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

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

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

PLAINTIFFS' OMNIBUS RESPONSE TO OBJECTIONS TO THE BMW, MAZDA, SUBARU AND TOYOTA SETTLEMENTS, AND CLASS COUNSEL'S APPLICATION FOR SERVICE AWARDS AND ATTORNEYS' FEES

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I. INTRODUCTION.

The Settlements with the Toyota, BMW, Mazda, and Subaru Defendants are outstanding: with a combined value of more than $740 million, they tackle the extraordinary public safety hazard posed by millions of defective Takata airbags and offer significant compensation to millions of Class Members.[1] Underscoring the fairness and reasonableness of the Settlements, as well as Class Counsel's application for service awards and attorneys' fees, remarkably few objections have been filed, and several are by "serial" or "professional" objectors. From a universe of 19,717,671 Class Members who received the Direct-Mail Notice, just 30 objections were made on behalf of 41 Class Members—an infinitesimal .00000002% of the combined Classes—far less than nationwide consumer settlements usually receive.[2] This uncommonly "low percentage of objections points to the reasonableness of [the] proposed settlement and supports its approval." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005).

As explained below, the few objections that have been raised lack merit, because the Settlements are fundamentally sound and provide substantial benefits to almost 20 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

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[1] The BMW, Mazda, Subaru, and Toyota Defendants – as identified in the Settlements, and inclusive of related entities identified in the Settlements – are collectively referred to as the "Settling Defendants." As the material terms of the Settlements, apart from the Settlement Amounts, are virtually identical, the Settlements will be referenced collectively, unless otherwise specified. Capitalized terms not defined herein shall have the same definitions and meanings ascribed to them in the Settlements.

[2] 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 class in this settlement. *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 of similar size to the class 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.

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 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, objector Sibley, filed an objection to the timeliness of the notice program. (ECF No. 2087.) The objection 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 19,717,671 potential Class Members between July 26, 2017 to August 25, 2017. (ECF No. 2030-1, ¶¶ 8, 16, 19, 26, 29.) It employed a series of methods to cross-check the accuracy of addresses and has re-mailed 181,779 Direct Mail Notices that were returned as undeliverable as of September 4, 2017. (*Id.*, ¶¶ 30, 32.) To compliment the Direct Mail Notice and reach an even broader audience, the Notice Program also included 30-second radio advertisements airing primarily between July 31, 2017 and August 13, 2017 on various radio stations nationwide (*id.*, ¶ 34), sizeable print advertisements in several magazines and newspapers nationwide from July 28, 2017 to August 25, 2017 (*id.*, ¶¶ 36-38), and digital banners on several websites, including popular sites like Facebook and Pandora, from July 26, 2017 to August 29, 2017 (*id.* at 39-45), 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).

Nevertheless, Mr. Sibley objects because he claims he received the Direct Mail Notice of the BMW Settlement six days before the deadline to object or opt out. His objection is simply without merit. His Direct Mail Notice was timely mailed in August 2017, but it was returned to Epiq as undeliverable on September 5, 2017. (Ex. A (Kao Decl.), ¶¶ 3-4.) Epiq then sent Mr. Sibley's record to "skip-tracing" or address research, which provided a new mailing address. (*Id.*) Direct Mail Notice was then resent to Mr. Sibley on September 13, 2017. (*Id.*, ¶ 5.) More to the point, the reasonableness of a class notice program looks to whether it provided the best practicable notice under the circumstances, not whether particular class members received actual notice. *See Juris v. Inamed Corp*., 685 F.3d 1294, 1321 (11th Cir. 2012) ("Courts have consistently recognized that, even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice."); *Adams v. Southern Farm Bureau Life Ins. Co*., 417 F. Supp. 2d 1373, 1380 n.6 (M.D. Ga. 2006) ("The analysis for purposes of due process is on the notice plan itself, and actual receipt of notice by each individual class member is not required."), *aff'd*, 493 F.3d 1276 (11th Cir. 2007).

People like Mr. Sibley, for whom address records were incorrect or incomplete, received the best practicable opportunity to receive notice of the Settlement. The multiple publications and syndications broadcast to the public also directed viewers, readers, and/or online visitors to the Settlement Website, which contained the Direct Mail Notice, the Settlement Agreements, Long Form Notice, and Claim Forms. Even if a particular Class Member never received the Direct Mail Notice or actual notice, the Notice Program was the best practicable under the circumstances, because it was structured to provide actual notice to the greatest amount of Class Members possible. Indeed, the fact that Mr. Sibley received the Direct Mail Notice within sufficient time to submit an objection evidences that the Notice Program was effective.

For the same reasons, there is no basis to grant an extension of time to object or opt out of the Settlement, as Mr. Sibley requests, because, as explained above, Rule 23 does not require actual notice. *See In re Terazosin Hydrochloride Antitrust Litig*., No. 99-MDL-1317, 2005 WL 2451957, at *3 (S.D. Fla. July 8, 2005) (denying request to consider late opt-outs because, *inter alia*, actual notice for each class member is not required, objector was sent direct mail notice to his address, and notice was published in several periodicals).[3] Nor is an extension of the opt-out

[3] *See also In re Prudential Ins. Co. of Am. Sales Practices Litig*., 177 F.R.D. 216, (D.N.J. 1997) (denying class members that allegedly received notice late or to whom notice was mailed to the

period necessary to address the concern of objector Zavislak (ECF No. 2099 at 2-3) that the notice indicated that objections should be received and filed by September 25, 2017, as opposed to "postmarked," as indicated in the Court's Order, because the Parties have accepted all opt-outs and considered and addressed all objections *postmarked* by September 25, 2017, including Mr. Zavisklak's objection.

ii. Notice Provided Was Sufficiently Clear and Not Misleading.

A handful of objectors raise issues concerning the clarity of the Notice. 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). Three objectors erroneously claim that the Notice was misleading because it failed to inform class members about immaterial or uncertain possibilities. 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. Objectors Bernstein, *et al.*, for example, argue 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. 2066 at 7.) But opting out does, as the notices correctly indicated, prevent a Class Member from enjoying the full benefits of the

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wrong address an extension of time to opt out of action because settlement's notice program "comported with due process and Rule 23 of the Federal Rules of Civil Procedure despite the lack of receipt of individual notice by all class members"); *Hill v. State Street Corp.*, No. 09-12146, 2015 WL 127728, at *1 (D. Mass. Jan. 8, 2015) (approving notice program where portion of class did not receive notice until after the deadlines for filing objections).

Settlements, including the Out-of-Pocket Claims Process, Residual Distribution, and Customer Support Program.

Despite the Notice clearly stating that additional payments beyond reimbursement of reasonable out-of-pocket expenses related to the Takata airbag recall would be from "residual Settlement funds, ***if any remain***," and were capped at $500 (ECF No. 2030-1 at 69 (emphasis added)), Ms. Marks objects that it is misleading because the "potential payment of up to a maximum of $500 to Class Members from residual Settlement funds intentionally lures Class Members into agreeing to the Settlement despite the very low likelihood that Residual Distributions will exist." (ECF No. 2063 at 1.) Ms. Marks does not explain why there is a "very low likelihood that residual distributions will exist," nor does she present any evidence to support her claim.

Finally, the Notice included the full value of the Settlement(s) for class members. Mr. Jan, however, objects to the Settlement because Notice did not state that the Mazda Settlement was "only part of settlement [sic] of captioned matter and the gross settlement represents a mega-fund." (ECF No. 2084 at 9.) But Mr. Jan cannot explain why this information would be material to a Mazda Class Member deciding whether to accept the Settlement's benefits, object, or opt out, as Mazda Class Members are not parties to the other Settlements. In addition, Mr. Jan overlooks that the publication notice disclosed the combined value of the four Settlements being considered for Final Approval. (ECF No. 2030-1 at 272.)

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

Eleven of the objections voice dissatisfaction with the amount of the applicable settlement, most in the form of generalized complaints that Defendants are not paying enough.[4] 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

[4] (*See* ECF Nos. 2016; 2018-1; 2051; 2052; 2054; 2062; 2063; 2065; 2066 at 4; 2070; 2071; 2072 at 3-4, 9-11, 14.)

Subaru settlement does not "fully compensate" class members (ECF No. 2016 at 1) is legally misguided. So, too, is the speculative objection that a $68 million price tag is inadequate to deter Subaru from similar future behavior. (ECF No. 2072 at 3.)

None of the objectors challenge the analysis required under the totality of the *Bennett* factors in assessing the reasonableness of the settlements. Plaintiffs' analysis of those considerations (ECF No. 2033 at 31-38), 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 $553 million, which represents roughly more than 50% 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. 2033-1 (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 each defendant gets under its settlement agreement for making free rental cars available to certain class members awaiting performance of the Recall Remedy. (ECF No. 2033-2 (Kleckner Decl.) at 9.) Further, the extended warranties guaranteed by the Customer Support Programs add significant value to the settlements—nearly $188 million more, according to Plaintiffs' valuation expert. (*Id*. at 8.) When those additional benefits are factored in, "the total benefits conferred by class counsel in these four settlements are *conservatively* estimated to be: $388 million to the Toyota class, $163 million to the BMW class, $98 million to Mazda class, and $90 million to the Subaru class." (ECF No. 2033-3 (Fitzpatrick Decl.), ¶ 15.) That is a total value of $741,287,307, or roughly ***three quarters of a billion dollars***.

The recovery of more than 50% 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. 2051; 2052; 2054; 2062; 2063; 2065) ignore the

value conferred by other important aspects of the settlements – the Notice Program, the Rental Car Program, and the Customer Support Program.

Objector Bernstein, who had his Subaru Legacy's airbags replaced and was given a "free loaner car" that day, complains that the Subaru settlement provides him "no value." (ECF No. 2066 at 1, 3-4.) But he is mistaken. He is precisely the kind of class member 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. 1724-3 at 26, § F(1).) Mr. Bernstein apparently incurred no out-of-pocket costs in connection with taking his car to a dealer for the recall remedy. (ECF No. 2066 at 5.) That does not disentitle him to cash relief. He 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. 1724-3 at 25, § E(1)), with the possibility of an additional $250 at the conclusion of year four (*id*. at 26, § E(2)(c)).

Objector Falkner, who sold his BMW after the date the Court preliminarily approved that settlement on June 9, 2017 (ECF No. 1801 at 19), contends that he is receiving no value. (ECF No. 2066 at 1, 3-4.) This objection really goes to the parties' choice of a cut-off date for the class definition. But class periods must be specified to provide clarity for preclusive purposes, *see* Federal Judicial Center, *Manual for Complex Litig., Fourth* § 21.222 at 271 (2004), and if the parties had selected the date of final approval instead of preliminary approval, there would also be people excluded from the class who would be in the same position as Mr. Falkner. Reasonable lines must be drawn.

Regarding the Rental Car Program, Objector Mejias complains that "BMW should be obligated to buy-back all related vehicles or provide alternate transportation until such parts are available." (ECF No. 2052 at 1.) The buy-back proposal, however, is not the damages theory that Plaintiffs pursued against BMW. In addition, how promptly Defendants would make available loaner vehicles to class members awaiting the Recall Remedy and which vehicles would fall under the Rental Car Program were subjects debated back and forth during settlement negotiations. The resulting negotiated settlement terms reflect the most generous Rental Car Program that Plaintiffs were able to get Defendants to fund.

One objector to the Subaru settlement, Mr. O'Donnell, raises an extraneous consideration: behavior by a single Surbaru dealer in California who reportedly was holding the

performance of the recall remedy "hostage" to requiring customers to pay for an expensive repair of a separate claimed defect in the cars' airbag warning light systems. (ECF No. 2018-1 at 1.) Subaru has addressed the concerns raised in this objection and has verified that its dealerships are not requiring customers to pay for any repairs as a condition for performing the Recall Remedy. In any event, this allegation of one dealer's non-compliance with a federally ordered Recall Remedy does not give rise to a basis to suspect the existence of a nationwide obstacle to Subaru class members' ability to reap the benefits of the settlement.

C. 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 the Settlements.

The "sole focus" of the Outreach Program, as reflected in the declaration of the Settlement Special Administrator, Patrick A. Juneau, "will be to increase remedy completion," which will significantly decrease the number of vehicles with dangerous Takata inflators. (Ex. B (Juneau Decl.), ¶ 4.) Utilizing a secure database with up-to-date information on Subject Vehicles and Class Members, the program will, among other things, "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, the Outreach Program will employ advanced marketing strategies that are not currently being used in outreach efforts to motivate Class Members to have the Recall Remedy performed on their vehicles.

Notwithstanding the Outreach Program's unassailable objective of saving lives and preventing serious injuries by removing and replacing defective airbags, several objectors bemoan the allocation of settlement funds to it, claiming that it does not benefit the Classes, calling it "a misallocation of resources" (ECF No. 2075 at 4), and contending that it does not provide any benefit beyond what the Settling Defendants already are doing. (ECF Nos. 1997 at 1; 2064 at 2-3;

2075 at 4-5.) These objections are not only shortsighted but groundless.

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. 1724-1 at 84.) The Outreach Program aims to overcome this obstacle and "significantly increase Recall Remedy completion rates." (ECF No. 1724-1, § 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. 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 to it.

Moreover, the Outreach Program's flexibility and active oversight by the Settlement Special Administrator will ensure that resources are not "misallocated." As defined in the Settlements, the Outreach Program "is not intended to be a static program with components that are fixed for the entire settlement period." (ECF No. 1724-1, § 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.*)[5] 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.[6]

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[5] Certain objectors complain that the parameters of the Outreach Program are not defined in sufficient detail. (ECF No. 2078 at 4-7.) 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. 1724-1, § III.B.2.)

[6] One objector misreads a provision of the Settlements as leaving the Settlement Amounts indefinite. (ECF No. 2078 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. 1724-1, § III.A.2.h.)

Certain objectors claim that the Outreach Program should not be treated as a benefit of the Settlements because the Settling Defendants already are conducting or required to conduct outreach to their customers. (ECF Nos. 2063 at 1-2; 2066 at 5-6; 2073 at 2; 2084 at 4-7.) This argument, however, ignores the plain language of the Settlements. The Settlements require the Outreach Program to utilize "traditional and non-traditional outreach efforts ***beyond*** those currently being used by [the Settling Defendants]." (*E.g.*, ECF No. 1724-1, § III.B.1. (emphasis added).) The objectors' argument, devoid of any supporting evidence, also ignores that current outreach efforts have resulted in incomplete rates of recall repairs. The objectors also are mistaken in claiming—without citing any authority—that federal law requires the Settling Defendants to conduct the type of innovative, extensive, and costly outreach campaigns mandated in the Outreach Program. In fact, federal regulations only require automakers implementing recalls to issue a single notice to vehicle owners. *See* 49 C.F.R. § 577.7. 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.

D. 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, whom one objector seeks to cross examine at the Fairness Hearing. (ECF Nos. 2064 at 3; 2068 at 17-18; 2075 at 2, 6-7.) To the extent the few sentences that objectors dedicate to the CSP even qualify as objections, they do not diminish the substantial benefit it provides to the Classes. And because no objector has raised any valid grounds to challenge Mr. Kleckner's valuation, the request to cross-examine him and turn the Fairness Hearing into a mini-trial should be denied.

In addition to the monetary elements of the Settlements, each Settling Defendant has also agreed to provide Class Members with a CSP that covers prospective coverage for repairs and adjustments (including parts and labor) necessary to correct any defects in the materials or workmanship of (1) the Takata PSAN inflators contained in the driver or passenger front airbag modules of Subject Vehicles, or (2) replacement driver or passenger inflators installed pursuant to the Takata Airbag Recall in the Subject Vehicles. (*E.g.*, ECF No. 1724-4, § III.G.) This benefit covers two important circumstances where Class Members are at risk of incurring additional expenses in the future: where their vehicle's airbag contains a not-yet-recalled Takata

PSAN inflator (*e.g.*, a vehicle designated with a low Priority Group level, or a vehicle with a desiccated inflator), and where they had the Recall Remedy performed, but the new inflator is in any way defective or breaks. The duration of the CSP benefit for each Class Member depends on whether the Recall Remedy has already been performed and whether the Subject Vehicle contains a desiccated Takata PSAN inflator, but in no event will be less than two years from the date of final approval of the Settlements. (ECF No. 1724-4, § III.G.)

The objectors, without explanation, claim that the CSP is an illusory benefit. But their objection is undercut by the Eleventh Circuit's recent decision in *Carter v. Forjas Taurus, S.A.*, No. 16-15277, 2017 WL 2813844 (11th Cir. June 29, 2017), which held that the provision of a similar extended warranty is "a significant tangible benefit." *Id.* at *5; *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").

Most objectors, moreover, do not dispute Mr. Kleckner's methodical valuation of the CSP. In fact, just one "serial" objector even mentions Mr. Kleckner's report. (ECF No. 2075 at 6.) The objector claims that Mr. Kleckner's valuation of the Toyota CSP is "inflated," but never offers any evidence to support that claim. (*Id.*) Instead, the objector contends, again without support, that Mr. Kleckner's valuation would not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for admissibility. But that argument fails at the starting gate, for 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. (ECF No. 2033-2 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, 17-20.) 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.

Nonetheless, a single objector questions Mr. Kleckner's methodology. (ECF No. 2075 at 6.) The lone specific criticism is that his report does not include "any scien[tific] assessment of the probabilities of future failures in inflators." (*Id.*) But Mr. Kleckner did not need to consider such probabilities because he properly was valuing the benefit of the CSP to Class Members under a market-based approach, not calculating the irrelevant expected cost of the CSP to Settling Defendants. (ECF No. 2033-2 at 4-6.) Several courts have endorsed this approach in rejecting similar objections. *See, e.g., In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d at 168–69 ("The Court does not accept [the] argument that the value of the extended warranties is limited to the value of repairs provided gratis during the extended warranty period. That valuation method reflects the costs the extended warranties imposed on the Defendants, but not the value the warranties conferred on class members."); *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 306-07 (E.D. Pa. 2003) (rejecting a valuation of an extended warranty benefit based on past warranty repair data because "[t]he cost to the [defendant of the warranty program] is irrelevant," and endorsing a valuation that "uses a market price for a warranty as its starting point"). The objector's criticism of Mr. Kleckner's valuation therefore finds no support in the facts or the law.

Having failed to identify any valid objection to Mr. Kleckner's valuation of the CSP, the objector should not be permitted to cross-examine Mr. Kleckner at the Fairness Hearing. The

[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).

Sixth Circuit has observed that "no court of appeals, to our knowledge, has demanded that district courts invariably conduct a full evidentiary hearing with live testimony and cross-examination before approving a settlement. . . . Our court, and several others, have instead deferred to the district court's traditionally broad discretion over the evidence it considers when reviewing a proposed class action settlement." *UAW*, 497 F.3d at 636. The former Fifth Circuit similarly observed that a district court conducting a settlement hearing "does not try the case," as the "very purpose of compromise is to avoid the delay and expense of such a trial." *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971). The final Fairness Hearing is designed to afford the court an opportunity to assure itself that the settlement is fair, reasonable, and adequate, *Canupp v. Liberty Behavioral Health Corp.*, 417 F. App'x 843, 845 (11th Cir. 2011), not to reach conclusions on issues of fact underlying the merits of the dispute. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). In undertaking this assessment, then, this Court need not conduct a mini-trial.

As a consequence, this Court "has the discretion to limit the fairness hearing, and the consideration of [] objections, so long as such limitations are consistent with the ultimate goal of determining whether the proposed settlement is fair, adequate and reasonable." *Tenn. Ass'n of HMOs, Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001); *see Geier v. Alexander*, 801 F.2d 799, 809 (6th Cir. 1986) ("[U]nless the objectors have made a clear and specific showing that vital material was ignored by the District Court[,] [t]here is no need for the District Court to hold an additional evidentiary hearing on the propriety of the settlement.") (internal quotation marks omitted).

Where, as here, evidence in the record is sufficient to allow the Court to document its evaluation of the fairness of the settlement, the Court should not indulge an objector's demand for the opportunity to develop additional evidence at or in advance of the fairness hearing. *See, e.g., Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (rejecting objectors' argument that they should have been entitled to "subpoena witnesses for the settlement hearing" regarding damages data because "a great deal, if not all, of this information already exists in the [document] depository"), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Where the evidence submitted in support of the settlement is the result of truly adversarial proceedings and where the "comprehensiveness" of the records developed by the proponents of the settlement is evident, the objector has a greater burden to show the necessity of additional evidence. *See Newberg on Class Actions* § 13:32 (5th ed.); *see also In re Lorazepam &*

Clorazepate Antitrust Litig., 205 F.R.D. 24, 27 (D.D.C. 2001). Because the objector has not satisfied its burden of showing the necessity of additional evidence, its request to cross-examine Mr. Kleckner should be denied.[8]

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

The Rental Car/Loaner Program ("RCP") provides another substantial benefit to the Classes. Some objectors implicitly acknowledge the significance of this benefit in seeking its extension to all Class Members, regardless of the priority status of their Subject Vehicles. (ECF Nos. 2052 at 1; 2075 at 2-4.) Other objectors, meanwhile, claim that the RCP is an illusory benefit because certain Settling Defendants have voluntarily provided rental cars to their customers in the past. (ECF Nos. 2066 at 5; 2073 at 2; 2078 at 7-8; 2084 at 9.) Both sets of objections are misguided, and should be overruled.

