

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE - NASHVILLE DIVISION**

CHRISTOPHER GANN, LEANDRE BISHOP,  
KEVIN BURKE, ELISA CABEBE, ISRAEL  
CHIA, KRISTA COSTA, HILLARY DICK,  
JURA GERALD, SEIJI SILER-HYATTE,  
JEANINE INGRASSIA, ARNIKA IRELAND,  
MONTELL JONES, MICHAEL KANZLER,  
ALEXANDRA MCCULLOUGH, TERESE  
MIRANDA, AUTUMN PIERCE, ROBERT H.  
WEINBERG, LASHANDRIKA WILLIAMS,  
AND LAURA WINDOM, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

NISSAN NORTH AMERICA, INC., a  
California corporation,

Defendant.

Case No. 3:18-cv-00966

**CLASS ACTION**

**PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF MOTION FOR AWARD  
OF ATTORNEYS' FEES,  
REIMBURSEMENT OF EXPENSES,  
AND SERVICE AWARDS FOR CLASS  
REPRESENTATIVES**

District Judge Eli Richardson  
Courtroom 874  
Magistrate Judge Alistair E. Newbern  
Courtroom 774

**JURY TRIAL DEMANDED**

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This motion for an award of attorneys' fees, expenses, and Class Representative service awards accompanies Plaintiffs' concurrently filed motion for final approval of the class action settlement. Plaintiffs will not here repeat the summary of the litigation and settlement terms detailed in their final approval brief, but rather incorporates them by reference herein. Throughout this memorandum, all capitalized terms have the same meaning as defined in the Settlement Agreement [Doc. No. 66-1], unless otherwise stated.

## **I. INTRODUCTION**

Counsel obtained an outstanding result for Class Members. The Settlement covers current and former owners and lessees of approximately 1.4 million vehicles and provides over \$444 million-worth of benefits, including free transmission repairs or replacements during the extended warranty period and reimbursements to eligible Class Members who already paid to have their transmissions replaced or repaired.

Plaintiffs seek an award of attorneys' fees and expenses in the total amount of \$5.9 million and a \$5,000 service award for each Plaintiff/Class Representative. The requested fee is very modest relative to the Settlement benefits, representing just 1.3% of the value of the extended warranty and reimbursement benefits alone, and a multiplier of 1.9 on Class Counsel's lodestar. The requested fees and expenses are especially reasonable given the tremendous result obtained for the Class and the efforts taken by counsel to obtain that result. Likewise, a service award of \$5,000 to each Class Representative is reasonable given the efforts they took to represent absent Class Members.

## **II. ATTORNEYS' FEES AND OUT-OF-POCKET EXPENSES**

### **A. Counsel Are Entitled to Attorneys' Fees and Reimbursement of Expenses**

Counsel for Plaintiffs and the Class are entitled to an award of attorneys' fees and expenses under the substantial benefit doctrine.



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. *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 U.S. Dist. LEXIS 22880, at \*84 (M.D. Tenn. Aug. 10, 1999) (Judge Nixon); *In re Unumprovident Corp. Derivative Litig.*, No. 1:02-cv-386, 2010 U.S. Dist. LEXIS 4326, at \*10-16 (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).

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 common fund, but rather common benefits in the form of extended death benefits and accidental death benefits that enhanced class members' life insurance policies. 1999 U.S. Dist. LEXIS 22880, at \*17. 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).<sup>1</sup>

Finally, through the Settlement, the parties entered into a contract after the material terms of the Settlement had been negotiated where defendant Nissan North America, Inc. ("NNA") agreed that counsel for Plaintiffs and the Class are entitled to fees and reimbursement of expenses, and agreed not to oppose a fee and expense request up to \$5.9 million. SA, ¶¶ 115-117.

#### **B. Standards Used to Determine the Award of Attorneys' Fees**

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

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<sup>1</sup> 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 U.S. Dist. LEXIS 199568, at \*5-6 (M.D. Tenn. May 28, 2014) (same). In any event, Tennessee state law is substantially similar to federal law and will be concurrently cited throughout.

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 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 Tenn. App. LEXIS 578, at \*12-13 (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. 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. 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.*, No. 2:08-MD-1000, 2018 U.S. Dist. LEXIS 131855, at \*14 (E.D. Tenn. July 11, 2018). In *In re Cardinal Health Inc. Securities Litigations*, the court explained, 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 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”);

*Kimber Baldwin Designs, LLC v. Silv Commc'ns, Inc.*, No. 1:16-cv-448, 2017 U.S. Dist. LEXIS 186830, at \*14 (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).

