UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION	No. 14-MD-2543 (JMF)
This Document Relates to: *ALL ECONOMIC LOSS ACTIONS*	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THE PARTIES' JOINT MOTION FOR FINAL APPROVAL OF THE PROPOSED CLASS SETTLEMENT AND THE PLAN OF ALLOCATION, AND CERTIFICATION OF THE SETTLEMENT CLASS

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PRELIMINARY STATEMENT[1]

After more than six years of hard-fought litigation, the Economic Loss Plaintiffs ("Plaintiffs"),[2] on behalf of themselves and the proposed Settlement Class,[3] respectfully submit this memorandum in support of their motion for: (1) final approval of the proposed Amended Settlement Agreement, (2) approval of the proposed plan for allocating the Net Common Fund ("Plan of Allocation" or "Allocation Decision"), and (3) certification of the Class for purposes of effectuating the Settlement.[4]

On April 27, 2020, as amended on May 1, 2020,[5] this Court, among other rulings, preliminarily approved the Settlement Agreement (as amended, "Settlement Agreement" or "Settlement"), including the Plan of Allocation, and found for settlement purposes that the Class and all Subclasses likely would meet the requirements for class certification. ECF No. 7877 ("Preliminary Approval Order" or "PAO").

Following preliminary approval, through a sweeping and comprehensive Notice program, Settlement Administrator JND delivered more than 27.5 million Notice forms to Class Members involving more than 15.5 million unique vehicles.[6] Despite the sizable Class, only 166 Class

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[1] Capitalized terms have the same meanings as in the Settlement Agreement. The Declarations of Elizabeth J. Cabraser ("Cabraser Decl."), Steve W. Berman ("Berman Decl."), and Jennifer M. Keough ("Keough Decl.") of JND Legal Administration Co. ("JND") are being submitted in support of this motion.

[2] Plaintiffs are current and/or former owners/lessees of New GM or General Motors Corporation ("Old GM") vehicles containing defective ignition switches, side airbags, or electric power steering systems that were included in National Highway Traffic Safety Administration Recall Nos. 14v049; 14v355, 14v394, 14v400; 14v346; 14v153; or 14v118 (the "Subject Vehicles"). The Parties here are Plaintiffs, General Motors LLC ("New GM"), the Motors Liquidation Company GUC Trust (the "GUC Trust"), and the Motors Liquidation Company Avoidance Action Trust (the "AAT").

[3] Unless otherwise indicated, all references to the Class refer to the overall Class as well as the five Subclasses, as defined in the Settlement Agreement. *See* ECF No. 7888-1 ("SA") ¶ 20.

[4] This proposed resolution would resolve all claims in the Actions, *see* SA ¶ 12, including all economic loss claims relating to the Recalls consolidated for pretrial proceedings in the MDL Court in *In re: General Motors Ignition Switch Litigation*, Case No. 14-MD-2543 (JMF) (the "MDL" or "MDL 2543"), and those filed or asserted in the Bankruptcy Case, *In re Motors Liquidation Company, et al., f/k/a General Motors Corp.*, Bankr. No. 09-50026.

[5] The Settlement Agreement was amended to add AAT as a party. *See* ECF No. 7888-1.

[6] More than 15.5 million unique vehicle identification numbers (VINs) for Subject Vehicles were provided by New GM to JND. The number of Class Members exceeds the number of vehicles because many Subject Vehicles had multiple owners.

Members—less than ***.0006%***—submitted potentially valid opt-outs,[7] and only ***two*** Class Members filed objections, neither of which raised substantive concerns about the Settlement or Plan of Allocation.[8] Even as of now, over 509,000 Class Members have filed claims already (although the deadline is not until March 2021), reflecting a ratio of claims to opt-outs of approximately 3,067:1. At minimum, hundreds of thousands of consumers will obtain meaningful economic relief now from the Settlement of this risky litigation, versus waiting possibly years to get possibly less (or nothing). And all Class Members and the public benefit from the role of the settlement in facilitating and completing repairs of defective vehicles. The response of the Class overwhelmingly supports settlement.

The carefully selected, separately represented Subclasses reflect the one arguably meaningful difference that exists: different defects, some more dangerous than others. Other differences do not warrant subclasses. Indeed, GM's alleged conduct was unlawful under all state's laws, and, while the damages methodology was hotly-disputed in the litigation context, the same measure of damages applies across all Subclasses. Further, this Settlement resolves claims against both Old and New GM, rendering immaterial (for this purpose) the time that a car was manufactured, sold, or re-sold. Thus, settlement subclasses beyond the five that were presented to the Class for consideration, in addition to inviting unnecessary manageability issues, are not warranted on legal or factual grounds.

Plaintiffs thus respectfully request that the Court grant final approval of the Settlement and Plan of Allocation, and certify the Class for purposes of effectuating the Settlement.

BACKGROUND

A detailed summary of the relevant background and procedural history—as well as the work

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[7] This figure includes both valid opt-outs and technically non-compliant opt-out requests containing procedural deficiencies, including those with missing documentation that must be cured. The Final Order reflects Plaintiffs' proposal that all Class Members who requested to opt-out should be treated as valid opt-outs, notwithstanding minor procedural deficiencies, but excluding potential opt-outs who are missing documentation.

[8] As explained below, Plaintiffs respectfully submit the objections should be overruled.

done by Plaintiffs' counsel—is set forth in Plaintiffs' Memorandum in Support of Preliminary Approval ("Preliminary Approval Memorandum"), ECF No. 7817, and Plaintiffs' Memorandum in Support of Interim Class Counsel's Rule 23(h) Motion for Approval of Award of Attorneys' Fees and Expenses and Service Awards ("Fee Motion"), ECF No. 8160, incorporated herein by reference.

A. The Litigation

This case arises from GM's years-long concealment of multiple serious safety defects in its vehicles, which were not disclosed until a series of unprecedented recalls of more than 15 million vehicles in 2014. Plaintiffs and Class Counsel have prosecuted this action on behalf of the Class with vigor and dedication for six years, including through multiple rounds of Fed. R. Civ. P. 12(b)(6) and summary judgment motions; complex litigation in this Court, the Bankruptcy Court, and the Second Circuit; extensive fact and expert discovery, including production and review of over 23.4 million pages of documents and hundreds of depositions; and multiple mediation sessions over two years. In the Bankruptcy Case, there have been years of motion practice and three separate attempts by certain Economic Loss Plaintiffs and the GUC Trust to reach a settlement agreement to resolve these disputes.

