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 HONDA AND NISSAN DEFENDANTS**

PLAINTIFFS' OMNIBUS RESPONSE TO OBJECTIONS TO THE HONDA AND NISSAN SETTLEMENTS, AND CLASS COUNSEL'S APPLICATION FOR SERVICE AWARDS AND ATTORNEYS' FEES

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I. INTRODUCTION.

The Settlements with the Honda and Nissan Defendants, not surprisingly, drew only a handful of objections.[1] From a total of 31,891,467 potential Class Members who received the Direct-Mail notice, only 26 objections were filed on behalf of 29 Class Members—a microscopic .00009% of the combined Classes—much fewer than consumer settlements typically attract, and even fewer than the first four Settlements in this MDL received, despite there being almost 10 million more Class Members in these two Settlements. This unusually "low percentage of objections points to the reasonableness of [the] proposed settlement[s] and supports [their] approval." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) (Altonaga, J.).

Given the substantial benefits provided to Class Members in the Settlements, this overwhelming acceptance is not surprising. With a combined value of almost $1 billion, the Settlements provide meaningful compensation to Class Members and simultaneously take aim at the grave public safety hazard posed by millions of defective Takata airbags still equipped in Honda and Nissan vehicles. Tragically, recent news reports confirming the 20th and 21st deaths caused by exploding Takata airbags serve as stark reminders of the severity and persistence of this hazard, as well as the urgent need for more effective outreach methods, which the Settlements will provide.

The few objections that have been submitted almost entirely recycle the same misguided arguments raised against the first four Settlements in this MDL, all of which this Court properly overruled. Many of these rehashed objections, moreover, have been submitted by the same "serial" or "professional" objectors who appeared in the first four Settlements, further

[1] An extensive empirical review determined that the average number of objections to settlements of consumer class actions is ***233***. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1550 (2004). More recently, a settlement approved in the Volkswagen MDL received ***462*** objections, even though the class there was less than *3 percent* the size of the Classes in these Settlements. *See In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB, 2016 WL 6248426, at *16 (N.D. Cal. Oct. 25, 2016). Similarly, the settlement approved in the Toyota Unintended Acceleration MDL received more than ***twice*** as many objections from a class about two-thirds the size of the combined Classes here. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML 02151 JVS, 2013 WL 3224585, at *6 (C.D. Cal. June 17, 2013). By any measure, the number of objections received here is remarkably low.

undercutting their credibility. None of the objections offers any coherent reason for the Court to depart from its prior, well-reasoned decisions.

The Honda and Nissan Settlements are fundamentally sound and provide substantial benefits to more than 30 million consumers. They more than fulfill the standards for final approval set forth in Federal Rule of Civil Procedure 23(e). And the service awards and attorneys' fees sought in Class Counsel's application are fair, reasonable, and entirely consistent with Eleventh Circuit precedent. Accordingly, Plaintiffs respectfully urge the Court to grant final approval of these Settlements to enable their prompt implementation; to award Class Representatives the requested service awards; and to award Class Counsel the requested attorneys' fees.

II. THE OBJECTIONS TO THE SETTLEMENTS SHOULD BE OVERRULED.

Because objections to the Settlements largely overlap and often are repetitive, they are addressed by general topic below. None of the objections seriously calls into question the fairness, reasonableness, or adequacy of the Settlements.

A. The Outreach Program Provides a Substantial Benefit to the Classes.

The Outreach Program, designed to ameliorate the extraordinary public safety hazard giving rise to this litigation, should be the least controversial aspect of the Settlements. Several objectors, however, take issue with it. Their objections are misguided, resting on mistaken assumptions and inaccurate characterizations of both the Outreach Program and Defendants' NHTSA-mandated outreach obligations.

Some objectors claim that the Outreach Program is merely duplicative of the Rule 23(c) Notice Plan. (ECF No. 2264 at 4-8; 2272-3 at 2.) This objection reflects a fundamental misunderstanding of the Settlements. The objective of the discrete Rule 23(c) Notice Plan—which is now complete and was implemented by the Court-appointed Notice Administrator, Epiq Systems, following preliminary approval of the Settlements (ECF No. 2256-2)—was simply "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 691 (S.D. Fla. 2014) (Moreno, J.) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–812 (1985)). In contrast, the objective of the Outreach Program, a central component of the Settlements that will be administered for at least four years, is to "maximiz[e], to the extent practicable, completion of the Recall Remedy in Subject Vehicles for the Takata Airbag Inflator Recalls"

(ECF No. 2013-1 at 25)—i.e., to remove as many defective, and potentially deadly, Takata inflators from Honda and Nissan vehicles as practicable. Unlike the Notice Plan, the Outreach Program will not be informing Class Members of their rights under the Settlements, but instead will be encouraging and motivating Class Members to bring their vehicles to dealerships to have the defective Takata inflators replaced. Objector Westcott's concern that Class Members will "toss[] out" small-print notices is precisely why the Outreach Program—which will utilize state-of-the-art outreach and marketing methods, not merely small-print notices—is such an essential benefit.

Several objectors nonetheless claim that the Outreach Program is not a benefit of the Settlements because it is coextensive with Honda's and Nissan's NHTSA-mandated obligations. (ECF No. 2262 at 6, 8-10; 2272-5 at 5-9; 2266 at 2; 2264 at 4-8; 2272-1 at 2.) The same misguided and ill-informed objection was raised and properly overruled as to the first four Settlements. (ECF Nos. 2063 at 1-2; 2066 at 5-6; 2073 at 2; 2084 at 4-7.)

Federal law governing recall notifications initially obligates an automaker to mail just one recall notice to car owners. *See* 49 U.S.C. § 30119(a)-(d); 49 C.F.R. § 577.7. Federal law also empowers NHTSA to require automakers to send additional notifications to car owners. *See* 49 U.S.C. § 30119(e); 49 C.F.R. §§ 577.10, 577.12. With this authority, NHTSA issued the Third Amendment to the Coordinated Remedy Order ("ACRO") on December 9, 2016, which is included as an exhibit to and referenced in each of the six Settlements. (ECF No. 2013-1 at 81.) The ACRO effectively establishes the baseline outreach obligations of the automotive Defendants for the Takata recalls. (ECF 2013-1 at 103, ¶ 42.) It requires the automotive Defendants to conduct "supplemental notification efforts," but ultimately leaves the scope, means, and sophistication of such efforts to the discretion of each automaker, unless specifically instructed to issue a particular notification by the Independent Monitor overseeing the ACRO. (*Id.*)

The unique benefit of each Settlement's Outreach Program is that it picks up where the baseline obligations of the ACRO leave off, expressly requiring the automotive Defendants to expand or go beyond their current outreach efforts. (ECF No. No. 1971-1 at 23, § III.B.1; 2013-1 at 25, § III.B.1.)[2] Far from leaving outreach to the discretion of the automakers, the

[2] Citing a December 2017 report that Honda has sent representatives to knock on car owners' doors to reach them, one objector claims that there is no need for the Outreach Program. (ECF

Settlement's Outreach Program mandates massive funding for outreach efforts—more than $231 million in the Honda and Nissan Settlements alone—and empowers the Settlement Special Administrator, Patrick A. Juneau, to oversee and administer a dynamic, state-of-the art program.

As reflected in Mr. Juneau's declaration, the "sole focus" of the Outreach Program "will be to increase remedy completion," which will significantly decrease the number of vehicles with dangerous Takata inflators. (ECF No. 2127-2, ¶ 4.) Utilizing a secure database with up-to-date information on Subject Vehicles and Class Members, the program will "develop and implement specific campaign strategies, optimized based on the unique characteristics of individual subgroups of the overall targeted population, to utilize personal and relevant messaging, graphics, content, media and channels, to increase remedy rates beyond those produced by generic outreach efforts." (*Id.*, ¶ 9.) It also "will monitor and test strategies utilized across various targeted populations to determine which outreach efforts resulted in successful remedies so that the process can continually evolve and be refined over time." (*Id.*, ¶ 10.) In short, with these strategies and others highlighted by the Settlement Special Administrator, in coordination and after consultation with Class Counsel, Honda, and Nissan, the Outreach Program will employ advanced marketing strategies that are not currently being used in outreach efforts to motivate Class Members to bring their vehicles to dealerships for removal and replacement of the dangerous inflators, far exceeding the baseline requirements of the ACRO.[3]

Moreover, the Outreach Program's flexibility and active oversight by the Settlement Special Administrator will ensure that resources are efficiently allocated to the most effective forms of outreach. As defined in the Settlements, the Outreach Program "is not intended to be a

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No. 2262 at 9.) Yet this objection overlooks the fact that the article credits this very Settlement for requiring Honda to earmark $40 million "to reach customers with the riskiest air bags" through methods that may include "in-person visits and repairs performed through mobile units." (ECF No. 2262-2 at 1.) The article also reinforces the need for the Outreach Program's innovative strategies, reporting that many of the customers who have received letters regarding the recall "underestimate the severity of it." (*Id.* at 3.)

[3] One objector erroneously claims that the Settlement Special Administrator is required "to confer with NHTSA and the Independent Monitor before making any communications," implying that the Outreach Program is effectively controlled by NHTSA and the Independent Monitor. (ECF No. 2262 at 9.) The objector fails to cite any provision in the Settlement containing this requirement because there is none. Instead, the Settlement vests the Settlement Special Administrator with *discretion* to confer with NHTSA and the Independent Monitor, which may occur to avoid interfering with NHTSA's separate activities. (ECF No. 2013-1 at 21, § III.B.1.)

static program with components that are fixed for the entire settlement period." (ECF No. 2013-1, § III.B.6.) Rather, the Settlement Special Administrator, with input from Class Counsel and the Settling Defendants, is empowered to "adjust and change its methods of outreach as is required to achieve its goal of maximizing the completion of the Recall Remedy." (*Id.*)[4] A demanding reporting schedule mandated in the Settlements—bi-monthly for the first year and every three months thereafter—will allow the Parties to identify which methods of outreach are most effective and allocate resources to them. (*Id.*, § III.B.4.) And because the Settlements are non-reversionary, any funds from the Outreach Program budget—which is capped at 33% of the Settlement Amounts—that the Settlement Special Administrator determines cannot be effectively spent to maximize Recall Remedy completion rates will be made available for cash payments directly to Class Members.[5]

Millions of dangerous, defective airbag inflators remain in Class Members' vehicles. A significant reason this hazard persists is that outreach efforts have been insufficient and ineffective. (*See* ECF No. 2013-1 at 84.) The Outreach Program aims to overcome this obstacle and "significantly increase Recall Remedy completion rates." (ECF No. 2013-1, § III.B.1.) It hardly can be disputed that making Class Members substantially safer by motivating them to remove life-threatening inflators from their vehicles provides a direct benefit to Class Members.[6] Indeed, by averting serious injuries and deaths from defective inflators that may otherwise remain in Class Members' vehicles for a longer period of time or indefinitely, it is likely that the actual value of the Outreach Program to Class Members will far exceed the amount of money allocated

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[4] One objector complains that the parameters of the Outreach Program are not defined in sufficient detail. (ECF No. 2264 at 4-8.) But the flexibility of the Outreach Program is essential to its effectiveness. In addition, the general forms of Outreach contemplated are outlined in the Settlements. (*E.g.*, ECF No. 2013-1, § III.B.2.)