Within this Circuit, the percentage typically ranges “from 20 to 50 percent of the fund.” *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%); *Ranney v. Am. Airlines*, No. 1:08cv137, 2016 U.S. Dist. LEXIS 14905, at \*5-6 (S.D. Ohio Feb. 8, 2016) (44%); *Mees v. Skreened, Ltd.*, No. 2:14-cv-142, 2016 U.S. Dist. LEXIS 1242, at \*15 (S.D. Ohio Jan. 6, 2016) (33%); *Swigart v. Fifth Third Bank*, No. 1:11-cv-88, 2014 U.S. Dist. LEXIS 94450, at \*19 (S.D. Ohio July 11, 2014) (33%); *Moore v. Aerotek, Inc.*, No. 2:15-cv-2701, 2017 U.S. Dist. LEXIS 102621, at \*20 (S.D. Ohio June 30, 2017) (33%); *Kimber Baldwin Designs*, 2017 U.S. Dist. LEXIS 186830, at \*13 (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%).

Further, when considering the award of attorneys’ fees (under either the percentage or lodestar methods), the court should also consider that the amount of fees class counsel would seek from the court was discussed between the parties, and NNA agreed not to oppose this fee request. 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*, 1999 U.S. Dist. LEXIS 22880, at \*84; (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 class 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. The fees were not discussed until after agreement was reached on the substantive terms of the Settlement. *See* Declaration of Timothy G. Blood in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement, Conditional Certification of Settlement Class, and Approval of Class Notice (“Blood Preliminary Approval Decl.”), ¶ 35; Declaration of Marc L. Godino in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement Agreement and Award of Attorneys' Fees, Costs, Expenses, and Representative Plaintiff Service Awards (“Godino Fee Decl.”), ¶ 25.<sup>2</sup> *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 U.S. Dist. LEXIS 22880, at \*84 (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.”).

### **C. The Fee Request 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

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<sup>2</sup> The facts of the litigation are also described in the Declaration of Ben Barnow, filed in support of Plaintiffs' motion for final approval. The Barnow declaration is incorporated herein by reference.

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.

#### **1. 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).

Here, because of hard-fought litigation originating in four district courts, the Settlement provides enormous value to the Class. The two primary benefits are: 1) the warranty extension; and 2) the repair and replacement reimbursement.

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 ATCU by 24 months or 24,000 miles, enabling Class Members to seek under-warranty transmission repairs until 84 months or 84,000 miles, whichever occurs first. NNA’s commitment for repairs under the warranty extension is uncapped, ensuring that all Class Members requiring a transmission repair during the warranty extension period will be able to take advantage of this valuable benefit.

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 a Nissan dealer (or up to \$5,000 paid to a non-NNA repair facility) to have their transmission repaired or replaced so long as the repair occurred during the extended warranty period. 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 repair is made prior to the vehicle exceeding 90,000 miles or by January 30, 2020, whichever occurs first. Class Members need only submit a simple Claim Form and supporting documentation to receive reimbursement for their transmission repairs or replacement.

These two settlement benefits – the warranty extension and repair reimbursement – alone have an estimated value of \$444,741,000.<sup>3</sup> This value was estimated by Lee M. Bowron, ACAS, MAAA, an actuary who specializes in pricing and valuing extended service contracts and warranty extensions. In its order of June 21, 2019 (Doc No. 76), the court directed Class Counsel to provide a reasonable estimate of the value of the settlement benefits to the Class in order to assist the court in evaluating the request for attorneys' fees. In response, Class Counsel reported that Mr. Bowron conservatively estimated the retail value to the Class of the warranty extension and reimbursement coverage benefits to be \$377,088,000. (Doc No. 77). Mr. Bowron's full report substantiating the estimated value is concurrently filed. *See* Declaration of Lee M.

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<sup>3</sup> 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. *See 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 estimated at \$1,101,398.92. Declaration of Lana Lucchesi Re: Notice Procedures, ¶ 19.

Bowron. 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's full report estimates the value of the extended warranty and reimbursement coverage to be between \$377,088,000 and \$512,395,000, with a point estimate representing Mr. Bowron's best actuarial judgment as to value of \$444,741,000. *Id.*, ¶ 4. *See also Manners*, 1999 U.S. Dist. LEXIS 22880, at \*25-26 (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 former owners, an expedited resolution process for future transmission claims, and the costs of notice and settlement administration, which standing alone supports Class Counsels' fee request.<sup>4</sup>

## 2. 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 claims and resources, and attorneys who take on class action cases enable this." *Kimber Baldwin Designs*, 2017 U.S. Dist. LEXIS 186830, at \*15. 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

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<sup>4</sup> 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-Pathé 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).



