UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF CORRECTED UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES

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Plaintiffs respectfully submit this memorandum of law in support of their corrected motion, pursuant to Federal Rule of Civil Procedure 23(h), for an award of attorneys' fees in the amount of $28,500,000; for reimbursement of $384,073.26 in unreimbursed litigation expenses that were reasonably and necessarily incurred in prosecuting and resolving the Action; and for $2,500 to be awarded to the Class Representatives in this action in recognition of their contributions to the successful prosecution of this case.[1] Defendants Toyota Motor Corporation ("TMC"), Toyota Motor North America, Inc. ("TMNA") ("TMNA" and "TMC" are collectively referred to as "Toyota"), and Denso International America, Inc. ("Denso") ("Toyota" and "Denso" are collectively referred to as "Defendants") do not oppose the Motion.

I. INTRODUCTION

After nearly three years of hard-fought, complex litigation, the Parties have reached a settlement that, if approved, provides substantial relief to the owners and lessees of the nearly 4,900,000 Toyota and Lexus vehicles that are eligible to participate in this nationwide Settlement. The Consumer Support Program (CSP) and the Extended New Parts Warranty[2] that are the cornerstones of the Settlement each provide for free repairs/replacement of Denso Fuel Pumps for a period of 15 years from the in-service date of the Additional Vehicles (vehicles that were not recalled but are part of the Settlement) and 15 years from July 15, 2021, or 150,000 miles, whichever comes first, in the case of the Subject Vehicles (the recalled vehicles) and SSC Vehicles (hybrid versions of the recalled vehicles that are also eligible for the recall remedy), as well as loaner vehicles during repairs and towing to the dealership, if necessary, for all of the Covered

[1] See text order dated November 23, 2022 granting Plaintiffs' motion (ECF No. 178) to file an corrected motion, memorandum of law and joint declaration in support (ECF Nos. 175, 176).

[2] Defined terms used herein have the same meanings ascribed to them as in the Settlement Agreement. *See* Settlement Agreement, ECF No. 162, ("SA"), at § II.

Vehicles. The Settlement also benefits former owners and lessees of the Covered Vehicles who, as is the case with current owners and lessees, can file claims to recover costs of repairs, parts, loaner vehicles and towing incurred in connection with the repair of the defective Fuel Pumps. The Settlement benefits yet another group of consumers: the subsequent owners and lessees of the Covered Vehicles who can also take advantage of the free repairs, loaner vehicles and towing because the benefits under the CSP and the Extended New Parts Warranty travel with the vehicles.

This superior Settlement follows over 11,600 hours of diligent attorney work investigating, researching, analyzing, and briefing the many complex factual and legal issues involved in this case, which include claims against a non-privity parts supplier not typically included in automotive class actions, as well as substantial formal discovery, and eighteen months of arms' length negotiations, informed by additional confirmatory discovery and aided by Court-appointed Settlement Special Master Patrick A. Juneau at later stages, among many other things. Overall, according to an independent valuation expert, the Class will receive between $212,000,000 and $287,000,000 worth of relief as part of this Settlement. *See* ECF No. 174-1, Declaration of Lee M. Bowron, ACAS, MAAA ("Bowron Decl.") at ¶ 8.

Once the Parties agreed on the substantive relief for the Class under the Settlement, the Parties negotiated attorneys' fees, eventually turning to Settlement Special Master Juneau (the "Special Master") to mediate. Ultimately, Settlement Special Master Juneau provided a mediator's proposal of $28,500,000 in attorneys' fees, which the Parties ultimately accepted. The fees, if approved, will be paid directly by Defendants and will not affect the benefits to the Class. The proposed fee, if approved, amounts to only 13.4% of $212,000,000, the lowest estimate of the economic benefit to the Class, and only 9.9% of the highest estimated value of $287,000,000, which is well within the range awarded in the Second Circuit.

This class action was complex and risky, especially considering the nationwide and multi-state class claims. Class Counsel assumed that risk without any guarantee of renumeration when they accepted this case on a contingency basis. Because of these risks, the benefits that Class Counsel has obtained for the class through the litigation, and the importance of class actions in society, the Court should approve Class Counsel's proposed fee.

The Court should also approve Class Counsel's expense request of $384,073.26, which all Plaintiffs' Counsel reasonably and necessarily incurred litigating this important consumer protection case, and which were incurred retaining and working with experts, managing discovery, and necessary travel, among other things.

Moreover, the work performed by the named Plaintiffs made this Settlement possible. The Court should award them each $2,500 for their commendable service in this litigation.

For these reasons and those below, the Court should grant Plaintiffs' Motion.

II. BACKGROUND

A. Procedural Background

On February 4, 2020, Plaintiff Sharon Cheng filed her complaint against Toyota seeking damages and equitable relief individually and on behalf of Class members, each of whom purchased or leased a Covered Vehicle. ECF No. 1. In the complaint, Plaintiff Cheng asserted consumer protection and other claims against Toyota for marketing and selling the Covered Vehicles as safe and dependable when the vehicles are equipped with a fuel pump that Toyota admitted in the recall is defective and can cause engines to stall and shut down, increasing the risk of a crash. *Id.* at ¶ 1. Plaintiff Cheng also alleged Toyota's recall, which at that time covered nearly 700,000 2018-2019 Toyota and Lexus vehicles, was deficient because additional Toyota

and Lexus vehicles shared the same defective fuel pump as those included in the recall but were not covered. *Id.* at ¶ 95.

On April 13, 2020, Plaintiff Cheng filed her First Amended Class Action Complaint ("FAC"), adding (1) new plaintiffs; (2) Denso and its parent, Denso Corporation,[3] the makers of the defective fuel pumps, as defendants; (3) new and more robust allegations arising from Toyota's March 19, 2020 expansion of the recall to about 1.8 million Toyota and Lexus Vehicles; and (4) the research and analysis of Plaintiffs' Automotive Expert. ECF Nos. 96 - 96-12.

After Plaintiff Cheng filed her original complaint on February 4, 2020, eight other cases were filed in different districts across the country. ECF No. 91.[4] Plaintiffs in many of these later-filed cases voluntarily transferred their cases to this District for consolidation with this Action, and, on July 3, 2020, Plaintiff Cheng, together with those Plaintiffs, filed a Consolidated Amended Complaint. ECF No. 59. Other plaintiffs filed an application with the Judicial Panel on Multidistrict Litigation ("JPML") to centralize the then pending cases in the Eastern District of Michigan. ECF No. 57. Ultimately, to best protect the interests of the Classes and preserve judicial and party resources, these plaintiffs dismissed their JPML application (ECF No. 79), and also transferred their cases to this District to be consolidated with this Action. All transferred cases were consolidated for all purposes by mid-October 2020 (ECF No. 91), and Plaintiffs filed their First Amended Consolidated Class Action Complaint ("FACC") on November 5, 2020. ECF No. 96.

[3] Denso Corporation ("Denso Corp.") was dismissed from this action pursuant to a tolling agreement.

[4] One additional complaint, *Jose Ruis, et al. v. Toyota Motor North America, Inc. et al.*, 2:20-cv-12600 (D.N.J.), was filed on September 11, 2020, and made similar allegations to the cases above. *Ruis* was dismissed without prejudice on September 23, 2020. SA at 4, n.4.

