.

This Action was initiated on March 6, 2020, when Plaintiffs filed their first Complaint in this District asserting eighty-eight (88) counts on behalf of a nationwide class and state subclasses. *See* ECF No. 1. Plaintiffs later filed an Amended Class Action Complaint alleging substantially similar facts, misconduct, and causes of action on October 9, 2020. *See* ECF No. 29. The Amended Complaint asserted ninety-seven (97) counts on behalf of a nationwide class and state subclasses for fraud, breach of express and implied warranties, negligent misrepresentation, unjust enrichment, the Magnuson-Moss Warranty Act, and violations of state consumer protection statutes. *See id.*

Defendants filed Motions to Dismiss the Amended Complaint that were addressed by the Court in written opinions issued on June 25, 2021, ECF No. 90,

and November 15, 2021, ECF No. 126. Thereafter, Defendants filed their respective Answers. ECF Nos. 103, 131, 132.

C. Investigation of Claims and Discovery

Prior to filing the Complaints discussed above, Plaintiffs' counsel conducted a thorough investigation into the claims and allegations. Likewise, during the course of this Action, the Parties engaged in meaningful discovery, beginning shortly after the Court's April 22, 2021 Order resolving the Parties' discovery dispute and ordering that full discovery should proceed on the claims against VWGoA, and limited jurisdictional discovery should proceed as to Audi AG. Cecchi Decl. ¶ 9; ECF No. 78. Plaintiffs and Defendants thereafter exchanged Initial Disclosures on June 4, 2021, as required by Federal Rule of Civil Procedure 26, negotiated Electronically Stored Information ("ESI") search queries, and exchanged comprehensive sets of Interrogatories and Requests for Production of Documents from May through December 2021. *Id.* Responses to discovery requests began in July 2021. Defendants continued to produce discovery through December 2022, including substantial productions by Audi AG in German, which Plaintiffs continued to review and assess throughout the Settlement negotiations. *Id.*

D. Settlement Discussions

After the Parties had an opportunity to thoroughly consider the Court's rulings on the Motions to Dismiss, and after the Parties began responding to discovery

requests and reviewing discovery responses, Settlement Class Counsel and defense counsel began discussing the potential for settlement. *Id.* at ¶ 15. Within the context of these settlement discussions, Defendants produced additional data in order to provide Settlement Class Counsel with more complete information regarding the Settlement Class Vehicles and the composition of the putative Settlement Class. *Id.* This exchange of information enabled the Parties to engage in comprehensive settlement negotiations. *Id.*

The Parties held multiple negotiation sessions—including with the assistance of experienced, and eminently qualified, JAMS mediator, Bradley Winters—which involved numerous communications via telephone, email, and videoconference, both before and after the formal mediation session with Mr. Winters in January 2023. *Id.* at ¶¶ 15-18. Over the course of the ensuing months, terms and conditions of the Settlement were debated and negotiated. *Id.* Ultimately, after vigorous arm's-length negotiations, the Parties came to agree upon the terms and conditions set forth in the Settlement Agreement, which was fully executed on October 13, 2023. *Id.*

Only after the Settlement Agreement was executed did the Parties begin arm's-length negotiations for attorneys' fees, expenses, and Class Representative service awards. *Id.* at ¶¶ 19-21. Again, using the mediation services of Mr. Winters, the Parties met on December 12, 2023. After a long and arduous negotiation, the

Parties achieved agreement on the amount of attorneys' fees, expenses, and Class Representative awards. *Id.*

E. The Settlement Relief to the Class

The Settlement Agreement provides substantial monetary and non-monetary relief to eligible Settlement Class Members. In particular, as set forth in the Settlement Agreement, *see* ECF No. 164-2, the Settlement will provide up to full reimbursement for out-of-pocket repair costs for Settlement Class Members who suffered failures of the timing chain and/or timing chain tensioner in their Settlement Class Vehicles, and will provide a generous extended warranty for the timing chain and timing chain tensioner to eligible Settlement Class Members who have not yet experienced a failure of the timing chain and/or timing chain tensioner in their vehicles. *See* Settlement Agreement, at § II. In particular, for eligible Settlement Class Members who had repairs to the timing chain and/or timing chain tensioner performed by an authorized Audi dealer, VWGoA will issue checks reimbursing **100%** of the dealer repair costs paid for repair or replacement of a failed timing chain tensioner and/or timing chain of a Settlement Class Vehicle, that was performed prior to the Notice Date and within ten (10) years or 100,000 miles (whichever occurred first) from the vehicle's In-Service Date. *Id.* at § II(B)(1). For replacement/repairs to the engine caused by the failure of the timing chain and/or timing chain tensioner, VWGoA will reimburse up to **100%** of the amount paid to

