IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHEYNE NORMAN and SOPHIA WESCOTT, individually, and on behalf of a class of similarly situated individuals, PLAINTIFFS, v. NISSAN NORTH AMERICA, INC., DEFENDANT.	Case No. 3:18-cv-00534 Judge Eli Richardson Magistrate Judge Alistair E. Newbern Date: March 6, 2020 Time: 1:30 p.m. Courtroom: 874

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

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Plaintiffs Cheyne Norman and Sophia Wescott (the "Class Representatives"), on behalf of themselves and on behalf of a preliminarily certified Settlement Class[1] of current and former owners and lessees of 2013-2017 Nissan Juke vehicles equipped with a Continuously Variable Transmission or "CVT" ("Class Vehicles"), submit this Memorandum in support of their Motion for Attorneys' Fees, Costs and Class Representative Service Awards. The Class Representatives request that the Court award: (1) $588,208.08 in attorneys' fees, (2) $26,791.92 for out-of-pocket litigation expenses to Class Counsel, and (3) service awards totaling $10,000, in the amount of $5,000 to each Class Representative.

INTRODUCTION

The Class Representatives and Class Counsel achieved a settlement on behalf of approximately 237,099 Class Members that provides a $17,018,000 to $22,841,000 benefit to the Class. (*See* Declaration of Lee Bowron, ACAS, MAAA ("Bowron Decl."), ¶ 4, Ex. 2))[2].

Under the settlement, all owners and lessees of a Class Vehicle will receive a 24 month / 24,000-mile extended warranty. The settlement also provides full or partial reimbursement for out-of-pocket expenses related to replacement or repair of the CVTs for qualifying Class Members if the repairs are done within the extended warranty period, vouchers for certain former owners toward the purchase or lease of a new Nissan or Infiniti vehicle, and an Expedited Resolution Process for any future warranty claims related to transmission design, manufacturing or performance, that preserves the right to file a lawsuit for those who do not receive vehicle repurchases. This excellent settlement is the result of Class Counsel's diligent work in this case and was achieved only after hard-fought negotiations mediated by Hunter R. Hughes III, a nationally well-known mediator for class actions.

Defendant does not oppose this motion for an award of fees, costs, and service awards. If the Court grants the motion, the requested fees, costs and service awards will be paid by Defendant, not by Class Members or from a common fund. Awarding the negotiated fees in full will not affect the benefits

[1] Unless otherwise defined herein, capitalized terms are defined in Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, filed simultaneously.

[2] The value of the extended warranty to the Class ranges from $17,018,000 to $22,841,000, with a point estimate of $19,929,000.

for Class Members and will fairly compensate Class Counsel for their work in this case, as confirmed under the prevailing percentage-of-the-benefit method for calculating fees as well as a lodestar crosscheck. Class Counsel's request should be granted.

BACKGROUND

I. Facts and Procedural History

A. Overview of the Litigation

Plaintiffs Cheyne Norman and Sophia Wescott (collectively, "Norman Plaintiffs"), together with Plaintiff Patricia Weckwerth, who is no longer a party to this action[3], filed suit against Nissan North America, Inc., (the United States subsidiary) and Nissan Motor Co., Ltd. (the Japanese parent company) in the Middle District of Tennessee on June 26, 2018 on behalf of themselves and other persons who purchased or leased any 2013-2017 Nissan Versa, Versa Note or Juke equipped with an Xtronic CVT. (*See* Declaration of Cody R. Padgett to Plaintiffs' Unopposed Motion for Final Approval of Settlement ("Padgett Decl.") ¶ 3.) The Parties negotiated a discovery and tolling agreement whereby Nissan Japan agreed to be subject to discovery in exchange for a dismissal without prejudice. *Id.*

After entering into a stipulation setting a briefing schedule and extending the deadline for Defendant to respond, Nissan filed its motion to dismiss Plaintiffs' complaint on August 29, 2018.[4] *Id.* at ¶ 4. The Norman Plaintiffs filed their opposition on September 27, 2018, and Nissan filed its reply on October 18, 2018. *Id.* The motion was under submission when the Parties negotiated this Settlement. *Id.*

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[3] Plaintiffs Cheyne Norman and Sophia Wescott own Nissan Juke vehicles, and the instant settlement involves only Nissan Juke vehicles. However, initially, Plaintiffs Cheyne Norman and Sophia Wescott brought their action together with another Plaintiff, Patricia Weckwerth, who owned a Nissan Versa, and the Plaintiffs' original complaint included allegations regarding the Nissan Juke and Nissan Versa vehicles (Case No. 3:18-cv-0588). As more fully discussed below and in Plaintiffs' Supplemental Brief regarding Preliminary Approval (see Dkt. 79, July 8, 2019), after the greater group of Nissan CVT actions resolved, the pleadings in the pending Nissan CVT cases were amended to group the Plaintiffs according to the settlements to which they were a party. Accordingly, Ms. Weckwerth was added to the Nissan Sentra and Nissan Versa action (Case No. 3:18-00588), via amended complaint, and Plaintiffs Cheyne Norman and Sophia Wescott were added to the instant action, Case No. 3:18-cv-0534, where the claims pertaining to the 2013-2017 Nissan Juke vehicles are being presented for settlement approval.

[4] Concurrent with briefing the Motion to Dismiss, the Parties jointly filed a Proposed Initial Case Management Order (Dkt. 53) setting the case schedule, and an agreed upon protective order (Dkt. 61) setting the parameters of confidential discovery materials. The parties had extensive negotiations regarding, and ultimately agreed upon, an ESI protocol.

B. Class Counsel Engaged in Extensive Investigation and Significant Discovery

Both before and after these actions were filed, Class Counsel investigated and researched their claims, which allowed Class Counsel to evaluate Plaintiffs' claims regarding the allegedly defective functioning CVTs.

Class Counsel, from early pre-suit investigation continuing over the course of litigation, fielded scores of inquiries from Class Members and investigated many of their reported claims. Class Counsel also conducted detailed interviews with Class Members regarding their pre-purchase research, their purchasing decisions, and their repair histories, and developed a plan for litigation and settlement based on Class Members' reported experiences with their Class Vehicles. (Padgett Decl. ¶¶ 7-8, Declaration of Lawrence Deutsch to Plaintiffs' Unopposed Motion for Final Approval of Settlement ("Deutsch Decl.") ¶ 16-19, Declaration of Gary E. Mason to Plaintiffs' Unopposed Motion for Final Approval of Settlement ("Mason Decl.") ¶¶ 15-18.)

Class Counsel also researched publicly available information provided by the National Highway Traffic Safety Administration ("NHTSA") concerning consumer complaints about the CVTs. (Padgett Decl. ¶¶ 7-8, Deutsch Decl. ¶ 20, Mason Decl. ¶ 19.) They reviewed and researched consumer complaints and discussions of incidents of transmission problems in articles and forums online, in addition to various Nissan manuals and technical service bulletins ("TSBs") discussing the alleged defect. *Id*. Finally, they analyzed similar automotive actions.