B. Negotiation of the Proposed Settlement

Plaintiffs and the GUC Trust first began discussing settlement in July 2016. In addition to, and at some point parallel to, those discussions, this Court appointed the Hon. Layn R. Phillips, a retired federal judge, as the Economic Loss Settlement Mediator. ECF No. 4525. Plaintiffs and New GM, who had engaged in earlier less formal (and non-fruitful) settlement discussions, participated in multiple in-person mediation sessions with Judge Phillips starting in December 2017. *See* Phillips Decl.[9] ¶¶ 10, 12-13. Between September 2019 (following the Court's August 6 Summary Judgment Ruling) and January 2019, the Parties participated in multiple in-person mediation sessions with Judge Phillips,

[9] "Phillips Decl." refers to the Declaration submitted by the Hon. Layn R. Phillips in support of preliminary approval, ECF No. 7820.

followed by lengthy telephone conferences, as well as exchanges of multiple drafts and related materials. *Id.* ¶¶ 20-29. After months of ongoing, contentious negotiations, the parties fully executed the Settlement Agreement on March 27, 2020. *Id.* ¶ 31.[10]

C. The Allocation Decision

Judge Phillips also presided over discussions regarding allocation of the Net Common Fund among the various Subclasses. After detailed review of various supporting documents, including a comprehensive Offer of Proof by Allocation Counsel[11] presenting the Plaintiffs' best evidence supporting liability claims on behalf of each proposed Subclass, Judge Phillips held a session on February 21, 2020 where each Allocation Counsel presented as to the Subclasses they were representing. *Id.* ¶ 34. Judge Phillips issued an Allocation Decision on March 25, 2020. ECF No. 7888-1.

SUMMARY OF THE SETTLEMENT

The Court granted preliminary approval to the Amended Settlement Agreement, including the Plan of Allocation, on May 4, 2020. *See* ECF No. 7892.

A. The Settlement's Benefits and the Proposed Class[12]

The Settlement Agreement establishes a non-reversionary $121.1 million fund (the "Common Fund" or the "Settlement Fund") for the benefit of Class Members.[13]

Additionally, the Settlement Agreement defines five Subclasses, based on which recall the Subject Vehicle they own(ed), purchase(d), and/or lease(d) was subject to, which tracked the nature of

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[10] The Settlement Agreement was subsequently amended on May 1, 2020 to add AAT as a party. *See* ECF No. 7888-1.

[11] A Court-appointed duty of the Plaintiffs' Executive Committee is to serve as allocation counsel. *See* ECF No. 304.

[12] The Class is defined as "all Persons who, at any time as of or before the Recall Announcement Date of the Recall(s) applicable to the Subject Vehicle, own(ed), purchase(d), and/or lease(d) a Subject Vehicle in any of the fifty States, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and all other United States territories and/or possessions," subject to certain exclusions set forth in the Settlement Agreement. SA ¶ 20.

[13] To serve the interest of public safety, all Class Members who are current owners, purchasers, or lessees of Subject Vehicles must have the applicable Recall repair performed by on their Subject Vehicle by an authorized GM dealer.

the defect: The Delta Ignition Switch Subclass (Subclass 1); The Key Rotation Subclass (Subclass 2); The Camaro Knee-Key Subclass (Subclass 3); The Electric Power Steering Subclass (Subclass 4); and The Side Airbag Subclass (Subclass 5). *See* SA ¶ 20.

B. Plan of Allocation

The entire Net Common Fund[14] will be distributed to Class Members with approved Settlement Claims pursuant to the Plan of Allocation. Members of Subclass 1 will receive two times the amount paid to members of Subclasses 3, 4 and 5, and members of Subclass 2 will receive 1.5 times the amount paid to members of Subclasses 3, 4, and 5. The calculation process works as follows:

- Step 1: The number of all approved Settlement Claims will be divided into the Net Common Fund to determine an initial "Base Payment Amount" for calculation purposes.
- Step 2: Pursuant to the Allocation Decision, an "Adjusted Base Payment Amount" will be determined by multiplying the Base Payment Amount by a factor of 2 for Subclass 1 claimants, by a factor of 1.5 for Subclass 2 claimants, and by a factor of 1 for Subclass 3, 4, and 5 claimants.
- Step 3: The Adjusted Base Payment Amount for each Subclass will be multiplied by the number of claimants for each Subclass to determine the total value of the claims for each Subclass.
- Step 4: The value of the claims for each Subclass will be totaled so that the value of claims for each Subclass can be assigned a percentage.
- Step 5: Each Subclass's percentage will be applied to the Net Common Fund in order to determine a prorated value of claims for each Subclass.
- Step 6: Each Subclass's prorated value of claims will be divided by the number of all approved claims for that Subclass to determine the payment amount for each Subclass claimant.[15]

No Class or Subclass member has objected to the Plan of Allocation.

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[14] The Settlement Amount plus interest, after deduction of Settlement Implementation Expenses (including, *inter alia*, Taxes and fees associated with preparing the Allocation Decision) and any Plaintiff Incentive Awards (the "Net Common Fund")

[15] Thus, the final Base Payment Amount that forms the basis for payments to individual claimants is as follows: [Net Common Fund]/ [(2) (no. of approved Settlement Claims in Subclass 1) + (1.5) (no. of approved Settlement Claims in Subclass 2) + (1) (no. of approved Settlement Claims in Subclass 3) + (1) (no. of approved Settlement Claims in Subclass 4) + (1) (no. of approved Settlement Claims in Subclass 5)]. Members of Subclasses 3, 4, and 5 receive this Base Payment Amount, and members of Subclasses 1 and 2 receive the Adjusted Base Payment Amounts.

C. Releases

Class Members will release claims against New GM, Old GM, AAT, and the GUC Trust related to or arising from any of the facts alleged in the Actions filed in this litigation and in the Bankruptcy Case. Notably, however, Class Members ***do not*** release claims for personal injury, wrongful death, or actual physical property damage arising from any accident.

D. Attorneys' Fees and Expenses

GM has agreed to pay all attorneys' fees and expenses separately from and in addition to the benefits paid to Class Members. Class Member recoveries will not be reduced to pay for attorneys' fees or costs. On September 28, 2020, Class Counsel applied for an award of attorneys' fees of $24,585,272.06 and expenses of $9,914,727.94. *See* ECF No. 8160. Class Members had the opportunity to review and comment on or object to the fee petition as provided for in Fed. R. Civ. P. 23(h) and ***not one Class Member objected to or opposed Class Counsel's motion***.

ARGUMENT

I. THE SETTLEMENT MEETS THE RULE 23(e) FINAL APPROVAL STANDARDS.

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any class action settlement. The court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted). This evaluation requires the Court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005).

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014). Accordingly, when exercising its discretion to approve the Settlement, the Court should be "mindful of 'the strong judicial policy in favor of settlements.'" *Wal-Mart*, 396 F.3d at 116 (citation omitted). Absent fraud or

collusion, the Court "should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014), *aff'd sub nom., Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

Rule 23(e)(2), as amended on December 1, 2018, provides that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Additionally, courts in the Second Circuit have long considered the following factors set forth in *City of Detroit v. Grinnell Corp.*:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). Not every factor must weigh in favor of settlement; "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003).

