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

RAFAEL SUAREZ, DAISY GONZALEZ, and RICHARD BYRD, individually and on behalf of all others similarly situated, Plaintiffs, vs. NISSAN NORTH AMERICA, INC., Defendant.	Case No.: 3:21-cv-00393 **Hon. William L. Campbell, Jr.** **CLASS ACTION**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND PLAINTIFFS' INCENTIVE AWARDS

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INTRODUCTION

Pursuant to the nationwide class action settlement reached with Nissan North America, Inc. ("NNA") in this action, Plaintiffs Rafael Suarez, Daisy Gonzalez, and Richard Byrd ("Plaintiffs") and Class Counsel respectfully move the Court to approve payment by NNA of a total of $2,500,000 for attorneys' fees and reimbursement of expenses, and incentive awards of $5,000 for each Plaintiff. As discussed herein, these amounts, which were negotiated with the assistance and recommendation of the mediator, Judge Diane Welsh (Ret.), after all other material terms of the Settlement were resolved, are well-supported by the outstanding results achieved and all applicable legal standards.

These amounts will not reduce any benefits available to the Settlement Class Members and have been agreed to by NNA.

A. The Settlement Provides Excellent Relief to Settlement Class Members

The relief that Plaintiffs and Lead Class Counsel recovered on behalf of the nationwide Settlement Class, consisting of all over 3 million current and former owners and lessees of about 1.43 million Class Vehicles, is outstanding. As described more fully in Plaintiffs' Memorandum of Law in Support of Final Approval of the Settlement:

(1) NNA will provide a six-year extended warranty, regardless of mileage, covering headlamp delamination. Settlement Agreement ("SA"), ECF 14-2 at ¶¶ 73-82. Further, Class Members who are currently within the six-year warranty now, and who do not wish to wait for the Effective Date of the Settlement, can pay for replacements from an Authorized Nissan Dealer now and receive reimbursement after the Settlement becomes Effective. *Id.* at ¶ 98.

(2) NNA will provide reimbursement of all out-of-pocket costs (parts, labor, shipping, tax, etc.) incurred to replace delaminated headlamps prior to October 25, 2021, regardless of the age or mileage of the vehicle. *Id.* at ¶¶ 90-97. Multiple replacements are covered. *Id.* at ¶ 95. There is no cap on replacements performed by Nissan dealerships, and the $1200 per replacement-event cap on replacements performed by independent repair facilities is above the typical cost and intended solely to ensure that NNA is not liable for extravagant charges. *Id.* at ¶¶ 92, 94-95.

(3) NNA will also provide a free set of replacement headlamps for *every* Class Vehicle that is currently experiencing delaminated headlamps, regardless of the age or mileage, during a six-month window following the Effective Date of the Settlement, subject to submission of a simple opt-in claim form. *Id.* at ¶¶ 83-88.

(4) All replacements performed pursuant to the Settlement will use newly designed parts, built with a countermeasure adopted in late 2018 to address headlamp delamination, and all replacement parts will come with a one-year parts and labor warranty, regardless of the age and mileage of the vehicle. *Id.* at ¶ 66.

(5) NNA will pay all costs of notice and administration separate and apart from the relief afforded Class Members. *Id.* at ¶ 99. The notice program is substantial, as it includes: (a) first-class, direct mailing of the Mailed Notice and a Reimbursement Claim Form to every current and former owner or lessee of a Class Vehicle who can be identified via state motor vehicle registration records (over 3 million Class Members); (b) publication in People magazine; (c) digital advertising, including through Facebook and Google, sufficient to create over 5,000,000 impressions; (d) issuance of a PR press release; and (e) creation and maintenance of the Settlement Website. Further, NNA

will send tailored post-Effective Date notices to Class Members who are, or soon will, be outside the extended warranty as of the Effective Date to ensure they have a fair opportunity to receive the benefits available to them. To date, the Settlement administrator has incurred $296,612.17 in costs, and the initial notice cost (not including post-approval notices) is estimated to be another $1,933,155.04. *See* Declaration of Lana Lucchesi re: Notice Procedures ("Lucchesi Decl."), filed contemporaneously herewith, at ¶ 20. These amounts do not include the post-Effective Date notices, claims handling, and other costs, which will also be substantial.

(6) In addition to and without reducing any of the above benefits, NNA will also pay, subject to Court approval, a total award of $2.5 million for attorneys' fees and reimbursement of expenses. SA ¶ 136. This amount was negotiated over the course of several weeks with Judge Welsh's "assistance and recommendation," and only after all other material terms of the Settlement were agreed upon. *See* Declaration of Judge Diane M. Welsh, ECF No. 15-1 ("Welsh Decl.") at ¶ 5.

The parties agree that the total economic value of the Settlement likely exceeds $50 million (SA ¶ 16), and that valuation is further supported by Plaintiffs' valuation expert report, discussed below. All of these benefits were negotiated with the close involvement of Judge Welsh over the course of five months, including three full-day mediation sessions and numerous follow-up letters and discussions. Judge Welsh has submitted a declaration to this Court in which she confirms that the Settlement was "hard fought" at "arm's length" by counsel on both sides who were "always professional," "highly experienced, effective and assertive," and "well versed in the facts of the case and the applicable law." *See* Welsh Decl. at ¶ 4.