The Parties also engaged in discovery prior to reaching a settlement in this action. On September 12, 2018, the Norman Plaintiffs served Plaintiffs' First Request for Production of Documents, to which Defendant Nissan responded on November 12, 2018. Defendant Nissan produced thousands of pages of documents in response, including more than 10,000 pages of confidential documents. (Padgett Decl. ¶ 5, Deutsch Decl. ¶ 23, Mason Decl. ¶ 22.)

On October 16, 2018, Defendant Nissan propounded its First Set of Interrogatories and First Set of Requests for Production to Plaintiffs Sophia Wescott and Cheyne Norman. Plaintiffs responded to each of these requests on December 7, 2018. (Padgett Decl. ¶ 6, Deutsch Decl. ¶ 24, Mason Decl. ¶ 23.)

C. Mediation Leading to Settlement

Following the above motion practice and the exchange of thousands of pages of documents and data, on February 19, 2019, counsel for Plaintiffs and Defendant participated in an all-day mediation before Mr. Hunter R. Hughes III, an experienced mediator, in Atlanta, Georgia. (Padgett Decl. ¶ 9, Deutsch Decl. ¶ 27, Mason Decl. ¶ 26.)

Although the Parties did not settle at the first mediation session, the Parties continued their settlement negotiations telephonically with the assistance of the mediator. On April 9, 2019, the Parties conducted a second in-person all-day face-to-face negotiation in Chicago, Illinois. At the close of this second session, the Parties had agreed on the principal terms of the proposed class relief.[5] Further evolution of the settlement terms took place in conjunction with the negotiations of the related cases concerning Nissan Altima's CVT transmissions in front of mediator Hughes in Atlanta, Georgia, later in April. After the Parties had agreed on the framework and material terms for settlement in Chicago, they began negotiating through telephonic conferences, via email, and with the assistance of Mr. Hughes, and ultimately agreed upon an appropriate request for service awards and Plaintiffs' attorneys' fees and expenses. In May 2019, the Parties finally were able to document the formal terms of their agreement to resolve the litigation. All of the terms of the Settlement are the result of extensive, adversarial, and arms' length negotiations between experienced counsel for both sides. (Padgett Decl. ¶ 10, Deutsch Decl. ¶¶ 28-31, Mason Decl. ¶¶ 27-30.)

Following negotiations, the Parties to this and several other Nissan CVT actions reached three settlements involving three vehicle and transmission model groups, and there were three actions pending in the Middle District of Tennessee before this Court. The Parties agreed that it was most logical and efficient to amend the pleadings in the three pending cases to group Plaintiffs according to the settlements to which they were a party. Accordingly, the Complaint in the instant case (No. 3:18-cv-00534), originally captioned as *Madrid*, was amended to add Norman and Wescott who, respectively, own and lease Nissan Juke vehicles and seek approval of the Juke Settlement. Plaintiff Madrid, a Nissan Altima

[5] The Nissan Juke claims were mediated in tandem with the Nissan Sentra, Nissan Versa, and Nissan Altima claims.

owner, was added to the Complaint in *Gann*, Case No. 3:18-cv-00966, and is no longer a Plaintiff in the instant case. Likewise, Plaintiff Patricia Weckwerth, a Nissan Versa owner, was added to the complaint in Case No. 3:18-cv-00588, where the claims regarding the Nissan Sentra and Nissan Versa vehicles are being presented for settlement approval. Further details are set forth in the Joint Supplemental Brief In Response to the Court's Order of June 21, 2019, Regarding Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. (*See* ECF No. 79.)

D. Preliminary Approval and Claims Status

On June 6, 2019, Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval"), wherein Plaintiffs sought an order: (1) granting preliminary approval of the Settlement and finding that it warrants sending notice to the Class; (2) certifying a class for settlement purposes and appointing Plaintiffs as Class Representatives and Plaintiffs' counsel, Whitfield, Bryson & Mason, LLP; Berger Montague PC; and Capstone Law APC as Class Counsel; (3) approving the Parties' proposed method of giving Class Members notice of the proposed Settlement; (4) directing that notice be given to Class Members in the proposed form and manner; and (5) setting a hearing on whether the Court should grant final approval of the Settlement, enter judgment, award attorneys' fees and expenses to Plaintiffs' counsel, and grant service awards to Plaintiffs. On July 16, 2019, the Court granted the Motion for Preliminary Approval and directed the filing of the instant Motion by January 24, 2020. (Preliminary Approval Order, ECF No. 80.) The Final Fairness Hearing is scheduled for March 6, 2020. (ECF No. 87.)

Following the Court's Plaintiffs' Preliminary Approval Order, the Claims Administrator sent, by U.S. First Class Mail, approximately 230,578 Class Notices to Class Members. (Declaration of Lana Lucchesi ("Lucchesi Decl.") ¶ 11.) The Administrator also resent 5,139 Class Notices with an updated address. (*Id.* at ¶¶ 12-13.) As of today, the Claims Administrator has only received six opt-outs and no objections, and only three objections have been docketed with the Court. Thus, only 0.0025% of the Settlement Class is opting out, only 0.0013% is objecting, and none of the objections concern the requested attorneys' fees, expenses, or service awards at issue in this Motion. (*See* Lucchesi Decl. ¶¶ 8, 17-18; ECF Nos. 88-90.)

Class Counsel also prepared this Motion and is concurrently filing the Motion for Final Approval of the Class Action Settlement and may file a supplemental brief responding to objections. Class Counsel expects that it will expend 100 hours after the filing of this Motion delivering services to Class Members.

II. Settlement Benefits

Class Counsel negotiated a Settlement with significant and practical benefits for Class Members, the terms of which are summarized as follows:

A. Extended Warranty

For all current owners and lessees of Class Vehicles, the Settlement provides an extension of the time and mileage limits for powertrain coverage under the applicable New Vehicle Limited Warranty for Class Vehicles. This warranty extension applies to the transmission assembly and Automatic Transmission Control Unit ("ATCU"), by adding 24 months or 24,000 miles, whichever occurs first ("Extended Warranty"), after the original powertrain coverage in the New Vehicle Limited Warranty (60 months or 60,000 miles, whichever occurs first) has expired. (Settlement Agreement ¶¶ 42, 43.) The Extended Warranty will be subject to the terms and conditions of the original Nissan New Vehicle Limited Warranty. (Settlement Agreement ¶ 55.) Notably, Defendant's financial obligations to the Class under the Extended Warranty are not capped; how much Defendant will pay for warranty repairs will depend on the extent to which Class Members experience problems with their CVTs going forward, assuring that the remedy is scaled to the scope of the problems that may be experienced.. The extended warranty component of the settlement has a value to the class of between $17,018,000 and $22,841,000. (*See* Bowron Decl., ¶ 4 and Ex. 2).

