EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

In re: Takata Airbag Product Liability Litigation
(Economic Loss Track Cases Against Nissan and Honda Defendants)

MDL No. 2599

SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK

1. My name is Brian Fitzpatrick and I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I filed a declaration in support of class counsel's fee requests in these cases on December 22, 2017. Class counsel asked me to prepare this supplemental declaration to give my opinion of the arguments made by some of the objectors in light of the data and economics underlying class action litigation.

2. One objector criticized the empirical study that I conducted and relied upon in my declaration as based on old data. *See* Walsh Objections p. 14. It is true that the data in my study is now 10 years old—the data was collected from class action settlements in 2006 and 2007—but it takes many years to collect this data, and my study is still the most comprehensive study of class action fees ever published.[1] But I did not just rely on my own empirical study; I also relied upon the excellent studies conducted by Professor Geoff Miller and his co-authors. Even still, until only a few weeks ago, my study was just as timely as the published Miller studies (which at that time went through 2008). Nonetheless, as I noted in my opening declaration, Professor

[1] For example, the studies that Professor Geoff Miller and his co-authors have published rely only on materials that can be found in electronic databases, and, as such, catch many fewer settlements per year than my study did. *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 817 (2010) (collecting almost the same number of settlements over two years that the Miller studies collected over 16 years).

Miller has been working on an update to his study, and I am happy to report that it has now been published. *See* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937 (2017). I am also happy to report that Professor Miller's latest study does not contradict any of the conclusions in my opening declaration. *See, e.g., id.* at 951 (finding mean and median awards in federal court of 27% and 29%, respectively, and of 30% and 33% in the Eleventh Circuit in particular).

3. Some objectors urge the court to slash class counsel's fee awards because these two settlements (or the sum of these two settlements when combined with the earlier settlements) are for large amounts of money (what some objectors call "megafund" settlements). *See, e.g.*, Dorlon et al. Objections pp. 3-4; Maggard et al. Objections p. 14; Walsh Objections pp. 14-15; Flores Objections pp. 14-16; Touche Objections p. 5; Gardiner et al. Objections pp. 11-14; Spaeth et al. pp. 14-16. There is no law in the Eleventh Circuit requiring courts to do this. It is true, as I noted in my opening declaration, that some courts in other districts follow this practice—enough of them that I and Professor Miller have found an inverse and statistically significant relationship between fee percentage and settlement size nationwide.[2] *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 837-38, 842 (2010). Some objectors claim that some courts do this in the Eleventh Circuit, too, but, if they do, as I noted in my opening declaration, they have not been numerous enough to make the effect statistically significant in the Eleventh Circuit. (Moreover, there is nothing in Professor Miller's latest study suggesting otherwise.) In any event, statistical significance aside, for the reasons I stated in my opening declaration, it is my

[2] The fact that I explicitly pointed out this practice in my opening declaration and recounted all of the data showing it demonstrates that I did not "avoid[] [my] own numbers," as contended by one objector. *See* Walsh Objections pp. 14-15.

opinion that it would undermine the efficacy of class action litigation to slash a fee percentage simply because a settlement is large. As I explained using a numerical example that I will not repeat here, doing this can actually lead to situations where class counsel can receive a *bigger* fee award by negotiating a *smaller* settlement. Such perverse incentives are obviously not in the best interests of class members—or in the best interests of a society interested in optimal compensation of injuries and optimal deterrence of wrongdoing.

4. Likewise, it would undermine the efficacy of class action litigation to slash a fee percentage simply because there have been earlier settlements against different defendants in the same litigation. As I explained using an example in my opening declaration that I will not repeat here, doing this encourages class counsel either 1) to delay settlements with early defendants until they can secure settlements with later defendants or 2) to invest less time in settlements with later defendants in favor of new litigation where they will not be compensated with lesser fee percentages. Neither set of incentives are good for class members or in the best interests of a society interested in optimal compensation of injuries and optimal deterrence of wrongdoing, which is probably why I do not recall ever seeing a court follow this practice. *See, e.g.*, *In re Checking Account Overdraft Litigation*, MDL 1291 (S.D. Fla.) (awarding at least 30% in fees across more than 20 settlements over 4 years).