As demonstrated herein, the Settlement readily satisfies all Rule 23(e)(2) and *Grinnell* factors,[16] meets the favored public policy of resolving class action claims, and warrants the Court's final approval.

A. Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class.

In determining whether to approve a class action settlement, the court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). "[T]he adequacy requirement 'entails inquiry as to whether: (1) plaintiffs' interests are antagonistic to the interest of other members of the class and (2) plaintiffs' attorneys are qualified, experienced and able to conduct the litigation.'" *In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 99 (S.D.N.Y. 2016).

First, no conflicting interests between the Plaintiffs and the proposed Class exist here; to the contrary, Plaintiffs are all members of the proposed Class and have suffered economic loss from the same course of conduct as other members of the proposed Class. The interests of Plaintiffs and proposed Class Members are co-extensive given that each Plaintiff, like each Class Member, has a strong interest in obtaining redress for the harm caused by GM.

All Plaintiffs have actively participated in the litigation by producing extensive fact sheets, participating in discovery where requested, and communicating with counsel. Plaintiffs in the Bellwether States have sat for depositions. Plaintiffs have demonstrated an understanding of the nature of their claims and their duties as class representatives and have remained "at least somewhat active in monitoring the litigation." *Ge Dandong v. Pinnacle Performance Ltd.*, No. 10-cv-8806, 2013 WL

[16] The factors set forth in Rule 23(e)(2) were intended "to add to, rather than displace, the *Grinnell* factors." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019). *See also* Advisory Committee Notes to 2018 Amendments to Rule 23 (noting that the Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the Court of Appeals.). Accordingly, Plaintiffs will discuss both the factors set forth in Rule 23(e)(2), and the non-duplicative *Grinnell* factors. Because there are no agreements requiring disclosure under Rule 23(e)(3), Plaintiffs will not discuss that factor.

5658790, at *7 (S.D.N.Y. Oct. 17, 2013).

Second, Class Counsel and Subclass Counsel are well-qualified, experienced, and have diligently prosecuted the Action for more than five years. Mr. Berman and Ms. Cabraser have extensive experience in litigating complex consumer protection class actions, and have recovered billions of dollars in class litigation on behalf of consumers, including in automotive defect-related class claims. Further, Class Counsel have undertaken an enormous amount of work, effort, and expense in this MDL and the Bankruptcy Case. They have demonstrated their willingness to devote whatever resources necessary to reach a successful outcome. They, too, satisfy Rule 23(a)(4). *See, e.g.*, *Karic v. Major Auto. Cos.*, No. 09 CV 5708, 2015 WL 9433847, at *6 (E.D.N.Y. Dec. 22, 2015) (counsel adequately represented class where counsel had "done substantial work identifying, investigating, prosecuting, and settling the claims over the past four years"), *report and recommendation adopted Karic v. Major Auto. Cos.*, No. 09cv-5708 2016 WL 323673 (E.D.N.Y. Jan. 26, 2016).

Subclass Counsel have also diligently pursued their responsibilities. Subclass Counsel are members of the Executive Committee firms. The Executive Committee members are highly experienced attorneys, selected by the Court, who have been involved with the case for its duration. They have provided assistance to Class Counsel and the Court at all stages of litigation, including in their Court-appointed role as Allocation Counsel (ECF No. 304), and have invested their time and financial resources into securing a favorable outcome for the Class.

B. The Settlement Was Negotiated at Arms'-Length with the Assistance of an Experienced Mediator.

Rule 23(e)(2)(B) further supports final approval because the Settlement was reached only after protracted, arm's-length negotiations facilitated by an experienced and well-respected mediator, as discussed above. *See supra*, at 3-4; ECF No. 7817 at 20 (listing cases where courts have recognized Judge Phillips' experience, reputation, and expertise); Phillips Decl. ¶ 37 ("The two-and-a-half-years-

mediation process was an extremely hard-fought and lengthy negotiation from beginning to end. . . . [a]t each step of the way, over the course of several years, counsel for the Parties advocated zealously on behalf of their clients working to maximize the settlement outcome to the benefit of their respective clients in a highly adversarial set of mediations."). *See also, e.g.*, *Yang v. Focus Media Holding Ltd.*, No. 11-cv-9051, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (participation of "highly qualified mediator strongly supports a finding that negotiations were conducted at arm's length and without collusion"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (fact that "settlement was the product of prolonged, arms-length negotiation, including as facilitated by a respected mediator" established that it was "procedurally fair").

C. The Settlement Provides Fair, Adequate, and Reasonable Relief to the Class.

1. The complexity, expense, and likely duration of this litigation favor approval.

Rule 23(e)(2)(C)(i) and the first *Grinnell* factor further support final approval of the Settlement, as courts consistently recognize that the expense, complexity, and possible duration of the litigation are key factors in evaluating the reasonableness of a settlement. *See In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation."); *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) ("[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court."). "Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015).

Class actions are generally complex and time-consuming. *See, e.g.*, *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (noting class action suits generally "have a well-deserved reputation as being most complex"). And this particular case has involved an especially extensive and complicated litigation process due, among other things, to the litigation in two courts, involving

conduct over many years, and an unprecedented scale of recalls.

Specifically, the conduct underlying this lawsuit dates back nearly 20 years. Discovery in the MDL required years of extensive investigations, in which Plaintiffs reviewed more than 23 million pages of documents and took and defended more than 750 depositions of experts, Plaintiffs, and fact witnesses. *See* ECF No. 7029. The Bankruptcy Court litigation has also been intensively litigated, including a trip to the Second Circuit. And, while the Parties have already engaged in vigorous litigation, many critical issues remain. These include New GM's renewed motion for summary judgment (ECF No. 7095), New GM's motion to exclude expert opinion (ECF No. 7100), Plaintiffs' motion for class certification, and Plaintiffs' claims under the laws of 47 other states and the District of Columbia. Additionally, the Bankruptcy Court must first decide threshold issues regarding whether late claims are allowed to be filed, and, if late claims are permitted, begin the process of adjudicating the merits of those claims, along with class certification issues. An interlocutory appeal is also pending with the Second Circuit, which the Court has recognized could result in "potentially lengthy delay." ECF No. 7616. If that interlocutory appeal is not accepted or is denied on the merits, Plaintiffs will need to significantly revise previously submitted briefing, including their motion for class certification.

Although the Parties have incurred great expenses and burdens in this litigation already, they would certainly incur much more going forward. *See Strougo ex rel. Brazilian Equity Fund v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[T]he passage of time would introduce yet more risks . . . and would in light of the time value of money, make future recoveries less valuable than this current recovery."). Even if, in the best case scenario, the many pending motions were resolved in Plaintiffs' favor, in the absence of settlement the Plaintiffs would still face a long road to recovery, including trial, post-trial motions, and appeals, with no guarantee of success. *See In re Marsh & McLennan, Cos. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *5 (S.D.N.Y. Dec. 23, 2009) (contrasting the expense and uncertainty of appeals with a settlement that "provides certain and substantial recompense

to Class members now"). Further, the Settlement will facilitate the repair of vehicles with defects. Thus, prolonging Settlement introduces additional risks in itself.