B. Reimbursement of Costs

The Settlement also provides that Defendant will reimburse Class Members for the portion of the costs for parts and labor paid by Class Member for replacement of, or repairs to, the transmission assembly or ATCU if the repairs were made after the expiration of the original warranty but within the

durational limits of the new Extended Warranty.[6] Costs for parts and labor actually paid by the Class Member will be reimbursed 100% if the repair was performed by an authorized Nissan dealer (Settlement Agreement ¶ 56(A)) and up to $5,000 if the repair was performed by a non-Nissan automotive repair facility. (Settlement Agreement ¶ 56(B).)

The Settlement also provides relief to Class Members who did not pay for a transmission repair within the Warranty Extension Period, but who present to the Settlement Administrator appropriate contemporaneous documentation showing that a Nissan dealer, within the Warranty Extension Period, diagnosed and recommended a repair to the transmission assembly or ATCU of the Class Vehicle. In this scenario, the Class Member is entitled to reimbursement of all costs incurred for parts and labor (subject to the $5,000 cap mentioned above for repairs by a non-Nissan automotive repair facility) if the Class Member provides the appropriate documentation that they obtained the recommended repair or replacement by January 30, 2020, or prior to the Class Vehicle exceeding 90,000 miles, whichever occurs first. (Settlement Agreement ¶ 57.)

C. Voucher Payment

For former owners of Class Vehicles, the Settlement provides that Defendant will issue a $1,000 voucher toward the purchase or lease of a single new Nissan or Infiniti vehicle per Class Vehicle that had two or more replacements or repairs to the transmission assembly (including torque converter and/or valve body) and/or ATCU during the period of their ownership, as reflected in Nissan warranty records. (Settlement Agreement ¶¶ 12, 59.) The voucher may be used in combination with other types of valid discount offers, rebates, and incentives.

No Class Member will be entitled to receive more than 5 vouchers. The voucher must be used within nine months of the Effective Date and is not transferrable. Class Members who are eligible for both reimbursement of out-of-pocket costs and a voucher for the same Class Vehicle must select the remedy they prefer and may not receive both benefits. (Settlement Agreement ¶¶ 61, 62.)

[6] To be eligible for reimbursement, Class Members must submit a claim and appropriate documentation, created at or near the time of the qualifying repair or replacement and as part of the same transaction, establishing that that they have paid for repairs and/or replacement of the transmission assembly or ATCU. (Settlement Agreement ¶ 13, 79.)

D. Expedited Resolution Process Through the Better Business Bureau for Future Claims of Breaches of Warranty Related to Transmission Defects

The Settlement also provides an expedited resolution process through the BBB Auto Line for any future warranty claims related to transmission design, manufacturing or performance based solely on events that occur after the Notice Date of November 1, 2019, and preserves the right for Class Members to file a lawsuit for those who do not receive repurchases (also known as buybacks). (Settlement Agreement ¶ 20, Ex. A). This free BBB process does not bind any Class Member unless Nissan is required to repurchase their vehicle or Nissan makes a written offer to repurchase the Class Vehicle; however, all BBB decisions will be binding on Nissan, and Nissan will not have a right to appeal.

III. Argument

Class Counsel seek an award of attorneys' fees, expenses, and service payments for each Class Representative. Such terms were separately negotiated once the principal terms for the Class were agreed upon as set forth in the Settlement Agreement. The requested amounts are modest compared to the $17,018,000 to $22,841,000 value of this Settlement, and they are reasonable under the legal standard applicable to assessing counsel fees, expenses, and representative service awards under Federal Rule of Civil Procedure 23(h).

IV. Legal Standard

Rule 23(h) of the Federal Rules of Civil Procedure provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In the Sixth Circuit, reasonableness is the ultimate standard for setting fees, and it is the courts' affirmative responsibility to ensure "that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential-Bache Props*, 9 F.3d 513, 516 (6th Cir. 1993); *accord Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). When assessing the reasonableness of an award, courts in the Sixth Circuit consider the following factors: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the

litigation; and (6) the professional skill and standing of counsel involved on both sides. *Moulton*, 581 F.3d at 352 (citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)). Further, courts may approve negotiated fee and expense awards where "the nature and extent of the legal services provided by plaintiff counsel and the costs expended [are] carefully considered," and "no written objections [are] filed regarding the amount of fees allotted by [agreement] to plaintiff counsel." *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 87 (E.D. Mich. 1989), aff'd, 925 F.2d 1464 (6th Cir. 1991) (affirming approval of fee and expense award negotiated by the parties).

Trial courts have discretion to award fees based on either (1) a percentage-of-the-benefit calculation, or (2) a lodestar/multiplier approach. *Rawlings*, 9 F.3d at 516. Under the percentage-of-benefit method, the court determines a percentage of the settlement to award class counsel. *See In re Telectronics Pacing Sys. Inc.*, 137 F. Supp. 2d 1029, 1041 (S.D. Ohio 2001). In the "lodestar/multiplier approach," "the court calculate[s] the reasonable number of hours submitted multiplied by the attorneys' reasonable hourly rates," which the Court then increases using a "multiplier" to account for, inter alia, the costs and risks involved in the litigation. *Id.* at 1042. "In the Sixth Circuit, it is within the discretion of the district court to decide which method to use in a given case." *Lonardo v. Travelers Indem. Co.*, 706 F.2d 766, 789 (N.D. Ohio 2010) (citing *In re Sulzer Orthopedics Inc.*, 398 F.3d 778, 922 (6th Cir. 2005)).

The percentage method is commonly used in common benefit cases within the Sixth Circuit. *See Manners v. Am. Gen. Life Ins. Co.*, No. Civ. A 3-98-0266, 1999 WL 33581944, at *29 (M.D. Tenn. Aug. 10, 1999) ("The preferred approach to calculating attorneys' fees to be awarded in a common benefit case is as a percentage of the class benefit"); *See In Re Se. Milk Antitrust Litig.*, Master File No. 2:08-MD-1000, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) ("[T]he trend in the Sixth Circuit is towards adoption of a percentage of the fund method in common fund cases") (internal quotation omitted); *In re Skelaxin (Metaxalone Antitrust Litig.)*, No. 2:12-cv-83, 2014 WL 2946459, at *1 (E.D. Tenn. June 30, 2014) (observing trend and adopting percentage of the fund approach); Manual for Complex Litigation (Fourth) § 14.121, at 187 (2004) (noting that courts have re-embraced the percentage method after a "period of experimentation with the lodestar method."). When used in cases where the common benefit includes non-monetary relief, the value of the non-monetary common benefits may be demonstrated by

expert testimony or other evidence. *See Manners*, 1999 WL 33581944, at *9 (finding that "Settlement will provide a minimum of $169 million in economic value to the Class" based on $130.3 million valuation of policy benefits by plaintiffs' actuarial experts, plus $38.7 million to fund a dedicated claims resolution process); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 WL 3341200, at *9 (W.D. Ky. 23, 2010) (estimating value of future credit monitoring portion of benefits at $7 million based on projected 30% of 2.4 million class members accepting free credit monitoring at a cost of $37 per person). While "a percentage of the class recovery . . . is the favored method of calculating attorneys' fees in class action cases[,]" courts may also use the lodestar method as a "cross-check . . . to evaluate whether the request is fair." *Salinas v. U.S. Xpress Enterprises, Inc*. Here, the fees and expenses requested by Class Counsel should be awarded because they are reasonable under both the percentage method or a lodestar/multiplier approach.

