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*	

MEMORANDUM IN SUPPORT OF INTERIM CLASS COUNSEL'S RULE 23(h) MOTION FOR APPROVAL OF AWARD OF ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARDS TO LEAD PLAINTIFFS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

III. THE WORK UNDERTAKEN BY THE ECONOMIC LOSS PLAINTIFFS AND THEIR COUNSEL 3

A. Investigating, Researching, and Initiating the Claims. 4

B. Litigating Serial Motions to Dismiss and Related Issues. 5

C. Large-Scale Discovery Efforts on Behalf of the Putative Classes. 7

D. The Bankruptcy Proceedings. 9

E. Extensive Motion Practice on Substantive Issues. 12

F. Settlement Negotiations. 14

III. APPLICABLE LEGAL STANDARDS 15

IV. ARGUMENT 16

A. A Fee of 16.8 Percent of the Net Constructive Common Fund Compares Favorably to Fees Awarded in Settlements of Similar Size and Complexity, Given the Circumstances of This Case. 16

B. The Other *Goldberger* Factors Likewise Support the Requested Fee. 20

C. The Requested Fee Reflects a Negative Multiplier, While Courts in this Circuit Regularly Approve Fees Resulting in Significant Multipliers. 23

D. Economic Loss Plaintiffs' Counsel's Expenditures on the Class's Behalf Were Reasonable. 27

E. Service Awards to Lead Plaintiffs Are Warranted Given Their Devotion to the Class, Which Helped Achieve This Result. 28

V. CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,
2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006) 24

Alaska Elec. Pension Fund v. Bank of Am. Corp.,
2018 U.S. Dist. LEXIS 202526 (S.D.N.Y. Nov. 29, 2018) (Furman, J.) 16, 29

Allapattah Servs., Inc. v. Exxon Corp.,
454 F. Supp. 2d 1185 (S.D. Fla. 2006) 19

In re Amaranth Nat. Gas Commodities Litig.,
2012 WL 2149094 (S.D.N.Y. June 11, 2012) 17, 26

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 19

Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.,
2012 WL 2064907 (S.D.N.Y. June 7, 2012) 24, 29

Bellifemine v. Sanofi-Aventis U.S. LLC,
2010 WL 3119374 (S.D.N.Y. Aug. 6, 2010) 28

Berni v. Barilla G. e R. Fratelli, S.p.A.,
332 F.R.D. 14 (E.D.N.Y. 2019) 29

In re Bisys Sec. Litig.,
2007 WL 2049726 (S.D.N.Y. July 16, 2007) 17, 23, 24

Blum v. Stenson,
465 U.S. 886 (1984) 26

In re Chambers Dev. Sec. Litig.,
912 F. Supp. 822 (W.D. Pa. 1995) 22

In re Checking Account Overdraft Litig.,
830 F. Supp. 2d 1330 (S.D. Fla. 2011) 19

City of Providence v. Aeropostale, Inc.,
2014 WL 1883494 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) 22

Dornberger v. Metro. Life Ins. Co.,
203 F.R.D. 118 (S.D.N.Y. 2001) 28, 29

Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.),
829 F.3d 135 (2d Cir. July 13, 2016).....10

Farbotko v. Clinton Cty.,
433 F.3d 204 (2d Cir. 2005).....26

Fleisher v. Phoenix Life Ins. Co.,
2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015)..... *passim*

Gascho v. Global Fitness Holdings, LLC,
822 F.3d 269 (6th Cir. 2016) 1

In re Gen. Motors LLC Ignition Switch Litig.,
407 F. Supp. 3d 212 (S.D.N.Y. 2019).....20

In re Global Crossing Sec. & ERISA Litig.,
225 F.R.D. 436 (S.D.N.Y. 2004) 24

Godson v. Eltman, Eltman, & Cooper, P.C.,
328 F.R.D. 35 (W.D.N.Y. 2018).....29

Goldberger v. Integrated Res., Inc.,
209 F.3d 43 (2d Cir. 2000).....15, 22, 23, 25

Grice v. Pepsi Beverages Co.,
363 F. Supp. 3d 401 (S.D.N.Y. 2019).....15, 19, 21

Hart v. BHH, LLC,
2020 U.S. Dist. LEXIS 173634 (S.D.N.Y. Sept. 22, 2020).....1

Hernandez v. Immortal Rise, Inc.,
306 F.R.D. 91 (E.D.N.Y. 2015).....28

In re IndyMac Mortg.-Backed Sec. Litig.,
94 F. Supp. 3d 517 (S.D.N.Y. 2015).....27

In re Initial Pub. Offering Sec. Litig.,
671 F. Supp. 2d 467 (S.D.N.Y. 2009).....19

Jermyn v. Best Buy Stores, L.P.,
2012 WL 2505644 (S.D.N.Y. June 27, 2012) 29

Kindle v. Dejana,
308 F. Supp. 3d 698 (E.D.N.Y. 2018) 29

In re Lloyd's Am. Trust Fund Litig.,
2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002).....24

Maley v. Del Global Techs. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002).....23, 24

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010).....22, 23

In re Motors Liquidation Co.,
529 B.R. 510 (Bankr. S.D.N.Y. 2015).....10

Norflet ex rel. Norflet v. John Hancock Life Ins. Co.,
658 F. Supp. 2d 350 (D. Conn. 2009).....29

Parker v. Time Warner Entm't Co., L.P.,
631 F. Supp. 2d 242 (E.D.N.Y. 2009), *aff'd sub nom. Lobur v. Parker*, 378 F. App'x 63 (2d Cir. 2010).....1

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,
507 U.S. 380 (1993).....10

In re Priceline.com, Inc. Sec. Litig.,
2007 WL 2115592 (D. Conn. July 20, 2007).....18

Torres v. Toback, Bernstein & Reiss LLP,
2014 WL 1330957 (E.D.N.Y. Mar. 31, 2014).....29

Velez v. Novartis Pharms. Corp.,
2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010).....16, 24

In re Vitamins Antitrust Litig.,
2001 WL 34312839 (D.D.C. July 16, 2001).....19

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005).....24

Woburn Ret. Sys. v. Salix Pharm., Ltd.,
2017 WL 3579892 (S.D.N.Y. Aug. 18, 2017).....25

Zink v. First Niagara Bank, N.A.,
2016 U.S. Dist. LEXIS 179900 (W.D.N.Y. Dec. 29, 2016).....1

OTHER AUTHORITIES

Theodore Eisenberg, Geoffrey Miller, & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937 (2017).....18, 19, 24

I. INTRODUCTION

After more than six years of hard fought litigation against sophisticated defense counsel, Court-appointed Interim Class Counsel for the Economic Loss Plaintiffs have secured a Settlement totaling $121,100,000 for the Class and $34,500,000 in Attorneys' Fees and Costs, for a total value of $155,600,000.[1] This matter has been intensely litigated including, *inter alia*, all merits and class discovery, motions for summary judgment and class certification, appellate litigation, multiple appearances before the MDL and the Bankruptcy Courts regarding a wide variety of substantive and procedural issues, discovery disputes and briefing, renewed motions for summary judgment, and intensive settlement negotiations. 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. As a result of these 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. Indeed, this Court has recognized that the Action was marked by "five-plus years of litigation, hundreds of depositions, millions of documents exchanged in discovery, and untold trees felled and ink spilled by the parties and the Court . . . ." Dkt. No. 7616.

