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United States District Court,
S.D. New York.
In re NISSAN RADIATOR/TRANSMISSION COOLER LITIGATION.

No. 10 CV 7493(VB).
May 30, 2013.

MEMORANDUM DECISION

BRICCETTI, District Judge.

***1** Now pending is the parties' joint motion for an order (1) granting final approval of the parties' proposed class action settlement; (2) certifying the proposed settlement class pursuant to Rule 23(b)(3); and (3) dismissing the lawsuit with prejudice. (Doc. # 94).

As part of the joint motion, plaintiffs' counsel also move for (1) an award of attorneys' fees in the amount of $1,620,000; (2) reimbursement of litigation expenses in the amount of $36,499.43, and (3) incentive awards of $5,000 for each of the named plaintiffs.

For the following reasons, the motion is GRANTED.

BACKGROUND

This putative class action was commenced by named plaintiffs William Szymczak, Stefan Schuele, Kim Dreher, Katrina Boyd, Mario Lopez, Melanie Rivera, David Simons, Angela Greathouse, Cornelius Jackson, Anne Stewart, Tim McElroy, and David and Phyllis Johnson (collectively "plaintiffs") on behalf of themselves and others similarly situated. The named plaintiffs and putative Class Members are current and former owners and lessees of Nissan Pathfinder, Xterra, or Frontier vehicles, model years 2005 through 2010, sold or leased in the United States and its territories, including Puerto Rico (the "Class Vehicles"). There are 764,277 class vehicles, and they all use the same radiator and automatic transmission oil cooler, which was newly designed for the 2005 model year.

Plaintiffs allege the class vehicles contain design and manufacturing defects that cause coolant from the radiators to contaminate the transmission system (the "AT Oil Cooler Leak"). As the vehicles aged, defendant Nissan North America, Inc. ("Nissan"), began investigating incidents of cross-contamination of engine coolant and transmission fluid. The investigation revealed that "on a small percentage of vehicles equipped with automatic transmissions, an internal fatigue crack in the transmission oil cooler tube might occur at higher mileages, leading to internal leakage of engine coolant and cross-contamination with transmission fluid that could damage the transmissions of affected vehicles." (D. Br. at 1).

Plaintiffs allege this AT Oil Cooler Leak causes extensive damage to the class vehicles by damaging the drivetrain and requiring repair and replacement of the transmission, valve body, radiator, and associated components.

I. *Procedural History*

On September 30, 2010, plaintiff Szymczak commenced this action on behalf of himself and all other similarly situated, alleging cross-contamination of coolant and transmission fluid in the 2005 model year Nissan Pathfinder.

Shortly thereafter, in October 2010, Nissan voluntarily extended the warranty on the radiator assembly for 2005–2010 model year Nissan Pathfinder, Xterra, and Frontier vehicles with automatic transmissions. Nissan asserts it was already in the process of extending the warranty before this action was commenced. The extended warranty applies to the radiator assembly and its component parts and extends the warranty from 3 years/36,000

miles, whichever occurs first, to 8 years/80,000 miles, whichever occurs first. The extended warranty also provides customers with reimbursement for repairs made and paid for before Nissan announced the extended warranty.[FN1]

> FN1. The parties dispute whether the extended warranty applies only to the radiator assembly, or also covers damage to the transmission. Plaintiffs also allege the warranty extension is inadequate because Nissan did not give appropriate notice to its customers.

***2** On January 14, 2011, Szymczak filed an amended complaint that expanded the putative class to a nationwide class action covering all of the vehicles covered by the warranty extension. The amended complaint added Nissan's parent company as a defendant, named additional plaintiffs, and asserted new claims. Thereafter, defendants moved to dismiss the complaint and the parties conducted a one day mediation, which was not successful.

On December 16, 2011, the Court issued a memorandum decision dismissing some of plaintiffs' claims. (Doc. # 26). The Court also granted plaintiffs' request for jurisdictional discovery as to Nissan's parent company. Thereafter, on January 17, 2012, plaintiffs filed a second amended complaint. (Doc. # 34).

While the motion to dismiss was pending, two additional lawsuits were filed raising the same issues and claims as this action. One action was commenced in Texas State Court and one was commenced in California State Court. On May 16, 2012, those actions were consolidated with this action. (Doc. # 58).

In June 2012, the parties resumed settlement negotiations. The parties reached agreement on the terms of a settlement on July 23, 2012, and formal settlement papers were executed in August 2012. After the parties reached agreement on the substantive settlement, the parties also reached a limited agreement with respect to attorneys' fees; namely, that the fees would (i) be paid by Nissan without diminishing the benefits of the settlement to the class, and (ii) fall within a specific "high-low" range.

On August 24, 2012, plaintiffs filed a third amended and first consolidated class action complaint. (Doc. # 69). Simultaneously, the parties moved for preliminary approval of a proposed class action settlement and preliminary certification of a class. On October 9, 2012, the motion was granted. (Doc. # 77).[FN2]

> FN2. The Court also so-ordered a partial stipulation of dismissal without prejudice of Nissan's parent company, Nissan Motor Co., Ltd., on October 9, 2012.

Thereafter, the Claims Administrator sent out 1,549,712 notices to identified Class Members. All notice and claims administration expenses were paid for by Nissan.

II. *Settlement*

The settlement class is defined as:

> All former and current owners and lessees of a 2005–2010 model year Nissan Pathfinder, Nissan Xterra or Nissan Frontier vehicle in the United States and its territories, including Puerto Rico, excluding fleet and governmental purchasers and lessees.

Pursuant to the settlement agreement, Nissan agreed to the following repair benefits:

> Nissan agrees to make repairs through authorized [Nissan] Dealers, if and as needed, on the radiator assembly and other damaged components (including the transmission) in Class Vehicles owned or leased by Settlement Class Members because of crosscontamination of engine coolant and transmission fluid (and inclusive of towing costs, if any) as a result of a defect in the radiator up to a maximum of 10 years or 100,000 miles, whichever is less, subject to the following customer co-pay:

(a) All repairs on vehicles that exceed eight years or 80,000 miles, whichever is less, but fewer than nine years or 90,000 miles, whichever is less, are subject to a customer co-pay in the amount of $2500 which is the responsibility of the Settlement Class Member.

***3** (b) All repairs on vehicles that exceed nine years or 90,000 miles, whichever is less, but fewer than 10 years or 100,000 miles, whichever is less, are subject to a customer co-pay in the amount of $3000 which is the responsibility of the Settlement Class Member. Settlement Agreement ¶ 41.

Nissan also agreed to reimburse Class Members who have paid for repairs to their radiators and other damaged components (including the transmission) because of crosscontamination of engine coolant and transmission fluid as a result of a defect in the radiator between 8 years/80,000 miles, whichever occurs first, and 10 years/100,000 miles, whichever occurs first, subject to the mileage-related co-payments described above. *See id.* ¶ 42. Reimbursement is inclusive of towing costs, if any, incurred as a result of this problem. (D. Br. at 5).

Further, to the extent Class Members did not receive notice of, did not submit a claim for reimbursement under, or had all or part of a claim denied under Nissan's 8 years/80,000 miles warranty extension (*i.e.*, the October 2010 New Vehicle Limited Warranty), Nissan agreed to honor those reimbursement claims for repairs to the radiator and transmission because of crosscontamination of engine coolant and transmission fluid as a result of a defect in the radiator. *See* Settlement Agreement ¶ 43. Reimbursement is inclusive of towing costs, if any, incurred as a result of this problem. (D. Br. at 5).

For purposes of determining whether any of the co-payments applies to a particular claim, Nissan will refer to the date that cross-contamination was diagnosed by a Nissan Dealer or other automotive repair facility, not the date that the AT Oil Cooler Leak was repaired. *See* Settlement Agreement ¶ 44.

Nissan further agreed to pay all notice and claims administration expenses, *id.* at 60, and agreed to make an incentive payment of $5,000 to each named plaintiff. *Id.* ¶ 88.

In return, the Class Members will release Nissan from any and all claims which were or could have been brought against Nissan based upon or related to AT Oil Cooler Leak Damage. The release does not include claims for personal injury or claims for property damage other than the class vehicle or its component parts. Also excluded from the release are claims by Class Members who provide "[a]ppropriate [c]ontemporaneous [d]ocumentation from an automotive repair or service center, odometer disclosure statement, or government agency establishing that, on [January 7, 2013, the date that notice was given for this class action settlement], the Settlement Class Member's vehicle had more than 10 years or 100,000 miles, whichever is less." *Id.* ¶ 26.

III. *Final Approval*

The parties now seek final approval of the class action settlement and certification of the settlement class. The parties assert the settlement is the result of extensive arm's-length negotiations by parties who have been represented by capable counsel with experience in these types of matters. They maintain the negotiations were informed by the knowledge and experience of plaintiffs' experts, vehicle inspections, and complaint investigation. Further, they maintain the parties reached a fair settlement taking into account the costs and risks of continued litigation.

DISCUSSION

I. *Standard*

***4** Unlike settlements in other types of cases, settlements in class actions must be approved by the Court. *See* Fed.R.Civ.P. 23(e); *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 82–83 (S.D.N.Y.2007). Review of a proposed class action settlement involves a two-step process: preliminary approval and a subsequent "fairness hearing."

Preliminary approval was granted on October 9, 2012, notice of the settlement agreement was sent on January 7, 2013, and a fairness hearing was held on May 2, 2013, giving the Class Members and settling parties an opportunity to be heard prior to final Court approval of the settlement.

Approval of class action settlements requires the Court to ensure the settlement is "fair, reasonable, and adequate" to the Class Members. