UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

MDL No. 2599
Master File No. 15-02599-MD-MORENO
14-24009-CV-MORENO

IN RE:

TAKATA AIRBAG PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATES TO ALL ECONOMIC LOSS ACTIONS AGAINST SUBARU DEFENDANTS

FINAL ORDER APPROVING CLASS SETTLEMENT AND CERTIFYING SETTLEMENT CLASS

THIS CAUSE came before the Court upon 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 Attorney's Fees **(D.E. 2033)**, filed on **September 8, 2017**.

THE COURT has considered the motion, the supporting memoranda, objections, and responses to objections, and other pertinent portions of the record, including the Settlement Agreement between Class Representatives and the Subaru Defendants **(D.E. 1724-3)**, and the Order Preliminarily Approving Class Settlement and Certifying Settlement Class **(D.E. 1798)**. Having held a Fairness Hearing on October 25, 2017, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED as follows:

1. This Final Order Approving Class Settlement incorporates the Settlement Agreement and its exhibits, and the Preliminary Approval Order. Unless otherwise provided, the

terms defined in the Settlement Agreement and Preliminary Approval Order shall have the same meanings for purposes of this Final Order and the accompanying Final Judgment.

2. The Court has personal jurisdiction over all parties in the Action including all Class Members, and has subject matter jurisdiction over the Action, including jurisdiction to approve the Settlement Agreement, grant final certification of the Class, settle and release all claims released in the Settlement Agreement, and dismiss with prejudice the economic loss claims asserted against Subaru in the Action and enter final judgment with respect to Subaru in the Action. Further, venue is proper in this Court.

I. THE SETTLEMENT CLASS

3. Based on the record before the Court, including all submissions in support of the settlement, objections and responses, and all prior proceedings in the Action, as well as the Settlement Agreement and its related documents and exhibits, the Court confirms the certification of the following nationwide Class for settlement purposes only:

> (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) Subaru, its officers, directors, employees and outside counsel; its affiliates and affiliates' officers, directors and employees; its distributors and distributors' officers, directors and employees; and Subaru'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.

4. The Court finds that only those persons/entities/organizations listed in Appendix B to this Final Order have timely and properly excluded themselves from the Class and, therefore, are not bound by this Final Order or the accompanying Final Judgment.

5. The Court confirms, for settlement purposes and conditioned upon the occurrence of the Effective Date, that the Class meets all the applicable requirements of Federal Rule of Civil Procedure 23(a) and (b)(3):

a. *Numerosity*. The Class, which is ascertainable, consists of more than 2.6 million members located throughout the United States and satisfies the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1). Joinder of these widely dispersed, numerous Class Members into one suit would be impracticable.

b. *Commonality*. There are some questions of law or fact common to the Class with regard to the alleged activities of Subaru in this case. These issues are sufficient to establish commonality under Federal Rule of Civil Procedure 23(a)(2).

c. *Typicality*. The claims of class representatives are typical of the claims of the Class Members they seek to represent for purposes of settlement.

d. *Adequate Representation*. Plaintiffs' interests do not conflict with those of absent members of the Class, and Plaintiffs' interests are co-extensive with those of absent Class Members. Additionally, the Court recognizes the experience of Settlement Class Counsel. Plaintiffs and their counsel have prosecuted this action vigorously on behalf of the Class. The Court finds that the requirement of adequate representation of the Class has been fully met under Federal Rule of Civil Procedure 23(a)(4).

e. *Predominance of Common Issues*. The questions of law or fact common to the Class Members predominate over any questions affecting any individual Class Member.

f. *Superiority of the Class Action Mechanism.* The class action mechanism provides a superior procedural vehicle for resolution of this matter compared to other available alternatives. Class certification promotes efficiency and uniformity of judgment because the many Class Members will not be forced to separately pursue claims or execute settlements in various courts around the country.

6. The designated class representatives are as follows: Michael Walker, Regina Reilly, and Dennis Carr. The Court finds that these Class Members have adequately represented the Class for purposes of entering into and implementing the Settlement Agreement. The Court appoints Peter Prieto of Podhurst Orseck, P.A. as Lead Settlement Class Counsel, and David Boies of Boies, Schiller & Flexner, L.L.P.; Todd A. Smith of Power, Rogers and Smith, L.L.P.; Roland Tellis of Baron & Budd, P.C.; James E. Cecchi of Carella, Byrne, Cecchi, Olstein, Brody, & Agnello, PC; and Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein, LLP as Settlement Class Counsel.

7. In making all of the foregoing findings, the Court has exercised its discretion in certifying the Class.

II. NOTICE AND OUTREACH TO CLASS MEMBERS, AND QUALIFIED SETTLEMENT FUND

8. Based on the record, the Court finds that the Class Notice has been given to the Class in the manner approved in the Preliminary Approval Order. The Class Notice: (i) is reasonable and constitutes the best practicable notice to Class Members under the circumstances; (ii) constitutes notice that was reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action and the terms of the Settlement Agreement, their right to exclude themselves from the Class or to object to all or any part of the Settlement Agreement, their right to appear at the Fairness Hearing (either on their own or through counsel hired at their

own expense), and the binding effect of the orders and Final Order and Final Judgment in the Action, whether favorable or unfavorable, on all persons and entities who or which do not exclude themselves from the Class; (iii) constitutes due, adequate, and sufficient notice to all persons or entities entitled to receive notice; and (iv) fully satisfied the requirements of the United States Constitution (including the Due Process Clause), Federal Rule of Civil Procedure 23 and any other applicable law as well as complying with the Federal Judicial Center's illustrative class action notices.

9. The Court further finds that Subaru, through the Settlement Notice Administrator, provided notice of the settlement to the appropriate state and federal government officials pursuant to 28 U.S.C. § 1715. The Court has given the appropriate state and federal government officials the requisite 90-day period to comment or object to the Settlement Agreement before entering its Final Order and Final Judgment.

10. The Parties' Settlement includes an Outreach Program by which a Settlement Special Administrator will take additional actions to notify vehicle owners about the Takata Airbag Inflator Recalls and to promptly remedy those issues. This Outreach Program includes: (a) direct contact of Class Members via U.S. mail, landline and cellular telephone calls, social media, email 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 internet. Because this recall effort affects the health and safety of consumers, the Court finds that it is in the public interest and the federal government's interest to begin this Outreach Program as soon as practicable, if not already begun, and that calls and texts made under the Outreach Program are being made for emergency purposes as that phrase is used in 47 U.S.C. § 227(b)(1)(A). Direct consumer contact through the Outreach Program is undertaken to convey important public

safety information to consumers. The Settlement Special Administrator and those working on his behalf shall serve as agents of the federal government for these purposes and shall be entitled to any rights or privileges afforded to government agents or contractors in carrying out their duties in this regard.

11. The Court finds that the Escrow Account is to be a "qualified settlement fund" as defined in Section 1.468B-1(c) of the Treasury Regulations in that it satisfies each of the following requirements:

(a) The Escrow Account is to be established pursuant to this Court's order, and is subject to the continuing jurisdiction of this Court;

(b) The Escrow Account is to be established to resolve or satisfy one or more claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liabilities; and

(c) The assets of the Escrow Account are to be segregated from other assets of Defendants, the transferor of the payment to the Settlement Fund, and controlled by an Escrow Agreement.

12. Under the "relation back" rule provided under Section 1.468B-1(j)(2)(i) of the Treasury Regulations, the Court finds that Subaru may elect to treat the Escrow Account as coming into existence as a "qualified settlement fund" on the latter of the date the Escrow Account meets the requirements of Paragraphs 11(b) and 11(c) of this Order or January 1 of the calendar year in which all of the requirements of Paragraph 11 of this Order are met. If such a relation-back election is made, the assets held by the Settlement Fund on such date shall be treated as having been transferred to the Escrow Account on that date.

III. FINAL APPROVAL OF SETTLEMENT AGREEMENT

13. The Court finds that the Settlement Agreement resulted from extensive arm's-length, good-faith negotiations between Settlement Class Counsel and Subaru, through experienced counsel.

14. Pursuant to Federal Rule of Civil Procedure 23(e), the Court approves the Settlement as set forth in the Settlement Agreement, and finds that the Settlement is fair, reasonable, and adequate, and in the best interest of the Class and is in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Class Action Fairness Act, and any other applicable law. The Court declares that the Settlement Agreement is binding on all Class Members, except those identified on Appendix B, and it is to be preclusive in the Action. The decisions of the Settlement Special Administrator relating to the review, processing, determination and payment of Claims submitted pursuant to the Settlement Agreement are final and not appealable.

