

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSHUA RIAUBIA, individually and on behalf of all others similarly situated,	:	
	:	CASE NO.: 2:16-cv-05150-CDJ
	:	
Plaintiff,	:	
v.	:	
	:	
HYUNDAI MOTOR AMERICA,	:	
	:	
Defendant.	:	
	:	
	:	
	:	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND
SERVICE AWARD**

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Class Representative, Joshua Riaubia (“Plaintiff”), by his counsel, Shepherd, Finkelman, Miller & Shah, LLP; Axler Goldich, LLC, and Robert P. Cocco, P.C. (“Class Counsel”), respectfully submits this Memorandum of Law in Support of Plaintiff’s Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Award.¹

I. INTRODUCTION

After years of litigation, Class Counsel achieved an extremely favorable Settlement (defined in Section II.D below) for the benefit of the Settlement Class, which includes:

All persons or entities in the fifty United States and the District of Columbia who currently own or lease, or previously owned or leased, a model year 2015 to 2017 U.S. specification Hyundai Sonata vehicle equipped with the Smart Trunk feature.² (“Settlement Class” or “Class” or “Class Members”)

This excellent result was achieved after nearly two years of zealous advocacy by Class Counsel, and several months of hard-fought negotiation, including two full-day mediation sessions with David Geronemus (the “Mediator”), a well-respected neutral with JAMS in New York. Class Counsel obtained favorable results on the initial Motion to Dismiss filed by Defendant, Hyundai Motor America (“HMA” or “Defendant”) (together with Plaintiff, the “Parties”), and engaged in discovery to uncover important evidence supporting the Settlement Class’s claims. As a result of these efforts, Class Counsel achieved an excellent result for the

¹ Plaintiff will also file his Memorandum in Support of Final Approval of the Settlement on November 19, 2019, as set forth in the Consent Order Regarding the Implementation Schedule of Class Action Settlement. (ECF 50.)

² Excluded from the Settlement Class are: Defendant, as well as Defendant’s affiliates, employees, officers, and directors, attorneys, agents, insurers, and dealers; third-party providers of extended warranty/service contracts; independent repair/service facilities; the attorneys representing Defendant in this case; the judges and mediator to whom this case is assigned and their immediate family members; all persons and entities who request exclusion from (opt-out of) the Settlement who previously released any and all claims encompassed in this Settlement, or whose Vehicle was permanently transported outside the United States after sale; and all persons or entities claiming personal injury or property damage other than to a Class Vehicle or claiming subrogation of such claims.

Settlement Class.³ On August 7, 2019, this Court entered a Preliminary Approval Order finding that the terms of the Settlement are sufficiently fair, reasonable and adequate to allow dissemination of notice. (ECF 47; 48, ¶¶ 1, 5.)

As compensation for their efforts, Class Counsel seek an award of attorneys' fees, costs and expenses of \$828,876.00 and a service award of \$5,000 for the Class Representative in recognition of the significant efforts he has undertaken to assist Class Counsel and the Settlement Class.

The requested fee is eminently fair and reasonable, because it will compensate Class Counsel for the heavy investment of time, resources, and lost opportunity to work on other matters; because the fee is not paid out of funds that would otherwise have been available to the Class; because of the risks presented by this case, the quality and amount of work performed, and the stakes presented; and because the requested award is in line with other awards in this District and Circuit, which employs the lodestar method to determine attorneys' fee awards to class counsel in similar class action settlements. Moreover, the requested fee and expense award is consistent with Class Counsel's lodestar in this Action and is reasonable and consistent with fee awards in the Third Circuit.

The requested fee and expense amount were disclosed in the Court-approved Notice, which was sent directly to Class Members and published on the Settlement website⁴, beginning in October 2019. The Notice and website inform Class Members that Class Counsel will apply for an award of attorneys' fees, cost and expenses not to exceed \$828,876.00. (ECF 42-3

³ The Settlement details are set forth in detail in Plaintiff's Unopposed Motion for Preliminary Approval of the Class Settlement (ECF 42-1), the Declaration of Natalie Finkelman Bennett in support thereof (ECF 42-2) and Exhibit 1 thereto (ECF 42-3) (Settlement Agreement).

⁴ <https://www.sonatasmarttrunksettlement.com>

(Settlement Agreement) at Exhibit 1.) The Notice and website also inform the Class that Plaintiff will seek a service award in the amount of \$5,000. (*Id.*)

II. FACTUAL AND PROCEDURAL BACKGROUND

For several years, Class Counsel have zealously pursued the litigation on behalf of the Settlement Class. Class Counsel's litigation efforts are detailed in the Declaration of James C. Shah submitted herewith ("Shah Declaration" or the "Decl.") and are briefly described below.