In sum, the additional years of complex and expensive litigation that the Settlement avoids weighs in favor of final approval.

2. The substantial risks of litigation favor final approval.

The substantial risk of proceeding with litigation also weighs in favor of approving the Settlement Agreement. Courts approve settlements where "plaintiffs would have faced significant legal and factual obstacles to proving their case." *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004). Particularly in light of the Court's August 6 Summary Judgment Ruling, those obstacles are substantial here.

If the Second Circuit affirms the Court's decision that Plaintiffs did not establish damages, pursuing litigation with respect to the remaining states' claims would require an entirely new theory or model of damages and come with a high-degree of risk.[17] Even setting aside the August 6 Summary Judgment Ruling, the litigation has reached a critical inflection point. Plaintiffs face a number of serious challenges, including pending class certification and renewed summary judgment motions. If, for example, the Court were to deny class certification—a distinct possibility given its rejection of Plaintiffs' damages theory—Class Members likely would receive nothing. Even if a litigation class or classes were certified and survived an inevitable Rule 23(f) attempt, the Class would face the risk and uncertainty of trial and a potentially lengthy appellate process on the merits. Defendants are well-financed and represented by highly-skilled counsel; they will undoubtedly raise vigorous challenges to both at trial or on appeal. For example, if the case went to trial, Plaintiffs would face the difficulties

[17] In the Bankruptcy Case, Plaintiffs relied on damages analysis that the Court rejected in the August 6 Summary Judgment Ruling to establish that their claims are worth the amount necessary to require payment of the Adjustment Shares. Like Judge Furman, Judge Glenn acknowledged that the August 6 Summary Judgment Ruling had "change[d] the landscape greatly" both in the MDL and the Bankruptcy Court.

and complexities inherent in proving damages to the jury.

Numerous complex issues likewise remain outstanding in the Bankruptcy Case. These include litigation of (a) late claims, class, and mootness issues for certain Ignition Switch Plaintiffs; (b) whether a due process violation exists with respect to other defects; and (c) remedies. Plaintiffs asserting claims against the GUC Trust have been arguing over their ability to even file late claims in the Bankruptcy Case and related matters for over five years. Thus, even if Plaintiffs are able to establish economic losses in the Bankruptcy Case, in order to collect any portion of those purported losses against the GUC Trust and New GM they face a long and challenging road to recovery.

Evaluated against these risks, the proposed Settlement is an excellent result for the Class: it "benefits each plaintiff in that he or she will recover a monetary award immediately, without having to risk that an outcome unfavorable to the plaintiffs will emerge from a trial." *Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007).

3. The late stage and substantial discovery completed favor final approval.

The advanced stage of the proceedings also supports approval of the settlement. Under the third *Grinnell* factor, settlement is especially favored when the litigation is at an "advanced stage" with an "extensive amount of discovery completed." *In re Marsh & McLennan*, 2009 WL 5178546, at *6. This factor goes to "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Facebook IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015).

As a result of the past six years of litigation, including the completion of class and merits discovery, the parties and their counsel are fully cognizant of the relative strengths and weaknesses of various claims and defenses, as well as the risks and potential outcomes absent settlement. Counsel therefore had the requisite information to make an informed decision about the relative benefits of

litigating or settling the Action and "developed an informed basis from which to negotiate a reasonable compromise." *Global Crossing*, 225 F.R.D. at 459. The Court should find that this factor weighs heavily in support of final approval of the Settlement Agreement.

4. The Settlement is reasonable in light of the best possible recovery and risks.

The Court must also balance the risks of establishing liability and damages against the benefits afforded to the Class, and the immediacy and certainty of a substantial recovery against the risks of continuing litigation. *Grinnell*, 495 F.2d at 463. In considering the reasonableness of a Settlement Amount, "[d]ollar amounts are judged not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd* 818 F.2d 145 (2d Cir. 1987). Consequently, the Second Circuit has recognized that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2.[18]

Through this Settlement, the Class will receive a meaningful and tangible present recovery: $121.1 million in monetary relief. With Court approval, this money plus interest will likely be distributed in a matter of months—rather than years, or never. *See In re AOL Time Warner*, Nos. MDL 1500, No. 02-cv-5575, 2006 WL 903236, at *13 (S.D.N.Y. Apr. 6, 2006) (concluding that where settlement fund is in escrow earning interest, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery"). And the Settlement is just one piece of a broader set of activities that, in totality, address New GM's conduct while making its victims whole. The relief for

[18] Consistent with that principle, courts often approve class settlements even where the benefits represent "even a fraction of the potential recovery." *See, e.g., In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467, 483-85 (S.D.N.Y. 2009) (approving settlement which provided only 2 percent of defendants' maximum possible liability, observing that "the Second Circuit has held that . . . even a fraction of the potential recovery does not render a proposed settlement inadequate"); *In re Prudential Inc. Secs. Ltd. P'ships Litig.*, MDL No. 1005, M-21-67, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6 percent and 5 percent of claimed damages).

economic loss supplements substantial benefits that have been paid to those who suffered personal injury or death (including a $595 million voluntary personal injury/wrongful death fund), and a $900 million penalty GM has paid in connection with federal probes. In its structure, the Settlement also incentivizes Class Members who still possess Subject Vehicles to make the necessary repairs, thereby serving an important public safety interest.

By contrast to ongoing litigation in two courts, "[s]ettlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, Nos. 05 Civ 10240, 05 CV 10287, 2007 WL 2230177, at *6 (S.D.N.Y. July 27, 2007) (internal citations omitted). The $121.1 million recovery readily falls within the range of reasonable results given the complexity of the Action and the significant barriers that stand between the present juncture of the litigation and final judgment.

5. The ability to withstand greater judgment does not weigh against final approval.

It is likely that GM could withstand a greater judgment, but "a defendant is not required to empty its coffers before a settlement can be found adequate." *Shapiro v. JPMorgan Chase & Co.*, Nos. 11-cv-8331, 11-cv-7961, 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014). GM's financial wherewithal "do[es] not ameliorate the force of the other *Grinnell* factors, which lead to the conclusion that the settlement is fair, reasonable and adequate." *Id.*

6. The Settlement claims process is straightforward and streamlined.

The Settlement provides relief to Class Members through a straightforward claims process designed to be as convenient as possible. Class Members have and will receive information about the Settlement benefits through the comprehensive, Court-approved Notice Program, detailed below. To obtain those benefits, Class Members submit their claims through a short paper claim form or through an online claims portal available on the Settlement Website. Class Members need only provide their name, contact information, and vehicle information to confirm their status as a current or former owner

or lessee of a Subject Vehicle. JND will review and process all claims received, provide claimants with an opportunity to cure any deficiency in their claim or request judicial review of the denial of their claim, and will ultimately mail claimants their pro rata share of the Net Common Fund as calculated under the Plan of Allocation, upon approval of the Court. The Settlement's method for processing claims and distributing relief is fair and reasonable.