On November 6, 2020, the Court appointed the undersigned Class Counsel as interim Class Counsel and appointed a Plaintiffs Steering Committee comprised of Finkelstein & Krinsk LLP ("Finkelstein & Krinsk"), Spector Roseman & Kodroff, P.C. ("Spector Roseman"), Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein"), and Hagens Berman Sobol Shapiro LLP ("Hagens Berman"). *See* November 6, 2020 Electronic Order.

On November 4, 2020, Toyota added about 1.52 million additional vehicles to the Recall, but the amended recall was not published until after Plaintiffs filed the FACC. The Parties stipulated for leave to file the Second Amended Consolidated Class Action Complaint ("SACC"), which was filed on December 14, 2020. ECF No. 106. The SACC added additional plaintiffs and asserted additional claims. All in all, there were 33 plaintiffs named and 97 causes of action for violations of state consumer protection statutes; breaches of express warranty; breaches of implied warranty; negligent recalls/undertakings; unjust enrichment; strict products liability; and, on behalf of a nationwide class, a claim for violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq*.

On January 15, 2021, DIAM and TMNA served Plaintiffs with their motions to dismiss, to which Plaintiffs served responses on March 30, 2021, and Defendants replied on May 28, 2021. ECF Nos. 129-134. The briefing included over 303 total pages of detailed legal and factual analyses of complex issues covering 33 Plaintiffs and 97 causes of action from 16 states related to issues such as Defendants' knowledge of the defect and their duty to disclose it; whether the economic loss doctrine barred Plaintiffs' claims; statutes of limitations and whether the claims could be tolled; and vertical privity with a vehicle manufacturer and part supplier, among other issues. Due to progress in the Parties' ongoing settlement negotiations, Defendants withdrew their Motions on March 1, 2022. ECF Nos. 152-153.

Plaintiffs voluntarily dismissed Denso Corp. on August 31, 2021. ECF No. 137. TMC was served on May 11, 2021, and filed a pre-motion letter requesting permission to file a motion to dismiss on August 16, 2021 (ECF No. 139), to which Plaintiffs responded on August 23, 2021 (ECF No. 141). The request remains pending.

The Parties submitted a Discovery Plan, which was approved by the Court on October 28, 2020. ECF No. 92-A. Plaintiffs served requests for production of documents on Defendants on July 2, 2020, and served updated Requests on January 22, 2021. DIAM served its responses to Plaintiffs' requests on March 15, 2021. TMNA served its responses to Plaintiffs' requests on April 7, 2021. On September 9, 2021, TMC served its Initial Disclosures, Responses to Plaintiffs' Requests for Production, and Response to Plaintiffs' Interrogatory. Also on September 9, 2021, TMNA served its Response to Plaintiffs' Interrogatory with verification. Defendants have produced documents responsive to Plaintiffs' requests. Plaintiffs, TMNA, and Denso served their written initial disclosures on November 2, 2020.

On November 3, 2021, the Court appointed Patrick A. Juneau as settlement special master. ECF No. 148.

On September 7, 2022, Plaintiffs filed their Third Amended Consolidated Class Action Complaint ("TACC"), ECF No. 160, along with the Parties' Joint Motion for Entry of an Order Granting Preliminary Approval of Class Action Settlement ("Preliminary Approval Motion"), ECF No. 161, the Settlement Agreement, ECF No. 162, and the Parties' respective briefs in support. ECF Nos. 163-165.

On September 16, 2022, this Court entered its Order preliminarily approving the Class Settlement, directing notice to the Class, and scheduling a fairness hearing for December 14, 2022.

ECF No. 167. The Court also appointed Class Counsel and Class Representatives for purposes of the Settlement. *Id.*

B. Formal and Informal Discovery

As part of formal discovery, Defendants produced, and Plaintiffs processed and reviewed, approximately 655,000 documents containing roughly 1.5 million pages of documents related to the Recall, the design and operation of the Defective Fuel Pumps, warranty data, failure modes, Defendants' investigation into the defect, and the Recall countermeasure development and implementation. Additionally, Plaintiffs' Automotive Expert sourced and inspected over 100 Defective Fuel Pumps, and analyzed their operation, specifications, and the density of their impellers.

During settlement negotiations, Class Counsel also conducted extensive confirmatory discovery. Toyota and Denso produced hundreds of pages of additional internal documents, including voluminous warranty data spreadsheets and detailed information about the Countermeasure Fuel Pumps, which Class Counsel reviewed and analyzed. Class Counsel consulted with their Automotive Expert about the information in these documents and provided Countermeasure Fuel Pumps for his analysis. Class Counsel also interviewed Toyota and Denso engineers who are knowledgeable about the Recall and its implementation, the Covered Vehicles, the Defective Fuel Pumps, and the Countermeasure Fuel Pumps. Joint Declaration of Wilson Daniel "Dee" Miles, III and Demet Basar in Support of Preliminary Approval Motion (ECF No. 165-1) at ¶¶ 19, 22.

C. Settlement

The Parties' negotiations culminating in this Settlement were complex, conducted in good faith and at arms' length over a period of eighteen months by informed and experienced counsel,

and aided by Court-appointed Special Master Patrick A. Juneau since November 3, 2021. Plaintiffs, with the goal of obtaining immediate valuable benefits for Class Members, and Defendants began to explore the possibility of an early resolution in March 2021 even while Defendants' motions to dismiss were being vigorously litigated and the Parties were engaged in substantial fact discovery.

During the course of the negotiations, Class Counsel, armed with the knowledge they gained through the informal and confirmatory discovery, as described below, and in consultation with their independent Automotive Expert, were able to meaningfully assess the reasons for the defect in the Fuel Pumps and the efficacy of the Recall remedy. Class Counsel and Defendants' counsel had numerous Zoom meetings and multiple in-person meetings, which required long distance travel by some Class Counsel, and, as negotiations intensified, frequent lengthy conference calls during which the Parties exchanged their views concerning the settlement terms then under discussion. Numerous drafts of the Settlement Agreement and related exhibits were exchanged, which Counsel carefully negotiated and refined before a final agreement could be reached. As a result of Counsel's efforts, the Parties were successful in reaching a settlement that provides concrete substantial benefits to millions of Class Members. *Id*. at ¶¶ 20-21.

The Parties finalized all the terms and conditions of the Settlement, which was executed on September 7, 2022, and submitted to this Court the same day along with the Parties' Preliminary Approval Motion. ECF No. 161. As part of the Settlement, Toyota and Denso will provide the following relief:

	Relief	
Additional Vehicles	Reimbursement for previous out-of-pocket repairs, including parts, labor, towing and rental expenses.	Implement a customer support program ("CSP"), providing coverage for original Denso Fuel Pumps for 15-years from the date of the original sale, including parts, labor, towing, and rental vehicle.
Recalled and SSC Vehicles		Extended the warranty of the Countermeasure Fuel Pump kit to 15-years from July 15, 2021, or 150,000 miles, whichever comes first, including parts, labor, towing, and rental vehicle.

ECF No. 165 at 12-16. These real-world benefits have been valued at between $212,000,000 and $287,000,000 by an independent valuation expert. *See* Bowron Decl. at ¶ 8.[5]

In addition to these benefits, the Settlement provides for a reconsideration procedure in connection with the CSP and the Extended Warranty (SA, § III.D) and Settlement oversight by Settlement Special Master Juneau. SA, § III.F. After relief for the Class was negotiated, the Parties mediated reasonable attorneys' fees with Special Settlement Master Juneau, which will be paid by Defendants and will not affect the relief to the Class. ECF No. 165-1 at ¶ 33.

The Court granted the Preliminary Approval Motion on September 16, 2022. ECF No. 167. This Order gave preliminary approval to the Settlement, preliminarily certified the Class, appointed Plaintiffs as Class Representatives and Class Counsel as counsel for the Settlement Class, approved the form and method of providing notice to the Class, and set a date for the final approval hearing. *Id.*

[5] The $212,000,000 represents the estimated out-of-pocket costs that Class Members would incur absent the relief in the CSP ($164,700,000) and the Extended Warranty ($47,300,000). S*ee* Bowron Decl. at ¶¶ 23-26, 31. The $287,000,000 represents the same estimated out-of-pocket costs that would be incurred absent the CSP (because it is a one-time replacement) but, for Class Members who are eligible for the Extended New Parts Warranty, the estimated retail price of a service contract with the same coverage as the Extended Warranty ($122,300,000). *Id.*, ¶¶ 27-34.

D. Post-Preliminary Approval

In accordance with the Preliminary Approval Order, notice of the Settlement was distributed in accordance with the Court-approved Notice Program. See Joint Declaration of Wilson Daniel "Dee" Miles, III and Demet Basar in Support of Plaintiffs' Unopposed Motion for Attorneys' Fees, Expenses, and Service Awards to Class Representative ("Jt. Decl.") at ¶ 22. The approved Direct Mail Notice was sent by first-class mail on a rolling basis beginning on about September 19, 2022, to each person within the Settlement Class who could be identified based on data provided by IHS Automotive, Driven by Polk. *Id*. Notice of the Settlement was also distributed via a number of publications, social media, and Internet channels. *Id*. In addition, the Long Form Notice of the Settlement and other key documents from this litigation, including the Preliminary Approval Motion and supporting materials, were published on the official settlement website at www.ToyotaFuelPumpsSettlement.com. *Id*. The Long Form Notice specifically described the provisions of the Settlement related to this motion:

> The law firms that worked on this Action will ask the Court for an award of attorneys' fees in the amount of $28,500,000.00 and for reimbursement of their out-of-pocket costs and expenses in an amount not to exceed $500,000.00.

See www.ToyotaFuelPumpsSettlement.com, Long Form Notice, at §15.

The two objections to the Settlement received to date do not object to Plaintiffs' request for attorneys' fees or reimbursement of out-of-pocket expenses. ECF Nos. 169-170. [6]

Since the preliminary approval hearing on September 14, 2022, Class Counsel has spent a substantial amount of time working with the Settlement Notice Administrator on getting the Settlement website up and running by the September 19, 2022 deadline in the Preliminary

[6] Because the objection deadline is November 25, 2022, Plaintiffs intend to address objections in their Supplemental memoranda to be filed with the Court on December 9, 2022. ECF No. 167 at 16.

Approval Order; otherwise reviewing and communicating with the Settlement Notice Administrator and others concerning notice and related issues; fielding Class Member questions; conferring with Plaintiffs concerning the Settlement and various other matters; working with other Plaintiffs' Counsel who were also working with their clients, and researching and drafting the final motion papers to approve the Settlement and related relief. Jt. Decl. at ¶ 23.

III. ARGUMENT

A. The Proposed Fee is Fair and Reasonable

"In a certified class action, 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) (emphasis added); *see Pearlman v. Cablevision Sys. Corp.*, 2019 WL 3974358, at *3 (E.D.N.Y. Aug. 20, 2019). Determining reasonable attorneys' fees "should not result in a second major litigation." *Fox v. Vice*, 563 US 826, 838 (2011) (citation omitted). As the Second Circuit has noted, "with the increasingly heavy burden upon the courts, settlements of disputes must be encouraged. Absent special circumstances . . . the negotiation of attorneys' fees cannot be excluded from this principle." *Malcham v. Davis*, 761 F.2d 893, 905 (2d Cir. 1985). Parties are, therefore, encouraged to reach an agreement on the amount of fees. *Hensley v. Eckerhard*, 461 U.S. 424, 437 (1983).

As a threshold matter, where, as here, the agreed fee is to be paid directly by defendants rather than from a common settlement fund, "and, thus, '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.'" *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 243 (E.D.N.Y. 2010) (quoting *McBean v. City of N.Y.*, 233 F.R.D. 377, 392 (S.D.N.Y.2006)); *Steinberg v. Nationwide Mut. Ins. Co.*, 612 F. Supp. 2d 219, 224 (E.D.N.Y.2009) ("[T]he Court notes with approval that the fee award will

not be drawn from the common fund but will be paid directly by [defendant]. In this regard, the fee award, however substantial, will have no effect on the monetary relief afforded to class members."); *Pearlman*, 2019 WL 3974358, at *3 (E.D.N.Y. August 20, 2019). "Furthermore, the fact that the parties did not negotiate the issue of attorneys' fees until after deciding on the benefit to the class weighs in favor of the reasonableness of the fees," as also happened here. *Dupler*, 705 F. Supp. 2d at 244 (citing *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *15 (S.D.N.Y. May 1, 2008) ("[T]he fee was negotiated only after agreement had been reached on the substantive terms of the Settlement benefitting the class. This tends to eliminate any danger of the amount of attorneys' fees affecting the amount of the class recovery.")); *Blessing v. Sirius Xm Radio, Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (upholding $13 million fee award in case with no cash payout to class where "fees were negotiated only after the terms of the settlement were reached, and the fee award comes directly from Sirius XM, rather than from funds (or coupons) earmarked for the class"). Similarly, here, after the Parties reached an agreement on the material terms of the relief to the Class, the Parties then mediated attorneys' fees with Settlement Special Master Juneau, who provided the Parties with a mediator's recommendation of $28,500,000 for Class Counsel attorneys' fees, which the Parties accepted. *See Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, 2016 WL 6542707, at *15 (D. Conn. Nov. 3, 2016).

Under the law of this Circuit, the mediated fee amount recommended by Settlement Special Master Juneau is a "reasonable fee" for Plaintiffs' Counsel's efforts and the excellent benefits secured for the millions of consumers that are eligible to participate in the Settlement. *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 84 (E.D.N.Y. 2002) (citing *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000)). Historically, courts have used two methods to determine reasonable fees: the lodestar method and the percentage of the common fund method.

However, since 2001,"[t]he trend in the Second Circuit [has been] to use the percentage method." *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d at 84 (citing *In re American Bank Note*, 127 F. Supp.2d 418, 431 (S.D.N.Y.2001) ("Although the law in the Circuit has not been uniform, the trend of the district courts in this Circuit is to use the percentage of the fund approach to calculate attorneys' fees.")); *see also Pearlman*, 2019 WL 3974358, at *3 (E.D.N.Y. August 20, 2019). Courts favor the percentage of the fund method because the lodestar method "created an unanticipated disincentive to early settlements," tempted lawyers to run up their hours, and "compell[ed] district courts to engage in a gimlet-eyed review of line-item fee audits." *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d at 84 (citing *Goldberger*, 209 F.3d at 48–49); *see In re Parking Heaters, Antitrust Litig.*, 2019 WL 8137325, at *7 (E.D.N.Y. Aug. 15, 2019). The Second Circuit recommends the lodestar method as a "cross check" on the reasonableness of the requested percentage. *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d at 84 (citing *Goldberger*, 209 F.3d at 50).