[5] An objector misreads a provision of the Settlements as leaving the Settlement Amounts indefinite. (ECF No. 2264 at 2-4.) That is obviously inaccurate. The provision that the objector misunderstands simply provides the Parties flexibility to alter the *timing* of payments to fulfill the purposes of the Settlements—e.g., if the recall schedule is accelerated, the Parties may agree to accelerate the timing of payments. (ECF No. 2013-1, § III.A.2.h.)

[6] One objector claims, without explanation, that the Outreach Program provides benefits "to the public at large," as opposed to Class Members. (ECF No. 2266 at 5.) This is simply incorrect. The Classes are defined to include, as of the preliminary approval date, all current owners and lessees of Honda and Nissan vehicles equipped with Takata inflators that are or will be recalled, the same population that the Outreach Program will target.

to it. Because the Outreach Program obligates the Settling Defendants to fund outreach efforts that far *exceed* both their current efforts and the requirements of law, it unquestionably represents a significant benefit to Class Members.

B. The Customer Support Program Provides a Substantial Benefit to the Classes.

A few objectors offer muted criticism of the Customer Support Program ("CSP") and the value ascribed to it by Kirk Kleckner, a well-recognized expert in the field. (ECF Nos. 2272-5 at 12; 2266 at 5.) To the extent the few sentences that objectors dedicate to the CSP even qualify as objections, they should be overruled.

Effectively an extended warranty, the CSP provides 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. (*E.g.*, ECF No. 2013-1, § III.G.) There is no serious challenge to the substantial benefit that the CSP provides to Class Members. Indeed, the Eleventh Circuit recently recognized that the provision of a similar extended warranty is "a significant tangible benefit." *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 767 (11th Cir. 2017); *see also In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML 02151 JVS, 2013 WL 3224585, at *17 (C.D. Cal. June 17, 2013) (holding that objections to similar customer support program "lack merit").

Nor is there a serious challenge to Mr. Kleckner's methodical valuation of the CSP. In fact, just two "serial" objectors even *mention* Mr. Kleckner's reports. (ECF No. 2272-5 at 12; 2266 at 5.) One objector merely criticizes Mr. Kleckner for not publishing some of the confidential data underlying his report (ECF No. 2272-5 at 12), while the other objector claims—without any explanation whatsoever—that Mr. Kleckner's valuation would not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for admissibility (ECF No. 2262 at 10-12). Neither argument actually addresses the details of Mr. Kleckner's reports, which describe his methodology and the data he relied upon.

The objections—if they even qualify as such—also fail, because a district court considering the fairness of a settlement need not determine the admissibility of evidence under *Daubert*. *See Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.* ("*UAW*"), 497 F.3d 615, 636-37 (6th Cir. 2007). This is because, "[i]n a fairness

hearing, the judge does not resolve the parties' factual disputes but merely ensures that the disputes are real and that the settlement fairly and reasonably resolves the parties' differences." *Id.*; *accord In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 442-43 (3d Cir. 2016).

Nonetheless, it is clear that Mr. Kleckner's valuation of the CSP would readily satisfy the requirements of *Daubert*. Mr. Kleckner, a Certified Public Accountant with an MBA, is a highly qualified valuation expert, particularly in the automotive field, having served as the CFO of an automotive dealership for several years and a valuation consultant and expert for almost two decades. (*E.g.*, ECF No. 2256-3 at 1-2, 11-14.) No objector contests this point. His valuation methodology, moreover, is reliable. Based on data provided by the Settling Defendants, together with industry and government data he has collected from years of experience in the field (*id.* at 15), Mr. Kleckner performed complex calculations to determine the number of Subject Vehicles eligible for the CSP, the number of coverage years the CSP is expected to provide, and the estimated retail price of a single year of the CSP (*id.* at 6-8). Mr. Kleckner explains his methodology in detail and shows his final calculations. (*Id.* at 6-8, 17.) A number of courts have relied on similar valuation opinions from Mr. Kleckner in evaluating the fairness of settlements and fee requests.[7] Indeed, his opinions have been deemed reliable and relevant under *Daubert*. *See In re Toyota Motor Corp.*, 2013 WL 3224585, at *3 n.10.

Because Mr. Kleckner's detailed valuations of the CSP are reliable, a fact that no objector seriously disputes, this Court should rely on them to estimate the value of the CSP in both Settlements.

C. The Rental Car Program Provides a Substantial Benefit to the Classes.

The Rental Car/Loaner Program ("RCP") provides another substantial benefit to the Classes. Several objectors, meanwhile, claim that the RCP is an illusory benefit because Honda and Nissan have voluntarily provided rental cars to their customers in the past. (ECF Nos. 2262 at 10; 2272-5 at 9-14; 2272-1 at 2.) This objection is misguided, and should be overruled.

The Nissan RCP 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

[7] *See, e.g., Gray v. BMW of N. Am., LLC*, No. 13-CV-3417 (WJM), 2017 WL 3638771, at *3 (D.N.J. Aug. 24, 2017) (relying on Kleckner valuation of settlement to grant final approval); *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 169 (D. Mass. 2015) (same for fee award); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML 02151 JVS, 2013 WL 3224585, at *3 (C.D. Cal. June 17, 2013).

shortages of replacement parts. Where replacement parts are unavailable, and the replacement of recalled inflators is delayed for an extended period as a result, Nissan Class Members who own or lease recalled vehicles that NHTSA has identified as the highest priority for repair (Priority Group 1 vehicles under the Third Amendment to the CRO) shall be entitled to use a loaner or rental vehicle in the interim at no charge. (*E.g.*, ECF No. 1971-1, § III.C.) Implemented within thirty calendar days of the issuance of the Court's Preliminary Approval Orders, this additional benefit furthers public safety and reduces a potential impediment to Class Members having the Recall Remedy performed on their vehicle.

The analogous program in the Honda Settlement is structured differently. Under Honda's Enhanced Rental Car/Loaner Program, any Class Member who brings a recalled Subject Vehicle to a dealership for the Recall Remedy and requests a rental/loaner vehicle will be provided one for free, until the Recall Remedy is performed on the Subject Vehicle. (ECF No. 2013-1, § III.C.).

Several objectors try to dismiss the value of the programs because Honda and Nissan have provided rental vehicles in the past to Class Members. (ECF Nos. 2262 at 10; 2272-5 at 9-14; 2272-1 at 2.) But even the evidence the objectors cite demonstrates that, absent the obligations of the Settlements, automakers are not required to provide rental vehicles to customers. (ECF No. 2262-1 at 16 (reporting that Nissan only provides rental vehicles on a "case-by-case basis"); 2262-1 at 4 (reporting that NHTSA "cannot require automakers to provide rental cars, and their practices vary").[8] In establishing an enforceable right to obtain a rental or loaner vehicle, the Settlements provide a significant and concrete benefit, which Mr. Kleckner has evaluated and determined exceeds the 10% credit that Nissan is receiving for undertaking the obligation, and the 20% credit that Honda is receiving for its far more expansive program. (ECF Nos. 2256-3 at 8-9; 2256-4 at 8-9.) The objections to the RCP should therefore be overruled. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012) ("Even assuming Objectors' premise that Beacon was already effectively terminated, absent a judicially-enforceable agreement, Facebook would be free to revive the program whenever it wanted. It is thus false to say that Facebook's promise never to

[8] Another objector claims that Honda's program lacks a means to audit Honda's compliance. (ECF No. 2272-5 at 11, 14.) The objector, however, is mistaken. The Settlement requires Honda to certify its compliance with the program every six months, and empowers the Settlement Special Administrator "to audit and confirm such compliance." (ECF No. 2013, § III.C.4.)

do so was illusory.").

D. There Are No Intra-Class Conflicts That Preclude Certification of the Classes or Approval of the Settlements.

A few objectors claim that there are intra-class conflicts between certain Class Members, which should preclude certification of the Settlement Classes. The purported conflict, objectors claim, is between former owners of Subject Vehicles and current owners. (ECF Nos. 2262 at 2-5; 2271 at 5-7; 2266 at 4.)[9] These objections, however, are groundless; no such conflicts exist, nor would they preclude class certification and final approval of the Settlements.

Claims of intra-class conflict implicate the adequacy prong of Rule 23(a), which requires class representatives and their counsel to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement "serves to uncover conflicts of interests between the named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). But "a party's claim to representative status is defeated only if the conflict between the representative and the class is a ***fundamental*** one, going to the specific issues in controversy." *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) (emphasis added). Thus, "a conflict will not defeat the adequacy requirement if it is merely speculative or hypothetical." *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (internal quotation marks omitted); *see also Cobell v. Salazar*, 679 F.3d 909, 920 (D.C. Cir. 2012) (holding that an objector's "discussion of a hypothetical conflict is an inadequate basis for vacating [a] class settlement agreement").

There are no disabling intra-class conflicts here. The interests of all Class Members align in establishing the defect in Takata inflators installed in Honda's and Nissan's vehicles, proving Defendants' knowledge of the defect, and recovering economic damages from Defendants. *See Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 989–90 (11th Cir. 2016) (rejecting intra-class conflict argument because "[e]ach class member is connected by the common predominate

[9] Some objectors claim that there is also a conflict between Class Members who have had their vehicles repaired and those who have not. (ECF Nos. 2262 at 2-5; 2266 at 4.) Ultimately, however, the objectors' arguments for positing such a purported conflict mirror those, advanced by the same objectors, for claiming that a conflict exists between former owners and current owners. (ECF Nos. 2262 at 2; 2271 at 5-6.) In both instances, the objectors claim that benefits of the Settlements were allocated to one group over another. For the reasons explained above, this argument fails to demonstrate a disabling conflict between owners who have had their vehicles repaired and those who have not. (Ex. A (Silver Dec.), ¶¶ 8-15.)

inquiry: Did [the defendant] violate FDUTPA by affixing inaccurate Monroney stickers to [the vehicles at issue]"); *James D. Hinson Elec. Contracting Co., Inc. v. BellSouth Telecomm., Inc.*, 275 F.R.D. 638, 643 (M.D. Fla. 2011) (finding that no fundamental intra-conflict existed when "[t]he specific issues in this controversy concern whether [defendant's] billing practices were deceptive, fraudulent, or resulted in unjust enrichment," and all class members would benefit if plaintiffs prevailed on their claims); Ex. A (Silver Decl.), ¶ 8 ("No objector has identified a conflict that would cause a single team of lawyers to harm class members of one type while pressing the claims of class members of another type."); *id.* at 35-36, ¶ 19 ("There are no conflicts between or among these Plaintiffs that would render joint representation problematic. All of their claims are compatible.").

