UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION *This Document Relates To* *All Economic Loss Actions*	No. 14-MD-2543 (JMF) No. 14-MC-2543 (JMF) Hon. Jesse M. Furman

DEFENDANT GENERAL MOTORS LLC'S MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND CERTIFICATION OF CLASS FOR PURPOSES OF SETTLEMENT

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INTRODUCTION

In August 2019, after five years of litigation, the Court granted New GM's summary judgment motion, ruling that the economic loss Bellwether plaintiffs could not prove their alleged benefit-of-the-bargain damages as a matter of law. *See In re Gen. Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d 212 (S.D.N.Y. 2019). The Court observed that "the ruling change[d] the landscape in dramatic ways," *id.* at 241, and suggested "it may well make sense for the parties to revisit the issue of settlement," *id.*, paving the way for the Parties to negotiate a class Settlement that ended years of hard fought litigation in this Court and the Bankruptcy Court. The case for finding that the Settlement is fair, reasonable, and adequate has only grown stronger following the Court's preliminary approval of the Settlement in April 2020. Following the court-approved Class Notice plan, there have been at most 166 Class Member opt-out requests and at most four Class Members have filed or otherwise submitted "objections"—none of which involve a substantive challenge to the Settlement. Accordingly, the Court should finally approve the Settlement.

The 2018 Amendments to Rule 23 require "a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object." Fed. R. Civ. P. 23 Advisory Committee's Note to 2018 Amendments; *see also id.* ("At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2)…."). In accordance with these provisions, New GM previously submitted a brief (Docket No. 7821, "New GM PA Br.") containing extensive arguments why the Settlement is fair, reasonable, and adequate.

In this Final Approval brief, New GM will briefly summarize, with cross-references for the Court's convenience, the factual background and legal factors supporting final approval of the Settlement that New GM addressed in prior briefing. New GM will also discuss at greater length new factual developments and legal arguments, including as to the primary *Grinnell* factor not

previously discussed, the Class's reaction to the Settlement following notice. As a matter of fact and law, the Settlement is more than fair, reasonable and adequate, and should be finally approved.

FACTUAL BACKGROUND

I. THE FACTUAL RECORD THROUGH PRELIMINARY APPROVAL.

New GM provided a thorough accounting of this litigation and the parties' mediation efforts in its preliminary approval brief. New GM PA Br. at 6-31. As most relevant here:

- New GM was created following the 2009 bankruptcy of General Motors Corporation ("Old GM"). *Id.* at 6-8. During 2014, New GM conducted multiple recalls of both Old GM and New GM vehicles, including the seven Recalls that are the subject of claims resolved through the Settlement. *See id.* at 8-11. New GM has reached settlements with thousands of personal injury and wrongful death claimants asserting claims related to the 2014 recalls. *See id.* at 11. New GM also entered into settlements with various government entities related to the ignition switch recalls. *See id.* at 12.

- Plaintiffs brought claims for alleged economic losses in the MDL, including for alleged damages based on a benefit-of-the-bargain defect theory and lost-time damages. Plaintiffs also sought certain injunctive relief. *See id.* at 12-13 and 5ACC.

- On December 22, 2016, two plaintiffs who are named plaintiffs in the 5ACC filed a Late Claims motion in the Bankruptcy Court seeking to assert proposed nationwide class claims against the GUC Trust under Rule 23(b)(3) and asserting the same damages theory that had been asserted in the 5ACC. *See* New GM PA Br. at 13-15.

- The parties engaged in extensive discovery and multiple rounds of motion practice in the MDL. *See id.* at 15-26. New GM achieved a number of victories, culminating in its successful summary judgment motion rejecting plaintiffs' benefit-of-the-bargain theory of damages. *See id.* at 15-22.[1] Other motions were also briefed but had not yet been decided as of the date of the Settlement. *See id.* at 22-26.

- The parties engaged in arm's-length settlement negotiations over several years with experienced court-appointed mediator, retired federal court Judge Layn Phillips, ultimately resulting in the Settlement Agreement that was executed on March 27, 2020. *See id.* at 26-28. The March 27 Settlement preserved the right of the Class, any named Plaintiff, or Class Member, to pursue claims against the Motors Liquidation Company Avoidance Action Trust ("AAT"). It also included provisions contemplating a potential amendment to the Settlement to include the AAT as one of the settling parties.

[1] Days after the parties filed their motion for preliminary approval of the Settlement, the Second Circuit granted the Bellwether plaintiffs' petition for interlocutory review of this Court's summary judgment decision. Due to the Settlement, New GM and plaintiffs stipulated to the dismissal of the appeal without prejudice to reinstatement.

- In advance of the Court's April 23, 2020 preliminary approval hearing, Plaintiffs, New GM, and the GUC Trust reached an agreement-in-principle with the AAT to include the AAT as a settling party. The terms of the agreement-in-principle were disclosed to the Court (Docket No. 7869), and discussed at the Preliminary Approval Hearing.

In an April 27, 2020 order, the Court preliminarily approved the Settlement and directed notice to the Class. Docket No. 7877. On May 1, the Parties—now including the AAT—executed and filed with the Court an Amended Settlement Agreement. Docket No. 7888-1. On May 4, the Court entered an Order supplementing the Preliminary Approval Order by approving the amended Settlement Agreement, including amended Class Notice. Docket No. 7892.