Interim Class Counsel now apply under Fed. R. Civ. P. 23(h) for an aggregate award of fees and costs in connection with the final approval of the proposed Economic Loss Class Action Settlement. In light of the substantial risks and complex issues in this litigation, the enormous

[1] Courts routinely consider the total amount of consideration paid by the settling party in determining the total value of the settlement. *See, e.g., Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 282 (6th Cir. 2016); *Hart v. BHH, LLC*, 2020 U.S. Dist. LEXIS 173634, at *21 (S.D.N.Y. Sept. 22, 2020); *Zink v. First Niagara Bank, N.A.*, 2016 U.S. Dist. LEXIS 179900, at *20 (W.D.N.Y. Dec. 29, 2016); *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 269 (E.D.N.Y. 2009), *aff'd sub nom. Lobur v. Parker*, 378 F. App'x 63 (2d Cir. 2010).

amount of work accomplished for the benefit of the Class, and the $155.6 million Settlement created, Interim Class Counsel on behalf of all Economic Loss Plaintiffs' Counsel respectfully request (i) an award of $24,585,272.06 in attorneys' fees—equal to 16.8 percent of the net constructive common fund (the Settlement Fund plus the fees and costs that New GM has agreed to pay, minus the requested $9,914,727.94 expense reimbursement) or 15.8% of the gross constructive common fund (the Settlement Fund plus the fees and costs that New GM has agreed to pay, including the requested $9,914,727.94 expense reimbursement); (ii) reimbursement of expenses incurred in connection with this litigation (and that have not been previously reimbursed from the Common Benefit Fund) of $9,914,727.94; and (iii) Service Awards for each of the Class Representatives—$2,000 for each Class Representative who had his or her deposition taken and $1,000 for the remaining representatives for a total of $310,000 in Service Awards.

As part of the Settlement, Interim Class Counsel agreed to seek, and New GM agreed not to oppose, an award of Attorneys' Fees and Expenses in the aggregate amount of $34,500,000 to be paid directly by New GM so that the Common Fund will not be diluted by an Attorneys' Fees and Expenses award. *See* Settlement Agreement, Section VIII. The amount of fees and costs were negotiated under the supervision and direction of the Court-Appointed Economic Loss Mediator, Retired Judge Layn, Phillips only after agreement was reached on the principal terms of the Settlement. *See infra* Section III.F.

The requested 16.8 percent fee award is reasonable compared to awards in complex class actions in this Circuit, where courts have awarded attorneys' fees in the range of 26-34 percent. *See infra* Section V.A. A recent empirical study of attorneys' fees in class action settlements also supports the 16.8 percent fee request. *Id.* The reasonableness of the requested award is further confirmed by a "lodestar cross-check." Based on Economic Loss Plaintiffs' Counsel's collective

lodestar for the case of $78,148,898.77, the requested award would lead to a multiplier of negative .31. This negative multiplier obviates any windfall given the size of the settlement recovery and necessarily results in an effective hourly rate far below the market rate for the hours devoted to the case by Plaintiffs' counsel. *See infra* Section V.C.

Beyond fees, the requested expense reimbursement is for expenses that were all critical to the representation of the Class. And the amount of the expenses, including the largest categories of expert costs and travel expenses (that is, hotels and air travel), are consistent with the amount of expenses reimbursed in comparable cases. *See infra* Section V.D. And the Service Awards are reasonable given the substantial commitment to the Class and investment of time provided to this case by the Class Representatives. *See infra* Section V.E. Interim Class Counsel respectfully request that their motion be granted.

III. THE WORK UNDERTAKEN BY THE ECONOMIC LOSS PLAINTIFFS AND THEIR COUNSEL

As the Court recently recognized, this MDL included untold rounds of motion practice and nearly 8,000 docket entries (although the bellwether cases are included in those docket entries). *See* Dkt. No. 7896. As the very lengthy docket demonstrates, every aspect of this case has been vigorously contested. Interim Class Counsel, together with the Executive Committee, have accomplished a tremendous amount of work in this litigation. Outlined below is the work done by counsel for the Economic Loss Plaintiffs, and the diligent participation of the Class Representatives. Indicative of the complexity of this case, the Court held more than 32 status conferences that were necessary to actively manage the long course of the litigation. Declaration of Steve W. Berman in Support of Interim Class Counsel's Motion for Approval of Award of Attorneys' Fees and Expenses and Service Awards to Lead Plaintiffs (the Berman Decl.), ¶¶ 48-49.

A. Investigating, Researching, and Initiating the Claims.

Interim Class Counsel conducted substantial work to identify and investigate potential claims in the MDL Action. As the initial detailed complaints demonstrate, counsel conducted a thorough investigation before filing suit. We closely monitored GM recalls and the Congressional investigation, and analyzed the Valukas Report (identifying its shortcomings). Other firms that would later be appointed by the Court to Executive Committee or Liaison roles in the MDL also filed thorough complaints. Berman Decl., ¶¶ 6-7.

In October 2014, Interim Class Counsel filed two consolidated complaints—the first with respect to economic loss claims concerning GM-branded vehicles that were acquired July 11, 2009, or later, and the second regarding vehicles manufactured by Old GM and purchased before July 11, 2009. *See* Dkt. Nos. 345, 347. These complaints consolidated the claims brought by Economic Loss Plaintiffs in the MDL.[2] Economic Loss Plaintiffs would amend the complaints several times. All told, there were five consolidated complaints filed in the Economic Loss Class Actions. Each amended complaint built on the prior and was molded based on evidence adduced to date and the Court's successive rulings on motions to dismiss (which are highlighted below). The current, operative complaint, which was filed on September 8, 2017, is the Fifth Amended Consolidated Complaint. *Id.*, ¶¶ 8-9.

The complaints were the result of a remarkable amount of fact investigation and legal research. As an example (and as the Court has noted), the Third Amended Consolidated Complaint ran "over a thousand pages and 4500 paragraphs, and include[d] claims under federal and state law brought by named Plaintiffs in all fifty states and the District of Columbia." Dkt. No. 221 at

[2] The claims in the Bankruptcy Court, and other litigation in the Bankruptcy Court, are discussed in Section III.D below.

3. The Fourth Amended Consolidated Complaint exceeded 1700 pages and 7500 paragraphs. *See* Dkt. No. 4175 at 1. Berman Decl., ¶ 10.

B. Litigating Serial Motions to Dismiss and Related Issues.

New GM filed two comprehensive motions to dismiss, testing the allegations and claims brought in the Third Amended Consolidated Class Action Complaint and the Fourth Amended Consolidated Class Action Complaint. New GM's first motion was a partial motion to dismiss the Third Amended Consolidated Class Action Complaint and was limited to the claims of Economic Loss Plaintiffs from eight jurisdictions (California, District of Columbia, Florida, Louisiana, Maryland, Missouri, Oklahoma, and Virginia) who purchased or leased New GM cars. The briefing on the motion included a deep dive into the law in the eight relevant states, in addition to lengthy briefing on RICO issues (and, particularly, causation and damages). The Court granted the motion with respect to Plaintiffs' RICO claim and claims brought by any Economic Loss Plaintiff whose car was not allegedly defective when sold; granted the motion with respect to some state law claims and denied it as to others; and ruled that the Economic Loss Plaintiffs who survived the motion could not bring claims on behalf of putative class members whose defects were not sufficiently similar to the Plaintiffs' defects. *See* Opinion and Order, Dkt. No. 221. Berman Decl., ¶¶ 11-12.