"Whatever method is used," the reasonableness of a fee award is governed by the following *Goldberger* factors: (1) counsel's time and labor; (2) the litigation's complexities and magnitude; (3) the litigation risks; (4) quality of representation; (5) the relationship of the requested fee to the settlement; and (6) considerations of public policy." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir.2007). Each of these factors clearly demonstrate that the requested fee of $28,500,000 is fair and reasonable.

1. Time and Labor

As described above and in the Joint Declaration of W. Daniel "Dee" Miles, III and Demet Basar, Class Counsel dedicated considerable time and effort investigating the claims at issue in this case, crafting the complaints, analyzing the Defendants' various arguments, reviewing many

relevant documents, retaining and working/consulting with experts, and negotiating the Settlement. More specifically, Class Counsel, among many other things, tracked and investigated Toyota's and Denso's Recalls; acquired and studied, with expert assistance, the relevant parts; interviewed Plaintiffs and Class members; studied Plaintiffs' relevant documents; researched, drafted and reviewed thousands of pages of pleadings; successfully opposed an MDL which resulted in informal coordination before this Court of multiple similar cases filed across the country; drafted, propounded, and met and conferred on discovery; reviewed over 1.5 million pages of document discovery; conducted informal, confirmatory discovery; retained and consulted with three experts in the fields of engineering, economics, and statistics; and negotiated this settlement for over a year and a half. Jt. Decl. at ¶¶ 7-23. In total, Class Counsel and other Plaintiffs' Counsel have devoted over 11,600 hours to this case through November 15, 2022, yielding a lodestar of nearly $7.7 million. Although Class Counsel worked efficiently and resolved this case at an early stage, this extremely favorable resolution would not have been possible without the careful work that went into the case at the outset and throughout. *See generally Shakur v. Lasertone Corp.*, 2019 WL 13220970, at *3 (E.D.N.Y. Dec. 16, 2019) (recognizing class counsel should not be punished for resolving cases early and favorably).

Moreover, Class Counsel expects to expend a significant amount of time in this case until it is fully resolved. Since November 15, 2022, Class Counsel has already spent many hours preparing and finalizing the voluminous motion papers, including 40 declarations, that are being filed today. Between now and the Fairness Hearing set for December 14, 2022, Class Counsel will continue to do a significant amount of work, including, among other things, (i) conferring with Defendants' counsel on Settlement-related issues; (ii) conferring with the Settlement Notice Administrator about notice, objectors and opt-out requests; (iii) consulting with the Settlement

Special Master Juneau as may be necessary; (iv) working with the firms on the PSC; (v) working with Plaintiffs' experts, including, potentially, on additional expert declarations; (vi) fielding calls from Class Members, including potential objectors; (vii) researching and drafting supplemental briefs and declarations by the December 9, 2022 deadline; (vii) preparing for the Fairness Hearing; (viii) traveling to and from New York; (ix) presenting oral argument at the Fairness Hearing; and (x) communicating with Class Representatives. Based on prior experience and recent billings, Class Counsel expects to expend another 750 hours on this litigation until the end of 2022, which yields a lodestar of nearly $600,000. Together with the lodestar of $7.7 million billed through November 15, 2022, the expected billings of about $600,000, would yield a lodestar of approximately $8.3 million. This further supports the reasonableness of the fee request.

If the Court grants final approval of the Settlement, Class Counsel will continue to expend time and resources overseeing the Settlement administration, assisting Class members, and tending to any other issues may arise related to the Settlement. Indeed, some of Class Counsel's future obligations are set forth in the Settlement Agreement itself. For example, under the Settlement Agreement, if a Class Member disputes the rejection of all or part of her Claim, or if a Class Member has an unresolved dispute concerning any benefit under the Settlement, Class Counsel will be involved in the resolution of the dispute, including by communicating with the Class Member, conferring with Defendants' Counsel, the Settlement Notice Administrator or the Settlement Claims Administrator, as the case may be, and may need to make written recommendations in connection with the dispute. SA, §§ III.C.5.b, III.F.1. Notably, some of the Covered Vehicles have coverage under the Extended New Parts Warranty until 2035. In addition, the Settlement Notice Administrator is to provide status reports to Class Counsel every six months until the distribution of the last check, together with copies of all rejection notices, which Class

Counsel will review and monitor. SA, § III.C.6. During the 12 months after the Final Effective Date, the Settlement Claims Administrator and the Settlement Notice Administrator, with cooperation of Defendants' Counsel, will provide quarterly reports to Class Counsel concerning the implementation of and Class Member participation in the CSP. SA, § III.F.2. In addition to these delineated duties, Class Counsel will field numerous Class Member inquiries and otherwise communicate with Class Members as Class Counsel are identified as the only lawyers Class Members should contact on the Settlement website.

Class Counsel expects to expend a significant of time and resources until they fulfill all of their obligations as Settlement Class Counsel. It is acceptable to utilize future, anticipated attorneys' fees and costs as part of an attorney fee calculation when assessing the reasonableness of a fee award. *See Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 316 (E.D.N.Y. 2015) (awarding future costs for settlement administration); *McDaniel v. Cnty. of Schenectady*, No. 04CV0757GLSRFT, 2007 WL 3274798, at *3 (N.D.N.Y. Nov. 5, 2007), *aff'd*, 595 F.3d 411 (2d Cir. 2010); *see also Lindy Bros. Builders of Philadelphia v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 121 (3d Cir. 1976); *Kenny Wayne Rounds & Randy Carl Smith, on behalf of themselves & all others similarly situated, Plaintiffs, v. FourPoint Energy, LLC n/k/a Unbridled Res., LLC, Defendant.*, No. CIV-20-00052-P, 2022 WL 16843240, at *6 (W.D. Okla. Aug. 23, 2022); *Joanne Harris Deitrich Tr. A v. Enerfin Res. I Ltd. P'ship*, No. 20-CV-084-KEW, 2022 WL 12097264, at *5 (E.D. Okla. July 25, 2022); *Riddle v. Atkins & Ogle L. Offs., LC*, No. CV 3:19-0249, 2020 WL 3496470, at *2 (S.D.W. Va. June 29, 2020) (finding estimated future work to be performed as reasonable and including in lodestar calculated for comparison); *St. Hilaire v. Indus. Roofing Co.*, 346 F. Supp. 2d 212, 215 (D. Me. 2004); *Trist v.*

First Fed. Sav. & Loan Ass'n of Chester, 89 F.R.D. 8, 12 (E.D. Pa. 1980); *United Fed'n of Postal Clerks, AFL-CIO v. United States*, 61 F.R.D. 13, 20–21 (D.D.C. 1973).

Given the difficulty of estimating the time it would take to oversee a Settlement that will be "live" for fifteen years after the Final Effective Date, Class Counsel cannot estimate with a reasonable degree of certainty the number of hours they would expect to bill during that period. However, if the Settlement is approved, it is certain that they will be spending a substantial amount of time continuing to fulfill their duties as Settlement Class Counsel, which supports the reasonableness of their percentage-based request. *See Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) ("The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward also supports their fee request."); *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012).

This factor also supports the proposed fee.

2. Magnitude and Complexities

Nationwide automotive class actions, such as this one, are inherently complex. *See generally In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir.1995) (recognizing complexity of class action involving "web of state and federal warranty, tort, and consumer protection claims"); *In re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at *16 (S.D.N.Y. May 30, 2013) ("This nationwide class action involves an alleged defect in three different vehicle models over six model years. The complexity and magnitude of the litigation weigh in favor of the reasonableness of the award sought.").