V. The Requested Fees and Expenses Are Fair, Reasonable, and Appropriate in Light of the Results Obtained

Class Counsel should be awarded the $615,000 of requested fees and expenses because they are supported by weighing all six *Moulton* factors, considering the effort expended by Class Counsel in achieving this substantial result for Class Members. *See* Fed. R. Civ. Proc. 23(h) (permitting the Court to award fees "authorized by ... the parties' agreement." Fed. R. Civ. P. 23(h)).

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As detailed further below and in Class Counsel's supporting declarations, the hours expended, lodestar, and amount of expenses incurred are:

	Hours	Lodestar	Expenses
Capstone	237	$115,417.50	$14,883.89
Berger Montague	146.5	$92,854.50	$281.90
WBM	265.95	$124,375.00	$11,626.13
Total	**649.45**	**$332,647.00**	**$26,791.92**

A. Based on the Value of the Benefits Rendered to the Class, the Requested Fee Falls Within the Range of Percentage Fees Considered Reasonable and Fair by Courts Within the Sixth Circuit.

The award for attorneys' fees Class Counsel seeks represents just 2.95%[7] of the conservative valuation of the Settlement benefits to the Class, which is well below the range courts in the Sixth Circuit and nationwide have deemed reasonable for attorneys' fee awards.

Courts often consider the value of the settlement benefits offered to Class Members when assessing the reasonableness of fees under either the percentage method or lodestar approach. *See, e.g., Manners*, 1999 WL 33581944, at *29 (valuing minimum settlement value at $169 million, including $130.3 million in policy benefits and $38.7 million paid into claims resolution fund, then awarding $19.5 million for fees and expenses (or 11.5% of settlement value) as reasonable under percentage approach); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2010 WL 3341200, at *9 ($3.5 million fee request representing 20% of total value of settlement benefits, which included $6.5 million of funds available to class members and estimated $7 million cost of future credit monitoring, was reasonable as compared with benchmark ranges of 20-30% of total fund in common fund cases); *O'Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 305-307 (E.D. Pa. 2003) (valuing extended warranty coverage at approximately $20 million and applying a percentage method to determine fees); *In re Volkswagen &*

[7] This is figure based on Mr. Bowron's point estimate of $19,929,000. Using Mr. Bowron's valuation range of $17,018,000 and $22,841,000, the requested award is between 3.46% and 2.58% of his valuation of the extended warranty and replacement coverage.

Audi Warranty Extension Litig., 89 F. Supp. 3d 155, 171 (D. Mass. 2015) (valuing benefits conferred at $101,148,498, including over $18 million for repairs and $8 million for reimbursements, along with over $73 million for the extended warranty based on "the price a class member would have paid for such a service absent settlement", then applying lodestar approach); *Alin v. Honda Motor Co.*, No. 08-4825, 2012 WL 8751045, at *19 (D.N.J. Apr. 13, 2012) (valuing the settlement benefit at over $38 million based on replacement costs of item for all class vehicles covered by the warranty and applying lodestar approach). When evaluating attorneys' fee awards under the percentage method, courts in this Circuit regularly cite 20 to 50 percent as a reasonable range for attorneys' fees in common fund cases. *See In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *3 (E.D. Tenn. May 17, 2013) (recognizing that a fee request of one-third of the recovery "is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit"); *Gokare v. Fed. Express Corp.*, 2013 WL 12094887, at *4 (W.D. Tenn. Nov. 22, 2013); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369 (S.D. Ohio 2006*); New England Health Care Employees Pension Fund v. Fruit of the Loom*, 234 F.R.D. 627, 633 (W.D. Ky. 2006); *Wise v. Popoff*, 835 F. Supp. 977, 980 (E.D. Mich. 1993).

Here, the result achieved on behalf of the Class has been conservatively valued at between $17,018,000 and $22,841,000 by Plaintiffs' expert, Lee M. Bowron, ACAS, MAAA, an actuary who specializes in pricing and valuing extended service contracts and warranty extensions. (*See* Bowron Decl. ¶ 2 and Ex. 1.) The Nissan CVT Litigation involves approximately 143,000 Nissan Juke vehicles with an average CVT replacement cost of approximately $3,500. As previewed in the parties' joint supplemental briefing to answer the Court's questions regarding Plaintiffs' Unopposed Motion for Preliminary Approval, Class Counsel engaged Mr. Bowron to provide the Court with a conservative value to assist it in determining whether the anticipated requested attorneys' fees in the Settlement is likely to be approved as fair, reasonable, and adequate. Based on the number of Class Vehicles, the average CVT replacement cost, the failure rate and other information, Mr. Bowron conservatively calculates the value to the Class of the key portion of the Settlement—the extended warranty and reimbursement coverage—to be between $17,018,000 and $22,841,000, with a point estimate of $19,929,000. (*See* Bowron Decl. ¶ 4 and Ex. 2.) This figure does not include the value of the other components of the Settlement, including vouchers for

certain former owners, an expedited resolution process for future transmission claims, and the costs of notice and settlement administration. Class Counsel's request for $588,208.08 in attorneys' fees, which amounts to 2.95% of the valuation, then, is fair and reasonable as it falls far below the attorneys' fees ranging between 20 to 50 percent of funds awarded by courts in the Sixth Circuit and nationwide.

Moreover, "[t]he overall value of the settlement to the class is further illustrated by the relative lack of objections from class members to the requested fees." *See In re Se. Milk*, 2013 WL 2155387, at *3 (under first factor, reasonableness of fee was supported where no objections to the settlement and only 3 objections to fees were received from over 7,000 class members). Here, the amount of fees and expenses that would be requested was included in the Notice to Class Members and publicly available on the settlement website.[8] This Court has already ordered that the proposed Notice Program, direct mailing of the Summary Notice, and publication of the Long Form Notice, Settlement Agreement and exhibits, and the Court's Order on the settlement website constitutes due and sufficient notice of the Settlement and this Order to all persons entitled thereto, and is in full compliance with the requirements of FED. R. CIV. P. 23(c), applicable law, and due process." (Preliminary Approval Order ¶ 6, ECF 80.) Significantly, only 0.0025% of the class is opting out and 0.0013% is objecting, and **none of the objections concern the requested attorneys' fees or expenses**. (Lucchesi Decl. ¶¶ 8, 17-18; ECF Nos. 88-90.) Thus, evaluation of this factor weighs heavily in favor of awarding Class Counsel their requested fees. *See In re Se. Milk*, 2013 WL 2155387, at *3; *Manners*, 1999 WL 33581944, at *29; *Huguley*, 128 F.R.D. at 87. Moreover, Defendant also does not object to the requested fees and expenses, which were separately negotiated only after agreement on the material terms of relief to the Class, and the amount that is awarded by the Court will be paid by Defendant without affecting any benefits rendered to the Class. (*See* Deutsch Decl. ¶¶ 31, 33; Lucchesi Decl. ¶ 11-14.) The Settlement Agreement provides that "the Parties negotiated and agreed to the amount of Attorneys' Fees and Expenses . . . for which Class Counsel could apply," and that Defendant "agree[s] not to oppose any applications for Attorneys' Fees and Expenses of $615,000 or less[.]" (Settlement Agreement ¶ 113-14.)

[8] http://www.jukecvtsettlement.com/frequently-asked-questions.aspx#a19 (last visited December 29, 2019).

B. The Value of the Fee Based Upon a Lodestar Cross-Check

Courts may use the lodestar method as a "cross-check" on the reasonableness of the requested fee. When doing so, the Court calculates the lodestar (the hours reasonably expended on the litigation multiplied by reasonable hourly rates), and then calculates a "multiplier" by comparing the lodestar to the amount of fees requested. *See, e.g., In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 767 (S.D. Ohio 2007); *In re Broadwing*, 252 F.R.D. at 381. Because a reasonable multiplier above the lodestar accounts for factors such as the contingency risk of the litigation and the quality of the work performed, the multiplier reflects reasonableness of the fee. *See New York State Teacher's Retirement Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 243-44 (E.D. Mich. 2016). Courts within the Sixth Circuit regularly approve lodestar multipliers of up to 4.5 and have approved multipliers as high as 10.78. *See, e.g., Manners*, 1999 WL 33581944, at *31 (M.D. Tenn. Aug. 10, 1999); *In Re Se. Milk*, 2013 WL 2155387, at *4.

Here, Class Counsel already has spent over 649.45 combined hours on this litigation. (*See* Deutsch Decl. ¶¶ 43-44, Padgett Decl. ¶ 20, Mason Decl. ¶¶ 42-43.) As detailed in the Deutsch, Padgett, and Mason Declarations, these hours were reasonable and necessary to prosecuting the claims of the Class Representatives and the Class Members, relating to such tasks as interviewing clients for pre-suit investigation, discovery, and settlement; researching and drafting Complaints; briefing a Rule 12 motion; analyzing records and spreadsheets of information produced by Defendant; preparing for and participating in mediation; engaging in extended settlement negotiations with Defendant's counsel; drafting preliminary approval papers; and overseeing the notice process.

At reasonable and customary rates, the hours worked by Class Counsel results in a lodestar figure of $332,647.00. (*See* Deutsch Decl. ¶ 44, Padgett Decl. ¶¶ 23-27, Mason Decl. ¶ 43.) Measured against the requested award of $588,208.08 for fees, the current lodestar multiplier is therefore 1.64. Even without accounting for future work, the modest multiplier requested here reflects and reinforces the reasonableness of the requested fees, as it is substantially lower than multipliers approved as reasonable in other cases within the Sixth Circuit. *See, e.g., Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at *31. Accordingly, the lodestar cross-check confirms the reasonableness of the requested $588,208.08

award.

C. Class Counsel Undertook this Litigation on a Contingency Fee Basis

The risk of receiving little or no recovery is a major factor consistently weighed by the courts in determining attorneys' fees. When counsel brings a putative class action on a contingency fee basis, counsel assumes "a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced." *In Se. Milk*, 2013 WL 2155387, at *5. In considering a fee award, the "[f]ailure to make any provision for risk of loss may result in systemic undercompensation of plaintiffs' counsel in a class action case, where . . . the only fee that counsel can obtain is, in the nature of the case, a contingent one." *In re Cont'l Ill. Sec. Litig*., 962 F.2d 566, 569 (7th Cir. 1992); *see also Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) (noting "the risk of not prevailing, and therefore the risk of not recovering any attorneys' fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee"). Weighing this factor "accounts for the substantial risk an attorney takes when he or she devotes substantial time and energy to a class action despite the fact that it will be uncompensated if the case does not settle and is dismissed." *Lonardo*, 706 F. Supp. 2d at 796.

By pursuing Plaintiffs' and the Class' claims litigation on a contingent basis, Class Counsel assumed a significant risk that the litigation would yield no recovery and leave counsel entirely uncompensated for their time and out-of-pocket expenses. (*See* Deutsch Decl. ¶ 46, Padgett Decl. ¶ 29, Mason Decl. ¶ 45.) The three lawsuits covered by this Settlement posed a number of risks from their inception. First, such lawsuits, pending in three different jurisdictions against a sophisticated automotive manufacturer defendant, would continue to demand significant attorneys' time and expenses – as well as court resources. Second, Defendant would have argued (1) that no defect exists, or that, even if defects did exist, that the technological complexities of and changes to the design and manufacturing of the Class Vehicles preclude the existence of one common defect suitable for class treatment as alleged by Plaintiffs; (2) that the Class Vehicles are already covered under their 5 year / 60,000 mile powertrain warranty and that no implied warranties apply; (3) that the alleged defect does not constitute a safety hazard; or (4) that Defendant never had a duty to disclose information about the transmission problems to Class Members; and (5) that damages are not probable. Indeed, as discussed above, the class vehicles were sold with a 5

year / 60,000-mile powertrain warranty that covered transmission repairs. Defendant would also likely argue that individual issues as to liability and damages prevail over common issues.

Notably, in a similar automotive defect action against Nissan, Judge Klausner of the United States District Court for the Central District of California denied class certification regarding a similar CVT issue in a different set of class vehicles. *Torres v. Nissan N. Am. Inc.*, 2015 WL 5170539 (C.D. Cal. Sept. 1, 2015). The Court held that the claims in the action, including the omissions and warranty claims, could not be certified due individualized issues. *Id.* While Plaintiffs respectfully disagree with *Torres* and can distinguish the claims and procedural posture in this case, it nevertheless presented significant risk to Plaintiffs' counsel in pursuing the instant case on a contingency basis.