The RCP uses the prioritization scheme adopted by NHTSA in the Third Amendment to the Coordinated Remedy Order ("CRO"), which places vehicles that have been or will be recalled into 12 priority groups, based on risk of rupture, as determined by NHTSA. (ECF No. 1724-1 at 76.) The 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 shortages of replacement parts. Where replacement parts are unavailable, and the replacement of recalled inflators is delayed for an extended period as a result, Class Members who own or lease recalled vehicles that NHTSA has identified as the highest priority for repair (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. 1724-1, § 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.

Objectors arguing that the RCP should be extended to all Class Members (ECF Nos. 2052 at 1; 2075 at 4-5) ignore the give-and-take of settlement negotiations. The RCP was a topic of intense and extensive negotiations, with Plaintiffs pushing for a larger, more generous program, and the Settling Defendants pushing for a more limited, smaller program. The application of the

[8] For the same reasons, the objector's request to cross-examine Professor Brian Fitzpatrick (ECF No. 2075 at 7) should be denied. Indeed, the objector does not even attempt to challenge Professor Fitzpatrick's methodology.

RCP to Priority Group 1 vehicles reflects the compromise that was reached. Objections to the scope of the program ignore the fact that "[s]ettlement is the offspring of compromise; [and] the question [the Court] address[es] is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

In addition, such objections ignore that the RCP is not the exclusive aspect of the Settlements that addresses alternative transportation due to the recall, including rental vehicles. All Class Members—i.e., not just those with Priority Group 1 vehicles—who incur expenses for securing alternative transportation, including rental vehicles, can submit a claim for reimbursement of those expenses under the Out-of-Pocket Claims Process. (ECF No. 1724-1, § III.D.3.)

In contrast to those seeking to expand the scope of the RCP, some objectors try to dismiss the value of the program because the Settling Defendants have provided rental vehicles in the past to Class Members. (ECF Nos. 2066 at 5; 2073 at 2; 2078 at 7-8; 2084 at 9.) 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. 2066-1 at 4-5 (reporting that NHTSA "cannot require automakers to provide rental cars, and their practices vary"). Instead, some policies provide that rental or loaner vehicles "***can be***" provided to customers, with the decision left to dealerships, far short of the binding obligations the Settlements impose. (ECF No. 2084-6 at 2 (emphasis added); 2066-1 at 4-5.) 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 the Settling Defendants receive for undertaking the obligation. (ECF No. 2033-2 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 do so was illusory.").

F. 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. Some claim that there is a conflict

between Class Members who have Priority Group 1 vehicles and the rest of the Classes. (ECF Nos. 2063 at 1-2; 2075 at 2-4; 2084 at 7-8.) Others claim that there is a conflict between former owners of Subject Vehicles and current owners. (ECF Nos. 2066 at 3-5; 2068 at 7-8.) 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 the Settling Defendants' vehicles, proving the Settling Defendants' knowledge of the defect, and recovering economic damages from the Settling 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 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. C (Silver Decl.), ¶ 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 Class Members who own

Priority Group 1 vehicles and the rest of the Classes, since the RCP only applies to those vehicles. (ECF Nos. 2063 at 1-2; 2075 at 2-4; 2084 at 7-8.) 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).

Nor are subclasses required under such circumstances, particularly because the priority groups merely reflect objective assessments from NHTSA, not Plaintiffs or Class Counsel, as to the risk of rupture among Subject Vehicles. *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).

As to the objection that there is a conflict among former and current owners, 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; *see also* Ex. C (Silver Decl.), ¶ 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. 1724-1, § III.F.)

To be sure, the Outreach Program and RCP will benefit certain current owners—i.e., those 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. C (Silver Decl.), ¶ 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.

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

G. The *Cy Pres* Provisions Are Appropriate.

Two objectors raise issues with the Settlements' use of a *cy pres* mechanism. (ECF Nos. 2073 at 2-3; 2077 at 6-8.) The Settlements utilize *cy pres* as a last resort, and only conditionally in the event that it is administratively infeasible to distribute any remaining funds at the end of the fourth year of the settlement program on a *per capita* basis because the administrative cost of distributing the money exceeds the funds themselves. (*See*, *e.g.*, ECF No. 1724-1 at 26, § E.3.)[9] This provision accords fully with the recommendations of the American Law Institute. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1355 (S.D. Fla. 2011) (citing American Law Inst., *Principles of the Law: Aggregate Litigation* §3.07, cmt. b (2010)).

The objectors further fault the Settlements for not including a list of potential *cy pres* recipients. (ECF Nos. 2073 at 2-3; 2077 at 6-8.) 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.

A third objector challenges the Mazda Settlement because "[n]o settlement monies are directed to non-profit organizations dedicated to consumer or traffic safety" (ECF No. 2051), but *cy pres* distribution is generally used when "the individuals injured are not likely to come forward and prove their claims or cannot be given notice." *In re Motorsports Merchandise*

[9] Objector Ference's contention that the *cy pres* provision of the Subaru settlement does *not* contain this infeasibility trigger (ECF No. 2077 at 6) simply ignores the plain wording of the Settlement Agreement. (ECF No. 1724-3 at 26, § E.3.)

Antitrust Litig., 160 F. Supp. 2d 1392, 1395 (N.D. Ga. 2001) (citing *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981)); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1355-56 (noting that *cy pres* distributions are appropriate "only when direct distribution to class members are not feasible") (internal citation and quotation marks omitted). Such is not the case here, because the majority of injured class members have received actual notice and can receive fund distributions. Objector Derusseau bluntly claims that the Settlement "does nothing for the public good, such as increasing automobile safety or changing the corporate culture that led to faulty and dangerous airbags being placed in vehicles" (ECF No. 2051), but overlooks the Settlement's Outreach, Rental Car/Loaner, and Customer Support Programs, all of which aim to improve automobile safety.

H. 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").

Objector Mejias challenges the BMW Settlement because, *inter alia*, BMW "has only replaced [his] airbag with the same exact airbag as the one recalled." (ECF No. 2052.) In addition to providing no factual evidence to support his contention, however, Mr. Mejias fails to address why the CSP, which requires BMW to "provide prospective coverage for repairs and adjustments (including parts and labor) needed to correct damaged and/or defective materials . . . of . . . replacement driver of passenger inflators installed pursuant to the Takata Airbag Recall in the Subject Vehicles" (ECF No. 1724-1 at 27), does not address his concern. In addition, under NHTSA's Third Amendment to the CRO, all "like for like" inflators that have been installed will be replaced.

Objector Margheim objects to the Toyota Settlement, in part, because she is unsure "whether or not the driver's side airbag [in her Toyota] should be replaced as well" (ECF No. 2070 at 3), but Ms. Margheim's driver side airbag does not appear to contain a defective Takata inflator. The Toyota Settlement covers airbags in Subject Vehicles that have been

recalled and "shall be recalled" or contain a defective Takata inflator referenced in NHTSA's consent orders with Takata, which were attached to the Settlement. (ECF No. 1724-4. ¶ 43.)

Objector Stevens (ECF No. 2025) and the Griffith objectors (ECF No. 1989) sent letters to the Court disagreeing with allegations against the Toyota and Subaru Defendants, 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 Mr. Stevens or the Griffiths did not wish to be included in the Settlements, they could have opted out.

Objector Winner contests the Subaru Settlement because, *inter alia*, he believes that Epiq was rude and his Subaru dealership was unaware of the Settlement. (ECF No. 2008-1.) Plaintiffs and the Settling Defendants have had multiple calls with the Settlement Administrator and Epiq to ensure the high quality of the call center and have conducted training of personnel equipped to handle calls that Epiq cannot. This objection, recounting a single interaction with Epiq and a Subaru dealership, does not address the fairness, adequacy, or reasonableness of the Subaru Settlement. *See Newby v. Enron Corp.*, 394 F.3d 296, 302-03, 310 (5th Cir. 2004) (affirming district court's dismissal of objection to settlement that was vague and unpersuasive).

Conversely, the Harris objectors assert that Subaru's conduct "is particularly egregious," and Class Counsel should have taken the case to trial. (ECF No. 2072 at 4-8.) But Mr. and Mrs. Harris seem to ignore the risks posed by continued litigation, including obtaining class certification, surviving summary judgment, and the uncertainty of a trial. *See Nelson*, 484 F. App'x 434-35 (noting that objectors failed to account for plaintiffs' risk at trial). *Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV, 2016 WL 1529902, at *21 (S.D. Fla. Apr. 13, 2016) (noting objectors failed to accurately address the risks associated with ongoing litigation). The Court, aided by "the judgment of experienced counsel," *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 539 (S.D. Fla. 1988), may evaluate the reasonableness and adequacy of the Subaru Settlement with those risks in mind. *Accord In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1351.

The Harrises also request that if the Settlement is approved, they be allowed to opt out. But as "objectors [they] chose to remain members of the class, potentially releasing their claims against Defendants by their own will." *Montoya*, 2016 WL 1529902, at * 25-26. "[I]t is well established that 'class members may either object or opt out, but they cannot do both.'" *Carter*, 2016 WL 3982489, at *13 (citing *Newberg on Class Actions* § 13:23 (5th ed.). The Harrises simply can't have their cake and eat it too. *See id.* (finding "no prejudice in the fact that the Class Members had to choose whether to opt out or object by the same deadline").

Next, the Harrises ask this Court to not equate Class Members' silence with the absence of objections. Courts have traditionally considered the number of objections to a settlement at final approval, *e.g., Braynen*, 2015 WL 6872519, at *2; *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1337, because it is the best evidence of Class Members' views of the Settlements. *See Perez*, 501 F. Supp. 2d at 1382 (finding "number and corresponding percentage of objections to the proposed Settlement" compared with amount of claims filed weighed in favor of approval); *In re Managed Care Litig.*, No. 00-MDL-1334, 2003 WL 22850070, at *4 (S.D. Fla. Oct. 24, 2003) (noting "miniscule percentage" of objections). The Harrises' theory that "the vast majority of people who object" do nothing or file a claim (ECF No. 2072 at 20-21) is pure speculation. Moreover, opt-outs are not objections, *see Coppolino v. Total Call Int'l, Inc.*, 588 F. Supp. 2d 594, 604-05 (D.N.J. 2008), and it would be improper for the Court to infer that every opt-out also opposed the Settlements.[10]

The Harrises also object to the definition of the Class, arguing that it is "unfair and excludes valid members of the class," because it excludes previous owners of a Subaru that sold or returned their Subaru vehicle prior to April 11, 2013. The Parties did not pick that cutoff date arbitrarily; it was a negotiated term. To have included people or entities that sold or returned their Subject Vehicles dating as far back as 2003, when Subaru first installed Takata's defective airbags in its vehicles, could have raised notice issues, given the difficulty

[10] Indeed, data from the Notice Administrator showing more than one million visits to the Settlement Website and more than 170,000 calls to the toll-free number indicate that Class Members are engaged and have expressed interest in the Settlements. (ECF No. 2120-1, ¶¶ 10-11.) Class Counsel's experience fielding more than 220 emails and calls from Class Members (Ex. F (Prieto Decl.), ¶¶ 4-6) confirm that as well.

of obtaining and verifying evidence of ownership or leasing that far back in time. Those who sold or leased their vehicles before the beginning of the Class period have not released their claims against Subaru and remain free to pursue claims against Subaru in another action.[11]

Objector Ference contests the Subaru Settlement because the "release is overbroad" and "should be limited to the claims brought in this lawsuit, and not what could have been brought." (ECF No. 2077 at 8.) The scope of the Release, however, is typical for a class settlement like this, and was negotiated between the Parties for the substantial consideration received from the Settling Defendants. *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.

Objectors Winner and Davenport complain that "reimbursement for out-of-pocket expenses is too burdensome for class members" (ECF Nos. 2064 at3; 2008-1 at1), but "objectors' criticism of the claims-made structure does not impact the fairness, reasonableness, or adequacy of the proposed settlement." *Hall v. Bank of Am.*, No. 1:12-cv-22700, 2014 WL 7184039, at *6 (S.D. Fla. Dec. 17, 2014). Here the claims process for out-of-pocket expenses Class Members incurred "maximizes the relief available to class members who opt to submit a claim." *Id.* at 7. Moreover, several other courts have found that filling out a claims form, similar to the one here, which merely requires Class Members to submit information necessary to verify that they are part of the Class and incurred out-of-pocket

[11] It bears mention that the Harrises lack standing to assert an objection on behalf of other Class Members or non-class members that do not affect their claims. *See Allapattah Servs., Inc. v. Exxon Corp.*, No. 91-0986-CIV, 2006 WL 1132371, at *2 (S.D. Fla. Apr. 7, 2006) ("[S]ingle objector only has standing to raise objections as to itself and not as to the Class as a whole[.]").

expenses as a result of the Recall is not burdensome. *See e.g., Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir. 2015) (rejecting challenge to claims-made class settlement because completing a claims form and submitting it online or by mail was neither "particularly difficult [n]or burdensome"), *cert. denied sub nom. Frank v. Poertner*, 136 S. Ct. 1453 (2016); *Braynen v. Nationstar Mortgage, LLC*, No. 14-cv-20726, 2015 WL 6872519, at *13-14 (S.D. Fla. Nov. 9, 2015) (noting the claim form, which "should take no more than a few minutes for the average Claimant to complete," was not particularly burdensome).[12]

Objector McCoy complains, *inter alia*, that the Toyota 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. 2073 at 2.) 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. 1724-1, § 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. McCoy fails to explain why this guidance is insufficient to assert specific objections. If Ms. McCoy'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).

Finally, Objector Miller lobs the wholly unsupported accusation that the parties

[12] *See also Montoya*, 2016 WL 1529902, at *20 (dismissing as "legally insufficient" a similar objection and concluding that "[f]illing out a claim form is a reasonable administrative requirement which generally does not impose an undue burden on members of the settlement class").

[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. 1724-4, § III.D.)

colluded to arrive at the Settlements. (ECF No. 2078 at 5-8.) 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 SERVICE AWARDS SHOULD BE OVERRULED.

Notwithstanding the various objections to the service awards, "there is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1219 (S.D. Fla. 2006). Despite the "fact [that] courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the litigation," *id.*, Objectors Ignacio and Marks claim that the $5,000 service awards sought for class representatives in this case "are excessive in proportion to the average compensation class members will receive." (ECF No. 2063 at 2.) [14] Yet "incentive award[s] [are] not tantamount to a payment for damages; rather the award[s] represent[] remuneration for the services performed for the benefit of the Settlement Class and reflects the amount of time and effort spent by the Class Representative[s]." *Burrows v. Purchasing Power, LLC*, No. 1:12-cv-22800, 2013 WL 10167232, at *8 (S.D. Fla. Oct. 7, 2013).[15] There is ample precedent for service awards in the amount requested here.[16] The class representatives in this case provided

[14] It is unclear if Mr. Ignacio is objecting based on a misapprehension that the service awards are designated for objectors, rather than the class representatives. (ECF No. 2016.)

[15] *See Montoya*, 2016 WL 1529902, at *25 (rejecting objectors argument that service award was excessive compared to class members' recovery as lacking basis because members had done "noting to earn such award"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1357 (noting that "[t]he factors for determining a service award include: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation," and approving service awards of $5,000 per class representative upon finding that "representatives expended time and effort in meeting their fiduciary obligations to the Class"); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1220-22 ("[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class action actions.") (internal quotation marks and citation omitted).

[16] *See, e.g., Gevaerts v. TD Bank*, No. 11:14-cv-20744, 2015 WL 6751061, at *9 (S.D. Fla. Nov. 5, 2015) (approving $10,000 service award for class representatives); *Marty v. Anheuser-Busch Co.*, No. 13-cv-23656, 2015 WL 6391185, at *1-2 (S.D. Fla. Oct. 22, 2015)

copious amounts of documentation and information requested by Defendants in interrogatories and requests for production, communicated with class counsel regarding the progress and status of the action, participated in the litigation, and sat for depositions. This required a significant amount of time and involvement. Accordingly, service awards of $5,000 are both justified and reasonable.

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

Class Counsel achieved an outstanding result in the face of significant risks. We advanced significant costs, invested our own time and labor, and bypassed other profitable work to vigorously pursue these claims. Class Counsel's fee request is commensurate with the 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, relying primarily on decisions from other circuits. Not a single objector, however, 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.

A. 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. 2066 at 10-13; 2083 at 2; 2084 at 6, 12.) They are wrong. The objectors cannot and do not even try to reconcile their position with binding Eleventh Circuit precedent or countless decisions from this District, and they are mistaken in assuming that this Court's jurisdiction rests exclusively on diversity of citizenship.

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

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(denying objection that $5,000 service award was excessive); *David v. American Suzuki Motor Corp.*, No. 08-cv-22278, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010) (same); *Perez v. Asurion Corp.*, No. 06-20734-CIV, 2007 WL 2591180, at *8-9 (S.D. Fla. Aug. 8, 2007) (same).

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. This is 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.").

To be sure, a few courts outside the Eleventh Circuit, relying primarily on inapposite 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 distinguishable and inconsistent with Eleventh Circuit law.

The decisions are distinguishable because the court's jurisdiction in each case depended exclusively on diversity of citizenship, which was the key factor behind each decision. Here, in contrast, this Court has federal-question jurisdiction due to Plaintiffs' Magnuson-Moss claims

asserted under 15 U.S.C. § 2310, 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 simply 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*, 444 U.S. at 474, 478 (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 Condo. Assoc., Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), and *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1293 (11th Cir. 1999), not state law. *Faught*, 668 F.3d at 1242-44. Likewise, in *Poertner*, 618 F. App'x at 625, a diversity case involving a single Florida statutory claim, the court exclusively considered its own common-fund precedent, not state law,[17] to affirm a fee award from a class settlement.

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.

B. 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 $741,287,307, which constitutes the common fund created through the Settlements. (ECF No. 2033 at 44.) Several objectors, however, claim that the value of the common fund, for the purpose of awarding attorneys' fees under the

[17] *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).

percentage-of-fund approach, should be reduced by the value of the Outreach Program, Notice Program, and CSP. (ECF Nos. 2063 at 2; 2064 at 3; 2073 at 2; 2075 at 6; 2078 at 6-7, 9-10; 2084 at 6.) They are incorrect. 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.[18]

As Brian Fitzpatrick, a law professor at Vanderbilt who has written extensively on class action settlements and fee awards, previously explained (ECF No. 2033-3) and reiterates again, "these are real benefits to the classes and therefore benefits for which class counsel should be compensated. If courts do not include such benefits in their fee 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. D (Fitzpatrick Supp. Decl.), ¶ 10.)

The objectors' attempt to excise the value of the non-monetary relief, such as the CSP, from the value of the common fund also fails because 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*, 2017 WL 2813844, at *5 (concluding that "fee award is a reasonable percentage of the settlement value" when considering the "enhanced warranty, which is itself a significant tangible benefit"); *Poertner*, 618 F. App'x at 629 (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.[19]

Because Mr. Kleckner's valuation of the CSP is largely unchallenged and well-supported,

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[18] A few objectors claim that the Settlements' present value should be used to calculate Class Counsel fees, but cite not authority for that approach. (ECF No. 2068 at 10.) The objectors' 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, the Settling Defendants are required to pay a substantial portion of the Settlement Amounts within the first year. (*E.g.*, ECF No. 1724-1, § III.A.2.)

[19] *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).

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.[20]

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

Many objectors who challenge Class Counsel's fee request simply ignore prevailing law in the Eleventh Circuit and this District. (ECF Nos. 1997; 2051; 2063 at 2; 2064 at 3-4; 2069 at 1-2; 2072 at 16-17; 2088 at 1.) Multiple cases in this District, however, fully support the requested fee of 30 percent of the applicable Settlement Amounts, which is equivalent to 22.4 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);[21]
- *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);[22]

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[20] 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).

[21] *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).

[22] 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. 2068 at 14.) But this difference does not help the objectors, because the fee requested here—22.4% of the combined value of the Settlements—is already well below the 31 ⅓% awarded in *Allapatah*.

- *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 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 22.4 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. 2068 at 11; 2083 at 2; 2084 at 11.) 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. 2033 at 47-59.) Plaintiffs' analysis of these factors, together with Professor Brian Fitzpatrick's initial opinion (ECF No. 2033-3, ¶¶ 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. E (Miller Decl.), ¶¶ 32-49.

The few objectors who even address the *Camden I* factors only do so in a cursory manner. (ECF Nos. 2068 at 16-17; 2078 at 11; 2084 at 11.) For example, despite Class Counsel's detailed description of the enormous amount of time and resources that more than 13 law firms have

invested in this case on a contingent basis (ECF No. 2033 at 48-51), which total thousands of hours and tens of millions of dollars in fees and expenses, 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. 2068 at 16-17). 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. It also ignores Class Counsel's sworn statements attesting to the time and labor expended in this action, which the Court has witnessed firsthand.

