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

MDL No. 2599
Master File No.: 15-MD-02599-MORENO
S.D. Fla. Case No. 1:14-cv-24009-MORENO

IN RE: TAKATA AIRBAG PRODUCT LIABILITY LITIGATION
THIS DOCUMENT RELATES TO: **ECONOMIC LOSS TRACK CASES AGAINST BMW, MAZDA, SUBARU, AND TOYOTA DEFENDANTS**

PLAINTIFFS' UNOPPOSED OMNIBUS MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENTS, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASSES, AND APPROVAL OF CLASS NOTICES AND INCORPORATED MEMORANDUM OF LAW

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Plaintiffs respectfully move, under Rule 23 of the Federal Rules of Civil Procedure, for preliminary approval of Settlements with the Toyota, BMW, Mazda, and Subaru Defendants, preliminary certification of the Classes defined in the Settlements, and approval of proposed notices to the Classes.[1] These Settlements, reached after more than two years of hard-fought litigation and extensive discovery, will resolve Plaintiffs' and Class Members' economic loss claims against the Settling Defendants in the above-captioned Action.

INTRODUCTION

For more than fifteen years, numerous automotive companies manufactured and sold to the unsuspecting public a staggering number of vehicles equipped with defective airbags supplied by Takata Corporation, and its subsidiary TK Holdings, Inc. (collectively "Takata"). Instead of functioning as safety devices, Takata's defective airbags have an unreasonably dangerous propensity to deploy aggressively or rupture, spraying metal shrapnel toward vehicle occupants. The common defect in Takata's airbags is tied to the inherent instability of the phase-stabilized ammonium-nitrate propellant used in Takata's airbag inflators.

This common defect, present in more than sixty million airbags nationwide, has given rise to the single largest automotive recall in United States history and an extraordinary public safety crisis. Even though nationwide recalls have been underway for more than three years, approximately 75% of Takata's defective airbags—i.e., around 45 million airbags—have yet to be removed from vehicles and replaced with safe airbags, according to the most recent data published by the National Highway Safety Transportation Authority ("NHTSA").

[1] The Settlement Agreements are attached hereto as Exhibits A to D. The BMW, Mazda, Subaru, and Toyota Defendants – as identified in the Settlements, and inclusive of related entities identified in the Settlements – are collectively referred to as the "Settling Defendants." Capitalized terms not defined herein shall have the same definitions and meanings ascribed to them in the Settlements.

When the scope and severity of this problem started to surface more than two years ago, Plaintiffs brought this Action, on behalf of themselves and the Classes they represent, to recover the economic losses they suffered as a result of the extraordinary crisis created by Takata and the automotive companies. Four of those automotive companies—the Settling Defendants—have agreed to resolve the economic loss claims asserted against them through separate class action Settlements totaling at least $553 million. The primary features of each Settlement will furnish Class Members with a wide spectrum of relief:

- Settlement Funds: The Settling Defendants will contribute approximately $500 million in cash to non-reversionary common funds over a four-year period to pay for state-of-the-art Outreach Programs, fund cash payments to Class Members, and cover all settlement-related fees and costs.

- Outreach Programs: Innovative and well-funded outreach methods will be employed, well beyond those currently used by the Settling Defendants, to maximize Class Members' recognition of the danger of not replacing the Takata airbag inflator in their vehicles, including, but not be limited to, direct contact via mail, telephone, social media, e-mail, and texting, and multi-media campaigns using radio, television, print, and the internet.

- Out-of-Pocket Claims Process: Class Members may submit claims for the reimbursement of reasonable expenses they incurred in connection with having the Recall Remedy performed on their vehicles, ranging from taxi fare and towing expenses to lost wages and child care costs.

- Residual Distributions: Class Members also have the option of registering for a payment $250 from distributions made from residual funds remaining in the Funds each program year, and because any residual funds cascade down from year to year, Class Members could receive up to $500 over the course of the Settlements.

- Rental Car/Loaner Programs: The Settling Defendants will provide free rental or loaner vehicles to Class Members exposed to the greatest risk of rupture when replacement parts are not available after a reasonable period of time.

- Customer Support Programs: The Settling Defendants will provide Class Members with prospective coverage for repairs and adjustments of current and replacement inflators, including the expense of parts and labor, for an extended period of time.

This is an outstanding result for the Classes. It achieves two of the primary objectives of the litigation: (1) it targets the significant safety risk that Takata's defective airbags pose to Class Members, via innovative, multifaceted Outreach Programs designed to encourage Class Members to bring their vehicles to dealerships for the Recall Remedy; and (2) it compensates Class Members for the economic damages they suffered, in a way that further incentivizes Class Members who still possess Subject Vehicles to have their dangerous airbag inflators replaced, reinforcing the public safety benefits of the Settlements.

To communicate these Settlements to the Classes, the Settlements propose robust and intensive direct mail, national media, and digital media Notice Programs designed and coordinated by media experts. These Notice Programs far exceed all applicable requirements of law, including Rule 23 and constitutional due process, to apprise Class Members of the pendency of the Action, the terms of the Settlements, and their rights to opt out of, or object to, the Settlements.

The proposed Settlements are fair, reasonable, and adequate. They have been reached after extensive arm's-length, intensely fought negotiations, conducted over the course of more than a year. And the Classes described in the Settlements satisfy all the requirements of Rule 23 for settlement purposes.

Accordingly, Plaintiffs seek preliminary approval of the Settlements and certification of the Classes for settlement purposes, and request, inter alia, that the Court order that notice of the Settlements be disseminated to the Classes, and that the Court schedule a Fairness Hearing to determine whether final approval of the Settlements should be granted. Proposed Preliminary Approval Orders for the respective Settlements are attached as exhibits to this motion and as Exhibit 7 to the Settlement Agreements.

BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background.

The Court is generally familiar with the facts giving rise to Plaintiffs' claims and the Settling Defendants' defenses. Plaintiffs reference such facts below to the extent pertinent to the issues raised in this motion.

In late 2014, Plaintiffs, on behalf of themselves and all others similarly situated, sued several automotive companies, including BMW, Ford, Honda, Mazda, Nissan, Subaru, and Toyota (the "Automotive Defendants"), and airbag suppliers Takata Corporation and TK Holdings, Inc. ("Takata"). Plaintiffs, who owned or leased vehicles manufactured or sold by the Automotive Defendants, alleged that their vehicles were equipped with defective airbags supplied by Takata. The airbags, Plaintiffs alleged, all share a common, uniform defect: the use of phase-stabilized ammonium nitrate, a notoriously volatile and unstable compound, as the propellant in their defectively designed inflators, which are metal canisters that are supposed to release gas to inflate an airbag cushion in the milliseconds following a crash. As a result of this common defect, the inflators within Takata's airbags have an unreasonably dangerous propensity to rupture and shoot metal shrapnel toward vehicle occupants.