authorized dealers of Audi vehicles, depending upon mileage and time In-Service of the vehicle. *Id*. Likewise, for repairs conducted by an independent service station, VWGoA will reimburse Settlement Class Members up to $7,800 for engine repair/replacement, depending upon mileage and time In-Service, and up to $2,000 for repairs/replacement of the timing chain and/or timing chain tensioner. *Id*. Further, VWGoA will extend the warranties on the Settlement Class Vehicles to cover timing chain and/or timing chain tensioner failures for up to one hundred thousand (100,000) miles/10 years from the In-Service Date. *Id*. at § II(A). This is an outstanding recovery for members of the Settlement Class, which this Court preliminarily approved on December 15, 2023. *See* ECF Nos. 173, 174.

II. THE REQUESTED ATTORNEYS' FEES AND EXPENSES SHOULD BE AWARDED

A. The Requested Attorneys' Fees, Expenses, and Service Awards Are Reasonable and Should be Awarded.

Class Counsel seek $4,798.014.47 in fees, $161,985.53_ for reimbursed costs, and $2,500 service awards for each of the named Settlement Class Representatives, for a combined total of $5 million. The attorneys' fees and cost award is entirely separate from, and does not diminish in any way, the class relief or Settlement Class Representative service awards. For the reasons set forth below, this award of attorneys' fees, expenses, and service awards is reasonable and should be approved by the Court.

The award of attorneys' fees in a class action settlement is within the Court's discretion. *Rossi v. Procter & Gamble Co.*, 2013 WL 5523098, at *9 (D.N.J. Oct. 3, 2013). In addition, as was done here, the Supreme Court has recognized a preference of allowing litigants to resolve fee issues through agreement. *Hensley v. Eckhart*, 461 U.S. 424, 437 (1983). In this District, courts routinely approve agreed-upon attorneys' fees when the amount is independent of the class recovery and does not diminish the benefit to the class. *See, e.g.*, *Granillo v. FCA US LLC*, 2019 WL 4052432, at *2 (D.N.J. Aug. 27, 2019); *Mirakay v. Dakota Growers Pasta Co.*, 2014 WL 5358987, at *11 (D.N.J. Oct. 20, 2014); *Rossi*, 2013 WL 5523098, at *9; *Pro v. Hertz Equip. Rental Corp.*, 2013 WL 3167736, at *6 (D.N.J. June 20, 2013); *In re LG/Zenith Rear Projection Television Class Action Litig.*, 2009 WL 455513, at *8 (D.N.J. Feb. 18, 2009). Where the attorneys' fees are paid independent of the award to the class, the Court's fiduciary role in overseeing the award is greatly reduced because there is no potential conflict between the attorneys and class members. *Oliver v. BMW of N. Am., LLC*, 2021 WL 870662, at *10 (D.N.J. Mar. 8, 2021); *Mirakay*, 2014 WL 5358987, at *11; *Rossi*, 2013 WL 5523098, at *9 (citing *McBean v. City of N.Y.*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006)).

"While the Court is not bound by the agreement between the parties, the fact that the award was the product of arm's-length negotiations weighs strongly in favor of approval." *Rossi*, 2013 WL 5523098, at *10. "[T]he benefit of a fee negotiated by

the parties at arm's length is that it is essentially a market-set price—[Defendant] has an interest in minimizing the fee and Class Counsel have an interest in maximizing the fee to compensate themselves for their work and assumption of risk." *Id.* Here, these standards counsel in favor of approving the requested fee. It was the product of a long and difficult negotiation, which occurred only after the parties had reached agreement on the substantive relief to the Class.