Some objectors nonetheless claim that a conflict exists between current and former owners, in that current owners will enjoy more benefits from the Settlements than former owners. But "almost every settlement will involve different awards for various class members." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999). "Such differences in settlement value do not, without more, demonstrate conflicting or antagonistic interests within the class." *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 346 (3d Cir. 2010).

In addition, the Eleventh Circuit recently rejected this very argument in *Carriuolo*, concluding that "the fact of resale is immaterial because the injury occurred when class members paid a price premium at the time of lease or purchase." 823 F.3d at 990;[10] *see also* Ex. A (Silver Decl.), at 36, ¶ 20 ("The liability and damages theories of current and former owners can also be advanced concurrently by a single team of attorneys because there is no obvious way in which argument or evidence helpful to one subgroup would work to the detriment of the other."). In addition, former owners and current owners are treated the same with respect to compensation from the Settlements: both are eligible for the out-of-pocket claims process and residual distribution. (*E.g.*, ECF No. 2013-1, § III.F.)

To be sure, the Outreach Program and RCP will benefit certain current owners—i.e., those

[10] One objector attempts to distinguish *Carriulo* on the grounds that there was not a difference of relief provided to class members in *Carriulo*. (ECF No. 2271 at 7.) But *Carriulo* cannot be distinguished on this basis, because it ignores Supreme Court precedent that the requirements of Rule 23(a)(4)'s adequacy prong remain the same in both the litigation and settlement context. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also* Ex. A (Silver Dec.), ¶¶ 8-9.

who have not had their defective airbags replaced yet. But as the authorities discussed above establish, the allocation of different benefits among Class Members does not, by itself, "demonstrate conflicting or antagonistic interests within the class." *In re Pet Food*, 629 F.3d at 346. Instead, as Professor Charles Silver, a leading expert on class actions, explains, the only pertinent question is whether the allocation of such benefits among Class Members is reasonable. (Ex. A (Silver Decl.), ¶ 9; *id.* at 36, ¶ 25.) As discussed in the preceding sections concerning the Outreach Program and RCP, the public safety rationale underlying the allocation of Settlement benefits to these programs establish that the structure of the Settlements is eminently reasonable.

Nor are subclasses required under such circumstances. *See, e.g.*, *Shaffer v. Cont'l Cas. Co.*, 362 F. App'x 627, 630–31 (9th Cir. 2010) (explaining that "the fact that it is possible to draw a line between categories of class members" does not necessarily mean that subclasses are required); *UAW*, 497 F.3d at 629 ("[I]f every distinction drawn (or not drawn) by a settlement required a new subclass, class counsel would need to confine settlement terms to the simplest imaginable or risk fragmenting the class beyond repair."); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005) ("[I]f subclassing is required for each material legal or economic difference that distinguishes class members, the Balkanization of the class action is threatened."); *Petrovic*, 200 F.3d at 1146-48 (rejecting need for creation of subclasses despite large differences in recovery among class members).

Objections claiming that intra-class conflicts exist should, therefore, be overruled.

E. The Settlement Amounts Are Fair and Reasonable and Represent Substantial Recoveries for the Classes.

Several objections voice dissatisfaction with the amount of the applicable Settlement, most in the form of generalized complaints that Defendants are not paying enough.[11] Respectfully, these objections misunderstand the pragmatic lens through which class settlements must be evaluated. Settlements, by their nature, rarely confer optimal relief; they are assessed, instead, for fairness, adequacy, and reasonableness, *not* – as some objectors seem to presume – whether the settlement reflects "the best possible deal" or a result equivalent to a "victory at trial." *In re Checking Account Overdraft Litig.*, No. 09-MD-02036, 2015 WL 12641970, *8, *10 (S.D. Fla. May 22, 2015) (quotation marks and citation omitted). Thus, the complaint that the Settlement does not fully compensate class members (ECF No. 2262 at 7) is legally misguided.

[11] (*See* ECF Nos. 2272-6 at 1; 2262 at 7, 12; 2272-3 at 1, 3; 2272-5 at 4; 2266 at 2-3.)

None of the objectors challenges the analysis required under the totality of the *Bennett* factors in assessing the reasonableness of the Settlements. Plaintiffs' analysis of those considerations (ECF No. 2256 at 28-34), therefore, stands essentially unrebutted. Nonetheless, we point out here why the value of the settlements readily satisfies the adequacy and reasonableness threshold. As Class Counsel summarized:

> Even before including the value of the Customer Support Program, the Settlements have a combined value of approximately $702.6 million, which represents roughly 45% of Plaintiffs' and Class Members' estimated damages recovery under a method of calculating damages based on the prices the Settling Defendants paid for and marked up Takata airbags[.]

(ECF No. 2256-1 (Prieto Decl.), ¶ 33.)

This estimate of the substantial value of the Settlements is conservative. It undersells the value class members will receive from the Rental Car Programs, which exceeds the 10% credit and 20% credit Nissan and Honda receive, respectively, for making free rental cars available to certain class members awaiting performance of the Recall Remedy. (ECF Nos. 2256-3 at 8-9; 2256-4 at 8-9.) Further, the extended warranties guaranteed by the Customer Support Programs add significant value to the settlements—nearly $282 million more, according to Plaintiffs' valuation expert. (*Id*. at 8.) That is a total value of $984,299,141, or roughly ***one billion dollars***.

The recovery of roughly 45% of the Classes' damages represents an excellent result. As this Court has observed elsewhere, far lesser recoveries can satisfy the adequacy requirement. *Almanazar v. Select Portfolio Servicing, Inc.*, No. 1:14-cv-22586-FAM, 2016 WL 1169198, *3 (S.D. Fla. Mar. 25, 2016) (even a settlement where monetary recovery represented 12.5% of class damages "'would still be adequate'") (quoting *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 693 (S.D. Fla. 2014)). Objectors who are unhappy with the amount of the cash component of the settlements (*e.g.*, ECF Nos. 2262 at 12; 2272-6 at 1) ignore the value conferred by other important aspects of the settlements—the Notice Program, the Rental Car Program, and the Customer Support Program.

Some objectors argue that the Settlements provide them with no benefits because they have already sold their Honda or Nissan vehicles. (ECF No. 2262 at 7.) But the objectors are mistaken. They are precisely the kind of class members for whom the residual distribution was designed. Class members who have already had the recall remedy performed are eligible to submit a claim for either out-of-pocket expenses incurred or a residual distribution. (ECF No. 2013-1 at 26, § F(1).) The objectors apparently incurred no out-of-pocket costs in connection

with taking their car to a dealer for the recall remedy. But that does not disentitle them to cash relief. They can still submit a claim for the residual distribution. The residual distribution can be up to $250 during the first four settlement program years (ECF No. 2013-1 at 25, § E(1)), with the possibility of an additional $250 at the conclusion of year four (*id*. at 26, § E(2)(c)).

F. The Approved Notice Programs Provided the Best Practicable Notice to Class Members and Satisfied Rule 23 and Due Process.

The Notice Programs satisfy constitutional due process requirements and adequately provided class members with notice of the Settlements. Objectors' arguments to the contrary are without merit, and repeatedly have been rejected by a number of courts.

i. Notice Was Timely and Sufficient.

A single class member filed an objection to the substance and clarity of the Notice Program. (ECF No. 2306.) The objection, however, fails to indicate any flaw in the extensive Notice Program.

Notice was disseminated broadly through a variety of means by the professional Notice Administrator, Epiq Systems Class Action and Claim Solutions. Epiq sent Direct Mail Notices to 31,891,467 potential Class Members. (ECF No. 2256-2, ¶¶ 12-25.) It employed a series of methods to cross-check the accuracy of addresses and has re-mailed Direct Mail Notices that were returned as undeliverable to maximize the number of Class Members reached by Direct Mail Notices. (*Id.*) To compliment the Direct Mail Notice and reach an even broader audience, the Notice Program also included 30-second radio advertisements airing on various radio stations nationwide (*id.*, ¶¶ 7-10), sizeable print advertisements in several magazines and newspapers nationwide (*id.*), and digital banners on several websites, including popular sites like Facebook and Pandora (*id.*), which appeared in both English and Spanish (*id*.).

Class members were afforded between 30 to 60 days from the date of mailing of the Direct Notice to the deadline to object or opt out. This window of opportunity comports with established guidelines under Rule 23(c). *See Greco v. Ginn Dev. Co., LLC*, 635 F. App'x 628, 634 (11th Cir. 2015) (collecting cases).

ii. Notice Provided Was Sufficiently Clear and Not Misleading.

The Notice provided to Class Members was clear, reasonable, and in no way misleading. Rule 23 only requires that class members be "given information reasonably necessary to make a decision whether to remain a class member and be bound by the final judgment or opt out of the action." *Faught v. Am. Home Shield Corp*., 668 F.3d 1233, 1239

(11th Cir. 2011) (internal quotation marks and alterations omitted). Two objectors erroneously claim that the Notice was misleading because it failed to inform class members about immaterial or uncertain possibilities. (ECF No. 2262 at 12-13; 2306 at 2-3.) But, as courts have made clear, "notice need not include 'every material fact' or be 'overly detailed.'" *Id.*; *Greco*, 635 F. App'x at 633 (same). Indeed, "an overly detailed notice has the potential to confuse class members and impermissibly encumber their rights to benefit from the action." *Greco*, 635 F. App'x at 634 (quoting *Faught*, 668 F.3d at 1239).

The Notice in this case sufficiently informed class members of the terms of the Settlements in a manner that allows them to make an informed decision regarding whether the Settlements serve their interests or they should opt-out or object. Indeed, none of the information objectors claim was omitted from the Notice was even material. One objector, for example, argues that notice was misleading because it failed to inform class members that even if they opted out of the Settlements, they would still receive the benefits of the Outreach Program. (ECF No. 2262 at 12-13.) But opting out does, as the notices correctly indicated, prevent a Class Member from enjoying the full benefits of the Settlements, including the Out-of-Pocket Claims Process, Residual Distribution, and Customer Support Program.

Another objector complains about the Honda Settlement's website. (ECF No. 2306 at 3-6.) But it is difficult to tell from the objection how the website is allegedly defective. As explained in the Notice Administrator's declaration, the website is simple to navigate and contains all the relevant dates and documents for Class Members. (ECF No. 2256-2 at 16-17.) The website, moreover, had received 2,767,157 visits and had presented 14,896,488 website pages as of December 19, 2017, indicating that Class Members are not having any trouble navigating through it to obtain information. (*Id.* at 17.)

