UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THOMAS ISLEY, JEFFERY QUINN, VIPUL KHANNA, WALINGTON URENA, DANIEL GULICK, MICHAEL HENCHY JR., ANGELA BOVENZI, JONATHAN YEHUDA, and PAUL HOFFNER, on behalf of themselves and all others similarly situated, Plaintiffs, v. BMW OF NORTH AMERICA, LLC, Defendant.	Case No. 2:19-cv-12680 (ESK)

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND APPROVAL OF CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

On August 2, 2021, this Court preliminarily approved a Settlement that provides significant relief to all Class members nationwide upon completion of a simple and straightforward claim form. (Dkt. No. 55.) The Settlement is an excellent result for class members and includes three categories of settlement benefits: a service action, reimbursements for qualifying expenses, and credits for future purchases or leases of BMW vehicles.

The significant relief made available to the Class came after more than two years of litigation, lengthy settlement discussions, and multiple mediation sessions with the Honorable Jose L. Linares, U.S.D.J. (Ret.). After agreeing on the terms of the substantive settlement, the parties began negotiating attorneys' fees and service awards with the Court's assistance at a February 26, 2021 settlement conference. (*See* Dkt. No. 46.) Pursuant to the Agreement, Settlement Class Counsel may apply for an award of attorneys' fees, costs, and expenses of not more than $1,873,000, and incentive payments for the nine Class Representatives of not more than $3,000 each, which results in a total payment by Defendant of $1,900,000 allocated to fees, costs, and service awards.[1] As detailed below, the amounts requested are reasonable under Third Circuit law, and well within the range of fees and service awards issued in other cases.

II. PROCEDURAL HISTORY OF THE CASE

On May 17, 2019, after months of pre-suit investigation, speaking with potential class members, and ascertaining the nature of the alleged Class Vehicle defects, Plaintiff Thomas Isley filed the initial class action complaints against BMW NA and Bayerische Motoren Werke Aktiengesellschaft ("BMW AG") in the U.S. District Court for the District of New Jersey. The individual complaint counts included: Count I: Breach of Uniform Commercial Code § 2-313: Express Warranty; Count II: Breach of Uniform Commercial Code § 2-314: Implied Warranty;

[1] *I.e.,* $1,873,000 + (9 x $3,000) = $1,900,000.

Count III: Unjust Enrichment; Count IV: Fraud by Omission; Count V: Violation of Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1); Count VI: Violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2; Count VII: Violation of State Consumer Fraud Acts;[2] and Count VIII: Breach of Uniform Commercial Code § 1-304: Breach of Implied Covenant of Good Faith and Fair Dealing.

On July 10, 2019, BMW NA filed a Motion to Dismiss. On July 22, 2019, Plaintiffs filed their First Amended Complaint, adding Jeffrey Quinn, Vipul Khanna, Walington Urena, Daniel Gulick, and Michael Henchy, Jr., as additional named parties. Plaintiffs also substituted in breach of California's Song-Beverley Act, Cal. Civ. Code § 1790 et seq. and California Commercial Code § 2314 in place of Count II: Breach of Uniform Commercial Code § 2-314: Implied Warranty. Additionally, Plaintiffs added Count VIII: Violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210, Count IX: Deceptive Acts or Practices under New York General Business Law § 349, and Count X: False Advertising under New York General Business Law § 350.

On August 26, 2019, BMW NA filed a Motion to Dismiss Plaintiffs' First Amended Complaint. The parties then stipulated to extend Plaintiff's briefing schedule and filed an application with the Court to this effect on September 20, 2019. Plaintiffs filed an opposition on September 23, 2019 and BMW NA replied on October 7, 2019.