Following numerous field ruptures of Takata's inflators that seriously injured or killed vehicle occupants, the Automotive Defendants began to recall vehicles equipped with such inflators. Honda initiated several narrow recalls from 2008 through 2012, claiming that the field ruptures resulted from a limited manufacturing defect. As field ruptures continued to occur, however, the recalls expanded significantly. From April 11, 2013 through May, 15, 2015, BMW, Ford, Honda, Mazda, Nissan, Subaru, and Toyota initiated and expanded recalls ultimately covering millions of vehicles. On May 18, 2015, Takata entered into a Consent Order

with NHTSA that required it to file Defect Information Reports, triggering recalls of almost 34 million inflators. Given the size of the recalls and a shortage of replacement inflators, NHTSA also entered a Coordinated Remedy Order to prioritize which vehicles should be repaired first. Takata's Consent Order has been amended several times, expanding the recall to all inflators with non-desiccated phase-stabilized ammonium-nitrate propellant, which includes approximately 60 million inflators, and setting a December 31, 2019 deadline for Takata to demonstrate the safety of its desiccated inflators, at which time NHTSA may require Takata to recall those inflators as well. The Coordinated Remedy Order also has been amended several times, and now divides vehicles into 12 priority groups to coordinate the schedule of repairing defective inflators. Priority 1 vehicles are the ones most at risk of experiencing a rupture.

Prior to the recalls, Plaintiffs allege that neither Takata nor the Automotive Defendants disclosed this common defect to Class Members. Instead, they represented that their products were safe. Plaintiffs alleged that they suffered several forms of economic damages as a result of purchasing defective airbags and vehicles that were inaccurately represented to be safe. Plaintiffs overpaid for their vehicles with defective airbags and did not receive the benefit of their bargain, because the vehicles and airbags were of a lesser standard and quality than represented. In addition, Plaintiffs suffered damages in the form of out-of-pocket expenses, including lost wages from taking time off work to bring their vehicles to dealerships for the recall, paying for rental cars and alternative transportation, and hiring child care while the recall remedy was being performed.

Beyond suffering these economic damages, millions of Class Members remain exposed to the unreasonable risk of serious injury or death posed by defective Takata inflators that have not been removed from their vehicles. Even though nationwide recalls have been underway for

more than three years, around 75% of the approximately 60 million recalled inflators in the United States have not yet been repaired. Although supply shortages are partly responsible for these low completion rates, NHTSA has also highlighted a lack of effective outreach programs from automotive companies.

B. Procedural History.

The following discussion recounts some of the major procedural events in this litigation. On October 27, 2014, eighteen plaintiffs[2] filed a class action complaint in *Craig Dunn, et al. v. Takata Corp., et al.*, No. 1:14-cv-24009 (S.D. Fla.) (the "Economic Loss Class Action Complaint"), asserting economic loss claims against the Automotive Defendants and Takata. The Judicial Panel on Multidistrict Litigation subsequently consolidated the *Dunn* action for pretrial proceedings with additional class and individual actions alleging similar or identical claims in *In re Takata Airbag Products Liability Litigation*, No. 1:15-md-02599-FAM (S.D. Fla.) (MDL 2599).

On March 17, 2015, the Court entered an Order Appointing Plaintiffs' Counsel and Setting Schedule, which designated Peter Prieto of Podhurst Orseck, P.A. as Chair Lead Counsel, David Boies of Boies Schiller and Flexner, LLP, and Todd A. Smith of Power Rogers & Smith, PC, as Co-Lead Counsel in the Economic Loss track; Curtis Miner of Colson Hicks Eidson as Lead Counsel for the Personal Injury track; and Roland Tellis of Baron & Budd P.C., James Cecchi of Carella Byrne Cecchi Olstein P.C., and Elizabeth Cabraser of Lieff, Cabraser, Heimann & Bernstein, LLP as Plaintiffs' Steering Committee members.

Plaintiffs filed an Amended Consolidated Class Action Complaint on April 30, 2015. On

[2] Craig Dunn, Pam Koehler, Zulmarie Rivera, Tru Value Auto Malls, LLC, David M. Jorgensen, Anna Marie Brechtell Flattmann, Robert Redfearn, Jr., Tasha R. Severio, Kenneth G. Decie, Gregory McCarthy, Nicole Peaslee, Karen Switkowski, Anthony D. Dark, Lemon Auto Sales, Inc., Nathan Bordewich, Kathleen Wilkinson, Haydee Masisni, and Nancy Barnett.

June 15, 2015, Plaintiffs filed a Second Amended Consolidated Class Action Complaint ("SACCAC"), which remains the operative pleading for Plaintiffs' economic loss claims.

On July 17, 2015, defendants Toyota, Ford, Subaru and Nissan filed a Joint Motion to Stay Based on the Primary Jurisdiction of the National Highway Traffic Safety Administration. The Court denied this motion on September 22, 2015. (Dkt. 737.)

On July 17, 2015, Takata and the seven Automotive Defendants each filed Motions to Dismiss Plaintiffs' SACCAC. The Court has ruled on almost all the Motions to Dismiss, granting them in part and denying them in part. (Dkt. 871; 1099; 1101; 1202; 1208; 1256; 1417.)

Extensive discovery has taken place in this case. Pursuant to the Court's initial case management order, discovery began almost immediately after creation of the MDL, in the spring of 2015. Over the past two years, the Defendants have produced more than 10 million pages of documents through discovery. Plaintiffs' counsel have dedicated a team of more than 40 attorneys to the laborious work of reviewing these documents, many of which are in Japanese, necessitating expensive and time-consuming translation, at great expense, which Plaintiffs have borne. The Defendants have deposed more than 70 class representatives, and Plaintiffs have deposed at least 45 witnesses of the Defendants. Depositions of individual employees of certain Automotive Defendants continue to be taken. Plaintiffs also have retained and engaged in substantial consultation with multiple experts on liability and damages issues in an effort to prepare the case for trial.

Meanwhile, the U.S. Department of Justice pursued a separate investigation of Takata. On January 13, 2017, Defendant Takata Corporation signed a criminal plea agreement in which it admitted, among other things, that it

> knowingly devised and participated in a scheme to obtain money and enrich Takata by, among other things, inducing the victim OEMs to purchase airbag

> systems from Takata that contained faulty, inferior, nonperforming, non-conforming, or dangerous PSAN inflators by deceiving the OEMs through the submission of false and fraudulent reports and other information that concealed the true and accurate test results for the inflators which the OEMs would not have otherwise purchased as they were.

U.S. v. Takata Corp., No. 2:16-cr-20810 GCS EAS, Dkt. No. 23 at 47 (E.D. Mich. Feb. 27, 2017). On the same day, an indictment of three Takata employees on related charges was unsealed. Takata entered a guilty plea to one count of wire fraud before U.S. District Judge George Caram Steeh, as part of a settlement with the U.S. Department of Justice. *See id.* at 2.

On March 10, 2017, the Automotive Defendants – Nissan, Ford, BMW NA, Toyota, Mazda, Subaru, and Honda – all filed cross-claims against Takata. (Dkt. 1444, 1445, 1446, 1451, 1452, 1453, 1454.) On April 28, 2017, Takata filed a Motion to Strike, Alternative Motion to Dismiss in Part and Memoranda of Law as to each of the Cross-Claims.