5. Some objectors urge the Court to crosscheck class counsel's fee requests with class counsel's lodestar. *See, e.g.*, Dorlon et al. Objections p. 5; Maggard et al. Objections p. 20; Walsh Objections pp. 17-18; Flores Objections pp. 16-17; Touche Objections p. 5l; Spaeth et al. p. 20. Nothing in Eleventh Circuit law requires this, either. Although, again, it is true that some courts do this, many do not. *See* Fitzpatrick, *supra*, at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method); Eisenberg et al., *supra*, at

945 (finding percent method with lodestar crosscheck used 38% of the time versus 54% for percent method without lodestar crosscheck). Moreover, in my opinion, the courts that do not do this are better serving the efficacy of class action litigation. This is the case because the lodestar crosscheck can only serve to cap class counsel's fee percentage at some multiple of class counsel's lodestar and doing this gives class counsel the incentive to behave just as they would if the court were using the lodestar method rather than the percentage method to award fees in the first place. As I explained in my opening declaration, the lodestar method was abandoned by courts because it undermined the efficacy of class action litigation: it encouraged class action lawyers to drag cases out to generate more lodestar and it made them indifferent to whether the settlement was big or small. In my opinion, we should not let these bad behaviors return through the backdoor with the lodestar crosscheck.

6. To see why the lodestar crosscheck encourages the same bad behaviors, consider the following example. Suppose a class action lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 30% fee if it exceeded twice his lodestar, then he would be *indifferent* between settling the case for $6.67 million and $66.7 million (or any number higher than $6.67 million). Now suppose that class counsel believed that the most it could wring from the defendant in this example was $13.33 million. In order to reap the maximum 30% fee with the lodestar crosscheck, class counsel would have to generate an additional $1 million in lodestar before agreeing to the settlement; this would give class counsel incentive to *drag the case out* before sealing the deal. Again, neither indifference as to settlement amount or incentive to delay settlement is in the interests of class members or of a society interested in optimal compensation of injuries and optimal deterrence of

wrongdoing. In my opinion courts should not encourage such behaviors by employing the lodestar crosscheck.

7. Nonetheless, even if one chooses to do the lodestar crosscheck, it would not change my opinion that the fee requests here are supported by the empirical studies of what courts have awarded in other cases. For example, in my empirical study, the lodestar crosscheck multipliers ranged from .07 to 10.26, with a mean and median of 1.65 and 1.34, respectively. *See* Fitzpatrick, *supra*, at 834. These numbers are consistent with the Miller studies. *See, e.g.*, Eisenberg et al., *supra*, at 965 (finding mean multiplier of 1.48 in federal court). Although the multipliers that would result here would be higher than the typical case, this is not the typical case. In particular, the relationship between settlement size and lodestar multipliers is the opposite of that between settlement size and fee percentages: as the settlement size increases, the lodestar multiplier class counsel receives typically increases as well. *See id.* at 966 ("[H]igher multipliers are associated with higher recoveries.") Indeed, when compared to cases of similar size, the multipliers here are well within the mainstream. For example, when I separated the percentage-method fee awards in my empirical study in settlements at or above $100 million from other settlements, I found that the mean and median multipliers were 3.45 and 2.75, respectively; in settlements at or above $500 million, the mean and median were 3.55 and 2.67, respectively. Although the Miller studies have not broken down their data this precisely, one of those studies reported similar numbers for one group of big settlements. *See* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 245, 274 (2010) (finding mean and median multipliers of 3.18 and 2.69, respectively, in settlements over $175.5 million). Thus, the lodestar multipliers that would result here do not give me any pause.

8. Some objectors oppose the timing of class counsel's proposed fee awards, either because class counsel would receive their fee awards before the defendants fully fund their settlements or because class counsel would receive their fee awards before any appeals are concluded. *See, e.g.*, Gardiner et al. Objections p.4; Walsh Objection pp. 7-8. In my opinion, neither of these objections is consistent with best practices in class action litigation. It is true that many scholars believe that delaying class counsel's fee award is the best practice if it is unclear how much defendants will pay out in a settlement. *See, e.g.*, Principles of the Law of Aggregate Litigation § 3.13 cmt. a (2010). The reason for this is to ensure that the court knows how much compensation or deterrence a settlement has actually generated before it decides how much to award class counsel in fees for creating the settlement. Thus, in so-called "claims made" settlements with reversion of unclaimed amounts to the defendant, it may well be appropriate to delay awarding fees until the claims process has concluded. *See id*. Here, by contrast, there is no doubt how much the defendants will pay out: other than credits for the rental car benefits, *none* of the settlement amounts can revert back to the defendants—and, with respect to the rental car benefits, class counsel's expert calculated that the value of the benefits will exceed the amount of any credits. Thus, there is nothing to be gained by delaying class counsel's fee awards in these cases; doing so would serve only to make life harder on contingency-fee lawyers by forcing them to make payroll at their firms for several more years while they wait to receive compensation for work they did long ago. Again, this is not good for class members or a society interested in optimal compensation of injuries and optimal deterrence of wrongdoing because it wantonly discourages class lawyers from taking cases.