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.

### **3. 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 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*, No. 1:07CV430, 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).

Counsel undertook the Lawsuits solely on a contingent basis, with no guarantee of recovery. Blood Fee Decl., ¶ 6; Declaration of Ben Barnow in Support of Plaintiffs’ Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards for Class Representatives (“Barnow Fee Decl.”), ¶ 46; Godino Fee Decl., ¶ 4; Declaration of Mark S. Greenstone in Support of Plaintiffs’ Motion for Final Approval of Class Action Settlement Agreement and Award of Attorneys’ Fees, Costs, Expenses and Representative Service Awards

(“Greenstone Fee Decl.”), ¶ 8. Despite such a challenge, counsel were able to negotiate a superb settlement agreement.

#### **4. 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 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 in the various actions and the seven motions to dismiss filed by NNA.

And even though Plaintiffs largely prevailed on the motions to dismiss, Class Counsel 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 four model-years, 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 U.S. Dist. LEXIS 106172 (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 U.S. Dist. LEXIS 81330 (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. 03-4558, 2012 U.S. Dist. LEXIS 13887 (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. Counsel served and responded to written discovery and reviewed over 20,000 pages of documents produced by NNA. Blood Preliminary Approval Decl., ¶¶ 29, 32; Godino Fee Decl., ¶ 15. Class Counsel also reviewed and analyzed hundreds of consumer complaints submitted to the National Highway Traffic Safety Administration and consumer complaint websites, such as Carcomplaints.com, interviewed hundreds of Altima owners and lessees about their experiences with the Altima, reviewed dozens of articles from engineering and mechanics publications and blogs, and reviewed NNA's technical service bulletins and maintenance manuals for the Class Vehicles. Blood Preliminary Approval Decl., ¶¶ 6-9; Godino Fee Decl., ¶¶ 7, 15, 17, 24, 30. Class Counsel also obtained and analyzed nearly one million lines of warranty claim-related information for the Class Vehicles and, based on their review developed follow-up questions to be answered by NNA. These questions regarding the warranty data and other areas of inquiry regarding NNA's identification of CVT issues and steps taken in response were then addressed by Class Counsel in a face-to-face interview with an NNA engineer. Blood Preliminary Approval Decl., ¶¶ 31-32; Blood Fee Decl., ¶ 2; Godino Fee Decl., ¶ 24.

Class Counsel also worked with a CVT expert who has published numerous articles regarding Altima CVTs. Blood Fee Decl., ¶ 3; Godino Fee Decl., ¶ 20. 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.

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.

## **5. Professional Skill and Standing of All Counsel**

Counsel are experienced in complex class litigation and have substantial experience prosecuting consumer class actions involving automobiles. Class 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. Blood Preliminary Approval Decl., ¶¶ 40, 49-55; Blood Fee Decl., Exhibit A (BHO Firm Resume); *see also* Barnow, Sharp, Godino, and Greenstone Fee Declarations.

As to defense counsel, NNA 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 reaching a settlement. *In re Cardinal Health*, 528 F. Supp. 2d at 768 (the skill and competence of opposing counsel should be considered). Yet, Class Counsel successfully persevered to achieve the very purpose of filing the Lawsuits: transmission repairs and replacements for the Class Members.

The skill and tenacity of counsel was put to the test throughout this litigation, but it resulted in an exceptional settlement for the Class and justifies the requested fee award.

## **6. 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.

In this case, the requested fee award represents a moderate multiplier of 1.9 to Class Counsel's reported collective lodestar of over \$3,011,500.<sup>5</sup> This multiplier is 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 Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 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); *Bailey v. AK Steel Corp.*, No. 1:06-cv-468, 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.*, No. 2:12-cv-83, 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"); *Meijer, Inc. v. 3M*, No. 04-5871, 2006 U.S. Dist. LEXIS 56744, at \*24 (E.D. Pa. Aug. 14, 2006) (approving a 4.77 multiplier in a case that settled after one year); *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.").

**a) 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

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<sup>5</sup> For simplicity, the lodestar and multiplier were calculated using only the time incurred by Class Counsel, even though four other firms (*i.e.*, "Other Plaintiffs' Counsel") also worked on the litigation. Co-Lead Class Counsel is charged with distributing the fee award among Class Counsel and Other Plaintiffs' Counsel. SA, ¶ 117.