Defendant would be expected to raise all or some of these arguments throughout each stage of the litigation, posing risks that (1) the Court would deny class certification or narrow the scope of the proposed classes, (2) the Sixth Circuit would overrule any class certification order in response to a petition for interlocutory appeal, (3) the Court could exclude one or more of Plaintiffs' experts or (4) the Court could dismiss some or all of Plaintiffs' claims at summary judgment, pre-trial evidentiary motions, or during or after the presentation of evidence at trial.

Despite these risks, Class Counsel has devoted over 649.45 hours of time on the Nissan CVT Litigation and incurred $26,791.92 of reasonable and necessary out-of-pocket expenses. (*See* Deutsch Decl. ¶¶ 43-44, 47; Padgett Decl. ¶¶ 23, 30; Mason Decl. ¶¶ 42-43, 46-47.) Because the fee in this matter is entirely contingent, Class Counsel shouldered a substantial risk that it could recover nothing for its efforts. Nevertheless, as supported by the Padgett, Deutsch, Mason Declarations, Class Counsel devoted substantial time and money to the vigorous and ultimately successful prosecution of the Nissan CVT Litigation for the benefit of the Class Members. Thus, the contingent nature of the Class Counsel's representation strongly favors approval of the requested fee.

D. Complexity of the Litigation

The complexity and novelty of the factual and legal issues presented, and the settlement negotiations necessary to resolve those issues, are factors to be considered in the approval of a fee request. *See Sulzer Hip Prosthesis & Knee Prosthesis*, 268 F. Supp. 2d 907, 939 (N.D. Ohio June 12, 2003).

From the outset, the cases comprising this Nissan CVT Litigation involved complex issues as to liability, causation, and class certification as described *supra*, Argument, Part III.C. Moreover, the facts underlying Plaintiffs' claims involved complicated engineering and design issues and presented significant discovery challenges given the involvement of a foreign parent corporation and a third-party supplier operating outside of the United States. The arguments Defendant would be expected to make have been successfully employed in other automobile defect class actions to defeat class certification or defeat automobile owners' claims on summary judgment. *See, e.g., Philips v. Ford Motor Co*., No. 14-02989, 2016 WL 7428810 at *17 (N.D. Cal. Dec. 22, 2016) (finding that plaintiffs failed to present a compelling damages model supporting a class-wide determination regarding Ford's alleged omission of a "systemic defect" in the vehicle's electronic steering system); *Smith v. Ford Motor Co*., 749 F. Supp. 2d 980, 991-92 (N.D. Cal. 2010) (granting defendant's motion for summary judgment and finding alleged ignition-lock defect not a safety risk); *Coba v. Ford Motor Co*., No. 12-1622-KM, 2017 WL 3332264 (D.N.J. Aug. 4, 2017) (similar).

The liability case here centered on vehicles designed and manufactured in close coordination with Defendant's foreign parent company, Nissan Japan, and a transmission designed and manufactured by a third party supplier. Despite the complications caused by essential discovery residing in the possession of foreign entities and/or third parties, Class Counsel addressed these discovery challenges by, for example, negotiating a discovery and tolling agreement whereby Nissan Japan, Defendant's foreign parent entity, agreed to be subject to discovery in exchange for a dismissal without prejudice.

As with all litigation, however, there was no guarantee that Plaintiffs would prevail. Class Counsel effectively crafted a well-researched complaint, anticipated the hurdles Plaintiffs would face prosecuting their claims through class certification and trial, and obtained critical evidence necessary to prove Plaintiffs' claims, all of which contributed to positioning the cases for a favorable settlement. This complexity factor thus also strongly supports Class Counsel's fee and expense request.

E. Public Policy Favors the Requested Award

"Adequate compensatory fee awards in successful class actions promote private enforcement of and compliance with important areas of" law. *See In re Broadwing*, 252 F.R.D. at 381 (citing *Bateman*

Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985)). Therefore, "[e]ncouraging qualified counsel to bring inherently difficult and risky but beneficial class actions . . . benefits society." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534 (E.D. Mich. 2003). As described *supra* Argument Part. III.C, D., Class Counsel prosecuted to the instant case to provide Class Members with a significant recovery in the form of extended warranties, reimbursement of repair costs, and vouchers to compensate former owners due to the alleged defect. Awarding the requested fee will continue to encourage highly qualified counsel to undertake time-consuming, labor-intensive, and expensive class action litigation—at substantial monetary risk—to vindicate the rights of other vehicle owners and lessees who otherwise might have no practical means of redress against large multinational and foreign corporations that manufacture and design the vehicles that consumers rely on in their daily work and personal activities. This factor of public policy therefore supports the requested fee award.

F. Class Counsel Are Skilled Class Action Practitioners Who Litigated Against Experienced Defense Counsel

Class Counsel submit that they have significant legal expertise, which was brought to bear in successfully prosecuting this class action and in securing the Settlement. All Class Counsel prepared declarations supporting this Motion, and included their firm resumes in doing so. (*See* Deutsch Decl. ¶¶ 5-9 and Ex. A, Padgett Decl. ¶¶ 18-21 and Ex. 1, Mason Decl. ¶¶ 4-5 and Ex. A.) It is clear from the materials that Class Counsel has substantial expertise and decades of success nationwide in class actions and other forms of complex civil litigation on behalf of consumers.

1. Berger Montague PC

Berger Montague is a full-spectrum class action and complex civil litigation firm, with nationally known attorneys highly sought after for their legal skills. The firm has been recognized by courts throughout the country for its ability and experience in handling major complex litigation, particularly in the fields of antitrust, securities, mass torts, civil and human rights, whistleblower cases, employment, and consumer litigation. In numerous precedent-setting cases, the firm has played a principal or lead role, and has also recovered over $30 billion dollars for its clients and the classes they have represented.) (*See* Deutsch Decl. ¶¶ 5-9 and Ex. A.)

The National Law Journal, which recognizes a select group of law firms each year that have done "exemplary, cutting-edge work on the plaintiffs' side," has selected Berger Montague in 12 out of 14 years (2003-05, 2007-13, 2015-16) for its "Hot List" of top plaintiffs'- oriented litigation firms in the United States in 12 out of 14 years. In 2018 and 2019 and , the National Law Journal recognized Berger Montague as for its "Elite Trial Lawyers" list in 2018 and 2019 after reviewing more than 300 submissions for this award. The firm has also achieved the highest possible rating by its peers and opponents as reported in Martindale-Hubbell and was ranked as a 2019 "Best Law Firm" by U.S. News - Best Lawyers.

