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

MICHELLE NELSON, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	No. 3:17-1114
v.	)	Hon. Eli Richardson
NISSAN NORTH AMERICA, INC., a California corporation,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF *UNOPPOSED* MOTION FOR APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

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I. INTRODUCTION

This Court preliminarily approved the Parties' class action Settlement Agreement,[1] bringing to a close two-and-a-half years of contentious litigation spanning multiple courts. Notice has been distributed to the Settlement Class Members, who may now, pursuant to the Extended Warranty provided by Defendant Nissan North America, Inc. ("NNA" or "Defendant") as part of the Settlement, bring their Nissan Rogue and Infiniti QX56 vehicles to authorized Nissan and Infiniti dealerships for vehicle repaints and associated rental car coverage. Additionally, NNA has also agreed to reimburse Settlement Class Members for repaints performed during the Extended Warranty prior to the Court's granting of Preliminary Approval, as well as for associated rental car expenses. Finally, the Settlement provides all Settlement Class Members with the opportunity to join NNA's Vehicle Purchase Program ("VPP), which enables them to purchase a new Nissan or Infiniti vehicle at special, pre-negotiated pricing, potentially saving them thousands of dollars on a new vehicle purchase.

The relief being made available through this Settlement is exceptional. By NNA's own estimate, the average out-of-pocket cost to repaint a Nissan Rogue is approximately $5,800 and the average out-of-pocket cost to repaint an Infiniti QX56 is approximately $10,000, such that even a conservative estimate of the value being made available under the Settlement with regards to repaints of the approximately 16,000 Subject Vehicles easily exceeds $16,000,000. And that is only one benefit provided by the Settlement. Combined with the Settlement's additional rental car coverage and VPP membership benefits, any conservative estimate of the value being made available to the Settlement Class Members exceeds $30,000,000.

[1] Unless otherwise indicated, capitalized terms have the same meaning as those terms are defined in the Parties' Settlement Agreement, attached hereto as Exhibit A (exhibits excluded).

With this Motion, Class Counsel request a fee award of $1,780,000, inclusive of their litigation expenses, plus Incentive Awards to the Class Representatives in the amount of $10,000 each. Both Class Counsel and the Class Representatives devoted significant time and effort to the prosecution of the Settlement Class Members' claims in the face of staunch defenses and significant risks. Their efforts have yielded the excellent benefits available under the Settlement for thousands of consumers nationwide. As set forth herein, the requested amount is amply justified in light of the investment, risks, and excellent results obtained for the Settlement Class Members.

II. BACKGROUND

A. History Of The Litigation And Class Counsel's Efforts During Negotiations.

This Settlement resolves claims against NNA for manufacturing and selling Infiniti QX56s and Nissan Rogues with allegedly defective white paint prone to premature peeling, which exposed whole sections of the vehicles to the elements. Since this paint-peeling issue was first brought to Class Counsel's attention, they have devoted substantial time and resources to investigating, litigating, and settling two lawsuits, *Anglin v. Nissan North America, Inc.* and *Nelson v. Nissan North America, Inc.*, resolved under this Settlement. (*See* Declaration of Myles McGuire ("McGuire Decl."), attached hereto as Exhibit B, ¶¶ 20–22); Declaration of Scott Morgan ("Morgan Decl."), attached hereto as Exhibit C, ¶¶ 11–18; Declaration of John Sawin ("Sawin Decl."), attached hereto as Exhibit D, ¶¶ 9–11); Declaration of Edwin Wallis ("Wallis Decl."), attached hereto as Exhibit E, ¶¶ 2, 7). Class Counsel spent significant time communicating with Plaintiffs, as well as with numerous other potential plaintiffs and class members; investigating facts; researching the law; preparing well-pleaded complaints and amended complaints; briefing NNA's motion to dismiss and NNA's motion to compel arbitration; attending multiple mediation

sessions conducted by the Seventh Circuit's Chief Circuit Mediator, Joel N. Shapiro; negotiating the Settlement Agreement and preparing the settlement-related exhibits, motions and filings; presenting the Settlement to this Court for preliminary approval, and, subsequently, supervising the dissemination of notice to the Settlement Class Members and communicating with Settlement Class Members on a regular and ongoing basis.

i. The *Nelson* action.

