UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERESA STRINGER, KAREN BROOKS, WILLIAM PAPANIA, JAYNE NEWTON, MENACHEM LANDA, ANDREA ELIASON, BRANDON LANE, DEBBIE O'CONNOR, MICHELLE WILLIAMS and WAYNE BALNICKI, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. NISSAN OF NORTH AMERICA, INC. and NISSAN MOTOR CO., LTD. Defendants.	Case No. 3:21-cv-00099 **CLASS ACTION** Judge William L. Campbell Courtroom A826 Magistrate Judge Barbara D. Holmes Courtroom 764 **JURY TRIAL DEMANDED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARDS

I. INTRODUCTION

Co-Lead Class Counsel and Executive Committee Counsel ("Counsel") obtained an outstanding result for Class Members in this case. The Settlement[1] extends substantial benefits to over 3.6 million current and former Class Vehicle owners and lessees, including an extended warranty and reimbursement program, vouchers for certain current and former class vehicle owners and an expedited resolution program should Class Members experience transmission problems in the future. The warranty extension and reimbursement program alone are valued at over $350 million. Declaration of Lee Bowron ("Bowron Decl.") ¶ 4.[2]

Plaintiffs seek an award of attorneys' fees and expenses in the total amount of $6,250,000 and a $5,000 service award for each Class Representative. This amount was separately negotiated after the material terms of the Settlement and will be paid separately by Defendant Nissan North America, Inc. ("Nissan") without any impact on the recovery of the Class. The requested fee is very modest relative to the Settlement benefits, representing just 1.76% of the value of the extended warranty and reimbursement benefits alone. As explained in greater detail in the Declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl."),[3] the nation's foremost expert on attorneys' fees in class action settlements, Counsels' requested fee percentage is "well within the range of reasonable fees." Fitzpatrick Decl. ¶ 14. In fact, it is on the very low end of requested fee percentages and is well in line with past precedent. Applying a lodestar crosscheck, the requested fee represents a 2.96 multiplier which is also consistent with cases of this size. *Id*.

[1] The definitions in the parties' Settlement Agreement (Dkt. No. 67-1) ("SA") are incorporated herein by reference. All capitalized terms shall have the same meaning ascribed to them in the Settlement Agreement unless otherwise indicated.
[2] The Bowron Decl. is filed contemporaneously herewith.
[3] The Fitzpatrick Decl. is filed contemporaneously herewith.

Likewise, a service award of $5,000 to each Class Representative is reasonable given the efforts they undertook to represent absent Class Members. Such service awards are routinely granted in this District and should be awarded here.

II. FACTUAL BACKGROUND

The complex procedural history of this matter, the extensive investigation and analysis of Counsel, Settlement negotiations, and the Notice Program, are detailed in the Declaration of J. Gerard Stranch, IV in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement Agreement and Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Service Awards ("Stranch Decl.").[4] The Stranch Declaration also details Counsels' time and expenses with supporting Declarations from all Counsel attached thereto.

III. COUNSEL ARE ENTITLED TO ATTORNEYS' FEES BASED UPON A PERCENTAGE OF THE RECOVERY

A. A Percentage of the Recovery Method is the Preferred Method for Evaluating Counsels' Fee Request

When "'awarding attorneys' fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved.'" *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (citation omitted). Generally, two methods are used to determine the amount of fees to award in class actions: the percentage of recovery method and the lodestar method. *Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 515-17 (6th Cir. 1993). "District courts have the discretion to select the particular method of calculation but must articulate the 'reasons for adopting a particular methodology and the factors to be considered in arriving at the fee.'" *Gascho*, 822 F.3d at 280 (citation omitted); *see also Harrison v. Bloomfield Bldg. Indus., Inc.*, 435 F.2d 1192, 1196 (6th Cir. 1970); *Hobson*, 801

[4] The Stranch Decl. is filed contemporaneously herewith.

S.W.2d at 812-13 ("lawful allowance of attorney fees by a trial court is a matter of discretion"); *Wheeler v. Burley*, No. 01A01-9701-CV-00006, 1997 WL 528801, at *5 (Tenn. Ct. App. Aug. 27, 1997).

When a settlement creates a quantifiable common benefit, courts, including those in the Sixth Circuit, have developed a strong preference for using the percentage of benefit method. Fitzpatrick Decl. ¶¶ 9-11. Advantages of the percentage method are that it "is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation." *Rawlings*, 9 F.3d at 516-17.

