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 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

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Class Counsel and Class Representatives respectfully move, under Rule 23 of the Federal Rules of Civil Procedure, for Final Approval of Settlements with the Toyota, BMW, Mazda, and Subaru Defendants, certification of the Classes defined in the Settlements, service awards for the named Class Representatives, and an award of attorneys' fees to Class Counsel.[1]

INTRODUCTION

In this action, Plaintiffs asserted economic loss claims against the Settling Defendants for manufacturing and selling more than 16 million vehicles equipped with defective airbags supplied by Takata Corporation, and its subsidiary TK Holdings, Inc. (collectively "Takata"), the majority of which have yet to be repaired or replaced under the largest automotive recall in United States history. After almost three years of hard-fought litigation and extensive discovery, Class Counsel successfully negotiated the Settlements, the approval of which will resolve Plaintiffs' and Class Members' economic loss claims against the Settling Defendants. The Settlements achieve two of the primary objectives of this litigation: (1) addressing the significant safety risk that Takata's defective airbags pose to Class Members, via innovative, multifaceted Outreach Programs designed to motivate Class Members to bring their vehicles to dealerships for the Recall Remedy; and (2) compensating Class Members for the economic damages they suffered, in a way that further incentivizes Class Members who still possess Subject Vehicles to have their dangerous airbag inflators replaced, reinforcing the public safety benefits of the Settlements.

[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." The Settlement Agreements, along with amendments thereto, have been filed with the Court. (ECF Nos. 1724-1, 1724-2, 1724-3, 1724-4.) 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.

Each Settlement will furnish Class Members with a wide spectrum of relief:

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

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

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

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

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

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

The Settlement Amounts—which include the Settling Defendants' cash payments and 10% credits for their respective Rental Car/Loaner Programs, but not the value of the Customer Support Programs—total $553,567,307. Including a valuation of the Customer Support Programs issued by a warranty valuation expert in support of Final Approval, the combined value of the Settlements is $741,287,307. This is an outstanding result for the Classes. In the face of numerous litigation obstacles and legal risks, Class Members will receive immediate and

substantial relief through a negotiated resolution that simultaneously targets the extraordinary public safety hazard posed by Takata's defective airbags.

Because the Settlements are fair, adequate, and reasonable, according to Fed. R. Civ. P. 23(e) and prevailing jurisprudence, and the Classes satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), the Class Representatives and Class Counsel now move for Final Approval of the Settlements and certification of the Classes. In addition, Class Counsel request that the Court approve service awards to the Class Representatives, whose willingness to represent the Classes and active participation in the Action have made this result possible. Finally, Class Counsel respectfully request that the Court award attorneys' fees in accordance with prevailing Eleventh Circuit precedent and customary fees in similar cases, to compensate Class Counsel for their work in achieving this excellent result for the benefit of the Classes, and for the extensive work Class Counsel must continue to perform over the unique four-year lifespan of the Settlements.

In accordance with the Settlement Agreements, proposed Final Orders and Final Judgments encompassing these requests and reciting material terms of the Settlements are submitted as exhibits to this motion.

BACKGROUND

A. Factual Background.

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

For more than fifteen years, numerous automotive companies, including BMW, Ford, Honda, Mazda, Nissan, Subaru, and Toyota (the "Automotive Defendants"), manufactured and

sold to the unsuspecting public a staggering number of vehicles equipped with defective airbags supplied by Takata. Instead of functioning as safety devices, Takata's defective airbags have an unreasonably dangerous propensity to deploy aggressively or rupture, spraying metal shrapnel toward vehicle occupants. The common defect in Takata's airbags is tied to the inherent instability of the phase-stabilized ammonium-nitrate propellant used in Takata's airbag inflators, which are metal canisters that are supposed to release gas to inflate an airbag cushion in the milliseconds following a crash.

This common defect, present in more than sixty million airbags nationwide, has given rise to the single largest automotive recall in United States history and an extraordinary public safety crisis. Even though nationwide recalls have been underway for more than three years, approximately 70% of Takata's defective airbags—i.e., around 40 million airbags—have yet to be removed from vehicles and replaced with safe airbags, according to the most recent data published by the National Highway Safety Transportation Authority ("NHTSA").[2]

Following numerous field ruptures of Takata's inflators that seriously injured or killed vehicle occupants, the Automotive Defendants began to recall vehicles equipped with such inflators. Honda initiated several narrow recalls from 2008 through 2012, claiming that the field ruptures resulted from limited manufacturing defects. As field ruptures continued to occur, however, the recalls expanded significantly. From April 11, 2013 through May, 15, 2015, the Automotive Defendants initiated and expanded recalls ultimately covering millions of vehicles.

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[2] *See* NHTSA Takata Airbags Spotlight, https://www.nhtsa.gov/recall-spotlight/takata-air-bags#takata-air-bags-completion-rates (last visited September 7, 2017) (reporting that approximately 17.7 million airbags have been repaired to date); NHTSA Third Amendment To The Coordinated Remedy Order, ¶ 3 & n.5 (stating that "approximately 61 million" infaltors are "scheduled for recall," a figure that does not include "like for like remedies," i.e., replacement inflators that must also eventually be replaced because they contain non-desiccated phase stabilized ammonium nitrate) (ECF No. 1724-1 at 78).

On May 18, 2015, Takata entered into a Consent Order with NHTSA that required it to file Defect Information Reports, triggering recalls of almost 34 million inflators. Given the size of the recalls and a shortage of replacement inflators, NHTSA also entered a Coordinated Remedy Order to prioritize which vehicles should be repaired first. Takata's Consent Order has been amended several times, expanding the recall to all inflators with non-desiccated phase-stabilized ammonium-nitrate propellant, which includes approximately 60 million inflators, and setting a December 31, 2019 deadline for Takata to demonstrate the safety of its desiccated inflators, at which time NHTSA may require Takata to recall those inflators as well. The Coordinated Remedy Order also has been amended several times, and now divides vehicles into 12 Priority Groups to coordinate the schedule of repairing defective inflators. Priority Group 1 vehicles are the ones most at risk of experiencing a rupture.

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

Beyond suffering these economic damages, millions of Class Members remain exposed to the unreasonable risk of serious injury or death posed by defective Takata inflators that have

not been removed from their vehicles. Even though nationwide recalls have been underway for more than three years, around 70% of the approximately 60 million recalled inflators in the United States have not yet been repaired. Although supply shortages are partly responsible for these low completion rates, NHTSA has highlighted a lack of effective outreach programs from automotive companies as well.

B. Procedural History.

The following discussion recounts some of the major procedural events in this litigation. On October 27, 2014, eighteen plaintiffs[3] filed a class action complaint in *Craig Dunn, et al. v. Takata Corp., et al.,* No. 1:14-cv-24009 (S.D. Fla.) (the "Economic Loss Class Action Complaint"), asserting economic loss claims against the Automotive Defendants and Takata. The Judicial Panel on Multidistrict Litigation subsequently consolidated the *Dunn* action for pretrial proceedings with additional class and individual actions alleging similar or identical claims before this Court in *In re Takata Airbag Products Liability Litigation*, No. 1:15-md-02599-FAM (S.D. Fla.) (MDL 2599).

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

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

Plaintiffs filed an Amended Consolidated Class Action Complaint on April 30, 2015. On June 15, 2015, Plaintiffs filed a Second Amended Consolidated Class Action Complaint ("SACCAC"), which was the operative pleading for Plaintiffs' economic loss claims at the time the Settlements were reached.

On July 17, 2015, defendants Toyota, Ford, Subaru and Nissan filed a Joint Motion to Stay Based on the Primary Jurisdiction of the National Highway Traffic Safety Administration. The Court denied this motion on September 22, 2015. (ECF No. 737.)

On July 17, 2015, Takata and the seven Automotive Defendants each filed Motions to Dismiss Plaintiffs' SACCAC. The Court has now ruled on all the Motions to Dismiss, granting them in part and denying them in part. (ECF Nos. 737, 871, 975, 1099, 1101, 1202, 1208, 1256, 1417, 1766, 1767.)

The Parties have taken extensive discovery in this case. Ex. A (Prieto Decl.), ¶ 15. Pursuant to the Court's initial case management order, discovery began almost immediately after creation of the MDL, in the spring of 2015. *Id.* Over the past two years, Defendants have produced more than 10 million pages of documents through discovery. *Id.* Plaintiffs' counsel have dedicated a team of more than 40 attorneys to the laborious work of reviewing these documents, many of which are in Japanese, necessitating time-consuming translation, at great expense, which Plaintiffs have borne. *Id.* The Defendants have deposed more than 70 putative class representatives, and Plaintiffs have deposed at least 45 witnesses of the Defendants. *Id.* Depositions of individual employees of certain Automotive Defendants continue to be taken. *Id.* Plaintiffs also have retained and consulted extensively with multiple experts on liability and damages issues in an effort to prepare the case for trial. *Id.*

While Plaintiffs were litigating before this Court, the U.S. Department of Justice pursued

a separate investigation of Takata. *Id.*, ¶ 16. On January 13, 2017, Defendant Takata Corporation signed a criminal plea agreement in which it admitted, among other things, that it

> knowingly devised and participated in a scheme to obtain money and enrich Takata by, among other things, inducing the victim OEMs to purchase airbag systems from Takata that contained faulty, inferior, nonperforming, non-conforming, or dangerous PSAN inflators by deceiving the OEMs through the submission of false and fraudulent reports and other information that concealed the true and accurate test results for the inflators which the OEMs would not have otherwise purchased as they were.

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

On March 10, 2017, the Automotive Defendants – Nissan, Ford, BMW NA, Toyota, Mazda, Subaru, and Honda – all filed cross-claims against Takata. (ECF No. 1444, 1445, 1446, 1451, 1452, 1453, 1454.) On April 28, 2017, Takata filed a Motion to Strike, Alternative Motion to Dismiss in Part and Memoranda of Law as to each of the Cross-Claims.