B. The Requested Award Is Presumptively Fair and Reasonable Since it Will Not Diminish the Settlement Fund

The Federal Rules of Civil Procedure expressly authorize that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Federal courts at all levels encourage litigants to resolve fee issues by agreement whenever possible. As the United States Supreme Court explained, "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley*, 461 U.S. at 437; *see also Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees."); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) ("Whether a defendant is required by statute or agrees as part of the settlement of a class action to pay the plaintiffs' attorneys' fees, ideally the parties will settle the amount of the

fee between themselves."). Accordingly, courts regularly approve agreed-upon attorneys' fees awards paid by the defendant, rather than the class members, especially where that amount does not decrease the benefit obtained for the class. *See LG/Zenith Rear Projection*, 2009 WL 455513, at *8-9 (approving agreed upon attorneys' fee award that did not diminish settlement fund); *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1652303, at *4 (D.N.J. June 5, 2007), *aff'd*, 579 F.3d 241 (3d Cir. 2009)); *In re Prudential Ins. Co. of Am. Sales Prac. Litig.*, 106 F. Supp. 2d 721, 732 (D.N.J. 2000) (finding it significant that attorneys' fees would not diminish the settlement fund); *see also McBean*, 233 F.R.D. at 392 (granting class counsel full amount of fees agreed to by defendant where attorneys' fees were separate from class settlement and did not diminish class settlement); *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 245 (E.D.N.Y. 2010) (same); *Bezio v. Gen. Elec. Co.*, 655 F. Supp. 2d 162, 167-68 (N.D.N.Y. 2009) (same); *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *15-16 (S.D.N.Y. May 1, 2008) (same); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (same).

Here, with the benefit of a mediator and in an arduous and lengthy negotiation, the Parties reached agreement on the combined total of $5 million in attorneys' fees, reimbursed costs, and service awards in connection with the relief obtained for the Class, subject to Court approval. This award is completely separate and apart from

the relief available to the Class, and thus will not reduce the relief to the Class in any manner. Furthermore, attorneys' fees and costs were not negotiated or discussed until after the agreement was reached between the parties on all other terms of the Settlement, and after Plaintiffs had already moved for preliminary approval. Cecchi Decl. ¶¶ 19-20.

Moreover, the fee arrangement was negotiated under the best of market conditions—an arm's-length negotiation with the help of a mediator—a process which the courts have encouraged. *Matter of Cont'l Ill. Sec. Litig*., 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by negotiating parties themselves, should determine the quantum of attorneys' fees). The virtue of a fee negotiated by the parties at arm's-length is that it is, essentially, a market-set price. Defendants have an interest in minimizing the fee; Class Counsel have an interest in maximizing the fee to compensate themselves (as the case law encourages) for their risk, innovation, and creativity; and the negotiations are informed by the parties' knowledge of the work done and result achieved, and their views on what the Court may award if the attorneys' fees award were litigated. *See Oliver*, 2021 WL 870662, at *10.

Because experienced counsel negotiated the fee arrangement in this case at arm's-length, judicial deference to the parties' fee agreement is warranted. *See In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *18 (D.N.J. Mar. 26,

2010) ("[W]ith regard to attorneys' fees[,] . . . the presence of an arms' length negotiated agreement among the parties weighs strongly in favor of approval,' even if it is 'not binding on the court.'") (quoting *Weber v. Gov't. Emps. Ins. Co.*, 262 F.R.D. 431, 451 (D.N.J. 2009)).[6]

Additionally, as explained in *McBean*, 233 F.R.D. at 377, a court need not review an application for attorneys' fees with a heightened level of scrutiny where, as here, the parties have contracted for an award of fees that will not be paid from a common fund. "If money paid to the attorneys comes from a common fund, and is, therefore money taken from the class," the court reasoned, "then the Court must carefully review the award to protect the interests of the absent class members." *Id.* at 392. "If, however, money paid to the attorneys is entirely independent of money