JND also maintains a toll-free number and email address to respond to Class Member inquiries. To date, JND has received more than 161,000 calls about the Settlement. *See* Keough Decl. ¶ 33. Class Counsel also remain available to assist Class Members throughout the claims process. As of November 9, 2020, Class Counsel and their staff have responded directly to over 950 calls and over 1,150 emails from Class Members requesting information or assistance. *See* Cabraser Decl. ¶ 3; Berman Decl. ¶ 5.

7. The requested attorneys' fees and costs will not reduce Class benefits.

Any Court-awarded attorneys' fees or costs will be paid separately by GM and will not be deducted from the compensation available to the Class. These fees and costs were separately negotiated only after the Settlement terms were agreed upon, a practice routinely approved by courts as in the Class' best interest. Additionally, as discussed in the Fee Motion, the proposed attorneys' fee represents a substantially lower payout than the value of the work performed, and only 16.8% of the net constructive common fund. Thus, the terms of the proposed fees and costs are fair and reasonable.

D. The Settlement Treats Class Members Equitably Relative to Each Other.

As discussed below in Section III, the proposed Plan of Allocation fairly and reasonably allocates benefits among the Subclasses. This factor, too, counsels in favor of granting final approval.

E. The Overwhelmingly Positive Reaction of the Settlement Class Supports Final Approval of the Settlement and the Plan of Allocation.

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002). Here, "[t]he fact that the vast majority of class members neither objected

nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate." *Wright v. Stern*, 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008).

1. The Court-approved Notice Program is providing the best practicable notice.

To ensure Notice is sufficiently disseminated to Class Members, Plaintiffs have utilized a comprehensive, multi-pronged approach developed in connection with notice expert Jennifer Keough of JND. The Notice Program more than satisfies the requirements of Rule 23, due process, and CAFA.

JND, under the supervision of Class Counsel, launched a nationwide, data-driven effort to identify all Class Members. JND retained a third-party aggregation service to collect the name and last known address of each Class Member from the Department of Motor Vehicles, utilizing vehicle identification numbers (VINs) for the Subject Vehicles provided by New GM. Keough Decl. ¶¶ 5-7. After Subject Vehicle owners and/or lessees were identified, JND updated the addresses with advanced address research using skip trace databases and the United States Postal Service National Change of Address database. *Id.* ¶ 9.

JND then mailed the Short Form Notice individually to 29,831,224 unique Class Members via first class mail. *Id.* ¶ 11. The Short Form Notice provides general information regarding the Settlement and Class Members' rights in connection with it (including how to submit a claim form) in clear, simple terms, and directs recipients to the Settlement website for additional information, including a copy of the Long Form Notice and Settlement Agreement. To ensure that all Class Members received notice, JND (a) re-mailed any Short Form Notices returned by the United States Postal Service with a forwarding address, and (b) researched any returned Short Form Notice that did not include a forwarding address to determine the recipient's current, best address, and mailed the Short Form notice to that address. *Id.* ¶ 13. For undeliverable postcard Short Form Notices for which valid mailing addresses could not be obtained, JND used reasonable research strategies, including an email append search, to find current email addresses for the relevant Class Members, and distributed an email notice

designed to avoid spam filters and ensure readability. *Id.* ¶¶ 14-18. Email notice was delivered successfully to an additional 1,205,961 Class Members. *Id.* ¶ 19.

Additionally, to extend notice further, particularly among Class Members for whom direct notice data was inaccurate or incomplete, JND issued a Court-approved nationwide press release to over 15,000 media outlets on July 28, 2020. *Id.* ¶ 22. The press release was picked up and transmitted by approximately 113 different outlets in English, and 109 different outlets in Spanish. *Id.* Another "reminder" release will be issued as the Claims deadline approaches. *Id.* ¶ 23. The Summary Settlement Notice was also published in the August 3, 2020 edition of *People* magazine, a weekly entertainment magazine that is one of the most read publications in the country, with a circulation of over 3.4 million and a total readership of over 34.9 million. *Id.* ¶¶ 20-21.

JND maintains a website, https://www.gmignitionswitcheconomicsettlement.com/, which provides all critical dates, key documents in both English and Spanish (including the Settlement Agreement, the Long Form Notice, and the Allocation Decision), a list of frequently asked questions, and contact information. *Id.* ¶ 29. The Settlement Website also posts a downloadable Settlement Claim Form in English and Spanish, has a "VIN Lookup tool," through which Class Members can look up the eligibility of any vehicle by entering its VIN, and hosts an online Settlement Claim Form where Class Members can submit claims electronically. *Id.* ¶¶ 29-30. JND also maintains a toll-free number to respond to class member inquiries. *Id.* ¶ 32. To date, the settlement website has received more 530,000 unique visitors, and JND has received more than 161,000 calls about the Settlement. *Id.* ¶¶ 31, 33.

These extensive efforts were directed to maximize the reach of notice under the circumstances of this case, and demonstrate the "best notice practicable." *See* PAO at 12. Due to this comprehensive program, initial Notice was successfully delivered to 27,885,901 potential Class Members, and reach exceeds 93.5%. Keough Decl. ¶ 27.

2. The reaction of Class Members has been overwhelmingly positive.

The reaction of Class Members to the proposed Settlement has been overwhelmingly positive. Although the claims deadline is, at a minimum, more than four months away, 509,268 claims have been received to date, suggesting a strong and positive initial reaction. On the other hand, notwithstanding the sizable Class, only 166 Class Members have requested exclusion (including technically noncompliant requests that Plaintiffs have elected to include in the Final Order in the interest of completeness, as well as requests requiring further documentation). This amounts to less than .0006% of Class Members. Put differently, for every one Class Member who opted out, 3,067 filed a claim. Comparison of these figures provides powerful evidence of the Settlement's fairness. *See, e.g.*, *Romero v. La Revise Assocs.*, 58 F. Supp. 3d 411, 420 (S.D.N.Y. 2014) (approving settlement with 1.2% opt out rate); *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412, 2018 WL 2324076, at *4 (S.D.N.Y. May 22, 2018) (approving settlement where court received 1,224 opt outs of 535,380 notices mailed, and noting that "[d]espite the exclusions and objections . . . the vast majority of class members did not object to the settlement or opt out of it, which indicates that the settlement is fair"); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d at 382 (reaction of the class overwhelmingly supported settlement approval where 2.5 million notices generated 134 exclusion requests).