On June 25, 2017, Takata Corporation's United States subsidiary, Defendant TK Holdings, Inc., filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. *In Re TK Holdings, Inc.*, No. 17-11375 (Bankr. D. Del.). Likewise, Takata Corporation has filed for insolvency protection in Japan and has filed a petition under 11 U.S.C. § 1501 to recognize the Japanese insolvency proceeding in the United States. (ECF No. 1857.) Consequently, Plaintiffs' claims against TK Holdings, Inc. and Takata Corporation are stayed.

C. Settlement Negotiations.

In parallel with the hard-fought litigation track, preliminary settlement discussions began

in early 2016, between Plaintiffs' counsel and Toyota's counsel, John P. Hooper of King & Spalding. Ex. A (Prieto Decl.), ¶ 19. During these and subsequent negotiations, the parties discussed their relative views of the law and facts and potential relief for the proposed Class, and exchanged a series of counter-proposals for key issues and concepts in a potential settlement. *Id.* After months of negotiations between Plaintiffs' counsel and Toyota's counsel, the settlement discussions expanded to include additional Automotive Defendants, including BMW, Mazda, and Subaru. These multi-party discussions ultimately ended in an impasse in early 2017. *Id.*

In early 2017, however, Plaintiffs' counsel and Toyota's counsel resumed direct negotiations and ultimately reached a preliminary agreement on March 21, 2017, signing a Memorandum of Understanding ("MOU") memorializing the essential terms of the Settlement. *Id.*, ¶ 20. Over the next six weeks, Plaintiffs' counsel intensely negotiated and reached agreements with counsel for BMW, Mazda, and Subaru. Plaintiffs' counsel's negotiations with counsel for BMW were aided by the Court-appointed mediator, Paul C. Huck, Jr. *Id.* After the MOUs were signed, the parties engaged in intense negotiations regarding the specific terms of each Settlement Agreement, requiring Plaintiffs to engage in multi-party diplomacy, with a hybrid of individual negotiations with each Defendant, as well as combined sessions with multiple Defendants at later stages when it was constructive. *Id.* The Settlement Agreements were signed on May 17, 2017. At all times, the lengthy negotiations were adversarial, non-collusive, and at arm's length. *Id.*

TERMS OF THE SETTLEMENTS

The terms of the Settlements are detailed in the Agreements, which have been filed with the Court (ECF Nos. 1724-1, 1724-2, 1724-3, 1724-4). The following is a summary of the material terms of the Settlements.

A. The Settlement Classes.

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

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

(ECF No. 1724-4, § II.A.8.)

"Subject Vehicles" are defined as BMW, Mazda, Subaru, or Toyota vehicles that "contain or contained Takata phase stabilized ammonium nitrate ('PSAN') inflators in their driver or passenger front airbag that (i) have been recalled, or (ii) shall be recalled or contain a desiccant and that may be subject to future recall as referenced in the National Highway Traffic Safety Administration's ('NHTSA') Consent Orders dated May 18, 2015 and November 3, 2015, and amendments thereto." An exhibit to each Settlement lists the Subject Vehicles that precisely define the scope of each Class. (*E.g.*, ECF No. 1724-4 at Exhibit 9.)

Based on the number of recalled vehicles reported by the Settling Defendants, Plaintiffs estimate that there are at least 9.2 million members of the Toyota Class, 2.64 million members of

the Subaru Class, 2.23 million members of the BMW Class, and 1.7 million members of the Mazda Class.

B. Settlement Funds.

The Settlements require the Settling Defendants to deposit a total of approximately $553 million,[4] less a 10% credit for their respective Rental Car/Loaner Programs, into separate non-reversionary Qualified Settlement Funds. As agreed in the Settlements, the Settling Defendants already have deposited approximately 12% of the full Settlement Amounts in escrow accounts, to immediately fund the first year of the Outreach Programs. The rest of the Settlement Fund payments will be made over a prescribed four-year schedule set forth in the Settlements. (*E.g.*, ECF No. 1724-4, § III.A.2.)

The Settlement Funds will be used to pay for: (a) the Outreach Programs; (b) an Out-of-Pocket Claims Process to compensate Class Members for out-of-pocket expenses relating to the Takata Airbag Inflator Recall; (c) residual cash payments to Class Members who have not incurred reimbursable out-of-pocket expenses and who register for residual payments, to the extent that there are residual amounts remaining; (d) the Rental Car/Loaner Programs, which will provide rental or loaner vehicles to Class Members with Priority Group 1 vehicles at no cost when the Recall Remedy cannot be performed within thirty days; (e) notice and related costs; (f) claims administration, including expenses associated with the Settlement Special Administrator; (g) Court-awarded Settlement Class Counsel's fees and expenses; and (h) Court-awarded incentive awards to Class Representatives. (*See*, *e.g.*, ECF No. 1724-4, § III.A.3.)

C. Outreach Programs.

A significant feature of each Settlement obligates each Settling Defendant to create an

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

intensive, innovative Outreach Program aimed at maximizing the removal of dangerous inflators from Class Members' vehicles. The Outreach Programs will utilize traditional and non-traditional media well beyond the methods currently used by the Settling Defendants, which thus far have resulted in unsatisfactory recall completion rates below 35%, leaving millions of Class Members exposed to the continuing unreasonable danger of rupturing inflators. The methods of outreach will include: (a) direct contact of Class Members via U.S. Mail, telephone, social media, e-mail, and texting; (b) contact of Class Members by third parties (*e.g.*, independent repair shops); and (c) multi-media campaigns, such as through print, television, radio, and/or the internet. (*E.g.*, ECF No. 1724-4, § III.B.)

The budget for the Outreach Programs is set at no more than 33% of each Settlement Amount, meaning that over $182 million can be invested in reaching Class members and encouraging them to bring their vehicles to dealerships for the Recall Remedy. The Settlement Special Administrator will oversee and administer the Outreach Programs, and will engage industry-leading consultants with specialized knowledge of different outreach methods to adjust the Outreach Programs to maximize their effectiveness. In this way, the Outreach Programs are designed to be flexible and nimble, inclined to redirect resources to methods that prove most effective at encouraging Class Members to bring their vehicles to dealerships for the Recall. The Settlement Special Administrator is also empowered to resolve disputes between the Parties about how best to design and implement the Outreach Programs.

Underscoring the public safety objective of the Settlements, the Settling Defendants did not wait until Final Approval and immediately funded the first 12 months of the Outreach Programs within 30 days of Preliminary Approval.

D. Out-Of-Pocket Claims Process.

Another critical feature of each Settlement is an Out-of-Pocket Claims Process, which will reimburse Class Members for reasonable out-of-pocket expenses incurred relating to the Takata Airbag Inflator Recalls. (*E.g.*, ECF No. 1724-4, § III.D.) There are two primary advantages to the Claims Process: first, it permits Class Members to recover for the reasonable expenses they actually incurred, without limiting recovery to certain pre-determined categories or amounts; and second, it furthers the public-safety goal of incentivizing Class Members who still own or lease Subject Vehicles to bring their vehicles to a dealership for the Recall Remedy, because having the Recall Remedy performed is a prerequisite to eligibility for such a payment. The Registration/Claim Form is straightforward, simple, and not burdensome. (*E.g.*, ECF No. 1724-4 at Exhibit 12 thereto.) They will be provided to Class Members via the Settlement website and Settlement Special Administrator and at dealerships when they bring their vehicles there for the Recall Remedy.

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

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

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

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

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

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

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

(*E.g.*, ECF No. 1724-4, § III.D.3.) In addition to these categories of expenses, the Settlement Special Administrator is empowered to approve and pay for other reimbursable claims that the Settlement Special Administrator deems to be a reasonable out-of-pocket expense, and Class Members are invited to submit claims for such expenses. (*Id.*, § III.D.2.)

As far as the timing of payments to Class Members, the first set of reimbursements to eligible Class Members who have completed and filed a Registration/Claim Form will be made on a rolling basis by the Settlement Special Administrator no later than 180 days after the Effective Date. Reimbursements for following years will be made on a rolling basis as claims are submitted and approved.

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

E. Residual Distribution Payments.

The settlement program offers Class Members an additional way to receive a cash payment. Rather than submit a claim for out-of-pocket expenses, Class Members have the option of registering for a Residual Distribution of up to $250 from the Settlement Fund. Residual Distributions will be funded with the monies remaining in the fund at the end of each of the four settlement program years, after all payments are made for the Outreach Program and approved claims for out-of-pocket expenses. (*E.g.*, ECF No. 1724-4, § III.E.)

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

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

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

F. Rental Car/Loaner Programs.

Another aspect of the Settlement relief – the Rental Car/Loaner Program – is designed to address difficulties and additional costs certain Class Members may face in getting the Recall Remedy performed on their vehicles due to supply shortages of replacement parts. Where replacement parts are unavailable, and the replacement of recalled inflators is delayed for an extended period as a result, Class Members who own or lease recalled vehicles that NHTSA has identified as the highest priority for repair (so-called "Priority Group I vehicles" under the NHTSA Coordinated Remedy Order) shall be entitled to use a loaner or rental vehicle in the interim at no charge. (*E.g.*, ECF No. 1724-4, § III.C.) Commencing no later than thirty calendar days after issuance of the Preliminary Approval Order, this additional benefit furthers public safety and reduces a potential impediment to Class Members having the Recall Remedy performed on their vehicles.

The program is designed as follows. Class Members are directed by the Outreach effort to contact their applicable automobile dealer to request the replacement of the Takata airbag inflator for the Recall Remedy. When they do so, if the dealer informs the Class Member that it does not have the Recall Remedy parts in stock, the Class Member can request a rental/loaner vehicle. If the Class Member has a Priority Group I vehicle – which are listed on the NHTSA

website and will be advertised – and the dealer cannot obtain the necessary Recall Remedy parts in fewer than 30 days, then a rental/loaner vehicle must be made available to the Class Member, at no charge, until a Recall Remedy is available for the Class Member's Subject Vehicle. The Class Member must, of course, provide adequate proof of insurance, and if a rental car (as opposed to a loaner) is provided, satisfy the applicable rental car company's guidelines. Upon being notified by the dealer that the replacement parts are ready, Class Members who obtain a rental/loaner vehicle through the program must promptly bring their Subject Vehicles to the dealer for performance of the Recall Remedy and return the rental/loaner vehicle as well.