Likewise, the objectors ineffectively attempt to minimize the "novelty and difficulty" factor by pointing to governmental investigations of Takata inflators. (ECF No. 2068 at 17; 2077 at 3-4.) 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.

The objectors, moreover, simply fail to address the significant contingent risk that Class Counsel undertook (ECF No. 2033 at 54-55), the various obstacles and risks overcome (*id.* at 52-53), the substantial amount of work that Class Counsel firms turned away because of the time and effort this MDL demanded (*id.* at 59), 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.*), as further detailed in the supplemental declaration of Class Counsel (Ex. F (Prieto Decl.), ¶¶ 7-17).

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 at1203. 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. C (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.

D. Class Counsel's Fee Request Is Consistent with Empirical Research on Fee Awards.

Even though Professor Fitzpatrick explained in his initial declaration that, based on his own empirical study of fee awards, Class Counsel's fee request is "*lower* than the typical Eleventh Circuit fee awards and *much lower* when the extended warranties [of the CSP] are

included" (ECF No. 2033-3, ¶ 18 (emphasis in original)), several objectors claim that empirical research, including Professor Fitzpatrick's own study, indicate that Class Counsel's fee request is excessive. (ECF Nos. 2066 at 8; 2068 at 11-16; 2069 at 1-2; 2077 at 4-6; 2078 at 11-12; 2083 at 2; 2084 at 10-11.) The premise of their arguments—that these four Settlements represent a "megafund"—is flawed, and in any event, the authors of the studies upon which the objectors rely decidedly conclude that Class Counsel's fee request is reasonable.

For the sake of convenience and brevity, Class Counsel have consolidated their arguments in favor of the Settlements in omnibus briefs, in part because the Settlements are virtually identical. But the Settlements remain separate agreements between different Classes and different Settling Defendants. And the suggestion, advanced by some objectors, that the claims against each Settling Defendant were "litigated together" without differentiation (ECF No. 2066 at 8) is inaccurate. Although the theories of liability largely overlapped, discovery against each Settling Defendant did not, requiring different teams of attorneys to focus on each Settling Defendant during almost three years of litigation. The objectors cite no authority for treating four similar but separate settlements as a single so-called "megafund" settlement for the purpose of determining a reasonable fee percentage.

Still, even when the four Settlements are considered together, the authors of the empirical studies upon which the objectors rely agree that it would ***not*** be appropriate to reduce the fee percentage here based on the size of the combined Settlements. (Ex. D (Fitzpatrick Supp. Decl.), ¶¶ 5-6; Ex. E (Miller Decl.), ¶¶ 38-49; ECF No. 2033-3, ¶¶ 20-22.) Although their studies did show that some 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. D (Fitzpatrick Supp. Decl.), ¶ 5; Ex. E (Miller Decl.), ¶ 37; ECF No. 2033-3, ¶ 20.) To the contrary, Professor Fitzpatrick's study shows that, in the Eleventh Circuit, the average fee awarded was 28.1 percent, and the median fee awarded was 30 percent (ECF No. 2033-3, ¶ 18);[23] 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. E (Miller Decl.) ¶ 37).

[23] 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. D (Fitzpatrick Supp. Decl.) at 3 n.2.)

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. 2033-3, ¶¶ 21-22.) Professor Silver, likewise, documents 35 settlements of $100 million or more in which fee awards equaled or exceeded 30 percent. (Ex. C (Silver Decl.) at 23-24.)

The combined value of these Settlements therefore does not support using a lower percentage to calculate Class Counsel's fees.

E. A Lodestar Cross Check Should Be Rejected

Some objectors argue that Class Counsel's fee request should be checked against their lodestar. (ECF Nos. 2066 at 13-14; 2068 at 18-19; 2073 at 3; 2075 at 6; 2078 at 12-13; 2084 at 12.) Courts in this District, as well as Professor Fitzpatrick, strongly disagree.

The Eleventh Circuit has held that district courts should award fees in class actions using the percentage-of-the-fund method rather than 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. D (Fitzpatrick Supp. Decl.), ¶¶ 7-8.) 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).

This Court should likewise reject the objectors' unsupported request to utilize a lodestar crosscheck.

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. 1724-1, § 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 No. 2068 at 8-10; 2072 at 16-17; 2073 at 3.) This objection is groundless.[24]

As Professor Fitzpatrick explains, the provision that requires the Settling Defendants to pay attorneys' fees not later than 14 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. D (Fitzpatrick Supp. Decl.), ¶ 4.) 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.*[25] 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).[26]

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[24] 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.

[25] Of course, if the Settlements are overturned on appeal, such fees must be immediately returned. (ECF No. 1724-1, § X.9.)

[26] *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*

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. D (Fitzpatrick Supp. Decl.), ¶ 3.)[27]

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 many firms that have contributed time and resources to this litigation. (ECF No. 2068 at 19-20.) Contrary to the objector's suggestion, however, the Court may properly grant lead counsel the authority to allocate any awarded fees in a manner that reflects each counsel's contribution to the 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"). 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"). Professor Fitzpatrick further confirms that "most fee awards are allocated" by lead counsel. (Ex. D (Fitzpatrick Supp. Decl.), ¶ 9.)

For the contrary proposition, the objector relies on *In re High Sulfur Content Gasoline*

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).

[27] 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.

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, the Court should exercise its authority to grant lead counsel the responsibility 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.

V. 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. 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, provide strong evidence that objections stem from professional objectors' counsel. Such lawyers—who employ objections, and 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").[28]

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

[28] Plaintiffs would note that John Pentz, counsel for objectors Jeffrey Bernstein, Robert Falkner, Katherine Falkner, Gary Maggard, Mary Beth Breese, and Charles F. Breese (ECF No. 2066) 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 Sean Hull, (DE 2068), 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) (representing objector Sean Hull); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 (N.D. Cal. 2012) (same).

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. (*E.g.*, ECF No. 2072 at 14.) 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.

Objector Hull's concern that the disclosure requirements are equivalent to unauthorized attorney discovery (ECF No. 2068 at 6) 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. (ECF Nos. 2072 at 15; 2077 at 11.) 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.[29] 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.

VI. CONCLUSION

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

[29] 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. (ECF No. 2077 at 11.) *See Bezdek*, 809 F.3d at 83 ([T]he imposition of disparate requirements on objectors does not provide an independent basis for invalidating the settlement.").

Dated: October 11, 2017

Respectfully submitted,

PODHURST ORSECK, P.A.

/s/ Peter Prieto

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 11, 2017, 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. In addition, objectors to the Settlements are being served as follows: Beverly Anne Griffith and Douglas Dean Griffith, 4806 109th Street North, St. Petersburg, FL 33708; Andrew D. Morrow, 8156 E. Girard Avenue, Denver, CO 80231; Ronald Winner, 3832 SE 52nd Avenue, Portland, OR 97206; Isaac Ignacio, P.O. Box 283, Pomfret, CT 06258; Jim O'Donnell, jimmyodude@gmail.com; Mac Stevens, stevensm@earthlink.net; Sabrina Derusseau, POB 273, 3726 Highway 20 House #1147, Island Park, ID 83429; Luis Mejias, 78 Sawyer Avenue, Apt. #3, Boston, MA 02125; Nia Trotter, sincerenia01@gmail.com; Rosa Aguero, aguero17@sbcglobal.net; Nicholas R. Chickering, nrchic@gmail.com; Amy R. Marks, 14 Hunters Lane, Telford, PA 18969; Scribe Family Trust, c/o Rene M. Scribe, 356 Via Almar, Palos Verdes Estates, California 90274; Staci Margheim, valiantthor2020@gmail.com; Abdul Tabb, 9217 Blue Grass Road, Apt. #12, Philadelphia, PA 19114; Jeffrey Harris and Mary Jane Harris, 1897 Southside Drive, Oneonta, NY 13820; Gary W. Sibley, g@juris.cc; Peter Albrecht, 4923 E. Hamblin Drive, Phoenix, AZ 85054; Laurie J. Tursi, 6555 Violet, Lumberton, TX 77657; Mark Zavislak, 10497 Anson Avenue, Cupertino, CA 95014.

By: */s/ Peter Prieto*
Peter Prieto

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: TAKATA AIRBAG PRODUCTS LIABILITY LITIGATION,	**Case No. 1:15-md-02599-FAM**

DECLARATION OF RYAN KAO REGARDING THE RECORD OF GARY SIBLEY.

I, Ryan Kao, hereby declare and state as follows:

1. I am a Project Manager employed by Epiq Class Action & Claims Solutions, Inc. ("Epiq"). The following statements are based on my personal knowledge and information provided to me by other Epiq employees working under my supervision, and if called on to do so, I could and would testify competently thereto.

2. This declaration provides information regarding the record of Gary Sibley. The facts in this declaration are based on what I personally know, as well as information provided to me in the ordinary course of my business by my colleagues from Hilsoft and Epiq, who worked with us to implement the notification effort.

Notice

3. In August, 2017, Mr. Sibley's BMW Direct Mail Notice was mailed to 3310 Fairmount St, Dallas, TX 75201-1216. This address was provided to Epiq by R.L. Polk, as the registration address associated with the Vehicle Identification Number (VIN) WBA6H1C53GD933021.

4. On September 5, 2017, the BMW Direct Mail Notice was returned as undeliverable with no new forwarding address. On September 6, 2017, Epiq sent Mr. Sibley's name and address to Lexis Nexis AllFind skip-tracing (address research) service. On September 7, 2017, Lexis Nexis returned Mr. Sibley's record with an updated mailing address of 3333 Lee Pkwy, Ste 600, Dallas, TX 75219-5117.

5. On September 13, 2017, Epiq re-mailed a new BMW Direct Notice to 3333 Lee Pkwy, Ste 600, Dallas, TX 75219-5117. As of October 11, 2017, this re-mailed BMW Direct Notice has not been returned as undeliverable.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2017.

Ryan Kao

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: TAKATA AIRBAG PRODUCTS LIABILITY LITIGATION	**Case No. 1:15-md-02599-FAM**

DECLARATION OF PATRICK A. JUNEAU, SETTLEMENT SPECIAL ADMINISTRATOR, REGARDING THE OUTREACH PROGRAM

I, Patrick A. Juneau, hereby declare and state as follows:

1. My name is Patrick A. Juneau. I have personal knowledge of the matters set forth herein, and I believe them to be true and correct.

2. I have been appointed as Settlement Special Administrator for the Settlement Agreements preliminarily approved by this Court in IN RE: TAKATA AIRBAG PRODUCTS LIABILITY LITIGATION (the "Settlement Agreements").

3. Those Settlement Agreements generally vest with the Settlement Special Administrator the role of overseeing and administering the Outreach Program with the goal of maximizing to the extent practicable completion of recall remedies in vehicles with outstanding inflator recalls.

4. The Outreach Program will be conducted in accordance with the Settlement Agreements as preliminary approved by this Court and in accordance with any and all instructions received from this Court. The sole focus of the Outreach Program will be to increase remedy completion. This declaration describes the anticipated implementation of the Outreach Program as currently contemplated.

5. The Outreach Program will be designed around the input from all Parties involved, including Class Counsel, the various settling automobile manufacturers (the "OEMs"), NHTSA,

the Takata Monitor, and engaged consultants and industry experts, in an effort to draw from past experiences to develop a focused and coordinated plan that incorporates successful solutions from each of these Parties into one joint effort that can be implemented consistently across the remaining affected vehicles subject to the Settlement Agreements.

6. The Outreach Program will benefit from the collective aggregation of recall efforts across several OEMs, providing for volume and scale that no single OEM has experienced, such that the Outreach Program's efforts will achieve efficiencies previously unable to be realized, resulting in more cost-effective outreach to consumers performed within the budgetary constraints set forth in the Settlement Agreements.

7. The Outreach Program will maintain a secure, centralized database of VIN and consumer information so that the most accurate, up-to-date information is relied upon in performing outreach and so that outreach results are reported in a consistent and relevant manner.

8. The Outreach Program will be designed to increase the recall remedy rate by the use of both traditional efforts, such as mailers, inbound and outbound call, texting, and email, as well as non-traditional outreach efforts, including targeted social media outreach and multi-media campaigns in order to spur the action of consumers who have not previously responded to traditional methods.

9. The Outreach 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 mass outreach efforts.

10. The Outreach Program will monitor and test strategies utilized across various targeted populations to determine what outreach efforts resulted in successful remedies so that the process

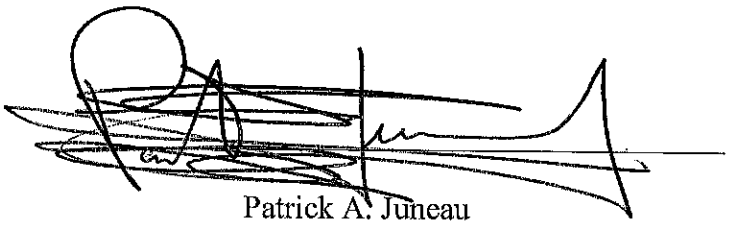
can continually evolve and be refined over time in a manner consistent with the goal of increasing the recall remedy rate.

11. In addition to brand-specific outreach targeted at owners of vehicles, the Outreach Program will also include a general awareness campaign not specific to any particular OEM, intended to increase consumer knowledge of the urgency of the inflator recall across the automotive industry as a whole.

12. In addition to dealers associated with the OEMs, the Outreach Program will work with various automotive industry third party groups and entities, including but not limited to independent repair facilities and third party dealerships, for the purpose of leveraging those relationships to improve the accuracy of consumer information and to increase remedy rates in affected vehicles.

13. The Outreach Program will work with various state governmental agencies and bodies, including the Departments of Motor Vehicles, to identify opportunities to increase remedy recall rates.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2017.



Patrick A. Juneau
Settlement Special Administrator

EXHIBIT C

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

In re: Takata Airbag Product Liability Litigation
(Economic Loss Track Cases Against BMW, Mazda, Subaru, and Toyota)

MDL No. 2599

DECLARATION OF CHARLES SILVER

At the request of Class Counsel,[1] I prepared this Declaration in which I express opinions on the adequacy of representation class members received and the requested award of attorneys' fees.

I. SUMMARY OF OPINIONS

- The requirement to provide absent class members with adequate representation implies neither that benefits must be distributed equally nor that the subclasses demanded by the Objectors are required.
- In the market for legal services, sophisticated clients typically pay fees in the 25 percent to 40 percent range when hiring lawyers on straight contingency; the Court should award a market-based fee in this case and has discretion to do so.

II. DOCUMENTS REVIEWED

1. In connection with this Declaration, I was provided or acquired on my own the documents listed below. I may also have reviewed other documents, including, without limitation, news articles, treatises, articles published in law reviews, and other secondary sources.

- Coordinated Remedy Order, U.S. Dept. of Transportation, National Highway Traffic Safety Administration, Docket No. NHTSA-2015-0055, November 3, 2015

[1] Class Counsel are Podhurst Orseck, P.A. (Court-appointed Chair Lead Counsel); Boies, Schiller & Flexner L.L.P. and Power, Rogers and Smith, L.L.P., (Court-appointed Co-Lead Counsel for the Economic Loss Track); and Baron & Budd P.C., Carella Byrne Cecchi Olstein P.C., and Lieff Cabraser Heimann & Bernstein, LLP (Court-appointed Plaintiffs' Steering Committee) on behalf of the Plaintiffs in the Takata MDL.

- Plaintiffs' Unopposed Omnibus Motion for Preliminary Approval of Class Settlements, Preliminary Certification of Settlement Classes, and Approval of Class Notices and Incorporated Memorandum of Law
- Toyota Settlement Agreement
- Toyota [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class
- Notice of Filing of Updated Exhibit 1 to the Settlement Agreement with the Toyota Defendants
- Exhibit 1 - List of Actions Against Toyota Transferred to MDL 2599
- Notice of Filing of Updated Exhibits 2 and 11 to the Settlement Agreements with the Toyota, BMW, Mazda, and Subaru Defendants
- Updated Exhibit 2 to Settlement Agreement with Toyota Defendants
- Amendment to the Declaration of Cameron R. Azari, Esq., on Proposed Class Notice Program
- Order Preliminarily Approving Toyota Class Settlement and Certifying Toyota Settlement Class
- Order Appointing Patrick A. Juneau as Settlement Special Administrator
- Coordinated Remedy Order
    - Amended Annex A – Priority Group 1 List
    - Amended Annex A - Coordinated Remedy Program Priority Groups (1-10)
    - Amended Annex A - Coordinated Remedy Program Priority Groups (1-10)
- Toyota Settlement Subject Vehicles
- Toyota Settlement Notice
- Toyota [Proposed] Final Judgment
- Toyota [Proposed] Final Order Approving Class Settlement and Certifying Settlement Class
- Plaintiffs' Omnibus Motion for Final Approval of Class Settlements and Certification of Settlement Classes, and Application for Class Representative Service Awards and Class Counsel's Attorneys' Fees, and Incorporated Memorandum of Law
- Declaration of Cameron R. Azari, Esq., on Implementation and Adequacy of Class Notice Program
- Exhibit A - Declaration of Peter Prieto in Support of Plaintiffs' Omnibus Motion for Final Approval of Class Settlements and Certification of Settlement Classes, and Application for Class Representative Service Awards and Class Counsel's Attorneys' Fees
- Exhibit B - Declaration of Kirk D. Kleckner Regarding the Customer Support Program and Rental Car/Loaner Program
- Exhibit C - Declaration of Brian T. Fitzpatrick
- Notice of Filing Declaration of Notice Administrator in Support of Final Approval
- Toyota Motor Corporation, Toyota Motor Sales U.S.A., Inc., and Toyota Motor Engineering & Manufacturing North America, Inc.'s Memorandum of Law in Support of Plaintiffs' Motion for Entry of an Order Granting Final Approval of Class Action Settlement And Issuance of Related Orders

- Objections of Sean Hull to BMW and Subaru Settlements and Class Counsels' Fee Requests; Objections of James McCain and Ashley McCain to Toyota Settlement and to Class Counsels' Fee Request
- Objector/Proposed Intervenors' Motion for Leave to Intervene in Toyota Case as Party Plaintiffs, for Appointment as Sub-Class Representative, and for Appointment of Sub-Class Counsel, with Supporting Memorandum of Law and Attached Proposed Complaint in Intervention
- All Other Filed Objections

III. CREDENTIALS

2. I have studied and written about class actions for decades, and have an especially extensive background in the area of attorneys' fees. My résumé appears below in Exhibit A.

3. I have testified as an expert on class actions and fee awards many times. Judges have cited or relied upon my opinions when awarding fees in the following major cases, as well as many smaller ones: *In re: Urethane Antitrust Litigation*, No. 04-1616-JWL, 2016 WL 4060156 (D. Kan. July 29, 2016) ($974 million recovery); *San Allen, Inc. v. Buehrer, Administrator, Ohio Bureau of Workers' Compensation*, (Ohio Common Pleas—Cuyahoga County, 2014) ($420 million recovery); *Silverman v. Motorola, Inc*., No. 07 C 4507, 2012 WL 1597388 (N.D. Ill. May 7, 2012) ($200 million recovery); *In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) ($410 million recovery); *In re Enron Corp. Securities, Derivative & "ERISA" Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008) ($7.2 billion recovery); *Allapattah Services, Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185 (S.D. Fla. 2006) ($1 billion recovery).

4. Professionally, I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where I also serve as Co-Director of the Center on Lawyers, Civil Justice, and the Media. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then I have been a Visiting Professor at the University of Michigan School of Law, the Vanderbilt University Law School, and the Harvard Law School.

5. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court.

6. I have taught, researched, written, consulted with lawyers, and testified about class actions, other large lawsuits, attorneys' fees, professional responsibility, and related subjects for 30 years. I have published almost 100 major writings, many of which appeared in peer-reviewed publications and many of which focus on subjects relevant to this Declaration. In 2015, two coauthors and I published a major study of fee awards in securities class actions in the Columbia Law Review. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUMBIA L. REV. 1371 (2015) ("*Is the Price Right?*"). The CORPORATE PRACTICE COMMENTATOR chose this article as one of the ten best in the field of corporate and securities law that appeared in 2016.

7. My writings are cited and discussed in leading treatises and other authorities, including the Manual for Complex Litigation, Third (1996) and the Manual for Complex Litigation, Fourth (2004), and the Restatement (Third) of the Law of Restitution and Unjust Enrichment. Judges have also cited my writings. The Supreme Court of California recently did so repeatedly in *Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 376 P.3d 672 (2016), a case that required it to decide whether trial judges in that state can use the percentage method when calculating common fund fee awards. In the course of concluding that they could, the California Supreme Court relied on three of my published works. See *Laffitte*, 376 P.3d at 689 (quoting Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 Cornell L. Rev. 656, 667 & 669 (1991) ("*Restitutionary Theory*"); *Id.* at 690 (quoting Charles Silver, *Dissent from Recommendation to Set Fees Ex Post,* 25 REV. LITIG. 497, 499 & 499-500 (2006); and *id. generally*

(repeatedly citing and discussing *Is the Price Right?*). I was one of a group of law professors who submitted an amicus brief in *Laffitte*.