This case involves nationwide class claims, multi-state class claims, and single-state class claims on behalf of 33 named Plaintiffs and approximately 4,900,000 absent Class members, each

of whom purchased or leased a Covered Vehicle, which includes over 30 models produced at different times ranging from 2013-2020. The Second Amended Consolidated Class Action Complaint, the operative complaint at the time Defendants filed their motions to dismiss, was nearly 400 pages long and contained 97 causes of action. In total, as set forth above, Class Counsel reviewed, analyzed, and briefed hundreds of pages related to Defendants' respective motions to dismiss, among other things. *Id.* at ¶ 16. Class Counsel had to quickly develop the technical details related to the defect to propound targeted discovery, as well as manage, review, and process multi-defendant discovery. *Id*. at ¶ 14-17. The defect, which is in a part within a bigger part – the impeller in a fuel pump – was intrinsically complex with multiple contributing factors and required highly technical and specialized discovery and expert work. Moreover, this case included, originally, four defendants, two of which are in Japan.[7] This factor also supports the proposed fee.

3. Risks of Litigation

The risk of litigation is "perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees." *Asare v. Change Grp. N.Y., Inc.*¸ 2013 WL 6144764, at *20 (S.D.N.Y. Nov. 15, 2013) (internal quotation omitted); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6888488, at *13 (E.D.N.Y. Dec. 16, 2019). There are two relevant risks the Court must consider: (1) the risk of successfully establishing liability and (2) contingency fee risks. *Id.* at *13 (E.D.N.Y. Dec. 16, 2019). Moreover, "risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. When this case was filed, many risks stood in the way of a successful resolution for the Class.

While Plaintiffs are confident in their positions, absent settlement, Toyota and Denso may

[7] Class Counsel successfully negotiated a tolling agreement with Denso Corporation, whereby Plaintiffs dismissed their claims against Denso Corp. without prejudice while still obtaining all needed discovery.

succeed in securing dismissal of some or all of Plaintiffs' claims.[8] Moreover, allegations of product defects like those asserted here would have required expert showings on whether the fuel pumps' impellers were defective, whether the alleged defect is present in all the Covered Vehicles, whether the defect poses an unreasonable risk of harm, pre-sale knowledge of the defect, and Toyota's and Denso's affirmative defenses, such as whether Plaintiffs' claims are timely under relevant statutes of limitations. To establish liability and damages Plaintiffs would have to rely on, in part, experts, "which always adds an element of uncertainty as to the outcome." *In re Sterling Foster & Co., Inc., Securities Litig.*, 238 F.Supp.2d 480, 484–85 (E.D.N.Y. 2002).

Plaintiffs also faced significant risk in securing certification of nationwide, multi-state, or single-state classes. There would surely have been a battle of the experts with respect to Plaintiffs' damages theories and methodologies under *Comcast Corp v. Behrend*, 569 U.S. 27 (2013). While Plaintiffs are certain they would be able to provide a viable damages model, this has provided an insurmountable hurdle for many proposed consumer classes. *See, e.g., Singleton v. Fifth Generation, Inc.*, 2017 WL 5001444, at *20-22 (N.D.N.Y Sept. 27, 2017); *Hughes v. The Ester C. Co., NBTY, Inc.*, 320 F.R.D. 337, 344 (E.D.N.Y. 2017). Where reliance is required, Toyota and Denso would be expected to vigorously argue differences in the Class members' exposure to and reliance on alleged misrepresentations and omissions. Issues related to Defendants' duties to disclose and scienter would also be hotly disputed. Moreover, bringing an array of state law claims could raise serious manageability issues due to what Toyota and Denso would likely argue are insurmountable conflicts between the laws of different states. Toyota and Denso would also likely

[8] *See, e.g., Cohen v. Subaru of Am., Inc.*, 2022 WL 714795 (D.N.J. Mar. 10, 2022) (granting in part and denying in part Denso's motion to dismiss in a class action involving the same or similar defect in a different manufacturers' vehicles; of nearly 60 claims, only 20 survived); *Cohen v. Subaru of Am., Inc.*, 2022 WL 721307, at *16 (D.N.J. Mar. 10, 2022) (same, but against Subaru; only 28 of nearly 50 claims survived).

argue many individual issues prevent certification, such as statutes of limitations. Though Plaintiffs are confident in their arguments that statutes of limitations do not create individual issues, class certification has been denied on this ground. *See, e.g., Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 324 F. Supp. 3d 387, 399 (S.D.N.Y. 2018). Plaintiffs also risked certification of their multi-state class claims since it is unresolved whether class members have standing to represent absent class members from states in which they do not reside or for products they did not purchase. *See generally In re Frito-Lay North Am., Inc. All Natural Litig.*, 2013 WL 4647512, at *11 (E.D.N.Y. Aug. 29, 2013); *In re HSBC Bank, USA, N.A. Debit Card Overdraft Fee Litig.*, 1 F. Supp. 2d 34, 39 (E.D.N.Y. 2014).

The risk of securing class certification is evidenced by the many decisions denying class certification in automobile defect cases. *See, e.g., Luppino v. Mercedes Benz USA*, 718 F. App'x 143, 148 (3d Cir. 2017); *Tomassini v. FCA US LLC*, 326 F.R.D. 375, 391 (N.D.N.Y. 2018); *Oscar v. BMW of N. Am., LLC*, 2012 WL 2359964 (S.D.N.Y. June 19, 2012); *Nguyen v. Nissan N. Am., Inc.*, 2018 WL 1831857 (N.D. Cal. Apr. 9, 2018); *Daigle v. Ford Motor Co.*, 2012 WL 3113854 (D. Minn. July 31, 2012); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534 (C.D. Cal. 2012); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2012 WL 379944 (D.N.J. Feb. 6, 2012). Even if a class were certified, it would be subject to potential decertification down the road. *Siqueiros v. Gen. Motors LLC*, 2021 WL 4061708, at *7 (N.D. Cal. Sept. 7, 2021) (decertifying automotive defect class). Furthermore, certification certainly would not have equaled success because Toyota and Denso would undoubtedly have zealously contested Plaintiffs' claims through summary judgment, trial, and appeal, including possible interlocutory appeals pursuant to Fed. R. Civ. P. 23(f).

It was with these significant risks in mind that Class Counsel took this case on a contingency basis. "Uncertainty that an ultimate recovery will be obtained is highly relevant in determining the reasonableness of an award." *Johnson v. Brennan*, 2011 WL 4357376, at *17 (S.D.N.Y. Sept. 16, 2011); *Goldberger*, 209 F.3d at 53 ("Of course contingency risk and quality of representation must be considered in setting a reasonable fee."); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6888488, at *13 (E.D.N.Y. Dec. 16, 2019) (citing *Johnson*). The risks in this case were not the usual litigation risks but were heightened based on the complexities and magnitude of the nationwide, multi-state, and single-classes and novel claims against a non-privity supplier.[9] With no guarantee of remuneration, Class Counsel accepted the risks of litigating this case against formidable, well-funded Defendants and defense counsel. Because Plaintiffs accepted all the significant risks inherent in this case, this factor is satisfied and supports approval of the proposed fee.

4. Quality of Representation

"When evaluating the quality of representation, 'courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit.'" *Hall v. ProSource Techs., LLC*, 2016 WL 1555128, at *15 (E.D.N.Y. Apr. 11, 2016) (citation omitted). Here, the recovery obtained is highly favorable, especially considering the substantial risks involved. As discussed below, the Settlement here provides more relief to a larger class of persons than other recent automotive class action settlements. *See* "Fee in Relation to the Settlement," *infra* § III.A.5.