On December 2, 2019, the parties submitted their Joint Discovery Plan followed by the Court's Pretrial Scheduling Order issued on December 4, 2019, setting a telephone conference for March 11, 2020. However, on February 14, 2020, the parties agreed to conduct a class

[2] Plaintiff alleged violation of the following Consumer Fraud Acts: California (Cal. Bus. & Prof. Code § 17200, *et seq*.); Florida (Fla. Stat. § 501.201, *et seq*.); Illinois (815 Ill. Comp. Stat. 505.1, *et seq*.); Massachusetts (Mass. Gen. Laws Ch. 93A, *et seq*.); Michigan (Mich. Comp. Laws § 445.901, *et seq*.); Minnesota (Minn. Stat. § 325F.67, *et seq*.); Missouri (Mo. Rev. Stat. § 407.010, *et seq*.); New Jersey (N.J. Stat. § 56:8-1, *et seq*.); New York (N.Y. Gen. Bus. Law § 349, *et seq*.); and Washington (Wash. Rev. Code § 19.86.010, *et seq*.).

mediation on March 24, 2020 before the Honorable Jose L. Linares, U.S.D.J. (Ret.). On February 19, 2020, the Court administratively terminated the Motion to Dismiss. On February 26, 2020, the parties jointly requested a stay of all deadlines pending completion of the mediation.

Notwithstanding the stay, the parties conducted discovery and exchanged documents and information.

On March 13, 2020, the onset of the COVID-19 pandemic and associated travel restrictions required the parties to re-schedule the mediation. The parties requested an additional 30 day stay in light of COVID-19 travel restrictions limiting various participants' ability to travel to attend mediation. The Court granted the joint request and rescheduled the telephonic status conference to May 11, 2020.

On April 17, 2020, the parties exchanged initial mediation statements. The parties also participated in an initial teleconference with Judge Linares on April 22, 2020. At that time, Judge Linares directed the parties to engage in direct negotiations and narrow the issues, which, as described further below, the parties did successfully over the coming months. On May 5, 2020, the parties filed a letter with the Court, apprising the Court of the parties' productive telephone conferences with Judge Linares.

On July 10, 2020, the parties exchanged updated mediation statements in advance of the July 21, 2020 Zoom mediation. However, on August 5, 2020, the parties informed the Court that the mediation that had been scheduled for July 21, 2020 had to be rescheduled to September 22, 2020.[3] The September 22, 2020 mediation session concluded with the parties agreeing on many terms, but a few remained outstanding. Over the coming months, the parties continued to negotiate the terms. On December 9, 2020, the parties wrote to the Court, advising that the

[3] The mediation was rescheduled by the Honorable Jose L. Linares due to personal reasons.

parties had a further mediation session scheduled with Judge Linares to resolve one or two outstanding issues and requesting that the Court adjourn the telephone conference scheduled for December 14, 2020 until after the parties December 18, 2020 mediation session.

On January 12, 2021, the Court held a telephonic status conference, and scheduled a follow up conference on February 26, 2021. At the parties' request, the Court converted this February conference into a settlement conference. With the Court's assistance, the parties were able to agree on terms regarding attorneys' fees and service awards that day.

All told, the parties engaged in extensive, vigorous discussions and arm's-length negotiations together with numerous exchanges of information and settlement proposals. As discussed, the parties also engaged the services of Judge Linares, an experienced and well-respected jurist, and participated in mediations on April 22, 2020, September 22, 2020, December 18, 2020, and then a settlement conference before the Court on February 26, 2021. Consequently, the parties were able to reach an agreement to resolve the case and disputes between them. Counsel for the parties did not discuss the appropriateness or amount of any application by Class Counsel for an award of attorneys' fees and expenses, or for service awards, until after the substantive terms of the Settlement had been negotiated at arm's-length and agreed upon.

III. THE SETTLEMENT PROVIDES AN ARRAY OF VALUABLE BENEFITS TO THE CLASS

The Settlement Class herein is defined as follows:

> All current (as of the Effective Date) and former owners and lessees in the United States, including the District of Columbia and Puerto Rico, of certain of the following U.S.-specification BMW vehicles distributed for sale, registered, and operated in the United States, including the District of Columbia and Puerto Rico:

Model Description	Model Years
650i/xi (TU1)	2013 - 2019
650i/xi Convertible (TU1)	2013 - 2018
650i/xi Coupe (TU1)	2013 - 2017

750i/xi (TU1)	2013 - 2015
750Li/LXi (TU1)	2013 - 2015
550i/xi (TU1)	2014 - 2016
X5 (TU1)	2014 - 2018
X6 (TU1)	2015 - 2019

The Settlement Agreement is attached as Exhibit 1 to the previously filed Declaration of Frederick J. Klorczyk III in Support of the Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 54-2). Under the Settlement terms, present owners or lessees of a Settlement Class Vehicle may secure the following services. For each future oil change at a BMW Center (pursuant to Condition-Based Service indicator) for the earlier of 10 years or 120,000 miles from the in-service date, but in no event less than one year from the Effective Date of the settlement, Settlement Class Members will receive two free quarts of oil for top-offs between oil changes. Additionally, Settlement Class Members may receive up to three free Oil Consumption Tests in the earlier of 10 years or 120,000 miles from in-service date, but in no event less than one year from the Effective Date of the Settlement Class. After one failed Oil Consumption Test, BMW can, at its discretion, authorize the BMW Center to make one repair attempt or offer the customer with an engine replacement pursuant to the schedule set out above. Likewise, if the vehicle is repaired and has a second Oil-Consumption Test failure, the customer will be offered an engine replacement per the schedule set out above.

Under this plan, no customer will be required to contribute to the costs of the replacement if the Class Vehicle engine is covered under warranty – either the New Vehicle Limited Warranty term or the Certified Pre-Owned Vehicle Warranty term. Otherwise, customer contribution for parts and labor will be pursuant to the schedule set forth below:

Odometer Mileage at time of failed Oil Consumption Test resulting in engine replacement		Customer Contribution (parts & labor)
Below	50,000	0%
50,001	60,000	5%
60,001	70,000	15%
70,001	80,000	27%
80,001	90,000	42%
90,001	100,000	55%
100,001	105,000	65%
105,001	110,000	70%
110,001	115,000	75%
115,001	120,000	85%
120,001	Above	100%

Additionally, there is a reimbursement program available to Settlement Class Members that will entitle them to reimbursement of the following expenses actually paid for by the Settlement Class Member. Class Members will be eligible to secure reimbursement for the cost of up to four oil changes (not to exceed $95 each) with receipts or other appropriate proofs, so long as the oil change took place within 12 months of the previous oil change. Class Members will also be eligible for reimbursement stemming from oil top offs, including $10 per quart with receipts for a limit of 9 quarts per Class Member. Class Members will be required to demonstrate that they purchased their vehicle within the earlier of 10 years / 120,000 miles from the in-service date and must show proof of a prior oil consumption complaint to BMW NA.

In accordance with the Agreement, "appropriate proofs" include (1) a legible repair order from an authorized BMW Center or independent repair facility licensed to perform such repairs that identifies the Class Vehicle and VIN, the part number(s) used, and the cost of the repair,

with parts and labor separated; (2) proof of payment, in the form of a canceled check, credit-card receipt, credit-card statement, or receipt from the repairing entity demonstrating that the Settlement Class Member paid for the amount(s) sought for reimbursement; (3) the mileage of the Class Vehicle at the time of repair; (4) the nature of the repair and the part(s) used in the repair; and (5) the date of the repair.

Subject to said proofs, Class Members will also be eligible for reimbursement for engine replacements in accordance with the above schedule if, prior to the Effective Date, and within the earlier of 10 years or 120,000 miles from in-service, a Settlement Class Member's vehicle failed one or more Oil Consumption Tests at a BMW Center, the BMW Center confirmed the oil consumption issue, and the customer replaced the engine at a BMW Center after the last failed Oil Consumption Test. Furthermore, each Settlement Class Member will be entitled to reimbursement in the aggregate of up to $900 for a failed oil consumption test and subsequent repairs resulting therefrom at a BMW Center upon appropriate proof of the amounts that were actually paid by a Settlement Class Member prior to the Effective Date of the settlement.

Moreover, each Settlement Class Member may file a claim that will entitle them to one future purchase / lease credit subject to the following terms. Class Members may apply for a $1,500 credit applicable for BMW 6 Series, 7 Series, X5, X6, or X7. Alternatively, Class Members may apply for a $1,000 credit applicable to all other BMW models. Such credits will be valid for 1 year from the Effective Date and cannot not be used retroactively and cannot be combined with other credits made available as part of this Settlement. These credits are also transferable to Class Members' immediate family or members of their household and are combinable with other applicable and then available and qualifying BMW purchase / lease incentives.

In addition to these terms, BMW NA will pay the costs of notice to the Class and for administration of claims. Pursuant to the Agreement, Settlement Class Counsel may apply for an award of attorney's fees, costs, and expenses of not more than $1,900,000.00. This amount will be inclusive of incentive payments for Class Representatives of not more than $3,000 each.

These Settlement benefits serve as consideration for the dismissal of this Action against BMW NA,[4] and the release of all claims by Plaintiffs and Settlement Class Members which takes effect on the Effective Date defined as the earliest of the following dates: (1) the date on which the time for appeal from the Final Judgment approving the Settlement has elapsed without any appeals being filed; or (2) the date on which all appeals from the Final Judgment approving this Settlement or from any appellate court decisions affirming the Final Judgment have been exhausted, and no further appeal may be taken.

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

A. The Lodestar Method Is The Appropriate Method For Evaluating The Reasonableness Of The Mediated Fee Agreement In This Case

Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "The amount of the award of attorney's fees and expenses is controlled by the Court and is within its sound discretion." *In re GM Trucks Litig.*, 55 F.3d 768, 783, 821 (3d Cir. 1995). "Determining an appropriate award is not an exact science. The facts of each individual case drive the amount of any award." *In re AremisSoft Corp. Sec. Litig.*, 210

[4] The released parties include BMW NA and its direct and indirect parents, subsidiaries, affiliates, officers, directors, agents, authorized BMW dealers, attorneys, and all other persons or entities acting on their behalf, suppliers, licensees, distributors, assemblers, partners, component part designers, manufacturers, holding companies, joint ventures, and any individuals or entities involved in the chain of design, development, testing, manufacture, sale, assembly, distribution, marketing, advertising, financing, warranty, repair and maintenance of the Class Vehicles and their component parts.

F.R.D. 109, 128 (D.N.J. 2002). The Third Circuit has established two methods for evaluating an award of attorneys' fees:

> the percentage-of-recovery method, which involves giving attorneys a portion of the total damages awarded to plaintiffs, and the lodestar method, which involves multiplying the number of hours reasonably worked on a case by the reasonable billing rate for the services. … The percentage-of-recovery method is generally favored in cases involving a common fund, while the lodestar method "is more commonly applied in statutory fee-shifting cases." … ***The lodestar method may also be applied "in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method***." … The court should perform a "cross-check" by comparing the fee award calculated under the chosen method with the award calculated under the alternative method. *Id.*

Skeen v. BMW of N. Am., LLC, 2016 WL 4033969, at *18 (D.N.J. July 26, 2016) (internal citations omitted and emphasis added).

Here, as in *Skeen*, "the lodestar method is the proper method of fee calculation for this matter." *Id.* First, in the SAC, "Plaintiffs bring a cause of action on behalf of the entire [Nationwide] Class under the Magnuson-Moss Warranty Act, which provides for statutory fee-shifting." *Id.*; *see also* ECF No. 51 ¶¶ 113-126. Second, the "lodestar method is also appropriate because the settlement award to [] Class members also does not consist of a single, predetermined, common fund from which a percentage-of-recovery can be easily calculated. Instead, the settlement includes a "non-monetary" provision – [the service action] – along with monetary awards that will not be calculated in the aggregate until all claim submission periods have ended and Defendants have processed the claims." *Skeen*, 2016 WL 4033969, at *18.

B. The Lodestar Method Supports An Award Of $1,873,000.00 In Fees And Expenses

"The Court calculates the lodestar amount by multiplying the number of hours 'reasonably worked' on a client's case by a 'reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of

the attorneys.'" *Skeen*, 2016 WL 4033969, at *19 (citation omitted). "Time expended is considered 'reasonable' if the work performed was 'useful and of a type ordinarily necessary to secure the final result obtained from the litigation." *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *17 (D.N.J. Mar. 26, 2010) (citations omitted). The lodestar figure is presumptively reasonable when it is calculated using a reasonable hourly rate and a reasonable number of hours. *Planned Parenthood of Cent. NJ. v. Att'y Gen. of NJ*, 297 F.3d 253, 265 n.5 (3d Cir. 2002) (citations omitted).