In *In re Cardinal Health Inc. Securities Litigations*, the court explained that under the percentage approach, "[n]ot only is the Court spared from the costly task of scrutinizing counsel's billable hours, but attorneys are discouraged from padding hours and encouraged to work more efficiently. Furthermore, because the attorneys receive a higher fee if they obtain a higher settlement the interests of the class and the attorneys are aligned." 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007). *See also Connectivity Sys. Inc. v. Nat'l City Bank*, No. 2:08-cv-1119, 2011 WL 292008, at *13 (S.D. Ohio Jan. 26, 2011) (the percentage method "most closely approximates how lawyers are paid in the private market and incentivizes lawyers to maximize class recovery, but in an efficient manner"); *Kimber Baldwin Designs, LLC v. Silv Commc'ns, Inc.*, No. 1:16-cv-448, 2017 WL 5247538, at *5 (S.D. Ohio Nov. 13, 2017) ("the preferred method is 'to award a reasonable percentage of the fund, with reference to the lodestar and the resulting multiplier.'") (citation omitted).

B. The Percentage of Recovery Method is Based Upon the Value of the Benefit Conferred

Courts in the Sixth Circuit have the power to award reasonable attorneys' fees and expenses

where, as here, a litigant proceeding in a representative capacity secures a "substantial benefit" for a class or others whether or not the settlement results in the establishment of a traditional cash common fund. *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1194-96 (6th Cir. 1974); *Manners v. Am. Gen. Life Ins. Co.*, No. 3-98-0266, 1999 WL 33581944, at *28 (M.D. Tenn. Aug. 10, 1999) (Judge Nixon); *In re Unumprovident Corp. Derivative Litig*., No. 1:02-cv-386, 2010 WL 289179, at *4 (E.D. Tenn. Jan. 20, 2010) (awarding attorneys' fees based on settlement value whether called "a common fund or the value of the benefit rendered"); *see also Johnston v. Comerica Mortg. Corp*., 83 F.3d 241, 244, 247 (8th Cir. 1996) (explaining substantial benefit doctrine). A settlement that creates a quantifiable benefit creates a form of common fund appropriate for application of the percentage of recovery method. Fitzpatrick Decl. ¶ 8.

In *Ramey*, the Sixth Circuit affirmed an award of attorneys' fees to be paid by defendants because "where a plaintiff has successfully maintained a suit … that benefits a group of others in the same manner as himself " the court has the power to award attorneys' fees. 508 F.2d at 1195 (quoting *Mills v. Elec. Auto-Lite Co*., 396 U.S. 375 (1970)). Plaintiffs were entitled to attorneys' fees "even though no fund ha[d] been brought into court and even though it may be impossible to assign an exact monetary value to the benefit [the litigation] conferred upon the corporation." *Ramey*, 508 F. 2d at 1194.

Similarly, in *Manners*, the court awarded attorneys' fees based on the value of the benefit the settlement provided to the class. In *Manners*, like here, the settlement did not create a cash common fund, but rather common benefits in the form of extended death benefits that enhanced class members' life insurance policies. 1999 WL 33581944, at *28. Similar to the warranty extension and repair reimbursement benefits provided here, class members were paid the enhanced policy benefits if the insured died while the extended benefits were in effect. The *Manners* court

used the value of the policy extensions (estimated by actuaries to be $130.3 million, *id*. at *25-26) to determine a reasonable attorneys' fee award. *Id*. at *85-95. Tennessee also awards attorneys' fees under the substantial benefit/common fund theories. *See Travelers Ins. Co. v. Williams*, 541 S.W.2d 587, 589-90 (Tenn. 1976); *Kline ex rel. Kline v. Eyrich*, 69 S.W.3d 197, 204-05 (Tenn. 2002); *Hobson v. First State Bank*, 801 S.W.2d 807, 809-10 (Tenn. Ct. App. 1990); *Denver Area Meat Cutters v. Clayton*, 209 S.W.3d 584, 592-93 (Tenn. Ct. App. 2006).[5]

C. The Percentage Awarded is Typically Far Greater than that Sought by Counsel

The data indicates that the majority of federal courts award fees between 25% to 35% of the common benefit. Fitzpatrick Decl. ¶ 20. This is true within the Sixth Circuit as well. *Id*. ¶ 21; *see also In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 380 (6th Cir. 2006) (collecting cases and noting that "[a]ttorneys fees awards typically range from 20 to 50 percent of the fund"); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351-52 (6th Cir. 2009) (30%); *Ranney v. Am. Airlines*, No. 1:08cv137, 2016 WL 471220, at *2-3 (S.D. Ohio Feb. 8, 2016) (44%); *Mees v. Skreened, Ltd.*, No. 2:14-cv-142, 2016 WL 67521, at *5 (S.D. Ohio Jan. 6, 2016) (33%); *Swigart v. Fifth Third Bank*, No. 1:11-cv-88, 2014 WL 3447947, at *5 (S.D. Ohio July 11, 2014) (33%); *Moore v. Aerotek, Inc.*, No. 2:15-cv-2701, 2017 WL 2838148, at *6 (S.D. Ohio June 30, 2017) (33%); *Kimber Baldwin Designs*, 2017 WL 5247538, at *5 (33%); *Kline ex rel. Kline*, 69 S.W.3d at 209-10 (33%); *Denver Area Meat Cutters*, 209 S.W.3d at 592-93 (33%).