G. The Remaining Miscellaneous Objections Have No Merit.

The remaining objections to the reasonableness of the Settlements are more difficult to categorize, but are largely conclusory, vague, not supported by specific factual or legal support, and should thus be overruled. *See Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434-35 (11th Cir. 2012) (affirming district court's finding that conclusory objections were meritless); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1382 (S.D. Fla. 2007) (noting that "lack of substance of the objections . . . weighs in favor of approving the Settlement").

One objector faults the Settlements for not including a list of potential *cy pres* recipients. (ECF Nos. 2272-1 at 3.) But because the *cy pres* provision only will be triggered if *per capita* distributions of residual funds to class members are administratively infeasible, it would have been premature for the Settlements to identify potential recipients. "[N]o *cy pres* disbursement is imminent; and the fund . . . may well be depleted before *cy pres* kicks in." *Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). If, at the conclusion of the Settlements, it is determined that funds will be distributed *cy pres*, such a decision will be published on the Settlement Website, so that Class Members will have notice of the public proceedings that will then take place in this Court to select appropriate recipients.

Objector Jacoby (ECF No. 2269-1) and objector Mattmuller (ECF No. 2249) sent letters to the Court disagreeing that Honda should be required to compensate Class Members, but the letters do not actually object to any aspect of the Settlements or dispute their fairness, reasonableness, or adequacy. *See Carter v. Forjas Taurus S.A.*, No. 1:13-cv-24583, 2016 WL 3982489, at *8 (S.D. Fla. July 22, 2016) (giving no credence to conclusory objections to settlement against manufacturer of a defective product that disagreed with the factual allegations of the complaint). If these objectors did not wish to be included in the Settlements, they could have opted out.

Objector Esche contests the Nissan Settlement based on the mistaken view that the Release discharges claims relating to "airbags and other items that are not subject to replacement by this recall." (ECF No. 2272-8.) The subject-matter limitation of the Release restricts its reach to claims involving "the Subject Vehicles' driver or passenger front airbag modules *containing desiccated or non-desiccated Takata PSAN inflators*." (ECF No. 1971-1, § VII.B (emphasis added).) The italicized qualification ensures that claims relating to non-Takata airbags that are not involved in the recalls are unaffected by the Release, which appears to be objector Esche's concern. The scope of the Release, moreover, is typical for a class settlement like this, and was negotiated between the Parties for the substantial consideration received from Nissan. *Carter*, 2016 WL 3982489, at *12 (overruling objection to settlement on scope of release and noting release was obtained for consideration); *Cf. Perez*, 501 F. Supp. 2d at 1382 (holding objectors wanting a "better deal" than provided in the settlement did not warrant rejecting the final settlement plan, provided settlement was fair, adequate, and reasonable). Further, "[i]t is well established law that class actions may include

claims not presented and even those which could not have been presented [in the release] as long as the released conduct arises out of the identical factual predicate as the settled conduct." *Saccoccio*. 297 F.R.D. at 697; *see also Greco*, 635 F. App'x at 635 (rejecting objector's argument that settlement's release was overly broad). In addition, a Class Member who wishes to assert an individual claim that could have been brought in the litigation was free to opt out of the Settlement. This objection to the Release should therefore be overruled.

Objector Bodnar complains that the Honda Settlement "fails to establish a clear claim review protocol for reimbursing class members who incur out-of-pocket expenses," and "[i]nstead delegates the entire matter to the Special Administrator," which arrangement, she contends, does not permit Class Members to evaluate the claims process's reasonableness in time to object. (ECF No. 2272-1 at 2.)[12] That is a gross overstatement. The parties negotiated and agreed upon a list of categories of the most obvious and legitimate expenses that should be reimbursed (ECF No. 2013-1, § III.D.3),[13] and reserved the right to recommend further categories to the Settlement Special Administrator, while recognizing that the Administrator would need discretion to develop a workable claims review protocol. Ms. Bodnar fails to explain why this guidance is insufficient to assert specific objections. If Ms. Bodnar's objection relates solely to the discretion provided to the Special Administrator, it should be rejected, as numerous courts have upheld the administration of a settlement fund by a third-party administrator. *See generally Faught*, 668 F.3d at 1240-41; *Perez*, 501 F. Supp. 2d at 1374; *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006).

Objector Bellaconis, in a letter to the Court, complains that replacement parts are not available for her Nissan vehicle yet, and that she must wait until the parts become available to submit a claim for out-of-pocket expenses. (ECF No. 2267-1.) The availability of replacement parts, however, is not affected by the Settlement. The placement of vehicles in

[12] The same objection, by the same "professional objector," was advanced and overruled in the first four Settlements. (ECF No. 2073 at 2.)

[13] The Settlements provide that Class Members shall be reimbursed for reasonable rental car and transportation expenses after requesting and while awaiting the Recall Remedy from a Dealer; towing charges to the dealer for completion of the Recall Remedy; childcare expenses necessary during the performance of the Recall Remedy by the Dealer; costs associated with repairing driver or passenger front airbags containing Takata PSAN inflators; lost wages due to missing work to drop off and pick up a vehicle at the Dealer for performance of the Recall Remedy; storage fees incurred after requesting and while awaiting the Recall Remedy; and other reasonable expenses associated with the Recall Remedy. (ECF No. 2013-1, § III.D.)

different priority groups, moreover, which is based on the risk of rupture, as determined by NHTSA and affects when vehicles are eligible to receive available parts, is governed by NHTSA and the ACRO, not the Settlement. (ECF No. 1971-1 at 76.)[14] Objector Bellaconis is correct that she will not be eligible to submit a claim for out-of-pocket expenses until her vehicle is repaired, but far from being objectionable, that is a unique safety-enhancing aspect of the Settlement. It provides a concrete financial incentive to Class Members to get their vehicles repaired; allowing all Class Members to submit claims immediately, regardless of whether their vehicles have been repaired, would eliminate this important incentive.

Finally, one set of objectors lobs the wholly unsupported accusation that the parties colluded to arrive at the Settlements. (ECF No. 2264 at 11.) Such unfounded allegations must be rejected in the face of a showing that the "agreement was the result of extensive arms-length negotiations." *Nelson*, 484 F. App'x at 435; *see Carter*, 2016 WL 3982489, at *13 (dismissing objector's suggestion of collusion based on speculation alone).

III. THE OBJECTIONS TO THE APPLICATION FOR ATTORNEYS' FEES SHOULD BE OVERRULED

Class Counsel achieved an outstanding result for the Classes in the face of significant risk and unrelenting opposition from Honda and Nissan during three years of hard-fought litigation. Class Counsel's fee request of $210,803,742 is commensurate with the extraordinary risk taken and result achieved, and is entirely consistent with prevailing law in the Eleventh Circuit and this District. Nonetheless, several objectors voice dissatisfaction with it, lodging boilerplate charges that the fee request is excessive and relying primarily on decisions from other circuits. Not a single objector, however, has submitted an expert declaration or provided *any* evidence undermining the conclusions reached by Class Counsel and their nationally recognized experts that the fee request is fair, reasonable, and adequate. For the reasons explained below, the objections to Class Counsel's fee request should be overruled.

[14] Objector Peterson challenges the "screening of Class Membership," because he received a Direct-Mail Notice but his Nissan vehicle has not been recalled yet. (ECF No. 2177.) This objection overlooks the ACRO, as well. The list of Subject Vehicles, which is incorporated into the definition of the Class, includes all Nissan vehicles with Takata PSAN inflators—not just those that have been recalled in the ACRO's earliest priority groups. Indeed, the reason the Settlement has a four-year lifespan is that vehicles will be recalled over that time period, under the ACRO.

A. Class Counsel's Fee Request Is Reasonable and Adheres to Prevailing Law in This Circuit and District.

Objections claiming that Class Counsel's fee request is excessive do not adequately account for the substantial risk of non-payment faced in prosecuting such a complex class action on a contingency basis. When a large class action succeeds in generating a valuable common fund for class members, hindsight bias—the inclination, after an event has occurred, to see it as having been predictable or inevitable—makes it easy to overlook such risk. The countless class actions and other contingency cases that are dismissed at various stages serve as a useful reminder of the risk involved. In the past several years, Class Counsel has brought—and lost, without recovering any fees—numerous significant cases that required the investment of considerable resources. The following are but only a few examples:

- *In re Natureguard Cement Roofing Shingles Cases*, JCCP No. 4215 (Stanislaus County, California): Product defect case litigated for more than five years in which class certification was granted and millions of dollars in hard costs were spent on experts and discovery, as well as many millions more in attorney time. After eight weeks of trial, the court reversed its prior decisions, nonsuited several claims, and decertified the class as to all claims. The jury returned a defense verdict for remaining claims. Appeals were unsuccessful. Zero recovery for plaintiffs and class members, and zero fees or expense reimbursement for counsel after a fight of more than seven years.
- *William Philips et al v. Ford Motor Co.*, No. 5:14-cv-02989 (N.D. Cal.): Consumer fraud claim seeking millions in damages for a defective Electronic Power Assist Steering system in hundreds of thousands of Ford vehicles. After 2 years of hard fought litigation and significant discovery, the court denied class certification and granted summary judgment. The case is pending before the Ninth Circuit.
- *Diana Ellis et al. v. J.P. Morgan Chase*, No. 4:12-cv-03897 (N.D. Cal.): RICO class action filed seeking millions in damages for Chase's imposition of unlawful fees for property inspections. After 3 years of hard fought litigation and significant discovery, the court denied class certification and granted summary judgment. The case is pending before the Ninth Circuit.
- *GH et al. v. Eli Lilly & Company et al.*, No. 13-SC-93732 (Mo. Sup. Ct., *en banc*, 2013): Case litigated for more than two years on a contingency basis against pharmaceutical companies, on behalf of approximately 60 plaintiffs who received defective chemotherapy that had been diluted. The case was dismissed by the trial court. After two appeals, the trial court's dismissal was affirmed by the Missouri Supreme Court.
- *Original IFPC Shareholders Inc., as assignee of The Goeken Group Corporation and In-Flight Phone Corporation v. AT&T Wireless Services*, Case No. 93 CH 1065 (DuPage County Circuit Court, Ill. 2003): A trade-secrets case over in-flight phones litigated for years on a contingency basis. After a seven week trial, the case ended with a defense verdict.