A. Nature of the Case

Plaintiff's claims center on the allegations that the Smart Trunk on the 2015 to 2017 Sonata vehicles ("Vehicle(s)" or "Class Vehicle(s)") were defective. The Smart Trunk, first made available on model year 2015 Vehicles, is a proximity-activated trunk lid that, due to the alleged common defect, fails to operate as advertised. HMA designed the Smart Trunk to automatically open by standing directly behind the Vehicle with a proximity key in one's hand, pocket, or purse. (Decl., ¶ 14.) Plaintiff alleges that the representations made by HMA's nationwide marketing campaign were inaccurate and misleading because the Vehicles share a common defect in that the Smart Trunk merely unlatches, failing to open more than a crack, which requires consumers to manually push open the trunk lid, thereby failing to provide the "hands-free" convenience the Smart Trunk is advertised to deliver. (*Id.*)

The Vehicles come with a five-year, 60,000-mile New Vehicle Limited Warranty, which covers the Smart Trunk defect at issue here, but Plaintiff alleges that HMA has failed to provide him and Class Members with conforming, non-defective Smart Trunks, notwithstanding attempts at repair. (*Id.* ¶ 15.)

The Complaint asserts that the alleged defect cost owners and lessees for repairs and that they did not get the non-defective Vehicle for which they paid. (*Id.* ¶ 16.) The Complaint states

claims for violations of California consumer protection statutes, violations of the federal Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, and breach of express and implied warranties. (*Id.* ¶ 13.)

B. Class Counsel Performed High-Quality Work for the Benefit of the Settlement Class

Plaintiff commenced this action on September 28, 2016. (ECF 1.) Prior to initiating the action, Class Counsel spent considerable time investigating the issues, including the Vehicle's Smart Truck failures and repair issues, with Plaintiff and a number of other potential Class Members, as well as investigating the scope of the problems with the Vehicles. No other firms or entities brought actions asserting similar claims. In addition, Class Counsel researched the various laws potentially applicable to the claims, including California and Pennsylvania law. (Decl., ¶¶ 11, 17-18.)

Defendant filed an extensive Motion to Dismiss on December 23, 2016. (ECF 10). Plaintiff filed a response in February 2017 and HMA filed a reply shortly thereafter. (ECF 17, 20.) In January 2017, the Parties met and conferred and discussed a Proposed Joint Discovery Plan. (Decl., ¶ 20.) On February 20, 2017, Plaintiff served HMA with his Initial Disclosures and, on March 20, 2017, HMA served its Initial Disclosures on Plaintiff. (*Id.*) The Parties negotiated the terms of a protocol for the inspection of Plaintiff's Vehicle, a Protective Order and an ESI Protocol. On April 21, 2017, Plaintiff propounded discovery requests on HMA, which were responded to on June 20, 2017. On May 16, 2017, Plaintiff filed a Report of the Parties' Rule 26(f) Conference and on August 22, 2017, this Court entered its Opinion and Order denying, in full, Defendant's Motion to Dismiss. *Riaubia v. Hyundai Motor Am.*, No. CV 16-5150, 2017 WL 3602520 (E.D. Pa. Aug. 22, 2017) (ECF 22). HMA then propounded discovery requests on Plaintiff and filed its Answer on October 6, 2017. (ECF 29). On October 12, 2017,

this Court entered an Order scheduling a Rule 16 Conference for November 13, 2017. (Decl., ¶¶ 21-25.)

Plaintiff's Counsel reviewed more than 20,000 pages of documents produced by HMA, including: engineering testing, engineering data and Vehicle and component specifications; warranty complaints and repairs; information as to the difference between the Sonata Smart Trunk components and the components in Hyundai's other models; and Quality Information Reports regarding the Smart Trunk. In addition, Plaintiff's Vehicle was inspected by Defendant and Plaintiff's expert reviewed HMA's materials and inspected Plaintiff's Vehicle. (Decl., ¶¶ 22, 27-28.)

C. History of Settlement Negotiations

Following the denial of Defendant's Motion to Dismiss in August 2017, the Parties commenced a dialogue to determine whether a framework could be developed to resolve the matter. Ultimately, the Parties agreed to seek a short stay of discovery and used that time to engage in mediation, using the services of the Mediator in New York City, NY. HMA had provided Plaintiff with confidential information including, *inter alia*, specifics regarding its sales of the Vehicles, various service bulletins dealing with the Smart Trunk issue, root cause testing, and warranty repair information. The Parties participated in two full-day in-person mediation sessions with the Mediator on January 8, 2018 and May 15, 2018. In connection with these mediation sessions, the Parties prepared and submitted detailed mediation briefs to the Mediator, setting forth their respective views on the strengths of their cases, and discussed their relative views of the law, facts, and potential relief for the proposed Class. In between the in-person mediation sessions, the Parties exchanged additional information⁵ and engaged in telephonic

⁵ Class Counsel analyzed information from engineers at HMA's parent company, Hyundai Motor Company, as well as additional information about countermeasures and failure rates, which is

negotiations with the Mediator. Ultimately, the Parties' prolonged efforts resulted in the Settlement. (Decl., ¶¶ 26-31.)

The Settlement was achieved only after (a) extensive analysis of the legal issues and issuance of the Court's Opinion on the Motion to Dismiss, the provision of information and warranty data that allowed Class Counsel to adequately evaluate the possibility of settlement; (b) and the production and analysis of thousands of pages of documents and information. In addition, Class Counsel had been conferring with an automotive engineering expert during the course of the litigation. Thus, the Settlement was reached after considerable investigation and careful consideration and discussions. As is evident from the procedural history, the negotiations, which ultimately resulted in the Settlement being presented to the Court, were adversarial, non-collusive, and conducted at arm's-length.