15. The Court finds that the Settlement Agreement is fair, reasonable and adequate based on the following factors: (a) there is no fraud or collusion underlying the Settlement Agreement; (b) the complexity, expense, uncertainty, and likely duration of litigation in the Action favor settlement on behalf of the Class; and (c) the Settlement Agreement provides meaningful benefits to the Class.

16. The Parties are directed to implement and consummate the Settlement according to the terms and provisions of the Settlement Agreement. In addition, the Parties are authorized to agree to and adopt such amendments and modifications to the Settlement Agreement as: (i) shall be consistent in all material respects with this Final Order, and (ii) do not limit the rights of the Class.

17. The Court has considered all objections, timely and proper or otherwise, to the Settlement Agreement, and denies and overrules them as without merit.

IV. SETTLEMENT CLASS COUNSEL'S FEE APPLICATION AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES

18. Class Counsel has applied for a service award in the amount of $5,000 for each Class Representative. Here, the Class Representatives clearly devoted considerable time and resources to this Action. Specifically, the Class Representatives maintained regular contact with Class Counsel, responded to written discovery requests, and many appeared for depositions. Thus, the Court approves the application of Service Awards of $5,000 for each Class Representative, to be paid from the common fund. Accordingly, Class Counsel's application for Service Awards of $5,000 for each named Class Representatives is **GRANTED**.

19. Class Counsel has filed an application for attorneys' fees equal to 30 percent of the $68,262,257 common fund created through their efforts in prosecuting and settling this Action, totaling **$20,478,677**.

20. As recognized by the United States Supreme Court, 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The law is equally well-established in the Eleventh Circuit that "[a]ttorneys' 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 Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991).

21. Per *Camden I*, the nonexclusive list of factors the Court should consider in determining the reasonableness of the attorneys' fees are as follows:

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

Id. at 772 n.3.

22. In support of their request for attorneys' fees equal to 30 percent of the common fund, Class Counsel has presented the Declaration of Professor Brian Fitzpatrick, a leading scholar on class actions, and the Declaration of Peter Prieto, Esq., the Court-appointed Chair Lead Counsel in this litigation. Both Declarations analyze each of the factors set forth in *Camden I*, and conclude that every applicable factor supports the reasonableness of the instant fee request. This Court agrees. The Court independently has analyzed the *Camden I* factors against the unique facts of this case and concludes that every applicable factor supports the reasonableness of the instant fee request.

23. Further, two additional factors support the reasonableness of the requested fee. First, as highlighted in the Declarations, the requested fee actually amounts to less than 30 percent of value of the common fund created through the settlement, due to the value of the Customer Support Program made available to all Class Members.[1] *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

[1] In Plaintiffs' motion for final approval, and at the Fairness Hearing, Class Counsel asserted that although the four Settlement Amounts at issue (BMW, Mazda, Subaru, and Toyota) total $553,567,307, the value of the combined settlements increases to $741,287,307 when accounting for the value of the Customer Support Programs associated with the settlements. Thus, attorneys suggest that the fee request really amounts to 22.4 percent of the combined settlement value. The Court makes no finding on the value of the settlements. Indeed, the value of the settlements may not be as large as the attorneys suggest. However, an attorneys' fee request totaling 30 percent of the Settlement Amount is reasonable.

"enhanced warranty, which is itself a significant tangible benefit"). Second, in addition to the time and labor already devoted to this case, Class Counsel will be required to expend considerable time and effort over the four-year lifespan of the settlement by overseeing and adjusting the Outreach Program and Out-of-Pocket Claims Process for the benefit of Class Members. *See Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1216 (S.D. Fla. 2006) (holding that class counsel's post-approval work "supports the application of a higher fee percentage award").

24. Accordingly, the Court approves the application for attorneys' fees of 30 percent of the $68,262,257 Settlement Amount, to be paid from the common fund.

V. DISMISSAL OF CLAIMS; RELEASE

25. All economic loss claims asserted against Subaru in the Action are dismissed with prejudice on the merits and without costs to any party, except as otherwise provided in this Order or in the Settlement Agreement.

26. Upon entry of this Final Order and the Final Judgment, Class Representatives and each Class Member (except those listed on Appendix B), on behalf of themselves and any other legal or natural persons and entities who or which may claim by, through, or under them, release their claims as outlined in the Settlement Agreement.