After Plaintiffs filed their Fourth Amended Consolidated Complaint, New GM moved to dismiss the claims of Economic Loss Plaintiffs from eight jurisdictions that were not addressed in the Court's opinion on the motion to dismiss the Third Amended Consolidated Class Action Complaint (Alabama, Illinois, Massachusetts, Michigan, New York, Pennsylvania, Texas, and Wisconsin). The parties' briefing dove deeply into the law in each of these eight jurisdictions and also addressed issues that were not state-specific such as Economic Loss Plaintiffs' brand devaluation theory of damages, the viability of economic loss claims brought by Economic Loss

Plaintiffs who bought their cars before New GM came into existence or who disposed of their cars prior to the recall announcements, and damages in the form of "lost time" spent by having vehicles repaired. In a 129-page opinion, the Court denied the motion as to the last issue and granted it as to Economic Loss Plaintiffs' narrowed claims for brand devaluation, as well as to pre-Sale purchases and pre-recall dispositions. Importantly, the Court sustained the majority of Economic Loss Plaintiffs' claims under the laws in the eight relevant states. *See* Opinion and Order [Regarding New GM's Partial Motion to Dismiss the Fourth Amended Consolidated Class Action Complaint], Dkt. No. 4175. Berman Decl., ¶ 13. Economic Loss Plaintiffs filed a Motion to Amend the Fourth Amended Consolidated Complaint, and New GM moved to dismiss and/or strike the newly proposed Fifth Amended Consolidated Complaint. The Court granted Plaintiffs' motion and denied new GM's cross motion (except to the extent that it concerned claims that the Court previously dismissed). *See* Memorandum Opinion and Order [Regarding Plaintiffs' Motion to Amend the Fourth Amended Consolidated Complaint and New GM's Partial Cross-Motion to Dismiss and/or Strike Plaintiffs' Fifth Amended Consolidated Complaint], Dkt. No. 4810. Berman Decl., ¶ 13.

As directed by the Court, the parties subsequently submitted lengthy briefing on whether manifest defect is required for Economic Loss Plaintiffs to recover for their economic losses under the laws of 27 jurisdictions, whether Economic Loss Plaintiffs could recover damages for lost time under the laws of 47 jurisdictions, and whether the existence of a contract or an adequate legal remedy bars Economic Loss Plaintiffs' unjust enrichment claims under the laws of 10 jurisdictions. The Court addressed the parties' contentions in an opinion spanning 108 pages and noted that resolution of the disputes was "no easy task given the sheer number of issues and jurisdictions in dispute, the fact that the relevant law in many of the jurisdictions is unsettled or in conflict, and

because 'subtle differences in state law can dictate different results for plaintiffs in different jurisdictions.'" *See* Opinion and Order [Regarding Application of the Court's Prior Rulings on Manifestation, Incidental Damages (Lost Time), and Unjust Enrichment to All Remaining Jurisdictions in Dispute (MDL Order No. 131 Issues)], Dkt. No. 6028 at 5. In sum, the Court found for all remaining jurisdictions in dispute that manifestation was not required to bring statutory consumer protection, common-law fraud, and implied warranty claims; that for all but six states, Economic Loss Plaintiffs could recover lost-time damages characterized as lost earnings or the equivalent (except for under Colorado, New York, Ohio, Oklahoma, Utah, and Virginia law, where lost personal time was recoverable); that for nine of the ten relevant jurisdictions, Economic Loss Plaintiffs could plead unjust enrichment claims in the alternative only where the validity or enforceability of a contract was in question; and that for seven out of the ten relevant jurisdictions, Plaintiffs could not maintain an unjust enrichment claims when an adequate remedy at law was available. *Id.* at 108 & Exh. A. Berman Decl., ¶ 15.

C. Large-Scale Discovery Efforts on Behalf of the Putative Classes.

The Economic Loss Plaintiffs engaged in extensive written discovery. In 2014, Plaintiffs served their first set of requests for production on New GM, encompassing 951 individual requests seeking information, among others, on all of the many recalls invoked by the initial complaints. These were replaced by a targeted, consolidated set of 112 individual requests for production that sought information relating to Phase One and Phase Two recalls, as well as damages. Ultimately, Plaintiffs served on New GM 12 sets of requests for the production of documents and three sets of interrogatories (excluding discovery requests relating to GUC Trust settlements in the Bankruptcy Court). Berman Decl., ¶ 16.

New GM produced more than 4.7 million documents totaling more than 23.4 million pages, almost all of which were made available in electronic form. Interim Class Counsel organized and

trained a team of lawyers that reviewed, searched, and extensively coded and analyzed all of the documents that were not specific to personal injury and bellwether Plaintiffs. This was a monumental undertaking that was necessary to identify the key evidence in the case. Berman Decl., ¶ 17; Declaration of Elizabeth Cabraser in Support of Interim Class Counsel's Rule 23(h) Motion for Approval of Award of Attorneys' Fees and Expenses (the Cabraser Decl.), ¶ 25.

Over the course of the litigation, in support of the motion for class certification and in opposition to certain New GM motions for summary judgment, Economic Loss Plaintiffs' Counsel undertook massive amounts of work related to experts. At a cost of millions of dollars, the Economic Loss Plaintiffs' eight experts submitted 16 expert reports collectively exceeding 1,000 pages. The Economic Loss Plaintiffs defended the depositions of each expert; the depositions, in the aggregate, consumed 18 days. The experts' work included an analysis of the alleged defects and their common impact on all Class members; New GM's allegedly misleading advertising; materiality of the defects to the Class; benefit-of-the bargain and lost-time damages; and responses to New GM's experts. The work of the experts provided essential support to the Economic Loss Plaintiffs' class certification motion and opposition to summary judgment. Berman Decl., ¶¶ 18-20. The Economic Loss Plaintiffs were also required to review and analyze reports from ***18 experts*** retained by New GM. Plaintiffs took the depositions of each of these experts. Berman Decl., ¶¶ 21-22.

Plaintiffs gathered key fact evidence via deposition. They took ***117*** depositions of New GM personnel. Counsel for the Economic Loss Plaintiffs were the lead examiners in 103 of these 117 depositions. Berman Decl., ¶¶ 23-24. New GM also engaged in fulsome discovery directed at the Plaintiffs, serving written discovery, utilizing detailed Plaintiff Fact Sheets, and taking

depositions. New GM took, and Economic Loss counsel defended, the depositions of 94 Economic Loss Plaintiffs. Berman Decl., ¶¶ 25-27.

Discovery also necessitated the filing of contested motions and agreed orders too numerous to count. *See* Berman Decl., ¶¶ 21-29.

D. The Bankruptcy Proceedings.

As the Court has acknowledged, the economic loss class actions—however complicated in their own right—were made substantially more complicated by the Old GM bankruptcy and New GM's agreement to purchase most of Old GM's assets while assuming only some of Old GM's liabilities. Plaintiffs moved to withdraw the bankruptcy reference in order to consolidate all proceedings in one court, but the Court denied the motion. The result was complex and long-running litigation in the Bankruptcy Court over whether and to what extent Plaintiffs could, consistent with bankruptcy law, bring claims against New GM. The disputes would generate thousands of pages of briefing, frequent court hearings, appeals to this Court, a Second Circuit decision and subsequent appellate proceedings, and aborted settlement attempts between Economic Loss Plaintiffs and the GUC Trust. The challenges posed by having class claims proceed simultaneously in the District Court and Bankruptcy Court posed special challenges not ordinarily invoked in typical MDL class cases. Berman Decl., ¶ 30.