B. Summary of Lead Class Counsel's and Plaintiffs' Efforts in Achieving The Settlement[1]

Although the docket in this case is relatively short, in reality, Lead Class Counsel and Plaintiffs had been pursuing the claims and settlement behind-the-scenes for nearly two years before the action was filed publicly. Lead Class Counsel initially began investigating the alleged defect and claims on behalf of Class Members in July 2018. Declaration of Timothy Mathews ("Mathews F.A. Decl.") at ¶ 10. Lead Class Counsel spent significant time investigating the facts of this case, potential legal theories, and communicating with putative Class Members. *Id*. This was a novel potential case, and the root cause of the defect was not immediately clear. *Id*.

On May 20, 2019, after having gathered substantial facts and communicating with many putative Class Members, Lead Class Counsel served a pre-suit notice of claims and demand for relief on behalf of Plaintiff Rafael Suarez and all others similarly situated, asserting breach of express and implied warranty and violation of state consumer protection statutes and common law. *Id*. at ¶ 11. In the subsequent weeks, Lead Class Counsel had several direct discussions with NNA's in-house counsel and, subsequently, outside counsel hired by NNA, Brigid Carpenter of Baker Donelson. *Id*. at ¶ 12. At that time, the parties did not discuss possible settlement terms, but rather, the possibility of exploring settlement. *Id*. at ¶ 13. Lead Class Counsel agreed to defer filing a lawsuit to further explore that possibility. *Id.* In order to ensure the rights of potential Class Members were protected, Lead Class Counsel insisted upon a nationwide tolling agreement, which the parties entered into on July 17, 2019. *Id*.

During the early discussions, Lead Class Counsel made clear that any discussion of settlement would require informal discovery from NNA. *Id*. at ¶ 14. The parties entered into a

[1] Additional details concerning the work performed by Class Counsel are set forth in the Declarations of Timothy Mathews and John Spragens, filed contemporaneously herewith.

confidentiality agreement covering the exchange of information and documents in November 2019. *Id*. NNA began providing informal discovery thereafter. *Id*. On November 13, 2019, Lead Class Counsel served a second demand and notice of claims on behalf of additional Plaintiffs Daisy Gonzalez and Richard Byrd. *Id*. at ¶ 15.

In early 2020, after NNA had provided initial informal discovery, the parties agreed to mediate, and exchanged the names of several potential mediators, ultimately agreeing to mediate with Judge Welsh. *Id*. at ¶ 17. Judge Welsh is a former United States Magistrate Judge and nationally renowned JAMS mediator with significant experience mediating class actions. *Id*.; Welsh Decl. at ¶ 1.

In anticipation of mediation, Lead Class Counsel continued to communicate with numerous putative Class Members and conducted further factual and legal research concerning the claims. Mathews F.A. Decl. at ¶ 18. Lead Class Counsel also retained a highly-qualified headlamp expert who consulted with them about the alleged defect and industry standards, reviewed several rounds of documents and data provided by NNA, and examined several sets of headlamps collected from Class Members. *Id*. at ¶ 20.

Since July 2018, Lead Class Counsel have communicated with over 2,600 Class Members, many of whom provided vital information, as well as sample headlamps for examination. *Id*. at ¶¶ 16, 29. In connection with the mediation, Lead Counsel also conducted a Class Member survey of 350 class members. *Id*. at ¶ 19. That information too, proved vital, as it provided Lead Class Counsel with data concerning average time to failure, typical repair costs, and other data. *Id*.

The mediation process lasted approximately five months. Welsh Decl. at ¶ 3. The parties exchanged mediation briefs in July 2020 and engaged in three full-day mediation sessions with Judge Welsh on August 3, 2020, September 30, 2020, and November 4, 2020. Mathews F.A. Decl.

at ¶ 21. During the course of the ensuing several months, the parties exchanged numerous letters and participated in numerous telephonic discussions with each other and with Judge Welsh. *Id*.

The parties did not discuss attorneys' fees or Plaintiff incentive awards until all other material terms of the settlement benefitting the Class had been agreed. *Id*. at ¶ 22; Welsh Decl. at ¶ 5. The parties reached agreement on all other material terms of the Settlement in the afternoon of the final mediation session on November 4, 2020. *Id*. They began discussion of fees at the end of that session but did not reach resolution. *Id.* Negotiation of attorneys' fees spanned several weeks thereafter and was accomplished with the assistance of Judge Welsh through telephonic discussions with the parties. *Id*. at ¶ 23. The parties reached agreement on attorneys' fees with Judge Welsh's recommendation on December 3, 2020. *Id.* Thereafter, Plaintiffs conducted additional confirmatory discovery, receiving several more batches of documents from NNA, which Lead Class Counsel and their expert reviewed. *Id.* at ¶ 24.

Drafting the Settlement and exhibits was time consuming given the scope of relief provided and the need for several customized notices, and, at times, the parties had to negotiate details of the drafts. *Id.* at ¶ 25. Plaintiffs took the lead in drafting the Settlement Agreement and virtually all of the attachments. *Id.* The parties then executed the Settlement between May 6 and May 9, 2021. *Id.* at ¶ 26.