27. If a Class Member who does not opt out commences, files, initiates, or institutes any new legal action or other proceeding against a Released Party for any claim released in this Settlement in any federal or state court, arbitral tribunal, or administrative or other forum, such legal action or proceeding shall be dismissed with prejudice at that Class Member's cost.

28. The Court orders that the Settlement Agreement shall be the exclusive remedy for all claims released in the Settlement Agreement for all Class Members not listed on Appendix B.

29. Therefore, except for those listed on Appendix B, all class representatives, Class Members and their representatives are permanently barred and enjoined from, either directly, through their representatives, or in any other capacity instituting, commencing, filing, maintaining, continuing or prosecuting against any of the Released Parties any action or proceeding in any court or tribunal asserting any of the matters, claims, or causes of action described. In addition, all class representatives, Class Members, and all persons and entities in active concert or participation with Class Members are permanently barred and enjoined from organizing Class Members who have not been excluded from the Class into a separate class for purposes of pursuing, as a purported class action, any lawsuit against the Released Parties based on or relating to the claims and causes of action in the Complaint in the Action, or the facts and circumstances relating thereto or the release in the Settlement Agreement. Pursuant to 28 U.S.C. §§ 1651(a) and 2283, the Court finds that issuance of this permanent injunction is necessary and appropriate in aid of its continuing jurisdiction and authority over the settlement as set forth in the Settlement Agreement, and the Action.

30. Class Members are not precluded from addressing, contacting, dealing with, or complying with requests or inquiries from any governmental authorities relating to the issues raised in this class action settlement.

VI. OTHER PROVISIONS

31. Without affecting the finality of this Final Order or the accompanying Final Judgment, the Court retains continuing and exclusive jurisdiction over the Action and all matters relating to the administration, consummation, enforcement, and interpretation of the Settlement Agreement and of this Final Order and the accompanying Final Judgment, to protect and effectuate this Final Order and the accompanying Final Judgment, and for any other necessary

purpose. The Parties, Class Representatives, and each Class Member not listed on Appendix B are deemed to have irrevocably submitted to the exclusive jurisdiction of this Court, for the purpose of any suit, action, proceeding or dispute arising out of or relating to the Settlement Agreement or the applicability of the Settlement Agreement, including the exhibits, and only for such purposes.

32. If the Effective Date does not occur, certification of the Class shall be automatically vacated and this Final Order and the accompanying Final Judgment, and other orders entered in connection with the Settlement Agreement and releases delivered in connection with the Settlement Agreement, shall be vacated and rendered null and void as provided by the Settlement Agreement.

33. Without further order of the Court, the Parties may agree to reasonably necessary extensions of time to carry out any of the provisions of the Settlement Agreement. Likewise, the Parties may, without further order of the Court, agree to and adopt amendments to the Settlement Agreement (including exhibits) as are consistent with this Final Order and the accompanying Final Judgment and do not limit the rights of Class Members under the Settlement Agreement.

34. Nothing in this Final Order or the accompanying Final Judgment shall preclude any action in this Court to enforce the terms of the Settlement Agreement.

35. Neither this Final Order nor the accompanying Final Judgment (nor any document related to the Settlement Agreement) is or shall be construed as an admission by the Parties. Neither the Settlement Agreement (or its exhibits), this Final Order, the accompanying Final Judgment, or any document related to the Settlement Agreement shall be offered in any proceeding as evidence against any of the Parties of any fact or legal claim; provided, however, that Subaru and the Released Parties may file any and all such documents in support of any

defense that the Settlement Agreement, this Final Order, the accompanying Final Judgment, and any other related document is binding on and shall have res judicata, collateral estoppel, and/or preclusive effect in any pending or future lawsuit by any person or entity who is subject to the release asserting a released claim against any of the Released Parties.

36. A copy of this Final Order shall be filed in, and applies to, each economic loss member action in this multidistrict litigation. Filed concurrently is the Court's Final Judgment. Attached as Appendix A is a list of the Subject Vehicles (identified by make, model, and year) to which these Orders and the Court's Final Judgment apply. Also attached as Appendix B is a list of persons, entities, and organizations who have excluded themselves from (or "opted out" of) the Class.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st of October 2017.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record