As part of its established and wide-ranging experience in class-action litigation generally, Berger Montague has successfully obtained a number of favorable class action settlements providing relief to automobile owners and lessees. *See, e.g., Batista v. Nissan N. Am., Inc*., No. 14-24728-RNS (S.D. Fla. June 29, 2017), ECF No. 191 (finally approving class action settlement alleging CVT defect); *Davis v. General Motors LLC,* No. 8:17-cv-2431 (M.D. Fla. 2017) (as co-lead counsel, obtained settlement alleging defects in Cadillac SRX headlights); *Yeager v. Subaru of America, Inc.*, No. 1:14-cv-04490 (D.N.J. Aug. 31, 2016) (finally approving class action settlement alleging damages from defect causing cars to burn excessive amounts of oil); *Salvucci v. Volkswagen of America, Inc. d/b/a Audi of America, Inc*., No. ATL-1461-03 (N.J. Sup. Ct. 2007) (as co-lead counsel, obtained settlement for nationwide class alleging damages from defectively designed timing belt tensioners); *In Re Volkswagen and Audi Warranty Extension Litigation*, No. 07-md-1790-JLT (D. Mass. 2007) (obtained settlement valued at $222 million for nationwide class, alleging engines were predisposed to formation of harmful sludge and deposits leading to engine damage); *Parker v. American Isuzu Motors, Inc*., No. 030903496 (Pa. Ct. Com. Pl., Phila. Cty.) (as sole lead counsel, obtained settlement including up for damages resulting from accidents caused by faulty brakes); *Burgo v. Volkswagen of America, Inc. d/b/a Audi of America, Inc*., No. HUD-L-2392-01 (N.J. Sup. Ct. 2001) (as co-lead counsel, obtained settlement, while the decision on class certification was pending, for proposed class members alleging damages arising from defective tires prone to bubbling and bulging).

2. Capstone Law APC

Capstone Law APC is one of California's largest plaintiff-only labor and consumer law firms. With over twenty seasoned attorneys, Capstone Law has the experience, resources, and expertise to successfully prosecute complex employment and consumer actions. (*See* Padgett Decl. ¶¶ 18-21 and Ex. 1.)

One of the largest California firms to prosecute aggregate actions on a wholly contingent basis, Capstone Law, as lead or co-lead counsel, has obtained final approval of sixty class actions valued at over $200 million dollars. Recognized for its active class action practice and cutting-edge appellate work, Capstone Law's recent accomplishments have included three of its attorneys being honored as 2014 California Lawyer's Attorneys of the Year ("CLAY") in the employment practice area for their work in the landmark case *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

Capstone Law has an established practice in automotive defect class actions and has obtained favorable appellate decisions and ultimate final approval of numerous class action settlements providing relief to automotive consumer owners/lessees during the last five years. *See Falco v. Nissan N. Am. Inc.*, No. 13-00686-DDP (C.D. Cal. July 16, 2018), ECF No. 341 (finally approving settlement after certifying class alleging timing chain defect on contested motion); *Vargas v. Ford Motor Co.*, No. CV12-08388 AB (FFMX), 2017 WL 4766677 (C.D. Cal. Oct. 18, 2017) (finally approving class action settlement involving transmission defects for 1.8 million class vehicles); *Batista v. Nissan N. Am., Inc.*, No. 14-24728-RNS (S.D. Fla. June 29, 2017), ECF No. 191 (finally approving class action settlement alleging CVT defect); *Chan v. Porsche Cars N.A., Inc.*, No. 15-02106-CCC (D.N.J. Oct. 6, 2017), ECF No. 65 (finally approving class action settlement involving alleged windshield glare defect); *Klee v. Nissan N. Am., Inc.*, No. 12-08238-AWT (PJWx), 2015 WL 4538426, at *1 (C.D. Cal. July 7, 2015) (settlement involving allegations that Nissan Leaf's driving range, based on the battery capacity, was lower than was represented by Nissan); *Asghari v. Volkswagen Grp. of Am.*, Inc., No. 13-cv-02529-MMM-VBK, 2015 WL 12732462 (C.D. Cal. May 29, 2015) (class action settlement providing repairs and reimbursement for oil consumption problem in certain Audi vehicles); *Aarons v. BMW of N. Am., LLC*, No. CV 11-7667 PSG (CWX), 2014 WL 4090564 (C.D. Cal. Apr. 29, 2014), objections overruled, No. CV 11-7667 PSG

CWX, 2014 WL 4090512 (C.D. Cal. June 20, 2014) (class action settlement providing up to $4,100 for repairs and reimbursement of transmission defect in certain BMW vehicles).

3. Whitfield Bryson & Mason, LLP

WBM is dedicated to representing plaintiffs in class actions, mass torts, and individual cases in courts throughout the United States. Founded in January 2012, the firm was created by a merger of three firms each of which had been representing plaintiffs for decades. The firm has offices in Washington, D.C.; Raleigh, North Carolina; Nashville, Tennessee; and Madisonville, Kentucky, and WBM attorneys have extensive experience litigating in this Court and the Fourth Circuit.(*See* Mason Decl. ¶¶ 4-5 and Ex. A).

WBM has served as lead counsel or co-lead counsel in numerous auto defect class, including *Berman et. al. vs. General Motors, LLC*, No. 2:18-CV-14371 (S.D. Fla. 2019) (national settlement for repairs, reimbursement of costs incurred, and a warranty extension for certain Chevrolet Equinoxes and GMC Terrains that suffered from excessive oil consumption; valued at a minimum of $42.3 million); *In re General Motors Corp. Speedometer Prods. Liability Litig*., MDL 1896 (W.D. Wash. 2007) (national settlement for repairs and reimbursement of repair costs incurred in connection with defective speedometers), *Lubitz v. Daimler Chrysler Corp*., No. L-4883-04 (Bergen Cty. Super. Ct, New Jersey 2006) (national settlement for repairs and reimbursement of repair costs incurred in connection with defective brake system; creation of $12 million fund; seventh largest judgment or settlement in New Jersey in 2006), *Baugh v. Goodyear,* Civil Action No. 00-L-1154 (Cir. Ct. Madison Cty. (Illinois, 2002) (class settlement of claims that Goodyear sold defective tires that are prone to tread separation when operated at highway speeds; Goodyear agreed to provide a combination of both monetary and non-monetary consideration to the Settlement Class in the form of an Enhanced Warranty Program and Rebate Program)

WBM's attorneys have frequently served as lead counsel or co-lead counsel or performed other leadership roles in class actions of national significance. For example, WBM currently serves as Co-Lead

Counsel in the Hill's Pet Food MDL,[9] Co-lead Counsel in the Lumber Liquidators Durability MDL,[10] Co-Lead Counsel in the Pella Windows & Doors MDL[11] and, in the Chinese Drywall MDL,[12] served as Co-Chair of the Science and Expert Committee, Co-Chair of the Insurance Committee, and a member of the trial team for the bell-weather trials. WBM has significant experience in data breach cases, and it is currently serving as Liaison Counsel in the Office of Personal Management (OPM) data breach litigation,[13] currently represents 14 bell-weather plaintiffs in the Marriott data breach litigation,[14] and previously served as Co-Lead counsel in *In Re: Department of Veterans Affairs (VA) Data Theft Litigation*, MDL No. 1796, No. 1:06-mc-00506 (D.D.C.) and *In re Google Buzz Privacy Litig*., No. 10-cv-00672-JW (N.D. Cal., filed Feb. 17, 2010).