II. THE TERMS OF THE SETTLEMENT.

The key terms of the as-amended Settlement are as follows:

- The Class is divided into five subclasses: (1) the Delta Ignition Switch Subclass, (2) the Key Rotation Subclass, (3) the Camaro Knee-Key Subclass, (4) the Power Steering Subclass, and (5) the Side Airbag Subclass. Settlement Agreement ¶ 20.

- The Class will be compensated through a Common Fund into which New GM shall contribute $68.9 million, the GUC Trust $50 million, and the AAT $2.2 million, resulting in a total Common Fund of $121.1 million. *Id.* ¶ 89.a. After Settlement Implementation Expenses (including notice costs) and any plaintiff Incentive Awards are paid from the Common Fund, the remainder of the Common Fund ("Net Common Fund") will be devoted exclusively to pay Class Members' claims. *Id.* ¶¶ 50, 89.b.

- Separate Allocation Counsel represented the five Subclasses in a mediation overseen by Judge Phillips. *Id.* ¶ 15. They agreed to be bound to the Allocation Decision proposed by Judge Phillips (*id.*, Ex. 2), which sets forth the methodology by which the Net Common Fund will be allocated among Class Members. *Id.* ¶ 89.b.

- In exchange for Settlement benefits, the Class and its Class Members will provide a standard release of and covenant not to sue New GM, the GUC Trust, the AAT, and other Released Parties regarding all claims relating to the subject matter of the Actions, the Recalls, or that are, or could have been, alleged in the 5ACC, the Late Claims Motions, or in the Proposed Proofs of Claims, including, but not limited to, those relating to the design, manufacturing, advertising, testing, marketing, functionality, servicing, sale, lease or resale of the Subject Vehicles. *Id.* ¶ 121-134.

- The Parties agreed that Class Counsel could request approval by the Court of up to but no more than $34.5 million in Attorneys' Fees and Expenses to be paid by New GM after the Settlement's Final Effective Date or the expiration of any appeal period pertaining to the Court's award of Attorneys' Fees and Expenses, and New GM would not oppose an

application for Attorneys' Fees and Expenses in an amount less than or equal to that maximum amount. Settlement Agreement ¶¶ 98.d., 159. Under no circumstances, however, will New GM pay any amount greater than $34.5 million in Attorneys' Fees and Expenses. *Id.* ¶ 159. The attorneys' fees were negotiated at arm's length under the supervision of, and through, the Court-appointed mediator (Judge Phillips), separately from and only after an agreement-in-principle was reached on settlement payment to the Class.

III. THE NOTICE CAMPAIGN AND REACTION OF THE CLASS.

The Class has received notice pursuant to the Class Notice plan approved by the Court. The implementation of the Class Notice plan is detailed in the declaration of the Class Action Settlement Administrator, Jennifer M. Keough of JND Legal Administration ("JND"), and in Plaintiffs' memorandum in support of final approval. As of November 9, 2020, 27,885,901 Class Members were successfully mailed or emailed a postcard Short Form Notice that was not returned as undeliverable. Thus, 93.5% of Class Members received direct notice of the Settlement.

As of November 9, 2020, there are 66 valid opt-out requests, 100 deficient opt-out requests, and 29 invalid opt-out requests.[2] As of the same date, 509,268 Settlement Claim Forms have been submitted, and JND continues to receive additional Settlement claims. The claims deadline will be no earlier than March 18, 2021.

ARGUMENT

I. THE COURT SHOULD GRANT FINAL APPROVAL BECAUSE THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

A. Legal Standard For Final Approval.

Final approval of the proposed Settlement should be granted if the Court concludes that the Settlement is "fair, reasonable, and adequate," 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:

[2] Deficient opt-out requests are missing certain required information, but may be cured. Invalid opt-out requests come from non-Class Members. JND also received two "objections," which it has submitted to the Court.

(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). Subsections A and B of Rule 23(e)(2) address procedural fairness, while subsections C and D address substantive fairness.[3]

Courts in the Second Circuit also continue to consider nine so-called *Grinnell* factors that may be relevant in deciding whether to approve a particular class settlement:

> (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.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). These factors overlap with those of Rule 23(e)(2); both sets of factors focus on whether the process is fair and class benefits are fair, reasonable, and adequate. "[N]ot every factor must weigh in favor of [the] settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *9 (S.D.N.Y. Oct. 16, 2019).

B. The Rule 23 Factors Are Met.

1. The Settlement Is Procedurally Fair.

The Settlement satisfies the two Rule 23(e)(2) factors going to the procedural fairness of a settlement. With respect to Rule 23(e)(2)(A), Co-Lead Counsel and the Class Representatives

[3] With respect to a class that has not previously been certified, the Court must also find that it is proper to certify the class for settlement purposes. Plaintiffs will address certification of the class for settlement purposes in their separate brief. New GM does not oppose certification of the class for settlement purposes only.

have actively represented the Class in five-plus years of contentious litigation, including extensive written discovery, deposition, and motion practice. This factor weighs in favor of finding that the Settlement is procedurally fair. *See* New GM PA Br. at 33-34.

With respect to Rule 23(e)(2)(B), the Parties negotiated the Settlement at arm's length, and were overseen, supervised, and aided by an experienced court-appointed mediator, who also is a former federal Judge. "A proposed settlement is presumed procedurally fair, reasonable, and adequate if it culminates from 'arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Pantelyat v. Bank of Am., N.A.*, 2019 WL 402854, at *3 (S.D.N.Y. Jan. 31, 2019); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). *See* New GM PA Br. at 34-35.