In exchange for providing the Rental Car/Loaner Program, each Settling Defendant shall receive a credit of 10% of the Settlement Amount to which it has agreed. One quarter of the credit shall be applied to each of the four annual payments that the Settling Defendant must make into the Settlement Fund, such that the full credit is realized at the time of the Year Four Payment.[5]

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

[5] As explained in the declaration of valuation expert Kirk Kleckner, which is submitted in support of this motion, the expected value to Class Members of the Rental Car/Loaner Program actually exceeds the amount of the 10% credit allocated to the Program in the BMW, Mazda, and Toyota Settlements. Ex. B (Kleckner Decl.), ¶ 7.e. Mr. Kleckner reached this conclusion by analyzing, among other things, the number of unrepaired Priority Group 1 vehicles for each Defendant, the current and estimated future supplies of repair parts for those vehicles, and average market rates for rental vehicles. *Id.*, ¶ 7. Mr. Kleckner did not perform the same analysis for Subaru's Rental Car/Loaner Program, however, because unlike the BMW, Mazda, and Toyota Settlements, which provide an automatic 10% credit to the applicable Defendants' payments for providing the Program, Subaru—which has far fewer Priority Group 1 vehicles than the other Defendants—only will receive such a credit if it documents that it has spent at least that much providing rental vehicles to Class Members. (ECF No. 1724-3, § III.C.3.)

program, and the Settlement Special Administrator is authorized to audit and confirm the Settling Defendants' compliance.

G. Customer Support Programs.

In addition to the monetary elements of the Settlements, each Settling Defendant has also agreed to provide Class Members with a Customer Support Program that covers prospective coverage for repairs and adjustments (including parts and labor) necessary to correct any defects in the materials or workmanship of (1) the Takata PSAN inflators contained in the driver or passenger front airbag modules of Subject Vehicles, or (2) replacement driver or passenger inflators installed pursuant to the Takata Airbag Recall in the Subject Vehicles. (*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.

Eligible Class Members may begin seeking the Customer Support Program benefits 30 days after the Court's issuance of the Final Order, a date chosen to give the Settling Defendants sufficient lead time to coordinate with their dealers regarding how to implement this benefit. The Customer Support Program benefit will be automatically transferred and will remain with the Subject Vehicle regardless of ownership. It does not apply, however, if a replacement airbag inflator deploys normally. Nor does the Customer Support Program extend to inoperable vehicles and vehicles with a salvaged, rebuilt or flood-damaged title.

The duration of the Customer Support Program benefit for each Class Member depends on whether the Recall Remedy has already been performed and whether the Subject Vehicle

contains a desiccated Takata PSAN inflator. The Settlements provide as follows:

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

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

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

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

(ECF No. 1724-4, § III.G.) A leading valuation expert, Kirk Kleckner, whose work has been cited with approval by a number of courts, has determined within a reasonable degree of professional certainty that the combined value to Class Members of these Customer Support

Programs is $187,720,000. Ex. B (Kleckner Decl.), ¶ 6.f.[6]

H. Releases.

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

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

(ECF No. 1724-4, § VII.B.) There are two important exceptions carved from the releases: for personal injury and physical property damage claims and for claims against certain "Excluded Parties."

First, the Settlement Agreements provide that "Plaintiffs and Class Members are *not* releasing and are expressly reserving all rights relating to claims for personal injury, wrongful death or actual physical property damage arising from an incident involving a Subject Vehicle, including the deployment or non-deployment of a driver or passenger front airbag with a Takata PSAN inflator." (ECF No. 1724-1, § VII.D. (emphasis added); ECF No. 1724-2, § VII.E.; ECF No. 1724-3, § VII.E.; ECF No. 1724-4, § VII.E.)

Second, each Settlement Agreement also reserves and does not release claims against "Excluded Parties," who are defined as Takata (and all related entities and persons) and, with limited specific exceptions, all other automotive manufacturers and distributors (and all their

[6] As to each Settlement's Customer Support Program, Mr. Kleckner calculated the following values: $32,240,000 for BMW, $22,530,000 for Mazda; $22,650,000 for Subaru; and $110,300,000 for Toyota.

related entities and persons), specifically including other, non-settling Defendants in the Action. (*E.g.*, ECF No. 1724-4, § VII.E.) Those limited specific exceptions apply to particular joint ventures that Mazda, Toyota, and Subaru had with another automobile manufacturer or distributor for specific vehicle lines, such that claims with respect to those vehicles are being released.

- The Mazda Class also releases Ford Motor Company and its related entities, but only "with respect to the Mazda B-Series truck," and Auto Alliance International, Inc. and its related entities, but only "with respect to the Mazda6 and any other Mazda-brand vehicles." (ECF No. 1724-2, § VII.C.)

- The Toyota Class also releases General Motors and related corporate entities, but only "with respect to the Pontiac Vibe." (ECF No. 1724-4, § VII.C.)

- The Subaru Class also releases General Motors and related entities but only "with respect to the 2005 and 2006 Saab 9-2X vehicles," as well as Saab Automobile AB and related entities. (ECF No. 1724-3, § VII.C.)

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

I. Notice Programs.

The Settlements proposed, and the Court approved in its Preliminary Approval Orders, robust Notice Programs designed to satisfy all applicable laws, including Rule 23 and constitutional due process. Notifying Class Members of the Settlements, in both English and Spanish, is being accomplished through a combination of the Direct Mailed Notices, Publication Notice (in newspapers, magazines and/or other media outlets), Radio Notice, notice through the Settlement website (www.AutoAirbagSettlement.com), a Long Form Notice, and other forms of notice, such as banner notifications on the internet. (ECF No. 2030-1.) The details of each form of notice are set forth in the Declaration of Cameron R. Azari, Esq., of Epiq Systems, Inc., the Settlement Notice Administrator, included as Exhibit 11 to the Settlement Agreements (ECF No.

1724-4, at Exhibit 11 thereto), and in Mr. Azari's more recent Declaration submitted as an exhibit in support of this motion (ECF No. 2030-1.)

The Settlements accomplished a reduction in administrative expenses by employing a single Settlement Notice Administrator to issue notice for all four settlements, and utilizing a consolidated form of Publication Notice, agreed to by Plaintiffs and the four Settling Defendants in the form substantially similar to the one attached to the Agreements as Exhibit 8. Similarly, the Settlement Notice Administrator established a combined Settlement website to inform Class Members of the terms of each Settlement Agreement, their rights, dates and deadlines and related information. The website includes, in .pdf format, materials agreed upon by the Parties and/or required by the Court, including the Registration/Claim Form, both in English and Spanish.

Class Members also received Direct Mailed Notice, substantially in the form attached as Exhibit 2 to each Settlement Agreement, by U.S. Mail. (ECF No. 2030-1, ¶¶ 12-30.) The Direct Mailed Notice – which is similar in form across Settlements but customized to each Settling Defendant's automobiles – informs potential Class Members of the various ways they can obtain the Long Form Notice (via the website, mail or a toll-free telephone number), and the general structure of the Settlement. (ECF No. 2030-1 at Exhibit 2.) The Settlement Notice Administrator also re-mailed Direct Mailed Notices returned by the U.S. Postal Service with a forwarding address and, for returned mail without a forwarding address, researched better addresses and promptly re-mailed copies of the applicable notice to any better addresses. (ECF No. 2030-1, ¶¶ 12-30.)

The Settlement Notice Administrator also established a toll-free telephone number that provides settlement-related information to Class Members using an Interactive Voice Response system, with an option to speak with live operators. (ECF No. 2030-1, ¶ 60.)

The Long Form Notices, attached as Exhibit 6 to the Settlement Agreements, also follow a standardized form, but are Defendant specific. (ECF No. 2030-1 at Exhibit 3.) They advise Class Members of the general terms of the applicable Settlement, including information on the identity of Class Members, the relief to be provided, and what claims are to be released; notify them of and explain their rights to opt out of or object to the Settlement; disclose the amounts of attorneys' fees and expenses that Settlement Class Counsel may seek, and individual awards to the Plaintiffs, and explain that such fees and expenses – as awarded by the Court – will be paid from the Settlement Fund. The Long Form Notice also includes the Registration/Claim Form, which is tailored to each Settlement. The Registration/Claim Form (attached as Exhibit 12 to each Settlement Agreement) informs the Class Member that the form must be fully completed and timely returned within the Claim Period to be eligible to obtain monetary relief pursuant to this Agreement.

To comply with the Class Action Fairness Act, the Settlement Notice Administrator also sent to each appropriate State and Federal official the materials specified in 28 U.S.C. § 1715 and otherwise complied with its terms. (ECF No. 2030-1, ¶ 11.)

J. Settlement Administration.

The Settlement Special Administrator is charged with administering all aspects of the Settlements, with the exception of the Notice Program, which the Settlement Notice Administrator shall handle, in coordination with the Settlement Special Administrator. The Court appointed Patrick A. Juneau, of Juneau David APLC, to serve as Settlement Special Administrator for each of the four Settlements. His responsibilities include (1) overseeing and administering the Outreach Programs, (2) auditing and confirming Settling Defendants' compliance with the Rental Car/Loaner Programs, (3) overseeing and administering the Out-of-

Pocket Claims Process and Residual Distribution, a function which requires the exercise of discretion to determine the reasonableness and eligibility of Class Members' claims for out-of-pocket expenses, and to deny any fraudulent claims. The Settlements achieve a further reduction in administrative expenses by employing a single Settlement Special Administrator to undertake these responsibilities.

K. Attorneys' Fees and Incentive Awards for Class Representatives.

The Parties did not begin to negotiate attorneys' fees and expenses until after agreeing to the principal terms set forth in the Settlement Agreements. Each Settlement Agreement provides that Class Counsel agree to limit their request to the Court for attorneys' fees and expenses to no more than 30% of the applicable Settlement Amount. Likewise, the Settling Defendants agree not to oppose such a request. Attorneys' fees and expenses awarded to Settlement Class Counsel for work done on behalf of each Class will be paid from each Settlement Fund. (ECF No. 1724-4, § VII.)