[5] In diversity actions, the Sixth Circuit and district courts have applied federal standards for determining attorneys' fees so long as the issue of attorneys' fees is ancillary to the main litigation. *Graceland Fruit, Inc. v. KIC Chems., Inc.*, 320 Fed. Appx. 323, 328 n.6 (6th Cir. 2008) ("the reasonableness of an award of attorneys' fees can be analyzed under federal common law," "'because attorney fee awards traditionally have not been under the exclusive domain of the states.'") (citation omitted); *Alticor, Inc. Nat'l Union Fire Ins. Co.*, 345 Fed. Appx. 995, 1000 (6th Cir. 2009) (the reasoning of *Graceland* applies where "the attorney fee issue [is] ancillary to the main litigation."); *Six L's Packing Co. v. Beale*, No. 3:10-cv-01132, 2014 WL 12577348, at *2 (M.D. Tenn. May 28, 2014) (same). In any event, there is no conflict here because Tennessee state law is substantially similar to federal law and will be concurrently cited throughout.

Further, when considering the award of attorneys' fees, the Court should also consider that the amount of fees sought by Counsel was separately negotiated by the parties, and only after resolution of negotiations regarding the benefits of the proposed Settlement to the Class. Negotiated fee agreements are entitled to substantial deference in the absence of indicia of collusion. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("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."); *Manners*, 1999WL 33581944, at *28; (giving "great weight to the negotiated fee in considering the fee and expense request."); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 861 (E.D. Mo. 2005) ("where, as here, the parties have agreed on the amount of attorneys' fees and expenses, courts give the parties' agreement substantial deference.").

Here, the amount of fees and expenses that Counsel would request from this Court were discussed at arm's length by experienced counsel and with the oversight and assistance of an experienced mediator, Hunter Hughes. Stranch Decl. ¶ 47. The fees were not discussed until after agreement was reached on the substantive terms of the Settlement and will be paid separately by Nissan such that they do not reduce the recovery to the Class. Thus, the fee agreement here is entitled to deference. *Id.*; SA ¶¶ 113-114; *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 695 n.12 (N.D. Ga. 2001) ("The evidence submitted by Class Counsel and the mediator demonstrates that attorneys' fees were negotiated separately, at arms-length, and without collusion."); *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) (fact that the parties "did not discuss attorneys' fees until all other issues were virtually finalized, is also indicative of a fair and arm's-length process."); *Manners*, 1999 WL 33581944, at *28 (according deference to negotiated fee awards "particularly where the attorneys' fees are negotiated separately and only after all terms of the settlement have been agreed to between the parties.").

IV. COUNSELS' FEE REQEUST IS REASONABLE

The Sixth Circuit looks to the following factors to determine if a requested fee is reasonable: (1) the value of the benefits rendered to the class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the complexity of the litigation; (5) the professional skill and standing of all counsel; and (6) the value of the services on an hourly basis. *Ramey*, 508 F.2d at 1196.

None of the *Ramey* factors is dispositive, and this court "enjoys wide discretion in assessing the[ir] weight and applicability." *Granada Inv., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992); *see also Denver Area Meat Cutters*, 209 S.W.3d at 592-93 (affirming award of attorney's fees under common fund that considered above factors); *Hobson*, 801 S.W.2d at 812-13 (same); Tenn. Sup. Ct. R. 8, RPC 1.5 (applying similar factors).

The requested fee award is reasonable under these factors.

A. The Value of the Benefits Provided to the Class

"The most important *Ramey* factor is the first – the value of the benefit to the class." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 795 (N.D. Ohio 2010). In determining the value of the benefit conferred, courts look to the total value made available to the class, not the amount ultimately claimed or used by class members. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980); *see also Moulton*, 581 F.3d at 351-52 (rejecting objection that fee award was too high, stating "[b]ut this estimate [of the settlement's value] is wrong: The objectors focus on the amount *claimed* rather than the amount *allocated*.") (emphasis in original); *Gascho*, 822 F.3d at 282 (citing *Boeing*, and holding that the district court was not required to value the settlement

based on the amount claimed because "there is value in providing a class member the ability to make a claim, whether she takes advantage of it or not"); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (district court abused its discretion by awarding fees based on the actual recovery, as opposed to the available benefit); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (same); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1296-97 (11th Cir. 1999) (same).