"Although a 'fee petition should include some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates,' … 'it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.'" *Skeen*, 2016 WL 4033969, at *19. Despite this rule, Class Counsel have submitted their detailed contemporaneous time records reflecting a lodestar of $777,233.00 in time, and a total of $37,563.54 in expenses. *See* 11/16 Klorczyk Decl. ¶¶ 19-20, 23; *id.* Exs. 1-2. Importantly, this lodestar amount does not account for the additional time that remains to be expended by Class Counsel to bring this litigation to conclusion. Counsel also excluded time spent on this fee motion.

"To determine whether an attorney's billing rate is reasonable, a court 'should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Skeen*, 2016 WL 4033969, at *19 (citation omitted). Class Counsel's hourly rates vary appropriately between attorneys and paralegals, depending on the position, experience level, and locale of the particular attorney. The hourly rates for the two

partners primarily responsible for this litigation are $700 and $850. *See* Ex. 1, p.1. The rates for each individual attorney and paralegal are set forth in Exhibit 1 to the Klorczyk Declaration. Class Counsel's rates have been deemed reasonable by courts across the country, including in New Jersey, New York, California, Michigan, Illinois, and Missouri. Klorczyk Decl. ¶ 27. To our knowledge, no court has ever cut Class Counsel's fee application by a single dollar on the ground that our hourly rates were not reasonable. *Id.* ¶ 28.

Finally, "[a] court may ... multiply the lodestar calculation to reflect 'the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation.'" *AremisSoft*, 210 F.R.D. at 134 (citation omitted). In class cases, courts "frequently apply a 'lodestar multiplier,' which 'attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work' by increasing the attorneys' fee awarded beyond the lodestar amount." *Skeen*, 2016 WL 4033969, at *20 (citations omitted). In the Third Circuit, courts "routinely find in complex class action cases that a lodestar multiplier between one and four is fair and reasonable." *Saint v. BMW of North America, LLC*, 2015 WL 2448846, at *16 (D.N.J. May 21, 2015). The Third Circuit has "approved a multiple of 2.99 in a relatively simple case." *Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011) (citing *Cendant PRIDES*, 243 F.3d 722, 742 (3d Cir. 2001)).

Here, Class Counsel is seeking a lodestar multiplier of 2.36, which is squarely within the accepted range.[5] *See id.*; *see also Schuler v. Medicines Co.*, 2016 WL 3457218 at *10 (D.N.J. June 24, 2016) (approving multiplier of 3.57); *In re Valeant Pharms. Int'l., Inc. Secs. Litig.*, 2021 WL 358611, at *8 (D.N.J. Feb. 1, 2021) (approving multiplier of 3.16, but also noting that "[e]ven if the lodestar multiplier was 4.4, however, it would still fall within the common range"); *McLennan v. LG Electronics USA, Inc.*, 2012 WL 686020, at *10 (D.N.J. Mar. 2, 2012)

[5] (Proposed Award – Expenses) / Lodestar = Multiplier. Thus, ($1,873,000 – 37,563.54) / 777,233 = 2.36.

(approving multiplier of 2.93); *McGee v. Cont'l. Tire N. Am., Inc.*, 2009 WL 539893, at *19 (D.N.J. Mar. 4, 2009) (approving multiplier of approximately 2.6); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 479 (D.N.J. 2008) (approving multiplier of 2.3).

C. The *Gunter* Factors Further Support The Requested Fee Award

The $1,873,000 requested by Class Counsel is also supported by a cross-check under the percentage method. The reasonableness of attorney-fee awards in class action cases are traditionally viewed under the factors enunciated in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). These 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*, 233 F.3d at 195 n.1.[6] "These factors 'need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest.'" *Schuler*, 2016 WL 3457218, at *9 (quoting *In re Diet Drugs*, 582 F.3d 524, 545 (3d Cir. 2009)).

1. Class Counsel Obtained A Substantial Benefit For Settlement Class Members

"The first *Gunter* factor 'consider[s] the fee request in comparison to … the number of class members to be benefitted.'" *Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 108 (D.N.J. 2018)") (citation omitted). This factor plainly weighs in favor of approving the requested attorneys' fees and expenses. There are approximately 74,000 settlement class vehicles.