D. The Settlement

As set forth in the Preliminary Approval filings and as will be fully discussed in Plaintiff's brief in Support of Final Approval of the Settlement (which will be filed on November 19, 2019), the Settlement follows the exchange of substantial information, and is the product of extensive, arm's-length negotiations involving experienced counsel over the course of many months. (Decl., ¶¶ 4-31.) The proposed Settlement Agreement resolves all claims against HMA on behalf of the Settlement Class. In short, without Class Counsel's persistence, hard work, and investment of resources, Class Members would have continued to have the same problems with the Subject Vehicles and continued to incur costs and drive the Vehicle without the use of the feature for which they paid. As a result of Class Counsel's work, however, Settlement Class

reflected in Hyundai Technical Service Bulletin Number 19-BD-222, Trunk Lid Torsion Bar Inspection and Repair.

Members will enjoy the benefit of real and immediate compensation, including the opportunity, without submitting a claim, for a free inspection and installation of a new torsion bar and extended warranty benefits, as well as reimbursement of costs for Smart Trunk repairs, all of which are specifically directed at the defect at issue.

The Agreement outlines separate areas of relief to the Class Members. First, all Class Members who have a documented complaint, repair, or warranty claim pertaining to the Smart Trunk not opening to expectation, prior to the Class Notice, may submit one claim for payment of \$50 cash in the form of a debit card or a \$100 HMA dealer credit, regardless of whether the Class Member has any out-of-pocket loss. (Decl., ¶ 9a.)

Next, all Class Members who believe that the Smart Trunk is not opening 7.5 inches or more may take the eligible Vehicle to an authorized HMA dealer for an inspection. If the inspection shows that the Smart Trunk opens less than 7.5 inches, replacement of the torsion bars will be performed by the authorized dealer, with all costs associated with the inspection and repair provided to the Class member free of charge. (*Id.*, ¶ 9b.) After the installation of the replacement torsion bars, the Class Member is also entitled to submit one claim for payment of a \$70 HMA dealer credit. (*Id.*)

The Settlement Agreement also provides additional relief to Class Members whose torsion bars *still* fail to open 7.5 inches or more *after* replacement torsion bars have been installed. After the second installation of replacement torsion bars, the Class Member may submit one additional claim for a \$100 debit card or a \$200 HMA dealer credit. The inspection and any necessary repair or replacement of the Smart Trunk torsion bars is available for Class Vehicles within six and one-half years of the Vehicle entering service or less than 78,000 miles, whichever comes first. (*Id.*)

In addition to providing compensation for documented complaints and a service campaign, the Settlement also provides that all Class Vehicle(s) under warranty will receive a warranty extension for the Smart Trunk torsion bars from five years or 60,000 miles to six and one-half years or 78,000 miles. Class Vehicles that are outside the warranty as of the date of the Final Approval Order will receive a warranty extension specific to the Smart Trunk Torsion Bars for a period of 18 months or 18,000 miles. Significantly, the warranty is transferrable in connection with any transfer of ownership of a Class Vehicle. (Decl., ¶ 9c.)

Further, in addition to the warranty extension as to the Smart Trunk torsion bars, compensation for documented complaints and service campaign, any Class Member who has incurred a documented out-of-pocket expense for repair of the Smart Trunk will be entitled to submit one claim for reimbursement of those repair expenses. Further, HMA will act in good faith and ensure that its advertising conforms to the design expectations for the Smart Trunk feature and no longer depicts the trunks fully opening. (*Id.*, ¶¶ 9d-9e.) Finally, the Settlement contains a dispute resolution process if any Class Member wishes to contest the reimbursement decision, and Class Members will have the right to participate in a Better Business Bureau alternative dispute resolution process, for which all fees and expenses (other than attorneys' fees) will be borne by HMA. (*Id.*, ¶ 9f.)

Throughout the negotiations, Class Counsel worked to ensure an appropriate Class Notice. As a result of Class Counsel's endeavors, they were able to achieve agreement that the Notice would be in the form of direct mail notice to each Class Member. The Notice was disseminated by the Consumer Affairs Division of HMA, which also serves as the Settlement Administrator. Pursuant to the terms of the Settlement, HMA will bear all costs of Notice and

administration of the Settlement. The Settlement website contains electronic versions of the Claim Form that can be (but is not required to be) submitted online, as well as important Court documents and answers to frequently asked questions. Class Counsel also prepared and presented to the Court the Motion for Preliminary Approval and have spoken with, and continue to speak with, Settlement Class Members to answer their questions and assist them with their claim submissions. (Decl. ¶¶ 37-38.)

E. Class Counsel's Fee Request

Subject to Court approval, Class Counsel seek an award of attorneys' fees, costs and expenses of up to \$828,870.00. Also subject to Court approval, Class Counsel will seek a service award of \$5,000 for the Class Representative. (Decl., ¶ 58.) Class Counsel's request is reasonable based on the benefits achieved for the Class and applicable legal principles. As with the Settlement itself, the Parties negotiated the fee amount under the auspices and with the assistance of the Mediator and the fee amount was negotiated only after all other terms of the Settlement were agreed upon.