Under even the most conservative approach to valuation, the benefit conferred by the Settlement easily justifies the requested fees. The warranty extension extends powertrain coverage under the applicable New Vehicle Limited warranty, as to the transmission assembly (including the valve body and torque converter) and Automatic Transmission Control Unit ("ATCU") by 24 months or 24,000 miles, whichever occurs first. SA ¶ 54. This benefit will apply automatically to the Class Vehicles, without Class Members needing to make a claim. Nissan's commitment for repairs under the warranty extension is uncapped, ensuring that all Class Members requiring a qualifying transmission repair during the warranty extension period will be able to take advantage of this valuable benefit. In addition, the repair and replacement reimbursement benefit effectively makes the warranty extension retroactive. That is, Class Members may submit a claim for reimbursement of the full amount for parts and labor they paid to an authorized Nissan or Infiniti dealer (or up to $5,000 paid to a non-Nissan/Infiniti repair facility) to have their transmission repaired or replaced so long as the qualifying repair or replacement occurred during the extended warranty period. *Id.* ¶ 56. Additionally, if an authorized Nissan dealer diagnosed and recommended a transmission repair during the vehicle's extended warranty, but the repair was performed outside of the extended warranty, Class Members are entitled to the same repair reimbursements so long as the qualifying repair is made prior to the vehicle exceeding 95,000 miles or by March 22, 2022, whichever occurs first. *Id.* ¶ 57. Class Members need

only submit a simple Claim Form and supporting documentation to receive reimbursement for their qualifying transmission repair or replacement. *Id*., Ex. B.

To value the Settlement, Counsel retained Lee M. Bowron, ACAS, MAAA, an actuary who specializes in pricing and valuing extended service contracts and warranty extensions. Mr. Bowron's full report substantiating the estimated value is concurrently filed. *See* Bowron Decl. Based on the number of Class Vehicles, the average CVT transmission replacement cost, the failure rate, the frequency of major versus minor repairs, and other information, Mr. Bowron estimates the value of the extended warranty and reimbursement coverage to be between $294,799,000 and $413,403,000, with a point estimate representing Mr. Bowron's best actuarial judgment as to value of $354,101,000. *Id*., ¶ 4.[6] *See also Manners*, 1999 WL 33581944, at *20 (valuing policy extensions benefits as estimated by the parties' actuaries).

This figure does not include the value of the other components of the Settlement, including vouchers for certain current and former owners, an expedited resolution process for future transmission claims, and the costs of notice and settlement administration, which standing alone supports Counsels' fee request. *See* Bowron Decl. ¶ 2.

The requested fee is just 1.76% of Mr. Bowron's $354,101,000 point estimate of the Settlement's value. As explained by Mr. Fitzpatrick, even an ultra-conservative approach to value that uses the *low end* of Mr. Bowron's range, *disregards* the value of the reimbursement program

[6] Though not included here, the total value of a settlement encompasses *all* amounts benefiting the class, including attorneys' fees and notice and administration costs, which amounts are normally borne by the class. Fitzpatrick Decl. ¶ 15; *see also Gascho*, 822 F.3d at 282 (attorney's fees and costs of settlement administration are part of the total value to the class); *Moulton*, 581 F.3d at 351-52; *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1008-09 (N.D. Ohio 2016); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015). The notice and settlement administration costs already incurred in this case are alone estimated at $1,331,211.91. Declaration of Lana Lucchesi ("Lucchesi Decl.") Re: Notice Procedures, ¶ 18.

entirely, *and* reduces the value of the extended warranty by 50%[7], results in a valuation of $100,000,000, of which the requested fees are only 6%. Fitzpatrick Decl. ¶ 15. This is far below the average percentage awarded in federal courts and well within the rage of reasonable fees. *Id.,* ¶¶ 16, 20-21; Section III.C., *supra*.

B. Rewarding Attorneys for the Benefit to Society

The second *Ramey* factor recognizes that "there is a benefit to society in ensuring that small claimants may pool their clams and resources, and attorneys who take on class action cases enable this." *Kimber Baldwin Designs*, 2017 WL 5247538, at *6. In the words of the Sixth Circuit:

> Consumer class actions, furthermore, have value to society more broadly, both as deterrents to unlawful behavior – particularly when the individual injuries are too small to justify the time and expense of litigation – and as private law enforcement regimes that free public sector resources. ***If we are to encourage these positive societal effects, class counsel must be adequately compensated….***

Gascho, 822 F.3d at 287 (emphasis added).

Here, counsel achieved tangible and valuable benefits for Class Members nationwide, the vast majority of whom would not have pursued their claims individually. *Lonardo*, 706 F. Supp. 2d at 795 (noting that "thousands of consumers will recover a meaningful portion [of alleged damages]" and "[b]ut for this litigation, it is a virtual certainty that these consumers would not have received a rebate of any kind"). This factor also supports the fee request.

C. The Contingent Nature of the Fee

An attorney whose compensation is dependent on success—who takes a significant risk of no compensation—should expect a significantly higher fee than an attorney who is paid a market

[7] Mr. Bowron's valuation assumes that if the extended warranty were offered in the marketplace, its price would include a 50% markup. Although this is a price that consumers would have to pay in the marketplace in the absence of a Settlement, Mr. Fitzpatrick has excluded the markup in the interest of assessing entitlement to fees under the most conservative possible approach to valuation.

rate as the case progresses, win or lose. *See Manners*, 1999 WL 33581944, at *31 (the contingent nature of the fee left "plaintiffs' counsel bearing the full risk of no recovery at all."); *Gentrup v. Renovo Servs., LLC*, No. 1:07CV430, 2011 WL 2532922, at *4 (S.D. Ohio June 24, 2011) (the fact that "Plaintiffs' counsel have made significant investments of time and have advanced costs but have received no compensation in this matter" weighed in favor of the requested fee).