‘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 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*, No. 2:08-cv-02100-JTF-cgc, 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”).<sup>6</sup>

Class Counsel’s lodestar is calculated using rates that have been accepted in numerous other class action cases. *See, e.g.*, Blood Fee Decl., ¶ 10 (citing cases); Barnow Fee Decl., ¶ 49; Godino Fee Decl., ¶ 37; Greenstone Fee Decl., ¶¶ 12-13.

Class Counsel’s rates also compare very 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 Makaeff v. Trump Univ., LLC*, No. 10cv0940 GPC (WVG), 2015 U.S. Dist. LEXIS 46749, at \*12-14 (S.D. Cal. Apr. 9, 2015) (approving hourly rates of \$600-\$825 for partners, and \$250-\$450 for associates, and \$150-\$430 for paralegals); *Lonardo*, 706 F. Supp. 2d at 793 (approving hourly rates up to \$825 “based on this Court’s knowledge of attorneys’ fees in

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<sup>6</sup> 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).

complex civil litigation and multi-district litigation”); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 U.S. Dist. LEXIS 67298, at \*14-15 (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 U.S. Dist. LEXIS 161077, at \*11 (S.D. Ill. Mar. 31, 2016) (approving hourly rates of \$460-\$998 for attorneys, \$309 for paralegals, and \$190 for legal assistants). Finally, Class Counsel have submitted sworn declarations attesting to their hourly rates and that their hourly rates charged here are the same as those charged in all their cases.

**b) The Hours Expended Are Reasonable**

The number of hours spent by Class Counsel is reasonable given the efforts to obtain this resolution. The litigation has lasted three years and involved substantial amounts of motion practice by multiple law firms representing 19 named plaintiffs in five district courts, discovery, expert work, and settlement negotiations and implementation. Blood Preliminary Approval Decl., ¶¶ 6-36; Blood Fee Decl., ¶¶ 2-3; Godino Fee Decl., ¶¶ 5-19.<sup>7</sup> Moreover, Class Counsel’s work is not yet done. Class 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

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<sup>7</sup> 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 Co. Spark Plug & Three Valve Engine Prods. Liab. Litig.*, No. 1:12-MD-2316, 2016 U.S. Dist. LEXIS 188074, at \*29-30 (N.D. Ohio Jan. 26, 2016) (concluding hours expended were reasonably 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*, 2018 U.S. Dist. LEXIS 131855, at \*14 n.3 (same).

to oversee and assist Class Members with the claims administration process, including addressing any claim review issues and monitoring payments to the Class Members;<sup>8</sup> (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.

Often, responding to objectors involves obtaining written discovery, deposition testimony, or both from the objectors. 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. In this case, counsel have seen a high volume of inquiries – numbered in the hundreds – from Altima owners. 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. Yet, as counsel's lodestar continues to increase, the multiplier will decrease, all of which further supports the reasonableness of the requested fee award.

#### **D. The Expenses Are Reasonable and Reimbursable**

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 NNA does not

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<sup>8</sup> Class 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 a transmission repair. Blood Fee Decl., ¶ 5 Godino Fee Decl., ¶ 30; Barnow Fee Decl., ¶ 45. Class Counsel have in turn worked with NNA's counsel so that transmission repair issues and other issues requiring immediate attention are dealt with. *Id.* Class Counsel's assistance to Class Members will continue throughout settlement implementation. *Id.*



oppose and which expenses will be paid by NNA to the extent awarded by the court. SA, ¶¶ 115-116.

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 U.S. Dist. LEXIS 94450, at \*19; *In re Southeastern Milk*, 2018 U.S. Dist. LEXIS 131855, at \*22-23.

Class Counsel collectively report having incurred \$69,505.15 in expenses in prosecuting this case. Blood Fee Decl., ¶¶ 17-18 (\$29,41886); Barnow Fee Decl., ¶¶ 55-57 (\$11,458.41); Sharp Fee Decl., ¶ 8 (\$400); Greenstone Fee Decl., ¶ 16 (\$5,292.47); Godino Fee Decl., ¶ 41 (\$22,935.41). The expenses include filing fees, travel to witness interviews, hearings and settlement conferences, expert costs, electronic discovery hosting, expert fees, mediator fees, 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).

### **III. THE SERVICE AWARDS ARE REASONABLE AND APPROPRIATE**

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 Plaintiff/Class Representative, which NNA does not oppose, to be paid by NNA in addition to classwide benefits. SA, ¶¶ 115-116.