Plaintiff Nelson initiated this action (the "*Nelson* Action") on August 4, 2017 in the United States District Court for the Middle District of Tennessee, bringing claims for (1) violations of the federal Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*; (2) breach of the implied warranty of merchantability; (3) negligence; (4) fraudulent concealment; and (5) unjust enrichment. The case was assigned to Judge Aleta A. Trauger.[2] On October 18, 2017, NNA simultaneously filed two motions: a motion to dismiss Plaintiff Nelson's claims, pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. 12), and a motion to strike her class allegations, pursuant to Fed. R. Civ. P. 23. (Dkt. 13). On November 15, 2017, Plaintiff Nelson filed her operative First Amended Class Action Complaint (Dkt. 19). In response, on December 6, 2017, NNA then filed a new Rule 12(b)(6) motion to dismiss (Dkt. 21) and a new Rule 23 motion to strike (Dkt. 22). After the filing of Plaintiff Nelson's response brief (Dkt. 28) and NNA's reply brief (Dkt. 31), the Court delayed ruling and ordered further briefing on choice-of-law issues, directing the Parties to clarify which state's law applied to Plaintiff Nelson's breach of implied warranty, fraudulent concealment, and unjust enrichment claims (Dkt. 34).

Following the Parties' supplemental submissions (Dkts. 35, 36), the Court issued an Order on June 11, 2018 dismissing Plaintiff Nelson's Magnuson-Moss, breach of implied warranty,

[2] The case was reassigned to Judge William L. Campbell, Jr. on February 16, 2018 (Dkt. 32), and was then reassigned to Judge Eli Richardson on October 24, 2018 (Dkt. 49).

negligence, and unjust enrichment claims (Dkts. 38, 39). However, the Court reserved ruling on Plaintiff Nelson's fraudulent concealment claim and on NNA's motion to strike class allegations, granting the Parties sixty days to conduct limited discovery concerning the dealership where Plaintiff Nelson purchased her Infiniti as well as the relationship between that dealership and NNA. The Court further ordered the Parties to file supplemental briefs within seven days of the limited discovery deadline (Dkt. 39 at 7). On August 8, 2018, still within the Court's sixty-day deadline, the Parties jointly moved to stay the *Nelson* Action due to a settlement conference scheduled in the concurrent *Anglin* Action (Dkt. 43). Those settlement conferences culminated in the Settlement preliminarily approved by the Court.

ii. The *Anglin* action.

Plaintiff Anglin filed his case (the "*Anglin* Action") on June 5, 2017 in the United States District Court for the Northern District of Illinois, bringing claims against NNA for (1) violations of the Magnuson-Moss Warranty Act; (2) breach of the implied warranty of merchantability; (3) breach of contract; (4) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2; and (5) negligence. The case was assigned to Judge Elaine E. Bucklo. In addition to NNA, Plaintiff Anglin also named as a defendant the dealership where he purchased his vehicle (the "Dealership") (Dkt. 1). On July 19, 2017, NNA responded to the initial complaint on its own behalf by simultaneously filing an Answer and a Rule 12(b)(6) motion to dismiss (Dkts. 8–10). Plaintiff Anglin then amended his complaint twice, filing the operative Second Amended Class Action Complaint on August 17, 2018 (Dkt. 17).

On September 21, 2017, instead of filing a new Rule 12(b)(6) motion, NNA moved jointly with the Dealership to compel arbitration, arguing that an arbitration clause appearing in the Dealership's Sales Agreement that Plaintiff Anglin signed obligated him to arbitrate his claims

(Dkt. 26). On November 16, 2017, Plaintiff Anglin voluntarily dismissed the Dealership from the action, and after full briefing, Judge Bucklo denied the motion to compel arbitration on May 9, 2018. On June 6, 2018, NNA appealed that ruling to the Seventh Circuit Court of Appeals. The underlying action was stayed in the District Court on June 6, 2018, pending the Seventh Circuit's ruling (Dkt. 64).

In accordance with Federal Rule of Appellate Procedure 33, the Seventh Circuit directed Plaintiff Anglin and NNA to conduct mediation with the Seventh Circuit's Chief Circuit Mediator, Joel N. Shapiro (App. Dkt. 5). Due to these settlement efforts, which are described in further detail below and which were ultimately successful, the *Anglin* Action was stayed in the Seventh Circuit on November 28, 2018 (App. Dkt. 13).

iii. Mediation and settlement negotiations.

The Parties conducted two full-day, arm's-length mediation sessions, on August 14, 2018 and September 27, 2018, before Joel N. Shapiro, who has mediated disputes at the federal appellate level since 1994. The Parties also conducted numerous subsequent telephone settlement discussions overseen by Mr. Shapiro and met again in person at the office of Plaintiffs' counsel to conduct settlement discussions. After roughly three months of contentious negotiations, the Parties reached a settlement in principle on November 16, 2018, only to then engage in months of further negotiations over the contours of the Settlement, including, among other issues, the scope of the relief for the Settlement Class Members, the scope of the release, and the forms of notice to be provided. These settlement discussions between the Parties have produced (1) greater clarity regarding the scope of the types of vehicles affected by the alleged paint defects and (2) a creative, unprecedented means for those affected by such alleged defects to obtain relief. After such discussions and after the Parties' agreement to resolve the cases was memorialized in the

Settlement Agreement and related exhibits, Class Counsel prepared a motion for preliminary approval of the Settlement (Dkt. 62), ensured the dissemination of notice to public entities as required by the Class Action Fairness Act, scheduled a preliminary approval hearing with the Court (Dkt. 65), and participated in the hearing on the motion for preliminary approval on August 8, 2019. At the Court's direction, Class Counsel filed an amended motion for preliminary approval on August 14, 2019 (Dkt. 80), with the Court granting preliminary approval of the Settlement two days later on August 16, 2019 (Dkt. 83).