- *Balschmiter v. TD Auto Finance, LLC*, Case No. 2:13-cv-01186 (E.D. Wisc.): A proposed class action under the Telephone Consumer Protection Act that was litigated until the eve of trial and ended without any recovery for the proposed class or fees for counsel.
- *Ray v. Spirit Airlines, Inc.*, No. 12-cv-61528 (S.D. Fla.): RICO class action seeking millions in damages for deceptive and unlawful fees dismissed after four years of litigation, including significant discovery and two appeals to the Eleventh Circuit.
- *100079 Canada, Inc. v. Stiefel Laboratories, Inc.*, No. 11-cv-22389 (S.D. Fla.): Contingency securities fraud case seeking tens of millions in damages. After almost three years of litigation and substantial discovery, the court granted the defendant summary judgment.
- *Chultem v. Ticor Title Ins. Co.*, 2015 IL App (1st) 140808 (1st Dist., 2015): Class action brought on behalf of purchasers of title insurance against title insurers, challenging payment of kickbacks to real estate attorneys who served as attorney agents for the insurers. After almost 11 years of litigation involving several appeals, orders granting and vacating class certification, and a bench trial, the court found for the defendants and the decision was affirmed on appeal. No recovery for the class and no compensation for almost 11 years of attorney time and substantial expenses.
- *Price v. Philip Morris, Inc.*, 2015 IL 117687, 43 N.E.3d 53 (Ill. 2015): Class action that was litigated for about 15 years on behalf of consumers against cigarette manufacturer, alleging fraud in manufacture, distribution, marketing, and sale of cigarettes. After numerous appeals, a reversal of the judgment for the plaintiffs was left to stand.

This ever-present, all-or-nothing risk of non-payment cannot fairly be ignored, as objectors try to do here in attacking Class Counsel's fee request in a vacuum. As one court cautioned, "[i]f the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear." *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1375-76 (D. Minn. 1985).

Ignoring these important considerations, the objectors' arguments for awarding Class Counsel less than the requested, reasonable fee rest on inaccurate assumptions and ultimately would undermine the efficacy of class action litigation. For example, some objectors argue that the fee awarded from the Honda and Nissan Settlements should be reduced because they are similar to the first four Settlements, from which Class Counsel were awarded fees and expenses of $166,070,192. (ECF Nos. 2262 at 14; 2271 at 9-10.) As explained in Class Counsel's Fee Request Supplement, however, the prior four Settlements did not reduce, or provide compensation for, the amount of work that Class Counsel had to do to pursue Plaintiffs' claims against Honda and Nissan for the past three years. (ECF No. 2313 at 5-11.) The mere similarity in the structure of the Settlements yielded *de minimis* efficiencies, because it only saved the time needed to draft

from scratch the actual Settlement Agreements and related motions, all of which were reviewed, revised, and customized for each Settlement in any event. Contrary to the objectors' ill-informed accusations (ECF No. 2262 at 14), nothing about Class Counsel's pursuit of Plaintiffs' claims against Honda and Nissan was "cookie cutter" or a "carbon copy" of anything. Class Counsel's immense amount of work on the Honda and Nissan claims—exceeding 100,000 hours over the past three years—was non-duplicative of the work that generated the first four Settlements.

Moreover, as Professor Brian T. Fitzpatrick, a leading class action scholar, explains in his initial and supplemental declarations, reducing Class Counsel's fee simply because there have been earlier settlements against different Defendants, as the objectors urge, would incentivize conduct contrary to the interests of class members *and* the courts. (Ex. B (Fitzpatrick Supp. Dec.), ¶ 4; ECF No. 2256-5, ¶ 23.) Professor Fitzpatrick provides the following example and analysis to illustrate this important point:

> [L]et's say that class counsel thought a court would award it 30% of the first settlement in a litigation but only 20% of the second settlement. Class counsel would then have the incentive to delay settlement with the first defendant until it could reach settlement with the second defendant so it could present settlement with both defendants as one transaction and seek 30% of the entire sum in fees. But unnecessarily delaying settlements is obviously not in the best interest of class members (or even defendants). Moreover, even if class counsel would not delay a first settlement, this line of thinking still creates bad incentives: why would class counsel invest as much time in a case where all they can get is 20% when they can work on an entirely different litigation where they might be able to get 30%?

(ECF No. 2256-5, ¶ 23.) As Professor Fitzpatrick demonstrates, reducing Class Counsel's fee award simply because of earlier Settlements in the MDL would only encourage attorneys in the future "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." (Ex. B (Fitzpatrick Supp. Decl.), ¶ 4.) Obviously, neither practice would benefit class members or the courts. Nor have the objectors cited any authority indicating that courts do or should reduce fee awards in such circumstances. Because it would establish counter-productive incentives that would undermine the efficacy of class action litigation, the objectors' argument for reducing Class Counsel's fee lacks merit.

Nor does the objectors' claim that Class Counsel's fee is excessive find any support in

prevailing law in the Eleventh Circuit and this District. (ECF Nos. 2269-1 at 1; 2272-3 at 1; 2271 at 10; 2266 at 5.) To the contrary, multiple cases in this very District fully support the requested fee of 30 percent of the applicable Settlement Amounts, which is equivalent to 21.4 percent of the full value of the Settlements:

- *In re Checking Account Overdraft Litig.*, 09-MD-02036 (S.D. Fla.) (awarding at least $265 million in fees (30%) of approximately $884.6 million in multiple settlements from the same MDL);[15]
- *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (awarding fees of $325,380,997 (31 ⅓%) of $1.06 billion settlement);[16]
- *Love v. Blue Cross & Blue Shield Assoc.*, No. 03-cv-21296 (S.D. Fla. Apr. 20, 2008) (awarding fees of $49,776,407 (38%) of $130 million settlement)
- *In re: Terazosin Hydrochloride Antitrust Litig.*, 99-md-1317 (S.D. Fla. April 19, 2005) (awarding fees of $24,166,667 (33 ⅓%) of $72.5 million settlement);
- *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-Civ (S.D. Fla. May 30, 2003) (awarding fees of $25.8 million (33 ⅓%) of $77.5 million settlement);
- *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (affirming fee award of 33 1/3 % of settlement of $40 million).

As these decisions demonstrate, the law in the Eleventh Circuit and this District is well-established that the starting point or "benchmark" percentage for fee awards is 25 percent, which

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[15] *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366 (30% ($123 million) of $410 million settlement); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036, 2013 WL 11319244, at *18 (S.D. Fla. Aug. 2, 2013) (30% ($3,900,000) of $13,000,000 settlement); 2013 WL 11320088, at *16 (S.D. Fla. Aug. 2, 2013) (30% ($660,000) of $2,200,000 settlement); 2013 WL 11319242, at *18 (S.D. Fla. Aug. 2, 2013) (30% ($1,200,000) of $4,000,000 settlement); 2013 WL 11319243, at *18 (S.D. Fla. Aug. 2, 2013) (30% ($6,960,000) of $23,200,000 settlement); 2013 WL 11319392, at *17 (S.D. Fla. Aug. 5, 2013) (30% ($27,000,000) of $90,000,000 settlement); 2013 WL 11319391, at *19 (S.D. Fla. Aug. 5, 2013) (30% ($2,820,000) of $9,400,000 settlement); 2014 WL 11370115, at *18 (S.D. Fla. Jan. 6, 2014) (30% ($16,500,000) of $55,000,000 settlement); 2014 WL 12557836, at *15 (S.D. Fla. Apr. 1, 2014) (30% ($1,040,000) of $3,680,000 settlement); 2014 WL 12557837, at *17 (S.D. Fla. June 10, 2014) (30% ($4,374,000) of $14,580,000 settlement); 2015 WL 12642178, at *15 (S.D. Fla. Apr. 2, 2015) (30% ($1,125,000) of $3,750,000 settlement); 2015 WL 12641970, at *18 (S.D. Fla. May 5, 2015) (31% ($9,847,832) of $31,767,200 settlement); ECF No. 3134 (S.D. Fla. Dec. 19, 2012) (30% ($48,600,000) of $162 million settlement); ECF No. 3331 (S.D. Fla. Mar. 12, 2013) (30% ($18,600,000) $62,000,000 settlement).

[16] Some objectors attempt to distinguish *Allapatah* on the grounds that it was litigated for a longer period of time and involved an appeal to the Supreme Court. (ECF No. 2271 at 13.) But this difference does not help the objectors, because the fee requested here—21.4% of the combined value of the Settlements—is already well below the 31 ⅓% awarded in *Allapatah*.

then may be adjusted based on the circumstances of each case. *See Faught*, 668 F.3d at 1243 (affirming fee award above the "25% benchmark"); *Waters*, 190 F.3d at 1294 (directing district courts "to view [the 20 percent to 30 percent] range as a 'benchmark,' which 'may be adjusted in accordance with the individual circumstances of each case'") (quoting *Camden I*, 946 F.2d at 774-75 (observing that "[t]he majority of common fund fee awards fall between 20 percent to 30 percent of the fund")). Class Counsel's fee request, whether calculated as 21.4 percent of the total value of the Settlements or 30 percent of the applicable Settlement Amounts, falls squarely within the Eleventh Circuit's benchmark.

A few objectors acknowledge "that the benchmark in the Eleventh Circuit is 25%, which may be adjusted depending on the circumstances of the case," but contend that the percentage should be adjusted downward here. (ECF Nos. 2271 at 11, 16-17; 2272-7 at 1; 2264 at 13; 2272-1 at 3.) Their arguments have no basis in the facts or the law.

As explained in Plaintiffs' motion for final approval, the pertinent *Camden I* factors strongly support the reasonableness of Class Counsel's fee request. (ECF No. 2256 at 38-48.) Plaintiffs' analysis of these factors, together with Professor Brian Fitzpatrick's initial opinion (ECF No. 2256-5, ¶¶ 14-27), not only remains largely unchallenged, but finds additional support in the declaration of Professor Geoffrey Miller of New York University, another leading scholar on class actions, who agrees that the *Camden I* factors (also known as the *Johnson* factors) support Plaintiffs' fee request. (Ex. C (Miller Decl.), ¶¶ 31-47.)

The few objectors who even address the *Camden I* factors only do so in a cursory manner. (ECF Nos. 2271 at 11, 16-17; 2272-7 at 1; 2264 at 13; 2272-1 at 3.) For example, despite Class Counsel's detailed description of the enormous amount of time and resources that more than 28 law firms have invested in this case on a contingent basis, the objectors insist that the "time and labor" factor does not support an upward adjustment in fees because Class Counsel have not presented lodestar figures (*e.g.*, ECF No. 2264 at 13). This argument fails because the Eleventh Circuit has expressly rejected the lodestar method for awarding fees in common fund cases, *Camden I*, 946 F.2d at 774. In any event, Class Counsel has since disclosed the lodestar value of the work performed to reach the Honda and Nissan Settlements in the Fee Request Supplement ordered by the Court (ECF No. 2313), and as discussed below, even a "lodestar cross-check" confirms the reasonableness of the fee request.