III. CLASS COUNSEL'S FEE AND EXPENSE REQUEST SHOULD BE APPROVED

It is well-settled that plaintiffs' attorneys in a class action lawsuit may petition the court for compensation for any benefits to the class that result from the attorneys' efforts. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). Rule 23 expressly states that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the Parties' agreement." Fed. R. Civ. P. 23(h). Here, Defendant does not oppose the fee request which will be paid, pursuant to the Settlement, by Defendant without diminishing or eroding the recovery that has otherwise been obtained for the Class. (Decl., ¶ 41.) Thus, the only question for the Court is whether the requested fee amount is reasonable.

When considering an award of fees in a class case, courts should reward success. *See, e.g., In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001); *In re Elec. Carbon Prod. AntiTrust Litig.*, 447 F. Supp. 2d 389, 405 (D.N.J. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). “[W]hat is important is that the district court evaluate what class counsel actually did and how it benefitted the class.” *AT&T*, 455 F.3d at 165-66. *See also Hensley v Eckerhart*, 461 U.S. 424, 436 (1983) (the “most critical factor is the degree of success obtained”); *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (“[t]he most significant factor in this case is the quality of representation, as measured by ‘the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel’”). Moreover, federal courts at all levels encourage litigants to resolve fee issues by agreement whenever possible. As the United States Supreme Court explains, “[a] request for attorney’s fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.” *Hensley*, 461 U.S. at 437.

Here, attorneys’ fees were not negotiated or discussed until after agreement was reached between the Parties on all other terms of the Settlement. (Decl., ¶ 43.) The amount of attorneys’ fees was negotiated by sophisticated counsel familiar with complex and class action litigation and was negotiated through a neutral mediator and under the best of market conditions – an arm’s-length negotiation – a process which the courts have encouraged. *Matter of Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys’ fees).

Because the fee arrangement in this case was negotiated by experienced counsel at arm's-length and with the assistance of an experienced mediator, judicial approval of the Parties' fee agreement is warranted. *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 429 (E.D. Pa. 2001) (citing *Grier v. Chase Manhattan Auto. Fin. Co.*, No. Civ. A. 99-180, 2000 WL 175126, at *5 (E.D. Pa. Feb. 16, 2000)); *Alderfer v. Clemens Markets, Inc. Ret. Sav. & Profit Sharing Plan 003*, No. CIV.A. 10-4423, 2012 WL 12292160, at *6 (E.D. Pa. Apr. 19, 2012) ("The Court believes that the proposed settlement was the result of arm's-length negotiation and therefore gives considerable weight to the views of experienced counsel regarding the merits of the settlement."); *Bellum v. Law Offices of Frederic I. Weinberg & Assocs., P.C.*, No. CV 15-2460, 2016 WL 4766079, at *6 (E.D. Pa. Sept. 13, 2016) (quoting *Hall v. AT&T Mobility LLC*, 2010 WL 4053547, at *7 (D.N.J. 2010)) ("[T]he participation of an independent mediator in settlement negotiations virtually insures [sic] that the negotiations were conducted at arm's length and without collusion between the parties."); *In re Apple Computer, Inc. Deriv. Litig.*, No. 06-4128, 2008 WL 4820784, at *3 (N.D. Cal. Nov. 5, 2008) ("A court should refrain from substituting its own value for a properly bargained-for agreement.").

"There are two primary methods for calculating attorneys' fees" awards in the class action context: (1) the percentage-of-recovery method; and (2) the lodestar method. *Dungee v. Davison Design & Dev. Inc.*, 674 F. App'x 153, 156 (3d Cir. 2017) (quoting *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001)). The lodestar method is appropriate in cases "where the nature of the settlement does not allow the court to determine the value of the settlement, or where there is a fee-shifting provision." *Id.* (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998)). The percentage-of-recovery method is typically used in cases involving a common fund. *Prudential*, 148 F.3d at

333. Because there is no established common fund from which a percentage can be taken here, and because the ultimate value of the settlement depends on the number of claims made by class members and the number of inspections and repairs (with the accompanying dealer credits), which do not require the filing of a claim form and could be performed months after the Effective Date of the Settlement, the lodestar method is more appropriate in this case. The Court may also conduct an optional “cross-check,” whereby it examines the factors of the percentage-of-the-fund method to confirm that the amount of fees is reasonable. *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 260 (E.D. Pa. 2011). The fee award requested here is fair and reasonable under both methods and should therefore be approved.

A. The Requested Fee Award is Reasonable Under the Lodestar Method

To calculate the lodestar amount, counsel’s reasonable hours expended on the litigation are multiplied by counsel’s reasonable rates. *See Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986). “The lodestar method has two separate components, both of which must be ‘reasonable’: (1) the rate charged; and (2) the total hours spent.” *Reibstein* at 259 (citing *Ursic v. Bethlehem Mines*, 719 F.2d 670, 676 (3d Cir. 183)). “A court determines a reasonable hourly rate by assessing the experience and skill of the prevailing party’s attorneys and by looking at the market rates in the relevant community for lawyers of reasonably comparable skill, experience and reputation.” *Perry v. FleetBoston Finan. Corp.*, 229 F.R.D. 105, 119 (E.D. Pa. 2005). This approach “need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.” *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, No. CV 09-MD-2034, 2019 WL 4645331, at *21 (E.D. Pa. Sept. 24, 2019) (quoting *In re*

Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305-07 (3d Cir. 2005)); *Henderson v. Volvo Cars of N. Am., LLC*, No. CIV.A. 09-4146 CCC, 2013 WL 1192479, at *15 (D.N.J. Mar. 22, 2013).

As detailed in the accompanying Shah Declaration, Class Counsel have spent 1,405.4 hours on this case for a total lodestar of \$806,263.00. (Decl., ¶¶ 56-57 and Exhibits 1-4.) This lodestar amount does *not* include time Class Counsel will spend in the future speaking to Class Members and answering questions about the Notice and Class Members rights under the Settlement, time spent preparing for and attending the Final Approval Hearing, the time for preparing the briefing in connection with final approval, and additional time working with the Settlement Class and Settlement Administrator, activities which will necessarily result in substantial additional lodestar. (*Id.*, ¶ 48.)

Additionally, the hourly rates vary appropriately between attorneys and paralegals, depending on position, experience level, and locale of the particular attorney. (*See* Decl., ¶ 49 and Exhibits 1, 3-4.) The rates for each individual attorney and paralegal are set forth in the Shah Declaration and in the charts and exhibits to the declarations. The rates are based on a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided and the experience of the lawyer. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000). Similar rates have been found to be reasonable in this district. *See In re Viropharma Inc., Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *18 (E.D. Pa. Jan. 25, 2016) (“The hourly billing rates of all of Plaintiff’s Counsel range from \$610 to \$925 for partners, \$475 to \$750 for of counsels, and \$350 to \$700 for other attorneys.”); *Moore v. GMAC Mortg.*, No. 07-4296, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) (finding reasonable rates between \$325 and \$860 per hour); *In re Avandia Mktg., Sales Practices and Products Liability Litig.*, No. 07-1871, 2012 WL 6923367, at *10 (E.D. Pa. 2012) (concluding a top hourly

rate of \$595 was “particularly reasonable in comparison” to the hourly rates of top Philadelphia firms); *I.W. v. Sch. Dist. of Philadelphia*, No. CV 14- 3141, 2016 WL 147148, at *5 (E.D. Pa. Jan. 13, 2016) (approving rates ranging from \$285 to \$600 per hour for attorneys).

Further support for the request is based on the fact that since Defendant will pay Class Counsel’s fees from its own resources, the fee award will not impact the benefits afforded to the Class Members. (Decl., at ¶¶ 42-43.) These negotiations took place following agreement on the material terms of the Settlement, and under the direction of the Mediator. (*Id.*) Courts in this District and Circuit have approved agreed-upon attorneys’ fees awards paid by a defendant, especially where that amount is independent of the benefit obtained for the class.⁶ *See generally Good v. Nationwide Credit, Inc.*, 314 F.R.D. 141, 161–62 (E.D. Pa. 2016) (“Even if the Court were to approve less than the \$125,000 negotiated amount, the class would not gain a greater recovery; rather, Defendant would simply keep the money. Under these circumstances, the Court concludes that the proposed attorneys’ fees do not offend what is an otherwise fair settlement.”); *Ebner v. Merchants & Med. Credit Corp.*, No. CV 14-06882, 2017 WL 1079966, at *6 (E.D. Pa. Mar. 22, 2017) (same); *see also In re LG/Zenith Rear Projection Television Class Action Litig.*, No. 06–5609(JLL), 2009 WL 455513, at *8–9 (D.N.J. Feb.18, 2009) (approving agreed-upon attorneys’ fee award that did not diminish the settlement fund); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 WL 1652303, at *4 (D.N.J. June 5, 2007), *aff’d*, 579 F.3d 241 (3d Cir. 2009) (same); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 106 F.Supp.2d 721, 732 (D.N.J. 2000) (finding it significant that attorneys’ fees would not diminish settlement fund).

⁶If money paid to the attorneys is entirely independent of money awarded to the class, some courts also have noted that their fiduciary role in overseeing the award is reduced, because there is no potential conflict of interest between attorneys and class members. *Rossi v. Proctor & Gamble Co.*, No. CIV.A. 11-7238 JLL, 2013 WL 5523098, at *9 (D.N.J. Oct. 3, 2013); *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006).

As discussed previously, the Settlement provides a monetary benefit to the Class, in the form of reimbursement for costs of any repairs, cash payment or larger dealer credit for documented complaints by Class Members, even if no out-of-pocket costs were incurred, free inspection and repair with an accompanying dealer credit, and a warranty extension on the part at issue. Here, Class Counsel handled the litigation entirely on a contingent basis, with no guarantee of recovery, and are seeking an aggregate award that includes attorneys' fee and expenses. Class Counsel expended a total of 1,405.40 hours working on the case through October 18, 2019, for a total lodestar of \$806,263.00. (Decl. ¶¶ 41, 56, 57.) Class Counsel analyzed documents and legal and factual theories, performed legal research and factual investigation, engaged in motion practice and discovery, participated in multiple mediation sessions, and took part in negotiations and drafting of settlement documents. (*Id.* at ¶¶ 7-8, 10-38.) By taking the case on a contingent basis, Class Counsel bore the risk of an unsuccessful outcome. Finally, Class Counsel is highly experienced in this area and its rates have been approved by state and local courts in Pennsylvania. (*Id.* at ¶¶ 49-51, 55.) For these reasons, the Court should find the fees and expenses requested to be reasonable.

In addition, as set forth below, the total expenses incurred by Class Counsel are \$30,186.55. (Decl., ¶ 57) When the award is reduced by the amount of the expenses, the amount allocated to the fee award is actually \$7,573.55 less than Class Counsel's lodestar. (*Id.*) Defendant agreed not to oppose the requested fee, which will be paid by HMA without diminishing or eroding the recovery that has otherwise been obtained for the Class. The requested fee is appropriate in light of the time, effort, and risk incurred, and the results achieved by Class Counsel, and it falls well within the range of class counsel fees approved in comparable cases.

As set forth in the accompanying Declarations, when looking at the total requested attorney fee and expense award (\$828,876.00), the calculation of the requested fee award divided by the total hours worked by Class Counsel plus the expenses (\$836,449.55) yields a slight negative multiplier.⁷ Because this is well within the range of multipliers that have routinely been accepted by the Third Circuit, Class Counsel submits that the fee requested is reasonable.

B. The *Gunter* Factors Support the Reasonableness of the Requested Fee and Expense Award

The lodestar method is the appropriate method of calculation in this case, but courts within the Third Circuit can decide to perform a “cross check” to confirm that the amount of fees calculated with the loadstar method is reasonable. *Fulton-Green v. Accolade, Inc.*, No. CV 18-274, 2019 WL 4677954, at *12 (E.D. Pa. Sept. 24, 2019). In performing a cross check, courts apply the *Gunter* factors to determine if the fee produced is reasonable. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000). “Among other things, these factors include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs’ counsel; and (7) the awards in similar cases.” *Id.* A court may also consider:

(1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations, (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained, and (3) any “innovative” terms of settlement.

⁷ The requested fee award divided by Class Counsel’s lodestar without the expenses yields a slight positive multiplier of .02%. Because the total award requested does include expenses, however, it is reasonable to view the two together.

In re AT & T Corp., 455 F.3d 160, 165 (3d Cir. 2006). Because the facts of each case are different, the factors “need not be applied in a formulaic way” and some factors may be afforded greater weight than others. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005), as amended (Feb. 25, 2005); *Gunter*, 223 F.3d at 195, n. 1. A review of these factors confirms the fee here is reasonable.

1. The Size Of The Fund And Number Of Persons Benefitted Supports The Requested Award

The first *Gunter* factor, the size of the fund created and the number of persons benefitted, plainly weighs in favor of approving the requested fee award. The Manual for Complex Litigation provides that “[g]enerally, the factor given the greatest emphasis [in awarding a percentage of the recovery] is the size of the [recovery] created, because [the recovery] ‘is itself the measure of success ... [and] represents the benchmark from which a reasonable fee will be awarded.’” Manual for Complex Litigation § 14.121 (4th ed. 2004) (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 14:6, at 547, 550 (4th ed. 2002)). As discussed above, while there is no fund, the Settlement benefits are substantial and will benefit all Class Members who purchased Subject Vehicles. Class Members who have a documented complaint, repair, or warranty claim pertaining to the Smart Trunk not opening to expectation, prior to the Class Notice, may submit one claim for payment of \$50 cash in the form of a debit card or a \$100 HMA dealer credit, regardless of whether the Class Member has any out-of-pocket loss. The Settlement also provides for inspection and the installation of a new Smart Trunk torsion bar pursuant to a TSB that was created as a result of the litigation, to remedy the issue at no cost to the Class Members, along with warranty extensions and additional dealer credits, where applicable. (Decl., ¶ 9.) Class Counsel negotiated a Settlement for the Class, which provides a certain, present return for the Class. Given the inherent litigation risks in this

putative nationwide class action, the benefit is highly significant and provides tangible benefits without the risks and delays of continued litigation.

2. The Reaction Of The Class To The Settlement

The second *Gunter* factor analysis is the presence or absence of objections by members of the Settlement Class to the terms of the Settlement. Although the deadline for objecting is not until November 4, 2019, to date, the reaction of the Class has been favorable and, as of this filing, no Class Member has objected to, or opted out of, the Settlement.

3. The Skill And Efficiency Of The Attorneys Involved Weighs In Favor Of The Requested Award

The third *Gunter* factor – the skill and efficiency of the attorneys involved – also weighs in favor of the requested fees and expenses. Class Counsel’s success in bringing this litigation to a successful conclusion is perhaps the best indicator of the experience and ability of the attorneys involved. *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) (“the single clearest factor reflecting the quality of the class counsels’ services to the class are the results obtained”). As noted above, Class Counsel developed a case alleging breach of warranty and deceptive trade practices, along with violations of California consumer protection statutes against Defendant. Class Counsel prevailed on the Motion to Dismiss for each of the claims. Employing their experience and skill, Class Counsel aggressively and swiftly worked to resolve this case in an efficient manner. After obtaining extensive information in discovery and confirmatory discovery, Class Counsel were able to utilize their pre-existing and specialized knowledge of the legal and factual issues involved with automotive defects. Class Counsel were therefore able to efficiently assess the risks associated with this case and the potential damages at issue. The quality of the work which has been presented to the Court, the undersigned believe,

speaks for itself. The substantial risk inherent in further litigation emphasizes the conclusion that the results obtained by Class Counsel are very beneficial for the Class.