B. Class Counsel's Continuing Efforts Since Preliminary Approval.

Since preliminary approval, Class Counsel have continued to invest significant time and effort towards administering the Settlement effectively. (McGuire Decl. ¶ 13; Morgan Decl. ¶ 13–14; Sawin Decl. ¶ 8). The Parties selected Kurtzman Carson Consultants LLC ("KCC") as Settlement Administrator, and Class Counsel have been actively involved in supervising and managing all aspects of KCC's administration of the notice program. (McGuire Decl. ¶ 13; Morgan Decl. ¶ 13–14; Sawin Decl. ¶ 8). Prior to and since preliminary approval, Class Counsel have regularly communicated with the Settlement Administrator to ensure that accurate and timely notice of the Settlement was provided to the Settlement Class Members and that the Settlement Website was accurate and operational. (*Id.*). To that end, Class Counsel reviewed the language and content of the Settlement Website, responded to numerous Settlement Class Members who contacted Class Counsel directly, and prepared the instant Motion. (McGuire Decl. ¶ 13). Class Counsel will continue to devote their time and effort as the settlement administration continues, as well as appear at the final approval hearing, respond to ongoing inquiries from Settlement Class Members, and monitor NNA's provision of the Settlement's benefits to the Settlement Class Members.

In total, Class Counsel have spent 1,256.7 combined hours in the *Anglin* and *Nelson* matters to date. (McGuire Decl. ¶ 20; Morgan Decl. ¶ 15; Sawin Decl. ¶ 15; Wallis Decl. ¶ 9). Class Counsel also incurred $7,885.17 in case-related expenses. (McGuire Decl. ¶ 22; Morgan Decl. ¶ 18; Sawin Decl. ¶ 17; Wallis Decl. ¶ 10). Class Counsel's combined efforts amply support the requested fee award and demonstrate that the fees which will be paid to Class Counsel as provided for in the Settlement Agreement are both reasonable and well-earned.

III. RELIEF FOR THE SETTLEMENT CLASS MEMBERS

A. The Settlement's Notice Plan Has Succeeded In Notifying Thousands of Potential Settlement Class Members.

As directed in the Court's Order granting preliminary approval, on October 15, 2019, KCC mailed postcard notices to 38,950 potential Settlement Class Members. (McGuire Decl. ¶ 23). In addition, the Publication Notice was placed in the October 14, 2019 issue of *People* magazine, one of the most popular and widely-read magazines in the United States. (*Id.*). Both the Postcard Notice and the Publication Notice direct Settlement Class Members to the Settlement Website, which went live on October 3, 2019 and contains copies of the operative complaints in both this action and the *Anglin* action, a copy of the Settlement Agreement, a copy of the Court's order granting preliminary approval of the Settlement, and a copy of the detailed Long Form Notice. To date, of the thousands of potential Settlement Class Members who have received direct notice, and the millions of individuals who have received notice through the additional Publication Notice, none have filed an objection or elected to opt out of the Settlement. (*Id.*).

B. Settlement Relief.

As detailed in Plaintiffs' preliminary approval filings, Class Counsel's prosecution of this action and the *Anglin* action has culminated in a Settlement that makes substantial monetary benefits available to the Settlement Class Members. As part of the Settlement, NNA has agreed to

provide Settlement Class Members with an Extended Warranty for their vehicles, offering two primary benefits: (1) repaints of the Subject Vehicles, or monetary reimbursement if Class Members already obtained a repaint; and (2) payment, or reimbursement, for related rental car expenses during the repaint process. In addition to the Extended Warranty, NNA has also agreed to provide Settlement Class Members with eligibility for Nissan's Vehicle Purchase Program. (Ex. A § 3). The vehicles purchased by the Settlement Class Members included exterior paint warranties that may have expired prior to the manifestation of the paint defect alleged in this litigation. Thus, the Extended Warranty extends the exterior paint warranty for Settlement Class Members' vehicles for four years. As a result, under the terms of the Settlement, in-scope Nissan Rogues have a seven-year total paint peel warranty – instead of a three-year warranty – and in-scope Infiniti QX56s have an eight-year total paint peel warranty—instead of a four-year warranty. (*Id.* § 1.11).

i. Subject Vehicle repaints.