[6] *See also Ingram v. Coca-Cola Co*., 200 F.R.D. 685, 695 (N.D. Ga. 2001) (giving "substantial weight to a negotiated fee amount"); *In re Apple Comput., Inc. Deriv. Litig*., 2008 WL 4820784, at *3 (N.D. Cal. Nov. 5, 2008) ("A court should refrain from substituting its own value for a properly bargained-for agreement."); *Cohn v. Nelson*, 375 F. Supp. 2d. 844, 861 (E.D. Mo. 2005) ("[W]here, as here, the parties have agreed on the amount of attorneys' fees and expenses, courts give the parties' agreement substantial deference."); *In re AXA Fin., Inc.*, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002) ("Where, as here, the fee is negotiated after the parties have reached an agreement in principle on settlement terms and is paid in addition to the benefit to be realized by the class, this court will also give weight to the agreement reached by the parties in relation to fees."); *In re First Capital Holdings Corp. Fin. Prod. Sec. Litig*., 1992 WL 226321, at *4 (C.D. Cal. June 10, 1992) (stating that the court should be reluctant to disturb agreed-upon attorneys' fees where class counsel negotiated the fee with sophisticated defense counsel who were familiar with the case, risks, amount, and value of class counsel's time, and nature of the result obtained for class).

awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *Id*. The *McBean* court concluded that the parties' agreement for attorneys' fees was objectively reasonable because it was the product of arm's-length negotiations. *Id*. In short, Class Counsel's requested award of $4,960,000 in fees and reimbursed expenses in connection with conferring a substantial benefit on the Class is presumptively reasonable where that award will not diminish the settlement fund.

C. The Factors Governing Approval of Attorneys' Fees and Expenses Support the Requested Amount

1. Class Counsel Obtained a Substantial Benefit for Settlement Class Members

The reasonableness of attorneys' fee awards in class action cases is traditionally viewed under the factors enunciated in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *see In re AT & T Corp.*, 455 F.3d 160, 166 (3d Cir. 2006).[7] Moreover, "[a]ttorneys' fees are awardable even though the

[7] Those factors include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *See Gunter*, 223 F.3d at 195 n.1. Two of these factors—the size of the fund created and the presence or absence of objectors—are irrelevant at this juncture. There is no common fund involved in this settlement and the deadline for filing objections is not until June 27, 2024—30 days after the

benefit conferred is purely nonpecuniary in nature." *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *15 (quoting *Merola v. Atl. Richfield Co.*, 515 F.2d 165, 169-70 (3d Cir. 1975)).

The first *Gunter* factor, as relevant here (*i.e.*, the number of persons benefitted), plainly weighs in favor of approving the requested attorneys' fees and expenses. *See Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 108 (D.N.J. 2018) ("The first *Gunter* factor 'consider[s] the fee request in comparison to . . . the number of class members to be benefitted.'") (quoting *Rowe v. E.I. DuPont de Nemours & Co.*, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011)). 528,150 individuals received direct notice, which informed Class Members of their settlement rights, and as of May 21, 2024, there have been 20,562 visits to the Settlement website by 14,275 unique users totaling 46,886 pageviews. Cecchi Decl., Ex. 1, Declaration of Jazminee Shumway of Angeion Group re: Notice Dissemination ("Shumway Decl."), at ¶ 12. As further detailed above, in Class Counsel's Declaration (Cecchi Decl. ¶¶ 22-27), and in the proposed Settlement Agreement, at 11-15, this Settlement provides a substantial benefit to the Class. Class Members who have not yet had a timing chain failure will receive an extension of warranties on the timing chain systems for their Class Vehicles. Class Members who incurred certain out-of-pocket

deadline for filing the instant motion. As such, Plaintiffs will respond separately to any objections and/or opt-outs with supplemental memoranda filed pursuant to the deadlines set in the Preliminary Approval Order (*i.e.*, by July 25, 2024).

expenses in connection with a failed timing chain are eligible for up to a 100% reimbursement for repairs performed by an authorized Audi dealer, and up to $2,000 for repairs not performed by an authorized Audi dealer, based on the age and milage of their Class Vehicle at the time of the repair. The warranty extension period shall be a period of ten years or 100,000 miles from their Class Vehicle's In-Service Date, whichever occurs first, and covers repair and replacement of timing-chain tensioners and/or timing chains, and resulting engine damages, as discussed above. Moreover, if a Class Vehicle has "timed out" of the warranty extension as of the Notice Date, due to its age from the In-Service Date, the warranty extension will apply for up to 120 days from the Notice Date or 100,000 miles, whichever occurs first.