In response to the many class actions filed against New GM, New GM filed a motion to enforce the Bankruptcy Court's Sale Order's provision that blocked economic loss lawsuits against New GM on claims involving vehicles and parts manufactured by Old GM (the Motion to Enforce). The Economic Loss Plaintiffs in this MDL litigation retained Edward Weisfelner and his firm (Brown Rudnick) to represent their interests in the Bankruptcy Court. The Motion to Enforce resulted in reams of briefing and argument in the Bankruptcy Court. The Bankruptcy Court granted in part New GM's motion and ruled that the Sale Order precluded pre-sale economic

loss claims against New GM. *See In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015). Berman Decl., ¶ 31.

The Second Circuit accepted a direct appeal of the Bankruptcy Court's Judgment on New GM's Motion to Enforce and affirmed the decision not to enforce the Sale Order as to independent claims; reversed the decision to enforce the Sale Order as to the Used Car Purchasers' claims and claims relating to the ignition switch defect; vacated the decision to enforce the Sale order as to claims relating to other defects; and vacated the decision on equitable mootness as advisory. *See Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135 (2d Cir. July 13, 2016). Perhaps most importantly, the court affirmed the Bankruptcy Court's factual finding that Old GM knew or should have known of the ignition switch defect and, therefore, should have provided individualized notice of its bankruptcy to potential claimants affected by the defect. Berman Decl., ¶ 32.

The Bankruptcy Court then required any Plaintiffs wishing to seek relief from the Sale Order because of a due process violation to file late claims motions related to the recalls. Bankr. Dkt. No. 13802 at 5. In response, two Economic Loss Plaintiffs named in the Fifth Amended Consolidated Complaint filed a Late Claims motion seeking leave to assert nationwide class claims against the GUC Trust. Many issues invoked by the Late Claims Motions were briefed but not yet decided by the Bankruptcy Court (see Bankr. Dkt. Nos. 13871-73, 13882-84), including whether Plaintiffs would be required to satisfy the standards set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), in order to obtain leave to file late proofs of claim and whether any or all of the Plaintiffs were the beneficiaries of a tolling agreement for purposes of the limitation period. Berman Decl., ¶ 33.

This Court also addressed bankruptcy issues. For instance, after the Bankruptcy Court ruled that certain claims and allegations were barred by the Sale Order, Plaintiffs moved to withdraw the bankruptcy reference so that the District Court could resolve whether certain claims would be subject to the Bankruptcy Court's ruling; the Court denied the motion. *See* Aug. 27, 2015 Opinion and Order, Dkt. No. 9. Berman Decl., ¶ 34. In the wake of the Second Circuit opinion, the parties in the bankruptcy proceedings appealed certain orders to the District Court, resulting in additional briefing efforts. On May 29, 2018, the Court resolved 11 such appeals. In pertinent part, the Court vacated the Bankruptcy Court's holding that the fraudulent concealment claims were not independent claims; affirmed the Bankruptcy Court's decision that Plaintiffs without the ignition switch defect are not barred from pursuing Independent Claims against New GM; affirmed the ruling that punitive damages against New GM based on Old GM conduct are not available; and vacated the Bankruptcy Court's determination that used car purchasers without the ignition switch defect were bound by the Sale Order to the same extent as their predecessors in interest. *See* Opinion and Order, Dkt. No. 5618. Berman Decl., ¶ 35.

In the Bankruptcy proceeding, Economic Loss Plaintiffs held extensive settlement discussions with the GUC Trust that resulted in three separate attempts to settle the claims in the Bankruptcy Court that would have facilitated resolution of the claims there against New GM. Substantial briefing was generated in the process, and an evidentiary-style mini-trial was held. The Bankruptcy Court declined to approve the first two settlements (*see* Bankr. Dkt. Nos. 14212, 14373), and the GUC Trust terminated the third agreement. Berman Decl., ¶ 36.

Displeased with the Plaintiffs' and GUC Trust settlement efforts in the Bankruptcy Court, New GM filed a Motion to Withdraw the Reference of the Economic Loss Plaintiffs' Rule 23 Motion (No. 19-CV-1852 (JMF)), Dkt. No. 1. Briefing was complete on the Motion (*see, e.g., id.*

at Dkt. No. 15 (Plaintiffs' opposition), but the Court had not ruled on the issue by the time the parties reached the Settlement now under consideration. Berman Decl., ¶ 37.

E. Extensive Motion Practice on Substantive Issues.

In addition to litigating motions to dismiss, discovery issues, and bankruptcy issues, the Economic Loss Plaintiffs were called upon to submit thousands of pages of briefing on miscellaneous issues, class certification, and motions for summary judgment. Berman Decl., ¶¶ 38-39. Pursuant to the bellwether class certification process established by the Court, the Economic Loss Plaintiffs moved to certify classes under the laws of California, Missouri, and Texas. The briefing was lengthy (*see* Dkt. Nos. 5845-49, 6181), and Plaintiffs' motion was supported by a detailed Offer of Proof citing 578 exhibits. Berman Decl., ¶ 40.

The parties also submitted reams of briefing related to summary judgment and *Daubert* motions. New GM moved for partial summary judgment on "successor liability" claims brought by Economic Loss Plaintiffs who bought or leased a Delta Ignition Switch Vehicle on or before July 9, 2009, in the 16 jurisdictions that were addressed in the Court's opinions on the motions to dismiss. These claims flowed from the Second Circuit's decision that such Plaintiffs were not barred by the Sale Order from bringing claims against New GM. In a 47-page opinion, the Court held that Delaware law applied in seven of the 16 jurisdictions at issue and that, under Delaware law, Economic Loss Plaintiffs' successor liability claims failed as a matter of law. The Court declined to resolve the merits of New GM's motion with respect to the other nine jurisdictions and asked for additional briefing. *See* Opinion and Order [Regarding New GM's Partial Motion for Summary Judgment on Plaintiffs' Successor Liability Claims in the Fourth Amended Consolidated Complaint] at 2-3, Dkt. No. 4345. On Plaintiffs' subsequent motion for reconsideration, the Court modified its opinion and sustained the pre-recall Plaintiffs' claims and deferred for "another day" resolution of that particular issue on a state-by-state and claim-by-claim basis. *See* Memorandum

Opinion and Order [Regarding Plaintiffs' Motion for Reconsideration and/or Clarification of the Court's Order Dismissing the Claims of "Pre-Recall Plaintiffs"], Dkt. No. 4416. Berman Decl., ¶ 41.

The parties filed supplemental briefing, and in December 2017 the Court dismissed the successor liability claims under Maryland law but denied the motion as to claims arising under the laws of Alabama, Illinois, Michigan, Missouri, Oklahoma, Pennsylvania, Texas, and Virginia. *See* Opinion and Order [Regarding New GM's Motion for Partial Summary Judgment on Successor Liability], Dkt. No. 4888. New GM moved for partial reconsideration, and the Court, after considering additional briefing, then dismissed the successor liability claims of Economic Loss Plaintiffs from New York, Texas, and Virginia. *See* Memorandum Opinion and Order [Regarding New GM's Motion for Partial Reconsideration of the Court's December 19, 2017 Order and Opinion on Successor Liability], Dkt. No. 5410. Berman Decl., ¶ 42.