9. Similarly, the provision in the settlement agreements that permit class counsel to receive their fees before appeals are concluded—subject to an obligation to repay those fees

should the settlement or fees be reversed on appeal—is the current best practice to discourage class members from taking appeals in an effort to blackmail class counsel. I have written an entire article about this subject that explains this in great detail: until settlements with objecting class members are prohibited outright, the best tool we have in our arsenal to discourage objector blackmail is the provision the settlements here include. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). The objectors who say that this provision obstructs class members from making objections are correct only to the extent that the objectors are motivated to make objections in the hope of pressuring class counsel into entering into settlements with them—i.e., what I call "blackmail-minded objectors." By contrast, objectors who are not interested in extracting a payment or fee, but, rather, interested in improving the settlement, are not affected by this provision them whatsoever.[3]

10. Some objectors oppose permitting lead class counsel to allocate the fees awarded by the court here among the various firms and lawyers that worked on these cases. *See, e.g.*, Walsh Objection p. 19. But, in my experience, that is how most fee awards are allocated. *See, e.g., Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 88 (2d Cir. 2010); *In re Initial Public Offering Securities Litigation*, 2011 WL 2732563, at *1 (S.D.N.Y. Jul. 8, 2011); *In re Vitamins Antitrust Litigation*, 398 F.Supp.2d 209, 221-222 (D.D.C. 2005). Lead class counsel is in the best position to know who did what and how valuable each lawyer's contributions were to the litigation. It is true that one of the firms lead counsel must allocate fees to is his own firm and lead class counsel will be self-interested with regard to this allocation.

[3] Although I sometimes worry the defendants might agree to these provisions only in exchange for other, more defendant-friendly settlement terms, these worries are not present here because class counsel followed best practices and negotiated all of the terms in the settlements regarding fees after the other terms of the settlements were agreed to.

But this is why the Court always retains jurisdiction over fee allocations in the event there is a dispute.

11. Some objectors oppose including in the benefits conferred to the classes in these cases 1) the monies that will be spent on outreach and 2) the credits for the rental car programs; they say these monies would have been spent and these benefits would have been conferred even without the settlements. *See, e.g.*, Flores Objections pp. 4-11; Gardiner et al. Objections pp. 5-10; Spaeth et al. Objections pp. 8-12. But, as I noted in my opening declaration, the settlements obligate the defendants to undertake outreach efforts *beyond* those they are currently required to undertake pursuant to the federal government's airbag recall. Moreover, there is currently no legal requirement *at all* that the defendants provide customers with rental cars while their airbags are replaced. Although a defendant may have voluntarily have provided these from time to time, the settlement makes them *obligatory* and *permanent* throughout the length of the recall. In my opinion, these are real benefits to the classes and therefore benefits for which class counsel should be compensated. If courts do not include such benefits in their fee awards, then class counsel will have no incentive to pursue in settlement negotiations any relief that defendants could offer voluntarily; this would leave class members at the mercy of the very defendants that wronged them to begin with.

12. Finally, some objectors suggest that there is something improper about the fact that the defendants agreed not to oppose class counsel's fee requests. *See, e.g.*, Gardiner et al. Objections pp. 10-11. It is true that I and other scholars sometimes worry that class counsel might trade away settlement terms more favorable to the class in exchange for an agreement not to oppose fees. *See, e.g.*, Newberg on Class Actions § 13:9 (5th ed.). But these concerns are not present here because, as I noted above, class counsel had no discussion with the defendants about

fees until the other terms of the settlements were negotiated. *See* n. 3, *supra*. Thus, class counsel could not have traded away anything of value to the class in exchange for this agreement.

13. For all these reasons, I continue to believe the fee requests here are reasonable.

Nashville, TN

January 24, 2018

Brian T. Fitzpatrick