The fact that a case settles as opposed to proceeding to trial “in and of itself, is never a factor that the district court should rely upon to reduce a fee award. To utilize such a factor would penalize efficient counsel, encourage costly litigation, and potentially discourage able lawyers from taking such cases.” *Gunter*, 223 F.3d at 198. Further, in achieving the Settlement before the Court, Class Counsel invested significant time and worked for over two years to achieve this Settlement.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Class Counsel. *See, e.g., Ikon*, 194 F.R.D. at 194; *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) (“The quality of opposing counsel is also important in evaluating the quality of plaintiffs’ counsels’ work.”); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 941, 970 (E.D. Tex. 2000). Defense counsel in this case are from a highly-respected national law firm, Buchanan Ingersoll & Rooney PC. Furthermore, defense counsel has a national reputation for successfully defending automotive defect cases. Class Counsel’s ability to obtain such a favorable result for the Class in the face of a formidable opponent further confirms the high quality of Class Counsel’s representation. Accordingly, Class Counsel respectfully submit that the third *Gunter* factor, the skill and efficiency of the attorneys involved, strongly supports their application.

4. Without This Settlement, The Class Would Encounter Time-Consuming, Lengthy Litigation

As a complex automobile defect class action on behalf of Class Members from numerous states, the case did entail, and, absent Settlement, would continue to entail, hard-fought and lengthy litigation. Additional class and merits discovery, as well as additional non-party

discovery would be sought, requiring time-consuming review and analysis. The case also would require continued extensive expert analysis and likely would shape up to be a battle of the experts, and thus, expert expenses would continue to grow. As a putative class action, complex legal and factual issues would be the subject of additional pretrial motions, including a motion for class certification. Defendant would likely challenge all facets of the Rule 23 analysis, including advancing its argument that there was no defect. The class certification decision would likely lead to a Rule 23(f) interlocutory appeal with the potential to significantly delay prosecution of the case in the event a stay pending appeal was granted. Given the very real prospect of protracted litigation, leading to the enormous expenditure of both time and money, this factor weighs in favor of Plaintiff's and Class Counsel's application.

5. Class Counsel Undertook The Risk Of Non-Payment

Class Counsel undertook this action on an entirely contingent fee basis, assuming a substantial risk that the litigation would yield no, or very little, recovery and leave them uncompensated for their time, as well as for their out-of-pocket expenses. (Decl., ¶ 45.) Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. "Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed, and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution." *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 WL 202394, at *6 (E.D. La. May 18, 1994).

Throughout the litigation, Defendant has maintained that there are no defects and no breach of any warranties. If this action had proceeded, this would have been a hotly contested

issue. Defendant also asserted numerous legal defenses to Plaintiff's claims. Moreover, Defendant would have certainly opposed certification of a class for litigation purposes in this case. These risks are highly relevant to the requested award because Class Counsel handled the case on a contingent fee basis, without any guarantee that they would be compensated for their extensive time investment or reimbursed for their expenses. It is only because Class Counsel agreed to accept these risks that they were able to represent Plaintiff and achieve a favorable substantial Class Settlement in this case. Accordingly, this factor also weighs in favor of the requested award.

6. Class Counsel Devoted Significant Time To This Case

The sixth *Gunter* factor also supports the requested award, as Class Counsel have invested significant time and effort prosecuting this action. Specifically, since its inception, Class Counsel have expended 1,405 hours and incurred \$806,263.00 in attorneys' fees and \$30,186.55 in out-of-pocket expenses on this litigation. (*See Decl.*, ¶ 57 and attached Class Counsel declarations.) This includes, *inter alia*: the time spent in the initial investigation of the case; researching complex issues of law; preparing and filing the Complaint; meeting and conferring with Defendant's counsel at the start of the case pursuant to Rule 26(f), and assisting in preparing a Rule 26(f) Report to the Court; negotiating and entering into a protective order and confidentiality order relating to the use of confidential documents and information produced by Defendant in this case; negotiating and entering into an inspection protocol for Plaintiff's vehicle and being present at that inspection; reviewing more than 20,000 pages of documents, as well as warranty information; briefing on the Motion to Dismiss; working with experts to analyze the underlying claims; preparing a lengthy mediation statement and follow-up statements; attending two full-day, in-person mediation sessions with the Mediator and follow-up calls; hard-fought