Moreover, Class Counsel in this case is comprised of attorneys and law firms that are national leaders in class action litigation generally, and automotive defect matters specifically. Jt.

[9] Most successful class action claims against automotive part suppliers are premised on RICO violations, which Plaintiffs did not allege here. *See, e.g., In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs., & Prod. Liab. Litig.*, 295 F. Supp. 3d 927 (N.D. Cal. 2018).

Decl. at ¶ 26. Lead Class Counsel – Beasley, Allen, Crow, Methvin, Portis & Miles P.C. ("Beasley Allen")– has been recognized by both federal and state courts across the country as being highly skilled and experienced in complex litigation, Jt. Decl. at ¶ 32, including successfully leading multiple automotive and consumer fraud class actions. *See Simerlein v. Toyota Motor Corp.*, No. 3:17-CV-1091 (VAB), 2019 WL 1435055, at *12 (D. Conn. Jan. 14, 2019) (recognizing that Beasley Allen "appear[s] to be well-experienced and to have litigated complex class actions in the past."). Beasley Allen just recently obtained a favorable $102.6 million jury verdict in an automotive class action against General Motors, LLC pending in the Northern District of California. Jt. Decl. at ¶ 32. The Class here has also been represented by counsel from the well-respected law firms of Spector Roseman & Kodroff, P.C., Finkelstein & Krinsk LLP, Wolf Haldenstein Adler Freeman & Herz LLP, and Hagens Berman Sobol Shapiro, LLP, each of whom has repeatedly garnered outstanding results for their clients in class actions across the country.[10] *Id*. at ¶ 26. The quality of Class Counsel's representation is also evident when considering the equally high-quality defense attorneys against whom they successfully litigated this case. *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (noting that "the quality of opposing counsel is also important in evaluating the quality of plaintiff's counsels' work") (citation omitted). From the outset, Toyota and Denso have been represented by highly capable attorneys from well-respected law firms, including counsel from King & Spalding LLP (over 1,000 attorneys) and Butzel Long (over 150 attorneys) with special expertise in automotive class action litigation. This factor is clearly satisfied and supports the proposed fee.

[10] The Firm Resumes will be included as appendices to each Firm's Declaration.

5. Fee in Relation to the Settlement

In the context of a common fund settlement, this factor is used to assess the percentage of the fund that should be paid to Class Counsel, as a matter of equity, to compensate for the benefit Class Counsel obtained for the class. In this case, however, the proposed fee, if approved, will not be deducted from a Class recovery, but rather will be paid directly by Defendants. Nonetheless, it is important to consider this factor here to confirm the proposed fee is proportional to the benefits to the Class.

"Courts ... consider the size of the settlement to ensure that the percentage awarded does not constitute a 'windfall.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6888488, at *19 (E.D.N.Y. Dec. 16, 2019) (citations omitted). "In order to weigh this *Goldberger* factor, courts sometimes 'determine a baseline reasonable fee by looking to other common fund settlements of a similar size, complexity and subject matter.'" *Id*. (citation omitted). Doing so here establishes that Class Counsel's request of approximately 13.4% is well within the accepted norms for cases of this size.

Presiding over an unprecedently large antitrust class action settlement in which class counsel sought attorneys' fees, Hon. John Gleeson (Ret.) of this District surveyed relevant case law and authorities to determine an appropriate percentage of the class recovery that class counsel should be awarded. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 443-48 (E.D.N.Y. 2014). Judge Gleeson noted that "the percentage of the fund awarded should scale back as the size of the fund increases," *id*. at 444, and analyzed a nationwide study that found if a settlement reaches $100 million in value, the percentage should fall below 20%, and if a settlement reaches $500 million in value, the percentage should fall below 15%. *Id*. Judge Gleeson then developed a fee schedule providing that 20% should be awarded in settlements

between $100 million and $500 million. *Id*. Class Counsel's requested fee of 13.4% of the value of the Settlement is well below the acceptable limits of Judge Gleeson's analysis.

Class Counsel's requested fee of 13.4% accords with other recent fee awards in this Circuit. *See, e.g., In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at *3 (S.D.N.Y. June 16, 2020) (20% of $386.5 million); *Ferrick v. Spotify USA Inc.*, 2018 WL 2324076, at *10 (S.D.N.Y. May 22, 2018) (11.6% of $112.55 million); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2018 WL 5839691, at *1 (S.D.N.Y. Nov. 8, 2018), *aff'd sub nom. Kornell v. Haverhill Ret. Sys.*, 790 F. App'x 296 (2d Cir. 2019) (13% of $2.3 billion); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009) (15.5% of $336 million fund).

The proposed fee amount is also below the average percent of recovery for high-risk cases across the country. As one court in this District observed:

> A recent study surveying the award of attorneys' fees in class action settlements reviewed data on cases nationwide and found that the mean fee award for employment class action settlements is 27 percent of the recovery, and the median is 25 percent of the recovery .... The study notes, however, that those percentages do not account for an important indicator of the fee award -- risk. Fee awards for class action in cases that are "low/medium" risk average 26.2 percent of total recovery, and in cases that are "high" risk average 35.1 percent of total recovery.

Ebbert v. Nassau Cnty., 2011 WL 6826121, at *15 (E.D.N.Y. Dec. 22, 2011) (citing *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010)). As discussed in the "Risks of Litigation" section, *supra*, this case was highly complex and risky and presented novel theories of recovery, putting this case on the "high" risk side of the survey with an average fee of 35.1% of the total recovery.

Not only is Class Counsel's proposed fee within accepted norms, but the circumstances of this case and the relief to the Class further justify the proposed fee. The Settlement here provides substantial benefits that have been valued by an expert to provide between $212,000,000 and

$287,000,000 in value to the Class.[11] The CSP and the Extended New Parts Warranty will benefit the owners and lessees of approximately 4.9 million Toyota and Lexus vehicles nationwide and will continue providing relief up through 2035 in some cases. Jt. Decl. at ¶ 37. And because the extended coverage runs with the vehicles, future persons not yet members of this Class will continue to benefit.[12]

Moreover, the relief obtained here far exceeds the relief obtained in other recent automotive class action settlements. For example, in *Oliver v. BMW of N. Am., LLC*, 2021 WL 870662, at *2 (D.N.J. Mar. 8, 2021), the warranty was extended to 7 years/84,000 miles, reimbursements were capped, and class members were provided a one-year replacement part warranty. But here, coverage for the Additional Vehicles is 15-years from in-service date, for the Recalled and SSC vehicles, the new parts warranty on the Countermeasure Fuel Pump kit is extended 15-years/150,000 miles, and reimbursement for repairs, parts, towing, and rental is uncapped. In *Kommer v. Ford Motor Co.*, 2020 WL 7356715, at *2 (N.D.N.Y. Dec. 15, 2020), the settlement applied to current owners and provided for reimbursement of out-of-pocket expenses capped between $200-$400. But here, the Settlement applies to all current and former owners and lesees, in addition to the benefits above, In *In re Nissan Radiator/Transmission Cooler Litigation*, 2013 WL 4080946 (S.D.N.Y. May 30, 2013), Nissan extended the warranty to 10-years or 100,000 miles and provided capped reimbursement for repair and towing costs only. But here, the warranty

[11] "In calculating the overall settlement value for purposes of the 'percentage of the recovery' approach, Courts include the value of both the monetary and non-monetary benefits conferred on the Class." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015).