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

The Parties also agreed that Plaintiffs' counsel may petition the Court for incentive awards of up to $5,000 per Class Representative in order to compensate the Plaintiffs for their efforts on behalf of the Classes. (*Id.*)

L. Proposed Final Orders and Final Judgments.

To ensure that the Court retains jurisdiction to enforce and interpret the Settlements and that the ultimate resolution is consistent with the Parties' Agreements, each Settlement includes a

proposed Final Order and Final Judgment as exhibits and specifies the requirements of any Final Order and Final Judgment. (ECF No. 1724-4, § IX.B. & Exhibits 4, 5.) Among other things, the Settlements call for each proposed Final Order and Final Judgment to dismiss Plaintiffs' claims with prejudice, incorporate the Release set forth in the Agreement, issue a permanent injunction against Class Members instituting or prosecuting any claims released pursuant to the Settlements, address any issues relating to Telephone Consumer Protection Act and Outreach Programs, and make the requisite findings to approve and implement the Settlements. (*Id.*) For the convenience, updated versions of the proposed Final Orders and Final Judgments are submitted as exhibits to this motion.[7]

MEMORANDUM OF LAW

I. The Court Should Grant Final Approval To The Settlements.

Rule 23(e) requires judicial approval for the compromise of claims brought on a class basis. "Although class action settlements require court approval, such approval is committed to the sound discretion of the district court." *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could

[7] The only material changes made in the updated versions of the proposed Final Orders are: (1) the inclusion of additional language clarifying that the Outreach Program, undertaken to convey important public safety information to consumers, is exempt from the TCPA; (2) the inclusion of additional language clarifying that any injunction does not preclude Class Members from contacting, dealing with, or complying with requests or inquiries from any governmental authorities relating to the issues raised in this class action settlement; and (3) the inclusion of a section addressing the application for Class Counsel's attorneys' fees and Class Representative Service Awards.

hope to obtain. *See*, *e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) (citing cases).

Under Rule 23(e), the following procedures govern the consideration and approval of a proposed class settlement:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under the subdivision (e); the objection may be withdrawn only with the court's approval.

Saccoccio v. JP Morgan Chase Bank, N.A., 297 F.R.D. 683, 690 (S.D. Fla. 2014) (Moreno, J.) (citing Fed. R. Civ. P. 23(e)). All five requirements of Rule 23(e) are satisfied here. A fairness hearing is scheduled for October 25, 2017, the Parties have filed the Settlement Agreements, Class Members have until September 25, 2017 to object to or opt out of the Settlements, and as explained below, notice to the Classes was reasonable and the

Settlements are fair, reasonable, and adequate. *Id.*[8]

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

"For a court to exercise jurisdiction over the claims of absent Class members, there must be minimal procedural due process protection." *Perez v. Asurion Corp.*, 501 F.Supp.2d 1360, 1377 (S.D. Fla. 2007). "In actions certified under 23(b)(3), class members should receive 'the best notice that is practicable under the circumstances.'" *Saccoccio*, 297 F.R.D. at 691 (quoting Fed. R. Civ. P. 23(c)(2)(B)). "Regardless of the category under which a class suit may be or potentially may be certified, however, Rule 23(e) requires that absent class members be informed when the lawsuit is in the process of being voluntarily dismissed or compromised." *Juris v. Inamed Corp.*, 685 F.3d 1294, 1317 (11th Cir.2012). "The notice should be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Saccoccio*, 297 F.R.D. at 691 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–812 (1985)).

As the Court properly determined in its Preliminary Approval Orders, each Settlement's Notice Program "is reasonably calculated under the circumstances to apprise the Class of the pendency of the Action, class certification for settlement purposes only, the terms of the Settlement, their rights to opt-out of the Class and object," and thus "satisf[ies] all applicable requirements of law, including, but not limited to, Rule 23 and the constitutional requirement of due process." (*E.g.*, ECF No. 1799, ¶ 11.) Each Settlement's Notice Program has been and continues to be implemented in accordance with the Court's Orders. (ECF No. 2030-1.)

As detailed in the declaration of the Notice Administrator, notices were mailed to

[8] Any objections to the Settlements will be addressed in Plaintiffs' response, which is due on October 11, 2017. (ECF No. 1799, ¶ 28.)

19,717,671 potential Class Members, as identified from vehicle information provided by the Settling Defendants and data acquired from IHS Automotive, driven by Polk ("Polk"). (ECF No. 2030-1, ¶ 8.) The Notice Administrator also utilized address updating services (both prior to mailing and on undeliverable pieces) and re-mailing protocols to maximize the number of Class Members reached by Direct-Mail Notices. (*Id.*) In addition, notice was provided via widely circulated weekly publications, including *People*, *Sports Illustrated* and *Parade*, and popular monthly publications, including *Better Homes & Gardens*, *Car and Driver*, *Motor Trend*, and *People en Español*. (*Id.*) Notices also appeared in U.S. Territory newspapers throughout Puerto Rico (notices were published in Spanish in the two newspapers), American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands. Further, prominent internet banner advertisements (on desktop and mobile devices) ran on a variety of websites purchased through the Conversant Ad Network, Yahoo! Ad Network, and Pulpo Spanish Ad Network, and banner advertisements also ran on Facebook and Instagram. (*Id.*) Notice also was provided through 30-second radio spots aired nationwide on AM and FM stations covering a variety of music formats such as Country, Rock n' Roll, Oldies, Top 40, and R&B (including spots in Spanish where appropriate). (*Id.*) Additionally, 30-second ads ran on Pandora online radio alongside traditional banner ads. (*Id.*) Coverage was further enhanced by a neutral Informational Release, Sponsored Search Listings, a Case Website, which has hosted 1,164,169 visits, and a toll-free telephone line, which has handled 132,248 calls representing 825,139 minutes of use. (*Id.*, ¶¶ 8, 59-60.)

Based on the Notice Administrator's estimates, the combined measured individual notice, broadcast media, print publication and online banner notice effort reached in excess of 95% of all U.S. adults aged 18+ who owned or leased one of the Subject Vehicles. (*Id.*, ¶ 9.) On average, each of these people had over four opportunities for exposure to the notice. (*Id.*) The media

notice effort alone reached 84.6% of all U.S. adults aged 18+ who owned or leased one of the Subject Vehicles. (*Id.*) The actual reach and frequency of the Notice Programs are consistent with other court-approved notice programs in settlements of similar magnitude, and met and exceeded due process requirements. (*Id.*)

These far-reaching Notice Programs provide the Court with personal jurisdiction over all members of the Classes, because they have received the requisite notice and due process required by the United States Supreme Court. *See Shutts*, 472 U.S. at 811-12; *see In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998) ("[T]he district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class.").

Moreover, the Court-approved notice provided to Class Members was sufficient to satisfy the requirements of due process because it described "the substantive claims . . . [and] contained information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104-05 (5th Cir. 1977). Each Direct-Mail Notice sent to Class Members, among other things, described the Class, the release, and the amount and proposed distribution of the Settlement proceeds, and informed Class Members of their right to opt-out and object, the procedures for doing so, and the time and place of the Fairness Hearing. (ECF No. 2030-1, ¶¶ 62-65.) Each Notice also notified Class Members that a class judgment would bind them unless they opted out, informed them that Class Counsel would be seeking attorneys' fees of up to 30 percent of the applicable Settlement Amount, and told them where they could obtain more information, such as the Class Website, where copies of the Agreement and Long-Form Notice were available for download. (*Id.* at

Exhibit 2.) Each Long-Form Notice, furthermore, provided detailed information about each Settlement, in a logical question-and-answer format. (*Id.* at Exhibit 3.)

In short, Class Members were provided with the best practicable notice "reasonably calculated, under [the] circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

B. The Settlements are Fair, Reasonable, and Adequate.

"The Court should approve a proposed class action settlement where it is 'fair, adequate and reasonable and is not the product of collusion between the parties.'" *Saccoccio*, 297 F.R.D at 691 (quoting *Bennett*, 737 F.2d at 986)). A settlement is fair, reasonable and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)). Importantly, the Court is "not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial." *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted). Instead, "[i]n considering the settlement, the district court may rely upon the judgment of experienced counsel for the parties." *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). "Absent fraud, collusion, or the like, the district court 'should be hesitant to substitute its own judgment for that of counsel.'" *Id.* (quoting *Cotton*, 559 F.2d at 1330).

Thus, in determining whether a settlement is fair, reasonable, and adequate, the Eleventh Circuit has instructed courts to consider the following six factors: (1) the existence of fraud or collusion among the parties in reaching the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and the substance and amount of opposition to the settlement. *Bennett*, 737 F.2d at 986; *accord Montoya v. PNC Bank, N.A.*, No. 14-cv-20474, 2016 WL 1529902, at *8 (S.D. Fla. Apr. 13, 2016). As explained below, an analysis of these factors shows the Settlements to be fair, reasonable, and adequate.

i. These Settlements are the product of good-faith, informed, and arm's-length negotiations, not collusion.

The Court is well aware of how hard and zealously the Parties litigated for more than two years, prior to reaching the Settlements. Ex. A (Prieto Decl.), ¶ 24. Plaintiffs continue to litigate these cases against other Defendants, and the sharply contested nature of the proceedings in this case readily shows the lack of fraud or collusion behind the Settlements. *See, e.g., In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 n.3 (S.D. Fla. 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (court had "no doubt that this case has been adversarial, featuring a high level of contention between the parties"); *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000) ("[t]his was not a quick settlement, and there is no suggestion of collusion"); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988) (record showed no evidence of collusion, but to the contrary showed "that the parties conducted discovery and negotiated the terms of settlement for an extended period of time"), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

Class Counsel negotiated the Settlements with similar vigor. Ex. A (Prieto Decl.), ¶ 25. Plaintiffs were represented by experienced counsel at these arms-length negotiations. *Id.* These lawyers and law firms are among the most experienced in complex commercial and class action litigation in the country. *Id.* During the extensive, adversarial negotiations for more than a year, the Parties exchanged countless proposals while the litigation continued on a parallel track. These negotiations were conducted in the absence of collusion. *Id.*

ii. The Settlements will avert years of highly complex and expensive litigation.