Settlement negotiations; confirmatory discovery; negotiating the details of the comprehensive Settlement Agreement; preparing the exhibits to the Settlement Agreement (including the Notice Claim Form and proposed Preliminary Approval Order); preparing a motion for preliminary approval of the Settlement; communicating with defense counsel and the Settlement Administrator to ensure a smooth Notice process following the Court's Preliminary Approval Order; reviewing the language and content of the Settlement website; responding to Class Members who contacted Class Counsel directly or who were forwarded to Class Counsel by the Settlement Administrator; communicating with the named Plaintiff throughout the litigation; and preparing the present motion. (Decl., ¶¶ 7-8, 10-45.) In addition, Class Counsel will devote further time and effort to preparing the briefing and appearing at the Final Approval Hearing, responding to ongoing inquiries from Class Members going forward, and monitoring the distribution of Settlement payments by the Settlement Administrator. These combined efforts amply support the requested award in this case and demonstrate that the fees which will be paid to Class Counsel under the Settlement have been well-earned. In sum, the *Gunter* factors plainly weigh in favor of granting Class Counsel's application for attorneys' fees.⁸

⁸ In addition to the *Gunter* factors discussed above, courts in the Third Circuit may also consider the factors articulated in *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 340 (3d Cir. 1998). These factors are (1) whether the benefits accruing to the class are attributable to the efforts of class counsel or other groups, such as government agencies; (2) whether the fee is comparable to the fee that would have been negotiated had the case been subject to a contingent fee agreement; and (3) whether the settlement agreement contains innovative terms and conditions. 148 F.3d at 337-40. These factors further support the requested award in this case. With respect to the first *Prudential* factor, the results obtained are solely the result of Class Counsel's efforts. Further, as to the second factor, the requested award is in line with a typical contingent fee arrangement. Finally, the third *Prudential* factor also supports the requested award, as the Settlement in this case provides excellent and unique relief, including several options to obtain cash or a higher amount of dealer credit, reimbursement for repairs paid for, and an extended warranty for all owners and lessees of the Vehicles.

C. Class Counsel Should Be Reimbursed for Their Reasonably Incurred Litigation Expenses

Litigation expenses are properly recovered if they are adequately documented and reasonable in nature. *In re Safety Components, Inc. Securities Litig.*, 166 F.Supp.2d 108 (D.N.J. 2001) (“Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action.”) (citing *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)). Courts have generally approved expenses arising from photocopying, use of the telephone and fax, postage, witness and deposition fees, and hiring of consultants. *Abrams*, 50 F.3d at 1225; *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 151 (E.D. Pa. 2000). Here, Class Counsel incurred total expenses in the amount of \$30,186.55. The vast majority of these expenses are for Plaintiff’s expert’s fees and costs relating to mediation. Class Counsel also incurred costs for expenses associated with court costs, travel, photocopying, telephone and conference call costs, postage and legal research. (*See* Decl., ¶¶ 53-55, and Exhibits 2-5.) These expenses were necessary to achieving the Settlement and were reasonable and appropriately incurred and should be awarded. *See, e.g., In re AT&T Corp., Sec. Litig.*, 455 F.3d 160, 172 n.8 (3d Cir. 2006) (“[e]xpenses are generally considered and reimbursed separately from attorneys’ fees”); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 263 (D. Del. 2002) (approving costs and expense reimbursements out of litigation fund as reasonable). Therefore, Class Counsel’s application for attorneys’ fees and expenses in the sum of \$828,876.00 should be granted.

IV. THE SERVICE AWARD SHOULD BE APPROVED

Service awards for class representatives promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. The efforts of the Class Representative were instrumental in achieving the Settlement on behalf of the Class and

justify the awards requested here. The Class Representative came forward to prosecute this litigation for the benefit of the Class as a whole. He sought successfully to remedy a widespread wrong and has conferred valuable benefits upon the fellow Class Members. The Class Representative provided a valuable service to the Class by: (a) providing information and input in connection with the drafting of the Complaint; (b) maintaining his subject Vehicle and making it available for inspection; (c) searching for and producing documents; (d) overseeing the prosecution of the litigation; (e) consulting with Class Counsel; and (f) offering advice and direction at critical junctures, including the Settlement of the litigation.

Thus, the requested service award of \$5,000 in recognition of Plaintiff's services to the Class is reasonable and should be approved. This award is warranted under the circumstances, and well in line with awards approved by federal courts in Pennsylvania and elsewhere. *See, e.g., In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, No. CV 09-MD-2034, 2019 WL 4645331 (E.D. Pa. Sept. 24, 2019); *In re Residential Doors Antitrust Litig.*, Civ. A. Nos. 94-3744, 96-2125, MDL 1039, 1998 WL 151804, at *9 (E.D. Pa. Apr. 2, 1998) (approving awards of \$10,000 each to four class representatives); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004) (approving awards of \$25,000 for each of five class representatives); and *Mayer v. Driver Solutions, Inc.*, Civ. A. No. 10-1939, 2012 WL 3578856, at *5 (E.D. Pa. Aug. 17, 2012) (approving \$15,000 service award for class representative); *Bernhard v. TD Bank, N.A.*, 2009 WL 3233541, at *2 (D.N.J. 2009) (“[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation.”) (quoting *Cullen*, 197 F.R.D. at 145); *McGee v Continental Tire North America*, 2009 WL 539893 at *18 (E.D. Pa. Mar. 4, 2009)(quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400

(D.D.C. 2002)) (“Incentive awards are ‘not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class.’”).

V. CONCLUSION

For all the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court approve the requested attorneys’ fees and reimbursement of expenses and the service award to Plaintiff.

DATED: November 4, 2019

Respectfully submitted,
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