[12] Toyota's consumer support and warranty programs have repeatedly been approved as providing valuable benefits to class members. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2013 WL 12327929, at *22 (C.D. Cal. July 24, 2013); *see also Simerlein*, No. 3:17-CV-1091 (VAB), 2019 WL 1435055, at *13-14 (D. Conn. Jan. 14, 2019); *Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2016 WL 8578913 (C.D. Cal. Dec. 2, 2016).

is extended to 15-years/150,000 miles and provides uncapped reimbursement for repairs, labor, towing, and rental. *See also Klee v. Nissan North America, Inc.*, 2015 WL 4538426 (C.D. Cal. July 7, 2015) (extended the warranty for 60 months or 60,000 miles, whichever occurs first, with no reimbursement); *Chess v. Volkswagen Grp. of Am., Inc.*, 2022 WL 4133300, at *2 (N.D. Cal. Sept. 12, 2022) (extended warranty only to 9 years/90,000 miles, and only *one* repair is reimbursable at capped amounts and only within 140 days).

All of the named Plaintiffs approve of this Settlement and Class Counsel's proposed fee, further supporting the reasonableness of Class Counsel's proposed fee. *See* ECF Nos. 174-2 – 174-34, Plaintiff Declarations.

6. Public Policy Considerations

Here, public policy strongly supports approval of Class Counsel's fee request. Courts in the Second Circuit have routinely stressed the importance of reasonable fee awards in encouraging private attorneys to bring contingency fee class actions representing the public interest. *Ellman v. Grandma Lee's Inc.*, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986) ("To make certain that the public [interest] is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding"); *In re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at * 17 (S.D.N.Y. May 30, 2013) ("Public policy favors reasonable attorney fee awards to encourage attorneys to prosecute merit-based class actions on a contingent fee basis."). Public policy concerns support the proposed fee.

B. The Fee Request is Reasonable when Cross Checked against the Lodestar

Where, as here, the Parties have negotiated the fee that Defendants shall pay and the amount to be paid to the Class will not be in any way diminished, "trial courts need not, and indeed should not, become green-eyeshade accountants." *Spence v. Ellis*, 2012 WL 7660124, at *2

(E.D.N.Y. Dec. 19, 2012), *report and recommendation adopted*, 2013 WL 867533 (E.D.N.Y. Mar. 7, 2013). "In cases where settlements of fee requests are made with the defendants after prior approval of damage claim settlements, the court can, in most instances, assume that the defendants closely scrutinized the fee requests, and agreed to pay no more than was reasonable." *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984). This is especially true where, as here, the fee was provided by a mediator's proposal. *See Kemp-DeLisser*, 2016 WL 6542707, at *15 (D. Conn. Nov. 3, 2016). When the lodestar method is used as a crosscheck, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *In re Nassau Cnty. Strip Search Cases*, 12 F. Supp. 3d 485, 496 (E.D.N.Y. 2014) (citing *Goldberger*, 209 F.3d at 50).

When courts employ the lodestar analysis to cross-check the reasonableness of the percentage of recovery award, counsel may be entitled to a multiplier:

> "Courts regularly award lodestar multipliers from 2 to 6 times lodestar" in this Circuit, *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623-24 (S.D.N.Y. 2012), and have been known to award lodestar multipliers significantly greater than the 4.87 multiplier sought here. *See, e.g.*, *Maley*, 186 F. Supp. 2d at 369 (awarding percentage method with cross-check lodestar multiplier of 4.65, which was "well within the range awarded by courts in this Circuit and courts throughout the country," and citing cases with a 7.7 multiplier and 5.5 multiplier); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court" (citing *Maley*)); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District.").

Fleisher v. Phoenix Life Ins. Co., 2015 WL 10847814, at *18 (S.D.N.Y. Sept. 9, 2015).

The lodestar analysis is simply a function of multiplying the number of hours Plaintiffs' Counsel spent litigating this matter times the applicable hourly billable rate. *Goldberger*, 209 F.3d at 47. In this case, Plaintiffs' Counsel's lodestar amount of $7.7 million results from 11,620 hours

devoted to prosecuting this matter, broken down as follows:[13]

Firm	Hours	Lodestar	Reference
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.	6835.9	$5,116,525.00	Jt. Decl. ¶ 30.
Wolf, Haldenstein, Adler, Freeman, & Herz LLP	1019.7	$596,964.00	Malcolm T. Brown Decl. ¶ 8.
Hagens Berman Sobol Shapiro, LLP	1186.7	$568,675.00	Jerrod C. Patterson Decl. ¶ 8.
Spector Roseman & Kodroff, P.C.	1840.9	$1,028,944.50	Jeffrey L. Spector Decl. ¶ 5.
Finkelstein & Krinsk LLP	519.2	$263,330.00	Jeffrey R. Krinsk Decl. ¶ 7.
Forchelli Deegan Terrana LLP	218.1	$112,009.50	Elbert F. Nasis Decl. ¶ 8.
Total	11620.5	$7,686,448.00	

The requested fee award thus yields a multiplier of 3.7, which is well within and below the accepted range in this Circuit. *Bekker v. Neuberger Berman Group 401(K) Plan Inv. Committee*, 504 F. Supp. 3d 265, 271 (S.D.N.Y. 2020) (finding 5.85 is within the range of acceptable multipliers in context of lodestar cross-check); *In re Payment Card*, 2019 WL 6888488, at *22 (E.D.N.Y. December 16, 2019) (awarding 2.5 but citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) and stating "the lodestar yields a multiplier of 3.5, which has been

[13] Plaintiffs' Counsel's use of current rates in calculating their lodestar has been approved by the Supreme Court and courts in the Second Circuit as a means of compensating for the delay in receiving payment and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Farbotko v. Clinton Cty.*, 433 F.3d 204, 210 n.11 (2d Cir. 2005) (applying "current rather than historic hourly rates." (quoting *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998)); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) ("[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment.").

deemed reasonable under analogous circumstances" and that "multipliers of between 3 and 4.5 have become common"); *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, 2016 WL 3369534, at *1 (S.D.N.Y. May 2, 2016) (approving a multiplier of 3.9 on a $272 million settlement); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (five times multiplier).

"This multiplier is especially reasonable given the fact that the lodestar does not reflect any work Lead Counsel . . . will do subsequent to the date of the publication of this order." *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 497 (S.D.N.Y. 2017), *aff'd sub nom. Fresno Cnty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63 (2d Cir. 2019). *See supra* at 15-17.

Thus, the lodestar cross-check confirms that the proposed fee is fair and reasonable.

C. Other Factors Support the Reasonableness of the Fee

1. Reaction of the Class

Class Counsel will address the reaction of the Class in its reply brief after the optout and objection period has passed.

2. Catalyst Fees

"When California plaintiffs prevail in federal court on California claims, they may obtain attorney fees under § 1021.5." *Klein v. City of Laguna Beach*, 810 F.3d 693 (Cal. 2016). California's Code of Civil Procedure section 1021.5 provides an exception to the general rule that each party to a lawsuit bears its own attorneys' fees. *See Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 565, 21 Cal.Rptr.3d 331, 101 P.3d 140 (2004). Section 1021.5 provides that a court may award attorneys' fees to a successful party when the action has resulted in the enforcement of an important right affecting the public interest if:

> (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

"To be entitled to an award of attorneys' fees under section 1021.5, a plaintiff need not obtain a court-ordered change in the defendant's behavior; it is enough when a plaintiff's action motivates the defendant to provide the primary relief sought." *MacDonald v. Ford Motor Co.*, 142 F. Supp. 3d 884, 890 (N.D. Cal. 2015). "Because it can be difficult to prove causation when a plaintiff seeks to recover under this theory and 'action is taken by the defendant after plaintiff's lawsuit is filed,' the chronology of events can give rise the inference that the two events are causally related." *Id*. (citation omitted).