C. Settlement Negotiations.

Parallel to the hard-fought litigation track, preliminary settlement discussions began in early 2016, between Plaintiffs' counsel and Toyota's counsel, John P. Hooper of Reed Smith LLP. During these and subsequent negotiations, the parties discussed their relative views of the law and facts and potential relief for the proposed Class, and exchanged a series of counter-proposals for key conceptual aspects of a potential settlement. After months of negotiations between Plaintiffs' counsel and Toyota's counsel, the settlement discussions expanded to include additional Automotive Defendants, including BMW, Mazda, and Subaru. These multi-party discussions ultimately ended in an impasse in late 2016.

In early 2017, Plaintiffs' counsel and Toyota's counsel resumed direct negotiations and ultimately reached a preliminary agreement on March 21, 2017, signing a Memorandum of Understanding ("MOU") memorializing the essential terms of the Settlement. Over the next six

weeks, Plaintiffs' counsel intensely negotiated and reached agreements with counsel for BMW, Mazda, and Subaru. Plaintiffs' counsel's negotiations with counsel for BMW were aided by the Court-appointed mediator, Paul C. Huck, Jr. After the MOUs were signed, the parties engaged in intense negotiations regarding the specific terms of each Settlement Agreement, requiring Plaintiffs to engage in multi-party diplomacy, with a hybrid of individual negotiations with each Defendant, as well as combined sessions with multiple Defendants at later stages when it was constructive. The Settlement Agreements were signed on May 17, 2017. At all times, negotiations were adversarial, non-collusive, and at arm's length.

TERMS OF THE SETTLEMENTS

The terms of the Settlements are detailed in the Agreements, attached hereto as Exhibits A through D. The following is a summary of the material terms of the Settlements.

A. The Settlement Classes.

The Classes are opt-out classes under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The Class in each of the Settlements is defined in nearly identical fashion. The Class in the Toyota Settlement exemplifies them. It defines the Class as:

> (1) all persons or entities who or which owned and/or leased, on the date of the issuance of the Preliminary Approval Order, Subject Vehicles distributed for sale or lease in the United States or any of its territories or possessions; and (2) all persons or entities who or which formerly owned and/or leased Subject Vehicles distributed for sale or lease in the United States or any of its territories or possessions, and who or which sold or returned, pursuant to a lease, the Subject Vehicles after April 11, 2013 and through the date of the issuance of the Preliminary Approval Order. Excluded from this Class are: (a) Toyota, its officers, directors, employees and outside counsel; its affiliates and affiliates' officers, directors and employees; its distributors and distributors' officers and directors; and Toyota's Dealers and their officers and directors; (b) Settlement Class Counsel, Plaintiffs' counsel, and their employees; (c) judicial officers and their immediate family members and associated court staff assigned to this case; (d) Automotive Recyclers and their outside counsel and employees;

> and (e) persons or entities who or which timely and properly exclude themselves from the Class.

Exhibit D (§ II.A.8.).

"Subject Vehicles" are defined as BMW, Mazda, Subaru, or Toyota vehicles that "contain or contained Takata phase stabilized ammonium nitrate ('PSAN') inflators in their driver or passenger front airbag that (i) have been recalled, or (ii) shall be recalled or contain a desiccant and that may be subject to future recall as referenced in the National Highway Traffic Safety Administration's ('NHTSA') Consent Orders dated May 18, 2015 and November 3, 2015, and amendments thereto." An exhibit to each Settlement lists the Subject Vehicles that precisely define the scope of each Class. *E.g.*, Exhibit D at Exhibit 9.

Based on number of recalled vehicles reported by the Settling Defendants, Plaintiffs estimate that there are approximately 9.2 million members of the Toyota Class, 2.64 million members of the Subaru Class, 2.23 million members of the BMW Class, and 1.7 million members of the Mazda Class.

B. Settlement Funds.

The Settlements require the Settling Defendants to deposit a total of approximately $553 million,[3] less a 10% credit for their respective Rental Car/Loaner Programs, into separate non-reversionary Qualified Settlement Funds. The Settling Defendants have agreed to deposit approximately 12% of the full Settlement Amount within 30 days of this Court's Preliminary Approval of the Settlements, to immediately fund the first year of the Outreach Program. The rest of the Settlement Fund payments will be made over a prescribed four-year schedule set forth in the Settlements. *See*, *e.g.*, Exhibit A (§ III.A.2.).

[3] The separate Settlement Amounts for each Settling Defendant are: $278.5 million for Toyota; $131 million for BMW; $75,805,050 for Mazda; and $68,262,257 for Subaru.

The Settlement Funds will be used to pay for: (a) the Outreach Programs; (b) an Out-of-Pocket Claims Process to compensate Class Members for out-of-pocket expenses relating to the Takata Airbag Inflator Recall; (c) residual cash payments to Class Members who have not incurred reimbursable out-of-pocket expenses and who register for residual payments, to the extent that there are residual amounts remaining; (d) the Rental Car/Loaner Programs, which will provide rental or loaner vehicles to Class Members with Priority 1 vehicles at no cost when the Recall Remedy cannot be performed for thirty days or longer; (e) notice and related costs; (f) claims administration, including expenses associated with the Settlement Special Administrator; (g) Court-awarded Settlement Class Counsel's fees and expenses; and (h) Court-awarded incentive awards to Class Representatives. *See, e.g.*, Exhibit A (§ III.A.3.).

C. Outreach Programs.

A significant feature of each Settlement obligates each Settling Defendant to create an intensive, innovative Outreach Program aimed at maximizing the removal of dangerous inflators from Class Members' vehicles. The Outreach Programs will utilize traditional and non-traditional media well beyond the methods currently used by the Settling Defendants, which thus far have resulted in unsatisfactory recall completion rates below 35%, leaving millions of Class Members exposed to the continuing unreasonable danger of rupturing inflators. The methods of outreach will include: (a) direct contact of Class Members via U.S. Mail, telephone, social media, e-mail, and texting; (b) contact of Class Members by third parties (e.g., independent repair shops); and (c) multi-media campaigns, such as through print, television, radio, and/or the internet. *See, e.g.*, Exhibit A (§ III.B.).

The budget for the Outreach Programs is set at no more than 33% of the Settlement Amount, meaning that over $182 million can be invested in reaching Class members and

encouraging them to bring their vehicles to dealerships for the Recall Remedy. The Settlement Special Administrator will oversee and administer the Outreach Programs, and will engage industry-leading consultants with specialized knowledge of different outreach methods to adjust the Outreach Programs to maximize their effectiveness. In this way, the Outreach Programs are designed to be flexible and nimble, inclined to redirect resources to methods that prove most effective at encouraging Class Members to bring their vehicles to dealerships for the Recall. The Settlement Special Administrator is also empowered to resolve disputes between the Parties about how best to design and implement the Outreach Programs.

Underscoring the public safety objective of the Settlements, the Settling Defendants have agreed to not wait until Final Approval and immediately fund and implement the first 12 months of the Outreach Programs within 30 days of Preliminary Approval.