8. Finally, because awards of attorneys' fees may be thought to raise issues relating to the professional responsibilities of attorneys, I note that I have an extensive background, publication record, and experience as an expert witness testifying on matters relating to this field. For example, I am a coauthor of William T. Barker and Charles Silver, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (LexisNexis Mathew Bender, Updated Annually Through 2017). I also served as the Invited Academic Member of the Task Force on the Contingent Fee created by the Tort Trial and Insurance Practice Section of the American Bar Association. I have also taught the subject of legal ethics for years, including a specialized course titled Professional Responsibility for Civil Litigators that includes a good deal of material on aggregate lawsuits and lawyers' fees.

IV. OBJECTIONS RELATING TO ADEQUACY OF REPRESENTATION

9. Several Objectors contend that the Court should reject the proposed settlement on the ground that different subgroups within the Class should have been separately represented. The evidence for this assertion appears to consist solely of the fact that the proposed settlement does not treat all class members the same. For example, the Hull/McCain Objectors write:

> There is a stark divide in recovery among groups represented by the same counsel. Class members who sold their Subject Vehicles receive a fraction of the settlement benefit compared to current owners. They receive no benefit from the outreach program (33% of the settlement fund), the customer support program, or the rental car program that reduces the settlement fund by 10%.

Objections of Sean Hull to BMW and Subaru Settlements and Class Counsels' Fee Requests; Objections of James McCain and Ashley McCain to Toyota Settlement and to Class Counsels' Fee Request, p. 7.

10. This complaint raises an interesting question: Do differential benefits doom a class action settlement unless they result from negotiations in which all subgroups are separately represented? When carefully considered, I believe that the answer to this question must be no.

11. The contention that, absent separate representation of subgroups, differential benefits doom a proposed settlement is said to rest on the Due Process Clause, which permits class actions to proceed to judgment only when class members are adequately represented. A plausible interpretation of this requirement is that class members must be represented at least as well as claimants who hire lawyers on their own.

12. If that is right, then it is pertinent to observe that, in mass actions where claimants *are* individually represented by common counsel, unequal settlement benefits are routine. Mass asbestos settlements regularly provide plaintiffs with mesothelioma, lung cancer, or asbestosis significantly larger payments than are received by those whose injuries are minor. In pelvic mesh cases, mass settlements benefit women who had revision surgeries more than they do women whose products are still in place. In a case involving an explosion that occurred when a gas cloud accumulated above an underground storage facility, plaintiffs whose houses were located near the center of the blast were treated more favorably than those whose houses were far away.

13. In none of the mass actions just described were subgroups of plaintiffs separately represented. Nor, to my knowledge, is separate representation for subgroups routinely or even commonly provided in mass actions of other types. To the contrary, in my experience it is decidedly uncommon.

14. The first thing to recognize, then, is that, outside of a class action, nothing would prevent a lawyer from jointly representing current and former owners of Subject Vehicles as co-clients in a mass suit, even though the clients' settlement-related interests may not converge

perfectly. The actions of Attorneys Jeff M. Brown and Christopher Bandas, who represent the Hull and McCain objectors, show this to be true. Hull is both a current owner of a BMW and a former owner of a Subaru. The McCains are former owners of a Lexus. The lawyers represent them concurrently even though, as concerns the allocation of settlement benefits, their interests may differ. Hull stands to benefit from provisions that shower dollars upon current owners or provide them with other remedies; the McCains do not. Yet, this divergence of interest has not led Messrs. Brown and Bandas to insist that their clients obtain separate counsel.[2] (Whether Messrs. Brown and Bandas have obtained informed conflict waivers from their clients, I do not know.)

15. If the requirement of adequate representation means that class members must have the same degree of protection from interest conflicts that clients normally receive when they hire attorneys directly, it does not follow that differential settlement benefits are permissible only when class members on opposite sides of those differences have separate negotiating counsel. The opposite conclusion is better. Class settlements can confer different benefits on claimants in different positions even when all claimants have the same attorneys.

16. The focus on unequal settlement benefits actually reflects a deep confusion. To see why, assume counterfactually that the proposed settlement entitled all class members—current and former owners alike—to the same relief: a cash payment of $500. With this assumption in place, the claim of disparate treatment disappears, the benefit being the same for all class members. But

[2] Technically, the interests of Hull and the McCains do not conflict because they owned cars made by difference manufacturers—BMW and Subaru for Hull; Toyota for the McCains—and are therefore objecting to different settlements. But all of the proposed settlements are pending before the same judge in the same multi-district litigation, have the same structure, and were negotiated the same way, that is, without separate counsel for current and former owners. One might therefore say that, based on their theory of intra-class conflicts, Messrs. Brown and Bandas have a positional conflict.

would it follow that all class members had the same interests and were adequately represented? No. Their claims could differ just as they do now, and the fact that they were treated the same could reflect a failure to take important differences between them into account. Share-and-share-alike distribution plans may seem equitable on the surface, but when the question is whether class members were adequately represented, equal treatment by itself means nothing.

17. In sum, differential benefits do not signal inadequate representation any more reliably than equal benefits signal the opposite. The only reliable way to assess adequacy, I believe, is to focus on an entirely different matter: whether class members' interests differ so radically that they must be divided into subgroups and separately represented *in litigation*. When a single team of lawyers can adequately represent all class members for litigation purposes, then a single team can also properly bargain for all of them in settlement. Otherwise, class members must be separately represented in litigation and in settlement negotiations too. When representation for litigation purposes is structured correctly, representation for settlement purposes is designed correctly too.

18. This point can be made concrete by focusing on the Class Representatives. A review of the Second Amended Consolidated Class Action Complaint indicates that they fall into at least three categories and possibly four. There are (1) Current owners of Subject Vehicles that have already had new airbags installed, (2) Current owners of vehicles that have yet to be repaired, and (3) Former owners who sold their cars after having the airbags replaced. There may also be (4) Former owners who sold their cars with the original airbags on board.

19. Can a single team of lawyers adequately represent all of the Class Representatives in litigation against the Vehicle Manufacturer Defendants, given that they fall into groups (1)-(3), and possibly (4)? Yes. There are no conflicts between or among these Plaintiffs that would render

joint representation problematic. All of their claims are compatible. By this I mean that a lawyer for all of them would not have to take a position in litigation that was good for one of them but bad for another. This is true even though plaintiffs of different types may be entitled to different forms of relief. For example, although all of the Class Representatives have diminution-in-value claims, type (2) Class Representatives can also demand new airbags plus reimbursement of expenses (including rental car costs, if any), while type (1) and type (3) Class Representatives can demand only reimbursements. Type (4) Class Representatives (assuming they exist) have only diminution claims. Class Representatives of types (1) and (2), all of whom are current owners, may also be entitled to warranties on the new airbags that are installed in their cars. Being former owners, neither type (3) or type (4) Class Representatives would be entitled to this relief.

20. Insofar as I am aware, neither the Hull/McCain Objectors nor any other objector provides a reason for thinking that current and former owners had to be placed into separate subclasses and given separate counsel for trial purposes. Nor am I aware of any basis for thinking that separate litigation subclasses for current and former owners were required. Class members of both types have harmonious interests because both stand to gain by showing that Takata airbag inflators are defective and dangerous, and by having the Vehicle Manufacturer Defendants held liable for selling the cars they came in. 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.

21. In all aggregate proceedings, including class actions, there is a need for allocation plans to be drawn up when settlements occur. In mass actions, the need to allocate settlement benefits does not require separate representation of individual claimants. Instead, lawyers must

adhere to the Aggregate Settlement Rule, which requires disclosures and individual client consent and is uniform across the jurisdictions. The Aggregate Settlement Rule does not apply to class actions, however. Instead, the class action rules ensure the fairness of allocation plans by allowing class members to object to and opt out of settlements they dislike, and by requiring judges to determine that benefits are reasonable in amount and allocated fairly.

22. By itself, then, the need to allocate relief among claimants does not preclude joint representation. If it did, all multiple-plaintiff representations would be imperiled because allocation plans are needed in all of them.

23. Allocation plans do not create themselves, of course. People design them, and there are only a limited number of candidates for the job. In a small-number joint representation, the claimants can carve up a gross recovery themselves. Otherwise, defendants, claimants' attorneys, or third parties like judges must handle the task.

24. In my experience, defendants normally refrain from becoming involved in allocations. Judges ordinarily take a hands-off approach too. In mass actions, they do this because they have limited power over settlements, which are private deals. In class actions, their powers are greater. But judicially-designed allocation plans are still uncommon, probably because judges do not want to evaluate the reasonableness of settlements they personally craft. The result is that, in both mass actions and class actions, claimants' attorneys normally allocate benefits, subject to being reviewed by their clients or a court. Both the Aggregate Settlement Rule and the rules that govern class action settlements allow them to do this.

25. By itself, then, the fact that Class Counsel designed the proposed settlement does not show that any particular class member was represented deficiently. Class members, like the Objectors, who feel shortchanged may have a different complaint, however. They may believe

that they should receive more generous benefits than an allocation plan proposes to give them. This is an objection to the reasonableness of a proposed allocation, not a claim of inadequate representation.

26. As a general matter, I will not offer opinions on the reasonableness of the proposed allocation plan. Class Counsel have explained the basis for the plan, and I have nothing to add to what they said. However, one objection raised by several Objectors seems to me to be fairly easy to address. The complaint is that too many dollars are targeted for the proposed Outreach Program, which may absorb as much as 33 percent of the settlement fund and will benefit only current owners of Subject Vehicles. Objectors who are former owners contend that the Outreach Program is too large and that some of the money designated for it should flow to them instead.

27. I do not know how much money the Outreach Program should cost. It is bound to be expensive, because of both the difficulty of convincing class members to take advantage of benefits and the importance of removing the defective airbags from cars. But whether it should consume up to one-third of the settlement, I cannot say.

28. However, I can say that the 33 percent figure is not carved in stone. Section III.B.1 of the Settlement Agreement states that "[t]he budget for the Outreach Program is not to exceed 33% of the Settlement Fund, *but the budget of the Outreach Program may be adjusted subject to the agreement of the Parties, through their respective counsel*." Settlement Agreement § III.B.1.

29. The discussion to this point is based on the assumption that the adequate representation requirement is supposed to ensure that absent class members receive the same loyalty from their representatives that lawyers normally give their signed clients. Whether that is a fair account of the standard set in the cases is, of course, a question of law for the Court. Rather than debate that question, I will simply point out that anyone who offers an alternative account of

the adequacy requirement carries the burden of providing a stopping point, lest one be driven to the untenable conclusion that every class member must be individually represented on settlement.

30. To see why a stopping point is needed, ask whether two owners of identical cars equipped with defective airbags have congruent interests. On my account, they do because a single lawyer can advocate for both of them in litigation without having to take a position for one that is detrimental to the other. But if one were to focus on their naked financial interests, one would see that they differ. Each owner would gain the most from a settlement that gave him or her all of the money and left none for the other. When the adequacy requirement is fleshed out in terms of financial interests, every class member is at odds with every other and all must be individually represented.

31. The objection that current owners must be separated from former owners because they would allocate settlement dollars differently invokes class members' naked financial interests. Consequently, it provides no analytical stopping point for subdividing the class. For example, it does not explain why the subclass of former owners must not be further divided into those who sold their cars in 2017 versus those who sold in prior years. The former would want all of the money in the settlement allocated to their subclass with none going to the other subclass. The latter would want the reverse. This is why a theory of conflicts is needed. Only with such a theory can one know how many divisions are required. To this point, the Objectors have not provided one.

32. The objection and motion to intervene filed by Ryan Major, Tara Major, and David Ginden exemplifies the need for a theory that provides a stopping point. They contend that the Court should create a subclass of Toyota owners who fall into Priority Group 4 and appoint them and their counsel as its representatives. They do so because, they contend, the proposed settlement

"arbitrarily and capriciously" denies owners in Priority Group 4 the benefit of free loaner cars while their vehicles are repaired. *Objector/Proposed Intervenors' Motion for Leave to Intervene in Toyota Case as Party Plaintiffs, for Appointment as Sub-Class Representative, and for Appointment of Sub-Class Counsel, with Supporting Memorandum of Law and Attached Proposed Complaint in Intervention*, p. 3.

33. Plainly, there is no inherent opposition between owners in Priority Group 4 and other owners. As the Major/Ginden Objectors point out, the hierarchy of Priority Groups was created by the National Highway Transportation Safety Association (NHTSA) as a way of categorizing vehicles according to the degree of risk they pose. But the existence of NHTSA's ranking does not change the fact that all owners have the same interest in having their inflators replaced.

34. But if there should be a subclass for owners in Priority Group 4, must there not also be subclasses for the 11 other Priority Groups? Without a theory that provides a stopping point, the number of subclasses proliferates quickly.

35. In support of their demand for a Priority Group 4 subclass, the Major/Ginden Objectors also point out that "[n]one of the named class representatives … are owners or lessees of vehicles that fall exclusively in [P]riority [G]roup 4." *Id*., p. 4. Therefore, they contend, the named plaintiffs "are in direct conflict" with them and other owners in that group. *Id*.

36. Again, the assertion of a conflict is unwarranted. All owners have the same interest and can properly be jointly represented in litigation, as previously explained. But if this complaint is taken seriously, must one not also ask whether other subgroups within the class also deserve to have named class representatives? For example, within Priority Group 4 there are Subject Vehicles that are more dangerous than others, if only because they are driven more often—the more a car is

driven, the more likely someone is to be hurt. Should not the requested Priority Group 4 subclass therefore be further divided into sub-subclasses for owners of high-use and low-use vehicles, each with its own champion? And two sub-subclasses might not be enough. Usage is a continuous variable, so the number of sub-subclasses could easily be increased.

37. Plainly, an argument that leads to a proliferation of subclasses without end must be rejected. An acceptable theory of intra-class conflicts must include a stopping point beyond which further divisions are unnecessary, as I said.

V. OBJECTIONS RELATING TO ATTORNEYS' FEES

38. Professors Brian T. Fitzpatrick and Geoffrey P. Miller have submitted declarations on the subject of attorneys' fees and have discussed objections relating to this subject. In this section, I will address an aspect of the subject they do not discuss, namely, market rates for attorneys who handle large lawsuits on contingency.

39. In expert reports filed with courts over many years, I have consistently maintained that fee awards from common funds should be based on the fees that sophisticated clients pay lawyers to handle large cases on contingency. This position best comports with the law of restitution and unjust enrichment—the body of private law that entitles lawyers to collect fee awards from common funds. See RESTATEMENT (THIRD) OF THE LAW GOVERNING RESTITUTION AND UNJUST ENRICHMENT § 29 (recognizing the right to collect compensation from common funds).

40. The reasoning is straightforward. The law of restitution governs the allocation of benefits in situations where it is difficult or impossible for parties to bargain over their allocation in advance. In class actions, lawyers and absent class members cannot provide for fees contractually. Therefore, the law of restitution regulates their relationship. It addresses the problem of unjust enrichment that would otherwise arise when recoveries are won by entitling

lawyers to reasonable compensation, the best measure of which is the fee that class members would rationally have agreed to pay had they been able to negotiate with class counsel directly. The market rate supplies the essential term in this hypothetical agreement. There is no reason to think that class members would have paid more than the market rate to obtain legal services, because the market rate is generally sufficient; nor is there reason to think that a lawyer would have agreed to accept less when the market offers a higher level of compensation.

41. I discussed these matters at length almost three decades ago in the first article I published after joining the faculty at the University of Texas School of Law. See *Restitutionary Theory, supra.* Many courts have cited this article with approval, including the Supreme Court of California, the Supreme Court of Colorado, the Supreme Court of Illinois, federal district courts in several circuits, and the Delaware Court of Chancery.[3] The article is also cited in many law review articles and treatises, and it provided the theoretical underpinnings for § 29 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING RESTITUTION AND UNJUST ENRICHMENT. See *Id.*, Reporter's Note, Section *c*.

42. The wisdom of basing fee awards on market rates has become evident to many judges. The Seventh Circuit formally requires judges to mimic the market. See, e.g., *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001); *In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566 (7th Cir.1992). Judges in other circuits also take note of market rates and endorse their use. In *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52 (2d Cir. 2000), the Second Circuit

[3] See *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 507, 376 P.3d 672, 689 (2016); *Kuhn v. State*, 924 P.2d 1053, 1059 (Colo. 1996) *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 238, 659 N.E.2d 909, 911 (1995); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 857 (E.D. La. 2007); *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 269 (D. Me. 2005); *Lachance v. Harrington*, 965 F. Supp. 630, 646 (E.D. Pa. 1997); *In re Appraisal of Dell Inc.*, No. CV 9322-VCL, 2016 WL 6069017, at *14 (Del. Ch. Oct. 17, 2016).

observed that "market rates, where available, are the ideal proxy for [lawyers'] compensation." *See also In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014) ("When awarding attorneys' fees, the 'ideal proxy' for the award should reflect the fees upon which common fund plaintiffs negotiating in an efficient market for legal services would agree." (citing *Goldberger*, 209 F.3d at 52).

43. Courts in the Eleventh Circuit have also used market rates as guides. Consider the following passage from *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1340–41 (S.D. Fla. 2007).

> The percentage method of awarding fees in class actions is consistent with, and is intended to mirror, practice in the private marketplace where attorneys typically negotiate percentage fee arrangements with their clients. Individual clients often recognize that they lack the expertise or time to monitor their attorneys' performance. Thus, they select a compensation formula-the contingent fee-that automatically aligns their attorneys' interest with their own. Courts are encouraged to look to the private marketplace in setting a percentage fee:
>
> > The judicial task might be simplified if the judge and the lawyers bent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the "clients" (the class members) of $45 million. The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client. Suppose a large investor had sued Continental for securities fraud and won $45 million. What would its lawyers have gotten pursuant to their contingent fee contract?
>
> *In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). *See also In re RJR Nabisco Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984, at 94,268 (S.D.N.Y. 1973) ("What should govern such [fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases.").

44. *Pinto* was a relatively small case that produced a $4.25 million settlement fund, out of which the court awarded a 30 percent common fund fee. But judges sitting in the Eleventh Circuit have taken guidance from market rates in much larger cases, too. Judge Alan Gold did so

in *Allapattah Services, Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185 (S.D. Fla. 2006), which settled for more than $1 billion and yielded a fee award equal to 31.33% of the recovery. When setting the award, Judge Gold wrote that "the most appropriate way to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal." *Id*., 454 F. Supp. at 1203.

45. To mimic the market, of course, a court needs information about prevailing market rates. Only with this information in hand can Class Counsel's fee request be compared to contingent fees paid in other representations. Before getting into details, I begin by noting that fees typically fall in the 25-40 percent range when sophisticated clients hire lawyers on straight contingency.[4] When lawyers also front litigation costs, fees toward the high end of the range prevail and expenses are typically reimbursed separately.

46. No database collects information on contingent fee arrangements used by sophisticated clients. One must therefore use studies, examples, and statements by informed observers to establish market rates. For example, when Professor David L. Schwartz interviewed 44 experienced lawyers and reviewed 42 contingent fee agreements used in patent cases, he found that fees in the range of 40 percent of the recovery were common.

> There are two main ways of setting the fees for the contingent fee lawyer: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

[4] Wealthy clients sometimes use hybrid fee arrangements that combine guaranteed fees with contingent bonuses. Percentages may be lower when hybrid arrangements are employed than when lawyers work on straight contingency because nonpayment risks are lower.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALABAMA LAW REVIEW 335, 360 (2012).[5]

47. As Professor Schwartz discovered, sophisticated clients sometimes use scales of percentages, but when they do the percentages appear to bottom out at 25 percent. A typical example can be found in *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP, et al.*, 105 S.W.3d 244 (Tex. Appls.—Houston, 2003), also a patent case. There, a sophisticated client "agreed to pay the [l]awyers a contingency fee pursuant to a sliding scale: 25% of the first $32 million recovered by Tanox, 33 1/3% of recovery from $32 million to $60 million, 40% of recovery from $60 million to $200 million, and 25% of recovery over $200 million." *Id*. at 248-249. The agreement also contained other provisions favorable to the lawyers, including a promise of "$100 million if they obtained a permanent injunction." *Id*. "The total fees Tanox agreed to pay the Lawyers were capped at $500 million and the total fees derived from royalties were capped at $300 million." *Id*. at 249.

48. Fees exceeding 25 percent of the recovery are even paid when clients' damages claims are enormous. The most famous patent case meeting this description is probably the litigation between NTP Inc. and Research In Motion Ltd., the company that manufactures the Blackberry. In that case, NTP promised its law firm, Wiley Rein & Fielding (WRF), a one-third

[5] Professor Schwartz's findings confirm what knowledgeable commentators have written. For example, Matt Cutler wrote:

> *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors—a strictly results-based system.

Matt Cutler, *Contingent Fee Patent Litigation, and Other Options*, PATENT LITIGATION, http://ipr-pgr.com/patent-litigationlaw-updates/cost-contained-u-s-patent-litigation.

contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees. Yuki Noguchi, *D.C. Law Firm's Big BlackBerry Payday: Case Fees of More Than $200 Million Are Said to Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, at D03.