Counsel undertook the Lawsuits solely on a contingent basis, with no guarantee of recovery. Stranch Decl. ¶ 64 and **Exhibits 5-9**. Despite such a challenge, Counsel were able to negotiate a superb settlement agreement.

D. The Complexity of the Litigation

The risk, expense, and complexity of the cases also demonstrate the reasonableness of the fee award. Class actions challenging the sale of allegedly defective vehicles are by nature complex, and this case was no exception, as demonstrated by the range and number of the causes of action alleged by Plaintiffs. *See generally* Amended Consolidated Class Action Complaint (Dkt. No. 59.)

Counsel also knew the Class faced obstacles ahead. Contested class certification would have been a risky and complex undertaking. Expensive and extensive expert analysis and testimony would be necessary to prove the alleged defect, show that it is systemic and common to all thirteen combinations of make and model year that comprise the Class Vehicles, and prove that it caused the transmission problems experienced by Plaintiffs and other Class Members.

After certification, significant time and expense would continue to be incurred to conclude expert discovery, to move for or defend against summary judgment, to conduct trial and to handle appeals that are almost inevitable in a case of this size.

Moreover, the risk of maintaining class action status through trial is always an issue and not hypothetical, as evidenced by decisions denying class certification in automobile defect cases.

See, *e.g.*, *Marcus v. BMW of N. Am., LLC,* 687 F.3d 583 (3d Cir. 2012); *Daigle v. Ford Motor Co*., No. 09-03214 (MJD/LIB), 2012 WL 3113854 (D. Minn. July 31, 2012); *Corder v. Ford Motor Co*., 283 F.R.D. 337 (W.D. Ky. 2012); *Edwards v. Ford Motor Co.*, No. 11-CV-1058-MMA (BLM), 2012 WL 2866424 (C.D. Cal. June 12, 2012), *rev'd on other grounds*, 603 Fed. Appx. 538 (9th Cir. 2015); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534 (C.D. Cal. 2012); *In re Ford Motor Co*. *E-350 Van Prods. Liab. Litig. (No. II)*, No. 03-4558, 2012 WL 379944 (D.N.J. Feb. 6, 2012); *Am. Honda Motor Co., Inc. v. Super. Ct.*, 199 Cal. App. 4th 1367 (2011).

Counsel for Plaintiffs were nonetheless positioned to meet these challenges. Co-Lead Class Counsel and Executive Committee Counsel engaged in extensive investigation of the facts and claims at issue. Stranch Decl. ¶¶ 30-34. From approximately a year prior to the filing of the initial complaint in this action through the present, counsel have been contacted by over a 1,000 putative Class Members and have conducted in-depth interviews with many of them. *Id*., ¶ 30, 34. In numerous instances this time-consuming process involved second and third round interviews and detailed review of repair order documentation. *Id.*, ¶¶ 34.

To understand the history, mechanics and severity of the alleged CVT Defect, counsel also reviewed all available Nissan Technical Service Bulletins ("TSBs") for the Class Vehicles and related vehicles; consulted with professional automobile technical consultants; reviewed hundreds of consumer complaints filed with the National Highway Transportation Safety Authority ("NHTSA") or reported on websites that collect and voice consumer complaints; reviewed maintenance manuals and warranty information for the Class Vehicles; and, extensively reviewed prior class action settlements and market actions taken by Nissan with respect to other Nissan vehicles equipped with CVTs. *Id*., ¶¶ 31-32.

During the course of settlement negotiations, Co-Lead Class Counsel and Executive

Committee Counsel obtained additional information from Nissan concerning the Class Vehicles' service history, CVT issues and countermeasures over time, the average warranty cost of CVT replacements, and sale and lease data over time. Stranch Decl. ¶¶ 46, 51. To date, Nissan has produced approximately 19,448 pages of documents to Plaintiffs, including detailed information regarding warranty information; project files; TSBs; investigation reports; Countermeasure Action Requests ("CAR"); customer complaints; and related materials. *Id*., ¶ 52.

In addition, Nissan has produced a database comprised of 123,244 rows of warranty claim-related information for CVT repairs and replacements to the Class Vehicles with comprehensive data for tens of thousands of vehicles serviced under warranty, including, *inter alia*, Vehicle Identification Number ("VIN"), make and model year, in service date, engine type, transmission type, claim type, production date, repair date, mileage at repair, cost of parts, cost of labor, operations codes, and detailed comments regarding the specific repair. *Id*. Counsel also consulted with an automotive technical expert with significant experience in automotive mechanics, including CVTs. Stranch Decl. ¶¶ 30, 32.