This case involves millions of Class Members and alleged damages in the billions of dollars. The claims and defenses are complex; litigating them is and has been difficult and time consuming. *Id.*, ¶ 28. The traditional means for handling claims like those at issue here would unduly tax the court system, require a massive expenditure of public and private resources, and ultimately would be impracticable. The Settlements are the best vehicle for Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Ongoing litigation would involve substantial, expensive fact and expert discovery, lengthy additional pretrial proceedings in this Court and the appellate courts and, ultimately, a trial and appeal. Absent the Settlements, litigation against the Settling Defendants would likely continue for two or three more years, at a minimum. *See United States v. Glens Falls Newspapers, Inc.*, 160 F. 3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial"); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 317, 325-26 & n.32 (N.D. Ga. 1993) (noting that "adjudication of the claims of two million claimants could last half a millennium").

In contrast, the Settlements will provide immediate and substantial benefits to millions of consumers. As stated in *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993):

> The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, '[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.'

Id. at 560 (alterations in original) (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). Especially because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (citation omitted), there can be no reasonable doubt as to the adequacy of these Settlements, which provide immediate, tangible, and significant benefits to the Classes.

iii. The factual record is sufficiently developed to enable Plaintiffs and Class Counsel to make a reasoned judgment concerning the Settlements.

Courts also consider "the degree of case development that class counsel have accomplished prior to settlement" to ensure that "counsel had an adequate appreciation of the merits of the case before negotiating." *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995). At the same time, "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler*, 822 F. Supp. at 1555.

Plaintiffs reached the Settlements with the benefit of extensive discovery. Ex. A (Prieto Decl.), ¶ 29. More than 10 million pages of documents have been produced thus far in

discovery, at least 45 depositions of Defendant witnesses have been conducted, and Class Counsel have engaged in extensive discussions and meetings with experts and consultants. *Id.*, ¶ 15. This well-developed discovery positioned Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and prospects for success at class certification, summary judgment and trial. *See Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-Civ, 2008 WL 649124, at *5 (S.D. Fla. Jan. 31, 2008) ("Class Counsel had substantial information to adequately evaluate the merits of the case and weigh the benefits against further litigation."). So too has the process of defending the depositions of over 70 class representatives, which has afforded Class Counsel insights into issues bearing on class certification and damages.

This extensive discovery allowed Class Counsel to thoroughly evaluate the strengths and weaknesses of their claims against the Settling Defendants. *Id.*; Ex. A (Prieto Decl.), ¶ 29. Before settling, Class Counsel had already developed ample information and performed extensive analyses from which "to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988).

iv. Plaintiffs would have faced significant obstacles to obtaining relief.

While Plaintiffs and Class Counsel are quite confident in the strength of their case, they are also pragmatic and fully aware of the various defenses available to the Settling Defendants, and the risks inherent in any litigation. Ex. A (Prieto Decl.), ¶ 30. For example, the Settling Defendants have claimed that they were deceived by Takata as to the safety of its inflators, and Takata recently pleaded guilty to a count of wire fraud based on providing allegedly misleading test results to certain automakers. *Id.* The Settling Defendants have argued that these charges, which portray them as "victims," are a "game changer" and ultimately absolve

them of any liability. *Id.* Making matters worse, Takata then filed for bankruptcy protection calling into question Plaintiffs' ability to recover any substantial sums from that entity. The Settling Defendants have also challenged Plaintiffs' damages theories. *Id.* Based on discovery that has been conducted to date, Plaintiffs believe that they could prevail in a litigated class certification battle. *Id.* Yet the Settling Defendants would assert numerous arguments against certification of all or parts of the Classes, which present risks. Moreover, even if Plaintiffs were successful, the Settling Defendants would inevitably seek interlocutory review of class certification rulings via Rule 23(f) in the Court of Appeals, delaying the progress towards trial, for months, if not years.

Given the myriad risks attending these claims, the Settlements cannot be seen as anything but a fair compromise. *See, e.g., Bennett v. Behring Corp.*, 96 F.R.D. 343, 349-50 (S.D. Fla. 1982) (plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and amount of damage," which made it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial"), *aff'd*, 737 F.2d 982 (11th Cir. 1984); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 248 (S.D. Ohio 1991) (citing the "very real potential that the [c]lass could come away from a long expensive trial with nothing," the court rejected the argument "that the Class should get more").

These Settlements provide substantial relief to Class Members and address an extraordinary national public safety crisis without further delay. The Settlements will speed up the recall and provide various substantial benefits to the Class Members far sooner than a litigated outcome. And some of those benefits are ones which the Settling Defendants could not have been compelled to deliver solely through litigation. Under the circumstances,

Plaintiffs and Class Counsel appropriately determined that the Settlements reached with the Settling Defendants outweighed the risks of continued litigation.

v. The benefits provided by the Settlements are fair, adequate, and reasonable when compared to the range of possible recovery.

In determining whether a settlement is fair in light of the potential range of recovery, this Court should be guided by the "important maxim[]" that "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Indeed, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Id.* This is because a settlement must be evaluated "in light of the attendant risks with litigation." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 64 (S.D.N.Y. 2003); *see Bennett*, 737 F.2d at 986 ("[C]ompromise is the essence of settlement."). Thus, courts regularly find settlements to be fair where "[p]laintiffs have not received the optimal relief." *Warren*, 693 F. Supp. at 1059; *see, e.g., Great Neck Capital Appreciation Investment P'ship, L.P. v. PriceWaterHouseCoopers*, L.L.P., 212 F.R.D. 400, 409-10 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

The Settlements provide substantial value to the Classes, well within the range of reasonableness. The Settlements have a *combined* value of $741,287,307, including the estimated value of the Customer Support Programs, according to a valuation presented in the declaration of a recognized warranty valuation expert, Kirk Kleckner, submitted as an exhibit to this motion. Yet even without the value of the Customer Support Programs, the approximately

$553 million in value of the Settlements represent roughly more than 50% of Plaintiffs' and Class Members' estimated damages recovery under a cognizable method of calculating damages that rests on the prices the Settling Defendants paid for and marked up Takata airbags.[9] Ex. A (Prieto Decl.), ¶ 33. This relatively conservative method of calculating damages has been sustained against a *Daubert* challenge in a similar automotive defect class action. *See In re Myford Touch Consumer Litig.*, No. 13-CV-03072-EMC, 2016 WL 7734558, at *5 (N.D. Cal. Sept. 14, 2016). The additional value of the Customer Support Programs only increases the range of recovery as a percentage of the possible damages that Plaintiffs and Class Members could recover if they were to prevail at trial, cementing a finding that the value of the Settlements is well within the range of reasonableness.

Indeed, by any reasonable measure, this recovery is a significant achievement given the obstacles that Plaintiffs faced and continue to confront in the litigation, including *Daubert* challenges to damage experts' methodologies, class certification, interlocutory Rule 23(f) appeals of class certification, motions for summary judgment, trial, and post-trial appeals. Given the substantial benefits that these Settlements provide to Class Members and the extraordinary public safety crisis that the Settlements address, the Settlements are fair and represent a reasonable and adequate recovery for the Classes in light of the Settling Defendants' defenses, and the challenging and unpredictable path of litigation Plaintiffs would have faced absent a settlement.

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

vi. The opinions of Class Counsel, Class Representatives, and absent Class Members strongly favor approval of the Settlements.

The Court should also give "great weight to the recommendations of counsel for the parties, given their considerable experience in this type of litigation." *Warren*, 693 F. Supp. at 1060; *see also Mashburn*, 684 F. Supp. at 669 ("If plaintiffs' counsel did not believe these factors all pointed substantially in favor of this settlement as presently structured, this Court is certain that they would not have signed their names to the settlement agreement."); *In re Domestic Air Transp.*, 148 F.R.D. at 312-13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel. '[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'") (citations omitted).

Class Counsel believe that these Settlements are extraordinary and deserving of Final Approval. Ex. A (Prieto Decl.), ¶ 36. Moreover, opposition to the Settlements thus far has been de minimis. Although the objection and opt-out deadlines have not expired yet, Class Counsel, to date, have received only 6 objections, and the number of opt-outs received to date is less than 320, representing less than .0017 percent of the Classes. As many courts have noted: "[A] small number of objectors from a plaintiff class of many thousands is strong evidence of a settlement's fairness and reasonableness." *Assn. for Disabled Americans v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002); *accord Mangone*, 206 F.R.D. at 227 ("In evaluating the fairness of a class action settlement, such overwhelming support by class members is strong circumstantial evidence supporting the fairness of the Settlement.").

In sum, all six factors the Eleventh Circuit has identified strongly support a finding that the Settlements are fair, reasonable, and adequate.

II. The Court Should Grant Final Certification Of The Settlement Classes.

For settlement purposes, Plaintiffs respectfully request that the Court certify the Classes defined above and in each of the Agreements. "A class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks omitted). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Class certification is appropriate where: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Certification of a class seeking monetary compensation also requires a showing that "questions of law and fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

In its Preliminary Approval Orders, the Court previously found the requirements of Rule 23(a) and 23(b)(3) to be satisfied for the Classes defined in the Settlement Agreements. (*E.g.*, ECF No. 1799, ¶¶ 3-6.) As the Class definitions have not changed since preliminary approval, there is no reason for the Court to depart from its previous findings that certification of the Classes is warranted.

In particular, as the Court previously recognized (*e.g.*, ECF No. 1799, ¶ 6(a)), the numerosity of Rule 23(a) is easily satisfied here, because each Class consists of millions of

people throughout the United States, and joinder of all such persons is impracticable. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area"). The commonality requirement is satisfied as well, because there are many questions of law and fact common to the Classes that center on the Settling Defendants' conduct in manufacturing and selling vehicles equipped with defective Takata airbags while representing that those vehicles were safe, as alleged in the Second Amended Consolidated Class Action Complaint. *See In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 673-74 (S.D. Fla. 2011) ("[W]here a common scheme of deceptive conduct has been alleged, the commonality requirement should be satisfied.") (internal quotation marks omitted).