Spawning mountains of briefing and factual submissions, New GM filed motions for summary judgment on a variety of issues relating to the bellwether economic loss claims, including benefit-of-the bargain damages, bankruptcy-fraud claims, lost time damages, the claims of Economic Loss Plaintiffs who purchased Old GM or used vehicles, the claims of Economic Loss Plaintiffs who sold their cars before the recalls, the claims of Plaintiffs whose cars were subject to the ignition switch "service part" recall, the effectiveness of New GM's recalls and repairs, and the availability of injunctive relief. The Court issued a ruling only on the benefit-of-the bargain summary judgment motion, leaving resolution of the remaining issues to another day. Opinion and Order [Regarding New GM's Motion for Summary Judgment as to the Bellwether Economic Loss Plaintiffs' Claims for Benefit-of-the-Bargain Damages], Dkt. No. 7019. In its order, the Court found that Economic Loss Plaintiffs could not prove benefit-of-the bargain damages on the

basis of the Boedeker conjoint survey. While Plaintiffs strongly disagreed (and still disagree) with this ruling, it was pivotal. Indeed, the Court characterized it as "chang[ing] the landscape in dramatic ways[.]" *Id.* at 43. Berman Decl., ¶¶ 43-44.

Plaintiffs then filed a motion for reconsideration or, in the alternative to certify the question to the Second Circuit for interlocutory appeal. The Court denied the reconsideration motion but certified the issue for interlocutory appeal. *See* Opinion and Order [Regarding Economic Loss Plaintiffs' Motion for Reconsideration of the Court's Summary Judgment Ruling or, in the Alternative, for Certification of Interlocutory Appeal], Dkt. No. 7616. Economic Loss Plaintiffs filed for leave to appeal, and the Second Circuit granted the petition for immediate appeal. *See* Dkt. No. 7858. Berman Decl., ¶ 45.

In connection with its summary judgment motions, New GM filed several *Daubert* motions to exclude certain opinions submitted by liability experts Glen Stevick, Steve Loudon, and Marvin Goldberg. *See* Dkt. Nos. 5855, 6065. New GM also moved to strike the opinions of Economic Loss Plaintiffs' damages experts Stefan Boedeker, Joshua Gans, and Ernie Manuel. *See* Dkt. Nos. 6069, 7100. Economic Loss Plaintiffs opposed all of these motions (*see* Dkt. Nos. 6185, 6187, 7249). Economic Loss Plaintiffs moved to exclude under *Daubert* the opinions of New GM experts Cornell, Hanssens, Keller, List, and Willig. *See* Dkt. Nos. 6108, 6110, 6114, 6116, 6118. The Court did not resolve any of the parties' *Daubert* motions (other than to find, in its summary judgment opinion, that Mr. Boedeker's analysis was insufficient to prove difference-in-value damages). Berman Decl., ¶ 46.

F. Settlement Negotiations.

Interim Class Counsel, New GM, the GUC Trust, and counsel to the Participating Unitholders negotiated the Settlement in good faith and at arm's length using the services of the independent Court-appointed economic loss mediator, retired Judge Layn R. Phillips. Early efforts

at negotiations in 2016 and 2017 proved unfruitful, and negotiations were moribund until the Court appointed Judge Phillips as mediator. Beginning in September 2017, Judge Phillips oversaw mediation efforts. The parties had three in-person mediation sessions in 2018, which ended without an agreement. Discussions did not gain momentum until after the Court granted summary judgment against Plaintiffs' benefit-of-the-bargain claims in August 2019. Thereafter, the parties held several in-person mediations in September 2019, December 2019, and January 2020, in addition to numerous phone calls, that ultimately resulted in the Settlement. Interim Class Counsel diligently prepared for each mediation session and negotiated in good faith. Fees were not negotiated until after agreement was reached on a settlement in principle. Berman Decl., ¶¶ 52-55.

III. APPLICABLE LEGAL STANDARDS

The law regarding fee applications in this Circuit demonstrates there is no one-size-fits-all approach to determining the appropriate fee in a class case. The Court has "very broad discretion . . . in determining a reasonable fee." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 57 (2d Cir. 2000). This Court "applies the percentage of the fund method" and considers the factors articulated in *Goldberger* "in three steps." *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 406 (S.D.N.Y. 2019) (Oetken, J.):

> First, the Court determines a reasonable baseline fee by comparing the requested rate to that awarded in "other common fund settlements of similar size and complexity, taking into account the requested fee in relation to the settlement, the magnitude and complexity of the instant case and the policy consideration of using a sliding scale based on the amount of the settlement to avoid a windfall to class counsel." Next, the Court considers some of the remaining *Goldberger* factors, such as the risk Class Counsel faced in litigating this case, the quality of representation provided by Class Counsel, and any remaining public policy concerns that render further adjustments to the baseline fee necessary. Finally, the Court will apply the lodestar method as a cross-check, in order to compare the resulting awarded percentage with the time and labor actually expended by Class Counsel.

Id. (quoting *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y.

2017)). Each of those factors supports the fee requested here.

IV. ARGUMENT

A. A Fee of 16.8 Percent of the Net Constructive Common Fund Compares Favorably to Fees Awarded in Settlements of Similar Size and Complexity, Given the Circumstances of This Case.

This Court recently evaluated a fee petition in a class action in *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 U.S. Dist. LEXIS 202526, at *16 (S.D.N.Y. Nov. 29, 2018) (Furman, J.)., and approved a fee award of $126,378,281, which represented 26% of the $486,070,312 net settlement fund. Counsel sought 28.5% of the *gross* settlement fund, *id.* at *8, but the Court found it more appropriate to predicate the award on the net settlement fund resulting after deduction of approved, reimbursable expenses. *Id.* at *15-16 (citing cases). Applying a similar approach here results in Interim Class Counsel requesting a fee award of 16.8% of the net constructive common fund of $145,685,272, after deducting expenses of $9,914,727 (or 15.8% of the gross constructive common fund without the $9,914,727.94 expense reimbursement removed).

A 16.8% fee award here compares very favorably with fees awarded to class counsel in the Second Circuit. All the hallmarks of a challenging case—complex facts, nettlesome legal issues, a well-funded defendant, and sophisticated opposing counsel—were present here. Courts both within and outside the Second Circuit have, in similar circumstances, awarded percentages at and above 30% of funds comparable to (and even larger than) this one. Indeed, as Judge McMahon has observed, "[t]he federal courts have established that a standard fee in complex class action cases . . . where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez v. Novartis Pharms. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010); *see also Alaska Elec. Pension Fund*, 2018 U.S. Dist. LEXIS 202526, at *16 (awarding attorneys' fees of 26% of $486 million settlement fund).

As another example, in *In re Amaranth Natural Gas Commodities Litigation*, Judge Scheindlin awarded a fee consisting of 30% of the $77.1 million settlement amount, which was "close to the standard range for fee awards given under *Goldberger*." 2012 WL 2149094, at *2 (S.D.N.Y. June 11, 2012); *see also id.* at n.12 (citing Theodore Eisenberg & Geoffrey Miller, *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions After Goldberger v. Integrated Resources, Inc.*, 29 WASH. U. J.L. & POL'Y 5, 18 (2009) (noting mean and median fee awards under *Goldberger* were 26.03% and 27.25%, respectively)). The court highlighted, among other things, plaintiffs' counsel's successes on threshold motions, the complex and time-consuming nature of the case, and the reasonableness of the fee in relation to the settlement amount, as it "compensate[d] plaintiffs' counsel for their efforts, but . . . also ensure[d] that class members receive[d] an adequate recovery." *Id.* at *2. So too, here.