2. The Settlement Is Substantively Fair.

a. The Proposed Settlement Is More Than Adequate.

"'The most important factor [in judging the adequacy of the settlement] is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *Grinnell Corp.*, 495 F.2d at 455 (internal quotations omitted). *See* New GM PA Br. at 36-49.

i. The Settlement Benefits Are Reasonable Given The Costs, Risks, And Delay Of Trials.

The value of plaintiffs' claims has been reduced substantially by rulings rejecting various claims as a matter of law and reducing the value of any remaining claims that are even potentially viable. *See id.* at 37-38. This Court's summary judgment ruling rejecting plaintiffs' benefit-of-the-bargain damages theory also greatly reduced the settlement value of their claims. *Id.* at 38-39. Indeed, if litigation continued, New GM would rely upon expert evidence establishing no damages

of any kind to the Class and the lack of any common method for establishing any purported class-wide damages. Docket Nos. 5859, 6132, 6064.

The economic loss plaintiffs have little chance of obtaining a different result on appeal. Indeed, the Court thoroughly considered and rejected plaintiffs' motion for reconsideration of summary judgment in a 33-page opinion. While the Second Circuit granted plaintiffs' interlocutory appeal a few days after the parties submitted the Settlement for preliminary approval, this procedural development does not materially change the settlement value of plaintiffs' claims. The motion for leave to appeal was pending when the parties negotiated the Settlement. The possibility that the Second Circuit might grant leave to appeal was thus baked into the Settlement. "[T]he risks of delay and reversal are merely additional data to factor into the calculus." *In re Gen. Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374, 395 (S.D.N.Y. 2019).

Moreover, the Second Circuit's order revealed little about its views on the merits of the summary judgment order. *See* 16 Wright & Miller, Fed. Prac. & Proc. Juris. § 3929 (3d ed.) ("The statutory criteria that guide the district court decision to enter an order authorizing § 1292(b) appeal do not directly apply to the court of appeals. The statute simply provides that the court of appeals 'may …, in its discretion, permit an appeal to be taken.' . . . The discretion of the court of appeals is so broad that it is difficult to imagine any controlling limit"). It is impossible to know, for example, whether the Court believed it should weigh in to reject plaintiffs' conjoint analysis or simply thought review was warranted because this is a large MDL and the summary judgment order has great significance. If the appeal were to be reinstated and the Second Circuit were to affirm, Plaintiffs would have little (if any) leverage in any future negotiations. Finally, although the summary judgment ruling was certainly a very significant factor in the Parties' valuation, it

was only one of many factors that affected the settlement agreement that the Parties were able to reach.[4]

In addition, independent of the Court's rulings rejecting plaintiffs' benefit-of-the-bargain damages evidence, Class claims against New GM fail for additional reasons explained in the Bellwether summary judgment motion, New GM's prior opposition to certification of a litigation class, and its *Daubert* motion concerning the lost-time damages opinions of Ernest Manuel. *See* New GM PA Br. at 40-41. Plaintiffs' claims against the GUC Trust are subject to this Court's prior rulings, as well as additional unique defenses such as untimeliness. *See id.* at 41-43.

In sum, where, as here, plaintiffs face material if not insurmountable barriers to any recovery at all, "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; *see also* New GM PA Br. at 43-44.

ii. The Proposed Claims Process Is An Effective Method Of Distributing Relief To The Class.

The Court must also evaluate "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). The Settlement provides for the creation of a Common Fund, and Class Members may file Settlement Claims in order to receive a share of the recovery. "The requirement that class members download a claim form or request in writing a claim form, complete the form, and mail it back to the settlement administrator is not onerous." *In re Toyota Motor Corp. Unintended*

[4] Even if the Second Circuit reversed this Court's rejection of the Bellwether plaintiffs' benefit-of-the-bargain evidence, plaintiffs cannot avoid this Court's holding that they are entitled only to the lesser of (i) the difference in market value between the vehicles as warranted and as sold, or (ii) repair costs—and they have not asserted or offered evidence that Boedeker's purported damages estimates are lower than the recall repair costs. Additionally, this Court's holding that plaintiffs had a duty to mitigate damages means that plaintiffs' only potential benefit-of-the-bargain damages claims are for the cost of repairs, which are zero because New GM already has offered to repair the vehicles under the Recalls at no cost to vehicle owners.

Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., 2013 WL 3224585, at *18 (C.D. Cal. June 17, 2013). In addition, here, Class Members may call a toll-free number to request that a hard copy of the Settlement Claim Form be mailed to them. Keough Decl. ¶ 32.

No portion of the Net Common Fund will revert to New GM, the GUC Trust, or the AAT. Settlement Agreement ¶¶ 88.a, 89; *see, e.g.*, 4 Newberg on Class Actions § 13:53 (5th ed.) ("where a sum certain is disgorged from the defendant," the settlement "is more likely to be found fair, reasonable, and adequate"). Instead, the entire Net Common Fund will be distributed to eligible Settlement Claimants. *See* Settlement Agreement, Ex. 10 n. 1; *see also* New GM PA Br. at 45-46.

iii. Attorneys' Fees And Expenses Are Consistent With The Complexity And Duration Of The Litigation.