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

Plaintiffs also satisfy the adequacy of representation requirement. Adequacy under Rule 23(a)(4) relates to (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this

litigation. *Fabricant*, 202 F.R.D. at 314. The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Emp. Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiffs' interests are coextensive with, and not antagonistic to, the interests of the Classes, because Plaintiffs and absent Class Members have an equally great interest in the relief offered by the Settlements, and absent Class Members have no diverging interests. Further, Plaintiffs are represented by qualified and competent counsel with extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Class Counsel have devoted substantial time and resources to vigorous litigation of the Action from inception through the date of the Settlements.

The predominance requirement of Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks omitted). Plaintiffs satisfy the predominance requirement because liability questions common to all Class Members substantially outweigh any possible issues that are individual to each Class Member. The salient evidence necessary to establish Plaintiffs' claims is common to both the Class Representatives and all members of the Classes – they would all seek to prove that the Settling Defendants' vehicles have common defects and that the Settling Defendants' conduct was wrongful and deceptive. And the evidentiary presentation changes little if there are 100 Class members or 15,000,000: in either instance, Plaintiffs would present the same evidence of the Settling

Defendants' marketing and promised warranties, and the same evidence of the Subject Vehicles' alleged common defect. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) ("[I]f common issues truly predominate over individualized issues in a lawsuit, then 'the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.'") (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 322 (5th Cir. 1978)).

Furthermore, there can be no doubt that resolution of millions of claims in one action is far superior to individual lawsuits. *See* Fed. R. Civ. P. 23(b)(3). "Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1176 (9th Cir. 2010).

For these reasons, the Court should certify the Classes defined in the Settlements.

III. <u>Application For Class Representative Service Awards.</u>

"In instituting litigation, representative plaintiffs act as private attorneys general seeking a remedy for what appeared to be a public wrong." *Saccoccio*, 297 F.R.D. at 695 (internal quotation marks omitted). Service awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). "[T]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action." *David v. American Suzuki Motor Corp.*, No. 08–CV–22278, 2010 WL 1628362, at *6 (S.D. Fla. Apr. 15, 2010). Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g., Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding class

representatives $300,000 each, explaining that "the magnitude of the relief the Class Representatives obtained on behalf of the class warrants a substantial incentive award"); *Spicer v. Chi. Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff).

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. *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

The above factors, as applied to this case, demonstrate the reasonableness of a service award of $5,000 to each Class Representative. Each Class Representative took numerous actions and provided substantial assistance to Class Counsel by, among other things, locating and forwarding responsive documents and information, and engaging in conferences with Class Counsel, with many preparing and sitting for depositions as well. Ex. A (Prieto Decl.), ¶¶ 40-41. In so doing, the Class Representatives were integral to educating Class Counsel and helping Class Counsel form and advance the central theories of this case. *Id.* The Class Representatives not only devoted time and effort to this long-running litigation, but the end result of their efforts, and those of counsel, was a substantial benefit to the Classes. *Id.* It is only fair that these Class Representatives be compensated for their service. *Id.*

If each of the Class Representatives are awarded $5,000, the total service awards will be $115,000. This is less than .02 percent of the collective Settlement Amounts of approximately $553 million, a ratio that is well within the range of reasonable service awards. *See, e.g., Enter. Energy Corp. v. Columbia Gas Transmission*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving

service awards totaling $300,000, or 0.56 percent of the $56.6 million settlement fund). The requested service awards of $5,000 are reasonable and should be approved.

IV. Class Counsel's Fee Application.

As indicated in the Court-approved notice disseminated to the Classes, and consistent with standard class action practice and procedure, Class Counsel respectfully request a fee of 30 percent of the $553,567,307 combined Settlement Amounts, which are the common funds created through Class Counsel's hard work and efforts. As noted earlier, however, the Settlement Amounts understate the actual value of the Settlements, because they do not attribute a specific value to the Customer Support Programs, for which a reliable valuation is now available. *See* Ex. B (Kleckner Decl), ¶ 6. Because the Customer Support Programs, as reflected in the expert opinion presented in Mr. Kleckner's declaration, have been valued at $187,720,000, Class Counsel's fee request really amounts to 22.4 percent of the combined $741,287,307 value of the common funds created through the Settlements.[10] This fee request is well within the guidelines set forth by the Eleventh Circuit in *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), and its progeny. For the reasons set forth below, the requested attorneys' fee award is appropriate, fair, and reasonable, and should be approved.

A. The Law Awards Class Counsel Fees From Common Funds Created By Their Efforts.

When a class settlement establishes a calculable monetary benefit for class members, attorneys' fees should be awarded to class counsel, under the longstanding common benefit doctrine, based on a percentage of the monetary benefit obtained. *Camden I*, 946 F.2d at 771;

[10] The Eleventh Circuit recently affirmed a district court's reliance on the value of a class settlement's enhanced warranty, as estimated by a valuation expert, to award class counsel attorneys' fees, recognizing that the enhanced warranty "is itself a significant tangible benefit." *Carter v. Forjas Taurus, S.A.*, No. 16-15277, 2017 WL 2813844, at *5 (11th Cir. June 29, 2017).

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). Following from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched," the common benefit doctrine "allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing*, 444 U.S. at 478; *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). The Supreme Court, the Eleventh Circuit, and courts in this District, therefore, have all held that "the law is well established that 'a litigant or 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.'" *Cifuentes v. Regions Bank*, No. 11-cv-23455, 2014 WL 1153772, at *7 (S.D. Fla. Mar. 20, 2014) (Moreno, J.) (quoting *Boeing*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval.").

Appropriate awards of attorneys' fees in cases like these encourage redress for wrongs caused to entire classes of persons and discourage future misconduct:

> [C]ourts . . . have acknowledged the economic reality that in order to encourage 'private attorney general' class actions brought to enforce . . . laws on behalf of persons with small individual losses, a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid.

Mashburn v. Nat'l Healthcare, Inc., 684 F. Supp. 679, 687 (M.D. Ala. 1988); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Given the risk, responsibility, and effort required, reasonable compensation is necessary to ensure the availability of counsel for plaintiffs:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear . . . . We as members of the

> judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375-76 (D. Minn. 1985); *see also Gevaerts v. TD Bank*, No. 1:14-CV-20744-RLR, 2015 WL 6751061, at *10 (S.D. Fla. Nov. 5, 2015) (holding that the common benefit doctrine serves the goal of "removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class") (internal quotation marks omitted).

In the Eleventh Circuit, in particular, class counsel fee awards must be based on a percentage of the common fund generated through a class action settlement. In *Camden I*—the controlling authority in the Eleventh Circuit dealing with the issue of attorneys' fees in common-fund class-action cases—the court held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I,* 946 F.2d at 774.

When using the percentage-of-the-fund approach, furthermore, "courts compensate class counsel for their work in extracting non-cash relief from the defendant in a variety of ways. When the non-cash relief can be reliably valued, courts often include the value of this relief in the common fund and award class counsel a percentage of the total fund." *In re: Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319391, at *13 (S.D. Fla. Aug. 5, 2013) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003)); *see Carter v. Forjas Taurus, S.A.*, No. 16-15277, 2017 WL 2813844, at *5 (11th Cir. June 29, 2017) (holding that fee

award was "a reasonable percentage of the settlement value" when considering the value of an "enhanced warranty, which is itself a significant tangible benefit").

In the Eleventh Circuit, the well-established 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 v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011) (affirming fee award above the "25% benchmark"); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) (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")). Our 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, particularly given the circumstances of this litigation. *See Waters*, 190 F.3d at 1294 (approving fee award where the district court determined that the benchmark should be 30 percent and then adjusted the fee award higher based on the circumstances of the case); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1203 (determining that "the 25% 'benchmark' should be considered a floor for a fee award in this case, and that the percentage should be adjusted upward" based on the circumstances of the case).

B. The *Camden I* Factors Support Class Counsel's Requested Fee.

The Eleventh Circuit has identified a set of factors the Court should consider to determine the appropriate percentage to award class-action counsel. These factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to 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 the length of the professional relationship with the client; (12) awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing factors originally set forth in *Johnson v. Ga. Hwy. Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These twelve factors are not exclusive. "Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action." *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1333 (S.D. Fla. 2001) (quoting *Camden I*, 946 F.2d at 775). The Eleventh Circuit also has "encouraged the lower courts to consider additional factors unique to the particular case." *Id.* (quoting *Walco Inv., Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997)). As applied here, the *Camden I* factors, together with other pertinent facts, all support awarding Class Counsel the requested fee.

i. The claims against the Settling Defendants required substantial time and labor.

Prosecuting and settling the claims in the Action demanded immense amounts of time and labor, making this fee request reasonable. Ex. A (Prieto Decl.), ¶ 44. Throughout the pendency of the Action, the internal organization of Class Counsel, including assignments of work, weekly or bi-weekly conference calls, oversight of various tasks and projects, ensured that Class Counsel were continuously engaged in coordinated, productive work to maximize efficiency and minimize duplication of effort. *Id.* With at least thirteen (13) law firms involved in prosecuting the Action, such coordination was particularly important. *Id.* To that end, in-

person meetings of Class Counsel were held at various times, to ensure that Class Counsel were adhering to our litigation strategy and advancing our objectives. *Id.*

Class Counsel spent hundreds of hours investigating the claims of many dozens of potential plaintiffs in this MDL. *Id.*, ¶ 45. Class Counsel interviewed hundreds of consumers and potential plaintiffs to gather information about the Settling Defendants' conduct and its impact upon consumers. *Id.* This information was essential to Class Counsel's ability to understand the nature of the Settling Defendants' conduct and potential remedies. *Id.*

Class Counsel expended significant resources researching and developing the legal claims at issue. *Id.*, ¶ 46. For example, state-by-state legal assessments were necessary to determine which state common law doctrines and consumer protection statutes provided Plaintiffs with viable claims. *Id.* Class counsel also invested significant resources retaining and working with consultants and experts to analyze, among other things, ammonium nitrate and its explosive properties, the functionality and risk of Takata inflators, the Automotive Defendants' validation procedures, and measurement of Plaintiffs' damages. *Id.*, ¶ 15.