D. Out-Of-Pocket Claims Process.

Another critical feature of each Settlement is an Out-of-Pocket Claims Process, which will reimburse Class Members for reasonable out-of-pocket expenses incurred relating to the Takata Airbag Inflator Recalls. *See, e.g.*, Exhibit A (§ III.D.). There are two primary advantages to the Claims Process: first, it permits Class Members to recover for the reasonable expenses they actually incurred, without limiting recovery to certain pre-determined categories or amounts; and second, it furthers the public-safety goal of incentivizing Class Members who still own or lease Subject Vehicles to bring their vehicles to a dealership for the Recall Remedy, because having the Recall Remedy performed is a prerequisite to eligibility for such a payment. The Registration/Claim Form is straightforward, simple, and not burdensome. *See, e.g.*, Exhibit A at Exhibit 12 thereto. They will be provided to Class Members via the Settlement website and at dealerships when they bring their vehicles there for the Recall Remedy.

The Settlement Special Administrator will oversee the Out-of-Pocket Claims Process, including the determination of types of reimbursable costs and the eligibility of claims for reimbursement. The Parties agreed to recommend several common types of recall-related expenses for reimbursement eligibility, all of which are identified on the Registration/Claim Form:

(i) reasonable unreimbursed rental car and transportation expenses, after requesting and while awaiting the Recall Remedy from an authorized dealership;

(ii) reasonable towing charges to an authorized dealership for completion of the Recall Remedy;

(iii) reasonable childcare expenses necessarily incurred during the time in which the Recall Remedy is being performed on the Subject Vehicle by an authorized dealership;

(iv) reasonable unreimbursed out-of-pocket costs associated with replacing driver's or passenger's front airbags containing Takata PSAN inflators;

(v) reasonable lost wages resulting from lost time from work directly associated with the drop off and/or pickup of his/her Subject Vehicle to/from an authorized dealership for performance of the Recall Remedy; and

(vi) reasonable fees incurred for storage of a Subject Vehicle after requesting and while awaiting a Recall Remedy part.

See, e.g., Exhibit A (§ III.D.3.). In addition to these categories of expenses, the Settlement Special Administrator is empowered to approve and pay for other reimbursable claims that the Settlement Special Administrator deems to be a reasonable out-of-pocket expense, and Class Members are invited to submit claims for such expenses. *Id.*, § III.D.2.

As far as the timing of payments to Class Members, the first set of reimbursements to eligible Class Members who have completed and filed a Registration/Claim Form will be made on a rolling basis by the Settlement Special Administrator no later than 180 days after the

Effective Date. Reimbursements for following years will be made on a rolling basis as claims are submitted and approved.

For the reimbursements that occur in years one through three, reimbursements will be made on a first-in-first-out basis until the Settlement Fund is depleted for that year. If there are no more funds to reimburse eligible Class Members in that particular year, then those Class Members will be moved to subsequent years for reimbursement. For reimbursements to eligible Class Members that are to occur in year four, the last year of the reimbursement process, out-of-pocket-expense payments will be made for the amounts approved by the Settlement Special Administrator, unless the approved reimbursements to eligible Class Members exceed the amount of the Settlement Fund remaining. If this event occurs, then reimbursements will be made on a *pro rata* basis until the available amount is exhausted.

E. Residual Distribution Payments

The settlement program offers Class Members an additional way to receive a cash payment. Rather than submit a claim for out-of-pocket expenses, Class Members have the option of registering for a Residual Distribution of up to $250 from the Settlement Fund. Residual Distributions will be funded with the monies remaining in the fund at the end of each of the four settlement program years, after all payments are made for the Outreach Program and approved claims for out-of-pocket expenses. *See, e.g.*, Exhibit A (§ III.E.).

Class Members are eligible for a Residual Distribution if they just registered for a residual payment or if they submitted claims in that year, or prior program years, that were previously rejected. Subject to certain exceptions, funds remaining after payment of the maximum residual payment to all Class Members in any given year shall be rolled over into the following year's settlement program. The settlement program will last for at least four years.

The settlement is structured to maximize cash payments to Class Members. Any funds that remain at the end of the last settlement program year after the Residual Distribution, if any, is made, shall, unless it is administratively unfeasible, be distributed on a *per capita* basis to Class Members who: (a) previously submitted claims that were paid; (b) previously submitted claims that were rejected and have not received any prior claims payments; or (c) registered for a residual payment only. The residual payment from this last settlement program year is limited to $250 per Class Member, as well. Thus, it is possible for a Class Member who simply registers for Residual Distribution payments to receive $500 over the course of the Settlement—$250 from the initial Residual Distribution at the end of the year the Class Member registers, and $250 from the final Residual Distribution at the end of the Settlement program.

Finally, if there are any funds remaining in the Settlement Fund after all of the foregoing payments have been made through the last program year, those funds are to be distributed to all Class Members on a *per capita* basis, unless it is administratively unfeasible. If the Settlement Special Administrator determines it to be administratively unfeasible (e.g., because the cost of distributing the remaining funds would consume them), then those funds shall be distributed *cy pres*, with the Court's approval.

F. Rental Car/Loaner Programs

Another aspect of the Settlement relief – the Rental Car/Loaner Program – is designed to address difficulties and additional costs certain Class Members may face in getting the Recall Remedy performed on their vehicles due to supply shortages of replacement parts. Where replacement parts are unavailable, and the replacement of recalled inflators is delayed for an extended period as a result, Class Members who own or lease recalled vehicles that NHTSA has identified as the highest priority for repair (so-called "Priority Group I vehicles" under the

NHTSA Coordinated Remedy Order) shall be entitled to use a loaner or rental vehicle in the interim at no charge. *See, e.g.*, Exhibit A (§ III.C.). Commencing no later than thirty calendar days after issuance of the Preliminary Approval Order, this additional benefit furthers public safety and reduces a potential impediment to Class Members having the Recall Remedy performed on their vehicle.

The program is designed as follows. Class Members are directed by the Outreach effort to contact their applicable automobile dealer to request the replacement of the Takata airbag inflator for the Recall Remedy. When they do so, if the dealer informs the Class Member that it does not have the Recall Remedy parts in stock, the Class Member can request a rental/loaner vehicle. If the Class Member has a Priority Group I vehicle – which are listed on the NHTSA website and will be advertised – and the dealer cannot obtain the necessary Recall Remedy parts in fewer than 30 days, then a rental/loaner vehicle must be made available to the Class Member, at no charge, until a Recall Remedy is available for the Class Member's Subject Vehicle. The Class Member must, of course, provide adequate proof of insurance, and if a rental car (as opposed to a loaner) is provided, satisfy the applicable rental car company's guidelines. Upon being notified by the dealer that the replacement parts are ready, Class Members who obtain a rental/loaner vehicle through the program must promptly bring their Subject Vehicles to the dealer for performance of the Recall Remedy and return the rental/loaner vehicle as well.

In exchange for providing the Rental Car/Loaner Program, each Settling Defendant shall receive a credit of 10% of the Settlement Amount to which it has agreed. One quarter of the credit shall be applied to each of the four annual payments that the Settling Defendant must make into the Settlement Fund, such that the full credit is realized at the time of the Year Four Payment.