Rule 23(e)(2)(C)(iii) directs the Court to consider the terms of any proposed award of attorneys' fees. Class Counsel has requested approval of $34.5 million in Attorneys' Fees and Expenses to be paid by New GM, and under the Settlement, New GM agreed not to oppose an application for Attorneys' Fees and Expenses less than or equal to that maximum amount. Settlement Agreement ¶¶ 98.d., 159. Given the duration and complexity of the litigation, the extensive briefing, and the number of expert witnesses as balanced against the litigation victories secured by New GM over the course of the litigation, the Attorneys' Fees and Expenses provision in the Settlement is reasonable. *See* New GM PA Br. at 47-49. Indeed, Class Counsel initially informed the Court that their unaudited lodestar exceeded $125 million. April 23, 2020 Tr. at 49:5. They later informed the Court that, based on their final lodestar calculation of $78,148,898.77, "the requested award would lead to a multiplier of negative .31." Docket No. 8160 at 3.

b. The Allocation Decision Treats Class Members Equitably.

Rule 23(e)(2)(D) instructs the Court to consider whether "the proposal treats class members equitably relative to each other." Here, this factor is satisfied because "similarly situated class

members are treated similarly and [ ] dissimilarly situated class members are not arbitrarily treated as if they were similarly situated." 4 Newberg on Class Actions § 13:56 (5th ed.).

Class Counsel, concluding that Class Members held claims of differing strength based on their respective recalls and the potential liability evidence concerning those different recalls, selected independent Allocation Counsel to represent the five subclasses comprising the types of recalls at issue. Docket No. 7820 (Phillips Decl.) ¶ 33; Allocation Decision ¶¶ 5-6. After receiving written and oral presentations from each Allocation Counsel, Judge Phillips developed the proposed Allocation Decision, which is based on Judge Phillips's evaluation of "the relative strengths of the liability claims of each of the Subclasses." Allocation Decision ¶¶ 5, 7, 14.

Because Rule 23(e)(2)(D) requires that a class action settlement "treat[] class members equitably relative to each other," it is appropriate for a plan of allocation to reflect the strengths and weaknesses of the various claims and "to allocate more of the settlement to class members with stronger claims on the merits." *See In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994).[5] *See* New GM PA Br. at 49-54.

Finally, the Court has asked the Parties to "address whether the number of subclasses is sufficient—in other words, whether there are conflicts within the subclasses that would bear on final approval." Docket No. 7877 at 19 n.6. In light of the Court's rejection of plaintiffs' benefit-of-the-bargain damages theory, there are *no* intra-class conflicts with respect to the key issue of what damages plaintiffs could prove because every Class Member would be entitled to the same amount of damages at trial—zero. *See In re Literary Works in Elec. Databases Copyright Litig.*,

[5] *See also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (*per curiam*) ("in the case of a large class action the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision"); *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 694-95 (S.D.N.Y. 2019) (plan of allocation "represents a reasonable method of ensuring 'the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund.'").

654 F.3d 242, 249 (2d Cir. 2011) ("Not every conflict among subgroups of a class will prevent class certification—the conflict must be 'fundamental' to violate Rule 23(a)(4).").[6] Nonetheless, as to the distribution of the Net Common Fund, Class Counsel, acting out of an abundance of caution, determined that subclasses divided into the five recall groups would appropriately reflect variations in the potential liability evidence of the subclasses. *See* Allocation Decision ¶¶ 5, 14 (evaluating "the relative strengths of the liability claims of each of the Subclasses.").

C. The Proposed Settlement Satisfies The *Grinnell* Factors.

Most of the *Grinnell* factors overlap with the Rule 23(e)(2) considerations discussed above. Three additional factors weigh in favor of settlement approval and warrant further discussion:

1. The Reaction Of The Class Has Been Overwhelmingly Positive.

"One of the key factors not found among those now enumerated in Rule 23(e)(2) is the class's reaction to the proposed settlement, specifically the quality and quantity of any objections and the quantity of class members who opt out." 4 Newberg on Class Actions § 13:58 (5th ed.). "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005).[7] Here, the small number of opt-outs and the lack of any valid objections[8] are especially noteworthy given that 27,885,901 individuals were successfully mailed or emailed a postcard

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6 Moreover, no Class Members have objected to the subclassing or raised issues related to any intra-Class conflict.

7 *See also id.* at 118 ("On the whole, the class appears to be overwhelmingly in favor of the Settlement. Only eighteen class members out of five million objected to the Settlement."); *D'Amato*, 236 F.3d at 86-87 (finding that the District Court properly concluded that the small number of objections—18 objections after 27,833 notices were sent—weighed in favor of the settlement); *In re Toys R Us Antitrust Litig.*, 191 F.R.D. 347, 355 (E.D.N.Y. 2000) ("the response of the class to the proposed Settlements supports approval. Given the huge number of potential class members and the massive nationwide notice, which has been estimated to have reached tens of millions of toy consumers, it is significant that only fifty-five potential class members have chosen to exclude themselves from these actions and only a handful of consumers (four, formally, and approximately a dozen, informally) have raised objections.").

8 *See* Section III, *infra*, for a discussion of why none of the "objections" have any merit.

Short Form Notice that was not returned as undeliverable and where 15,522,079 vehicles are eligible. "[T]he notice and approval process generally solicits negative feedback regarding a settlement, because it is designed to solicit opt outs and objections by advising class members of the procedures and deadlines for filing such responses with the court. . . . [I]n litigation involving a large class, such as that here, 'it would be extremely unusual not to encounter objections.'" *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 197 (S.D.N.Y. 2012). Nor did any Attorney General register any objection to the Settlement following CAFA notice.