Moreover, of the tens of millions of Notices delivered, Class Counsel has received ***only two objections***. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (11 objections out of 1.8 million mailed notices reflected "overwhelmingly positive reaction of the class . . . weigh[ing] heavily in favor of approval of the Settlement"). Three other submissions to JND or the Court, styled as objections, are invalid. Two of the three are not from Class Members, and only one of the three (none by Class Members) was filed with the Court, as required. Notably, ***none*** of the submissions challenges the specific terms of the Settlement or the Plan of Allocation. Even if they were validly submitted by people with standing to object, they should still be

overruled.

a. Warren and Davis Objections

Class Member Richard H. Warren filed an objection with the Court on August 24, 2020. ECF No. 8122. Mr. Warren argues that he "paid a fair price" and "GM stood behind the car by its recall for the ignition switch problem." *Id.* at 1. Mr. Warren's personal belief that the recall remedied GM's wrongdoing does not bear on whether the Settlement is fair, reasonable, and adequate *to the Class*. And, to the extent Mr. Warren's objection suggests that the Settlement is unfair *to GM*, "[t]he Court's role in reviewing the proposed settlement is 'as a fiduciary who must serve as a guardian of the rights of absent class members.'" *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 753 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Because "[t]his Court is concerned solely with the fairness of the settlement to the class," *id.*—which Mr. Warren does not dispute—the objection should be overruled.

Additionally, on October 27, 2020, Kisha Davis and her sisters TaRisha Davis-James and Rochelle Davis-James filed an objection with the Court. ECF No. 8216. Their submission shared the tragic story of an accident that killed their mother involving a GM vehicle. *Id.*at 1-4. Kisha Davis is personal representative of her mother's estate. *Id.* at 8. While devastating, the serious concerns that Ms. Davis's submission raise implicate potential personal injury claims, which are not released under the Settlement. *See* SA ¶ 122. Class Counsel has reached out to Ms. Davis to inform her of options available with respect to personal injury claims. However, with respect to the Settlement, her objection should be overruled.

b. Comment Letters

Two comment letters were submitted regarding the Settlement. These are not objections, either because they were not filed with the Court, were not submitted by Class Members, or both of the above. However, in the interest of completeness, Plaintiffs address them.

On September 21, 2020, JND received a letter regarding the Settlement. Keough Decl. at

31(Ex. F). The writer stated that her son had owned a Subject Vehicle that he brought to the dealership to have repaired pursuant to a Recall. She stated that her son would like to object to the lawsuit against the dealer, with whom they "had no problem," and that she had not had the car since 2007. *Id.* There are no claims against the GM dealers, so the comment, which reflects a misunderstanding, should not bear on or cause concern about the Settlement. *See Athale v. Sinotech Energy Ltd.*, No. 11-cv-5831, 2013 WL 11310686, at *4 (S.D.N.Y. Sept. 4, 2013) (overruling objection that "does not present any actual basis for not finding the settlement fair, reasonable, or adequate"). Further, the author is not a Class Member and would have lacked standing to object even if the objection had been properly submitted.[19] *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) ("Nonparties to a settlement generally do not have standing to object to a settlement of a class action." (citation and internal quotation marks omitted)).

On October 19, 2020, JND received a separate short letter "object[ing]" to the Settlement. Keough Decl. at 29 (Ex. F). The author takes issue with the Recall repair requirement because the GM dealership will not permit him to drive his car into the shop, as he would like to, but instead requires that someone else drive it in. *Id.* This does not raise an issue with the Settlement itself and, further, settlements need not (and, in a Class this large, cannot) provide relief that every Class Member considers attractive. Rather, approval is warranted if the settlement is fair, reasonable, and adequate—which the letter does not contest. *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.").

c. Goodwin Procter Filing

On September 28, 2020, Bankruptcy Counsel/Participating Counsel Goodwin Procter LLP

[19] Further, to the extent the writer suggests current vehicle ownership is required of Class Members, this is incorrect.

("Goodwin") filed a Motion for Payment of Fees and Reimbursement of Expenses in response to Plaintiffs' Fee Motion. ECF No. 8157. Plaintiffs previously filed an opposition to Goodwin's Motion in connection with fees, explaining that it was premature and inconsistent with this Court's orders. *See* ECF No. 8202.

While Goodwin is plainly not a Class Member, its motion merits brief additional mention in this context because it asserts that Goodwin may be entitled to fees out of the pockets of the Class via the Common Fund. *See, e.g.,* ECF No. 8157 ¶ 22. This is improper. The Common Fund has been designated for payment of the Class, with minor—and already disclosed—exceptions.[20] SA ¶¶ 50, 85-90. Permissible uses of the Common Fund do *not* include payments to Participating Counsel; the Settlement expressly precludes that. ECF No. 7888-1 ¶¶ 177-79. There is no basis to amend the Settlement Agreement and re-notice the more than 27 million Class Members.

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In sum, the positive reaction of the Class, including the negligible percentage of opt-out requests and objections, "weighs strongly in favor of" final approval of the Settlement. *In re Bear Stearns Cos., Inc. Secs., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266–67 (S.D.N.Y. 2012) (5.1% exclusion rate and less than 1% objection rate "weighs strongly in favor of approval").[21]

II. THE NUMBER OF SUBCLASSES IS SUFFICIENT, AND THERE ARE NO CONFLICTS THAT WOULD BEAR ON FINAL APPROVAL.

In its Preliminary Approval Order, the Court directed the parties to address "whether the

[20] The Settlement Fund may also be used to fund Settlement Implementation Expenses (*e.g.*, notice costs) and Incentive Awards. SA ¶ 50.

[21] *See also Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) ("[s]uch a small number of class members seeking exclusion or objecting [24 objections and 127 opt -outs of 11,800,514 class members] indicates an overwhelmingly positive reaction of the class"); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019) ("The Court finds that, while it has received hundreds of exclusion requests and objections, the numbers are still relatively small when compared to the over 16 million long form notices that were sent to merchants, and the over 12 million estimated class members."); *In re Sony Corp. SXRD*, 448 F. App'x 85, 87 (2d Cir. 2011) (affirming approval of settlement with eighty-three opt outs and twenty objections in a class of 352,000, roughly 0.02%).

number of subclasses is sufficient—in other words, whether there are conflicts within the subclasses that would bear on final approval" in their submission in support of final approval. PAO at 19, n.6. Plaintiffs respectfully submit that there are no intra-subclass conflicts that would bear on final approval here.

Subclasses alleviate "fundamental" conflicts going "to the very heart of litigation" that might arise between Class Members. *Cent. States*, 504 F.3d at 246; *see also* 1 *McLaughlin on Class Actions* § 4:45 (17th ed.) ("A conflict must be actual and fundamental, *i.e.*, go to the heart of the class members' interests in the claims, to preclude a finding of adequate representation."). In *In re Literary Works*, the Second Circuit set forth the contours for determining when subclasses are appropriate. The Court found that subclasses with separate representation are required where class members' "interests diverge as to the distribution of" a recovery because "each category of claim is of different strength and therefore commands a different settlement value." 654 F.3d 242, 254 (2d Cir. 2011). It explained:

> We agree with objectors that the interests of class members who hold only Category C claims fundamentally conflict with those of class members who hold Category A and B claims. Although all class members share an interest in maximizing the collective recovery, their interests diverge as to the distribution of that recovery because each category of claim is of different strength and therefore commands a different settlement value . . . . The interests of Category C-only plaintiffs could be protected only by the formation of a subclass and the advocacy of independent counsel.