Under the Settlement, NNA will provide one full vehicle repaint of the Subject Vehicles during the Extended Warranty Period. Specifically, NNA will pay 90% of the repaint costs during the first two years of the Extended Warranty Period and 70% during the final two years. As explained in the notices, Settlement Class Members need only bring their vehicles to an authorized NNA dealer for inspection and confirmation of eligibility for a repaint. Additionally, the Settlement provides that NNA will reimburse any Settlement Class Member who paid to repaint a vehicle during the Extended Warranty Period prior to the proposed Settlement if he or she properly submits a claim and provides adequate proof of a repaint purchase. (*Id.* §§ 3.1.1–3.1.2). Notably, the Settlement gives Settlement Class Members an entire year following final approval to submit reimbursement claims. (*Id.* § 1.31).

ii. Rental car cost reimbursement during the Repaint Period.

Under the Settlement, NNA will provide Settlement Class Members who choose to repaint their Infiniti QX56s, subject to the terms above, with up to and including $600 in rental car coverage. NNA will reimburse in that same amount any Settlement Class Member who provides proof of payment for rental car services in connection with a repaint performed prior to the proposed Settlement. NNA will provide these exact same benefits to Settlement Class Members who repaint their Nissan Rogues, but in the amount of $400 instead of $600. The Settlement Class Members also have an entire year following final approval to submit rental car reimbursement claims. (*Id.* § 1.31).

iii. Nissan's Vehicle Purchase Program eligibility.

Pursuant to the Settlement, all Settlement Class Members will automatically become eligible for Nissan's Vehicle Purchase Program ("VPP") for a period of three months. Nissan's VPP offers pre-negotiated pricing on new car purchases. (*Id.*). To obtain this benefit, Settlement Class Members need only bring proof of their VPP eligibility to an authorized Nissan or Infiniti dealer during the three-month period and state they wish to purchase a new Nissan or Infiniti vehicle and act on their VPP eligibility. (*Id.* § 3.1.3).

IV. DISCUSSION

A. Class Counsel's Requested Fee Award Is Reasonable.

Federal Rule of Civil Procedure 23 provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are unauthorized by law or by the parties' agreement." Fed R. Civ. P. 23(h). The Sixth Circuit recognizes that "when awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Gascho v. Glob. Fitness Holdings, LLC*,

822 F.3d 269, 279 (6th Cir. 2016) (quoting *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)). In assessing the work done and the results achieved, "it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Id.* (quoting *Rawlings*, 9 F.3d at 516). Because an appropriate award depends on the unique circumstances of the case, the award of attorneys' fees "lies within the sound discretion of the trial court." *In re Telectronics Pacing Systems, Inc.*, 137 F. Supp. 2d 1029, 1041 (S.D. Ohio 2001) (citing *Smillie v. Park Chemical Co.*, 710 F.2d 271, 275 (6th Cir. 1983)).

Nonetheless, a district court should articulate the "reasons for 'adopting a particular methodology and the factors considered in arriving at the fee.'" *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (quoting *Rawlings*, 9 F.3d at 516). *Moulton* set out the relevant factors district courts should consider:

> Often, but by no means invariably, the explanation will address these factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides."

581 F.3d at 352 (quoting *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)). Of these factors, "the two most important factors . . . value of benefit rendered to the class and value of services on an hourly basis – require individualized analysis." *In re Skechers Toning Shoe Prods. Liab. Litig.*, No. 11-md-2308, 2013 WL 2010702, at *8 (W.D. Ky. May 13, 2013). Here, the requested fee award is justified both by the considerable value of the benefits made available to the Settlement Class Members and by the value of Class Counsel's services.

i. The benefits provided to the Settlement Class Members – conservatively valued at over $30,000,000 – justify the requested fee award.

The Sixth Circuit's recent *Gascho* decision provides that a district court should evaluate a settlement's value based on the "total relief class counsel makes available to the settlement class members." *Gascho*, 822 F.3d at 278. Specifically, the *Gascho* court referenced the Supreme Court's direction that class members' "right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it*, is a benefit . . . created by the efforts of class representatives and their counsel." *Id.* (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980)) (emphasis in original). Here, although the Settlement does not expressly establish a common fund, *per se*, the requested fee award is more than reasonable as a percentage of the Settlement's conservatively-estimated value.