Courts also sometimes consider the claims rate in assessing the reaction of the class. Here, while the claims period will not conclude for many months, the current claims rate—3.28% reflecting 509,268 claims in relation to the number of eligible vehicles and 1.70% in relation to potential class members—is within the typical range for consumer protection class actions. *See, e.g.*, *Amin v Mercedes Benz USA, LLC*, 2020 WL 5510730, *1, 3 (N.D. Ga. Sept. 11, 2020) (granting final approval of settlement where 16,828 claim forms had been submitted out of a class of over 2.5 million vehicles (0.63% claims rate)).[9] Regardless, given that both the Class Notice plan and Settlement Claims Process are appropriate and fair (*see* Sections II, *infra*, and I.B.2.a.ii, *supra*), the claims rate does not call into doubt the ultimate fairness of the Settlement. *Montoya v. PNC Bank, N.A.*, 2016 U.S. Dist. LEXIS 50315, at *73 (S.D. Fla. Apr. 13, 2016) (approving class

[9] *See also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944-45 (9th Cir. 2015) (affirming final approval of settlement involving 35 million-member settlement class when only 1.183 million—less than 4%—filed claims and noting "settlements have been approved where less than five percent of class members file claims"); *Moore v. Verizon Commc'n Inc.*, 2013 WL 4610764, at *8 (N.D. Cal. Aug. 28, 2013) (granting final approval of class action settlement with 3% claims rate—250,236 submitted valid claims out of 8,089,893 potential class members); *Keil v. Lopez*, 862 F.3d 685, 697 (8th Cir. 2017) ("Although Lopez points out that the low claims rate also means that only 3 percent of the class will receive this benefit, we note that a claim rate as low as 3 percent is hardly unusual in consumer class actions and does not suggest unfairness."); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*) (noting evidence that claims rates in consumer class settlements "rarely exceed 7%, even with the most extensive notice campaigns"); *Touhey v. United States*, 2011 WL 3179036, at *7-8 (C.D. Cal. July 25, 2011) (finding a 2% (38 responses out of 1,875 notices mailed) response rate acceptable); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (approving 10.3 million-member settlement class when less than 119,000—approximately 1.1%—filed claims).

settlement; "[a] low claims rate would not necessarily compel the conclusion that the settlement as a whole is not fair, reasonable, or adequate.").[10]

The claims rate here likely reflects "that many class members received notice, but opted not to participate for any number of reasons." *Pollard v. Remington Arms Co., LLC*, 896 F.3d 900, 906–07 (8th Cir. 2018). Correspondence from Class Members suggests that some are indifferent or even opposed to receiving a payment, while others welcome a payment because they feel personally frustrated and aggrieved due to the Recalls. For example, Class Member Richard H. Warren filed an objection with the Court stating:

> I am a Class Member and have not excluded myself from the Class. I object to the proposed Settlement because it is frivolous. I purchased a GM vehicle at a fair price. I had faith that it was a good product that GM would stand behind. GM stood behind the car by its recall for the ignition switch problem."

Docket No. 8122. Another Class Member similarly wrote to JND, "Please exclude me from this class settlement. I didn't have any economic loss [ ] etc. So please excuse me from this class." Bloom Decl., Ex. A. Yet another wrote, "I do recall a minor recall notice on occasion, but fortunately nothing more serious, or because I felt threatened…. Anyway, I would like to opt-out of this suit because I don't believe I am an actual victim other than feeling slighted by [the] salesman" who sold this Class Member a bigger vehicle than she wanted. *Id.*, Ex. B; *see also* Docket No. 8141, Ex. A (Class Member seeking to be removed from the class action lawsuit

[10] *See also Lee v. Ocwen Loan Servicing, LLC*, 2015 WL 5449813, at *22 (S.D. Fla. Sep. 14, 2015) (approving settlement agreement and noting "there is nothing inherently unfair about a single-digit claims rate in a class settlement"); *Hamilton v. SunTrust Mortg. Inc.*, 2014 WL 5419507, at *5 (S.D. Fla. Oct. 24, 2014) ("a low claims rate at this stage does not compel the conclusion that the settlement is not 'fair, reasonable, or adequate.' ...[because] ... [t]he question for the Court at the Final Fairness Hearing stage is whether the settlement provided to the class is 'fair, reasonable, and adequate,' not whether the class decides to actually take advantage of the opportunity provided."); *Zimmer Paper Prod., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 92-93 (3d Cir. 1985) (holding that where defendant engaged in customary and court approved notice procedure, the response rate was not determinative of the adequacy of the class notice); *Casey v. Citibank, N.A.*, 2014 WL 4120599, at *2 (N.D.N.Y. Aug. 21, 2014) ("Although the objectors' criticism of the claims-made structure is valid, it does not impact the fairness, reasonableness, or adequacy of the proposed settlement.").

because she had not had possession of the vehicle for three years). Other Class Members, in contrast, have written to the Court to express their frustration with respect to the Recalls and to indicate that they want to file claims and receive payment.[11]

The fact that several Class Members were so strongly opposed to receiving a settlement payment that they took the time to write to the Court or JND suggests that many additional Class Members may have felt similarly but simply elected to do nothing. *Cf. Pollard*, 896 F.3d 900, 906 ("Perhaps they are satisfied with their firearms and see no reason to submit a claim. Class members that are entitled to a $10 or $12 voucher might find that the effort it takes to submit a claim is not a worthwhile investment of their time."); *Lee*, 2015 WL 5449813, at *18 (noting that a direct-payment structure "is not necessarily any fairer…. Negotiating for a smaller amount to go to Class Members would, in effect, unfairly reward some Class Members for their own indifference at the expense of those who would take the minimal step of returning the simple Claim Form to receive the larger amount."). On the other hand, those Class Members who subjectively feel that they have been aggrieved by the Recalls will likely choose to submit claims.