By agreeing to defer litigation, and engaging in pre-litigation mediation and settlement, Lead Class Counsel acted in the best interests of Class Members and reached an excellent result, faster than could have been achieved through litigation, even though it meant their own lodestar would be less. Indeed, while the total time from the initial demand letter to execution of the settlement was roughly two years, this is far less than it would have been if the parties had litigated. *Compare, e.g.*, *Kemp v. Nissan*, No. 3:19-cv-0085 (M.D. Tenn.) (currently pending before the

Court for nearly two years with discovery still in the early stages and involving numerous plaintiffs' counsel and several cases asserting the same claims).

As stated by Judge Welsh, "[t]hroughout the mediation process, the parties dealt with each other at arm's length . . . [and] the negotiations were hard fought by both sides. The parties were each represented by highly experienced, effective and assertive counsel who were well versed in the facts of the case and the applicable law. I was satisfied throughout the negotiations that the parties' positions were thoroughly explored and advanced." Welsh Decl. at ¶ 4.

I. ARGUMENT

A. Class Counsel's Fee Request Is Reasonable

Class Counsel ask the Court to approve payment by NNA of a total of $2,500,000 for fees and expenses, consisting of reimbursement of $54,209.54 in expenses and $2,445,790.46 in attorneys' fees. NNA has agreed to pay this amount, above and beyond all other benefits of the Settlement. SA ¶ 136. As discussed below, the requested fee represents less than 5% of the economic value of the Settlement, and a multiple of less than 2.12 of Class Counsel's lodestar, both of which are well-within the typical ranges commonly approved.

In class action litigation, the Court's focus in evaluating a fee request is ensuring that it is reasonable. Courts in this Circuit consider the "*Ramey* factors" to determine reasonable compensation to class counsel. These include: (a) the value of the benefits to the class; (b) the value of the services on an hourly basis; (c) society's stake in rewarding attorneys who produce such benefits to maintain an incentive to others; (d) whether the attorneys worked on a contingent fee basis; (e) the complexity of the litigation; and (f) the professional skill and standing of counsel. *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974). None of the *Ramey*

factors is dispositive, and this Court "enjoys wide discretion in assessing the[ir] weight and applicability." *Granada Invs. Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992).

Here, there is ample justification to reward Class Counsel for achieving the benefits of this Settlement. The Settlement provides excellent relief for an alleged defect that poses a potential safety hazard. Lead Class Counsel worked for over two years and incurred tens-of-thousands of dollars in out-of-pocket expenses on a contingent basis to achieve this result. Lead Class Counsel displayed a high degree of skill, as the claims at issue were unquestionably complex, and achieved an excellent result relatively quickly without imposing undue burden on the Court. Importantly, at all times Lead Class Counsel placed the interest of Class Members first, even though it meant their own fees might ultimately be less.

1. The Requested Fee Is Modest Relative to the Value of the Benefits Provided to the Class

The requested fee is modest relative to the economic value of the Settlement. The parties agree that the total economic value of the Settlement likely exceeds $50 million (SA ¶ 16). Plaintiffs' valuation expert estimates a significantly higher value, discussed below. Thus, the requested fee represents less than 5% of the economic value of the Settlement.

"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). When a settlement creates a quantifiable common benefit, courts in the Sixth Circuit have developed a preference for using the percentage of benefit method to calculate attorneys' fees because 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 v. Prudential-Bache Properties*, 9 F.3d 513, 516-17 (6th Cir. 1993). District courts have noted the "clear trend in the Sixth Circuit" is for the percentage of benefit method with a lodestar cross-

check, which "accounts for both the amount of work done and reflects the results achieved by class counsel[.]" *In re Southeastern Milk Antitrust Litig.*, 2018 U.S. Dist. LEXIS 131855, at *14 (E.D. Tenn. July 11, 2018); *see also Connectivity Sys. Inc. v. Nat'l City Bank*, 2011 U.S. Dist. LEXIS 7829, at *34 (S.D. Ohio Jan. 25, 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").

Where, as here, there is not a true common fund, courts typically use estimates to value the settlement relief. *See e.g.*, *Gann v. Nissan*, No. 3:18-cv-00966, ECF No. 130 (M.D. Tenn. Mar. 10, 2020) (granting fee requested under the percentage of benefit model based on expert valuation of the extended warranty); *Manners v. Am. Gen. Life Ins. Co.*, 1999 U.S. Dist. LEXIS 22880, at *84 (M.D. Tenn. Aug. 10, 1999) (awarding fees based on estimated value using various claims assumptions); *see also Kenney v. Centerstone of America, Inc.*, No. 3:20-cv-01007, ECF No. 44 at ¶ 7 (M.D. Tenn. Aug. 9, 2021) (awarding attorneys' fees "constituting 27 1/3% of the Settlement Cap" in a claims made settlement).

The Settlement here provides very substantial economic benefits in the form of warranty coverage, free replacements, and reimbursement of out-of-pockets costs, plus the costs of notice and administration.

First, the Settlement provides a three-year warranty extension (for a total of six years), plus a window of opportunity for all Class Members to receive free replacements, even if they are outside the six-year extended warranty. The latter is a form of warranty coverage too, divorced from mileage or age. Indeed, the oldest Class Vehicles are approaching ten-years old, but even they can get free replacements.[2]

[2] 2013 models began selling in mid-2012.