In addition, counsel retained the actuarial services of Lee M. Bowron to estimate the minimum retail value to the Class of the extended warranty and reimbursement coverage as discussed above. *Id*., ¶ 67; *see* Bowron Decl.

A complex case involves complex discovery and development of the facts to combat the inevitable challenges at class certification and trial. Counsel here rose to the challenge. Thus, this factor also weighs in favor of the proposed fee award.

E. The Professional Skill and Standing of All Counsel

Counsel are experienced in complex class litigation and have substantial experience prosecuting consumer automotive class actions. Counsel have a thorough understanding of the

issues presented by these types of cases and through their skill and reputation, were able to obtain a settlement that provides everything the Class could reasonably hope to obtain in this litigation. *See* Stranch Decl. ¶¶ 54-58 and **Exhibit 2** (Branstetter Firm Resume), and **Exhibits 5-9** (Declarations of Co-Lead Class Counsel Greenstone Law APC and Glancy Prongay & Murray LLP, and Executive Committee Counsel Barrack, Rodos & Bacine, Berger Montague PC and Keller Rohrback L.L.P. with firm Resumes attached).

As to defense counsel, Nissan hired highly capable and aggressive law firms to represent it, and it has resources to engage in the battle of the experts that would have surely ensued if not for the Settlement. *In re Cardinal Health*, 528 F. Supp. 2d at 768 (the skill and competence of opposing counsel should be considered). Yet, Counsel successfully persevered to achieve the purpose of the litigation: transmission repairs and replacements for the Class Members.

The skill and tenacity of Counsel resulted in an exceptional settlement for the Class and justifies the requested fee award.

F. The Value of the Services on an Hourly Basis: The Lodestar Cross-Check

Although the lodestar cross-check is not required in the Sixth Circuit, it, too, demonstrates the reasonableness of the requested fee. Under the lodestar calculation, the court first "multiplies the number of hours 'reasonably expended' on the litigation by a 'reasonable hourly rate.'" *Gascho*, 822 F.3d at 279 (citation omitted). "The court 'may then, within limits, adjust the lodestar to reflect relevant considerations peculiar to the subject litigation.'" *Id*. (citation omitted). These considerations include the benefits obtained under the settlement, the complexity of the case, and the quality of the representation. *Rawlings*, 9 F.3d at 516.

Counsel collectively invested 2881.9 hours in this case with a corresponding lodestar of $2,085,654.80. The requested fee award represents a moderate multiplier of 2.96. This multiplier

is on par with the mean multiplier in high value settlements such as this one. Fitzpatrick Decl. ¶ 28.

This multiplier is also well within the range of multipliers approved by the Sixth Circuit, the Middle District of Tennessee, and other courts in the Sixth Circuit. *See*, *e.g.*, *Rawlings*, 9 F.3d at 517 (approving a 2 multiplier); *In re Cardinal Health*, 528 F. Supp. 2d at 767-68 (5.9 multiplier); *In re Southeastern Milk Antitrust Litig*., No. 2:08-MD-1000, 2013 WL 2155387, at *4 (E.D. Tenn. May 17, 2013) ("The requested fee represents a lodestar multiplier of 1.90, clearly within, but in the bottom half of, the range of typical lodestar multipliers."); *Manners*, 1999 WL 33581944, at *31 (3.8 multiplier); *Bailey v. AK Steel Corp*., No. 1:06-cv-468, 2008 WL 553764, at *2 (S.D. Ohio Feb. 28, 2008) (awarding 3.04 multiplier and identifying a "normal range of between two and five"); *Hainey v. Parrott*, 2007 WL 3308027, at *1 (S.D. Ohio Nov. 6, 2007) (7.47 multiplier); *In re Skelaxin (Metaxalone) Antitrust Litig*., No. 2:12-cv-83, 2014 WL 2946459, at *2 (E.D. Tenn. June 30, 2014) (awarding multiplier between 2.1 and 2.5; noting that level of multipliers is "routinely accepted as fair and reasonable"); *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (approving a 4.77 multiplier in a case that settled after one year); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085 (FSH), 2005 WL 3008808, at *17 (D.N.J. Nov. 9, 2005) (multiplier of 1.86 is on the "'low end of the spectrum'") (citation omitted); *Newberg on Class Action* § 14.6 (4th ed. 2009) ("Multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied.").

1. The Hourly Rates are Reasonable

Reasonable hourly rates are determined by "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). "'In ascertaining the proper 'community,' district courts may look to national markets, an area of specialization, or any other

market they believe is appropriate to fairly compensate attorneys in individual cases.'" *Amos v. PPG Indus.*, No. 2:05-cv-70, 2015 WL 4881459, at *9 (S.D. Ohio Aug. 13, 2015) (citation omitted).