The Settlement Special Administrator is charged with monitoring the Settling Defendants' compliance with the Rental Car/Loaner Program. Every six months, each Settling Defendant must certify to the Settlement Special Administrator that it is complying with the program, and the Settlement Special Administrator is authorized to audit and confirm the Settling Defendants' compliance.

G. Customer Support Programs

In addition to the monetary elements of the Settlements, each Settling Defendants has also agreed to provide Class Members with a Customer Support Program that covers prospective coverage for repairs and adjustments (including parts and labor) necessary to correct any defects in the materials or workmanship of (1) the Takata PSAN inflators contained in the driver or passenger front airbag modules of Subject Vehicles, or (2) replacement driver or passenger inflators installed pursuant to the Takata Airbag Recall in the Subject Vehicles. *See, e.g.*, Exhibit A (§ III.G.). This benefit covers two important circumstances where Class Members are at risk of incurring additional expenses in the future: where their vehicle's airbag contains a not-yet-recalled Takata PSAN inflator (e.g., a vehicle designated with a low priority level, or vehicle with a desiccated inflator), and where they had the Recall Remedy performed, but the new inflator is in any way defective or breaks.

Eligible Class Members may begin seeking the Customer Support Program benefits 30 days after the Court's issuance of the Final Order, a date chosen to give the Settling Defendants sufficient lead time to coordinate with their dealers regarding how to implement this benefit. The Customer Support Program benefit will be automatically transferred and will remain with the Subject Vehicle regardless of ownership. It does not apply, however, if a replacement airbag

inflator deploys normally. Nor does the Customer Support Program extend to inoperable vehicles and vehicles with a salvaged, rebuilt or flood-damaged title.

The duration of the Customer Support Program benefit for each Class Member depends on whether the Recall Remedy has already been performed and whether the Subject Vehicle contains a desiccated Takata PSAN inflator. The Settlements provide as follows:

(i) If the vehicle has been recalled and the Recall Remedy *has* been completed as of the date of the Order, the program will last for 10 years from the date the Recall Remedy was performed, subject to a maximum limit of 150,000 miles from the date the vehicle was originally sold or leased ("Date of First Use"), but not less than 75,000 miles from the date the Recall Remedy was performed, whichever is later. In any event, each eligible vehicle will receive no less than two years of coverage from the date of the Order.

(ii) If the vehicle has been or will be recalled and the Recall Remedy has *not* been completed as of the date of the Order, then the program will last for 10 years from the Date of First Use or the date the Recall Remedy was performed, subject to a maximum limit of 150,000 miles from the Date of First Use, but not less than 75,000 miles from the date the Recall Remedy was performed. In any event, each eligible vehicle will receive no less than two years of coverage from the date of the Order or from the date the Recall Remedy was performed, whichever is later.

(iii) If the vehicle contains a desiccated Takata PSAN inflator in the driver or passenger front airbag as original equipment, then the program will last for 10 years, measured from the Date of First Use, subject to a maximum limit of 150,000 miles from the Date of First Use. In any event, each eligible vehicle will receive no less than two years of coverage from the date of the Order.

(iv) Further, in the event desiccated Takata PSAN inflators in the driver or passenger front airbag modules in any of the Subject Vehicles are recalled in the future, then the program will be extended to last for 10 years, from the date such future Recall Remedy is performed, subject to a maximum limit of 150,000 miles, from the Date of First Use, but not less than 75,000 miles from the date the Recall Remedy was performed. In any event, each eligible vehicle will receive no less than two years of coverage from the date of the future Recall Remedy.

H. Releases

Upon entry of final judgment, Class Members agree to give a broad release to the "Released Parties," defined essentially as the Settling Defendants and all related entities and persons, of all claims "regarding the subject matter of the Actions,"

> arising from, related to, connected with, and/or in any way involving the Actions, the Subject Vehicles' driver or passenger front airbag modules containing desiccated or non-desiccated Takata PSAN inflators, and any and all claims involving the Takata Airbag Inflator Recalls that are, or could have been, alleged, asserted or described in the Economic Loss Class Action Complaint, Amended Economic Loss Consolidated Class Action Complaint, the Second Amended Consolidated Class Action Complaint, the Actions or any amendments of the Actions.

Exhibit A (§ VII.B.). There are two important exceptions carved from the releases: for personal injury and physical property damage claims and for claims against certain "Excluded Parties."

First, the Settlement Agreements provide that "Plaintiffs and Class Members are *not* releasing and are expressly reserving all rights relating to claims for personal injury, wrongful death or actual physical property damage arising from an incident involving a Subject Vehicle, including the deployment or non-deployment of a driver or passenger front airbag with a Takata PSAN inflator." Exhibit A (§ VII.D.) (emphasis added); Exhibit B (§ VII.E.); Exhibit C (§ VII.E.); Exhibit D (§ VII.E.).

Second, each Settlement Agreement also reserves and does not release claims against "Excluded Parties," who are defined as Takata (and all related entities and persons) and, with limited specific exceptions, all other automotive manufacturers and distributors (and all their related entities and persons), specifically including other, non-settling Defendants in the Action. *E.g.*, Exhibit A (§ VII.E.). Those limited specific exceptions apply to particular joint ventures that Mazda, Toyota, and Subaru had with another automobile manufacturer or distributor for specific vehicle lines, such that claims with respect to those vehicles are being released.

- The Mazda Class also releases Ford Motor Company and its related entities, but only "with respect to the Mazda B-Series truck," and Auto Alliance International, Inc. and its related entities, but only "with respect to the Mazda6 and any other Mazda-brand vehicles." Exhibit B (§ VII.C.).

- The Toyota Class also releases General Motors and related corporate entities, but only "with respect to the Pontiac Vibe." Exhibit D (§ VII.C.).

- The Subaru Class also releases General Motors and related entities but only "with respect to the 2005 and 2006 Saab 9-2X vehicles," as well as Saab Automobile AB and related entities. Exhibit C (§ VII.C.).

Each Settlement Agreement makes clear that it does *not* release any claims against these other automotive companies "with respect to any other vehicles."

I. Notice Programs

The Settlements contain robust Class notice programs designed to satisfy all applicable laws, including Rule 23 and constitutional due process. Notifying Class Members of the Settlements, in both English and Spanish, will be accomplished through a combination of the Direct Mailed Notices, Publication Notice (in newspapers, magazines and/or other media outlets), Radio Notice, notice through the Settlement website (www.AutoAirbagSettlement.com), a Long Form Notice, and other forms of notice, such as banner notifications on the internet. The details of each form of notice are set forth in the Declaration of Cameron R. Azari, Esq., of Epiq Systems, Inc., the proposed Settlement Notice Administrator. *See* Exhibit 11 to the Settlement Agreements.

The Settlements accomplish a reduction in administrative expenses by employing a single Settlement Notice Administrator to issue notice for all four settlements, and utilizing a consolidated form of Publication Notice, agreed to by Plaintiffs and the four Settling Defendants in the form substantially similar to the one attached to the Agreements as Exhibit 8. Similarly, the Settlement Notice Administrator shall establish a combined Settlement website that will

inform Class Members of the terms of each Settlement Agreement, their rights, dates and deadlines and related information. The website shall include, in .pdf format, materials agreed upon by the Parties and/or required by the Court, including the Registration/Claim Form, both in English and Spanish.