2. The Stage Of The Proceedings Supports Approval Of The Settlement.

This factor strongly favors approval. This Court has already found that after "five-plus years of litigation . . . the parties should have enough data to agree on a settlement value." *In re Gen. Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d at 395. *See* New GM PA Br. at 54.

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[11] Class Member, Sharnetta Ward submitted a letter (and claim form) to the Court, stating:

> I owned a 2004 Pontiac grand am that had ignition issues…. I found myself late for work on several occasions. The last straw for me was being late for work due to my car not cranking in the piggly wiggly parking lot…. Unfortunately, that was a very frustrating day for me…. I appreciate all the letters and notices for all of these victims in this matter, and I hope we can get justice for this matter at hand. I hope everyone will seek justice at the end. Although, this matter at hand has been a while for our resolution to come to an end.

Docket No. 8148, Ex. A; *see also* Docket No. 8141, Ex. B (Class Member Mary Romano stating that she wished to submit a claim and that "I owned a Chevrolet Malibu in 2014. I remember taking the Malibu for service several times for recalls.").

3. No Class Could Be Certified For Trial.

The claims of the Rule 23(b)(3) classes proposed by Plaintiffs in the MDL and Bankruptcy Court could not be certified for trial. For example, the Bellwether plaintiffs have proposed an unmanageable single trial of 23 separate classes and subclasses applying the differing laws of 3 states, involving 7 distinct recalls involving 160 different vehicle models, under 7 counts, each with their own varying elements, and with diverse bases for claims against New GM, such as direct liability, successor liability, and novel Bankruptcy-Claim-Fraud counts. Pls. Mot. for Class Certification, Docket No. 5845 at 1-12; Pls.' Mem. ISO Mot., Docket No. 5846 at 36. New GM has objected and raised a myriad of manageability problems with the Bellwether plaintiffs' proposed classes. Docket No. 6132 at 100-102. These manageability problems, however, are irrelevant to the proposed settlement classes. *See* New GM PA Br. at 55-56.

II. THE NOTICE CAMPAIGN SATISFIED THE REQUIREMENTS OF RULE 23, DUE PROCESS, AND CAFA.

As discussed in greater detail in Plaintiffs' brief, the Notice here satisfied the requirements of Rule 23 and Due Process. Indeed, direct mail notice is the "gold standard" for class notice. *Good v. Am. Water Works Co., Inc.*, 2016 WL 5746347, at *7 (S.D.W. Va. Sept. 30, 2016). Also, notice under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, has been satisfied. CAFA requires that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]" 28 U.S.C. § 1715(b). To grant final approval of a class action settlement, a court must ensure CAFA notice requirements are met. 28 U.S.C. § 1715(d).

On April 2, 2020, New GM timely and properly caused the required CAFA Notice of the original settlement to be sent to the United States Attorney General and all "Appropriate" Federal

and State Officials. Bloom Decl. ¶ 2. None of these CAFA Notices were ultimately returned as undeliverable. *Id.* On May 11, 2020, New GM timely and properly sent an additional CAFA Notice advising of the amended settlement adding the AAT. *Id.* ¶ 3. One notice was initially returned but was later delivered electronically with receipt confirmed. *Id.* More than 90 days passed from "the dates on which the appropriate Federal office and the appropriate State official [were] served." *See* 28 U.S.C. § 1715(d). At this time, there have been no requests or responses of any kind from state and federal officials on this matter.

III. NO MERITORIOUS OBJECTIONS HAVE BEEN FILED.

A. The Few Class Member "Objections" Provide No Obstacle to Final Approval.

Only five Class Members have sent any correspondence to the Court, and only two of those purported to "object" to the Settlement.[12] JND also received three communications from Class Members purporting to "object."[13] None of the purported objections comply with Rule 23(e)(5)(A)'s requirement that an objection "state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection," and they are otherwise without merit. In addition, the objections sent to JND failed to comply with the Court's directive set forth in the Preliminary Approval Order and repeated in the Notice that objections should be sent to the Court. Docket No. 7877, ¶ 33; Settlement Agreement, Ex. 5 at 9 ("To object, you must mail your written objection to the District Court.").

- Kisha M. Davis's letter to the Court objects to the Settlement on behalf of her deceased mother (a Class Member), who died in a 2006 motor vehicle accident while driving a 2004

[12] Mr. Warren's "objection" to the "frivolous" nature of the Settlement (which provides no reason to reject the Settlement), as well as letters to the Court from the three other Class Members are discussed in Section I.C.1, *supra*.