Several objectors also ineffectively attempt to minimize the "novelty and difficulty" factor by pointing to governmental investigations of Takata inflators. (*E.g.*, ECF No. 2262 at 10-12; 2272-1 at 3.) These investigations, as reflected in Takata's guilty plea, focused on Takata's wrongdoing, not the conduct of the automotive companies, with whom these Settlements were reached following Class Counsel's diligent investigation of their knowledge of Takata's defective inflators. If anything, the governmental investigation of Takata impeded Plaintiffs' claims, because it yielded Takata's guilty plea to wire fraud, which Defendants, including Honda and Nissan, attempted to use as a defense. Virtually all of the automotive Defendants made this argument to the Court in a Status Report dated February 23, 2017:

> Takata's guilty plea significantly undermines Plaintiffs' claims against the Automotive Defendants in the economic loss class actions. The gist of those claims is that the Automotive Defendants allegedly hid a safety defect from their customers but Takata has now admitted that it concealed inflator ruptures that occurred during development testing from those very same defendants. . . . *In short, Takata's guilty plea makes the theory of Plaintiffs' case even more implausible than it already was.*

Automotive Defendants' Status Report, dated February 23, 2017 (ECF No. 1407) (emphasis added). The objectors' claim that Class Counsel merely "piggy-back[ed]" governmental investigations (ECF No. 2264 at 10), therefore, is baseless.

The objectors, moreover, simply fail to address the significant contingent risk that Class Counsel undertook (ECF No. 2256 at 44-45), the various obstacles and risks overcome (*id.* at 42-43), the substantial amount of work that Class Counsel firms turned away because of the time and effort this MDL demanded (*id.* at 44-45, 48), and the extensive amount of work that remains for Class Counsel to perform over the next four years to oversee and manage the Settlements on behalf of the Classes (*id.* at 48).

The objectors also neglect the "customary fee" factor, which references "the market rate for a contingent fee in private commercial cases." *Allapattah*, 454 F. Supp. 2d at 1203. As Professor Silver explains in detail, Class Counsel's requested fee falls well within the market rate for contingent fees in private commercial cases, further demonstrating its reasonableness. (Ex. A (Silver Decl.), ¶¶ 39-62.)

Collectively, these factors, as confirmed by the separate opinions of three preeminent class action experts, support Class Counsel's fee request here.

B. Class Counsel's Fee Should Not Be Reduced Because the Settlements Are "Megafunds."

Relying on cases from courts outside the Eleventh Circuit, several objectors claim that the percentage used to calculate Class Counsel's fee should be reduced because the Settlements represent "megafunds." For good reason, this argument has expressly and repeatedly been rejected in this District. For example, in *Allapattah*, Judge Gold explained:

> While some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, ***that approach is antithetical to the percentage of the recovery method adopted by the Eleventh Circuit*** in *Camden*, the whole purpose of which is to align the interests of Class Counsel and the Class by rewarding counsel in proportion to the result obtained. *See Camden*, 946 F.2d at 774 (percentage award should be determined early on in the litigation so that attorneys can devote their full time to attempting to increase the fund for the class, which in turn increases their own fee). By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little.

454 F. Supp. 2d at 1213 (emphasis added); *accord In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1367 (quoting *Allapattah*).

Several objectors also cite empirical studies of fee awards to argue that the percentage of the fund awarded should be lower in "megafund" cases. (ECF Nos. 2271 at 14-2272-1 at 3; 2264 at 13-14; 2266 at 6; 2272-2 at 16-17; 2272-5 at 11-16; 2262 at 14.)[17] Ironically, the authors of the same empirical studies upon which the objectors rely disagree and decidedly conclude that it would ***not*** be appropriate to reduce the fee percentage here based on the size of the Honda and Nissan Settlements. (Ex. B (Fitzpatrick Supp. Decl.), ¶¶ 5-6; Ex. C (Miller Decl.), ¶¶ 38-47; ECF No. 2256-5, ¶¶ 20-21.) Although their studies did show that a few courts outside the Eleventh Circuit reduce fee percentages as settlement sizes increase, they did not find any statistically significant evidence that courts within the Eleventh Circuit engage in this practice. (Ex. B (Fitzpatrick Supp. Decl.), ¶ 5; Ex. B (Miller Decl.), ¶¶ 37-39; ECF No. 2033-3, ¶ 20.) To the contrary, Professor Fitzpatrick's study shows that, in the Eleventh Circuit, the average fee

[17] The same arguments were made and overruled in connection with the prior four Settlements.

awarded was 28.1 percent, and the median fee awarded was 30 percent (ECF No. 2033-3, ¶ 18);[18] meanwhile, Professor Miller's most recent study, which incorporates data from 2009-2013, shows that, in the Eleventh Circuit, the mean percentage fee ***increased*** to 30 percent and the median percentage fee ***increased*** to 33 percent (Ex. C (Miller Decl.) ¶¶ 36-37). Indeed, as Professor Fitzpatrick explains, there are a number of examples from across the country of fee awards at or above 30 percent, and there are sound policy reasons for not reducing fee percentages as settlement sizes increase. (ECF No. 2256-5, ¶¶ 21-22.) Professor Silver, likewise, lists ***35*** settlements of $100 million or more in which fee awards equaled or exceeded 30 percent. (Ex. A (Silver Decl.) at 23-24.)

Professor Silver's research also shows that the market for legal services, which provides useful guidance in awarding fees, does not support reducing fee percentages as the value of recoveries increase. (Ex. A (Silver Dec.), ¶ 19; *id.* at 41, ¶¶ 38-62.) "[S]ophisticated clients normally pay fees ranging from 25 percent of the recovery to 40 percent of the recovery when hiring lawyers on straight contingency to handle big commercial cases." (*Id.*, ¶ 19.) As a number of examples cited by Professor Silver demonstrate, these market rates generally do not decrease when or when cases involve "megafund" recoveries or multiple, succesive settlements. (*Id.*, ¶¶ 20-37.)

Aside from this empirical research, there are important policy reasons for not reducing fee-award percentages when settlements are for large amounts of money. Such a practice would establish "perverse incentives [that] 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." (Ex. B (Fitzpatrick Supp. Dec., ¶ 3.) With the following example, Professor Fitzpatrick illustrates this point:

> [I]f courts award class action attorneys 30% of settlements if they are under $100 million but only 20% of settlements if they are over $100 million, then rational class action attorneys will prefer to settle cases for $90 million (i.e., a $27 million fee award) rather than $125 million (i.e., a $25 million fee award).

(ECF No. 2256-5, ¶ 21.) Reducing fee percentages as settlement amounts increase thus "blunt[s]

[18] One objector criticizes Professor Fitzpatrick's study as relying on old data (ECF No. 2068 at 14-16), but it remains "the most comprehensive study of class action fees ever published." (Ex. __ (Fitzpatrick Supp. Decl.) at 3 n.2.)

the incentives of class counsel to fight for the largest settlement, and, indeed, might incentivize class counsel to settle cases earlier for smaller sums" (*id.*), none of which would serve the interests of class members.

Neither the law, similar awards, nor sound policy supports using a lower percentage to calculate Class Counsel's fees because of the size of the Honda and Nissan Settlements.

C. A Lodestar Cross Check Should Be Rejected

Some objectors argue that Class Counsel's fee request should be checked against their lodestar. (ECF Nos. 2271 at 17-18; 2272-5 at 16-17; 2272-2 at 2; 2266 at 5.) Courts in this District strongly disagree.

The Eleventh Circuit has squarely held that district courts should award fees in class actions using the percentage-of-the-fund method, and not the lodestar method. *Camden I,* 946 F.2d at 774. Our Circuit has never held that a district court abused its discretion by choosing not to employ a "lodestar crosscheck." Indeed, according to Professor Fitzpatrick, courts that do not use the lodestar crosscheck are on firmer footing than courts that do. (Ex. B (Fitzpatrick Supp. Decl.), ¶¶ 5-6.) As scholars have explained, the lodestar crosscheck can effectively cap the amount of compensation class counsel can receive from a settlement and thereby blunt their incentives to achieve the largest possible award for the class. *See* Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 140-45 (2006). As such, it can reintroduce the very same undesirable consequences of the lodestar method—to delay resolution of a case in order to build up lodestar figures—that the percentage-of-the-fund method was designed to correct in the first place. *See, e.g., Camden I*, 946 F.2d 768, 771-74 (citing the lodestar method's difficulty to administer and failure to align class counsel's interests with the class's interests). For this reason, courts in this District have expressly rejected objections calling for the use of a lodestar crosscheck. *See, e.g., In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1362–63 ("The lodestar approach should not be imposed through the back door via a 'cross-check.' Lodestar creates an incentive to keep litigation going in order to maximize the number of hours included in the court's lodestar calculation.") (internal quotation marks omitted); *accord Wilson v. EverBank*, No. 14-cv-22264, 2016 WL 457011, at *19 (S.D. Fla. Feb. 3, 2016).

While prevailing law in the Eleventh Circuit and this District is clear that a lodestar cross-check should not be employed, its use here only further demonstrates that the requested fee

is reasonable and fair. As explained in more detail in Class Counsel's Fee Request Supplement, dividing the requested fee from the Honda and Nissan Settlements—$210,803,742—by Plaintiffs' Counsel's lodestar relating to Honda and Nissan—$58,100,000—yields a lodestar "multiplier" of 3.63. (ECF No. 2313 at 10.) This multiplier is well within the range that numerous courts, including those in this District, have approved as reasonable. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672, 2017 WL 3175924, at *4 (N.D. Cal. July 21, 2017) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1343–44 (S.D. Fla. 2007) (noting that "lodestar multiples in large and complicated class actions range from 2.26 to 4.5") (internal quotation marks omitted); (ECF No. 2313 at 9-10 (citing additional cases)). Empirical studies also confirm that, for Settlements of this size, a multiplier of 3.63 is "well within the mainstream." (Ex. B (Fitzpatrick Supp. Dec.), ¶ 7; Ex. C (Miller Dec.), ¶ 39.)

Thus, although prevailing law in this Circuit and District reject use of the lodestar method in common fund settlements like these, the lodestar cross-check here provides only further support for Class Counsel's requested fee.

D. Eleventh Circuit Law, Not Florida Law, Governs the Fee Request.

Several "professional" objectors claim that this Court should apply Florida law, instead of the federal common-fund doctrine, as established by the United States Supreme Court and the Eleventh Circuit, to Class Counsel's fee request. (ECF Nos. 2262 at 16-20; 2272-2 at 2; 2083 at 2; 2264 at 14-16.) They are wrong.[19] The objectors' argument is premised on the mistaken assumption that this Court's jurisdiction rests exclusively on diversity of citizenship, and in any event, cannot be reconciled with binding Eleventh Circuit precedent or countless decisions from this District.[20]

To be sure, a few courts outside the Eleventh Circuit, relying primarily on inapposite

[19] The same objectors' counsel unsuccessfully advanced the identical argument against Class Counsel's fee request from the first four Settlements. (ECF Nos. 2066 at 10-13; 2083 at 2; 2084 at 6, 12.)

[20] Although the objectors' argument should be rejected because it is wrong on the law, calculating Class Counsel's fee based on Florida law could actually produce an even higher award than Class Counsel is seeking, since Florida law permits the use of a 5 multiplier, *Kuhnlein v. Dep't of Rev.*, 662 So. 2d 309, 315 (Fla. 1995), which would produce a fee of $290.5 million.

authorities concerning fee-shifting disputes, have applied state law to award attorneys' fees from class settlements in diversity cases. *See, e.g., In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 15 (1st Cir. 2012); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). But these decisions are both inapplicable to the facts here and inconsistent with Eleventh Circuit law.