49. Turning from patent lawsuits to large matters of other types, compensation as a significant percentage of recovery appears to be common. In 2012, the U.S. Court of Appeals for the Tenth Circuit decided a case involving a dispute over the fee that a business client owed the law firm of Susman & Godfrey (S&G), which had handled an oil and gas matter on the following terms. "Under the Fee Agreement, [the client] agreed to pay [S&G] 30% 'of the sum recovered by settlement or judgment,'" subject to caps based on when the lawsuit was resolved. *Grynberg Production Corp. v. Susman Godfrey, L.L.P.*, No. 10-1248, 2012 U.S. App. LEXIS 3316, at *2 (10th Cir. Colo., February 16, 2012). "[T]he Fee Agreement capped fees at $50 million if the case settled within one year after the action was filed." *Id.* The fee agreement thus entitled S&G to be paid $50 million for a year's worth of work—and that is what an arbitrator decided S&G should receive, subject to an offset of less than $2 million that, for present purposes, is irrelevant. The Tenth Circuit affirmed the fee award.

50. According to an article published in THE ADVOCATE, a journal produced by the Litigation Section of the State Bar of Texas, S&G's fee percentage was typical.

> A pure contingency fee arrangement is the most traditional alternative fee arrangement. In this scenario, a firm receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the contingency is approximately 33%, with the client covering litigation expenses; however, firms can also share part or all of the expense risk with clients. Pure contingency fees, which are usually negotiated at approximately 40%, can be useful structures in cases where the plaintiff is seeking monetary or monetizable damages. They are also often appropriate when the client is an individual, start up, or corporation with limited resources to finance its litigation. Even large clients, however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 66 THE ADVOCATE (TEXAS) 20 (2011).

51. I could offer more examples, but I hope it is clear that fees ranging from 25 percent to 40 percent of the recovery are the norm in commercial cases of all types, including those with the potential to generate enormous recoveries. They also predominate in mass tort lawsuits and most conventional personal injury cases. Fees tend to be higher in medical malpractice lawsuits than other personal injury cases because the costs and risks associated with malpractice cases tend to be especially great. In these cases, fees in the 40 percent to 50 percent range are common.

52. One of the few contexts in which fees below 25 percent are observed with any frequency is in securities fraud class actions where certain public pension funds are at the helm. In these cases, declining scales of percentages are also sometimes employed.

53. The contrast between the actions of public pension funds and other sophisticated plaintiffs led Professor John C. Coffee, Jr., the country's leading authority on class action lawsuits, to speculate that public pension funds, which are politically-controlled, have objects other than maximizing class members' recoveries. The following passage appeared in an expert witness report he submitted.

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen such a fee contract used in the antitrust context; nor, in any context, have I seen a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas). My belief is that public pension funds prefer the "declining percentage" formula largely for political reasons, while private corporations disdain such formula for economic reasons. That is, public pension funds are frequently administered by elected political officials who are potentially subject to media and political criticism for conferring "windfall" fees on their attorneys. Necessarily, they seek to avoid criticism, and the declining percentage formula seems primarily a defensive strategy to protect political officials from such criticism. Corroborating this conclusion is the rareness of its use by private corporations (as Coca-Cola,

> PepsiCo and Admiral Beverage have implicitly confirmed in this case [by paying straight percentage fees in the typical range].

Declaration of John C. Coffee, Jr., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004), ¶ 22. According to Professor Coffee, then, public pension funds do themselves and other investors a disservice by using inferior fee arrangements.

54. *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (D. Md. 2000), where the court concluded that the market price for the legal services supported a 40 percent fee, provides an example supporting Professor Coffee's assessment that the market is not fond of declining percentage scales. There, the bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees, 21 times its lodestar. The bankruptcy judge granted the request, writing: "Viewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." 244 B.R. 327 at 335. The court's logic is impeccable.

55. Securities class actions also provide questionable guidance because they often entail smaller risks than class actions of other types. Being the most common type of class action, the issues they raise tend to have been litigated often, making outcomes more predictable than they may be in class actions of other types that make their way through the courts less often. To be clear, securities cases are still risky and expensive lawsuits, and the lawyers who handle them should be fairly paid. The point is only that it may be perilous to draw strong inferences from them when setting fees in class actions of other types.

56. Finally, even in securities class actions that are led by public pension funds, fees comparable to those requested by Plaintiffs' Counsel are common. As mentioned above, I recently co-authored an empirical study of 431 securities class actions that settled in federal district courts from 2007 through 2012. My co-authors and I found that "[c]ases with public pension lead plaintiffs ha[d] fee requests that average[d] 24.8%." Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUMBIA L. REV. 1371, 1407 (2015).

57. The market for legal fees exists outside the courtroom. Consequently, to this point I have said nothing about judicial fee award practices, the subject that Professors Fitzpatrick and Miller address. But it is important to know that judges have awarded fee percentages similar to those that prevail in the private market even when class actions produce enormous recoveries. They need only be convinced that the risks, costs, and results obtained merit compensation in the normal market range.

58. The table below documents this point empirically. It lists 35 litigations with settlements of $100 million or more (the traditional mega-fund threshold) in which fee awards equaled or exceeded 30 percent.

Mega-Fund Class Actions with Fee Awards of 30% or More			
	Case	**Recovery (millions)**	**Fee Award**
1	*In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000)[5]	$185	40.00%
2	*In re Combustion, Inc.*, 968 F.Supp. 1116 (W.D.La.1997)	$127	36.00%
3	*In re Managed care Litig. (Aetna)*, 2003 WL 22850070 (S.D. Fla, Oct. 24, 2003; and *In re Managed Care Litig. (Cigna)*, 1:00-1334-MD-01334 (S.D. Fla Feb. 2, 2004)[11]	$310	35.50%
4	*In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001)	$365	34.60%
5	*In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *4 (D. Kan. July 29, 2016)	$974	33.33%
6	*In re U.S. Foodservice, Inc. Pricing Litig.*, No. 3:07-md-1894 (AWT) (D. Ct. Dec. 9, 2014)	$297	33.33%
7	*In re Tricor Direct Purchaser Litig.*, D. Del. 05-340-SLR, Doc. No. 543 (2009)	$250	33.33%
8	*In re Neurontin Antitrust Litigation*, D.N.J. 2:02-cv-01830, Doc. No. 114	$190	33.33%
9	*Standard Iron Works v. Arcelormittal et al.*, No. 08-C-5214 (N.D. Ill., Oct. 22, 2014)	$164	33.33%
10	*In re Titanium Dioxide Antitrust Litig.*, 10-CV-00318 (D. Maryland, Dec. 13, 2013)	$164	33.33%
11	*In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013)	$150	33.33%
12	*City of Greenville v. Syngenta Crop Protection*, No. 3:10-cv-00188 (S.D. Ill. Oct. 23, 2012)	$105	33.33%
13	*In re Initial Pub. Offering Sec. Litig.*, 671 F.Supp.2d 467 (S.D.N.Y. 2009)	$510	33.30%
14	*In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003)[3]	$220	33.30%
15	*In re Relafen Antitrust Litig., No. 01-12239*, 2004 U.S. Dist. LEXIS 28801 (D. Mass. Apr. 9, 2004)	$175	33.30%
16	*In re OSB Antitrust Litig.*, Master File No. 06-826 (March 4, 2009)	$111	33.30%
17	*Kirk Dahl et al. v. Bain Capital Partners LLC et al.*, No. 1:07-cv-12388 (D. Mass. Jan., 2015)	$590	33.00%
18	*In re Apollo Group Inc. Securities Litigation*, 2012 WL 1378677, at *9 (D.Ariz., April 20, 2012)	$145	33.00%

19	*San Allen, Inc. v. Buehrer, Admin., Ohio Bureau of Workers' Compensation*, CV-07-644950 (Common Pleas, Cuyahoga Cty, OH Nov. 25, 2014)	$420.0	32.70%
20	*In re Automotive Refinishing Paint Antitrust* Litigation, MDL No. 1426 (E.D. Pa. Jan. 3, 2008)	$106	32.70%
21	*Weatherford Roofing Co., et al. v. Employers National Ins. Co.*, No. 91-05637 (116th Dist. Ct, Dallas, TX) (Dec. 1, 1995)	$190	31.60%
22	*Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	$1,060	31.33%
23	*In Re (Bank of America) Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330 (S.D. Fla. 2011)	$410	30.00%
24	*In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995)	$220	30.00%
25	*In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. Pa. 2004)	$203	30.00%
26	*In re Home-Stake Prod. Co. Sec. Litig.*, MDL No. 153 (N.D.Okla. Jan. 2, 1990)	$185	30.00%
27	*In re: (Chase Bank) Checking Account Overdraft Litig.*, No. 1:09-MD-02036 (S.D. Fla. Dec., 19, 2012)	$162	30.00%
28	*Chieftain Royalty Co. v. QEP Energy Co.*, Case No. CIV-11-212-R (W.D. Okla. May 31, 2013)	$155	30.00%
29	*In re: (Citizens Bank) Checking Account Overdraft Litig.*, No. 1:09-MD-02036 (S.D. Fla. Mar. 12, 2013)	$137.5	30.00%
30	*In re Informix Corp. Sec. Litig.*, Master File No. C-97-1289-CRB (N.D.Cal. Nov. 2, 1999)	$132	30.00%
31	*Kurzweil v. Philip Morris Co., Inc.*, Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123	30.00%
32	*In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D.Pa.2000)	$111	30.00%
33	*Klein v. O'Neal, Inc.*, 705 F.Supp.2d 632 (N.D.Tex. Apr. 9, 2010)	$110	30.00%
34	*In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, at 18-20 (E.D.Mich. Nov. 26, 2002)	$110	30.00%
35	*In re Prison Realty Sec. Litig.*, Civil Action No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D.Tenn. Feb. 9, 2001)	$104	30.00%

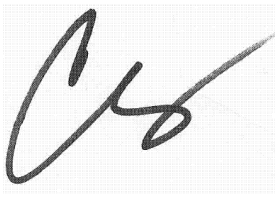
60. Several things must be kept in mind when considering this table. First, the list is *not* complete. Because no comprehensive dataset of mega-fund class actions exists, I cannot say with certainty how many time judges have awarded fees of 30 percent or more in cases with recoveries of at least $100 million. Often, when I update the table, I discover additional cases.

61. Second, mega-fund settlements are rare. Although enormous class action settlements receive disproportionate attention in the press, they are uncommon.

62. Third, because mega-fund settlements are rare, the 35 cases listed in the table actually document a significant tendency on the part of judges to award fees of 30 percent or more in large cases. As explained above, these cases show that the prevailing judicial practice is *not* to reduce fee percentages automatically as recoveries grow; it is to award fees that are warranted in light of the circumstances, which can justify substantial percentages in even the largest cases. The Court has discretion to award a fee based on the market rate in this case. It need only consider the evidence and explain its decision.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

October 11, 2017



CHARLES SILVER

EXHIBIT A

RESUME OF PROFESSOR CHARLES SILVER

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ACADEMIC EMPLOYMENTS

UNIVERSITY OF TEXAS SCHOOL OF LAW

Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure	2004-present
Co-Director, Center on Lawyers, Civil Justice, and the Media	2001-present
Robert W. Calvert Faculty Fellow	2000-2004
Cecil D. Redford Professor	1994-2004
W. James Kronzer Chair in Trial & Appellate Advocacy	Summer 1994
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow	1991-1992
Assistant Professor	1987-1991

HARVARD LAW SCHOOL

Visiting Professor	Fall 2011

VANDERBILT UNIVERSITY LAW SCHOOL

Visiting Professor	2003

UNIVERSITY OF MICHIGAN LAW SCHOOL

Visiting Professor	1994

UNIVERSITY OF CHICAGO

Managing Editor, Ethics: A Journal of Social, Political and Legal Philosophy	1983-1984

EDUCATION

JD 1987, Yale Law School
MA 1981, University of Chicago (Political Science)
BA 1979, University of Florida (Political Science)

SPECIAL PROJECTS

Associate Reporter, Principles of the Law of Aggregate Litigation, American Law Institute (2010) (with Samuel Issacharoff (Reporter), Robert Klonoff and Richard Nagareda (Associate Reporters)).

Co-Reporter, Practical Guide for Insurance Defense Lawyers, International Association of Defense Counsel (2002) (with Ellen S. Pryor and Kent D. Syverud) (published on the IADC website in 2003 and revised and distributed to all IADC members as a supplement to the Defense Counsel J. in January 2004).

BOOKS IN PROGRESS

Overcharged: From Medicare to Obamacare and Beyond (coauthored with David A. Hyman)

To Sue is Human: Medical Malpractice Litigation in Texas 1988-2005 (coauthored with Bernard Black, David Hyman, and William Sage).

BOOKS

Health Law and Economics, Edward Elgar (2016) (coedited with Ronen Avraham and David Hyman).

Law of Class Actions and Other Aggregate Litigation, 2nd Edition, Foundation Press (2013) (with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley).

Professional Responsibilities of Insurance Defense Counsel, LexisNexis Mathew Bender (2012) (with William T. Barker) (Annual Updates 2013-2105).

PUBLICATIONS AND WORKS IN PROGRESS

1. "A Private Law Defense of the Fiduciary Duty" (in progress) (presented at several law schools and conferences), available at http://ssrn.com/abstract=2728326.

2. "The DOMA Sideshow" (in progress), available at http://ssrn.com/abstract=2584709.

3. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," in I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds., Oxford Handbook of American Health Law (forthcoming 2016) (with David A. Hyman).*

4. "Compensating Persons Injured by Medical Malpractice and Other tortious behavior for Future Medical Expenses Under the Affordable Care Act," 25 Annals of Health Law 35 (2016) (with Maxwell J. Mehlman, Jay Angoff, Patrick A. Malone, and Peter H. Weinberger)

5. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010," J. Empirical Legal Stud. (forthcoming 2016) (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati).

6. "Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions," 115 Columbia L. Rev. 1371 (2015) (with Lynn A. Baker and Michael A. Perino).

7. "The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique," Rutgers U. L. Rev. (forthcoming 2015) (with William T. Barker) (symposium issue).

8. "The Economics of Plaintiff-Side Personal Injury Practice," U. Ill. L. Rev. 1563 (2015) (with Bernard S. Black and David A. Hyman).

9. "Fix Problems Where They Arise: The Liability System Is Not To Blame For The Problems of Healthcare," Oxford Handbook of American Health Law (Glenn I. Cohen, Allison Hoffman, and William Sage, eds.) (forthcoming 2015) (with David A. Hyman) (invited chapter).

10. "Policy Limits, Payouts, and Blood Money: Another Look at Med Mal Settlements in the Shadow of Insurance," U.C. Irvine L. Rev. (forthcoming 2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik) (invited symposium).

11. "The Basic Economics of the Duty to Defend," in D. Schwarcz and P. Siegelman, eds., *Research Handbook in the Law & Economics of Insurance* (forthcoming 2015) (peer-reviewed).

12. "Does Tort Reform Affect Physician Supply? Evidence from Texas," Int'l Rev. of L. & Econ. (2015) (with David A. Hyman, Bernard S. Black and Myungho Paik) (peer-reviewed), available at http://dx.doi.org/10.1016/j.irle.2015.02.002.

13. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter 1 (Aug. 2014) (with William T. Barker).

14. "Regulation of Fee Awards in the Fifth Circuit," 67 The Advocate (Texas) 36 (2014) (invited submission).

15. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation," 5 J. of Tort L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

16. "Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," 63 DePaul L. Rev. 574 (2014) (with David A. Hyman) (invited symposium).

17. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DePaul L. Rev. 617 (2014) (invited symposium).

18. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 Vanderbilt L. Rev. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

19. "Five Myths of Medical Malpractice," 143:1 Chest 222-227 (January 2013) (with David A. Hyman) (peer-reviewed).

20. "How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence From Texas" (with Bernard Black, David A. Hyman, Myungho Paik, and William Sage), Amer. L. & Econ. Rev. (2012), doi: 10.1093/aler/ahs017 (peer-reviewed).

21. "Ethical Obligations of Independent Defense Counsel," 22:4 Insurance Coverage (July-August 2012) (with William T. Barker), available at http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

22. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (coauthored with David A. Hyman), 46 New England L. Rev. 101 (2012) (invited symposium).

23. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?", in Ken Oliphant & Richard W. Wright (eds.) Medical Malpractice and Compensation in Global Perspective (2013), originally published in 87 Chicago-Kent L. Rev. 163 (2012) (coauthored with David A. Hyman).

24. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman) (peer reviewed).

25. "Will Tort Reform Bend the Cost Curve? Evidence from Texas" (with Bernard Black, David A. Hyman, Myungho Paik), 9 J. Empirical Legal Stud. 173-216 (2012) (peer-reviewed).

26. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. 1985 (2011) (invited symposium).

27. "Fiduciaries and Fees," 79 Fordham L. Rev. 1833 (2011) (with Lynn A. Baker) (invited symposium).

28. "The Impact of the Duty to Settle on Settlement: Evidence From Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard Black and David A. Hyman) (peer reviewed).

29. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

30. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. Empirical Legal Stud. 379 (2010) (with Bernard Black and David A. Hyman) (peer reviewed).

31. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

32. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 Vanderbilt L. Rev. 107 (2010) (with Geoffrey P. Miller).

33. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. Empirical Legal Stud. 723 (2009) (with David A. Hyman and Bernard S. Black) (peer-reviewed).

34. **"**Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. Legal Analysis 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue) (peer-reviewed).

35. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate 25 (2008) (with David A. Hyman and Bernard Black) (invited symposium).

36. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard Black, David A. Hyman, and William M. Sage) (peer-reviewed).

37. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul L. Rev. 471 (2008) (with Sam Dinkin) (invited symposium), reprinted in L. Padmavathi, ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).

38. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 33 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with David A. Hyman, Bernard S. Black, William M. Sage and Kathryn Zeiler) (peer-reviewed).

39. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. S9 (2007) (with Bernard Black, David A. Hyman, William Sage, and Kathryn Zeiler) (peer-reviewed).

40. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard Black, David A. Hyman, William M. Sage, and Kathryn Zeiler) (peer-reviewed).

41. Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider, 20 The NAPPA Report 7 (Aug. 2006).

42. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda) (peer-reviewed).

43. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006) (accompanied Task Force on Contingent Fees, Tort Trial and Insurance Practice Section

of the American Bar Association, "Report on Contingent Fees in Class Action Litigation," 25 Rev. of Litig. 459 (2006)).

44. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

45. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

46. "A Rejoinder to Lester Brickman: *On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepperdine L. Rev. 765 (2005).

47. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

48. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard Black, David A. Hyman, and William S. Sage) (peer-reviewed).

49. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

50. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?," 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

51. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

52. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

53. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

54. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

55. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

56. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

57. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

58. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

59. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

60. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).

61. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

62. "What's Not To Like About Being A Lawyer?," 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

63. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

64. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

65. "Representative Lawsuits & Class Actions," in Int'l Ency. Of L. & Econ., B. Bouckaert & G. De Geest, eds., (1999) (peer-reviewed).

66. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

67. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

68. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

69. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

70. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

71. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

72. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

73. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6-3 Coverage 47 (May/June 1996) (with Michael Sean Quinn).

74. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6-2 Coverage 21 (Jan./Feb. 1996) (with Michael Sean Quinn).

75. "Bargaining Impediments and Settlement Behavior," in Dispute Resolution: Bridging the Settlement Gap, D.A. Anderson, ed. (1996) (with Samuel Issacharoff and Kent D. Syverud).

76. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

77. "Do We Know Enough About Legal Norms?" in Social Rules: Origin; Character; Logic: Change, D. Braybrooke, ed. (1996).

78. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud), reprinted in Ins. L. Anthol. (1996) and 64 Def. L. J. 1 (Spring 1997).

79. "Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

80. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

81. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994), reprinted in Practising Law Institute, Insurance Law: What Every Lawyer and Businessperson Needs To Know, Litigation and Administrative Practice Course Handbook Series, PLI Order No. H0-000S (1998).

82. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A Guide to the Basics of Law Practice (3d) (Texas Center for Legal Ethics and Professionalism 1996).

83. "Getting and Keeping Clients," in F.W. Newton, ed., A Guide to the Basics of Law Practice (3d) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

84. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 Law and Contemporary Problems 213 (1995) (with John S. Dzienkowski, Sanford Levinson, and Amon Burton).

85. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A Guide to the Basics of Law Practice (Texas Center for Legal Ethics and Professionalism 1994).

86. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A Guide to the Basics of Law Practice (Texas Center for Legal Ethics and Professionalism 1994).

87. "Thoughts on Procedural Issues in Insurance Litigation," VII Ins. L. Anthol. (1994).

88. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

89. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

90. "A Missed Misalignment of Interests: A Comment on Syverud, The Duty to Settle," 77 Va. L. Rev. 1585 (1991), reprinted in VI Ins. L. Anthol. 857-870 (1992).

91. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

92. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

93. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

94. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987) (peer-reviewed).