[13] One of the three originally indicated a desire to both opt-out and object. Keough Decl. ¶ 37. That Class Member has confirmed to JND that he is opting out of the Settlement. *Id.* Thus, because he is no longer a class member, he has no standing to object. *Stinson v. City of New York*, 256 F. Supp. 3d 283, 292 (S.D.N.Y. 2017) ("Class members who opt-out of the settlement extinguish their ability to object to it and those objections need not be considered.").

Pontiac Grand Prix, but purports to assert a wrongful death claim. Docket No. 8216. Under the Settlement, however, Class Members do not release claims for personal injury or wrongful death. Settlement Agreement ¶ 122. The Notice informed Class Members that "[t]he Settlement will not include the release of any claims for personal injury, wrongful death or actual physical injury." *Id.*, Ex. 11 (Short Form Notice).[14] Accordingly, Ms. Davis's objection is based on a misunderstanding of the Settlement and Release, and poses no obstacle to final approval.

- One Class Member wrote to JND to "object to the settlement" claiming "I paid too much for this car when I bought it in 2009 and I still own it and I won't have it fix[ed] for the key rotation, and the valve cover because the dealer will not let me drive the car in [their] shop. I don't let anyone drive my cars." Keough Decl. Ex. F. His objection is "conclusory and bereft of factual or legal support" and therefore "can be overruled without engaging in a substantive analysis." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 264 n.3 (S.D.N.Y. 2012).[15]

- The mother of a second Class Member wrote to JND on behalf of her son (who also signed the letter), stating that her "son would like to object to this law suit against the dealer, [b]ecause we had no problem with them when my youngest [son] had the car and also he hasn't had that car since 07." Keough Decl. Ex. F. The letter also stated that "[w]hen my son had the car we took the car to the dealer for a re-call and they repaired it with open

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[14] *See also id.*, Ex. 5 (Long Form Notice) at 1; *id.* at 7; Ex. 12 (Summary Settlement Notice); Ex. 16 (Initial Press Release). This language was added to the various notices at the suggestion of the Court. *See* Docket No. 7868 (Court question: "Should the notice provided to putative class members not make clear that the settlement does not affect claims for personal injury, wrongful death, or property damages?"); April 23, 2020 Tr. at 49 (Class Counsel responding that "The answer to question number one is yes. The notice should make it very clear that the settlement does not affect claims for personal injury, wrongful death, or property damages.").

[15] *See also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 168 (S.D.N.Y. 2007) ("conclusory statements" "that that the settlement is 'unreasonably low and is not in the investors class' best interests'" "are not sufficient to weigh against approval of the Settlement as fair and reasonable."); *Park v. The Thomson Corp.*, 2008 WL 4684232, at *3 (S.D.N.Y. Oct. 22, 2008) ("conclusory statement that the Amended Settlement is simply not fair 'need not be given any weight'").

In advance of the Preliminary Approval Hearing, the Court asked "Paragraph 82 of the Settlement Agreement conditions recovery by class members on completion of recall repairs. What authority supports that limitation? Put differently, what authority supports the proposition that the Court may compromise class members' rights and interests in the name of 'public safety'?" Docket No. 7868. If it approves the Settlement, the Court will not be "compromising class members' rights." Instead, the Settlement represents a bargained-for exchange. If a putative class member does not like that a condition to getting settlement benefits is first having to get the recall repair done, then the class member can opt-out and preserve all of his or her rights. The recall repair condition also addresses claims made in the 5ACC, where plaintiffs specifically alleged harm from New GM failing to timely repair the Defects. *See* 5ACC, ¶ 44 ("New GM's failure to timely repair the Defects at issue in the Complaint, and its concealment of those defects, injured all owners and lessees of New GM vehicles."). In addition, the recall repair condition minimizes future legal harms resulting from class members' failing to disclose an unrepaired recall to any subsequent buyers.

New GM's interests, shared by Class Counsel and the named Plaintiffs, is to enhance the public safety of drivers of GM vehicles. This provision embraces and fulfills all parties' interests in this regard. In light of these considerations, this condition is consistent with Rule 23(e)(2)'s requirement that the terms of the settlement be fair, reasonable, and adequate.

> arms." *Id.* This "objection" expressing satisfaction with the GM car and with customer service and a repair provided by a GM dealer obviously provides no basis for rejecting the Settlement.

Finally, the fact that in a Class of over 28 million at most four Class Members objected is proof that the Class as a whole is satisfied with and does not object to the Settlement.

B. The Goodwin Proctor "Limited Objection" Should Be Rejected.

Goodwin Proctor filed a so-called "limited objection" to the Settlement "to the extent there is a purported bar against the payment of Goodwin's Rule 23(h) fee claims from the 'Common Fund.'" Docket No. 8207, ¶ 10. As an initial matter, New GM does not understand Goodwin to be arguing that it can recover any attorneys' fees directly from New GM or that there is any basis for any increase in the Common Fund above the $121.1 million in aggregate that New GM, the GUC Trust, and the AAT agreed to contribute subject to a Final Effective Date and other Settlement terms and conditions. Any such argument would be entirely without merit, as contrary to the express terms of the Settlement itself. The Agreement provides that "New GM shall not be liable for, or obligated to pay, any fees, expenses, costs, or disbursements to any person or entity, either directly or indirectly, in connection with the Actions or the Agreement, other than as set forth in Section II.A and this Section VIII." Settlement Agreement ¶ 165.[16] Accordingly, any suggestion or claim that New GM is required to make any direct or indirect payment of any additional attorneys' fees beyond those contemplated by the Agreement would alter the terms of the Settlement Agreement, something which the Court may not do. "Rule 23(e) wisely requires