Class Counsel faced a particularly demanding hurdle with the filing of the Settling Defendants' voluminous motions to dismiss. *Id.*, ¶ 47. Opposing these potentially dispositive motions required substantial legal research, as well as an enormous briefing effort that ultimately resulted in Plaintiffs' 121-page Omnibus Response. *Id.* Class Counsel also convened in advance of oral argument on the various motions to prepare for the day-long argument held on October 23, 2015. *Id.*

Discovery began almost immediately after the formation of the MDL. *Id.*, ¶ 48. Class Counsel served more than 100 written discovery requests on each of the Defendants, seeking relevant and probative documents and information in their possession. *Id.* The process of

developing, refining and finalizing such discovery requests—with an eye toward class certification, summary judgment, and trial—required considerable effort by Class Counsel. *Id.*

Defendants have produced over ten (10) million pages of documents in response to Plaintiffs' discovery requests, and also served responses to interrogatories. *Id.*, ¶ 49. Defendants also asserted layers of objections to Plaintiffs' discovery requests. *Id.* The parties held countless meet-and-confer discussions to resolve numerous discovery disputes and develop discovery protocols. *Id.* Those disputes that could not be resolved were presented to the Special Master through briefs and oral arguments, which also demanded considerable time and effort. *Id.*

Class Counsel established a large document review team consisting of more than 40 attorneys from thirteen (13) different law firms, to diligently review, sort, and code the mountain of documents Defendants produced. *Id.*, ¶ 50. The document review project was especially complicated and demanding, because many documents were produced in Japanese, requiring time-consuming translation and specialized reviewers, at great expense. *Id.* To make the review and subsequent litigation more efficient, Class Counsel established uniform coding procedures for electronic review of the documents, and team members remained in constant contact with each other to ensure that all counsel became aware of significant emerging evidence in real time. *Id.* Such document review efforts and coordination were essential—and account for a large amount of the attorney time expended in this Action. *Id.*

In addition, Class Counsel expended significant time and effort to prepare responses to the Settling Defendants' interrogatories and requests for production of documents directed to more than 100 Plaintiffs, and to successfully prepare for and defend depositions of Plaintiffs. *Id.*, ¶ 51. More than 70 such depositions have taken place to date. *Id.*

Class Counsel also expended tremendous amounts of time and expense preparing for and taking depositions of Defendants' witnesses across the country. *Id.*, ¶ 52. Class Counsel have deposed at least 45 witnesses of the Defendants to date. *Id.* Teams of attorneys spent weeks preparing for each deposition, a consequence of the sheer volume of documents produced, as well as the breadth of issues and timespan that had to be covered. *Id.* Many of the depositions, furthermore, were conducted in Japanese, requiring additional time and expense for real-time translation. *Id.*

Beginning in early 2016, Class Counsel began preliminary settlement discussions with Toyota's counsel. *Id.*, ¶ 53. Throughout 2016, Class Counsel prepared for and participated in numerous days of negotiations at various locations in an attempt to settle the Action. *Id.* After the Parties executed the MOUs in connection with the Settlements, Class Counsel engaged in protracted discussions over drafting the terms of the Settlement Agreements. *Id.*, ¶ 54.

All told, Class Counsel's steadfast and coordinated work paid great dividends for the Classes. *Id.*, ¶ 55. Each of the above-described efforts was essential to achieving the Settlements currently before the Court. *Id.* Taken together, the time, expertise, effort, and resources Class Counsel devoted to prosecuting and settling the Action of nationwide importance justify the fee Class Counsel are now seeking. *Id.*

ii. The issues involved were novel and difficult and required the exceptional skill of a highly talented group of attorneys.

The Court, we believe, regularly witnessed the high quality of Class Counsel's legal work, which has conferred an exceptional benefit on the Classes in the face of daunting litigation obstacles and highly sophisticated defense counsel. *Id.*, ¶ 56. As the Court is aware, it is a formidable and complicated challenge to successfully prosecute a case like this. *Id.* Moreover, the orderly and effective management of this massive MDL, with claims against seven of the

world's largest automotive companies asserted on behalf of tens of millions of consumers, presented challenges that many law firms and lawyers simply would not be able to meet. *Id.*

Indeed, litigation of a case like this requires counsel highly trained in class action law and procedure as well as the specialized issues these cases present. *Id.*, ¶ 57. All of the lawyers representing Plaintiffs, and in particular those whom this Court appointed to represent Plaintiffs, possess these attributes, and their participation as Class Counsel added significant value to the representation of these unusually large Classes consisting of millions of individuals. *Id.* The record before the Court establishes that the Action involved a wide array of complex and novel challenges, which Class Counsel met at every juncture based on their collective, extensive experience in complex litigation and class action litigation. *Id.* Respectfully, the skill and diligence demonstrated by Class Counsel in this litigation supports the requested fee.

The quality of opposing counsel with whom Class Counsel sparred also bears on an assessment of the quality of representation. *See Walco*, 975 F. Supp. at 1472 (explaining that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"); *see also Camden I*, 946 F.2d at 772 n.3; *Johnson*, 488 F.2d at 718. The Settling Defendants were represented by extremely able, sophisticated, and diligent attorneys, who fought at every turn to protect their clients' interests. These were worthy, highly skilled adversaries.

iii. The claims against the Settling Defendants entailed considerable risk.

These Settlements were far from a foregone conclusion, evidenced by the preceding two-and-a-half years of intense litigation. The Settling Defendants mounted vigorous defenses to Plaintiffs' claims, denying any and all liability in the Actions. Ex. A (Prieto Decl.), ¶ 59. The success achieved under these circumstances thus represents a genuine milestone.

In considering the "undesirability" factor, courts consider, among things, the "expense and time involved in prosecuting [the] litigation on a contingent basis, with no guarantee or high likelihood of recovery." *Waters v. Cook's Pest Control, Inc.*, No. 2:07-CV-00394-LSC, 2012 WL 2923542, at *18 (N.D. Ala. July 17, 2012). "[T]his factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk." *In re Sunbeam*, 176 F. Supp. 2d at 1336. "Undesirability" and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit – not retroactively, with the benefit of hindsight. *Lindy Bros. Builders, Inc. v. Am. Radiator & Std. Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473.

Prosecuting the Action was risky from the outset, with numerous obstacles to overcome. Ex. A (Prieto Decl.), ¶ 60. For example, the Settling Defendants have claimed that they were deceived by Takata as to the safety of its inflators, a defense they claim finds support in Takata's guilty plea to one count of wire fraud based on providing allegedly misleading test results to certain automakers. *Id.*, ¶ 61. The Settling Defendants have argued that these criminal charges, which portray them as "victims" of Takata's deception, were a "game changer" and absolve them of any liability. Takata's recent bankruptcy filing compounded this risk, for if the Settling Defendants prevailed in shifting the blame to Takata, its bankruptcy likely would have prevented the Classes from obtaining anything close to the relief obtained in the Settlements. *Id.*

As another example, the Settling Defendants have challenged Plaintiffs' damages theories. *Id.*, ¶ 62. While Plaintiffs allege that they suffered economic losses at the time of purchase, because a vehicle with a defect is, by definition, worth less than a defect-free vehicle, the Settling Defendants contend that Plaintiffs have not suffered compensable damages because most defective inflators eventually will be replaced through recalls. *Id.*

A third example is the Settling Defendants' foreshadowed opposition to class certification. *Id.*, ¶ 63. Though Plaintiffs believe that they would prevail in a litigated class certification battle, the Settling Defendants would assert, and have already telegraphed, numerous arguments against certification of all or parts of the Classes. *Id.* Moreover, even if Plaintiffs were successful, the Settling Defendants would inevitably seek interlocutory review of class certification rulings in the Court of Appeals, delaying the progress towards trial, for months, if not years. *Id.*

Each of these risks, standing alone, could have impeded Plaintiffs' successful prosecution of these claims at trial (and in any appeal). *Id.*, ¶ 64. Together, they overwhelmingly show that Plaintiffs' claims against the Settling Defendants were far from a "slam dunk" and that, in light of all the circumstances, the Settlements achieved an excellent class-wide result. *Id.*

iv. Class Counsel pursued this Action on a pure contingency basis, and were precluded from other employment as a result.

Class Counsel prosecuted the Action entirely on a contingent fee basis. *Id.*, ¶ 65. Meeting the immense time and expense demands of the case limited the ability of Class Counsel to work on numerous other matters, all without any guarantee that such a substantial investment of time and effort would ever be reimbursed. *Id.*, ¶ 68. This significant risk of nonpayment or underpayment warrants the requested fee.

Numerous cases recognize that contingent-fee risk is an important factor in determining the fee award. "A contingency fee arrangement often justifies an increase in the award of attorney's fees." *In re Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also In re Continental Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately

for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award."); *Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga. 1985), *modified*, 803 F.2d 1135 (11th Cir.); *York v. Ala. State Bd. of Educ.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986).

Public policy concerns—especially ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs whose individual claims would defy vindication—further justifies the requested fee award. As courts in this District have observed:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Behrens, 118 F.R.D. at 548 (emphasis added).

The progress of the Action to date readily demonstrates the inherent risk that Class Counsel faced in prosecuting these cases on a contingency fee basis. Ex. A (Prieto Decl.), ¶ 67. Despite Class Counsel's enormous and ongoing effort in litigating before this Court for almost three years, Class Counsel have not received any reimbursement or compensation for the millions of dollars of time and expenses that have been spent for the benefit of the Classes. *Id.* Uncompensated expenditures of this magnitude can severely damage or even destroy some law firms. It cannot be disputed that the Action entailed substantial risk of nonpayment and resulting financial hardship for Class Counsel's practices. *Id.*

Furthermore, the time Class Counsel spent on the Action was time that could not be spent on other matters. *Id.*, ¶ 68. This factor strongly militates in favor of the requested fee.

v. Class Counsel Achieved an Excellent Result.

The Settlements represent an outstanding result for the Classes. *Id.*, ¶ 69. With a combined value of more than $741 million, the Settlements will achieve the two primary objectives of this litigation: they will accelerate the removal of dangerous, defective Takata airbag inflators from millions of Class Members' vehicles, through innovative, flexible Outreach Programs; and they will compensate Class Members for the economic damages they suffered, in a manner that reinforces the public safety benefits of the Settlements. *Id.* Instead of facing additional years of costly and uncertain litigation, millions of Class Members will receive an immediate benefit. *Id.* The Settlements represent an exceptional achievement by any measure.

vi. The requested fee comports with customary fees awarded in similar cases.

The fee requested here easily matches the fee typically awarded in similar cases, particularly in this District and Circuit. *Id.*, ¶ 70. As countless decisions have recognized, a fee award of 30 percent of a common fund is well within the range of a customary fee or benchmark in this District and Circuit. *See, e.g., In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366; *In re Sunbeam*, 176 F. Supp. 2d at 1333-34. Numerous decisions in this District, alone, have awarded attorneys' fees up to (and in excess of) 30 percent, precedent which confirms the fairness and reasonableness of the fee requested here. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366 (awarding fees of 30 percent of $410 million); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1210 (awarding fees equaling 31¼ percent of settlement of over $1 billion including interest); *In re Managed Care Litig.*, No. 00-md-1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (35.5 percent including costs on settlement of $100 million); *Gutter v. E.I. Dupont De Nemours & Co.*, 95-2152-CIV-Gold (S.D. Fla. May 30, 2003) (33¼ percent on

settlement of $77.5 million); *In re Terazosin Hydrochloride Antitrust Litig.*, 99-1317-MDL-Seitz (S.D. Fla. Apr. 19, 2005) (33¼ percent on settlement of over $30 million).[11]

In fact, an empirical study of class action settlements performed by Professor Brian Fitzpatrick, a distinguished scholar on class actions,[12] found that, in cases within the Eleventh Circuit, the average fee awarded was 28.1 percent and the median fee awarded was 30 percent. Ex. C (Fitzpatrick Decl.), ¶ 18. Half of the fee awards within the Eleventh Circuit, then, were greater than 30 percent. *Id.* Professor Fitzpatrick observes that Class Counsel's fee request is "even more modest than the [study] suggests because the data from [his] empirical study was exclusive of class counsel's expenses," whereas Class Counsel's fee request here is inclusive of Class Counsel's substantial litigation expenses. *Id.* Based on the circumstances of this litigation and his extensive expertise, Professor Fitzpatrick concludes that "the fee awards requested here are reasonable." *Id.*, ¶ 27.

Class Counsel's fee request, moreover, falls at the low end of the average in the private marketplace, where contingency fee arrangements often approach or equal 40 percent of any recovery. *See, e.g., Kirchoff v. Flynn*, 786 F.2d 320, 325 n.5 (7th Cir. 1986) (observing that "40

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[11] *See also In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (34.06 percent of approximately $359 million settlement); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (35.1 percent)); *see also Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) (finding that 33 percent is the norm, but awarding 38 percent of the settlement fund).

[12] Mr. Fitzpatrick is a professor of law at Vanderbilt Law School. After graduating *summa cum laude* from the University of Notre Dame and first in his class at Harvard Law School, he served as a law clerk for Judge Diarmuid O'Scannlain on the Ninth Circuit and Justice Antonin Scalia on the United States Supreme Court. Professor Fitzpatrick has published numerous articles on class actions and attorneys' fees, including: *An Empirical Look at Compensation in Consumer Class Actions*, 11 New York University Journal of Law & Business 767 (2015); *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 Journal of Empirical Legal Studies 811 (2010); *Do Class Action Lawyers Make Too Little?*, 158 University of Pennsylvania Law Review 2043 (2010); and *The End of Objector Blackmail?*, 62 Vanderbilt Law Review 1623 (2009).

percent is the customary fee in tort litigation"); *In re Public Serv. Co. of New Mexico*, 1992 WL 278452, at *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery."); *see also In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."). "In tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring).

Class Counsel's requested fee, equivalent to 30 percent of the applicable Settlement Amounts or 22.4 percent of the total value of the Settlements, including the estimated value of the Customer Support Programs, comports easily with customary fees awarded in similar cases.[13]

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[13] *See also James v. JPMorgan Chase Bank, N.A.*, No. 15-cv-2424-T-23JSS, 2017 WL 2472499, at *2 (M.D. Fla. June 5, 2017) (30 percent); *Warren v. Cook Sales, Inc.*, No. 15-cv-0603, 2017 WL 325829, at *9 (S.D. Ala. Jan. 23, 2017) (30 percent); *Comeens v. HM Operating, Inc.*, No. 14-cv-00521, 2016 WL 4398412, at *4 (N.D. Ala. Aug. 18, 2016) (33⅓ percent); *Diakos v. HSS Sys., LLC*, No. 14-cv-61784, 2016 WL 3702698, at *7 (S.D. Fla. Feb. 5, 2016) (Scola, J.) (33⅓ percent); *Duque v. 130 NE 40th St., LLC*, No. 14-cv-23965, 2016 WL 7442797, at *3 (S.D. Fla. Jan. 27, 2016) (33 percent); *Camp v. City of Pelham*, No. 10-cv-01270, 2015 WL 12746716, at *3 (N.D. Ala. Dec. 16, 2015) (41 percent); *Pierre-Val v. Buccaneers Ltd. P'ship*, No. 14-cv-01182, 2015 WL 12843849, at *2 (M.D. Fla. Dec. 7, 2015) (32 percent); *Gevaerts v. TD Bank*, No. 14-cv-20744-RLR, 2015 WL 6751061, at *14 (S.D. Fla. Nov. 5, 2015) (30 percent); *Vogenberger v. ATC Fitness Cape Coral, LLC*, No. 14-cv-436-FTM-29CM, 2015 WL 1883537, at *4 (M.D. Fla. Apr. 24, 2015) (33 percent); *Amason v. Pantry, Inc.*, No. 09-cv-02117, 2014 WL 12600263, at *3 (N.D. Ala. July 3, 2014) (30 percent); *Cifuentes v. Regions Bank*, No. 11-cv-23455-FAM, 2014 WL 1153772, at *8 (S.D. Fla. Mar. 20, 2014) (Moreno, J.) (30 percent); *In re Friedman's, Inc. Sec. Litig.*, No. 03-cv-3475, 2009 WL 1456698 (N.D. Ga. May 22, 2009) (30 percent); *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-cv-61677-Martinez, 2008 WL 649124 (S.D. Fla. 2008) (30 percent); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (30 percent); *In re Cryolife, Inc. Sec. Litig.*, No. 02-cv-1868-BBM (N.D. Ga. Nov. 9, 2005) (Martin, J.) (30 percent); *In re Profit Recovery Group Int'l, Inc. Sec. Litig.*, No. 1:00-cv-1416-CC (N.D. Ga. May 26, 2005) (33¼ percent plus interest and expenses); *In re Clarus Corp. Sec. Litig.*, No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) (33¼ percent); *Sands Point Partners, LP v. Pediatrix Med. Group, Inc.*, 2002 U.S. Dist. Lexis 25721 (S.D. Fla. 2002) (30 percent).

vii. The remaining *Camden I* factors and additional considerations favor approving Class Counsel's fee request.

The remaining *Camden I* factors likewise support granting Class Counsel's fee request. As noted, the burdens of this litigation have precluded Class Counsel's pursuit of other cases. Ex. A (Prieto Decl.), ¶ 71. The relatively small size of most of the firms representing Plaintiffs, and the major commitment involved in pursuing this representation, prevented Class Counsel firms from working on other matters and accepting other representations. *Id.* In fact, over the past two years, Class Counsel firms have repeatedly turned away work, or refused to become involved in other cases, because of the significant time and effort that this case and MDL demanded. *Id.* In addition, Class Counsel's fee request is firmly rooted in "the economics involved in prosecuting a class action." *See In re Sunbeam*, 176 F. Supp. 2d at 1333. Class Counsel has advanced millions of dollars in out-of-pocket costs and expenses, which the requested fee award will include and cover. Without adequate compensation and financial reward, cases such as this simply could not and would not be pursued.

Finally, unlike most settlements, Class Counsel's work in connection with these Settlements will not end at Final Approval. Ex. A (Prieto Decl.), ¶ 73. These Settlements will last for at least four years and will require substantial involvement of Class Counsel to oversee and adjust the Outreach Programs and Out-of-Pocket Claims Processes. *Id.* The requested fee award will cover this extensive and important work by Class Counsel over the next four years as well. *See Vogenberger v. ATC Fitness Cape Coral, LLC*, No. 14-cv-436, 2015 WL 1883537, at *4 (M.D. Fla. Apr. 24, 2015) (weighing "the time and effort by Plaintiffs' counsel that still will be necessary to effectuate the settlement" as a factor to support 33 percent fee award); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1216 (holding that class counsel's post-approval work "supports the application of a higher fee percentage award").

CONCLUSION

The Settlements, with a combined value of more than $741 million, constitute an outstanding result by any measure. The Settlements easily satisfy the fairness and reasonableness standard embodied in Rule 23(e), as well as the class certification requirements of Rules 23(a) and (b)(3). Class Counsel's request for $5,000 service awards for the Class Representatives comports with well-established precedent as well. Likewise, Class Counsel's fee request is reasonable under the circumstances of this case. The request satisfies the guidelines of *Camden I* given the outstanding result, the considerable risks of litigation, the extremely complicated nature of the factual and legal issues, and the time, effort and skill required to litigate claims of this nature to a satisfactory conclusion.

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

1. Grants final approval to each of the Settlements;

2. Certifies the proposed Classes defined in the Settlements pursuant to Rule 23(b)(3) and (e) for settlement purposes only, appoints as Class Counsel the attorneys and firms identified as Class Counsel in the Preliminary Approval Orders, and appoints as Class Representatives the individuals identified as Class Representatives in the Preliminary Approval Orders;

3. Approves $5,000 service awards to the appointed Class Representatives;

4. Awards Class Counsel attorneys' fees from each Settlement equivalent to 30 percent of the applicable Settlement Amount; and

5. Enters Final Judgment dismissing the Action with respect to the Settling Defendants with prejudice, in accordance with the proposed Final Orders and Final Judgments submitted as exhibits hereto.

Dated: September 8, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 8, 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.

By: */s/ Peter Prieto*
Peter Prieto