Potential Class Members shall also receive Direct Mailed Notice, substantially in the form attached as Exhibit 2 to each Settlement Agreement, by U.S. Mail. The Direct Mailed Notice – which is similar in form across Settlements but customized to each Settling Defendant's automobiles – informs potential Class Members of the various ways they can obtain the Long Form Notice (via the website, mail or a toll-free telephone number), and the general structure of the Settlement. The Settlement Notice Administrator must also re-mail any Direct Mailed Notices returned by the U.S. Postal Service with a forwarding address no later than the deadline found in the Preliminary Approval Order and, for returned mail without a forwarding address, research better addresses and promptly re-mail copies of the applicable notice to any better addresses.

The Settlement Notice Administrator shall also establish a toll-free telephone number that will provide settlement-related information to Class Members using an Interactive Voice Response system, with an option to speak with live operators.

The Long Form Notices, attached as Exhibit 6 to the Settlement Agreements, also follow a standardized form, but are Defendant specific. They shall advise Class Members of the general terms of the applicable Settlement, including information on the identity of Class Members, the relief to be provided, and what claims are to be released; notify them of and explain their rights to opt out of or object to the Settlement; disclose the amounts of attorney's fees and expenses that Settlement Class Counsel may seek, and individual awards to the Plaintiffs, and shall explain

that such fees and expenses – as awarded by the Court – will be paid from the Settlement Fund. The Long Form Notice will also include the Registration/Claim Form, which is tailored to each Settlement. The Registration/Claim Form (attached as Exhibit 12 to each Settlement Agreement) informs the Class Member that the form must be fully completed and timely returned within the Claim Period to be eligible to obtain monetary relief pursuant to this Agreement.

To comply with the Class Action Fairness Act, the Settlement Notice Administrator shall also send to each appropriate State and Federal official the materials specified in 28 U.S.C. § 1715 and otherwise comply with its terms. The identities of such officials and the content of the materials shall be mutually agreeable to the Parties, through their respective counsel.

J. Settlement Administration

The Settlement Special Administrator is charged with administering all aspects of the Settlements, with the exception of the Notice Program, which the Settlement Notice Administrator shall handle, in coordination with the Settlement Special Administrator. The Parties agree that Patrick A. Juneau, of Juneau David APLC, should serve as Settlement Special Administrator, subject to the Court's approval, for each of the four Settlements. His responsibilities will include (1) overseeing and administering the Outreach Programs, (2) auditing and confirming Settling Defendants' compliance with the Rental Car/Loaner Programs, (3) overseeing and administering the Out-of-Pocket Claims Process and Residual Distribution, a function which requires the exercise of discretion to determine the reasonableness and eligibility of Class Members' claims for out-of-pocket expenses, and to deny any fraudulent claims. The Settlements achieve a further reduction in administrative expenses by employing a single Settlement Special Administrator to undertake these responsibilities.

K. Attorneys' Fees and Incentive Awards for Class Representatives

The Parties did not begin to negotiate attorneys' fees and expenses until after agreeing to the principal terms set forth in the Settlement Agreement. Each Settlement Agreement provides that Settlement Class Counsel agree to limit their request to the Court for attorneys' fees and expenses to no more than 30% of the applicable Settlement Amount.[4] Likewise, the Settling Defendants agree not to oppose such a request. Attorney's fees and expenses awarded to Settlement Class Counsel for work done on behalf of each Class will be paid from each Settlement Fund.

The Parties agreed that the Court's resolution of the issue of attorneys' fees and expenses shall have no bearing on the Settlement Agreements. In particular, an Order relating to attorneys' fees or expenses shall not operate to terminate or cancel the Settlement Agreements, or affect or delay their Effective Dates.

Finally, Plaintiffs' counsel may petition the Court for incentive awards of up to $5,000 per Class Representative in order to compensate the Plaintiffs for their efforts on behalf of the Classes.

MEMORANDUM OF LAW

A. The Legal Standard for Preliminary Approval

Rule 23(e) requires judicial approval for the compromise of claims brought on a class basis. "Although class action settlements require court approval, such approval is committed to the sound discretion of the district court." *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th

[4] This percentage is in keeping with prevailing law and practice in this Circuit. *See, e.g., Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1365-66 (S.D. Fla. 2011); *Almanazar v. Select Portfolio Servicing, Inc.*, No. 14-cv-22586-FAM, 2016 WL 1169198, *4 (S.D. Fla. Mar. 25, 2016).

Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g., Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) (citing cases).

The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness." 4 NEWBERG § 11.26; *Almanazar v. Select Portfolio Servicing, Inc.*, No. 14-cv-22586-FAM, 2015 WL 10857401, *1 (S.D. Fla. Oct. 15, 2015). "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, No. 09-cv-60646, 2010 WL 2401149, *2 (S.D. Fla. June 15, 2010). "Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness." *Almanazar*, 2015 WL 10857401, at *1. *See* MANUAL FOR COMPLEX LITIGATION, Third, § 30.42 (West 1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

When determining whether a settlement is ultimately fair, adequate and reasonable, courts in this circuit have looked to six factors: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986. Courts have, at times, engaged in a "preliminary evaluation" of these factors to determine whether the settlement falls within the range of reason at the preliminary approval stage. *See*, *e.g.*, *Smith*, 2010 WL 2401149 at *2.

The Court's grant of Preliminary Approval will allow all Class Members to receive notice of the Settlements' terms, and of the date and time of the Fairness Hearing at which Class Members may be heard, and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented by the Parties. *See* MANUAL FOR COMPL. LITIG., §§ 13.14, § 21.632.

Neither formal notice nor a hearing is required at the preliminary approval stage; the Court may grant such relief upon an informal application by the settling parties, and may conduct any necessary hearing in court or in chambers, at the Court's discretion. *Id.* § 13.14.

B. These Settlements Satisfy the Criteria for Preliminary Approval.

Each of the relevant factors weighs in favor of Preliminary Approval of these Settlements. First, the Settlements were reached in the absence of collusion, and are the product of good-faith, informed and arm's-length negotiations by competent counsel. Furthermore, a preliminary review of the factors related to the fairness, adequacy and reasonableness of the

Settlements demonstrates that the Settlements fit well within the range of reasonableness, such that Preliminary Approval is appropriate.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiffs maintain that the claims asserted are meritorious, that any motion for class certification would prove successful, and that Plaintiffs would prevail if this matter proceeded to trial. The Settling Defendants, however, maintain that Plaintiffs' claims are unfounded, and cannot be maintained as a class action. The Settling Defendants deny any potential liability, and have shown a willingness to litigate Plaintiffs' claims vigorously.

The Parties have concluded that the benefits of settlement in this case outweigh the risks attendant to continued litigation, which include, but are not limited to, the time and expenses associated with proceeding to trial, the time and expenses associated with appellate review, and the countless uncertainties of litigation, particularly in the context of a large and complex multi-district litigation.