4. Defendant's Counsel

Courts also consider the quality of opposing counsel when evaluating services provided by plaintiffs' counsel. *See In re Se. Milk*, 2013 WL 2155387, at *4 ("Class counsel have efficiently and competently managed their enormous tasks and have vigorously and effectively prosecuted the case on behalf of the class. They have also been opposed by equally experienced and highly competent counsel for defendants and have achieved an excellent result for their clients."); *Dick v. Sprint Commc'ns Co., L.P*., 297 F.R.D. 283, 301 (W.D. Ky. 2014) ("Counsel for both sides are skilled attorneys who brought extensive experience and knowledge to their motion practice, the fairness hearing, and the bargaining table."). Here, Defendant is represented by highly qualified counsel. Defendant's lawyers are from three large national law firms, Drinker, Biddle & Reath, LLP; Baker, Donelson, Bearman, Caldwell &

[9] *In Re: Hill's Pet Nutrition, Inc. Dog Food Products Liab. Litg.*, MDL No. 2887 (D. Kansas).

[10] *In re: Lumber Liquidators Chinese-Manufactured Flooring Durability Marketing and Sales Practice Litig.*, MDL No. 2743 (N.D. Va.)

[11] *In Re: Pella Corporation Architect and Designer Series Windows Marketing, Sales Practices and Products Liab. Litig.*, MDL No. 2514 (D.S.C.)

[12] *In re: Chinese Manufactured Drywall Products Liability Litig.*, MDL No. 2047, No. 2:09-md-02047 (E.D. La.).

[13] *In Re: U.S. Office of Personnel Management Data Security Breach Litig.*, MDL 2664 (D.D.C).

[14] *In re: Marriott International Inc., Customer Data Security Breach Litig.*, MDL No. 19-md-2879 (D. Md).

Berkowitz, PC; and Bradley Arant Boult Cummings LLP, well-known for their vigorous advocacy in defending complex civil actions and in class action lawsuits. Defense counsel mounted formidable opposition in this Litigation, including a Rule 12 motion, and would have vigorously fought class certification and the merits of the underlying claims had the parties not reached settlement. The ability of Class Counsel to achieve such a favorable settlement in the face of determined, skilled opposition attests to the quality of Class Counsel's work. Accordingly, this factor of the skill of defense counsel also strongly favors the requested fee award.

G. The Court Should Approve Class Counsel's Request for Expenses

"Class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses." *In re Countrywide*, 2010 WL 3341200, at *12 (quoting *In re Cardizem*, 218 F.R.D. at 535); *see In re Broadwing*, 252 F.R.D. at 382 (awarding requested expenses as "reasonable and necessary expenses, including photocopying, postage, travel, lodging, filing fees and Pacer expenses, long distance telephone, telecopier, computer database research, deposition expenses, and expert fees and expenses"). Here, Class Counsel respectfully requests that the Court reimburse $26,791.92 or their expenses, which is within the amount agreed to by Defendants and communicated to Class Members through the Notice Plan. (*See* Deutsch Decl. ¶ 47; Padgett Decl. ¶ 30; Mason Decl. ¶ 46.) These include costs and expenses for filing fees, postage, research fees, subpoena fees, service of process, expert fees, mediation fees, and travel expenses associated with court appearances and mediation. Class Counsel incurred these charges with no guarantee of reimbursement. All these charges were fair, reasonable, and incurred for the benefit of the Class. Class Counsel seeks reimbursement for $26,791.92, which Defendant agreed to pay, and therefore should be awarded.

H. Service Awards of $5,000 to Each of the Two Class Representative Are Appropriate

Class Representatives Cheyne Norman and Sophia Wescott request service awards of $5,000 each for their contributions to the Litigation. Payment of a service award to the putative class representative is appropriately awarded as compensation for named Plaintiff's undertaking the risk and expense of litigation to advance the class' interests. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at 535 (noting that service payments "are common in class actions"). Such awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and to recognize their willingness to act as private attorneys general." *In re Se. Milk*, 2013 WL 2155387 at *8 (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)); *see Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) ("[T]here is something to be said for rewarding those [plaintiffs] who protest and help to bring rights to [others]").

In evaluating requests for service awards, district courts in the Sixth Circuit consider, *inter alia*, the actions the named plaintiff have taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the named plaintiff expended in pursuing the litigation. *See Gascho v. Glob. Fitness Holdings, LLC*, No. 2:11-CV-436, 2014 WL 1350509, at *27 (S.D. Ohio Apr. 4, 2014), *report and recommendation adopted*, No. 2:11-CV-00436, 2014 WL 3543819 (S.D. Ohio July 16, 2014), *aff'd*, 822 F.3d 269 (6th Cir. 2016). Service awards that are paid separately from the benefits rendered to the Class also indicates reasonableness of the award. *See Paxton v. Bluegreen Vacations Unlimited*, No. 3:16-CV-523, 2019 WL 2067224, at *3 (E.D. Tenn. May 9, 2019).

Here, all of these factors support the requested awards. The Class Representatives reviewed pleadings and discovery requests; responded to written discovery; assisted counsel in fact investigation necessary to develop the case and negotiate settlement terms; and reviewed and agreed to all terms of the Settlement before it was executed. (*See* Deutsch Decl. ¶¶ 32, 48; Padgett Decl. ¶ 31; Mason Decl. ¶¶ 31, 48.) As a direct result of the Class Representatives' efforts and their willingness to pursue this action, substantial benefits have been achieved on behalf of the Class. These requested service payments have

received no objections and are within the range of awards granted in other complex litigation in this Circuit. *See, e.g.*, *Gascho*, 2014 WL 1350509, at *26 (gathering cases approving awards from $2,500 to 55,000); *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, No. 2:09-MD-2009-SMH, 2014 WL 12808031, at *6 (W.D. Tenn. Dec. 24, 2014) (awarding $10,000 each to two named plaintiffs); *Paxton*, 2019 WL 2067224, at *3 (awarding $5,000 to each of two named plaintiff as amounts "within what other courts have found proper.").

Thus, service awards of $5,000 each to Class Representatives Norman and Wescott, totaling $10,000, are justified and reasonable, and should be awarded.

VI. CONCLUSION

Based on the foregoing, Class Counsel respectfully requests that the Court grant Class Counsel's requested awards of: (1) $588,208.08 in attorneys' fees, (2) $26,791.92 in expenses, and (3) $10,000 in service awards, in the amount of $5,000 each to Class Representatives Cheyne Norman and Sophia Wescott.

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Respectfully submitted,

/s/ Cody R. Padgett

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