Similarly, in *In re Bisys Securities Litigation*, Judge Rakoff awarded 30% of a $65.87 million settlement fund, observing that as a general matter, "[a] 30% fee [would be] consistent with fees awarded in . . . class action settlements in the Second Circuit." 2007 WL 2049726, at *2 (S.D.N.Y. July 16, 2007) (alterations and ellipsis in original). And while noting "most such case[s] have involved smaller settlement funds and therefore have not bestowed so large a sum, in absolute terms, on class counsel," the court noted the extraordinarily "high level of risk," the "extensive discovery," and the "positive . . . final result for the class members" obtained by counsel. *Id.* at *2, *3.

With respect to the effort involved in pursuing class members' claims, lead counsel in *Bisys* noted their work "over the course of more than two (2) years" included (1) "[i]nvestigating the circumstances surrounding the Company's restatement announcement, including interviews of former Company employees"; (2) "[r]esearching and drafting the operative 94-page Complaint";

(3) "[l]itigating a complicated array of motions to dismiss, which challenged all aspects of the Complaint"; (4) "[m]astering the information, data and documents through the creation of an electronic data base"; (5) "[c]onsulting with the Class's experts with respect to accounting, damages and liability issues"; (6) "[r]eviewing, analyzing and mastering both the [PricewaterhouseCoopers] audit workpapers and more than 2.0 million pages of documents produced by Defendants and third-parties"; (7) "[c]onducting numerous depositions of parties, Company employees, and third parties"; and (8) "[e]ngaging in multiple rounds of adversarial settlement discussions, including several mediation sessions." Case No. 1:04-cv-03840-JSR-GWG, ECF No. 143, at 7-8. As discussed above and detailed in the Berman Declaration, the Economic Loss Counsel's efforts here were far more extensive.

In *In re Priceline.com, Inc. Securities Litigation*, Judge Covello awarded lead counsel a fee consisting of 30% of the $80 million settlement amount. Counsel in that case "investigated publicly available materials, reviewed millions of pages of documents, consulted with experts, conducted ongoing research and drafted court documents for an extensive motions practice, formulated litigation strategy, prepared for and participated in multiple mediation sessions, and negotiated and administered the . . . settlement." 2007 WL 2115592, at *5 (D. Conn. July 20, 2007). The court further recognized that "[p]roving the elements of this case would be a necessary and formidable task." *Id.* The "effort by counsel," as well as "the result obtained and similar awards in comparable cases in this circuit," all "weigh[ed] in favor of the requested fee." *Id.*

Studies of recent class settlements also support the proposed fee. For instance, in their most-recent survey of attorneys' fees and class recoveries, prominent commentators Theodore Eisenberg and Geoffrey Miller observe the mean and median percentage fees in class cases in this District from 2009 to 2013 were 27% and 31%, respectively. Theodore Eisenberg, Geoffrey

Miller, & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 950 (2017). The 16.8% fee requested here falls well below this range.

While the foregoing case law and studies do not establish a definitive benchmark, they illustrate courts' willingness to award substantial percentages of settlement funds where the particular circumstances of those cases warranted it, including accounting for "the policy consideration of using a sliding scale based on the amount of the settlement to avoid a windfall to class counsel." *Grice*, 363 F. Supp. 3d at 406.[3]

Interim Class Counsel and all counsel for the Economic Loss Plaintiffs expended significant effort in researching and prosecuting Class Members' claims, filing amended complaints, completing a massive amount of fact and expert discovery, engaging in extensive summary judgment, *Daubert*, and other motion practice, and navigating the complex bankruptcy proceedings, as well as negotiating and administering this Settlement. Further, unlike in securities (or commodities) cases like *Priceline.com*, *Bisys*, and *Amaranth*—where "[p]redominance is a test readily met," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)—the Economic Loss Plaintiffs faced a higher prospect that the class would not be certified, particularly given the Court's grant of summary judgment to New GM on benefit-of-the-bargain damages. The requested fee is thus well-supported.

The percentage requested here reflects the extensive work and extraordinary risk that Interim Class Counsel undertook to prosecute this case; there is no "windfall" (particularly given the negative multiplier discussed below). Rather, Interim Class Counsel are confident that a 16.8

[3] *See also, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) ("*IPO*") (awarding fee representing one-third of $510 million); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (30% of approximately $410 million); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1240 (S.D. Fla. 2006) (31.33% of $1.038 billion); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (34.06% of $359.4 million).

percent fee is reasonable and strikes the appropriate balance between rewarding Economic Loss Plaintiffs' Counsel for their successful efforts and the Court's (as well as Interim Class Counsel's) duty to protect Class Members' interests, particularly since the requested fee will not reduce the Class recovery. *See* Berman Decl., ¶¶ 63-65; Cabraser Decl., ¶ 9.

B. The Other *Goldberger* Factors Likewise Support the Requested Fee.

The remaining *Goldberger* factors—the risks confronting plaintiffs' counsel, the quality of representation they have provided, and public policies favoring private remediation of misconduct and providing incentives to counsel to pursue important cases on a contingent basis—all support a 16.8% fee.

1. Counsel for the Economic Loss Plaintiffs worked entirely on a contingent basis and faced the very real prospect of no recovery due to the significant factual and legal hurdles in the case.

Economic Loss Plaintiffs' Counsel faced substantial risk at every stage of this Action. Indeed, even having survived New GM's motion to dismiss, most of the issues that New GM raised were tested again on summary judgment and at the class certification stage, and would have continued to pose hurdles at trial (assuming the claims survived until then).

To assess the magnitude of the risk and legal hurdles faced by counsel, we need look no further at the challenges confronting the Economic Loss Plaintiffs at this juncture. Those challenges are many and include: (i) the Court granted summary judgment against Plaintiffs' benefit-of-the-bargain damages in the three bellwether states, thereby posing a fundamental barrier to *any* recovery by plaintiffs nationwide unless overturned by the Second Circuit;[4] (ii) the Court held that claims for lost time damages generally require proof of lost income; and (iii) the Court

[4] The Court described its summary judgment ruling as "chang[ing] the landscape in dramatic ways." *See In re Gen. Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d 212, 241 (S.D.N.Y. 2019).

held that many states would not allow the Delta Ignition Switch Plaintiffs' successor liability claims. Berman Decl., ¶ 56. As for class certification in the three bellwether states, while the briefing on Plaintiffs' motion was complete, the Court stayed consideration of the motion pending the potential need for additional briefing in light of the Court's summary judgment order. *See* Dkt. No. 7019 at 43-44.

Further, complex issues fraught with risk to the Economic Loss Plaintiffs remain in the Bankruptcy Court arising from the Late Claim Motions, including, but not limited to, whether Plaintiffs should be granted authority to file late proofs of claim (and whether such authority can be granted solely on due process grounds), whether the Plaintiffs' claims are equitably moot, whether additional grounds exist to object to the Plaintiffs' claims, and the amount of said claims in the event that they are allowed. Litigation of all of these issues has been ongoing for several years, and has consumed significant time, money, and resources from the parties and the Court. Berman Decl., ¶¶ 57-58.

In sum, victory was far from assured at any stage, with meaningful hurdles to overcome to certify a class, overcome motions for summary judgment, win at trial, and preserve a favorable judgment on appeal. The requested fee reflects the extraordinary risks that Economic Loss Plaintiffs' Counsel undertook in pursuing this case on a contingency basis for more than six years.[5]

[5] This case is thus a far cry from *Grice*, where this Court reduced the requested one-third fee to 22%. That case, brought under the Fair Credit Reporting Act, was "not very complex," involving "a single claim involving a single statutory provision and a single form." 363 F. Supp. 3d at 407. Further, plaintiff's liability case against defendant "was never vigorously contested, as the parties settled early in the litigation before engaging in any extensive discovery." *Id.* Indeed, defendant "never filed any dispositive motions throughout the proceedings." *Id.* at 408. Additionally, the Court determined "the reversionary nature of the settlement fund . . . merit[ed] a reduction to the baseline percentage." *Id.* at 409. None of those circumstances are present here.

2. Economic Loss Plaintiffs' Counsel provided exemplary representation of the Class.

"[T]he quality of representation is best measured by results," which "may be calculated by comparing the extent of possible recovery with the amount of actual verdict or settlement." *Goldberger*, 209 F.3d at 55. The $155.6 million result that Economic Loss Plaintiffs' Counsel achieved substantially compensates Class Members for their losses and is particularly impressive given that the Court's summary judgment order, if not reversed on interlocutory appeal by the Second Circuit, could wipe away most of the damages that the Economic Loss Plaintiffs could recover.

Any assessment of the percentage recovery this Settlement represents must, moreover, account not only for the litigation uncertainties detailed above—including with respect to class certification, summary judgment, trial, and any appeal—but also the certainty of delay as the Economic Loss Plaintiffs would attempt to clear each of those hurdles. In other words, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995). Economic Loss Plaintiffs' Counsel should be rewarded for achieving this excellent recovery for Class Members without imposing on them the cost of potentially years of additional litigation toward an uncertain outcome.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *17 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) (summary order). Economic Loss Plaintiffs' Counsel faced top-flight defense attorneys, who were also able to draw on New GM's vast resources. The high quality of the lawyers at Kirkland & Ellis "further proves the caliber of representation that was necessary to achieve the Settlement." *In re Marsh*

ERISA Litig., 265 F.R.D. 128, 148 (S.D.N.Y. 2010). And no Class Member has (thus far) objected to the fee request.[6] This "overwhelmingly positive response by the Class attests to the approval of the Class with respect to the Settlement and the fee and expense application." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002).

3. Public policy considerations support the proposed fee.

The requested fee furthers the policy goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Goldberger*, 209 F.3d at 51. The public interest is well served by this Action, which sought to hold New GM accountable for knowingly selling cars with safety defects. "Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf." *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *22 (S.D.N.Y. Sept. 9, 2015).

A 16.8% fee would, moreover, compensate Plaintiffs' Counsel at a level commensurate with the benefits they have conferred on the Class, the substantial investment of time and money they devoted to litigating this case and bringing about the Settlement, as well as the contingent nature of their representation. Public policy favors this fee request.

C. The Requested Fee Reflects a Negative Multiplier, While Courts in this Circuit Regularly Approve Fees Resulting in Significant Multipliers.

The degree of a multiplier should reflect "the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Bisys*, 2007 WL 2049726, at *3. The requested $24,585,272.06 for Economic Loss Class fees would

[6] The deadline for Class Members to object is October 19, 2020.

result in a multiplier of ***negative .31*** of the total lodestar contributed by Economic Loss Plaintiffs' Counsel ($78,148,898.77), based on 170,669 total hours devoted to this Action. *See* Cabraser Decl., ¶ 21. Thus, notwithstanding the risks that Economic Loss Plaintiffs' Counsel faced, the complexity of this very non-typical litigation, and the creativity and diligence that Economic Loss Plaintiffs' Counsel demonstrated in pursuing the Action and producing a $155.6 million Settlement, Economic Loss Plaintiffs' Counsel will fall far short of being reimbursed their collective lodestar.

A negative multiplier is certainly reasonable given the positive multipliers resulting from fee awards in cases involving large class large recoveries within this Circuit. *See, e.g.*, *Fleisher*, 2015 WL 10847814, at *18 ("Courts regularly award lodestar multipliers from 2 to 6 times lodestar in this Circuit, and have been known to award lodestar multipliers significantly greater than the 4.87 multiplier sought here."); *Bisys*, 2007 WL 2049726, at *3 (2.99 multiplier fell "well within the parameters set in this district and elsewhere").[7] The mean and median multiplier for class settlements of more than $67.5 million between 2009 and 2013 were 2.72 and 1.5, respectively, with a standard deviation of 3.59. *See* Eisenberg, et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. at 967; *see also Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) ("*AFTRA*") (2.86 multiplier was "adequate, but not excessive, in light of the *Goldberger* factors"); *Velez*, 2010 WL 4877852, at

[7] *See also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (upholding award yielding a 3.5 lodestar multiplier); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) (awarding 2.89 multiplier, corresponding to 21.4% of $455 million settlement); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("the requested 2.16 multiplier falls comfortably within the range of lodestar multipliers and implied lodestar multipliers used for cross-check purposes in common fund cases in the Southern District of New York"); *Maley*, 186 F. Supp. 2d at 368-69 (awarding 4.65 multiplier); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) (2.09 multiplier was "at the lower end of the range of multipliers awarded by courts within the Second Circuit").

*21 (2.4 multiplier fell "well within (indeed, at the lower end) of the range of multipliers accepted within the Second Circuit").

Because the Court is using lodestar as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized," but rather "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Goldberger*, 209 F.3d at 50. Interim Class Counsel nonetheless respectfully submit that the hours recorded in this case withstand even close scrutiny, as Interim Class Counsel strove to maximize efficiency, including avoiding duplication, without sacrificing the quality of their representation. Cabraser Decl., ¶¶ 16-19.

Over more than six years, Economic Loss Plaintiffs' Counsel collectively devoted more than 170,669 hours to prosecuting this class case and achieving the recovery for the Class. Much of that time was spent mustering the necessary proof to prevail, on class certification and at trial, to respond to New GM's motions for summary judgment and to strike experts, and to prosecute claims in the Bankruptcy Court. To that end, Plaintiffs' Counsel obtained and analyzed more than 23 million pages of documents, prepared for and participated in 117 fact depositions of GM personnel, the depositions of 18 experts retained by New GM and eight experts retained by the Economic Loss Plaintiffs, and the 94 depositions of the Class Representatives. Given the size and complexity of the Action, 170,669 hours over six years is reasonable, and compares favorably to other recent complex cases. *See, e.g.*, *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, 2017 WL 3579892, at *5 (S.D.N.Y. Aug. 18, 2017) (more than 34,000 hours recorded, where plaintiffs' counsel "investigated the facts, moved to be appointed Lead Plaintiff and Lead Counsel, submitted amended pleadings, successfully defended the Motion to Dismiss, conducted discovery, took ten fact witness depositions, consulted experts, moved for class certification, and ultimately negotiated

a favorable settlement for their clients"); *Amaranth*, 2012 WL 2149094, at *2 (49,113 hours recorded, where plaintiffs' counsel "survived a motion to dismiss and successfully moved for class certification").