Class Counsel negotiated a meaningful Settlement for the Class and conferred an immediate and real benefit on the Settlement Class. "Despite the difficulties they pose to measurement, nonpecuniary benefits . . . may support a settlement." *Bell Atl. Corp.*, 2 F.3d at 1311. Given the inherent litigation risks in this putative nationwide class action, the benefit is highly significant as it provides tangible benefits without the risks and delays of continued litigation. This factor, therefore, favors settlement.

2. The Absence of Substantial Objections

Further, although the second *Gunter* factor—the presence or absence of substantial objections to the settlement terms and/or fees requested by counsel—will be addressed in a subsequent brief, to date, no requests for exclusion or objections

have been submitted pursuant to the terms of the Settlement Agreement and Preliminary Approval Order. Ex. 1, Shumway Decl. ¶¶ 15-16. Low numbers indicate a highly positive response to the proposed Settlement, which favors settlement. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 321 (3d Cir. 2011) ("minimal number of objections and requests for exclusion are consistent with class settlements we have previously approved" and "favor settlement"); *Demmick v. Cellco P'ship*, 2015 WL 13643682, at *7 (D.N.J. May 1, 2015). Silence from the overwhelming majority of class members is presumed to indicate agreement with the Settlement terms. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995). Class Counsel will provide a final tally of the exclusions and will respond fully to the substance of any objections in a separate brief.

3. Skill and Efficiency of Counsel: Class Counsel Brought This Matter to an Efficient Conclusion

Class Counsel's success in bringing this litigation to a successful conclusion is perhaps the best indicator of the experience and ability of the attorneys involved. *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) ("The single clearest factor reflecting the quality of the class counsels' services to the class are the results obtained."). The quality of the work which has been presented to the Court, the undersigned believe, speaks for itself. Facing the risk of further litigation, as discussed above, Class Counsel's results here are substantial. Class Counsel have

delivered a significant benefit to the Class in the face of numerous potentially fatal obstacles.

The fact that a case settles as opposed to proceeding to trial "in and of itself, is never a factor that the district court should rely upon to reduce a fee award. To utilize such a factor would penalize efficient counsel, encourage costly litigation, and potentially discourage able lawyers from taking such cases." *Gunter*, 223 F.3d at 198. Further, Class Counsel invested significant time and worked for several years to achieve the Settlement. *See* Cecchi Decl. ¶¶ 6-22.

In addition, Class Counsel has substantial experience litigating large-scale class actions and multidistrict litigations, and the Settlement Agreement is an extremely favorable resolution for the Settlement Class Members given the attendant risks of continued litigation. *See* Cecchi Decl. ¶ 35, Exhs. 5-7. Both sides litigated this case aggressively and professionally.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Class Counsel. *See, e.g.*, *In re Ikon Office Sol., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000); *In re Warner Comm'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 970 (E.D. Tex. 2000). Defendants were ably represented by counsel from Shook, Hardy & Bacon, LLP, who are highly

experienced and seasoned attorneys known for success in civil litigation matters, and specifically including automobile-related litigation.

Class Counsel's ability to obtain the Settlement for the Class in the face of a formidable opponent further confirms the high quality of Class Counsel's representation. Accordingly, Class Counsel respectfully submits that the third *Gunter* factor, the skill and efficiency of the attorneys involved, strongly supports their application.

4. The Complexity and Duration of the Litigation

The fourth *Gunter* factor is intended to capture "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors*, 55 F.3d at 812 (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)). Plaintiffs here faced considerable legal and factual hurdles absent settlement. "[E]ven [though] Plaintiffs' Complaint survived Defendants' motion to dismiss, their case would have faced additional legal and factual hurdles on summary judgment, at trial, and potentially on appeal." *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *28 (D.N.J. Nov. 15, 2016) (citation omitted). Continued litigation likely would have been very costly for both parties. Even if Plaintiffs would have recovered a large judgment at trial on behalf of the Settlement Class Members, their actual recovery would likely be postponed for years. There is also the possibility that Plaintiffs would recover nothing. The Settlement Agreement secures a recovery for the

Settlement Class now, rather than the "speculative promise of a larger payment years from now." *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016). Thus, the fourth *Gunter* factor weighs in favor of approval.

5. Class Counsel Undertook the Risk of Non-Payment

Class Counsel undertook this action on an entirely contingent fee basis, assuming a substantial risk that the litigation would yield no, or very little, recovery and leave them uncompensated for their time as well as for their substantial out-of-pocket expenses. Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See, e.g.*, *Warner Comm'ns*, 618 F. Supp. at 747-49 (citing cases). As one court stated:

> Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In re Prudential-Bache Energy Income P'ships Sec. Litig., 1994 WL 202394, at *6 (E.D. La. May 18, 1994); *see also In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *28 ("Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees.") (citation omitted); *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. 2012) ("Courts routinely recognize that the

risk created by undertaking an action on a contingency fee basis militates in favor of approval.") (citations omitted). Class Counsel has litigated this case for more than four years without pay, and has shouldered the risk that the litigation would yield little to no recovery. Despite the litigation risks, Class Counsel were able to forge a resolution that provides significant relief to the Class. Thus, there is little doubt that Class Counsel undertook a significant risk here and the fee award, respectfully, should reflect that risk. Accordingly, the fifth *Gunter* factor weighs in favor of approving the attorneys' fees request.

6. Class Counsel Devoted Significant Time to This Case

The sixth *Gunter* factor looks at counsel's time devoted to the litigation. *Gunter*, 223 F.3d at 199. Since the inception of this case, over 4,500 hours of attorney and other professional or paraprofessional time were expended on this case. Cecchi Decl. ¶ 43. This includes, *inter alia*: the time spent in the initial factual investigation of the case and interviewing clients about their experiences; researching complex issues of law; preparing and filing the initial and Amended Complaints; attempting foreign service through the Hague Convention; responding to Defendants' comprehensive Motions to Dismiss; drafting discovery requests; defeating jurisdictional challenges; briefing and arguing numerous discovery disputes; reviewing documents produced by Defendants; collecting and producing documents for Plaintiffs and responding to witten discovery; extensive consulting

with multiple experts; hard-fought settlement negotiations; documenting the Settlement; researching and briefing issues relating to the preliminary approval of the Settlement; working with the Settlement Administrator to effectuate Notice; and responding to Class Member inquiries. *See id*. These hours are reasonable for a complex class case like this one. Further, Class Counsel's submission today does not include time to be spent going forward—both in preparing and presenting arguments on final approval, defending the Settlement from any appellate or other attacks that may result, and assisting Class Members with further inquiries and the claims process.

Thus, the sixth *Gunter* factor also weighs in favor of approving the attorneys' fees request.

7. Awards in Similar Cases

With regard to the seventh *Gunter* factor, the $4,960,000 attorneys' fee award and reimbursement of costs sought by Plaintiffs is similar to awards approved in similar cases. *See, e.g*, *In re Volkswagen Timing Chain Prod. Liab. Litig.*, 2018 WL 11413299 (D.N.J. Dec. 14, 2018) (awarding $8,650,000 in fees and expenses related to similar litigation involving certain 2009-2012 model year Volkswagen and Audi vehicles with defective timing chain systems); *In re Volkswagen & Audi Warranty Extension Litig*., 692 F.3d 4, 22 (1st Cir. 2012) (in engine defect case, circuit court directed lower court on remand to use "the base lodestar figure of $7,734,000" for

calculating fees for class counsel where settlement offered, among other benefits, payment for engine repair or replacement costs and warranty extension for vehicles); *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 166-71 (D. Mass. 2015) (on remand, granting enhanced fees of $15,468,000, using base lodestar of $7,734,000, where settlement resolved claims of improprieties in automobile manufacturer's warranty extension and reimbursement program, and involved allegations of engine defects); *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 390-94, 400 (D.N.J. 2012) (granting attorney fees of $9,207,248.19 where settlement involved Volkswagen and Audi automobiles with allegedly defectively designed sunroofs that leaked and primary claim was for breach of express warranty), *aff'd*, 558 F. App'x 191 (3d Cir. 2014); *Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738, 750-51 (E.D. Tex. 2007) (granting adjusted lodestar of $9,500,000 where proposed settlement provides class members with lease and warranty extensions based on defective odometer claim).