[6] One factor – the presence or absence of objectors – is irrelevant at this juncture. Class Notice was just sent on October 29, 2021, and the deadline for filing objections is not until November 30, 2021. *See* ECF No. 55 at 5. 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.

Klorczyk Decl. ¶ 12. As detailed above, the Settlement here provides a substantial benefit to the class in the form of a service action, reimbursements for qualifying expenses, and credits for future purchases or leases of BMW vehicles. Class Counsel negotiated a meaningful settlement for Settlement Class Members that confers real benefits. Given the inherent litigation risks in this putative nationwide class action, the benefit is highly significant as it provides substantial tangible benefits without the risks and delays of continued litigation. This *Gunter* factor favors approval of the requested fee.

2. 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. *See In re AremisSoft,* 210 F.R.D. at 132 ("the single clearest factor reflecting the quality of the class counsels' services to the class are the results obtained"). Faced with the substantial risk of further litigation, as discussed above, Class Counsel's results here are substantial. Class Counsel has delivered a significant benefit to the nationwide Class in the face of numerous potentially fatal obstacles. Moreover, because vehicles tend to depreciate over time and generally may not remain in the class members' possession after a period of time, the fact that this Settlement was achieved relatively quickly is significant and allows a greater number of Settlement Class Members to immediately benefit from the Settlement. 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. In achieving the Settlement, Class Counsel invested significant time and worked for over two years to bring this class action to fruition. *See* Klorczyk Decl. ¶¶ 2-12, 17-18.

Class Counsel have substantial experience litigating large-scale class actions and multidistrict litigations. *See* Klorczyk Decl. ¶¶ 29-30, Ex. 13 (Bursor & Fisher firm resume). The Agreement is an extremely favorable resolution for the Class given the risks attendant with continued litigation. The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Class Counsel. *See In re Ikon Off. Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000); *In re Warner Communications Securities Litigation*, 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 Buchanan, Ingersoll & Rooney PC, who are experienced and seasoned attorneys known for their success in civil litigation matters, particularly consumer products liability class actions involving automobile defect claims. Class Counsel's ability to obtain the Settlement for the Class in face of a formidable opponent further confirms the high quality of Class Counsel's representation. Accordingly, Class Counsel respectfully submits that the second *Gunter* factor supports their application for fees in the requested amount.

3. The Complexity And Duration Of The Litigation

This *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' complaint here faced considerable legal and factual hurdles absent settlement. Klorczyk Decl. ¶¶ 15-16. Continued litigation likely would have been very costly for both parties. Even if Plaintiffs recovered a large judgment at trial on behalf of the Settlement Class Members, actual recovery likely would be postponed for years. There is also the substantial possibility that Plaintiffs would recover nothing. The Settlement secures relief 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, this *Gunter* factor weighs in favor of approval of the requested fee award.

4. 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 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 Warner Communications*, 618 F. Supp. at 747-49 (citing cases). As one court noted:

> 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 Partnerships Securities Litigation, 1994 WL 202394, at *6 (E.D. La. May 18, 1994); *see also In re Ocean Power Techs, Inc.,* 2016 WL 6778218, at *28 (D.N.J. Nov. 15, 2016) ("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 attorney's fees.") (citation omitted). Class Counsel litigated this case for over two years and 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 present relief to the Class within a relatively modest time period (even taking into account delays due to the Covid-19 pandemic). There is little doubt that Class Counsel undertook a significant risk here and the fee award, respectfully, should reflect that risk. Accordingly, this *Gunter* factor weighs in favor of approving the attorneys' fee request.

5. Class Counsel Devoted Significant Time To This Case

The next *Gunter* factor looks at counsel's time devoted to the litigation. *Gunter*, 223 F.3d at 199. Since the inception of this case, over 1000 hours of attorney and other professional/paraprofessional time were expended. Klorczyk Decl. ¶ 20. Based on past experience with consumer class actions, including managing the settlement process of such matters, it is estimated that my firm will spend an additional approximately 50-75 hours between now and the final conclusion of the Action working on future necessary activities. Klorczyk Decl. ¶ 21.[7] The necessary future anticipated work includes interacting with Settlement Class Members seeking guidance and posing questions via phone and email as to the Settlement terms, the claims process and the rights and remedies of Settlement Class Members going forward under the Settlement; the status of submitted claims; assistance with curing deficient claims; the administrative appeal process and attorney review of claim denials; assisting class members requesting exclusion; addressing objections, if any, with respect to the Settlement; coordinating with defense counsel and claims administrator Atticus as to issues concerning claims and payments; reviewing and addressing miscellaneous administrative issues that are certain to occur; overseeing the final distributions and administration; addressing any questions or issues raised by Settlement Class Members in relation to the warranty extension; researching, drafting, revising and finalizing the final approval motion papers; addressing any issues in connection with the final approval motion and final approval reply papers; and, attending the final approval hearing before the Court. *See* Klorczyk Decl. ¶ 21.

[7] *See Hanlon v. Chrysler Corp*. 150 F.3d 1011, 1029-30 (9th Cir.1998) ("Class counsel presented affidavits to the district court justifying their fees on the basis of their work on the individual state class actions. The fee award also includes all future services that class counsel must provide through the life of the latch replacement program. They must remain available to enforce the contractual elements of the settlement agreement and represent any class members who encounter difficulties. The factual record provides a sufficient evidentiary basis for the district court's approval of the fee request.").

To date, the time incurred by Class Counsel has included, *inter alia:* the time spent in the initial investigation of the case; researching complex issues of law; preparing and filing the initial complaint; reviewing documents produced by Defendants; engaging in hard-fought settlement negotiations; Settlement documentation; responding to Defendants' motion to dismiss; and researching and briefing issues relating to the preliminary and final approval of the Settlement as well as a plethora of other required work. *See generally* Ex. B. to Klorczyk Decl.[8] The accumulated hours are reasonable for a complex class action case. As noted, the current lodestar and time records do not take into account the anticipated time spent going forward on future case demands, such as preparing and presenting arguments on final approval, defending the settlement from any objections and/or appellate or other attacks that may result, or assisting Class Members with the claims process. *Hanlon*, 150 F.3d at 1029-30. Thus, this fifth *Gunter* factor also weighs in favor of approving the attorney's fees request.

6. Lodestar Awards In Similar Cases

With respect to the last *Gunter* factor, the $1,873,000 award requested is less than comparable awards approved in similar cases. Based on the lodestar to date, the lodestar crosscheck results in a multiplier of 2.36 after accounting for Class Counsel's litigation costs ($37,563.54), and deducting them from the $1,873,000 award. This multiplier is well within the range of appropriate multipliers. *See Milliron*, 423 F. App'x at 135 (explaining the Third Circuit

[8] Work on this matter also included other tasks like communicating with clients and other putative class members; researching and drafting portions of the memorandum of law in opposition to motion to dismiss; preparing documents for service upon a foreign entity through the Hague Convention; preparing for mediation with Judge Linares and a settlement conference before the Court; preparing and negotiating a term sheet in connection with substantive settlement; researching comparable settlements in PACER and Westlaw databases; negotiating, reviewing and revising multiple versions of the settlement agreement and exhibits (draft class notice, settlement claim form, Preliminary Approval Order and proposed Final Approval Order); communicating with defense counsel regarding settlement documents; preparing and filing the Preliminary Approval Motion and supporting documents. *See generally* Ex. 1 to Klorczyk Decl.

has "approved a multiple of 2.99 in a relatively simple case."); *see also supra* p. 10 (citing cases approving multipliers between 3.16 and 2.3).

D. The Requested Award Is Presumptively Fair And Reasonable Since It Will Not Diminish The Settlement Fund

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). "While the Court is not bound by the agreement between the parties, the fact that the award was the product of arms-length negotiations weighs strongly in favor of approval." *Rossi v. Proctor & Gamble Co.*, 2013 WL 5523098, at *10 (D.N.J. Oct. 3, 2013). "[T]he benefit of a fee negotiated by the parties at arm's length is that it is essentially a market-set price – [Defendants] ha[ve] 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.* As such, courts in this District routinely approve agreed-upon attorneys' fees when the amount is independent from the class recovery and does not diminish the benefit to the class. *See Mirakay v. Dakota Growers Pasta Co., Inc.,* 2014 WL 5358987, at *11 (D.N.J. Oct. 20, 2014); *Rossi*, 2013 WL 5523098, at *8–9; *Pro v. Hertz Equipment Rental Corp.,* 2013 WL 3167736, at *6 (D.N.J. June 20, 2013). Where, as here, 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. *Mirakay*, 2014 WL 5358987, at *11; *Rossi*, 2013 WL 5523098, at *9 (citing *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006)).

These standards clearly weigh in favor of approving the requested fee here. The agreed upon fee agreement was the product of long and difficult negotiations, which occurred only after the parties had reached agreement on the substantive relief to the class. Klorczyk Decl. ¶ 11. The Settlement Agreement provides that payment of fees and costs "will be paid separate and apart from any relief provided to the Settlement Class," and therefore will not reduce the relief to

the Class in any manner *See* Dkt. No. 54-2, Agreement § VIII(A). As noted previously, attorneys' fees were not negotiated or discussed until after agreement was reached between the Parties on all other terms of the settlement. Klorczyk Decl. ¶¶ 10-11.

Because the fee arrangement in this case was negotiated by experienced counsel at arm's-length with the oversight of the Court during a settlement conference, judicial deference to the parties' fee agreement is warranted. *See In re Schering-Plough/Merck Merger Litigation*, 2010 WL 1257722, at *18 ("[W]ith regard to attorney's 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.'") (quotation omitted).[9] As explained in *McBean*, 233 F.R.D. at 377, a court need not review an application for attorney's 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 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 attorney's fees was objectively reasonable because it was the product of arm's-length negotiations. *Id.* Class Counsel's requested award of $1,873,000 in connection with conferring

[9] *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 Computer, 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 attorney's 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.").

a substantial benefit on the class is presumptively reasonable where that award will not diminish the settlement fund.

V. THE 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 Class Representatives were instrumental in achieving the Settlement on behalf of the Class and justify the awards requested here. The 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 Class Representatives provided a valuable service to the class by: (a) providing information and input in connection with the drafting of the complaint; (b) overseeing the prosecution of the litigation; (c) consulting with counsel during the litigation; and (d) participating in the settlement process. A $3,000.00 incentive award for each of the 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. *Bernhard v. TD Bank, N.A.*, 2009 WL 3233541, at *2 (D.N.J. 2009) ("[C]ourts 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."); *McGee*, 2009 WL 539893, at *18 ("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. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) (awarding representative plaintiffs incentive payments in the amounts of $10,500.00 and $5,000.00, for a total of $115,000.00, finding those amounts to be "reasonable compensation considering the extent of the named plaintiffs' involvement and the sacrifice of their anonymity."); *Bezio v. Gen. Elec. Co.*, 655 F. Supp. 2d 162, 168 (N.D.N.Y.

2009) (incentive awards in the amount of $5,000.00 each are "within the range of awards found acceptable for class representatives."). Here, as with the negotiated fee-and-expense award, the incentive awards of $3,000.00 to each Class Representative are particularly uncontroversial as no deduction from the Settlement fund will be made to make such payment. Plaintiffs and Class Counsel respectfully request that the incentive awards provided for in Section VIII(C) of the Settlement Agreement be approved.

VI. CLASS COUNSEL'S 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 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."); *see also Skeen*, 2016 WL 4033969, at *24.

Apart from attorneys' fees, the $1,873,000 negotiated by the parties here also covers expenses incurred in this litigation, which currently total approximately $37,563.54. Klorczyk Decl. ¶ 23; *see also* Klorczyk Decl. Ex. 2. The expenses are of the type typically billed by attorneys to paying clients in the marketplace and include such costs as court filing fees, travel in connection with this litigation, mediator fees, and similar costs. All of the expenses incurred were reasonable and necessary for the successful prosecution of this case and should be approved.

CONCLUSION

Plaintiffs respectfully submit that the award of attorneys' fees and reimbursement of expenses are justified and are fair, reasonable and adequate. Similarly, Class Representative Service Awards are fair, reasonable and adequate. Accordingly, Plaintiffs respectfully submit

that the request for attorneys' fees and reimbursement of expenses and the service fee award all be approved in the amounts requested.

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Respectfully submitted,

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