Further, Economic Loss Plaintiffs' Counsel's hourly rates reflect "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, expertise and reputation," *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984), that is, the Southern District of New York. *See Farbotko v. Clinton Cty.*, 433 F.3d 204, 208 (2d Cir. 2005) (relevant community is "the district in which the court sits"); *see also id.* at 209 (determination of reasonable rate entails "a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel," which may include "judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district"). The blended hourly rate for all attorneys and staff included in the Lodestar calculation was $457. Cabraser Decl., ¶ 23. Economic Loss Plaintiffs' Counsel's hourly rates ranged from $210-805 for associates and senior associates (with a weighted average of approximately $452), and $350-1,565 for partners (with a weighted average of approximately $770). Cabraser Decl., ¶ 27.[8] These rates are comparable to rates found reasonable by courts in this District.[9] *See, e.g.*, *Fleisher*, 2015 WL 10847814, at *18 n.15 (observing "[o]ne source commonly used by courts in this Circuit to assess prevailing rates in this District is the National Law Journal Survey," and noting "[t]he National Law Journal survey

[8] In granting in full the fee request in *In re Bank of New York Mellon Corp. Forex Transactions Litigation*, Judge Kaplan approved billing rates of $275 to $425 for attorneys who primarily or entirely performed document/ESI analysis similar in depth and significance to the work performed by staff and contract attorneys in this case. *See* Case No. 12-md-2335 (S.D.N.Y.), ECF No. 619, at 16 (noting rates), ECF No. 642, at 17 (Court: "I accept the lodestar. I accept as fair, reasonable and accurate everything that went into it.").

[9] Economic Loss Plaintiffs' Counsel's lodestar is calculated using their historical hourly rates, even though courts have repeatedly endorsed the use of current rates "as a means of accounting for the delay in payment inherent in class actions and for inflation." *Fleisher*, 2015 WL 10847814, at *18.

for 2012 shows that partners at New York firms charge between $330 to $1200 and associates range between $215 to $760"); *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517, 528 (S.D.N.Y. 2015) (approving "a blended hourly rate of $514.29").

Economic Loss Plaintiffs' Counsel's fee request is, in short, well justified by the negative blended lodestar multiplier, particularly given the significant amount of work that went into this case and the serious risk of no recovery. It should be approved.

D. Economic Loss Plaintiffs' Counsel's Expenditures on the Class's Behalf Were Reasonable.

"Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Fleisher*, 2015 WL 10847814, at *23. Interim Class Counsel's request for reimbursement of the expenses that Plaintiffs' Counsel devoted to pursuing claims on behalf of Lead Plaintiffs and other Class Members is reasonable.

Economic Loss Plaintiffs' Counsel spent $9,914,727.94 in unreimbursed out-of-pocket costs in prosecuting and resolving this Class Action. The Cabraser Declaration (at ¶¶ 29-32) sets forth the breakdown of those expenses, which "are the type of expenses typically billed by attorneys to paying clients in the marketplace," including "fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with th[e] litigation." *Fleisher*, 2015 WL 10847814, at *23. "The fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Id.* This request for reimbursement should be granted in full.

E. Service Awards to Lead Plaintiffs Are Warranted Given Their Devotion to the Class, Which Helped Achieve This Result.

In the Second Circuit, Plaintiff incentive awards "are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs." *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 101 (E.D.N.Y. 2015); *see also Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010) (courts within this Circuit "have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award"); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 124 (S.D.N.Y. 2001) ("An incentive award is meant to compensate the named plaintiff for any personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit.").

The Economic Loss Plaintiffs have devoted considerable time and effort to this litigation. All of the Economic Loss Plaintiffs reviewed and approved multiple complaints and stayed in regular communication with counsel. Approximately half of the Economic Loss Plaintiffs completed fact sheets and produced documents. Most of the Economic Loss Plaintiffs responded to written discovery (both interrogatories and requests for production) and produced documents, and most of these Plaintiffs had their vehicles inspected and sat for depositions. And because this litigation has been particularly protracted—enduring for over six years—all Economic Loss Plaintiffs have been required to attend to their obligations as class representatives and expend efforts for an unusually long period of time. Berman Decl., ¶¶ 66-72. Under such circumstances, the proposed Economic Loss Plaintiff Incentive Awards to be paid from the Net Common Fund—

$2000 for Plaintiffs who were deposed,[10] and $1000 for Plaintiffs who were not deposed—are reasonable, and fall squarely within the range approved for similar cases in this Circuit. *See, e.g.*, *Alaska Elec. Pension Fund*, 2018 U.S. Dist. LEXIS 202526, at *17-18 (approving award of $50,000 for six plaintiffs and $100,000 for two plaintiffs); *Berni v. Barilla G. e R. Fratelli, S.p.A.*, 332 F.R.D. 14, 36-37 (E.D.N.Y. 2019) (approving award of $1,500 for each named plaintiff and noting that the amount was "modest relative to others awarded in our Circuit"); *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 60 (W.D.N.Y. 2018) (approving a $10,000 incentive award because named plaintiff had "been actively involved in the litigation of this case since its inception" and "provided counsel with assistance"); *Kindle v. Dejana*, 308 F. Supp. 3d 698, 718 (E.D.N.Y. 2018) (awarding named plaintiff $10,000 and collecting cases granting incentive awards in this amount); *AFTRA*, 2012 WL 2064907, at *3 (approving *$50,000* service award to each of the named plaintiffs, who "diligently performed the tasks expected of them and reasonably incurred costs and expenses in responding to document requests and interrogatories, producing responsive documents, reviewing filings, attending depositions, and communicating regularly with plaintiffs' counsel"); *Jermyn v. Best Buy Stores, L.P.*, 2012 WL 2505644, at *8 (S.D.N.Y. June 27, 2012) (approving a "modest" incentive award of $1,000 where the class representative

[10] Courts in this Circuit have recognized that named plaintiffs who are deposed may be entitled to more substantial incentive awards as compensation for the additional time and expense required of them. *See, e.g.*, *Norflet ex rel. Norflet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350, 354 (D. Conn. 2009) (approving $20,000 incentive award after considering "the time she spent in deposition, responding to discovery, and/or otherwise working with Class Counsel to prosecute and resolve this case"); *Fleisher*, 2015 WL 10847814, at *24 (approving an incentive award of $25,000 to named plaintiff who spent "at least 88 hours actively fulfilling his obligations as a Class representative," including by attending all-day deposition, and approving $5,000 incentive awards to other named plaintiffs); *Dornberger*, 203 F.R.D. at 124-25 (approving an award of $10,000, for named plaintiff who provided assistance to class counsel for six years, including by "travel[ing] to New York for her deposition at her own cost," and approving awards of $1,500 each for eight additional subclass representatives); *see also Torres v. Toback, Bernstein & Reiss LLP*, 2014 WL 1330957, at *3 (E.D.N.Y. Mar. 31, 2014) ("An incentive award may also be warranted when a named plaintiff has dedicated significant time and effort to the litigation, for example by preparing and sitting for a deposition.").

"participated in discovery," and, "[t]hroughout the long progress of this case, he stayed in contact with Class Counsel").

V. CONCLUSION

Economic Loss Plaintiffs' Counsel respectfully request that the Court grant their application for (i) attorneys' fees of $24,585,272.06 (representing 16.8% of the net constructive common fund) to Economic Loss Plaintiffs' Counsel; (ii) reimbursement of $9,914,727.94 in out-of-pocket costs; and (iii) Service Awards totaling $310,000 to the Class Representatives.

Dated: September 28, 2020

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Steve W. Berman

Steve W. Berman
Sean R. Matt
Andrew M. Volk
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
seam@hbsslaw.com
andrew@hbsslaw.com

Interim Class Counsel

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: /s/ Elizabeth J. Cabraser

Elizabeth J. Cabraser
275 Battery Street, 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
ecabraser@lchb.com

Rachel Geman
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: (212) 355-9500
Facsimile: (212) 355-9592
rgeman@lchb.com

Interim Class Counsel

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 September 28, 2020, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
Steve W. Berman