Id. In *In re Petrobras*, Judge Rakoff, applying *Literary Works*, held that class counsel and class representatives provided adequate representation for a proposed settlement class including both domestic and nondomestic claims where, *inter alia*, all members of the proposed class suffered the same injury. 317 F. Supp. 3d 858 (S.D.N.Y. 2018), *aff'd on other grounds*, 784 F. App'x 10 (2d Cir. 2019).

The carefully selected (and independently represented) Subclasses here apply the Second Circuit standard insofar as they distinguish categories of claims with different strength, based on the nature of the injury. The Subclasses reflect the one arguably meaningful difference between Class members: the nature of the defect. Some of the defects were deadly safety defects; others were

significant, but less dangerous. And GM's knowledge of each defect and conduct in remedying it, too, varied by type of defect.[22] These issues arguably "go to the very heart of" the litigation, as reflected in the differential recovery of the Subclasses. *See* Section III. *See also Literary Works*, 654 F.3d at 254 (subclasses required where "[a]lthough all class members share an interest in maximizing the collective recovery, their interests diverge as to the distribution of that recovery because each category of claim is of different strength and therefore commands a different settlement value.").

No Second Circuit case, by contrast, has held that variation in state law within a Class or Subclass in itself *requires* the creation of additional subclasses. To the contrary, courts in this Circuit have routinely permitted the certification of nationwide or large, multi-state classes notwithstanding differences in state law. *See, e.g.*, *Cassese v. Washington Mut., Inc.*, 255 F.R.D. 89, 97 (E.D.N.Y. 2008) (certifying nationwide class and finding that "the variations present in state common laws of contracts, unjust enrichment, and fraud, as well as potential variations among state consumer protection statutes do not preclude certification"); *Rapoport-Hecht v. Seventh Generation, Inc.*, No. 14-CV-9087, 2017 WL 5508915, at *2 (S.D.N.Y. Apr. 28, 2017) (certifying nationwide settlement class in light of "authority providing for certification in similar circumstances"). And, because a district court "[c]onfronted with a request for settlement-only class certification" need not inquire whether the case "would present intractable management problems," *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997), variations in state law are irrelevant to the extent they implicate manageability concerns. *Davis v. J.P Morgan Chase & Co.*, 775 F. Supp. 2d 601, 609 (W.D.N.Y. 2011) ("[S]tate-law distinctions impact trial manageability, which is relevant principally with respect to litigation at trial."). Indeed, some courts have certified settlement classes even when there are arguably much more pronounced differences between the states' laws than exist here. In *Sullivan v. DB Investments, Inc.*,

[22] Additionally, their claims arise from common legal theories— generally common law fraud by concealment and statutory unfair and deceptive trade practices act claims.

for example, the Third Circuit *en banc* opinion held that "variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance"—notwithstanding the fact that certain states permitted recovery for indirect purchases, while others did not. 667 F.3d 273, 301 (3d Cir. 2011). To the contrary, it explained, "concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class" *Id.* at 297.

In other high-profile automotive cases, courts similarly settle nationwide claims. In *Hanlon*, a nationwide auto defect/safety recall settlement like this one, the Ninth Circuit affirmed certification of a nationwide settlement class alleging fraud and violations of deceptive trade practices acts, and held that "the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over shared claims." 150 F.3d at 1022-23. The court further explained that, "although some class members may possess slightly differing remedies based on state statute or common law," the claims "are not sufficiently anomalous to deny class certification." *Id.* at 1022. The "common nucleus of facts and potential legal remedies" dominated the litigation and satisfied the predominance inquiry. *Id.*; *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597 (9th Cir. 2017) (affirming certification of a single settlement class containing owners, lessees, and sellers of numerous models of 2009-2015 vehicles from all states); *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10-CV-7493, 2013 WL 4080946, at *21 (S.D.N.Y. May 30, 2013) (certifying nationwide settlement class in automotive defect case raising claims for unjust enrichment, fraud, breach of warranty, and violation of state consumer protection statutes).

The variations in state law are not so great here as to defeat commonality or predominance for settlement purposes, given that manageability is not a concern. On a high level, the conduct alleged here is unlawful in all states. Differences at the margins of the consumer protection laws do not translate into materially different settlement compensation even if, in litigation, there were separate

classes based on state law. For example, a few consumer protection statutes require a showing of reliance, while most do not. But even statutes that require reliance may permit an inference rather than direct proof. So, while issues of reliance may need to be litigated differently under differing state laws, the settlement value is similar. Likewise, some states may require knowledge by the defendant, while others do not. Again, these issues may require different litigation strategies, but where there is common evidence of the defendant's knowledge, as here, the settlement values are on par. And the same, albeit hotly-disputed, measure of damages applies across all subclasses. Thus, because "a sufficient constellation of common issues binds class members together, variations in the sources and application" of applicable laws "will not automatically foreclose class certification." *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162–63 (3d Cir. 2002). *See also Reynolds v. Lifewatch, Inc.*, 136 F. Supp. 3d 503, 518 (S.D.N.Y. 2015) ("When a class action raises common issues of conduct that would establish liability under a number of states' laws, it is possible for those common issues to predominate and for class certification to be an appropriate mechanism for handling the dispute.").

Nor is further subclassing needed based on whether Old GM or New GM manufactured the car. Because this Settlement resolves claims against both Old GM and New GM, it is immaterial, for purposes of settlement value, when a Subject Vehicle was manufactured, sold, or re-sold. Including all owners and lessors of the Subject Vehicles, regardless of when the purchase or lease occurred, is warranted.

In sum, the Subclasses created here are appropriate, and do not raise intra-subclass conflicts—let alone "fundamental" conflicts that go to the heart of the litigation. Even setting aside the fact that increasing the number of Subclasses would introduce case management challenges,[23] further

[23] "[M]ultiple subclasses . . . can generate unnecessary administrative inefficiencies." William B. Rubenstein, *Newberg on Class Actions* § 7:30 (5th ed.). Indeed, the Second Circuit has described seven subclasses as "surely beyond the point at which 'reclassification with separate counsel' must end." *Literary Works*, 654 F.3d at 257 (citation omitted).

subclasses are not warranted. Subclassing based on defect, rather than other theoretical possibilities (*e.g.*, state law, time period), comports with applicable law.

III. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE.