1. These Settlements are the product of good-faith, informed, and arm's-length negotiations.

A class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton*, 559 F.2d at 1330; *see also Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 318-19 (S.D. Fla. 2005) (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

These Settlements are the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual

issues of these cases. The Parties engaged in extensive, adversarial negotiations for more than a year, exchanging countless proposals while the litigation continued on a parallel track. These negotiations were conducted in the absence of collusion.

Furthermore, counsel for each party are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Counsel zealously represented their clients' interests through protracted litigation before this Court for well over two years.

In negotiating these Settlements in particular, Settlement Class Counsel had the benefit of years of experience and a familiarity with the facts of this Action as well as with other cases involving similar claims. Settlement Class Counsel conducted a thorough investigation and analysis of Plaintiffs' claims and the Settling Defendants' defenses, and engaged in extensive formal discovery with the Settling Defendants. Settlement Class Counsel's review of that extensive discovery enabled them to gain an understanding of the evidence related to central questions in the case, and prepared counsel for well-informed settlement negotiations. *See Francisco v. Numismatic Guaranty Corp. of America*, 2008 WL 649124, *11 (S.D. Fla. Jan. 31, 2008) (stating that "Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation" where counsel conducted two 30(b)(6) depositions and obtained "thousands" of pages of documentary discovery).

2. The facts support a preliminary determination that the Settlements are fair, adequate, and reasonable.

As noted, this Court may conduct a preliminary review of the *Bennett* factors to determine whether the Settlements fall within the "range of reason" such that notice and a final hearing as to the fairness, adequacy, and reasonableness of the Settlements are warranted.

(a) Likelihood of success at trial

While Plaintiffs and Settlement Class Counsel are confident in the strength of their case, they are also pragmatic in their awareness of the various defenses available to the Settling Defendants, and the risks inherent to litigation. The Settling Defendants have claimed that they were deceived by Takata as to the safety of its inflators, and Takata recently pleaded guilty to a count of wire fraud based on testing results provided to certain OEMs. The Settling Defendants have argued that these charges, which portray them as "victims" and they have described as a "game changer," absolve them of any liability. The Settling Defendants have also challenged Plaintiffs' damages theories. Based on the discovery that has been conducted to date, Plaintiffs believe that they could prevail in a litigated class certification battle. Yet the Settling Defendants would assert numerous arguments against certification of all or parts of the Classes, which present risks. Moreover, even if Plaintiffs were successful, the Settling Defendants would inevitably seek interlocutory review of class certification rulings via Rule 23(f) in the Court of Appeals, delaying the progress towards trial.

The success of Plaintiffs' claims in future litigation turns on these and other questions that are certain to arise in the context of motions for summary judgment and at trial. Protracted litigation carries inherent risks that would necessarily have delayed and endangered Class Members' monetary recovery. Even if Plaintiffs prevailed at trial against each of the Settling Defendants, any recovery could be delayed for years by an appeal. *See Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

This Settlement provides substantial relief to Class Members and addresses an extraordinary national public safety crisis without further delay. The fact is that settlement will speed up the recall and provide benefits to the Class Members far sooner than a litigated

outcome. And some of those benefits are ones which the Settling Defendants could not have been compelled to deliver solely through litigation. Under the circumstances, Plaintiffs and Settlement Class Counsel appropriately determined that the Settlement reached with the Settling Defendants outweighs the risks of continued litigation.

(b) Range of possible recovery and the point on or below the range of recovery at which a settlement is fair.

When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.*

Courts have determined that settlements may be reasonable even where Plaintiffs recover only part of their actual losses. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"). "The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable." *Lipuma*, 406 F. Supp. 2d at 1323.

Settlement Class Counsel have a thorough understanding of the practical and legal issues they would continue to face litigating these claims against the Settling Defendants. In this case, Plaintiffs face a number of serious challenges, including class certification and summary judgment. The approximately $553 million recovery, along with the Customer Support Programs, are outstanding results given the complexity of the Action and the significant barriers that stand between the present juncture of the litigation and final judgment: *Daubert* challenges to damage experts' methodologies; class certification; interlocutory Rule 23(f) appeal of class certification; motions for summary judgment; trial; and post-trial appeals.

The approximately $553 million value of the Settlements alone represent more than 50% of Plaintiffs' and Class Members' estimated damages recovery under a method of calculating damages that rests on the prices the Settling Defendants paid for and marked up Takata airbags.[5] This method of calculating damages has been sustained against a *Daubert* challenge in a similar automotive defect class action. *See In re Myford Touch Consumer Litig.*, No. 13-CV-03072-EMC, 2016 WL 7734558, at *5 (N.D. Cal. Sept. 14, 2016). The additional value of the Customer Support Programs further increases the range of recovery as a percentage of the possible damages that Plaintiffs and Class Members could recover if they were to prevail all the way through trial and on appeal.

By any reasonable measure, this recovery is a significant achievement given the obstacles that Plaintiffs faced and continue to confront in the litigation. Given the substantial benefits that these Settlements provide to Class Members and the extraordinary public safety crisis that the Settlements aim to address, the Settlements are fair and represent a reasonable recovery for the Classes in light of the Settling Defendants' defenses, and the challenging and unpredictable path of litigation Plaintiffs would have faced absent a settlement.

(c) Complexity, expense and duration of litigation.

The traditional means for handling claims like those at issue here would unduly tax the court system, require a massive expenditure of public and private resources, and ultimately would be impracticable. The Settlements are the best vehicle for Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Ongoing litigation would

[5] Alternative methods for calculating damages, many of which would yield damages far greater than a conservative method based on the prices of airbag modules, are available to Plaintiffs as well. Of course, if this case were to proceed to trial, Plaintiffs would not be limited to the most conservative measure of damages, and instead could pursue these alternative methodologies.

involve substantial, expensive fact and expert discovery, lengthy additional pretrial proceedings in this Court and the appellate courts and, ultimately, a trial and appeal. Absent the Settlements, the Action would likely continue for two or three more years, at a minimum.

(d) Stage of the proceedings.

Courts consider the stage of proceedings at which settlement is achieved "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324.

Plaintiffs settled the Action with the benefit of approximately more than 10 million pages of documents produced thus far in discovery, at least 45 depositions of Defendant witnesses, and extensive discussions with experts and consultants. As noted, review of those documents and depositions positioned Settlement Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and prospects for success at class certification, summary judgment and trial. *Id.*; *see also Numismatic Guaranty Corp.*, 2008 WL 649124 at *11. So too has the process of defending the depositions of over 70 class representatives, which has afforded Settlement Class Counsel insights into issues bearing on class certification and damages.

C. Preliminary Certification of the Settlement Classes Is Appropriate.

For settlement purposes, Plaintiffs respectfully request that the Court certify the Settlement Classes defined above and in each of the Agreements. "A class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks omitted). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable

management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Preliminary certification of a nationwide class for settlement purposes permits notice of the proposed Settlement to issue to the class to inform class members of the existence and terms of the proposed Settlement, of their right to be heard on its fairness, of their right to opt out, and of the date, time and place of the fairness hearing. *See* MANUAL FOR COMPL. LITIG., §§ 21.632, 21.633. For purposes of these Settlements only, the Settling Defendants do not oppose class certification. For the reasons set forth below, certification is appropriate under Rules 23(a) and (b)(3).