The out-of-pocket costs of Subject Vehicle repaints as determined by NNA itself from its business records ($5,800 for the subject Nissan Rogues and $10,000 for the subject Infiniti QX56s), combined with the sheer volume of Subject Vehicles (approximately 16,000), demonstrates that the Settlement should be valued in the tens of millions of dollars. Indeed, even the most conservative estimate – that is, even if every car were a Nisan Rogue and subject to a 30% co-pay – reveals a Settlement benefit value far in excess of $30 million. And that number does not even factor in the millions of dollars being made available for rental car coverage (over $400 in value for each vehicle) nor the savings provided by membership in NNA's Vehicle Purchase Program, which offers pre-negotiated pricing on new vehicle purchases.[3]

[3] The rental car coverage and reimbursement being made available – even based solely on the lower $400 benefit for the Nissan Rogues – is itself valued at over $6,400,000. This is in addition to the tens of millions of dollars in repaint value.

In the Settlement Agreement, the Parties conservatively represented that the value of financial benefits made available under this Settlement exceeds $30 million. The requested fee award of $1,780,000, which is inclusive of legal expenses incurred, equals less than 6% of that amount (and less than 5% of the most conservative estimate that includes the rental car benefit)—a small fraction of the percentages routinely approved by courts within this Circuit. *See, e.g.*, *Palombaro v. Emery Fed. Credit Union*, No. 15-cv-792, 2018 WL 5312687, at *8 (S.D. Ohio Oct. 25, 2018) ("An award of one third of a common fund is within the percentage range that courts have awarded in class action settlements in the Sixth Circuit"); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141-AC-DAS, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (approving one-third of the settlement fund as appropriate fee and "within the range of fees ordinarily awarded"); *Johnson v. Midwest Logistics Sys., Ltd.*, No. 11-cv-1061, 2013 WL 2295880, at *6 (S.D. Ohio May 24, 2013) ("Class Counsel's fee request is consistent with the general fee awards in class action cases: '[e]mpirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery'") (quoting 4 *Newberg on Class Actions* § 14:6 (4th ed.)).

Importantly, and unlike in most common fund class action settlements which deduct attorneys' fees from the settlement fund at the expense of the class members, the Parties' separately-negotiated fee award does not reduce the value of the benefits being provided to the Settlement Class Members. If approved, NNA's payment of the fee request to Class Counsel will have no impact on the settlement consideration made available to the Settlement Class Members under the Settlement Agreement.

Thus, when compared with a conservative valuation of even just one of the three financial benefits being made available to the Settlement Class Members, Class Counsel's fee request is

eminently reasonable and well below the amounts customary in class action settlements. Taken together with the fact that payments to Class Counsel will have no impact on the benefits provided to Settlement Class Members, the first *Moulton* factor overwhelmingly favors approving the fee request.

ii. The value of Class Counsel's services justifies the requested fee award.

Just as the award requested by Class Counsel is justified by a comparison to the tens of millions of dollars in benefits being made available to the Settlement Class Members, their request is reasonable under the alternative "lodestar" methodology, as well. Even without accounting for the additional work they will perform in seeking final approval of the Settlement and ensuring efficient administration of the Settlement, Class Counsel's current collective lodestar amounts to $691,871.00. As detailed in the attached Declarations of Class Counsel, Class Counsel's rates are comparable to those charged by attorneys with similar backgrounds and experience, and are commensurate with judicially-approved rates in class actions in the Northern District of Illinois (where the *Anglin* action was originally pending and McGuire Law, Morgan Law, and Sawin Law are based) and in this District. (McGuire Decl. ¶ 20; Morgan Decl. ¶ 15; Sawin Decl. ¶¶ 14–15; Wallis Decl. ¶ 9); *Spano v. Boeing Co.*, No. 06-cv-743, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (approving class counsel's rates of $850 per hour for attorneys with 15-24 years of experience, $612 per hour for attorneys with 5-14 years of experience, and $460 per hour for attorneys with 2-4 years of experience); *Bainter v. Akram Investments, LLC*, No. 17-cv-7064, 2018 WL 4943884, at *5 (N.D. Ill. June 10, 2015) (approving $700 per hour partner rate); *Villegas v. Metro. Gov't*, No. 09-cv-0219, 2012 WL 4329235, at *7 (M.D. Tenn. Sept. 20, 2012) (approving partner hourly rate of $535); *Crawford v. Metro. Gov't*, No. 03-cv-0996, 2010 WL 11610314, at *3 (M.D. Tenn. Apr. 9, 2010) (approving partner hourly rate of $500).