The Plan of Allocation is an effective and equitable means of distributing relief to the Class. A plan for allocating settlement proceeds, like the Settlement itself, should be approved if it is fair, reasonable, and adequate. *See, e.g., In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012). A plan of allocation "need not be perfect"; rather, an allocation formula "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Meredith Corp. v. SESAC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y 2015); *see also In re Flag Telecom Holdings Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *21 (S.D.N.Y. Nov. 8, 2010) (approving allocation plan that was recommended by "experienced and competent counsel" and based on assessments of the strengths and weaknesses of the claims asserted and the likelihood of recovery). A plan of allocation that reimburses class members differentially based on the relative strength or value of their claims may be reasonable, even if certain class members ultimately recover more than others. *See In re Telik. Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strengths and values of different categories of claims."). In fact, the Second Circuit has recognized that, where a settlement award fails to differentiate between class members with different claim strength, "'[t]he very decision to treat them all the same is itself an allocation decision.'" *Literary Works*, 654 F.3d at 251 (quoting *Ortiz*, 527 U.S. at 857).

The proposed Plan of Allocation provides for a reasonable and rational means of distributing the Common Fund to the Class Members: based on the relative strength of each Subclass's claims, as determined by a neutral, third-party mediator. *See Danieli v. IBM*, No. 08 CV 3688, 2009 WL 6583144, at *4-5 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where proposed allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted").

Specifically, Judge Phillips reviewed extensive materials detailing the bases for the claims and defenses available to each Subclass, including a comprehensive, 64-page Offer of Proof created by the Plaintiffs, presenting the Plaintiffs' best evidence supporting liability claims on behalf of each proposed Subclass. *See* Allocation Decision ("AD") ¶ 13. Judge Phillips then held an all-day session on February 21, 2020 relating to allocation of the Common Fund amongst the Subclasses, at which Allocation Counsel made presentations as to the Subclasses each was representing for purposes of the development of an allocation plan. *Id.* ¶ 16. On the basis of Allocation Counsel's presentations, the comprehensive documentary materials, and drawing on his extensive experience as a Judge and mediator in the Action, Judge Phillips issued an Allocation Decision, which reflected his assessment of the relative strength of the liability claims of each of the five proposed Subclasses.

Judge Phillips concluded that "(i) Subclass 1 has a materially better case on liability than any of the other Subclasses and is therefore entitled to a 2X multiplier, and (ii) that Subclass 2's case is less robust than Subclass 1's but superior to those of Subclasses 3, 4 and 5 and, therefore, Subclass 2 is entitled to a 1.5X multiplier." *Id.* ¶ 19. He also found that Subclasses 3, 4, and 5 were not entitled to a multiplier because they had "weaker liability cases than Subclasses 1 and 2," and had "no distinction among them sufficient to warrant disparate treatment." *Id.* Specifically, Judge Phillips explained that in the DPA that New GM entered into, it admitted that with respect to vehicles owned or leased by the members of Subclass 1, "GM knowingly manufactured and sold several models of vehicles equipped with the Defective Switch." *Id.* ¶¶ 20-23. "Because of the DPA, it is clear that Subclass 1 has the strongest liability case. In addition, in the NHTSA Consent Order GM acknowledged there was a violation of 'the Safety Act by failing to provide notice to NHTSA on the safety-related defect that is the subject of Recall No. 14v047 . . . .'" *Id.* ¶ 21. Judge Phillips also found that Subclass 2 "has made a credible case" that its liability case was "stronger than that of any Subclass other than Subclass 1." *Id.* ¶ 22. Documents and deposition testimony evidenced that, because of the similarity between the

ignition switches in Subclass 1 and Subclass 2 vehicles, as well as Old GM's and New GM's cross-platform knowledge, GM "knowingly sold" Subclass 2 vehicles with defective ignition switches. *Id.* ¶ 23. With respect to the remaining Subclasses, Judge Phillips concluded that they had weaker liability claims based on the evidence and arguments presented. *Id.* ¶¶ 27-29.

The Plan of Allocation provides for the greatest recovery to the Subclass with the strongest liability claims—Subclass 1—followed by the next strongest liability case, Subclass 2, and then the remaining Subclasses 3, 4, and 5. "Although some class members will benefit more from this allocation formula that is ultimately appropriate as it recognizes the strengths and weaknesses of each class members' individual claims." *In re Sturm, Ruger, & Co. Sec. Litig.*, No. 3:09CV1293, 2012 WL 3589610, at *8 (D. Conn. Aug. 20, 2012); *see also Vargas v. Ford Motor Co.*, No. CV-12-08388, 2020 WL 1164066, at *10 (C.D. Cal. Mar. 5, 2020) ("[W]hile the Settlement was structured to deliver the most complete relief to those Class Members that experienced persistent defects (e.g., those with more service visits will receive a greater cash payment), this is an objective and logical explanation for the variations in monetary recovery."). Further, the Plan of Allocation is recommended by counsel with decades of experience in complex class actions, including automotive cases, after more than six years of work on this case (including extensive discovery), and with the benefit of the Court's many detailed opinions. The conclusion of "experienced and competent counsel" that the Plan of Allocation is fair and reasonable is "entitled to great weight." *FLAG Telecom*, 2010 WL 4537550, at *21; *EVCI*, 2007 WL 2230177, at *11 ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.").

Finally, as noted above, more than 27 million copies of the Notice, which directs Class Members to the Plan of Allocation and Allocation Decision, and advises Class Members of their right to object to the proposed Plan of Allocation, have been delivered to potential Class Members. *See* Keough Decl. ¶ 27. There were no valid objections to the proposed Plan of Allocation. The lack of

objection further confirms that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Common Fund. *See Spann v. AOL Time Warner Inc.*, No. 02-cv-8238, 2005 WL 1330937, at *7 (S.D.N.Y. June 7, 2005) (approving settlement that provided greater recovery to one subclass over another where "Class Notice clearly indicated the method of allocating the Settlement Fund and the rationale for such allocation, and no class member objected to the allocation").

In sum, the Plan of Allocation has a "reasonable, rational basis," and is the product of careful consideration by experienced Counsel, overseen by a neutral mediator. It should be approved.

IV. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS AND SUBCLASSES.

In its Preliminary Approval Order, the Court found, for purposes of settlement, "that the Class, including all Subclasses . . . . will likely meet the requirements for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(3)." PAO at 6 (analyzing how the Class satisfies each element for certification). Nothing has changed to call that conclusion into question. For the reasons discussed in Plaintiffs' Preliminary Approval Memorandum, and further addressed with respect to certain issues in Section II above, Plaintiffs respectfully submit that the Class, including the Subclasses, satisfy all elements of Rule 23(a) and (b)(3). *See Bear Stearns*, 909 F. Supp. 2d at 264 (adopting the certification analysis at the preliminary approval stage and granting final class certification).

CONCLUSION

For the reasons stated herein and in the accompanying Declarations and Plaintiffs' Preliminary Approval Memorandum, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement, approve the Plan of Allocation, and certify the Class for purposes of effectuating the Settlement.

Dated: November 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on November 9, 2020, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
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