Thus, Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Blum*, 465 U.S. at 895 n.11; *see also Monroe v. FTS USA, LLC*, No. 2:08-cv-02100-JTF-cgc, 2014 WL 4472720, at *13 (W.D. Tenn. July 28, 2014) ("Although many of these hourly rates are beyond the prevailing market rate in Memphis, Tennessee, based on the attorney profiles, their experiences and reputation in the wage and hour community, the above-mentioned affidavits, and the complexity of this case, the Court finds that the … attorneys' hourly rates are reasonable"); *In re Flint Water Cases*, No. 516CV10444, 2022 WL 340675 (E.D. Mich. Feb. 4, 2022) (finding rates reasonable based on the "counsel's experience level and the prevailing market rates in the geographic locations of counsel").[8]

Counsels' lodestar is calculated using rates that that have been accepted in numerous other class action cases. *See*, *e.g.*, Stranch Decl. ¶¶ 69-70 and **Exhibits 5-9**.

Counsels' rates also compare favorably with rates approved by other trial courts in class action litigation, by what attorneys of comparable skill charge in similar areas of specialization. *See In re Flint Water Cases*, 2022 WL 340675 (holding that rates between $300-$1,125 per hour are "reasonable rate[s] under the circumstances of this case given counsel's experience level and the prevailing market rates in the geographic locations of counsel"); *Johnson v. Saul*, 2020 WL

[8] An attorney's actual billing rate for similar work is presumptively appropriate. *See Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 909-10 (6th Cir. 1991); *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996). "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

1223539, at *3 (C.D. Cal. Feb. 3, 2020) (noting that courts have "repeatedly found reasonable fees with effective hourly rates exceeding $1,000 per hour" in class action cases); *Lonardo*, 706 F. Supp. 2d at 793 (approving hourly rates up to $825 "based on this Court's knowledge of attorneys' fees in complex civil litigation and multi-district litigation"); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274 (N.D. Cal. May 21, 2015) (finding reasonable rates in a consumer fraud class action of between $475-$975 for partners, $300-$490 for associates, and $150-$430 for paralegals); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (approving hourly rates of $460-$998 for attorneys, $309 for paralegals, and $190 for legal assistants).

2. The Hours Expended are Reasonable

The number of hours spent by Counsel is reasonable given the efforts to obtain this resolution. Counsel have worked on this matter from approximately one year prior to the filing of the initial complaint in the action through the present. Counsel were contacted by over 1,000 class members and conducted in-depth interviews with hundreds of them. Stranch Decl. ¶ 34. In addition, Counsel reviewed the extensive publicly available information concerning the Class Vehicles and their CVTs, consulted with technical experts, reviewed extensive post-filing information provided by Nissan including nearly 20,000 pages of documents, settlement negotiations, interviewed a knowledgeable Nissan engineer concerning the history of the Class Vehicles' CVTs and Nissan's countermeasures, and oversaw implementation of the Settlement. *Id*. ¶¶ 24, 28, 30-34, 52.[9]

[9] Counsel need only submit summaries of their hours incurred; submission of billing records is not required. *Gascho*, 822 F.3d at 281 (reliance on time summaries was proper because counsel averred under penalty of perjury the hours expended were reasonable, and the percentage of fund cross-check validated the fee request); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 284 (3d Cir. 2009) (finding district court's reliance on time summaries of counsel proper); *In re Ford Motor*

Since Notice was mailed, Counsel have been contacted by hundreds of additional Class Members concerning the Settlement and have spent significant time answering their questions, reviewing their documentation and walking them through the claims process. *Id*., ¶ 28. Moreover, Counsels' work is not yet close to being completed. Counsel still need to: (1) prepare for and attend the Fairness Hearing, including research and drafting of the reply papers and response to objectors; (2) continue to oversee and assist Class Members with the claims administration process, including addressing any claim review issues and monitoring payments to the Class Members;[10] (3) oversee the extended warranty benefit to ensure Nissan dealers are appropriately notified and extended warranty repairs are timely paid; and (4) handle appeals, if any. *Id*., ¶ 72.

Responding to objectors will involve additional briefing at a minimum. And if there are appeals, hundreds of thousands of dollars of additional attorney time may be incurred in post-judgment motions (such as appeal bond requests) and in defending the Settlement on appeal to the Sixth Circuit. The Class Notice was mailed a little over a month ago and Counsel have already received hundreds of inquiries from Class Members. In a class action of this size, these inquiries typically continue for months, if not years, after the Fairness Hearing. None of this additional time will be compensated. As counsel's lodestar continues to increase, the multiplier will decrease, all

Co. Spark Plug & Three Valve Engine Prods. Liab. Litig., No. 1:12-MD-2316, 2016 WL 6909078, at *10 (N.D. Ohio Jan. 26, 2016) (concluding hours expended were reasonable based on summaries and the court's own observations and knowledge of the case); *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148-49 (9th Cir. 2000) (the court may rely on summaries of the total number of hours spent by counsel). This is particularly true when the lodestar method is used as a cross-check to the percentage method. *In re Cardinal Health*, 528 F. Supp. 2d at 767 ("In contrast to employing the lodestar method in full, when using a lodestar cross-check, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'") (citation omitted); *In re Southeastern Milk*, 2013 WL 2155387, at *2 n.3 (same).