For example, in *MacDonald*, the court awarded attorneys' fees pursuant to California's Code of Civil Procedure § 1021.5 because the plaintiffs' lawsuit was the catalyst for Ford's recall. The court reasoned that, despite Ford's knowledge of the defect and vehicles affected, it did not issue its recall until after litigation was commenced with pressure from the plaintiffs. *MacDonald*, 142 F. Supp. 3d at 891-93. The same is true here. When Plaintiff Cheng first filed this lawsuit, Toyota had only recalled approximately 700,000 vehicles and Denso had not yet issued its recall, and Plaintiffs alleged the scope was woefully insufficient. ECF No. 1. Following Plaintiffs' amended complaints and discovery pressure, Toyota and Denso issued recall after recall, expanding the scope of recalled vehicles to more than 3.4 million. ECF Nos. 96, 106. Like plaintiffs' counsel in *MacDonald*, Class Counsel are entitled to attorneys' fees here for bringing a substantial benefit to a large class of persons in California, which supports Class Counsel's fee request.

D. The Proposed Expense Reimbursement is Reasonable

It is axiomatic that counsel should be reimbursed for all expenses that are reasonable and necessarily incurred. Fed. R. Civ. P. 23(h); *see generally In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 363 (E.D.N.Y. 2010) ("In connection with settlement of a class action, counsel's reasonable out-of-pocket expenses are properly awarded."); *see also Ersler v. Toshiba Am., Inc.*, 2009 WL 454354, at *7 (E.D.N.Y. Feb. 24, 2009).

In prosecuting this action, Plaintiffs' Counsel incurred $384,073.26 for which it respectfully requests reimbursement, as follows:

Firm	Expenses	Reference
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.	$194,424.14	Jt. Decl. ¶ 33.
Wolf, Haldenstein, Adler, Freeman, & Herz LLP	$69,260.44	Malcolm T. Brown Decl. ¶ 11.
Hagens Berman Sobol Shapiro, LLP	$23,595.41	Jerrod C. Patterson Decl. ¶ 11.
Spector Roseman & Kodroff, P.C.	$56,414.04	Jeffrey L. Spector Decl. ¶ 11.
Finkelstein & Krinsk LLP	$40,379.23	Jeffrey R. Krinsk Decl. ¶ 10.
Forchelli Deegan Terrana LLP	Not seeking reimbursement for any expenses.	Elbert F. Nasis Decl. ¶ 10.
Total	**$384,073.26**	

All of the expenses were reasonable and necessary to the prosecution of this matter and represent standard litigation costs and expenses such as expert, mediation and travel expenses, as well as court costs. The expenses are itemized in further detail in the Declarations submitted herewith. All expenses for which Plaintiffs' Counsel now seeks reimbursement were necessary to the successful outcome of this case.

E. The Proposed Class Representative Service Awards are Reasonable

Plaintiffs request that the Court approve the Class Representative service awards of

$2,500.00 for the Class Representatives.[14] Awards like the ones requested here promote the important public policy of encouraging individuals to undertake the responsibility of representative lawsuits. The favorable result achieved by Class Counsel in this case would not have been possible without the assistance of the Class Representatives. Plaintiffs worked with Class Counsel to provide relevant and critical documentation, remained fully informed of the details of the litigation, and provided invaluable input, information, and assistance at every stage. *See* ECF Nos. 174-2 – 174-34, Class Representative Declarations.

"[C]ourts have held that class representatives 'merit recognition for assuming the risk [associated with the litigation] for the sake of absent class members.'" *Karic v. Major Auto. Companies, Inc.*, 2016 WL 1745037, at *7 (E.D.N.Y. Apr. 27, 2016) (citation omitted). For this reason, "[a]t the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2018 WL 3863445, at *2 (S.D.N.Y. Aug. 14, 2018) (citing Newberg on Class Action § 17:1 (5th ed.)). In this Circuit and others, incentive awards may be awarded by the court as compensation to named plaintiffs for their efforts on behalf of a class which has benefitted from them. *Id*. (citing *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200–01 (S.D.N.Y.1997) ("The guiding standard in determining an incentive award is broadly stated as being the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other

[14] The notice stated that Plaintiffs who had their vehicles inspected by Defendants would receive $3,500. However, Defendants did not request inspections, so no Plaintiff will seek an award of $3,500.

burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claims, and, of course, the ultimate recovery.")).

The $2,500.00 service award sought in this case is at or below case contribution awards in many other class actions. *See, e.g., In re Grana y Montero S.A.A. Sec. Litig.*, 2021 WL 4173684, at *19 (E.D.N.Y. Aug. 13, 2021), *report and recommendation adopted*, 2021 WL 4173170 (E.D.N.Y. Sept. 14, 2021) ($4,000); *Swetz v. GSK Consumer Health, Inc.*, 2021 WL 5449639, at *2 (S.D.N.Y. Nov. 22, 2021) ($3,000); *Diaz v. FCI Lender Servs., Inc.*, 2020 WL 4570460, at *6 (S.D.N.Y. Aug. 7, 2020) (awarding $5,000 and citing *Dornberger v. Metropolitan Life Insurance Co.*, 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001) (discussing cases supporting awards from $2,500.00 to $85,000.00)); *Spagnuoli v. Louie's Seafood Rest., LLC*, 2018 WL 7413304, at *6 (E.D.N.Y. Sept. 27, 2018) ($7,500); *In re Honest Mktg. Litig.*, 2017 WL 8780329, at *2 (S.D.N.Y. Dec. 8, 2017) ($5,000); *In re Sinus Buster Prod. Consumer Litig.*, 2014 WL 5819921, at 19 (E.D.N.Y. Nov. 10, 2014) (finding an incentive award of $2,500 to each Class Representative reasonable); *In re Colgate–Palmolive Co. Erisa Litig.*, 2014 WL 3292415 at *8 (approving award of $5,000 to class representatives because "they reviewed draft pleadings and motions, searched for and produced relevant documents, reviewed filings, and communicated regularly with Class Counsel"); *Dupler*, 705 F. Supp. 2d at 245–46 (finding incentive awards of $5,000 and $25,000 reasonable.).

Moreover, the relief to the Settlement Class is significant considering their claims and actual damages, and the award of service payments will not reduce the relief available to Settlement Class members. Modest and fair service payments promote public policy by encouraging individuals to participate as class representatives in class actions and by compensating

them for their service to the class. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F. 3d 454, 463 (9th Cir. 2000); *see also* Manual for Complex Litig., § 21.62 n.971 (4th ed. 2004).

Thus, each Plaintiff who served in this capacity should be awarded $2,500.00 for their service throughout this litigation which culminated in a settlement that provides valuable, real-world benefits to a nationwide Settlement Class.

IV. CONCLUSION

For all of these reasons, Plaintiffs respectfully submit that the Court should award $28,500,000 in requested attorneys' fees, $384,073.26 to reimburse Plaintiffs' Counsel for their reasonably and necessarily incurred expenses, and $2,500 each to Class Representatives for their service in this case.

Dated: November 23, 2022

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