Indeed, numerous state and federal courts have previously approved Class Counsel's then-current hourly rates as reasonable. (McGuire Decl. ¶ 19). The fact that many other courts have approved Class Counsel's hourly rates further supports the rates' reasonableness within the relevant markets. *See People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1312 (7th Cir. 1996) ("[R]ates awarded in similar cases are clearly evidence of an attorney's market rate"); *Monroe v. FTS USA, LLC*, No. 08-cv-02110, 2014 WL 4472720, at *9 (W.D. Tenn. July 28, 2014) ("In determining the prevailing market rate, the district court can examine . . . awards in analogous cases") (internal quotations omitted). Additionally, the Sixth Circuit authorizes an award of fees computed on Class Counsel's current rates because the fees will be "received several years after services were rendered." *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005) (using current market rate in calculating plaintiff's attorney fees where case had gone on for years); *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 617 (6th Cir. 2007) (same).

Using the lodestar amount, the Court "may then, within limits, adjust the 'lodestar' to reflect relevant considerations peculiar to the subject litigation." *Gascho*, 822 F.3d at 279. Here, the requested fee award requires a multiplier of less than 2.6 to reach the $1,780,000 in attorneys' fees and expenses requested. This relatively small multiplier is "reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one." *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 12-cv-83, 2014 WL 2946459, at *2 (E.D. Tenn. June 30, 2014); *see also Bailey v. AK Steel Corp.,* No. l:06–cv–468, 2008 WL 55376, at *7 (S.D. Ohio Feb. 28, 2008) (awarding multiplier of 3.04, noting that "[c]ourts typically ... increas[e] the lodestar amount by a multiple of several times itself and identifying a "normal range of between two and five"); *Manners v. American General Life Ins. Co.,* 98–cv-0266, 1999 WL 33581944, at *93 (M.D. Tenn. Aug 11, 1999) (3.8 multiplier); *In re Cardinal Health Sec. Litig.,* 528 F. Supp. 2d. 752, 770 (S.D.

Ohio 2007) (multiplier of 5.9); *Lowther v. AK Steel Corp*., No. 11-cv-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (awarding lodestar multiplier of 5.3); *In re Rite Aid Corp. Sec. Litig.,* 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (finding 4.5 to 8.5 lodestar multiplier "unquestionably reasonable").

Indeed, the purpose of a multiplier is to "enhance the lodestar figure in recognition of the 'risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved.'" *Lonardo v. Travelers Indem. Co.*, 708 F. Supp. 2d 766, 794 (N.D. Ohio 2010) (quoting *Rawlings*, 9 F.3d at 515–17); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992) ("The need for [a risk multiplier] adjustment is particularly acute in class action suits. The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent"). Here, Class Counsel undertook a substantial risk in filing these actions, as the applicable law regarding Plaintiffs' claims was uncertain, if not unfavorable. Indeed, at the time Class Counsel secured the Settlement, Plaintiff Nelson's amended complaint had only one surviving claim, and NNA's arbitration defenses threatened Plaintiff Anglin's adequacy as a class representative. The excellent benefits worth thousands of dollars per Settlement Class Member that Class Counsel negotiated for consumers across the country at such a disadvantage – where the ultimate success of Plaintiffs' claims and Plaintiffs' adequacy to represent a national class were in doubt – justifies a reasonable multiplier of approximately 2.57. In sum, Class Counsel's fee request is justified under both the Sixth Circuit's percentage-of-the-benefit and lodestar methodologies (and the two most important *Moulton* factors) and should thus be approved as reasonable under the circumstances.

B. The Remaining *Moulton* Factors Confirm The Reasonableness Of Class Counsel's Fee Request.

i. Class Counsel's services were undertaken on a contingent basis.

Class Counsel undertook this case and the *Anglin* action on a contingent fee basis, and thus assumed a significant risk that the litigation would yield no recovery, leaving them entirely uncompensated for their time and out-of-pocket expenses. As such, Plaintiffs and Class Counsel agreed in Plaintiffs' respective retainer agreements that Class Counsel would be entitled to a contingency fee of one-third of all monies recovered, in addition to their costs, but accepted the risk that in the event no monies were recovered, Plaintiffs would owe Class Counsel nothing. Indeed, since Class Counsel brought both cases in 2017, they have devoted over 1256.7 hours to the cases already and have incurred $7,885.17 of reasonable and necessary out-of-pocket expenses. Accordingly, Class Counsel "accepted a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced." *Gokare v. Federal Express Corp.*, No. 11-cv-2131, 2013 WL 12094887, at *8 (W.D. Tenn. Nov. 22, 2013). As other courts within this Circuit have noted, "[i]f counsel are not rewarded for this risk, few attorneys will undertake 'the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.'" *In re Southeastern Milk Antitrust Litig.*, No. 07-cv-208, 2013 WL 2155387, at *5 (E.D. Tenn. May 17, 2013) (quoting *Behrens v. Wometco Enter., Inc.,* 118 F.R.D. 534, 548 (S.D. Fla. 1988)).