Court universally hold that the value of extended warranty coverage is the estimated price that consumers would be expected to pay to acquire similar coverage if such coverage were sold on the market. *See In re Volkswagen & Audi Warranty Extension Litig*., 89 F. Supp. 3d 155, 169 (D. Mass. 2015) ("from a consumer's perspective, a warranty against repair has value even when no repairs are claimed during the period of coverage. The fact of coverage is its own benefit; for a price, a consumer can purchase certainty as to what repairs will cost if they are needed."); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig*., 2013 U.S. Dist. LEXIS 123298 at *234 n.7, 298-99, n.10 (C.D. Cal. July 24, 2013) (valuing warranty "based on the market price of similar extended service contracts offered in the industry"); *In re Sony Corp. SXRD Rear Projection TV Mktg., Sales Practices & Prods. Liab. Litig*., 2010 U.S. Dist. LEXIS 87643, at *27 (S.D.N.Y. Aug. 24, 2010) (extrapolation based on market cost); *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 304-305 (E.D. Pa. 2003) (value should "be based on the benefit to the class and not the cost to the defendant").

Here, Plaintiffs retained an expert, Lee Bowron, ACAS, MAAA, to estimate the economic value of the warranty extension and the window of opportunity for out-of-warranty replacements (together, the "Warranty Benefits"). Mr. Bowron has substantial experience valuing automotive warranty coverage, including in several cases involving NNA in this Court. *See* Declaration of Lee Bowron ("Bowron Decl."), filed contemporaneously herewith, at 4; *see also Weckwerth v. Nissan*, No. 3:18-cv-00588, ECF No. 154 (M.D. Tenn. Jan. 27, 2020); *Gann v. Nissan*, No. 3:18-cv-00966, ECF No. 112 (M.D. Tenn. Jan. 24, 2020). Mr. Bowron estimates that the market value of the Warranty Benefits here ranges from approximately $47 million to potentially more than $79 million, with his best estimate being around $59 million. Bowron Decl. at ¶ 7. Thus, Class Counsel's fee request is a reasonable fraction of the warranty benefits alone – i.e., about 4%.

In addition, NNA will pay cash reimbursements to Class Members who paid to replace their headlamps at any time prior to the Notice Date (October 25, 2021) and who submit a valid reimbursement claim by April 22, 2022.[3] Mr. Bowron's report does not include any amount for expected reimbursement claims. In cases where the value of a settlement benefit depends on the number of class members who submit claims, courts in the Sixth Circuit have sometimes estimated a value based on an assumption that all, or some percentage of, class members will submit a claim for purposes of confirming the reasonableness of fees. *See e.g., Dick v. Sprint Communs. Co. L.P.*, 297 F.R.D. 283, 299 (W.D. Ky. 2014) (assuming all class members would claim); *Manners*, 1999 U.S. Dist. LEXIS 22880, at *90-91 (basing valuation, in part, on the assumption that 5% of class members would utilize a settlement benefit). Some courts have calculated fees based on the total potential payment cap. *See Kenney*, No. 3:20-cv-01007, ECF No. 44 at ¶ 7 (M.D. Tenn. Aug. 9, 2021) (awarding attorneys' fees "constituting 27 1/3% of the Settlement Cap" in a claims made settlement). Here, NNA's total liability for reimbursements is uncapped.

As of the date of this brief, KCC has not yet commenced the notice program, other than establishing the Settlement website and sending notice to the Attorneys General pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. Section 1715. Lucchesi Decl. at ¶¶ 10-14. Nevertheless, despite the fact that the Mailed Notice, publication notice, and digital media notice have not even begun, 397 putative Class Members have already submitted reimbursement claims with a face value of $335,564.85.[4] *Id.* at ¶ 17. That number will increase significantly once the notice program begins. Class Counsel will provide updated claims information prior to the December 20, 2021 Final Hearing. Regardless of the total number of claims, however, from a

[3] The process for submitting a reimbursement claim is simple, and only requires basic documentation to show the amount of cost incurred.
[4] These claims have not yet been reviewed or validated by KCC.

qualitative perspective the reimbursement component of the Settlement provides a full recovery to Class Members who paid out-of-pocket for replacements. It is clearly valuable relief.

In addition, the Settlement requires NNA to pay all of the costs of notice and administration. SA ¶ 99. To date, KCC has incurred $296,612.17 in settlement administration costs, and the total initial noticing costs are estimated to be $1,933,155.04 for printing and mailing the notice packets. Lucchesi Decl. at ¶ 20. This does not include the costs of the post-Effective Date notices or reviewing and administering claims. *Id*. Additional costs will also be incurred to review claims from Members of the Settlement Class, process and pay valid claims, communicate with Class Members, and carry out other tasks in administering the settlement. *Id*. Thus, the total notice and administration costs alone will exceed the attorneys' fee that is sought.

Given the value of the warranty components, cash reimbursements, and notice and administration costs, plus the payment of attorneys' fees, the parties' agreement that the total value of the Settlement is at least $50 million is justified. SA ¶ 16. The Court need not determine a precise value here, however, because it only needs to conclude that a fee of $2,445,790 is reasonable in light of the value of the benefits of the Settlement, which it easily is.