Certification under Rule 23(a) requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Under Rule 23(b)(3), certification is appropriate if the questions of law or fact common to the members of the class predominate over individual issues of law or fact and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The numerosity requirement of Rule 23(a) is satisfied because each Settlement Class consists of millions of people throughout the United States, and joinder of all such persons is impracticable. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area").

"[C]ommonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc.*, 568 F.3d

1350, 1355 (11th Cir. 2009) (internal quotation marks omitted); *see also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001) (same). Here, the commonality requirement is satisfied because there are many questions of law and fact common to the Settlement Classes that center on the Settling Defendants' conduct in manufacturing and selling vehicles equipped with defective Takata airbags while representing that those vehicles were safe, as alleged in the operative Second Amended Consolidated Class Action Complaint. *See In re Checking Account Overdraft Litig.*, 275 F.R.D. 666 (S.D. Fla. 2011).

For similar reasons, Plaintiffs' claims are reasonably coextensive with those of the absent Class Members, such that the Rule 23(a)(3) typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the class members"). Plaintiffs are typical of absent Class Members because they were subjected to the same conduct of the Settling Defendants and claim to have suffered from the same injuries, and because they will equally benefit from the relief provided by the Settlement.

Plaintiffs also satisfy the adequacy of representation requirement. Adequacy under Rule 23(a)(4) relates to (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. *Fabricant*, 202 F.R.D. at 314. The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Emp. Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiffs' interests are

coextensive with, and not antagonistic to, the interests of the Classes, because Plaintiffs and absent Class Members have an equally great interest in the relief offered by the Settlements, and absent Class Members have no diverging interests. Further, Plaintiffs are represented by qualified and competent counsel with extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Settlement Class Counsel have devoted substantial time and resources to vigorous litigation of the Action from inception through the date of the Settlement.

The predominance requirement of Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks omitted). Plaintiffs satisfy the predominance requirement because liability questions common to all Class Members substantially outweigh any possible issues that are individual to each Settlement Class Member. The salient evidence necessary to establish Plaintiffs' claims is common to both the Class Representatives and all members of the Classes – they would all seek to prove that the Settling Defendants' vehicles have common defects and that the Settling Defendants' conduct was wrongful. And the evidentiary presentation changes little if there are 100 Class members or 15,000,000: in either instance, Plaintiffs would present the same evidence of the Settling Defendants' marketing and promised warranties, and the same evidence of the Subject Vehicles' alleged defects. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) ("[I]f common issues truly predominate over individualized issues in a lawsuit, then 'the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance

or quantity of evidence offered.'") (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 322 (5th Cir. 1978)).

Furthermore, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). For these reasons, the Court should certify the Classes defined in the Settlements.

D. The Court Should Approve the Proposed Notice Programs Because They Are Constitutionally Sound.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPL. LITIG., § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co*., 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* MANUAL FOR COMPL. LITIG., § 21.312 (listing relevant information).

The proposed Notice Programs satisfy all of these criteria. As recited in the Settlements and above, the Notice Programs will inform Class Members of the substantive terms of the Settlements, will advise Class Members of their options for opting-out or objecting to the Settlements, and will direct them where to obtain additional information about the Settlements.

Moreover, the Notice Programs were designed and are being implemented by one of the most respected Notice experts in the country, Cameron Azari of Epiq Systems, Inc.

In his declaration, attached as Exhibit 11 to the Settlement Agreements, Mr. Azari provides detailed information about the design and scope of the Notice Programs, which Epiq Systems will administer. As Mr. Azari states, the programs are "the best practicable notice under the circumstances of this case[.]" Exhibit 11, ¶¶ 12, 60. Among other things, the programs include direct mail, the best possible form of notice (*id.*, ¶¶ 21-25), and with the addition of broadcast media, print publications and online banners, the notice is "estimated to reach at least 95% of all U.S. Adults aged 18+ who own or lease one of the Subject Vehicles" (*id.*, ¶ 20). Such a program is designed to exceed the requirements of constitutional due process. *Id.*

Importantly, the Notice program also targets a Spanish-speaking audience, with placements in Spanish-language print publications, magazines, radio, and online. *See id.*, ¶¶ 14, 25, 26, 27. Likewise, the Direct Mail Notices and Long Form Notices will be available in Spanish on the website. *Id.*, ¶ 56.

Therefore, the Court should approve the Notice Programs and the form and content of the Notices appended as Exhibits 2, 6, and 8 of the Settlement Agreements.

E. <u>The Court Should Schedule a Fairness Hearing.</u>

The last step in the Settlement approval process is a Fairness Hearing, at which the Court will hear all evidence and argument necessary to make its final evaluation of the Settlements. Proponents of the Settlements may explain the terms and conditions of the Settlements, and offer argument in support of final approval. The Court will determine at or after the Fairness Hearing whether the Settlement should be approved; whether to enter a final order and judgment under Rule 23(e); and whether to approve Class Counsel's application for attorneys' fees and

reimbursement of costs and expenses and the request for Service Awards for the Class Representatives.

Plaintiffs request that the Court schedule the Fairness Hearing for a full day during the week of October 25, 2017, if that is convenient for the Court. Plaintiffs will file their motion for final approval of the Settlements, and Class Counsel will file their Fee Application and request for Service Awards for Class Representatives, no later than 45 prior to the Fairness Hearing.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order that:

1. Grants preliminary approval to each of the Settlements;

2. Preliminarily certifies the proposed Classes defined in the Settlements pursuant to Rule 23(b)(3) and (e) for settlement purposes only, and appoints the following as Class Representatives:

   (a) for the BMW Class: Billy Richardson, Carla Thompson, Christopher Day, Constantine Kazos, David Gunther, Gerdgene K. Veser, Henry Pham, Howard Morris, and Richard Lee;

   (b) for the Mazda Class: Crystal Pardue and Mickey Vukadinovic;

   (c) for the Subaru Class: Michael Walker, Regina Reilly, and Dennis Carr; and

   (d) for the Toyota Class: Angela Ruffin, Connie Collins, Corene Quirk, Cynthia Wishkovsky, John Huebner, Lisa Peterson, Marc Raiken, Shelley Shader, and Nelson Powell;

3. Approves (a) the Notice Programs set forth in the Settlements, (b) the form and content of the Notices as set forth in the forms attached to the Settlements as Exhibits 2, 6, 8 thereto, and (c) the Registration/Claim Form attached as Exhibit 12 thereto;

4. Approves and orders the opt-out and objection procedures set forth in the Settlements;

5. Stays the economic loss claims asserted in the Action against the Settling Defendants (only);

6. Appoints as Settlement Class Counsel the law firms listed in each Settlement Agreement (*e.g.*, Exhibit A, § I.A.42.);

7. Schedules a Fairness Hearing during the week of October 25, 2017, subject to the Court's availability and convenience; and

8. Addresses the other related matters pertinent to the preliminary approval of the Settlement.

Dated: May 18, 2017

Respectfully submitted,

PODHURST ORSECK, P.A.

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