95. "Justice In Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman) (peer-reviewed).

96. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985) (peer-reviewed).

97. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984) (peer-reviewed).

98. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro) (peer-reviewed).

NOTABLE SERVICE ACTIVITIES

Associate Reporter, American Law Institute Project on the Principles of Aggregate Litigation

Interested Party, Statistical Information Task Force, National Association of Insurance Commissioners, Model Medical Malpractice Closed Claim Reporting Law

Invited Academic Member, American Bar Association/Tort & Insurance Practice Section Task Force on the Contingent Fee

Chair, Dean Search Committee, School of Law, University of Texas at Austin

Chair, Budget Committee, School of Law, University of Texas at Austin

Coordinator, General Faculty Colloquium Series, School of Law, University of Texas at Austin

Sole Drafter, Assessment Report for the Juris Doctor Program at the School of Law, University of Texas at Austin, for the Commission on Colleges of the Southern Association of Colleges and Schools

RECENT AWARDS

Distinguished Fellow**,** Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law (2014)

Robert B. McKay Law Professor Award, Tort Trial & Insurance Practice Section, American Bar Association (2009)

Faculty Research Grants, University of Texas at Austin (various years)

MEMBERSHIPS

American Bar Foundation

Texas Bar Foundation (Life Fellow)

State Bar of Texas (admitted 1988)

Tort Trial and Insurance Practice Section, American Bar Association

Society for Empirical Legal Studies

American Law and Economics Association

American Association for Justice

Association of American Law Schools

EXHIBIT D

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

In re: Takata Airbag Product Liability Litigation
(Economic Loss Track Cases Against BMW, Mazda, Subaru, and Toyota)

MDL No. 2599

SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK

1. My name is Brian Fitzpatrick and I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I filed a declaration in support of class counsel's fee requests in these cases on September 8, 2017. Class counsel asked me to prepare this supplemental declaration to give my opinion of the arguments made by some of the objectors in light of the data and economics underlying class action litigation.

2. First, some objectors oppose the timing of class counsel's proposed fee awards, either because class counsel would receive their fee awards before the defendants fully fund their settlements or because class counsel would receive their fee awards before any appeals are concluded. *See, e.g.*, Hull-McCain Objections pp. 8-10. In my opinion, neither of these objections is consistent with best practices in class action litigation.

3. It is true that many scholars believe that delaying class counsel's fee award is the best practice if it is unclear how much defendants will ultimately pay out in a settlement. *See, e.g.*, Principles of the Law of Aggregate Litigation § 3.13 cmt. a (2010). The reason for this is to ensure that the court is fully aware of how much compensation or deterrence a settlement has actually generated before it decides how much to award class counsel in fees for creating the settlement. Thus, in so-called "claims made" settlements with reversion of unclaimed amounts to the defendant, it may well be appropriate to delay awarding fees until the claims process has

concluded. *See id*. Here, by contrast, there is no doubt how much the defendants will pay out: other than credits for the rental car benefits, *none* of the settlement amounts could possibly revert back to the defendants—and, with respect to the rental car benefits, class counsel's expert calculated that the value of the benefits will exceed the amount of any credits. Thus, there is nothing to be gained by delaying class counsel's fee awards in these cases; doing so would serve only to make life harder on contingency-fee lawyers by forcing them to make payroll at their firms for several more years while they wait to receive compensation for work they did long ago. Making life harder on class action lawyers without any reason serves only to hurt class members in the long run by discouraging lawyers from taking their cases.

4. Similarly, the provision in the settlement agreements that permit class counsel to receive their fees before appeals are concluded—subject to an obligation to repay those fees should the settlement or fees be reversed on appeal—is the current best practice to discourage class members from taking appeals in an effort to blackmail class counsel. I have written an entire article about this subject that explains this in great detail: until settlements with objecting class members are prohibited outright, the best tool we have in our arsenal to discourage objector blackmail is the provision the settlements here include. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). The objectors who claim that this provision obstructs class members from making objections, *see* Hull-McCain Objections p. 9 n. 17, are correct only to the extent that the objectors are motivated to make objections in the hope of pressuring class counsel into entering into settlements with them—i.e., what I call "blackmail-minded objectors." By contrast, if the objectors are not interested in simply extracting a payment

or fee, but, rather, interested in improving the settlement, then the settlement provisions here will not affect them whatsoever.[1]

5. Second, some objectors urge the court to slash class counsel's fee awards in these cases because some of the settlements (or the sum of all four settlements) come to more than $100 million. *See, e.g.*, Bernstein et al. Objections pp. 8-10; Hull-McCain Objections pp. 11-16; Jan Objections pp. 9-12. There is no law in the Eleventh Circuit requiring courts to do so. It is true, as I noted in my opening declaration, that some courts in other Districts follow this practice—enough of them that I found in my empirical study an inverse and statistically significant relationship between fee percentage and settlement size nationwide. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 837-38, 842 (2010). Some objectors claim that some courts do this in the Eleventh Circuit, too, but, if they do, as I noted in my opening declaration, they have not been numerous enough to make the effect statistically significant in the Eleventh Circuit.[2]

6. In any event, statistical significance aside, for the reasons I stated in my opening declaration, it is my opinion that it would undermine the efficacy of class action litigation to slash a fee percentage simply because a settlement is large. As I explained using a numerical

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

[2] Some objectors criticize my study as relying on old data—the data in my empirical study was collected from class action settlements in 2006 and 2007. *See* Hull-McCain Objections p. 15. It is true that this data is now 10 years old, but it takes many years to collect this data, and my study is still the most comprehensive study of class action fees ever published. (As I noted in my opening declaration, Professor Geoff Miller has been working on an update to his study, but it has not yet been published. In any event, the drafts of his update have not asserted anything contrary to what I have said in my declaration: none the drafts of his update that I have seen has asserted there is a statistically significant and inverse relationship between fees and settlement size in the cases in the Eleventh Circuit.)

example that I will not repeat here, doing this can actually lead to situations where class counsel can receive a *bigger* fee award by negotiating a *smaller* settlement. Such perverse incentives are obviously not in the best interests of class members—or in the best interests of a society interested in optimal compensation of injuries and optimal deterrence of wrongdoing.

7. Third, some objectors urge the Court to crosscheck class counsel's fee requests with class counsel's lodestar. *See, e.g.*, Bernstein et al. Objections pp. 13-14. Nothing in Eleventh Circuit law requires this, either. Although it is true that some courts do this, many do not. *See* Fitzpatrick, *Empirical Study*, *supra*, at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method). Moreover, in my opinion, the courts that do not do this are better serving the efficacy of class action litigation. This is the case because the lodestar crosscheck can only serve to cap class counsel's fee percentage at some multiple of class counsel's lodestar and doing this gives class counsel the incentive to behave just as they would if the court were using the lodestar method rather than the percentage method to award fees in the first place. As I explained in my opening declaration, the lodestar method was abandoned by courts because it undermined the efficacy of class action litigation: it encouraged class action lawyers to drag cases out to generate more lodestar and it made them indifferent to whether the settlement was big or small. In my opinion, we should not let these bad behaviors return through the backdoor with the lodestar crosscheck.

8. To see why the lodestar crosscheck encourages the same bad behaviors, consider the following example. Suppose a class action lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 30% fee if it exceeded twice his lodestar, then he would be *indifferent* between settling the case for $6.67 million and $66.7 million (or any number higher than $6.67 million). Now suppose that class

counsel believed that the most it could wring from the defendant in this example was $13.33 million. In order to reap the maximum 30% fee with the lodestar crosscheck, class counsel would have to generate an additional $1 million in lodestar before agreeing to the settlement; this would give class counsel incentive to *drag the case out* before sealing the deal. Although I am not suggesting that class counsel here would have been tempted by these bad behaviors, the decisions courts make today set the expectations for class action lawyers tomorrow, and, in my opinion, courts should not create the expectation that the lodestar crosscheck will cap class counsel's fees under the percentage method.

9. Fourth, some objectors oppose permitting lead class counsel to allocate the fees awarded by the court here among the various firms and lawyers that worked on these cases. *See* Hull-McCain Objections pp. 19-20. But, in my experience, that is precisely how most fee awards are allocated. *See, e.g., Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 88 (2d Cir. 2010); *In re Initial Public Offering Securities Litigation*, 2011 WL 2732563, at *1 (S.D.N.Y. Jul. 8, 2011); *In re Vitamins Antitrust Litigation*, 398 F.Supp.2d 209, 221-222 (D.D.C. 2005). Lead class counsel is obviously in the best position to know who did what and how valuable everyone's contributions were to the litigation. Of course, it is also true that one of the firms lead counsel must allocate fees to is his own firm and lead class counsel will be self-interested with regard to this allocation. But this is why the Court always retains ultimate jurisdiction over fee allocations in the event there is a dispute.

10. Fifth, some objectors oppose including in the benefits conferred to the classes in these cases 1) the monies that will be spent on outreach and 2) the credits for the rental car programs; they claim these monies would have been spent and these benefits would have been conferred even without the settlements. *See, e.g.*, Bernstein et al. Objections pp. 5-7; Jan

Objections pp. 4-6. But, as I noted in my opening declaration, the settlements obligate the defendants to undertake outreach efforts *beyond* those they are currently required to undertake pursuant to the federal government's airbag recall. Moreover, there is currently no legal requirement *at all* that the defendants provide customers with rental cars while their airbags are replaced. Although it is possible that some defendants voluntarily have provided these from time to time, the settlement makes this program *obligatory* and *permanent* throughout the length of the recall. In my opinion, these are real benefits to the classes and therefore benefits for which class counsel should be compensated. If courts do not include such benefits in their fee 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.

11. Finally, some objectors imply that there is something improper about the fact that the defendants here agreed not to oppose class counsel's fee requests. *See, e.g.*, Bernstein et al. Objections p. 9; Miller Objections p. 8. It is true that courts and scholars—including me—sometimes worry that class counsel might trade away settlement terms more favorable to the class in exchange for a defendant's agreement not to oppose fees. *See, e.g.*, Newberg on Class Actions § 13:9 (5th ed.). But these concerns are not present here because, as I noted above, class counsel followed best practices and had no discussion with the defendants whatsoever about fees until the rest of the settlements were negotiated. *See* n. 1, *supra*. Thus, class counsel had no opportunity to trade anything of the class's away in exchange for this agreement. Defendants can agree not to oppose fee requests either because they have no standing to object to fees that come from the class's recovery rather than their own pockets, *see, e.g., Tennille v. W. Union Co.*,

809 F.3d 555 (10th Cir. 2015), or because they think that even class action lawyers sometimes do a good job and deserve to be paid.

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

Nashville, TN

October 11, 2017

Brian T. Fitzpatrick

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: TAKATA AIRBAG PRODUCTS LIABILITY LITIGATION, This Document Relates to: ALL ECONOMIC LOSS ACTIONS AGAINST THE SUBARU, TOYOTA, MAZDA and BMW DEFENDANTS	**Case No. 1:15-md-02599-FAM**

DECLARATION OF PROFESSOR GEOFFREY P. MILLER

I, Geoffrey P. Miller, declare as follows:

1. I am the Stuyvesant P. Comfort Professor of Law at New York University located in New York, New York. I have been retained by Plaintiffs to provide an expert opinion on plaintiffs' counsel's request for an award of attorneys' fees. I make this declaration on the basis of the information described in Appendix 1. If called as a witness, I could and would competently testify to the matters stated herein.

Background and qualifications

2. For more than twenty years, I have been involved in the area of complex litigation as a teacher, scholar, attorney, consultant, and expert witness.

3. I am presently teaching or have taught classes covering the issue of attorneys' fees, including Civil Procedure, Complex Litigation, Corporations, Professional Responsibility, and Securities Regulation. I have lectured on attorneys' fee issues in continuing legal education seminars and participated in academic conferences and meetings devoted to these issues. I was a member of the advisory committee for the American Law Institute's Principles of the Law project on Aggregate Litigation, which addressed questions of attorneys' fees in class actions and related types of cases.

4. I have frequently consulted with attorneys to assist with issues pertaining to awards of counsel fees. I have been qualified as an expert and testified in cases in state and federal courts across the United States, including testimony on the topic of attorneys' fees.

5. I am a 2011 inductee in the American Society of Arts and Sciences and am a founder and past co-president of the Society for Empirical Legal Studies, a multidisciplinary scholarly organization devoted to promoting the use of statistical methods in the analysis of legal questions.

6. I have published widely cited studies of attorneys' fees in class action cases. These include the following:

• Theodore Eisenberg and Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008, 7 Journal of Empirical Legal Studies 248 (2010).

• Theodore Eisenberg, Geoffrey Miller, and Michael Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.,* 29 Washington University Journal of Law & Policy 5-35 (2009).

• Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 Journal of Empirical Legal Studies 51 (2004).

7. My most recent study of attorneys' fees in class actions, co-authored with statisticians Theodore Eisenberg and Roy Germano, is due to be published shortly in the New York University Law Review. To the best of my knowledge, the Eisenberg-Miller-Germano article is the most recent publication on the topic in the literature. The citation to this forthcoming article is:

• Theodore Eisenberg, Geoffrey Miller and Roy Germano, Attorneys' Fees in Class Actions: 2009–2013, __ New York University Law Review __ (forthcoming, 2017).

8. My research articles on class action cases, especially in the area of counsel fees, have been cited by many state and federal courts across the United States. A list of cases citing to my research is provided as Appendix 2. Further information on my background and qualifications is set forth in my resume, attached hereto as Appendix 3.

9. I am have billed for my work on this declaration at my normal and usual billing rate of $750 per hour, with a retainer of $20,000.

Summary of opinion

10. For the reasons stated below, it is my opinion that the requested attorneys' fee is reasonable and consistent with awards in similar cases.

Materials Relied On

11. In preparing this opinion, I have reviewed pleadings and other documents in this case, including, but not limited to the materials listed in Appendix 3. I have discussed this matter with counsel and investigated appropriate case law and secondary authorities.

The Litigation

12. On October 27, 2014, putative class representatives filed a lawsuit in this Court alleging that certain automotive companies ("Automotive Defendants") manufactured, distributed, or sold vehicles containing defective airbag inflators manufactured by Takata Corporation ("Takata"). The complaint demanded compensation for alleged economic losses experienced by plaintiffs as a result of this product defect. That case was captioned *Craig Dunn, et al. v. Takata Corp*., et al., No. 1:14-cv-24009 (S.D. Fla.).

13. The Judicial Panel on Multidistrict Litigation consolidated the *Dunn* action for pretrial proceedings in this Court along with other lawsuits making similar claims. *In re Takata Airbag Products Liability Litigation*, No. 1:15-md-02599-FAM (S.D. Fla.) (MDL 2599).

14. On March 17, 2015, this Court entered an order appointing Peter Prieto of Podhurst Orseck, P.A. as Chair Lead Counsel and assigning leadership responsibilities to other attorneys and firms.

15. Plaintiffs in these cases thereafter filed consolidated class action complaints.

16. The Automotive Defendants vigorously contested this litigation from the outset. In July 2015 Toyota, Ford, Subaru and Nissan jointly moved to stay the proceedings based on

asserted primary jurisdiction of the National Highway Traffic Safety Administration. This Court denied that motion in September 2015.

17. In July 2015, Mazda, Ford, Toyota, Subaru, Honda, Nissan, and BMW filed separate motions to dismiss the second consolidated class action complaint. In rulings issued between December 2015 and February 2017, this Court granted these motions in part and denied them in part.

18. The parties engaged in extensive discovery practice. As of February 2017, in excess of ten million pages of documents had been produced, Automotive Defendants had deposed more than 70 class representatives, and Plaintiffs had deposed at least 45 defense witnesses. The parties continued with active discovery at the time they reached a settlement in this matter.

19. In March, 2017, certain Automotive Defendants cross-claimed against Takata and Takata filed motions seeking to strike or dismiss these cross-claims.

20. Meanwhile, as the economic loss track of the MDL was proceeding, other events influenced the course of this litigation. In January 2017, Takata signed a plea agreement in the Eastern District of Michigan admitting, among other things, that it had submitted false reports designed to conceal the product defect. On June 26, 2017, Takata's United States subsidiary, TK Holdings, filed a Chapter 11 bankruptcy petition. Takata filed for insolvency protection in Japan and petitioned that the Japanese bankruptcy proceeding receive recognition in the United States. In consequence, litigation against Takata and its U.S. subsidiary have been stayed.

21. On a parallel track with the hotly contested litigation, the parties commenced preliminary settlement discussions with Toyota in early 2016. Eventually these discussions expanded to include other Automotive Defendants. However, despite the parties' efforts, these settlement discussions broke down early in 2017. Thereafter, Plaintiffs' counsel resumed negotiations with Toyota, resulting in a preliminary agreement in March 2017. Over the next six weeks, agreements were achieved with BMW, Subaru, and Mazda (negotiations with BMW were facilitated by the Court-appointed mediator, Paul C. Huck, Jr.).

22. The settling parties then engaged in bilateral and multilateral negotiations to reduce the agreements in principle to definitive language. The agreements now before the Court were signed on May 17, 2017.

23. The Parties did not begin to negotiate attorneys' fees and expenses until after agreeing to the principal terms set forth in the Settlement Agreements. Settlement Class Counsel agreed to file, and Defendants agreed not to oppose, an application for an award of attorneys' fees and expenses of not more than 30% of the Settlement Amount. This award would be paid from the Settlement Fund.

The Settlement Agreements

24. At issue before this Court are settlement agreements with certain Automotive Defendants. These agreements, which are substantially similar, provide that the settling Automotive Defendants will pay the following items: (a) an outreach program designed to enhance the effectiveness of recalls to fix the product defect; (b) an out-of-pocket claims process; (c) a rental car/loaner program; (d) notice and related costs; (e) claims administration; (f) residual

cash payments to class members; (g) counsel fees and expenses; and (h) incentive awards to representative plaintiffs.

25. The following table reports on the settlement recovery generated by this litigation, including (a) cash payments and (b) a 10 percent credit to cover a settling Automotive Defendant's costs of providing the rental car/loaner programs called for in the settlement agreements (collectively, the "Settlement Amount"). The total Settlement Amount is $553,567,307. Importantly, all of the cash payments called for in these agreements are to be distributed to class members or, if such a distribution is not feasible, to a charity pursuant to a *cy pres* award. None of these funds will revert to the settling Automotive Defendants.

Defendant	Cash	Credit	Total
Subaru	$61,436,031	$6,826,226	$68,262,257
Toyota	$250,650,000	$27,850,000	$278,500,000
BMW	$117,900,000	$13,100,000	$131,000,000
Mazda	$68,224,545	$7,580,505	$75,805,050
Total:	$498,210,676	$55,356,731	**$553,567,307**

26. In addition to these payments, all settling Automotive Defendants will share in a payment of $2,000,000 to cover costs of settlement administration. Moreover, the settlements contain a Consumer Support Program which provides for an extended warranty and is estimated to deliver more than $200 million in additional value to class members. When these additional items of value are included, the total value of the settlements is estimated at approximately $741 million.

27. Consistent with the settlement agreements and notices, Counsel seeks a fee equal to 30% of the $553,567,307 Settlement Amount. Counsel is not seeking a fee against the value of the settling Automotive Defendant's commitment to defray costs of settlement administration and to implement the requirements of the Consumer Support Program. If the estimated value of these additional class benefits are considered, Counsel's fee request would equal 22.4% of the total value achieved for the benefit of the class.

Opinion

Risks and Challenges of this Litigation

28. Before I begin my analysis of counsel's fee request, a word is in order about the risks and challenges associated with this litigation. While the existence of the product defect is not in dispute, the liability of the Automotive Defendants was much in doubt. Takata, the manufacturer, pled guilty to wire fraud and subsequently entered into bankruptcy. The Automotive Defendants placed the blame on Takata and claimed that, just like the Plaintiffs in this action, they too were innocent victims of Takata's misconduct. Plaintiffs would have faced significant challenges in establishing that the Automotive Defendants had an understanding of the risks sufficient to support a finding of liability under any of the theories put forward in the consolidated complaint. Takata's bankruptcy complicated matters further, because if the Automotive Defendants were successful in shifting the blame entirely to Takata, Plaintiffs would have faced the uncertain prospects of pursuing their claims as unsecured creditors in a complex international bankruptcy proceeding. Further, proving damages in these economic loss cases would have been challenging because there were millions of class members, multiple

models of automobiles, and many factors that could potentially affect the market value of these products, coupled with the fact that many class members have received or will receive replacement products free of charge as a result of various product recalls. Plaintiffs would have had to develop a well-supported damages model and to support that model against the challenges that were sure to come from Defendant's highly capable defense attorneys. Class certification was also in doubt in light of the plethora of laws involved, the multiple models of vehicles, and the millions of class members. In light of these multiple challenges, I would rank the risks of this litigation as significantly higher than average.