Indeed, even a much smaller settlement would support a $2.5 million fee. For example, a $7.5 million value alone could support a $2.5 million fee because, in the Sixth Circuit, fees awarded under the percentage of the benefit method typically range "from 20 to 50 percent of the fund," with 33% being a very common percentage. *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 380 (6th Cir. 2006) (collecting cases); *see also Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351-52 (6th Cir. 2009) (30%); *Kenney v. Centerstone of America, Inc.*, No. 3:20-cv-01007, ECF No. 44 at ¶ 7 (M.D. Tenn. Aug. 9, 2021) (awarding attorneys' fees "constituting 27 1/3% of the Settlement Cap"); *Hosp. Auth. of Metro. Gov't v. Momenta Pharms., Inc.*, 2020 U.S. Dist. LEXIS

99546, *6 (M.D. Tenn. May 29, 2020) (33%); *Arledge*, 2018 U.S. Dist. LEXIS 179474, at *8 (awarding 22.6% of the sum total of the benefits to the class and the attorneys' fees added together); *Moore v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 102621, at *20 (S.D. Ohio June 30, 2017) (33%); *Ranney v. Am. Airlines*, 2016 U.S. Dist. LEXIS 14905, at *5-6 (S.D. Ohio Feb. 8, 2016) (44%); *Mees v. Skreened, Ltd.*, 2016 U.S. Dist. LEXIS 1242, at *15 (S.D. Ohio Jan. 6, 2016) (33%); *Swigart v. Fifth Third Bank*, 2014 U.S. Dist. LEXIS 94450, at *19 (S.D. Ohio July 11, 2014) (33%). This simply demonstrates that the fee requested here is quite modest relative to the results achieved.

Class Counsel's fee request should be approved based on the value of the Settlement.

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

The requested fee is also supported by Class Counsel's lodestar.

Under the lodestar calculation, the Court first "multiplies the number of hours 'reasonably expended' on the litigation by a 'reasonable hourly rate,'" and then uses a multiplier to "adjust the lodestar to reflect relevant considerations peculiar to the subject litigation.'" *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (citation omitted). In applying a multiplier, the Court should consider "the nature of the case, the market for such legal services, the risk involved, and the results achieved, such that the Court rewards a lead counsel that takes on more risk, demonstrates superior quality, or achieves a greater settlement with a larger lodestar multiplier." *In re Cardinal Health Inc. Sec. Litigs.*, 528 F. Supp. 2d, at 761.

Class Counsel's unadorned lodestar as of August 31, 2021—i.e., their total hours multiplied by their standard hourly rates—is $1,156,127.50. Mathews F.A. Decl. at ¶ 35; Declaration of John Spragens ("Spragens F.A. Decl.") at ¶¶ 18-20. The requested fee represents a multiplier of less than 2.12 of Class Counsel's lodestar, which is well within the range of

multipliers approved by the Sixth Circuit, the Middle District of Tennessee, and other district courts in the Sixth Circuit. It is fully justified by all relevant factors, especially the strong results and the efficiency with which they were achieved here.

i. Class Counsel's Hours Are Reasonable

Class Counsel expended over 2,212 hours to date pursuing the claims and achieving the Settlement. Mathews F.A. Decl. at ¶ 35; Spragens F.A. Decl. at ¶ 20. As set forth in the Declarations of Timothy Mathews and John Spragens, all hours were reasonably and necessarily incurred in pursuit of the claims here. Mathews F.A. Decl. at ¶ 40; Spragens F.A. Decl. at ¶ 18. Their respective declarations describe in detail the efforts undertaken by their respective firms, and the number of hours spent on each aspect of the case by each time keeper.

All timekeepers kept contemporaneous time records in six-minute increments, and Mr. Mathews and Mr. Spragens have reviewed the detailed time of each timekeeper in their respective firms and made appropriate reductions in the exercise of billing discretion to ensure that all time billed was reasonable.[5] Lead Class Counsel have also excluded the time of any timekeeper who devoted less than ten hours to this matter. Mathews F.A. Decl. at ¶ 33.

Further, these hours do not include the substantial time that Class Counsel will continue to expend in furtherance of this case in the future, including for reply briefs, the final approval hearing, communicating with Class Members about the settlement, and supervising the claims administration process. *See Estate of McConnell v. EUBA Corp.*, 2021 U.S. Dist. LEXIS 97576, *19 (S.D. Ohio May 24, 2021) ("The Court is aware that Class Counsel's work does not end at final approval. Class Counsel frequently spend additional time, sometimes significant time,

[5] Class Counsel will provide their detailed time records to the Court for *in camera* inspection upon request.

dealing with class members' inquiries, administration issues, and other post-approval matters."); *In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at *47 (D.N.J. May 14, 2012) (recognizing that time submitted in connection with a fee petition filed before final approval "does not include the fees and expenses . . . expended after [that date] on tasks such as preparing for and appearing at the fairness hearing").

Importantly, in every class action they settle, Class Counsel take seriously their obligation to ensure that the claims administration process proceeds as intended, which requires significant investment of time long after final approval. Here, for example, the Settlement includes a provision expressly allowing an audit of the Settlement Administrator's claims review work to ensure that the Settlement has been implemented properly. SA ¶ 125. It is not uncommon for Lead Class Counsel to incur hundreds-of-thousands of dollars in additional lodestar after final approval. Mathews F.A. Decl. at ¶ 41.

ii. Class Counsel's Hourly Rates Are Reasonable

Class Counsels' hourly rates are reasonable, as has been found repeatedly by courts.

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.*, 2015 U.S. Dist. LEXIS 106944, at *27-28 (S.D. Ohio Aug. 13, 2015) (citation omitted). Thus, Class 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*, 2014 U.S. Dist. LEXIS 128451, at *25-37 (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").

The hourly rates for the attorneys from the Chimicles firm responsible for prosecuting this action range between $400 and $725 per hour, and for paralegals and IT professionals between $200 and $300. Mathews F.A. Decl. at ¶ 37. The blended hourly rate for the Chimicles firm is $523. *Id.*

These hourly rates are within the range typically approved in the Sixth Circuit and Middle District of Tennessee in complex class action litigation. *See, e.g., Gann v. Nissan*, No. 3:18-cv-00966, ECF Nos. 107, 108, 109 (Attorney Declarations) & 130 at ¶ 16 (M.D. Tenn. Mar. 10, 2020) (approving rates as high as $1,000 and $875 per hour in an automotive defect case against NNA); *Weckwerth v. Nissan*, No. 3:18-cv-00588, ECF Nos. 148, 149, 150, 151, 152 (Attorney Declarations) & 181 at ¶ 17 (M.D. Tenn. Mar. 10, 2020) (approving rates as high as $1,150 and $875 per hour in an automotive defect case against NNA); *Cassell v. Vanderbilt Univ.*, No. 16-2086, ECF No. 174 at 3 (M.D. Tenn. Oct. 22, 2019) (approving a rate of $1,060 per hour for a non-local firm); *In re Auto. Parts Antitrust Litig.*, 2020 U.S. Dist. LEXIS 174177, at *170 (E.D. Mich. Sept. 23, 2020) (approving hourly rates that exceeded $700 for senior attorneys); *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").

Moreover, as class action practitioners, Class Counsels' hourly rates are frequently reviewed and found to be reasonable by courts across the country. The hourly rates billed by the Chimicles firm, including the rates billed by Mr. Mathews and Mr. Kashurba, who performed the bulk of the work here, have been approved by numerous courts over the course of many years. *See*

Mathews F.A. Decl. at ¶ 38. Similarly, many courts have approved the rates of the Spragens firm as well. *See* Spragens F.A. Decl. at ¶ 19.

iii. Class Counsel Deserve the Modest Multiplier Requested

Class Counsel's request for approval of $2,445,790.46 in fees represents a multiple of less than 2.12 of their reasonable lodestar. This too is well within the typical range commonly approved, and it is readily justified by the excellent results here and efficiency with which they were achieved.

"The Sixth Circuit Court of Appeals has endorsed the use of multipliers …." *In re Oral Sodium Phosphate Sol.-Based Prods. Liab. Action*, 2010 U.S. Dist. LEXIS 128371, at *24 (N.D. Ohio Dec. 6, 2010); *see also id*. at *27 n.28 (citing Stuart J. Logan, Dr. Jack Moshman, & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports (March-April 2003)) (finding an average multiplier of 3.89 across 1,120 fee awards entered by state and federal courts).

Lodestar multiples of 2 to 5 are common 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); *City of Plantation Police Officers' Emples. Ret. Sys. v. Jeffries*, 2014 U.S. Dist. LEXIS 178280, at *48 (S.D. Ohio Dec. 29, 2014) (3 multiplier); *In re Se. Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70167, at *20 (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 U.S. Dist. LEXIS 22880, at *93 (3.8 multiplier); *Merkner*, 2011 U.S. Dist. LEXIS 157375, at *18 (5.3 multiplier); *Bailey v. AK Steel Corp.*, 2008 U.S. Dist. LEXIS 18838, at *7 (S.D. Ohio Feb. 28, 2008) (awarding 3.04 multiplier and identifying a "normal range of between two and five"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 U.S. Dist. LEXIS 91661, at *7 (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"); Newberg on Class Action § 14.6 (4th ed. 2009) (Multiples ranging from one to four frequently are awarded"); *see also Nelson v. Nissan*, No. 3:17-cv-01114, ECF Nos. 85 & 91 (M.D. Tenn. Dec. 19, 2019) (approving fee request that amounted to less than 6% of the estimated value of benefits made available to the class and a 2.57 multiplier on class counsel's lodestar).

When awarding a multiplier, courts consider "the nature of the case, the market for such legal services, the risk involved, and the results achieved." *In re Cardinal Health Inc. Sec. Litigs.*, 528 F. Supp. 2d at 76; *see also Rawlings*, 9 F.3d at 51 (multiplier considerations include the benefits obtained under the settlement, the complexity of the case, and the quality of the representation). Courts should "reward a lead counsel that takes on more risk, demonstrates superior quality, or achieves a greater settlement with a larger lodestar multiplier." *In re Cardinal Health Inc. Sec. Litigs.*, 528 F. Supp. 2d at 76.

These factors support the requested fee here. Most importantly, the results achieved in the Settlement are outstanding. Further, Class Counsel achieved an excellent result extremely efficiently in a complicated and technical case, which they took on a purely contingent basis.