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*, 2018 U.S. Dist. LEXIS 131855, at \*23-24. 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 U.S. Dist. LEXIS 186830, at \*19 (\$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 U.S. Dist. LEXIS 15581, at \*31 (N.D. Ohio Feb. 6, 2012) (\$15,000 award).

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 nineteen Plaintiffs contributed their efforts 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. Blood Fee Decl., ¶ 20; *see also* Barnow Fee Decl., ¶ 58; Sharp Fee Decl., ¶ 9; Godino Fee Decl., ¶¶ 45-46; Greenstone Fee Decl., ¶ 19.

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#### IV. 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 fees and expenses totaling \$5.9 million and service awards of \$5,000 to each of the Plaintiffs.

Dated: January 24, 2020

Respectfully submitted,

s/ Timothy G. Blood

Timothy G. Blood (admitted *pro hac vice*)  
Leslie E. Hurst  
Thomas O'Reardon (admitted *pro hac vice*)  
BLOOD HURST & O'REARDON, LLP  
501 West Broadway, Suite 1490  
San Diego, CA 92101  
Tel: (619) 338-1100  
Fax: (619) 338-1101  
tblood@bholaw.com  
lhurst@bholaw.com  
toreardon@bholaw.com

Ben Barnow (admitted *pro hac vice*)  
Erich P. Schork (admitted *pro hac vice*)  
BARNOW AND ASSOCIATES, P.C.  
One North LaSalle Street, Suite 4600  
Chicago, IL 60602  
Tel: (312) 621-2000  
Fax: (312) 641-5504  
b.barnow@barnowlaw.com  
e.schork@barnowlaw.com

Marc L. Godino (admitted *pro hac vice*)  
Danielle L. Manning (admitted *pro hac vice*)  
GLANCY PRONGAY & MURRAY LLP  
1925 Century Park East, Suite 2100  
Los Angeles, California 90067  
Telephone: (310) 201-9150  
Facsimile: (310) 201-9160  
mgodino@glancylaw.com  
dmanning@glancylaw.com

Mark S. Greenstone (admitted *pro hac vice*)  
GREENSTONE LAW APC

1925 Century Park East, Suite 2100  
Los Angeles, CA 90067  
Telephone: (310) 201-9156  
Facsimile: (310) 201-9160  
mgreenstone@greenstonelaw.com

*Co-Lead Class Counsel*

Kevin H. Sharp  
SANFORD HEISLER SHARP, LLP  
611 Commerce Street, Suite 3100  
Nashville, TN 37203  
Tel: 615/434-7000  
615/434-7020 (fax)  
ksharp@sanfordheisler.com

*Class Counsel*

David Pastor  
PASTOR LAW OFFICE  
63 Atlantic Avenue, 3rd Floor  
Boston, MA 02110  
(617) 742-9700 (p)  
(617) 742-9701 (f)  
dpastor@pastorlawoffice.com

Raul Perez  
CAPSTONE LAW APC  
1875 Century Park East, Suite 1000  
Los Angeles, CA 90067  
Tel: (310) 556-4881  
Fax: (310) 943-0396  
Raul.Perez@CapstoneLawyers.com

Gary E. Mason  
Whitfield Bryson & Mason LLP  
5101 Wisconsin Ave. NW, Ste. 305  
Washington, D.C. 20016  
Tel: (202) 429-2290  
gmason@wbmlp.com

Lawrence Deutsch  
Russell D. Paul  
BERGER & MONTAGUE, P.C.  
1622 Locust Street  
Philadelphia, PA 19103-6305

Tel : (215) 875-3000  
ldeutsch@bm.net  
rpaul@bm.net

*Other Plaintiffs' Counsel*

## CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2020, a copy of the foregoing was filed electronically with the Clerk of the court for the United States District Court for the Middle District of Tennessee using the CM/ECF filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

John S. Hicks (BPR No. 010478)  
Baker, Donelson, Bearman,  
Caldwell & Berkowitz, P.C.  
211 Commerce Street, Suite 800  
Nashville, Tennessee 37201  
Telephone: 615-726-5600  
Fax: 615-744-7337  
jhicks@bakerdonelson.com

E Paul Cauley, Jr. (admitted *pro hac vice*)  
S. Vance Wittie (admitted *pro hac vice*)  
Drinker, Biddle & Reath, LLP  
1717 Main Street, Suite 5400  
Dallas, Texas 75201  
Telephone: 469-227-8200  
Fax: 469-227-8004  
paul.cauley@dbr.com  
vance.wittie@dbr.com

s/ Timothy G. Blood  
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Timothy G. Blood