29. This litigation was extremely challenging to conduct. Counsel needed to familiarize themselves with the claims of the individual plaintiffs and also with the claims of the class as a whole. Because the litigation included state law claims by class members in every state, counsel had to perform an analysis of the law of at least fifty different jurisdictions. This included not only the availability of common law causes of action, but also the potential for recovery under consumer protection laws or other statutory provisions. Counsel needed to become familiar with the technical aspects of the product defect, with the details of the various recalls, with the government response to the revelations of problems in Takata's airbag inflators, and with other aspects of this complex matter.

30. As mentioned above, discovery was a major burden. Defendants collectively produced more than 10 million pages of documents. Counsel established a team of more than 40 attorneys charged with reviewing, analyzing, sorting, and coding the produced documents. Many of these documents were in Japanese, creating further problems of translation and

analysis. Counsel also had to prepare responses to Defendants' interrogatories and requests for production, to defend 70 depositions of named plaintiffs, and to prepare for, take, and analyze dozens of Defendants' witnesses.

31. This complex enterprise could not have generated a successful and cost-efficient outcome without careful organization. Members of the leadership group carried out the difficult task of supervising and coordinating a team consisting of multiple law firms and dozens of attorneys.

Analysis of the Fee Request

32. Attorneys' fees in this Circuit are determined under the standards set forth in *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). *Camden I* established that class counsel fees must be based on a percentage of the common fund generated in the settlement. That percentage can include both the cash portion of a settlement as well as non-cash elements that can be reasonably valued. *Camden I* and subsequent cases established a benchmark point estimate of 25% of the common fund and a benchmark range of between 20% and 30%. These benchmarks can be adjusted to account for features of a given case. In *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1203 (S.D. Fl. 2006), the Court observed that a fee of 25% should be considered a floor to be adjusted upward in light of the facts and circumstances.

33. *Camden I* indicated that in determining the amount of any adjustment to the benchmark, a court should consider the application of a non-exclusive list of factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Expr., Inc*., 488 F.2d 714 (5th Cir.1974). The

Johnson factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

34. Among the most important of the *Johnson* factors are the evaluations of the "customary fee" and of "awards in similar cases." These factors set a competitive benchmark for similar types of litigation. Perspective on this fee request can be obtained by comparing this fee request to awards in other class action cases.

35. During the 2000s, researchers conducted extensive investigations into awards of attorneys' fees in class action settlements. One large-scale study covering a ten-year period in courts around the country is reported in the March-April 2003 edition of *Class Action Reports* (CAR). This study found that the mean fee across the range of cases was 27.0% and the median fee was 30.0%. Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 Journal of Empirical Legal Studies 51 (2004), analyzing data from Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (2003). The fee requested in the present action is consistent with the results of this study.

36. Eisenberg and Miller's study of all reported class action settlements between 1993 and 2008 found that the mean percentage fee in federal courts was 24% and the median fee was 25%. Theodore Eisenberg and Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008, 7 Journal of Empirical Legal Studies 248 (2010). Fitzpatrick's study of 444 class action settlements between 2006 and 2007 found, similarly, that the average award was 25.4 percent and the median was 25 percent, with most fee awards falling between 25 percent and 35 percent. Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 833 (2010). The fee requested in the present case, equal to 30% of the Settlement Amount and 22.4% of total settlement value, is in line with the results of these studies.

37. Similar conclusions follow from Eisenberg, Miller and Germano's study of 458 class action settlements reported in the five years from 2009-2013. These authors find that on average, fees were 27% of the class recovery. Importantly, the Eisenberg-Miller-Germano study found that the mean percentage fee in the Eleventh Circuit was 30% and the median percentage fee in the Eleventh Circuit was 33%. In other words, even if counsel's fee request is valued at 30% of the Settlement Amount rather than 22.4% of total settlement value, the request is *no higher* than the mean fee and *below* the median fee for Eleventh Circuit cases.

38. The Eisenberg-Miller, Eisenberg-Miller-Germano and Fitzpatrick studies found a scaling effect, in that fees tended to decline as recoveries grew larger. However, the studies by Eisenberg and others also found a significant risk effect, in the sense that fee awards increase in

riskier cases. As noted above, this case posed significant risks, raising the distinct possibility that the case would wash out with little or no fee award to Class Counsel.

39. Fees of 30% or higher are observed even in "mega" cases that generate excellent results under conditions of elevated risk. An example is the decision of the Southern District of Florida in *In re Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330 (S.D. Fl. 2011), awarding a 30% fee on a $410 million recovery in light of the risks of the case and the outstanding results achieved. The settlement now before this Court presents features remarkably similar to the *In re Checking Account Overdraft Litigation* case: an excellent recovery for the class, a complex case involving millions of class members, and elevated litigation risks. Other fee awards of 30% or more in mega cases from the Southern District of Florida display similar features. See, e.g., *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1210 (S.D. Fl. 2006); *In re Managed Care Litigation*, No. 00-md-1224, 2003 WL 22850070 (S.D. Fl., October 23, 2003); *Gutter v. E.I. Dupont De Nemours & Co.*, No. 95-2152-CIV-Gold (S.D. Fla., May 30, 2003).

40. I now turn to a consideration of the remaining *Johnson* factors. These include the "time and labor required;" "preclusion of other employment;" and "time limitations imposed by the client or the circumstances." Given its size and complexity, this case was enormously taxing on counsel's time. These demands precluded counsel's ability to take on other matters.

41. The requested fee is consistent with the *Johnson* factor of the "novelty and difficulty of the questions." The litigation raised the difficult issue of establishing that manufacturers of automobiles were on notice of the defect in a component part they had

incorporated into their product, in a case where the defendants claimed they were duped and the manufacturer of the component part had pled guilty to criminal fraud.

42. Another *Johnson* factor is "whether the fee is fixed or contingent." Class counsel litigated this matter on an entirely contingent basis, standing to lose the full value of their investment of time and resources if the case washed out.

43. Two of the *Johnson* factors address the qualifications and ability of counsel: "the experience, reputation, and ability of the attorneys" and the "the skill requisite to perform the legal service properly." The challenges posed in conducting this litigation are described above and hardly need to be emphasized here: this is one of the most complex and demanding consumer class actions in American history. Class Counsel clearly displayed the skill requisite to perform the legal service properly.

44. The *Johnson* factor of the "undesirability" of the case looks, in part, to the risk presented for plaintiffs' counsel. Cases that pose a high litigation risk are, for that reason, less desirable for counsel working, as here, on a contingent fee basis, because riskier cases present a lower probability of any payoff at the end of the day. Also pertinent to the "undesirability" factor is the expense and time involved for counsel.

45. The eleventh *Johnson* factor is "the nature and length of the professional relationship with the client." Counsel worked effectively with their clients in this litigation, defending 70 depositions of named plaintiffs and coordinating responses to interrogatories and demands for the production of documents.

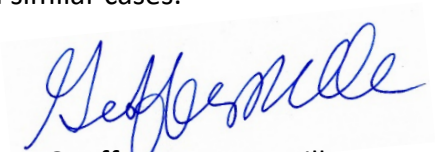
46. The final *Johnson* factor, "the amount involved and the results obtained," is among the most important. It is my opinion that the settlement amount here represents a remarkable recovery for class members and a benefit to the public at large. The total estimated value of the settlement – more than $741 million – is extraordinary in itself. Beyond this, the settlement will protect the public safety and welfare by facilitating the removal of dangerous and defective products from millions of automobiles.

47. An additional consideration bearing on counsel's fee request is Defendants' agreement not to contest an application for a fee of up to 30% of the Settlement Amount – an agreement that was negotiated only after the parties had already agreed on the principal terms in the Settlement Agreements. In litigation as hard-fought and adversarial as this, such a "clear sailing" provision tends to substantiate the value of the legal services provided to class members.

48. Further, it is my opinion that it is appropriate and normal for Class Counsel to allocate the fee award among themselves by private agreement.

Conclusion

49. For the reasons stated above, it is my opinion that the requested attorneys' fee is (a) in line with the benchmark fees identified in this Circuit, (b) supported by the *Johnson* factors, and (c) consistent with awards in similar cases.



Geoffrey Parsons Miller
October 10, 2017

Appendix 1: Materials Reviewed

- Settlement Agreement, BMW Economic Loss Actions, plus attached exhibits
- Settlement Agreement, Mazda Economic Loss Actions, plus attached exhibits
- Settlement Agreement, Subaru Economic Loss Actions, plus attached exhibits
- Settlement Agreement, Toyota Economic Loss Actions, plus attached exhibits
- Objection of
- Declaration of Peter Prieto in Support of Plaintiffs' Omnibus Motion for Final Approval of Class Settlements and Certification of Settlement Classes, and Application for Class Representative Service Awards and Class Counsel's Attorneys' Fees
- Declaration of Kirk D. Kleckner Regarding the Customer Support Program and Rental Car/Loaner Program
- Declaration of Brian T. Fitzpatrick
- Plaintiffs' Omnibus Motion for Final Approval of Class Settlements and Certification of Settlement Classes, and Application for Class Representative Service Awards and Class Counsel's Attorneys' Fees, And Incorporated Memorandum of Law
- Plaintiffs' Unopposed Omnibus Motion for Preliminary Approval Class Settlements, Preliminary Certification of Settlement Classes, And Approval of Class Notices and Incorporated Memorandum of Law
- Notice of Filing Declaration of Notice Administrator on Support of Final Approval
- Objection of Amy Marks
- Objection of Andrew Morrow
- Objection of Jeffrey Bernstein, et al.
- Objection of Cameron Jan
- Objection of Sabrina Derusseau
- Objection of Elizabeth A Miller
- Objection of Gary W. Sibley
- Objections of Sean Hull, et al.
- Objection of Jacqueline B. Frazier

- Objection of Jeffrey and Mary Jane Harris
- Objection of Justin Ference
- Objection of Lisa Davenport
- Objection of Janeen M. Miklowski and Troy A. Budgen
- Objection of Nicholas Chickering
- Objection of Pamela McCoy
- Supplemental Objection of Ryan Major, Tara Major, and David Ginden

Appendix 2: Cases citing to Geoffrey Miller's Research on Class Action Litigation

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Appendix 3: Resume

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Work Experience

New York University Law School (1995-present)
Stuyvesant P. Comfort Professor of Law
Co-Director, Program in Corporate Compliance and Enforcement (2014-present)
Faculty Co-Director, Center on Civil Justice at NYU Law School (2015-present)
Director, NYU Center for Financial Institutions (1994-present)
Co-Director, NYU Center for Law, Economics and Organization (2006-2012)
Chair, Academic Personnel Committee (1999-2000; 2004-2006)
Chair, Promotions and Tenure Committee (2007-2009)

University of Chicago Law School (1983-1995)
Kirkland & Ellis Professor (1989-1995)
Editor, Journal of Legal Studies (1989-1995)
Director, Program in Law and Economics (1994-1995)
Director, Legal Theory Workshop (1989-1993)
Associate Dean (1987-1989)
Professor of Law (1987-1989)
Assistant Professor of Law (1983-1987)

Distinguished Visiting Professor, Vanderbilt Law School 2014
Visiting Professor, University of Frankfurt, Summer 2013
Faculty Member, Study Center Gerzensee, Switzerland, Spring 2012, Summer 2016

Visiting Lecturer, University of Genoa Department of Law, 2011
Visiting Lecturer, Collegio Carlo Alberto (Moncalieri, Italy), 2011, 2013
Visiting Scholar, European University Institute, Florence, Italy, Fall/Winter 2010
Visiting Chair on Private Actors and Globalisation, Hague Institute for the Internationalisation of Law, Fall/Winter 2010
Robert B. and Candace J. Haas Visiting Professor of Law, Harvard Law School, Fall 2009
Max Schmidheiny Guest Professor, University of St. Gallen, Switzerland Summer 2009
Faculty Member, NYU-NUS in Singapore, 2009, 2011, 2013
Fresco Endowed Professor of Law, University of Genoa, Italy, Summer 2008, Spring 2009, Summer 2010
Visiting Scholar, University of Minnesota Law School, Spring 2008
Visiting Lecturer, University of Bolzano, Italy, Summer 2007
Commerzbank Visiting Professor, Institute for Law & Finance, University of Frankfurt, Germany, Summer 2004, Summer 2005, Summer 2010
Visiting Professor, Columbia Law School, Fall 2001
Visiting Professor, University of Sydney, Australia, Summer 2002; Summer 2006; Spring 2009
Zaeslin Visiting Professor, University of Basel, Switzerland, Summer 2001, 2002, 2003, 2004, 2005, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016
Visiting Scholar, CentER for Economic Research, Tilburg, Holland, Summer 1996
John M. Olin Visiting Scholar, Cornell University Law School, Summer 1992, Spring 1996; Winter 1997, Summer 2005, Spring 2008, Spring 2009, Spring 2010
Visiting Scholar, Bank of Japan, Spring 1995
Visiting Professor, New York University Law School, Fall 1994
Consultant, Federal Reserve Bank of Chicago, 1992-1994
Visiting Scholar, New York University Law School, Fall 1993
Simpson Grierson Butler White Visiting Professor, University of Aukland, New Zealand, Summer 1993

Associate, Ennis, Friedman, Bersoff & Ewing
Washington, D.C. (1982-83)

Attorney Adviser, Office of Legal Counsel
U.S. Department of Justice (1980-82)

Clerk, Hon. Byron R. White
Supreme Court of the United States (1979-80)

Clerk, Hon. Carl McGowan
U.S. Court of Appeals, District of Columbia (1978-79)

Scholarly and Law Reform Activities

Member, American Law Institute (elected 2015)

American Law Institute, Reporter, Principles of the Law, Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations (2014-present)

Fellow, American Academy of Arts and Sciences (elected 2011)

Society for Empirical Legal Studies
Co-Founder and Co-President (2006-2007)
Board Member (2006-2014)

Corporate Service

Member of the Board of Directors, State Farm Bank (2010-present) – board and committee service for nontraditional thrift institution with $17 billion in assets. Audit Committee Chair (2015-present)

Education

Columbia Law School, J.D. (1978)
Editor-in-Chief, Columbia Law Review (1977-78)
Princeton University, A.B. *magna cum laude* (1973)

Publications

Books

The Economics of Securities Law I (editor) (Edward Elgar 2016)

The Economics of Securities Law II (editor) (Edward Elgar 2016)

The Economics of Financial Law I (editor) (Edward Elgar 2016)

The Economics of Financial Law II (editor) (Edward Elgar 2016)

Banking Law and Regulation, Little, Brown & Co. 1992 (with Jonathan R. Macey); Second Edition, Aspen Law & Business 1997 (with Jonathan R. Macey), Third Edition, Aspen Law & Business 2001 (with Jonathan R. Macey and Richard Scott Carnell); Fourth Edition, Aspen Law & Business 2008 (with Richard Scott Carnell and Jonathan R. Macey), under title "The Law of Banking and Financial Institutions); Fifth Edition (with Richard Scott Carnell and Jonathan R. Macey), under title "The Law of Financial Institutions) Wolters Kluwer Law & Business (2013)

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On the Advantages of Defined Contribution Plans, in Samuel Estreicher, ed., Proceedings of the 50th Annual Conference on Labor (Kluwer Academic Press, forthcoming 1998)

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Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan and the United States, 48 Stanford Law Review 73 (1995) (with Jonathan R. Macey)

Comment on "Brokerage, Market Fragmentation, and Securities Market Regulation," in Andrew W. Lo, ed., The Industrial Organization and Regulation of the Securities Industry, University of Chicago Press (1996)

Corporate Stakeholders: A Contractual Perspective, 43 University of Toronto Law Review 401 (1993) (with Jonathan R. Macey)

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The Economic Efficiency of Close Corporation Law: A Comment, 70 Washington University Law Quarterly 399 (1992)

Lessons from Financial Economics: Materiality, Reliance, and the Utility of Empirical Methodology in Extending the Reach of Basic v. Levinson, 77 Virginia Law Review 1015 (1991) (with Jonathan R. Macey, Jeffrey Netter, and Mark Mitchell)

The Fraud on the Market System Revisited, 77 Virginia Law Review 999 (1991) (with Jonathan R. Macey)

Politics, Bureaucracies, and Financial Markets: Bank Entry into Commercial Paper Underwriting in the United States and Japan, 139 University of Pennsylvania Law Review 369-453 (1990) (with David Litt, Jonathan R. Macey, and Edward L. Rubin)

Good Finance, Bad Economics: An Analysis of the Fraud on the Market Theory, 42 Stanford Law Review 1059 (1990) (with Jonathan R. Macey)

Trans-Union Reconsidered, 98 Yale Law Journal 127 (1988)(with Jonathan R. Macey)

Toward an Interest Group Theory of Delaware Corporate Law, 65 Texas Law Review 469 (1987) (with Jonathan R. Macey)

Constitutional Law

Confederacy, in The Encyclopedia of Political Thought 661-62 (Wiley-Blackwell: 2014)

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The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 Cardozo Law Review 201 (1993)

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The Appropriations Power and the Necessary and Proper Clause, 68 Washington University Law Quarterly 640 (1990) (panel)

From Compromise to Confrontation: Separation of Powers in the Reagan Era, 57 George Washington Law Review 401 (1989)

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War Powers and the Constitution: A Middle Ground, 43 University of Miami Law Review 35 (1988) (panel)

The Debate Over Independent Agencies in Light of the Empirical Evidence, 1988 Duke Law Journal 215 (1988)

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<u>Compliance and Risk Management</u>

Financial Private Regulation and Enforcement, in Fabrizio Cafaggi, ed., Enforcement of Transnational Regulation: Ensuring Compliance in a Global World, pp. 263-278 (Edward Elgar 2012)

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Compliance in Corporate Law, in Jeffrey N Gordon and Georg Ringe, eds., Oxford Handbook of Corporate Law and Governance (Oxford University Press, forthcoming 2015)

The Rise of Risk Management: An Essay in Honor of Peter Nobel, in Peter Sester, ed., Liber Amicorum Peter Nobel (forthcoming 2015)

An Economic Analysis of Effective Compliance Programs, in Jennifer Arlen, ed., Research Handbook on Corporate Crime and Financial Misdealing (Edward Elgar, forthcoming 2015)

Financial Institutions

Introduction, in The Economics of Financial Law (Geoffrey Miller, editor) (Edward Elgar, forthcoming)

Intellectual Hazard and the Design of Financial Stability Regulation, in University of St. Gallen Series in Law and Economics, Peter Nobel, ed. (Zurich: Schulthess, 2010) (with Gerald Rosenfeld)

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The Basel Committee, Global Administrative Law, and the Developing World, in Benedict Kingsbury and Richard Stewart, eds, India, the South and the Shaping of Global Administrative Law (forthcoming, Oxford University Press India 2008) (with Michael Barr)

Comment: Credit Risk Transfer, Hedge Funds, and the Supply of Liquidity, in Peter Nobel and Marina Gets, eds., Law and Economics of Risk in Finance, University of St. Gallen Series in Law and Economics 73 (2008)

Global Administrative Law – The View from Basel, 17 European Journal of International Law 15 (2006) (with Michael Barr)

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Universal Banks are Not the Answer to America's Corporate Governance "Problem": A Look at Germany, Japan, and the U.S., 9 Journal of Applied Corporate Finance 57-73 (1997)(with

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The McCarran-Ferguson Act: A Case Study of Regulatory Federalism, 68 New York University Law Review 13 (1993), republished in 7 National Insurance Law Review 521 (1995)(with Jonathan R. Macey)(study prepared originally under the auspices of the American Enterprise Institute's Project on Federalism)

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Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler, 93 Columbia Law Review 854 (1993) (with Norman Silber)

Double Liability of Bank Shareholders: History and Implications, 27 Wake Forest Law Review 31 (1992) (with Jonathan R. Macey)

Origin of the Blue Sky Laws, 70 Texas Law Review 347 (1991) (with Jonathan R. Macey), reprinted in 34 Corporate Practice Commentator 223 (1992)

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Interviewer, Columbia University Oral History Collection, Life of Herbert Wechsler (1980-1982) (with Norman Silber)

<u>Jurisprudence</u>

Empirical Analysis of Legal Theory: In Honor of Theodore Eisenberg, 171 Journal of Institutional and Theoretical Economics 6-18 (2015)

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The Case of the Speluncean Explorers: Contemporary Proceedings, 61 George Washington Law Review 1798 (1993)

The End of History and the New World Order: The Triumph of Capitalism and the Competition Between Liberalism and Democracy, 25 Cornell International Law Journal 277 (1992) (with Jonathan R. Macey)

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Ancient Law

The Kingdom of God in Samuel, forthcoming in Diana Edelman and Ehud Ben Zvi, Leadership, Social Memory, and Judean Discourse in the 5th–2nd Centuries BCE (Worlds of the Ancient Near East and Mediterranean Series: Equinox Press (forthcoming)

Property Law, in II Oxford Encyclopedia of the Bible and Law, pp. 175-182 (Oxford University Press: 2015)

Taxation, in II Oxford Encyclopedia of the Bible and Law, pp. 356-360 (Oxford University Press: 2015)

The Political Function of Revelation: Lessons from the Hebrew Bible, 30 Touro Law Review 77 (2014)

Logos and Narrative, NYU School of Law, Public Law Research Paper No. 10-78 (2010)

Monarchy in the Hebrew Bible, NYU School of Law, Public Law Research Paper No. 10-76 (2010)