As the Third Circuit Task Force recognized in its Report on Court Awarded Attorneys' Fees, a class action attorney's "contribution to a prompt . . . resolution" should be rewarded because doing so "encourage[s] early settlement by providing an incentive that neutralizes an attorney's possible predilection to increase the number of hours invested in a case for lodestar purposes." Court Awarded Atty. Fees, 1985 U.S. App. LEXIS 31653, at *66-67 (3d Cir. Oct. 8, 1985). Lead Class Counsel here achieved the Settlement in the most efficient way possible, minimizing burden on the court system, even though it meant their own lodestar (and fees) would

almost certainly be less. After serving their demand letter, Lead Class Counsel could have filed their lawsuit and litigated in Court, which certainly would have increased their lodestar and, ultimately, fees. By agreeing to proceed with informal discovery and engage in early settlement discussions, however, Lead Class Counsel prioritized getting relief to Class Members quickly.

In addition, the benefits of this Settlement, which provides a remedy for a potential safety hazard, would not exist but for the efforts of Plaintiffs and Lead Class Counsel. Notably, despite receiving numerous complaints from consumers since at least 2013 (*see* ECF No. 1 at ¶ 49), the National Highway Traffic Safety Administration ("NHTSA") did not require action from NNA concerning the headlamps.

The multiplier of less than 2.12 requested here is fully justified and well within the range regularly approved. Moreover, as noted above, Class Counsel will continue to devote significant hours to this case into the future.

3. Rewarding Attorneys for the Benefit to Society

This Settlement also creates a significant benefit to society, not only because it provides economic benefits to Class Members whose claims would be too small to pursue individually, but also because it addresses a potential safety concern. Plaintiffs allege that the defect poses a potential safety hazard if the headlamps are not replaced before they become significantly degraded. While some Class Members have already replaced their delaminated headlamps, some have not. By providing reimbursements and replacements, the Settlement benefits not only the Class Members, but also other drivers, cyclists, pedestrians, and emergency personnel. The Settlement relief is solely the result of the efforts of Plaintiffs and Lead Class Counsel.

Ramey recognizes that "there is a benefit to society in ensuring that small claimants may pool their claims and resources, and attorneys who take on class action cases enable this." *Kimber*

Baldwin Designs LLC v. Silv Commc'ns, Inc., 2017 U.S. Dist. LEXIS 186830, at *15 (S.D. Ohio Nov. 13, 2017). "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.

Courts also recognize this *Ramey* factor is particularly compelling where, like here, a settlement addresses an ongoing harm and potential safety issues. *See In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 936 (N.D. Ohio Jun. 12, 2003) (quoting *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1281-1282 (S.D. Ohio Mar. 1, 1996) ("Furthermore, it is clear that 'the global settlement negotiated by Counsel in this case is providing benefits to a class of people who are very much in need of help.'")).

Here, Lead Class 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").

Lead Class Counsel should be rewarded for the benefits to society they achieved.

4. The Contingent Nature of the Fee

Lead Class Counsel also invested significant time and expense solely on a contingent basis.

The fourth *Ramey* factor recognizes that an attorney whose compensation is dependent on success – who takes a significant risk of no compensation – should receive a higher fee than an attorney who is paid a market rate as the case goes along, win or lose. *See Manners*, 1999 U.S.

Dist. LEXIS 22880, at *92 (the contingent nature of the fee left "plaintiffs' counsel bearing the full risk of no recovery at all"); *Gentrup v. Renovo Servs., LLC*, 2011 U.S. Dist. LEXIS 67887, at *14 (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).

Class Counsel, collectively, expended 2,212.1 hours over the course of more than two years pursuing this action, and spent $54,209 in out-of-pocket expenses. Mathews F.A. Decl. at ¶¶ 35, 42; Spragens F.A. Decl. at ¶¶ 20, 21. Even though the parties agreed to engage in early settlement discussions, there was no guarantee that they would reach agreement. As noted by the mediator, the negotiations were hard fought and lasted many months. Welsh Decl. at ¶ 4. Class Counsel advanced all attorney time, expert fees, court costs, and mediation expenses without any assurance that they would be paid. Mathews F.A. Decl. at ¶¶ 40, 42. Accordingly, this factor also supports approval of the fee request.

5. The Complexity of the Litigation

This case also involved complex factual and legal issues, including complex issues related to the federal automotive regulatory standards applicable to headlamps. Thus, this *Ramey* factor, which takes into consideration the complexity of the litigation, also supports the requested fee.

Courts consider a variety of issues in evaluating this factor, including the legal and factual issues involved, and the structure of the settlement agreement. *See In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d, at 939-40 ("The complexity and novelty of the factual and legal issues presented, and the settlement negotiations necessary to resolve those issues, were exceptional . . . . The final settlement agreement, which is intricate and lengthy, reflects the complexity of the case.").

The claims at issue here involved significant factual complexity, which is one of the reasons Lead Class Counsel retained a consulting headlamp expert to assist with their analysis of the alleged defect and to advise counsel regarding industry standards.

The legal claims at issue are also complex, and involve a nexus with federal automobile regulatory law. Plaintiffs asserted claims for breaches of warranty, violations of state consumer fraud statutes, and common law claims, on behalf of both individual state and nationwide classes. As noted by Judge Welsh, "throughout the negotiations … the parties' positions were thoroughly explored and advanced." Welsh Decl. at ¶ 4.

Finally, the Settlement itself provides several different forms of relief and requires multiple forms of notice to Class Members depending on the status of their extended warranty at the time of final approval. Class Counsel will be responsible for overseeing this process long after final approval.