[10] Counsel have already spent significant time and effort working with the hundreds of Class Members who have contacted them with questions about the Settlement, what their options are, and how they can obtain reimbursement for CVT repairs. Stranch Decl., ¶ 24. Counsel have in turn worked with Nissan's counsel and the Settlement Administrator so that transmission repair issues and other issues requiring immediate attention are dealt with. *Id*. Counsels' assistance to Class Members will continue throughout settlement implementation. *Id*.

of which further supports the reasonableness of the requested fee award.

V. COUNSELS' EXPENSES ARE REASONABLE

Counsel are "'entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses.'" *New England Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006) (citation omitted). Counsel are also entitled to apply to the court for an award of their reasonable expenses, which application Nissan agreed not to oppose provided that the total amount sought for fees and expenses does not exceed $6,250,000, and which expenses will be paid by Nissan to the extent awarded by the court, separate and apart from the relief to the Class. SA, ¶¶ 113-114.

In determining which expenses are reasonable and compensable the question is whether such costs are of the variety typically billed by attorneys to paying clients in similar litigation. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003); *see also Swigart*, 2014 WL 3447947, at *7; *In re Southeastern Milk*, 2013 WL 2155387, at *8.

Counsel have submitted declarations attesting that $83,816.19 in expenses has been incurred in prosecuting this case. Stranch Decl. ¶ 73 and **Exhibits 5-9**. The expenses include filing fees, expert fees, mediator fees, travel, electronic discovery hosting, computer research, photocopies, postage, and telephone charges. All these expenses were reasonably and necessarily incurred and are of the sort that would typically be billed to paying clients in the marketplace. *See Cardizem*, 218 F.R.D. at 535 (awarding reimbursement for document productions, expert fees, and travel); *New England Health*, 234 F.R.D. at 635 (awarding reimbursement for costs associated with maintaining an electronic document database, computerized research, travel and lodging,

photocopies, filing and witness fees, postage and delivery, and court reporters and depositions).

VI. THE CLASS REPRESENTATIVE SERVICE AWARDS SHOULD BE APPROVED

Class Representative service awards are typical in class actions. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Here, Plaintiffs request approval of moderate $5,000 service awards to each Class Representative, which Nissan does not oppose, to be paid by Nissan in addition to class-wide benefits. SA, ¶¶ 113-114.

The amounts requested are consistent with or below the amounts typically awarded in similar litigation. For instance, the Eastern District approved service awards of $10,000 to each of the 15 class representatives in an antitrust class action. *In re Southeastern Milk*, 2013 WL 2155387, at *9.

Other district courts in the Sixth Circuit have made similar or larger awards. *See Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (awarding $50,000 to each of six class representatives); *Kimber Baldwin Designs,* 2017 WL 5247538, at *7 ($5,000 award); *Lonardo*, 706 F. Supp. 2d at 787 ($5,000 awards); *Physicians of Winter Haven, LLC v. Steris Corp.*, No. 1:10 CV 264, 2012 WL 406966, at *9 (N.D. Ohio Feb. 6, 2012) ($15,000 award).

In fact, service awards comparable to those requested here are routinely granted in this District. Judge Richardson approved $5,000 service awards in the previously approved Nissan CVT settlement that involved different model and model years than the present action. *Gann v. Nissan North America, Inc.*, Case No. 3:18-cv-00966 (D.E. #130, March 10, 2020). Judge Crenshaw approved a $7,500 service award in *Skeete v. Republic Schools of* Nashville, Case No. 3:16-cv-00043 (D.E. #112, February 26, 2018). And this Court approved a $5,000 service award in *Ajose v. Interline Brands, Inc.*, Case No. 3:14-cv-01707 (D.E. #269, October 23, 2018).

The service awards requested are justified in light of the willingness of Plaintiffs to devote their time and energy to prosecuting a representative action. All ten Plaintiffs contributed to this matter by initiating lawsuits in their respective venues, providing information and documents to their counsel, including significant documentation and information regarding their vehicles and the transmission malfunctions they experienced, remaining informed and involved throughout the lengthy litigation, contacting and consulting their counsel concerning the litigation, reviewing pleadings and the Settlement, and remaining at all times willing to testify at trial. Stranch Decl. ¶ 75.

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their motion be granted and the Court include in its final judgment and order an award of attorneys' fees and expenses totaling $6.25 million and service awards of $5,000 to each of the Plaintiffs.

Respectfully submitted,

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