[16] *See also* ¶ 159 ("This award by the MDL Court of Attorneys' Fees and Expenses, which shall not exceed the Maximum Attorneys' Fees and Expenses Amount, shall be the sole compensation paid by New GM for all attorneys who represent any Person asserting economic loss claims pertaining to the Actions. In no event and under no circumstances shall New GM pay any amount in Attorneys' Fees and Expenses greater than the Maximum Attorneys' Fees and Expenses Amount."); ¶ 161 ("New GM shall have no responsibility to make any payment to Plaintiffs' Class Counsel, Allocation Counsel, Designated Counsel or any other counsel arguing that it has conferred a benefit upon Plaintiffs, the Class, or any Class Member other than amount in Attorneys' Fees and Expenses awarded by the MDL Court, which amount shall not exceed Thirty Four Million Five Hundred Thousand U.S. Dollars ($34,500,000.00).").

court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) (finding that when parties had agreed to a class settlement that included a waiver of attorneys' fees, court could not alter the settlement terms by "enforc[ing] the settlement on the merits and award[ing] attorney's fees"); *see also In re Warner Commc'ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) (district court "should approve or disapprove a proposed agreement as it is placed before [it] and should not take it upon [itself] to modify its terms").

Moreover, when objectors to a settlement have sought fees, courts have rejected any argument that such fees should be paid by a settling defendant. *See Fleury v. Richemont N. Am., Inc.*, 2008 WL 4829868, at *4 (N.D. Cal. Nov. 4, 2008) (finding objector's suggestion that defendant "should pay for his fees is not sustainable because Richemont did not receive any benefit based on his actions"); *Petruzzi's, Inc. v. Darling-Delaware Company, Inc.*, 983 F. Supp 595, 623 (M.D. Pa. 1996) (refusing to order settling defendant to pay objector's fees because defendant's liability for fees to class counsel was capped in the settlement agreement and "the agreement did not address the liability of any party for the fees of [the objector]".).

Nor should Goodwin be permitted to claim any portion of the Common Fund, which is to be used exclusively for the benefit of the Class through the payment of Class Members' claims and Settlement Implementation Expenses. Settlement Agreement ¶ 89(b) ("[T]he Court-Appointed Economic Loss Mediator has issued his Allocation Decision for allocating the Net Common Fund among the Subclasses."); *id.*, Ex. 10 ("[T]he entire Net Common Fund will be distributed to Class Members with approved Settlement Claims."). Thus, just as the Court may not alter the Settlement by requiring New GM to pay any additional amount in attorneys' fees, it

likewise may not alter the Settlement by awarding fees to Goodwin Proctor from the Common Fund. *See Evans.*, 475 U.S. at 726; *see also In re Warner Commc'ns Sec. Litig.*, 798 F.2d at 37. Also, an award of attorneys' fees to Goodwin Proctor from the Common Fund would conflict with the Notice, which informed the Class: "The Net Common Fund, which is the Settlement Amount less the costs of providing notice to the class and the expenses of administering the Settlement, will be exclusively used to provide payments to Class Members for eligible claims." Settlement Agreement, Ex. 5 (Long Form Notice) ¶ 5(B). Any alteration of those terms to divert part of the Common Fund to Goodwin Proctor would likely require re-notice to the Class, improperly depleting the amount of funds available for the Class's benefit. Goodwin Proctor's purported "limited objection" is no reason for this Court to conclude that the Settlement is not reasonable, fair, and adequate or to deny final approval. Indeed, permitting Goodwin Proctor to recover fees from the Common Fund would only injure the Class, diminishing the Class benefits under the Settlement.[17]

CONCLUSION

New GM respectfully requests that the Court grant the Parties' motion for final approval of the Settlement Agreement. The Settlement satisfies Rule 23 as well as the governing law.

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[17] In limited situations, courts have awarded attorneys' fees to attorneys other than Class Counsel who provided some benefit to the Class. Such an award from the Common Fund is inappropriate here, where the Settlement provides a mechanism, overseen by Class Counsel with oversight by the Court, for the allocation of fees to any such attorneys. Paragraph 162 of the Settlement Agreement provides:

> The Attorneys' Fees and Expenses paid by New GM as provided for in this Agreement shall be allocated by Plaintiffs' Class Counsel among other plaintiffs' counsel who seek a portion of the Attorneys' Fees and Expenses in a manner that Plaintiffs' Class Counsel in good faith believes reflects the contributions of such plaintiffs' counsel to the prosecution and settlement of the claims against New GM, the AAT, and the GUC Trust in the Actions. The allocation among plaintiffs' counsel shall be approved by the MDL Court, and Plaintiffs' Class Counsel shall distribute the Attorneys' Fees and Expenses as directed by the MDL Court.

As Class Counsel explained, any decision on whether Goodwin Proctor should receive a portion of the Attorneys' Fees and Expenses should be deferred until the proposed allocation is submitted. Docket No. 8202 at 6.

Respectfully submitted,

Dated November 9, 2020:

/s/Richard C. Godfrey, P.C.

/s/ Wendy L. Bloom

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2020, I electronically filed the foregoing using the CM/ECF system which will serve notification of such filing to the email of all counsel of record in this action.

By: /s/ *Wendy L. Bloom*
Wendy L. Bloom