D. The Lodestar Cross-Check Supports That the Requested Fees and Expenses Are Fair and Reasonable

Even though the fact that a fee is negotiated weighs in favor of approval, the Court may also perform a lodestar cross-check to determine the reasonableness of the fee. *Rossi*, 2013 WL 5523098, at *10; *LG/Zenith Rear Projection*, 2009 WL 455513, at *8. In determining the lodestar for cross-check purposes, the Court need not engage in a "full-blown lodestar inquiry." *In re AT&T Corp.*, 455 F.3d at 169

n.6 (citation omitted). Indeed, where there have been no objections to the lodestar calculations, "a full-blown lodestar analysis is an unnecessary and inefficient use of judicial resources." *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 592 (D.N.J. 2010). To calculate the lodestar amount, counsel's reasonable hours expended on the litigation are multiplied by counsel's reasonable rates. *See Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). Here, the lodestar method confirms the reasonableness of the percentage fee being sought as the lodestar represents negative multiplier.

Class Counsel and their staff, and additional counsel, have expended over 4,500 hours on this case. Cecchi Decl. ¶ 43. The hours recorded were incurred on matters for the benefit of the litigation and representation of their clients as detailed *supra* regarding the sixth *Gunter* factor. Given the effort expended and the complexity of the legal and factual issues involved, the hours incurred are entirely reasonable.

Moreover, the hourly rates vary appropriately between attorneys and between paralegals, depending on the position, experience level, and locale of the particular attorney. *Id*. ¶¶ 36-44, 42 n.5.; Cecchi Decl. Exs. 5-7. The rates for each attorney and paralegal are set forth in Class Counsel's Declarations and the charts and exhibits to the Declarations. *Id*., Exs. 5-7. The lodestar rates are based on a reasonable hourly billing rate for such services given the geographical area, the

nature of the services provided, and the experience of the lawyer. *Gunter*, 223 F.3d at 195.

Taking into account the several factors discussed above, including the economic benefits of the Settlement, the complexity and risk of the litigation, and the skill and experience of counsel, Class Counsel's rates are reasonable in this case. Altogether, this yields a collective lodestar, based solely on the time for Class Counsel, of over $4,722,121 in attorney time, and $161,985.53 in expenses which will be paid entirely by the Defendant. Notably, the fee sought represents a modest multiplier of 1.02, which is well within the range of appropriate multipliers for complex contingent litigation such as this. *See McLennan v. LG Elecs. USA, Inc*., 2012 WL 686020, at *10 (D.N.J. Mar. 2, 2012) (awarding multiplier of 2.93 and citing cases noting that the range of multipliers in this circuit is between 1 and 4).

The reasonableness of the negotiated fee is also illustrated by comparing the fee to the value of the monetary and non-monetary relief that is being made available to the nearly 528,150 Settlement Class Members who have owned or leased one of the 197,023 Settlement Class Vehicles covered under this Settlement. Ex. 1, Shumway Decl. ¶¶ 7-8. While discovery was ongoing at the time the Settlement was reached, and expert reports not yet due, using warranty repair data provided during discovery and pro-rating for the age of the vehicles, Settlement Class Counsel understands that the value of the reimbursement of out-of-pocket costs is estimated

at over $27 million. Cecchi Decl. ¶ 27. This amount is in addition to the value of the warranty extension, which Settlement Class Counsel understands is worth more than $2.5 million. *Id*. Accordingly, Settlement Class Counsel's fee request represents a modest 16 percent of the relief being made available to the Class. As the Court is well aware, this percentage is well below the norm of 33.3 percent, which is frequently utilized in this Circuit. *See Demmick v. Cellco P'Ship.*, 2015 WL 13646311, at *3 (D.N.J. May 1, 2015) ("Many district courts in this Circuit have chosen to award attorneys' fees at the 33.33% level—which is the approximate median of the range recognized as acceptable by the Third Circuit.") (citing cases); *cf. In re NFL Players' Concussion Injury Litig.*, 2018 WL 1658808, at *3 & n.3 (E.D. Pa. Apr. 5, 2018).