6. The Professional Skill and Standing of Counsel

The profession skill and standing of counsel here are outstanding. This also supports approval of the fee request. *Arp v. Hohla & Wyss Enters.*, LLP, 2020 U.S. Dist. LEXIS 207512, at *22 (S.D. Ohio Nov. 5, 2020) (finding the sixth *Ramey* factor weighs in favor of approval of the fee request where "Plaintiff and Defendants are represented by experienced counsel. All counsel are highly qualified and have substantial experience in federal courts and class action litigation.").

Timothy Mathews, the partner who headed this case, has nearly two decades of experience leading complex class actions and has been described as "among the most capable and experienced lawyers in the country" in consumer class action litigation. *Chambers v. Whirlpool*, 214 F. Supp. 3d 877, 902 (C.D. Cal. 2016). He has held a lead role in many cases, like this one, where he achieved excellent results, including several full recoveries. Mathews F.A. Decl. at ¶ 5. He is also

an experienced appellate attorney, has excellent academic credentials, has received numerous honors, and is a prominent member of his local community. *Id*. at ¶ 6.

Alex Kashurba, the primary associate on this case, served as a law clerk for two judges in the United States District Court for the Western District of Pennsylvania, and interned for the United States Attorney's Office for the Eastern District of Pennsylvania as well as the Office of General Counsel for the United States House of Representatives prior to joining the Chimicles firm. He has several years of experience litigating complex class actions on behalf of consumers. *Id*. at ¶ 7.

The additional Class Counsel who contributed to this case likewise have demonstrated a high degree of standing, as reflected in the declarations of Timothy Mathews and John Spragens. As already discussed, Class Counsel demonstrated a high degree of skill in achieving an excellent result in an extremely efficient manner, to the benefit of Class Members

The standing of NNA's defense counsel is also relevant, as the Settlement and fee amount were vigorously negotiated. *In re Cardinal Health*, 528 F. Supp. 2d at 768 (the skill and competence of opposing counsel should be considered). NNA's defense team was headed by Brigid Carpenter, the managing partner of Baker Donelson's Nashville office. Ms. Carpenter has extensive trial experience and is consistently recognized as a top defense lawyer.

Finally, the standing of the mediator, Judge Welsh, is also relevant here, as the fee was agreed by the parties based on Judge Welsh's recommendation. Mathews F.A. Decl. at ¶ 23; Welsh. Decl. at ¶ 5. Judge Welsh is a nationally renowned JAMS mediator with extensive experience mediating class actions, and has received numerous professional accolades. Mathews F.A. Decl. at ¶ 17; Welsh. Decl. at ¶ 1.

Thus, the skill and professional standing of counsel also support approval of the fee request.

B. Class Counsel's Requested Reimbursement of Expenses Is Reasonable

The Court should also approve NNA's reimbursement of $54,209 for Class Counsels' out-of-pocket litigation expenses. 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).

The expenses, which are described more fully in the Mathews and Spragens Declarations, include expert fees, mediator fees, filing fees, computer research, photocopies, postage, telephone charges, and other expenses reasonably necessary to the prosecution of this action, which are recorded on the books and records of their firms and have not been reimbursed previously. Mathews F.A. Decl. at ¶ 42; Spragens F.A. Decl. at ¶ 21. All these expenses were reasonable and necessarily incurred and are of the sort that would typically be billed to paying clients in the marketplace.

C. The Requested Incentive Awards Are Reasonable

Finally, the Court should approve NNA's payment of $5,000 incentive awards to each of the Plaintiffs. These amounts too were negotiated with the assistance of Judge Welsh only after all other material terms of the settlement had been agreed. Welsh Decl. at ¶ 5.

Service awards for the named plaintiffs are typical in class actions. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). "The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011).

The amounts requested here are consistent with or below the amounts typically awarded in similar litigation. *See, e.g.*, *Gann v. Nissan*, No. 3:18-cv-00966, ECF No. 130 at ¶ 16 (M.D. Tenn.

Mar. 10, 2020) ($5,000 awards); *In re Southeastern Milk Antitrust Litig.*, 2018 U.S. Dist. LEXIS 131855, at *23-24 (E.D. Tenn. July 11, 2018) ($10,000 awards); *Kimber Baldwin Designs*, 2017 U.S. Dist. LEXIS 186830, at *19 ($5,000 awards); *Lonardo*, 706 F. Supp. 2d at 787 ($5,000 awards); *Physicians of Winter Haven, LLC v. Steris Corp.*, 2012 U.S. Dist. LEXIS 15581, at *31 (N.D. Ohio Feb. 6, 2012) ($15,000 awards).

Moreover, these amounts are justified by each individual Plaintiff's efforts and contribution to achieving the Settlement here, as described in their Declarations (ECF Nos. 15-4, 15-5, 15-6). The $5,000 incentives are well-deserved and should be awarded.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion and approve NNA's payment pursuant to the Settlement of $2,500,000 for attorneys' fees and reimbursement of expenses, and incentive awards of $5,000 to each of the three Plaintiffs.

DATED: September 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I electronically filed the foregoing Plaintiffs' Memorandum Of Law In Support Of Motion For Award Of Attorneys' Fees And Expenses And Plaintiffs' Incentive Awards with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

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