The decisions are inapplicable because, in each case, the court's jurisdiction depended exclusively on diversity of citizenship, which was the key factor driving each decision. Here, in contrast, this Court has federal-question jurisdiction based on Plaintiffs' Magnuson-Moss claims asserted under 15 U.S.C. § 2310 and Plaintiffs' RICO claims asserted under 18 U.S.C. § 1964, as well as supplemental jurisdiction over state-law claims under 28 U.S.C. § 1367 (ECF No. 579, ¶¶ 444-62), a decisive factor the objectors completely ignore. Because this Court has federal-question jurisdiction, the cases upon which the objectors rely are irrelevant, and the federal common-fund doctrine unquestionably applies. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (applying federal common-fund doctrine where plaintiffs asserted federal securities claims but ultimately obtained recovery "under the New York law of contracts").

The objectors' out-of-circuit decisions also are inconsequential because they are inconsistent with Eleventh Circuit law. On numerous occasions, the Eleventh Circuit has applied the federal common-fund doctrine to review fee awards from class action settlements in diversity cases. For example, in *Faught*, 668 F.3d at 1237, the plaintiffs asserted only state-law claims for breach of contract and bad faith failure to pay an insurance claim, and invoked the Court's diversity jurisdiction under 28 U.S.C. § 1332. *See* Nationwide Class Action Complaint, *Faught v. Am. Home Shield Corp.*, No. cv-07-P-1928, 2007 WL 4652588 (N.D. Ala. Oct. 22, 2007). In reviewing the district court's fee award from the class settlement that resolved the case, the Eleventh Circuit exclusively applied its own, well-established common-fund precedents, including *Camden I*, 946 F.2d at 768, and *Waters*, 190 F.3d at 1293, not state law. *Faught*, 668 F.3d at 1242-44. Likewise, in *Poertner v. Gillette Co.*, 618 F. App'x 624, 625 (11th Cir. 2015), a diversity case involving a single Florida statutory claim, the court exclusively considered its own common-fund precedent, not state law,[21] to affirm a fee award from a class settlement.

One basis for applying the federal common-fund doctrine in diversity cases is that it is

[21] *See* Third Amended Class Action Complaint and Demand for Jury Trial, *Poertner v. Gillette Co.*, No. 12-cv-00803, 2013 WL 11089015 (M.D. Fla. Nov. 1, 2013).

rooted in the court's equitable powers. Since its decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), more than a century ago, the Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees." *Id.* (citations omitted)

Linking the common-fund doctrine to a court's equitable power is, likewise, an enduring tenet of Eleventh Circuit law, as the former Fifth Circuit affirmed forty years ago, when it described "the inherent equitable power of a trial court to allow counsel fees and litigation expenses out of the proceeds of a fund that has been created, increased or protected by successful litigation." *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1017 (5th Cir. 1977). The equitable principle upon which the doctrine rests is that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478.

As an assertion of the court's inherent equitable power, the common-fund doctrine applies even in diversity cases, because "[n]either the Federal Rules of Civil Procedure nor the *Erie* doctrine deprive Federal courts in diversity cases of the power to enforce State-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in the courts of the State." *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54, 57 (5th Cir. 1970) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)). For this reason, several decisions from this District have expressly rejected the objectors' position in diversity cases and have applied the federal common-law doctrine to award attorneys' fees from class action settlements. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1362 n.32 ("Eleventh Circuit attorneys' fee law governs this request, not the law of Florida."); *Allapattah*, 454 F. Supp. 2d at 1200 ("The district court presiding over a diversity-based class action pursuant to Fed. R. Civ. P. 23 has equitable power to apply federal common law in determining fee awards irrespective of state law.").

Ultimately, then, the objectors urge this Court to ignore both that it has federal-question jurisdiction and binding Eleventh Circuit precedent. In accordance with the Eleventh Circuit's

directive in *Camden I*, the Court should award attorneys' fees here "based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774.

E. Fees Should Be Awarded on the Full Value of the Settlements.

As outlined in Plaintiffs' motion for final approval, the combined value of the Settlements, including Mr. Kleckner's valuation of the CSP, is $984,299,141, which constitutes the common fund created through the Settlements. Several objectors, however, claim that the value of the common fund, for the purpose of awarding attorneys' fees under the percentage-of-fund approach, should be reduced by the value of the Outreach Program, Notice Program, CSP, and Rental Car Program. (ECF Nos. 2262 at 7, 10-12; 2271 at 17; 2272-5 at 9, 12-13; 2266 at 5; 2264 at 11-13; 2272-1 at 3.)[22] They are wrong.

The objectors' arguments for subtracting these settlement components from the value of the common fund largely echo the debunked arguments discussed above challenging whether these programs benefit Class Members.[23] These programs "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 decisions, then class counsel will have no incentive to seek to make obligatory anything defendants could do on their own voluntarily—which would leave class members at the mercy of the very defendants that wronged them to begin with." (Ex. B (Fitzpatrick Supp. Decl.), ¶ 11; ECF No. 2256-5, ¶¶ 15-16.)

The objectors' attempt to excise the value of the non-monetary relief, such as the CSP, from the value of the common fund fails for another, albeit decisive, reason: it conflicts with Eleventh Circuit precedent. *See Faught*, 668 F.3d at 1243–44 (affirming fee award "designed to compensate the class counsel for the non-monetary benefits they achieved for the class"); *see also Carter*, 701 F. App'x at 767 (concluding that "fee award is a reasonable percentage of the settlement value" when considering the "enhanced warranty, which is itself a significant tangible

[22] The same arguments were raised and overruled in connection with the first four Settlements. (ECF Nos. 2063 at 2; 2064 at 3; 2073 at 2; 2075 at 6; 2078 at 6-7, 9-10; 2084 at 6.)

[23] One objector claims that the Settlements' present value should be used to calculate Class Counsel fee, but cites not authority for that approach. (ECF No. 2271 at 9.) The objector's calculation of the so-called "present value" of the Settlements, moreover, bears little relationship to the actual value of the Settlements, because it incorrectly assumes that the benefits of the Settlements will be distributed evenly over four years; in reality, Honda and Nissan are required to pay a substantial portion of the Settlement Amounts within the first year. (*E.g.*, ECF No. 2013-1, § III.A.2.)

benefit");[24] *Poertner*, 618 F. App'x at 628-29 (affirming district court's valuation of nonmonetary relief). A number of courts around the country likewise have based fee awards on the value of non-monetary relief, as established by expert valuations.[25]

Because Mr. Kleckner's valuation of the CSP is largely unchallenged and well-supported, the value of the CSP, along with the value of the Outreach and Notice Programs, all of which provide benefits to the Classes, should be included in the common fund when calculating an appropriate fee.[26]

F. Class Counsel's Fee Award Should Be Paid Following Final Approval.

The attorneys' fee provision of the Settlements requires the Settling Defendants to pay the fees awarded by the Court not later than 14 days after the Court issues the Final Order and Final Judgment. (ECF No. 2013-1, § III.A.2.c.) A few objectors argue, however, that attorneys' fees should not be paid for several years, until distributions to all Class Members are made. (ECF Nos. 2272-1 at 4; 2271 at 7-9.)[27] This objection is groundless.[28]

The provision that requires the Settling Defendants to pay attorneys' fees not later than 14

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[24] One objector (ECF No. 2271 at 17) claims that the court in *Carter* did not consider the value of the extended warranty in affirming the reasonableness of the fee. That is incorrect. The court compared the awarded fee to the value of the settlement *both* with *and* without the extended warranty, and concluded that the fee was reasonable either way. *Carter*, 701 F. App'x at 767.

[25] *In re Shop-Vac Mktg. & Sales Practices Litig.*, No. 2380, 2016 WL 7178421, at *12 (M.D. Pa. Dec. 9, 2016) (using percentage-of-fund approach for settlement that provided extended warranty, which was valued by expert); *O'Keefe*, 214 F.R.D. at 304 (same); *In re LG/Zenith Rear Projection Television Class Action Litig.*, No. CIV.A. 06-5609 (JLL), 2009 WL 455513, at *9 (D.N.J. Feb. 18, 2009) (same).

[26] The costs of the Notice Program, along with any administration costs, should be included in the value of the common fund when calculating a fee award. *See Huyer v. Buckley*, 849 F.3d 395, 398 (8th Cir. 2017) ("[A] district court may include fund administration costs as part of the 'benefit' when calculating the percentage-of-the-benefit fee amount.") (internal quotation marks omitted).

[27] The same arguments were advanced and properly overruled in connection with the first four Settlements. (ECF No. 2068 at 8-10; 2072 at 16-17; 2073 at 3.)

[28] In seeking to delay the payment of Class Counsel fees, the objectors misconstrue the purpose of the four-year settlement program. The Settlements have a four-year lifespan to track the expected schedule of recalls and thereby ensure that settlement funds will be available for Class Members who have vehicles in the lower Priority Groups, which will not be recalled for several years. As the Settlements make clear, Class Members do not need to wait four years to make a claim for compensation or to start receiving other settlement benefits. In fact, certain benefits, including the Outreach Program and Rental Car Program were funded and made available after Preliminary Approval.

days after the Court awards such fees and grants Final Approval "is the current best practice to discourage class members from taking appeals in an effort to blackmail class counsel." (Ex. B (Fitzpatrick Supp. Decl.), ¶ 9.) In other words, it is designed to remove the incentive for Class Counsel to give into "objector blackmail" from the same professional objectors who are challenging this very provision. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?,* 62 Vand. L. Rev. 1623, 1625 (2009).

The fee provision of the Settlements "permit[s] counsel to receive whatever fees the district court awards them as soon as those courts approve those settlements, regardless of whether the settlements are appealed," and thus "objectors who bring meritless appeals can no longer delay the point at which class counsel receive their fees." *Id*.[29] Courts routinely approve such provisions for this precise reason, i.e., "the socially-useful purpose of deterring serial objectors." *In re: Whirlpool Corp. Front–loading Washer Prod. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *20–21 (N.D. Ohio Sept. 23, 2016).[30]

In addition, because these Settlements are non-reversionary—i.e., none of the Settlement Funds revert back to the Settling Defendants—there is no doubt how much the Settling Defendants will pay toward the Settlements. Thus, "there is nothing to be gained to delay 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." (Ex. B (Fitzpatrick Supp. Decl.), ¶ 8.)[31]

G. The Court Should Authorize Lead Counsel to Allocate Any Fee Award.

One objector asks the Court to "supervise" the allocation of attorneys' fees among the

[29] Of course, if the Settlements are overturned on appeal, such fees must be immediately returned. (ECF No. 2013-1, § X.9.)