E. The Settlement Class Representative Service Awards Should be Approved

Service awards for class representatives promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. The efforts of the Settlement Class Representatives were instrumental in achieving the Settlement on behalf of the Class and justify the awards requested here. The Settlement Class Representatives came forward to prosecute this litigation for the benefit of the class as a whole. They sought successfully to remedy a widespread wrong and have conferred valuable benefits upon their fellow Class Members. The Settlement Class Representatives provided a valuable service to the class by: (a)

providing information and input in connection with the drafting of the Complaints; (b) overseeing the prosecution of the litigation; (c) participating in discovery and preparing for their depositions; (d) agreeing to make their Class Vehicles available for inspection; (e) consulting with counsel during the litigation; and (f) offering advice and direction at critical junctures, including the Settlement of the litigation. A $2,500 service award for each of the Settlement Class Representatives in recognition of their services to the Class is modest under the circumstances, and well in line with awards approved by federal courts in New Jersey and elsewhere. *In re Volkswagen Timing Chain Prod. Liab. Litig.*, 2018 WL 11413299 (awarding class representatives $2,500 service awards under similar circumstances to the present matter); *Bernhard v. TD Bank, N.A.*, 2009 WL 3233541, at *2 (D.N.J. 2009) ("Courts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation.") (quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000)); *McGee v. Cont'l Tire N. Am., Inc.*, 2009 WL 539893, at *18 (D.N.J. Mar. 4, 2009) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002)) ("Incentive awards are 'not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.'"); *In re Am. Invs. Life Ins. Co. Annuity Mktg. & Sales Pracs. Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) (awarding representative

plaintiffs incentive payments in the amounts of $10,500 and $5,000, for a total of $115,000, finding those amounts to be "reasonable compensation considering the extent of the named plaintiffs' involvement and the sacrifice of their anonymity"); *Bezio*, 655 F. Supp. 2d at 168 (incentive awards in the amount of $5,000 each are "within the range of awards found acceptable for class representatives"). Plaintiffs and Class Counsel respectfully request that the service awards provided for in Section IX(C) of the Settlement Agreement be approved.

F. Class Counsels' Expenses Are Reasonable and Should Be Approved

In addition to being entitled to reasonable attorneys' fees, it is well-settled that prevailing Plaintiffs' attorneys are "entitled to reimbursement of reasonable litigation expenses." *See, e.g.*, *Carroll v. Stettler*, 2011 U.S. Dist. LEXIS 121185, at *26 (E.D. Pa. Oct. 19, 2011) (citing *In re Gen. Motors*, 55 F.3d at 820 n.39); *see also In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001) ("Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action.") (citing *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)).

Class Counsel's out-of-pocket expenses incurred in this litigation currently total $161,985.53 Cecchi Decl. ¶ 46; Exhs. 5-7. The expenses are of the type typically billed by attorneys to paying clients in the marketplace and include such

costs as copying fees, expert fees, computerized research, costs to obtain failed engines, travel in connection with this litigation, translation and certification of documents in connection with service of process upon the foreign-entity Defendants under the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, fees in connection with such process under the Hague Convention, and discovery expenses. All of the expenses were reasonable and necessary for the successful prosecution of this case and should be approved.

Finally, Class Counsel will incur additional expenses on this case going forward, including working with Angeion Group (the Claims Administrator), communicating with Settlement Class Members, and attending the Final Approval Hearing.

Class Counsel respectfully requests that the Court approve reimbursement of the $161,985.53 in expenses.

CONCLUSION

Because the award of attorneys' fees, reimbursement of expenses, and Plaintiffs' service awards are reasonable and justified, Plaintiffs respectfully request that they be approved by the Court.

Dated: May 28, 2024

Respectfully submitted,

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