Nationhood and Law in the Hebrew Bible, NYU School of Law, Public Law Research Paper No. 10-57 (2010)

Revelation and Legitimacy in the Hebrew Bible, NYU School of Law, Public Law Research Paper No. 10-52 (2010)

The Book of Judges: The Hebrew Bible's Federalist Papers, NYU School of Law, Public Law Research Paper No. 10-66 (2010)

Consent of the Governed in the Hebrew Bible, NYU School of Law, Public Law Research Paper No. 10-56 (2010)

Nomadism, Dependency, Slavery and Nationhood: Comparative Politics in the Book of Exodus, NYU School of Law, Public Law Research Paper No. 10-49 (2010)

Economics of Ancient Law, in Geoffrey P. Miller, ed., The Economics of Ancient Law (Edward Elgar, forthcoming 2010)

Patriarchy: The Political Theory of Family Authority in the Book of Genesis (manuscript 2010)

The Dark Age: How the Biblical Narratives Demonstrate the Necessity for Law and Government (NYU School of Law, Public Law Research Paper No. 10-18)

Origin of Obligation: Genesis 2:4b-3:24 (NYU School of Law, Public Law Research Paper No. 09-60)

Sovereignty and Conquest in the Hebrew Bible, NYU School of Law, Public Law Research Paper No. 10-61 (2010)

Golden Calves, Stone Tablets, and Fundamental Law: A Political Interpretation of Exodus 32 (NYU School of Law, Public Law Research Paper No. 10-02)

A Riposte Form in the Song of Deborah, in Tikva Frymer-Kensky, Bernard Levinson and Victor Matthews, eds., Gender and Law in the Hebrew Bible and the Ancient Near East 113-27 (1998)

Foreword: The Development of Ancient Near Eastern Law, 70 Chicago-Kent Law Review 1623 (1996)

Why Ancient Law?, 70 Chicago-Kent Law Review 1465 (1995)(with James Lindgrin and Laurent Mayali)

Foreword: Land Law in Ancient Times, 71 Chicago-Kent Law Review 233 (1996)

The Song of Deborah: A Legal-Economic Analysis, 144 University of Pennsylvania Law Review 2293 (1996)

The Legal-Economic Approach to Biblical Interpretation, 150 Journal of Institutional and Theoretical Economics [Zeitschrift fur die gesamte Staatswissenschaft] 755 (1994)

J as Constitutionalist: A Legal-Economic Interpretation of Exodus 17:8-16 and Related Texts, 70 Chicago-Kent Law Review 1829 (1995)

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Ritual and Regulation: A Legal-Economic Analysis of Selected Biblical Texts, 22 Journal of Legal Studies 477 (1993)

Law and Society

Parental Bonding and the Design of Child Support Obligations, in William S. Comanor, ed., The Law and Economics of Child Support Payments 210-240 (Edward Elgar 2004)

The Legal Function of Ritual, 80 Chicago-Kent Law Review 1181 (2005)

Handicapped Parking, 29 Hofstra Law Review 81 (2000) (with Lori S. Singer)

Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations, 33 Indiana Law Review 691 (2000)

Norm Enforcement in the Public Sphere: The Case of Handicapped Parking, 71 George Washington Law Review 895-933 (2004)

Norms and Interests, 32 Hofstra Law Review 637 (2003)

Female Genital Mutilation: A Cultural-Legal Analysis (manuscript)

Circumcision: A Legal-Cultural Analysis, 9 Virginia Journal of Social Policy and the Law 498-585 (2002), pre-published as New York University Public Law and Legal Theory Working Paper Series, Working Paper 5 (2000)

Law, Pollution, and the Management of Social Anxiety, 7 Michigan Women's Law Journal 221-289 (2001)

Other:

Richard Posner, 61 N.Y.U. Annual Survey of American Law 13 (2004)

Introduction: The Law and Economics of Risk, 19 Journal of Legal Studies 531 (1990) (with Richard A. Epstein)

Law School Curriculum: A Reply to Kennedy, 14 Seton Hall Law Review 1077 (1984) (under pen name of Chris Langdell)

Book Reviews

Defusing the Banks' Financial Time Bomb, BusinessWeek (Mar. 11, 2010) (review of Robert Pozen, Too Big to Save? How to Fix the U.S. Financial System

Love & Joy: Law, Language and Religion in Ancient Israel, by Yochanan Muffs, 58 Journal of Near Eastern Studies 144-45 (1999)

Jesus and the Jews: The Pharisaic Tradition in John; The Trial Of Jesus; Jesus And The Law, by Alan Watson, 1 Edinburgh Law Review 273 (1997)

No Contest: Corporate Lawyers and the Perversion of Justice in America, by Ralph Nader and Wesley J. Smith, Washington Post (October 13, 1996)

The Rise and Fall of the Classical Corporation: Hovenkamp's Enterprise and American Law: 1836-1937, 59 University of Chicago Law Review 1677 (1993)

Property Rights and the Constitution: A Review of James W. Ely, Jr.'s The Guardian of Every Other Right, 37 American Journal of Legal History 378 (1993)

Anatomy of A Disaster: Why Bank Regulation Failed, 86 Northwestern University Law Review 742 (1992)

The Glittering Eye of Law, 84 Michigan Law Review 1901 (1986)

A Rhetoric of Law, 52 University of Chicago Law Review 247 (1985)

Major Lectures

Revelation as a Source of Legal Authority (Keynote Address, Conference on Religious Liberty, Touro Law School 2013)

Trust, Risk, and Moral Hazard in Financial Markets (University of Genoa, Fresco Chair Lectures in Law and Finance, June 2010)

A Simple Theory of Takeover Regulation in the United States and Europe; Intellectual Hazard (Commerzebank Lectures, University of Frankfurt, May 2010)

The European Union's Takeover Directive and Its Implementation in Italy (University of Rome III, 2008)

Catastrophic Financial Failures: Enron, HIH and More (Ross Parsons Lecture, Sydney, Australia, 2002)

Das Kapital: Solvency Regulation of the American Business Enterprise (Coase Lecture, University of Chicago Law School, 1993)

Banking in the Theory of Finance; The Simple Economics of Litigation and Settlement; The Economic Structure of Corporation Law (University of Auckland, New Zealand, 1993)

Journal Referee Reports

American Law and Economics Review
Journal of Legal Studies
Journal of Law, Economics and Organization
Review of Law and Economics

Conferences Organized

ETH-NYU Law and Banking Conference 2015 (Zurich, Switzerland)

Achieving and Responsible Enterprise: Principles of Effective Compliance and Enforcement (May 8, 2015)

ETH-NYU Law and Banking Conference 2014 (New York, New York)

Global Economic Policy Forum (New York 2013) (keynote speakers included Federal Reserve Bank of New York President William Dudley and former Governor of the Bank of England Baron King of Lothbury).

The Good Bank Debate (New York 2013) (co-sponsored with Mazars)

ETH-NYU Law and Banking Conference 2013 (Zurich, Switzerland)

ETH-NYU Law and Banking Conference 2012 (New York, New York)

ETH-NYU Law and Banking Conference 2011 (Florence, Italy)

NYU Global Economic Policy Forum 2012

NYU Global Economic Policy Forum 2010

Judicial Dialogue on Mass Litigation, Florence Italy, October 15-16, 2010 (co-organizer of conference co-sponsored by NYU Law School, the American Law Institute, and the European University Institute)

Finlawmetrics 2010: Central Banking, Regulation & Supervision after the Financial Crisis (co-sponsor and member of steering committee)

Finlawmetrics 2009: After The Big Bang: Reshaping Central Banking, Regulation and Supervision (Milan, Italy, Spring 2009) (co-sponsor and member of steering committee)

NYU Global Economic Policy Forum 2009: The Future of Regulation and Capital Markets (November 5, 2009) (co-organized with Professor Alan Rechtschaffen and with the NYU Law School Alumni Association)

Third Annual Conference on Empirical Legal Studies (Cornell University, Ithaca, New York, Fall 2008) (co-organizer)

NYU Global Economic Policy Forum (April 14, 2009). Major conference on economic policy. Keynote address by Jean Claude Trichet, President of the European Central Bank; presentations by Tevi Troy, Deputy Secretary of the Department of Health and Human Services; Kevin Warsh, Member of the Board of Governors of the Federal Reserve System; and Donald B. Marron, Jr., Senior Economic Advisor, President's Council of Economic Advisors. Co-organized with Professor Alan Rechtschaffen.

Second Annual Conference on Empirical Legal Studies (New York, New York, November 10-11, 2007). Major conference (425 participants) exploring all aspects of the empirical study of law. Co-organized with Jennifer Arlen, Bernard Black, Theodore Eisenberg and Michael Heise.

NYU Global Economic Policy Forum (April 11, 2007). Major conference on economic policy. Keynote address by Ben S. Bernanke, Chairman of the Board of Governors of the Federal Reserve System; presentations by Stanley Druckenmiller, Founder of Dusquesne Capital, Tevi Troy, Domestic Policy Advisor for President George W. Bush, and Jeffrey Rosen, Vice Chair of Lazard. Co-organized with Professor Alan Rechtschaffen.

First Annual Conference on Empirical Legal Studies (Austin, Texas, October 2006). Major conference exploring all aspects of the empirical study of law. Co-organized with Jennifer Arlen, Bernard Black, Theodore Eisenberg and Michael Heise.

Conference on Legal Aspects of the International Activities of Central Banks, Lima Peru, October 1997. This conference, co-sponsored by the central bank of Peru, brought together leaders in the legal and economic issues facing central banks in the management of their external reserves.

Conference on the Governance of Institutional Investors (New York, New York, February 14, 1997). This conference, sponsored by the NYU Stern School of Business Salomon Center in association with the New York University Law School Center for the Study of Central Banks, brought together top executives, attorneys, scholars and others interested in the management and organization, both economic and legal, of the nation's large institutional investors, including its mutual fund industry.

Conference on Bank Mergers and Acquisitions (New York, New York, October 11, 1996). This conference, sponsored by the NYU Stern School of Business Salomon Center in association with the New York University Law School's Center for the Study of Central Banks, brought together leading academics, lawyers, and investment bankers to discuss some of the broader implications of bank mergers and acquisitions. Co-organizer of this conference was Professor Yakov Amihud of the Stern School's Finance Department.

Conference in Central Banks in Latin America (Bogota, Colombia, February, 1996). This conference, co-sponsored by the central bank of Colombia with technical assistance from the Legal Affairs Department of the International Monetary Fund, brought together leaders of Latin American central banks, the international financial community, and scholars from a variety of disciplines, to discuss issues related to the independence of central banks and economic development.

Conference on Central Banks in Asia (Shanghai, China, October, 1995). This conference, co-sponsored with KPMG-Peat Marwick, brought together leaders from commercial banks, investment banks, and industrial firms, as well as central bankers, to discuss Asian central banks to address issues such as the proposed law granting a degree of independence to the central bank of China.

Conference on Ancient Law (Berkeley, California, March 1995). This conference, organized with Professors James Lindgren of Chicago-Kent Law School and Laurent Mayali of the University of California at Berkeley Law School, brought together important figures from a variety of disciplines interested in Ancient Law.

Conference on Central Banks in Eastern Europe and the Newly Independent States (Chicago, Illinois, April 1994). This conference brought together the Prime Minister of Estonia, three present or former Ministers of Finance of Eastern European states (including Boris Fyoderov, former Finance Minister of the Russian Republic), the heads of the central banks of eleven nations in Eastern Europe and the Newly Independent States, together with a wide variety of highly-placed officials from these countries and from the west, to discuss issues related to the independence of central banks and economic development.

Professional Memberships and Positions

New York State Bar
District of Columbia Bar
American Bar Association
American Law Institute (1988-1996)
Member, Paolo Baffi Centre Scientific Advisory Board, Milan, Italy (2008- present)
Member, International Academic Council, University of St. Gallen, Switzerland (2004-present)
Chairman, Section on Business Associations, American Association of Law Schools (1995)
Member of the Board of Directors, American Law and Economics Association (1995-1998)
Member of the Foreign Advisory Committee, Latin American Law and Economics Association (1995-2000)
Member of the Foreign Advisory Board, Universitad Tocurato Di Tella School of Law, Buenos Aires, Argentina (1992-1999)
Member of the Editorial Board, Supreme Court Economic Review
Member of the Editorial Board, The Independent Review
Member of the Advisory Board, Yearbook of International Financial and Economic Law
Member of the Advisory Board, University of Hong Kong Faculty of Law Asian Institute of International Financial Law (2001-present)

Member of the Advisory Board, LSN Comparative Law Abstracts

Courses

Governance, Risk and Compliance (Study Center Gerzensee, Switzerland 2016)
Law and Business of Bitcoin (2015) (with David Yermack)
Compliance and Risk Management for Attorneys (2014, 2015, 2017 (scheduled))
Legal Profession (1985-93; 1996-98; 2003-2007; 2013)
The Crisis of 2008 (2009, 2010)
Reading Class: Restructuring Finance (2009); Cutting Issues in Finance (2014-2015); Law and Politics in Shakespeare (2015-2016)
Property (1986-87)
Corporations (1985-88; 1991-93; 1997-2000; 2005; 2008; 2012; 2014; 2016)
Seminar on Separation of Powers (1985, 1987)
Civil Procedure (1983-84; 2004-2005; 2011; 2013; 2016
Federal Regulation of Banking (1983, 1989-93; 1995-97; 2003, 2006-2010; 2012; 2015)
Law and Business of Banking (2012; with Gerald Rosenfeld)
Land Development (1984-85)
Securities Law (1990-91)
Workshop in Legal Theory (1989-91)
Seminar on Financial Institutions (1992-93 (with Merton Miller); 1996-97)
Ethics in Class Action Practice (Continuing Legal Education Seminar 2002-2005)
Law and Economics (University of Basel, Switzerland 2005, 2007-2014)
Advanced Seminar on Law and Economics (University of Genoa, Italy 2008)
Banking and the Financial Crisis (University of Genoa, Italy 2009)
Trust, Risk, and Moral Hazard in Financial Markets (University of Genoa, Italy, 2010)
International Banking (University of Sydney, Australia, 2002, 2006)
Introduction to Banking Law (University of Basel, Switzerland 2001, 2002, 2003, 2004, 2009, 2010; 2011; 2012; 2013; 2014)
Banking in the Theory of Finance (University of Frankfurt, Germany 2004, 2005)
Banking Regulation in Crisis (University of Frankfurt, Germany, 2010)
Banking: Law and Economics Issues after the Financial Crisis (Study Center Gerzensee, 2012)

Expert Witness Testimony (past five years)

The Board of Trustees of the Southern California IBEW-NECA Defined Contribution Plan v. Bank of New York Mellon, Civil Action No. 09-Cv-06273, Southern District of New York (2011) (declaration on certification)

Iorio v. Asset Marketing Systems, Inc., Case No.: 05-CV-0633-JLS (CAB), Southern District of California (2011) (declaration in fees)

Villaflor v. Equifax Information Services, LLC, Case No.: 3:09-cv-00329-MMC, Northern District of California (2011) (declaration on fees)

Feely v. Allstate Insurance Company, Case No. CV-2004-294-3A, Circuit Court of Miller County, Arkansas (2011) (affidavit on settlement and fees)

Keegan v. American Honda Motor Co., Inc., Case Number: 2:10-cv-09508-MMM-AJW, United States District Court for the Central District of California (2011) (declaration on certification)

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Other Activities

Fellow, Society for Empirical Legal Studies (2015-present)

Member, Board of Directors, American Law and Economics Association (1996-1999)

Member, Board of Advisors, The Independent Review (1996-present)

Member, Board of Advisors, Asian Institute of International Financial Law (2001-present)

Member, Editorial Advisory Board, Supreme Court Economic Review (1995-2001)

Member, Editorial Advisory Board, The Brookings-Wharton Papers on Financial Policy (1997-present)

President, Section on Financial Institutions and Consumer Financial Services, American Association of Law Schools (1999)

President, Section on Business Associations, American Association of Law Schools (1995)

Member, Board of Contributors, American Bar Association Preview of Supreme Court Cases (1985-1993)

Consultant, Administrative Conference of the United States (1988-89; 1991-1992)

Board of Directors and Volunteer Listener, D.C. Hotline (1980-83)

Awards

1992 Paul M. Bator Award for Excellence in Teaching, Scholarship and Public Service, from the Federalist Society for Law and Public Policy Studies

Podell Distinguished Teaching Award (NYU Law School 2016)

Languages

Reading knowledge of Spanish, French, and Italian.

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EXHIBIT F

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

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

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

DECLARATION OF PETER PRIETO
IN SUPPORT OF PLAINTIFFS' OMNIBUS RESPONSE TO OBJECTIONS TO THE BMW, MAZDA, SUBARU AND TOYOTA SETTLEMENTS AND APPLICATION FOR SERVICE AWARDS AND ATTORNEYS' FEES

PETER PRIETO declares as follows:

1. I am Chair Lead Counsel for Plaintiffs and the proposed Settlement Classes in these coordinated proceedings against the Toyota, BMW, Mazda, and Subaru Defendants.[1] I respectfully submit this declaration in support of Plaintiffs' Omnibus Response to Objections to the BMW, Mazda, Subaru, and Toyota Settlements and Application for Service Awards and Attorneys' Fees. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration, and could testify competently to them if called upon to do so.

2. After almost three years of hard-fought litigation and extensive discovery, and more than a year of arm's-length negotiations, Plaintiffs and the Settling Defendants executed

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

the Settlement Agreements on May 17, 2017. The Settlements require the Settling Defendants to pay almost $500 million in cash to non-reversionary Settlement Funds, and, according to Plaintiffs' valuation expert, have a combined value of approximately $741,287,307, or three-quarters of a billion dollars, when including the estimated value of the Customer Support Programs being provided.

3. Though the Settlements have been executed and will shortly be subject to final approval, the work of Class Counsel has continued and is expected to continue for at least the next 4 years.

4. Immediately after the Settlements were made public, and especially after Class Members began receiving formal notice of the Settlements, Class Counsel began receiving calls and emails from Class Members asking questions about the Settlements and the benefits available to them under the Settlements.

5. To handle these numerous calls and emails from Class Members, each firm appointed by the Court to a leadership position in the MDL assigned 2 lawyers from their firm to handle these calls and emails. To date, these firms have received an approximate total of more than 220 emails and calls.

6. During these calls, lawyers from the Court-appointed leadership firms have patiently answered Class Members' questions, and in many cases have walked through the benefits of the Settlements with the Class Members, including advising them where to obtain a Claim Form and how to complete it.

7. Because the Settlements include not only vehicles that have been recalled but vehicles that will, or may, be recalled in the next few years, and because the claim process is

only beginning, I expect Class Member calls and other inquiries to continue into the foreseeable future.

8. Since the Settlements were preliminarily approved in June of this year, Class Counsel has also been working with the Settlement Special Administrator to implement other aspects of the Settlements.

9. The Settlement Special Administrator, for example, has prepared a tentative budget that he has shared with Class Counsel and the Settling Defendants.

10. He has also retained consultants to advise him on the Outreach Program. Class Counsel has met with, and will continue to meet with these consultants.

11. Class Counsel will also be required to provide input and oversight over the Outreach Program for the next 4 years because the Outreach Program, which is designed to significantly increase the replacement of defective Takata inflators, is "intended to be a program that will adjust and change its methods of outreach as is required to achieve its goal of maximizing completion of the Recall Remedy. It is not intended to be a static program with components that are fixed for the entire settlement period." Toyota Settlement Agreement at § III. B. 6.

12. Over the next few months, the Settlement Special Administrator is expected to develop a Claims Review Protocol that will be used to reimburse eligible Class Members for reasonable out-of-pocket expenses. *Id.* at § II. A. 7. Class Counsel, along with the Settling Defendants, will be required to provide input into the development of that Claims Review Protocol to insure that it is efficient, effective, and fair. *Id.*

13. To further implement the claims process, Class Counsel will also be required to recommend to the Settlement Special Administrator, "what types of reasonable out-of-pocket expenses are reimbursable." *Id.* at § III. D. 3.

14. Once the Claims Review Protocol has been established, and these types of reasonable out-of-pocket expenses have been identified, Class Counsel, over the next 4 years, will have to monitor the claims being submitted by Class Members to ensure that they are being treated fairly and reasonably.

15. During this claims process, Class Counsel will also have to represent Class Members in any disputes that arise, including any claims that are rejected or disputed by the Settlement Special Administrator or the Settling Defendants.

16. At the end of the 4-year claims process, Class Counsel will also need to determine whether any *cy pres* distribution is appropriate, consult with the Settling Defendants, and if appropriate, seek court approval for a *cy pres* distribution.

17. In sum, the final approval of the Settlements, assuming this Court grants final approval, is in effect the beginning of a settlement implementation process that will require Class Counsel's involvement and commitment for at least the next 4 years.

I declare under penalty of perjury of the laws of Florida and the United States that the foregoing is true and correct, and that this declaration was executed in Miami, Florida on October 11, 2017.

/s/ *Peter Prieto*
Peter Prieto