[30] *See also Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016); *Brown v. Hain Celestial Grp., Inc.*, No. 3:11-CV-03082-LB, 2016 WL 631880, at *10 (N.D. Cal. Feb. 17, 2016); *In re LivingSocial Marketing & Sales Prac. Litig.*, 298 F.R.D. 1, 22 n.25 (D.D.C. 2012); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3.07-md-1827, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011).

[31] The objectors' reliance on *Walco Investments, Inc. v. Thenen*, 975 F. Supp. 1468 (S.D. Fla. 1997), is misplaced. In that case, the attorneys were paid through a "hybrid fee arrangement" whereby the attorneys received interim payments at a reduced hourly rate and a final enhancement at the end of the litigation. *Id.* at 1470. Here, in contrast, Class Counsel have invested enormous amounts of time and resources on a purely contingent basis.

many firms that have contributed time and resources to this MDL litigation. (ECF No. 2271 at 19.) Contrary to the objector's suggestion, however, and as explained in Class Counsel's Fee Request Supplement (ECF No. 2313 at 11-13), the Court should continue to permit Chair Lead Counsel, in the absence of any dispute, to allocate awarded fees and expenses in a manner that reflects each counsel's contribution to the litigation, as occurred with respect to the fee awarded from the first four Settlements in this MDL. This is, in fact, the "accepted practice." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004); *In re ECOtality, Inc. Sec. Litig.*, No. 13-cv-03791-SC, 2015 WL 5117618, at *5 (N.D. Cal. Aug. 28, 2015) (granting lead counsel authority to allocate attorneys' fees "in a manner that reflects each counsel's contribution to the initiation, prosecution, and resolution of the litigation"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 149692, at *3 (N.D. Cal. Jan. 14, 2013) (directing "Co-Lead Class Counsel" to allocate attorneys' fees and expenses "in a manner which, in Co–Lead Class Counsel's good-faith judgment, accurately reflects each of such Plaintiff's Counsel's contributions to the establishment, prosecution, and resolution of this litigation"); *See Love v. Blue Cross & Blue Shield Assoc.*, No. 03-cv-21296 (S.D. Fla. Apr. 20, 2008) (directing the plaintiff firms to "divide" the fee award among "plaintiff firms according to agreement"). Professor Fitzpatrick further confirms that "most fee awards are allocated" by lead counsel. (Ex. B (Fitzpatrick Supp. Decl.), ¶ 10.)

For the contrary proposition, the objector relies on *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220 (5th Cir. 2008), and *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 216 (2d Cir. 1987), both of which are inapplicable. In fact, the *Agent Orange* decision undercuts the objector's argument in observing that "the practice of allowing class counsel to distribute a general fee award in an equitable fund case among themselves pursuant to a fee sharing agreement is unexceptional." 818 F.2d at 223. Likewise, the *High Sulfur* decision does not support the objector's request for the Court to immediately get involved in the allocation of fees because:

> [the *High Sulfur* decision] did not hold that district courts cannot allow plaintiffs' lawyers to divide a fee that is reasonable in the aggregate among themselves. Rather, the court held that when some of the plaintiffs' attorneys object to a proposed allocation . . . the court has a duty to rule on the objection and allocate fees in a fair manner. . . . The court acknowledged circuit precedent allowing a district court to award an aggregate sum to plaintiffs' attorneys and then leave apportionment up to the attorneys

themselves, and it did not disapprove of this precedent.

In re Subway Footlong Sandwich Mktg. & Sales Practices Litig., 316 F.R.D. 240, 253 (E.D. Wis. 2016); *see also In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1006 (N.D. Ohio 2016) (distinguishing *High Sulfur* and observing that "[c]ourts routinely permit counsel to divide common benefit fees among themselves").

Here, absent any fee dispute requiring judicial intervention, the Court should continue to permit Chair Lead Counsel to allocate any awarded fees and costs among firms that have contributed to the common benefit of the Classes in a manner consistent with each firm's contributions. Should any dispute arise out of such allocation, the Court would of course retain jurisdiction to resolve it.

IV. THE ARGUMENTS OF SERIAL OBJECTORS LACK CREDIBILITY.

The Court-approved Notice requirement that Objectors and their lawyers list their prior recent objections – designed to deter and ferret out frivolous objections – seems to have struck a nerve. The drawn-out protestations in some objector papers indicate they have something to hide—and they do. While "meritorious objectors can be of immense help to a district court in evaluating the fairness of a settlement," courts have correspondingly cautioned that "it is also important for district courts to screen out improper objections because objectors can, by holding up a settlement for the rest of the class, essentially extort a settlement of even unmeritorious objections." *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 n.3 (1st Cir. 2015) (citing *Newberg on Class Actions* § 13:21 (5th ed.)).

Several of the objectors here are represented by members of a small but active group of lawyers, often acting in concert, who have made a cottage industry out of challenging class action settlements, not to benefit the class, but to leverage a fee. One such attorney, Chistopher Bandas, reports that he has served as counsel for 72 objections over the past year (ECF No. 2271 at 4), while another attorney, John Pentz, claims that he has represented so many objectors over the past five years that simply providing the number of such representations would be burdensome (ECF No. 2262 at 21). Beyond the number of settlements challenged over the past five years, strong evidence that objections stem from professional objectors' counsel include baseless rote allegations (such as those before the Court) that class counsel deliberately undervalued the claims, and boilerplate objections (again, like those before the Court) to fees, notice, or the settlement release. Such lawyers—who employ objections, followed by meritless appeals, to merely obtain a

payoff—interfere with the system and "often delay and unnecessarily complicate class proceedings." *Newberg on Class Actions* § 15:37. The Federal Judicial Center therefore advises courts to "[w]atch out . . . for canned objections from professional objectors who seek out class actions to extract a fee by lodging generic, unhelpful protests." Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges*, at 15 (2d ed. 2009); *see also In re Elec. Books Antitrust Litig.*, 639 F. App'x 724, 728 (2d Cir. 2016) ("[P]rofessional objectors are lawyers who file stock objections to class action settlements—objections that are [m]ost often . . . nonmeritorious—and then are rewarded with a fee by class counsel to settle their objections."); *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d at 1362 (recognizing that professional objectors' "sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch onto" rather than "a concern for the welfare of the Settlement Class").[32]

Contrary to the objectors' complaints, the information pertaining to past objections requested in the Notice, which is most likely in the possession of objectors and their counsel, may be relevant to and properly considered by this Court in determining any potential "ulterior motive" of the objectors. *See Greco*, 635 F. App'x at 633 (noting that the district court "properly considered that [an objector] (or his counsel) may have had an ulterior motive in objecting to the settlement, rather than opting out"). These disclosure requirements reasonably seek to aid this Court in its responsibility to screen out wholly nonmeritorious objections.

The complaint of several objectors that Class Counsel could just as easily obtain the requested information through the federal court's PACER system misses the point. The Notice's disclosure requirements are not primarily for the benefit of Class Counsel. Instead the information that objectors are required to disclose, not only to Class and Defense Counsel but also directly to this Court, is intended to conserve this Court's time and resources in its administration of this litigation. *See Garber*, 2017 WL 752183, at *4 n.9.

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[32] Plaintiffs would note that John Pentz, counsel for objectors Maggard and Spaeth (ECF No. 2262) has been identified as a "professional objector" by other district courts. *See In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 497 n.219 (S.D.N.Y 2010) *opinion clarified*, No. 21 MC 92 SAS, 2010 WL 5186791 (S.D.N.Y. July 20, 2010) (listing cases). Likewise, Christopher Bandas, counsel for objector Walsh (ECF No. 2271), has been linked to this "class of attorneys called 'professional objectors.'" *See, e.g., Garber v. Ofc. of Comm'r of Baseball*, No. 12-CV-03704 (VEC), 2017 WL 752183, at *4 n.9 (S.D.N.Y. Feb. 27, 2017); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 (N.D. Cal. 2012).

The objectors' concern that the disclosure requirements are equivalent to unauthorized attorney discovery (ECF No. 2271 at 4-5) likewise is without merit. As objectors readily admit, the information regarding objectors and their counsel's prior class action litigation history is available on public forums such as this Court's PACER system and the website www.serialobjector.com and thus disclosure of such information does not intrude upon any confidential or attorney-client privileged information. Nor does the Notice's requirement to provide any "agreements that relate to the objection or the process of objecting" seek protected information. *See In re Grand Jury Subpoena,* 204 F.3d 516, 520 (4th Cir. 2000) ("[T]he identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege, because such information ordinarily reveals no confidential professional communications between attorney and client.") (internal citations and quotation marks omitted).

Rather than "strongly disfavor[ing]" (ECF No. 2068 at 6 n.10) attorney discovery, in attempting to curtail abusive serial objector practices, district courts have ordered discovery, not unlike the information sought by the Notice's disclosure requirements, from objectors and/or their attorneys. *See In re IPO Sec. Litig*., 728 F. Supp. 2d at 294–95 ("These questions sought to determine if any of the Objectors' counsel have a pattern or practice of objecting to class action settlements for the purpose of securing a settlement from class counsel."); 2 *McLaughlin on Class Actions* § 6:10 at n.9 (13th ed.) (compiling cases).

Debate over whether the information sought regarding past litigation practices is relevant to the merits of any given objection or to an objector's standing does not render the disclosure requirements unreasonable. Federal courts have demonstrated that they are capable of separating any analysis of the merits of objections, even if lodged by known serial objectors, from consideration of the motives of such objectors. *See In re Checking Account Overdraft Litig*., 830 F. Supp. 2d at 1362 (notwithstanding the recognized improper motives of certain objectors, the court "nonetheless considered their objections on the merits."). Still, requiring an objector to provide information that could shed light on the basis for his objection is not inconsequential to the Court's obligation to ensure that a class action settlement is fair, adequate, and reasonable.[33]

[33] Nor does the requirement that all objectors personally sign the objection even when represented by counsel necessarily unduly burden an objector by subjecting him to a higher standard than other class members. *See Bezdek*, 809 F.3d at 83 ([T]he imposition of disparate

Along these lines, some courts have considered the objector's or counsel's history of objecting to class action settlements relevant to the court's discretion in ordering the posting of an appellate bond. *In re IPO Sec. Litig.*, 728 F. Supp. 2d at 214-16.

Accordingly, it was entirely reasonable for this Court to approve the Notice with its litigation-history disclosure requirements, and the information gleaned from those disclosures warrants the Court viewing the positions advanced by the serial objectors with skepticism.

V. CONCLUSION

For the foregoing reasons, the objections of Class Members to approval of the Honda and Nissan Settlements, Service Awards, and Class Counsel's fee request should be overruled.

Dated: January 24, 2018

Respectfully submitted,

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requirements on objectors does not provide an independent basis for invalidating the settlement.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 24, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

By: */s/ Peter Prieto*
Peter Prieto