Class Counsel undertook these cases against one of the world's largest automobile manufacturers with deep resources and a reputation for aggressively defending itself against class-action litigation. As discussed above, NNA's counsel mounted a vigorous defense of both the *Anglin* action and this action, successfully obtained dismissal of several of Plaintiff Nelson's claims, and sought to send Plaintiff Anglin's claims to arbitration. NNA demonstrated its

willingness and ability to appeal any adverse decision by its appeal to the Seventh Circuit of a preliminary venue issue. Nonetheless, and as discussed above, in the face of these severe challenges, Class Counsel negotiated an excellent result for the Settlement Class Members. Accordingly, this *Moulton* factor supports the reasonableness of Class Counsel's fee request.

ii. Public policy favors the fee request.

As explained above and in their preliminary approval papers, Class Counsel have obtained an excellent result for Plaintiffs as well as the Settlement Class Members in obtaining the Extended Warranty for their vehicles. "Adequate compensatory fee awards in successful class actions promote private enforcement of compliance within important areas of federal law," such as the Magnuson-Moss Warranty Act. *Wess v. Storey*, No. 08-cv-623, 2011 WL 1463609, at *11 (S.D. Ohio Apr. 14, 2011); *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534 (E.D. Mich. 2003) ("Society's stake in rewarding attorneys who can produce such benefits in complex litigation . . . counsels in favor of a generous fee"). Awarding an appropriate fee will continue to encourage highly-qualified counsel to undertake time-consuming class action litigation at substantial risk in order to vindicate the rights of consumers who otherwise would have no practical means of redress. Here, Class Counsel undertook their efforts – and the significant risk in this litigation – with the hopes of "making things right" and ensuring that individuals whose vehicles had paint problems could obtain a form of reasonable compensation. Such a consumer protection purpose, and the excellent results ultimately obtained, is strongly supported by public policy. Thus, this factor also supports the reasonableness of Class Counsel's fee request.

iii. The complexity of the litigation.

From the outset, this action and the *Anglin* action involved complex issues as to liability, choice-of-law, class certification, and arbitration, and the Parties spent nearly a year and a half

litigating those issues until reaching an agreement in principle to resolve both cases. Prior to the Parties' settlement efforts, NNA's vigorous defense in this action nearly culminated in the complete dismissal of Plaintiff Nelson's claims. Similarly, in the *Anglin* Action, the Parties litigated arbitration issues for over a year with no definitive outcome. While Judge Bucklo denied NNA's motion to compel arbitration in the Northern District of Illinois, NNA appealed that ruling to the Seventh Circuit, where the proceedings were stayed. However, even if Plaintiff Anglin prevailed in the Seventh Circuit with regards to arbitration, he would almost certainly have faced more pretrial attempts to dismiss his claims under Rule 12(b)(6) for the same reasons NNA sought early dismissal in this action. In short, had these matters not settled, there was a significant risk – if not a likely result – that the Settlement Class Members would receive no benefit at all. At best, the Settlement Class Members would be required to wait years before obtaining any relief, which would most likely not have been as substantial as that obtained though this Settlement.

iv. Both Plaintiffs and NNA have been represented by experienced and skilled counsel.

Class Counsel have substantial experience and experience in prosecuting consumer class action suits and in securing settlements for class members, and have served as class counsel in numerous other consumer class actions in federal and state courts throughout the country. (McGuire Decl. ¶ 5; Morgan Decl. ¶¶ 6–7; Sawin Decl. ¶¶ 4–5; Wallis Decl. ¶¶ 4–6). The quality of opposing counsel is also important when evaluating services provided by class counsel. *Lowther*, 2012 WL 6676131, at *3. Here, NNA has been represented by attorneys from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC as well as Shook, Hardy & Bacon LLP, both of which are among the top-ninety largest law firms in the United States and both of which have a well-deserved reputation for vigorous advocacy in defending complex civil actions, including consumer class actions. Defense counsel constructed formidable defenses from the outset of both

the *Anglin* action and this action which, if ultimately successful, would have prevented the Settlement Class Members from obtaining any redress from NNA. Class Counsel's ability "to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested." *Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 301 (W.D. Ky. 2014) (quoting *In re Delphi Corp. Securities, Derivative & ERISA Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008)). At the time the Parties agreed to resolve this litigation, Plaintiff Nelson's claims had nearly been dismissed in their entirety and there was some risk that Plaintiff Anglin would be compelled to arbitrate his claims individually. Class Counsel's ability to negotiate a favorable resolution in the face of such skillfully constructed and skillfully presented defenses justifies their fee request.

C. Class Counsel Should Be Compensated For Their Reasonable Expenses Incurred In Prosecuting This Litigation.

Class Counsel's request for an award of $1,780,000 includes reimbursement of their reasonable litigation expenses. It is well established that class counsel are entitled to reimbursement "of expenses that counsel have spent out of their own pocket in litigating a class action case." *Salinas v. U.S. Xpress Enterprises, Inc.*, No. 13-cv-00245, 2018 WL 1477127, at *9 (E.D. Tenn. Mar. 8, 2018). Such reimbursable expenses include "normal costs incurred in connection with travel, experts, computerized research, court filing and services, deposition and court reporters, and document storage, printing, copying, and shipping." *In re Ford Motor Co. Spark Plug & Three Valve Engine Prod. Liab. Litig*., No. 12-md-2316, 2016 WL 6909078, at *9 (N.D. Ohio Jan. 26, 2016); *New Eng. Health Care Empls. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) (approving reimbursement of these categories of expenses).

Here, Class Counsel have incurred $7,885.17 in reimbursable expenses related to filing, appearances, travel, copying, case administration, postage, delivery services, and computerized

legal research. (McGuire Decl. ¶ 22; Morgan Decl. ¶ 18; Sawin Decl. ¶ 17; Wallis Decl. ¶ 10). Class Counsel's expenses here all fall into the categories outlined above and were all reasonably incurred in pursuing this litigation. (*Id.*). Class Counsel have reviewed the expense records carefully and determined that the expenses were necessary to the successful prosecution of this case and the *Anglin* action. (*Id.*). These expenses were necessary to prosecute litigation of this size and complexity on behalf of the Settlement Class Members, and they are typical of expenses regularly awarded in large-scale class actions. Accordingly, Class Counsel request that the Court approve as reasonable their request for reimbursement of their out-of-pocket expenses in the amount of $7,885.17.

D. The Agreed-Upon Incentive Awards Are Warranted And Are In Line With Other Incentive Awards Approved By Other Courts In This Circuit.

The requested Incentive Awards of $10,000 for each Class Representative's service for the benefit of the Settlement Class Members are also fair and reasonable and warrant approval. "[Incentive] awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Gokare*, 2013 WL 12094887, at *10 (quoting *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *8 (awarding $10,000 incentive awards to 16 named plaintiffs)). $10,000 awards for individual class representatives are "well within the appropriate range," *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1000 (N.D. Ohio 2016), and courts have authorized much higher awards. *See, e.g.*, *Hainey v. Parrott*, No. 02-cv-733, 2007 WL 3308027, at *3 (S.D. Ohio Nov. 6, 2007) (approving four $50,000 incentive awards); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001) (approving $50,000 incentive award);

Johnson, 2013 WL 2295880, at *5 (S.D. Ohio May 24, 2013) (approving $12,500 incentive award).

Here, although no award of any kind was promised to Plaintiffs prior to or during the litigation, Plaintiffs nonetheless contributed their time and efforts in pursuing their claims against NNA and serving as representatives on behalf of the Settlement Class Members—exhibiting a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (McGuire Decl. ¶¶ 24–26; Sawin Decl. ¶¶ 18–19). Moreover, agreeing to serve as class representatives meant that Plaintiffs publicly put their names on this litigation subjecting them to potential financial or reputational risks. *Gokare*, 2013 WL 12094887, at *10. Were it not for Plaintiffs' willingness to pursue their claims on a classwide basis and their efforts and contributions to the litigation, including participating in and monitoring the cases through settlement and approval, the substantial benefits to the Settlement Class Members afforded by the Settlement would not exist.

Notably, and similar to the requested attorneys' fee award, the Incentive Awards, if approved, will not be paid at the expense of the Settlement Class Members; payment of the Incentive Awards will not in any way affect the benefits available under the Settlement. Compensating Plaintiffs for the risks and efforts they undertook on behalf of the Settlement Class Members is especially appropriate given the exceptional results obtained. No objectors have raised an objection to the requested Incentive Awards to date. Accordingly, Incentive Awards of $10,000 to each Plaintiff are reasonable, justified by Plaintiffs' time and efforts in this litigation, and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiffs Nelson and Anglin respectfully request that the Court enter an Order (1) approving the requested award of $1,780,000, representing Class Counsel's attorneys' fees and reimbursement of their litigation expenses; (2) approving Incentive Awards of $10,000 for each Plaintiff for their service on behalf of the Settlement Class; and (3) providing such other and further relief as the Court deems reasonable and just.

Dated: October 30, 2019

Respectfully submitted,

MICHELLE NELSON and JOHN ANGLIN, individually and on behalf of a class of similarly situated individuals

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2019, a true and correct copy of *Plaintiffs' Memorandum in Support of Unopposed Motion for Approval of Attorneys' Fees, Expenses, and Incentive Awards* was served on the below counsel of record via the Court's ECF system:

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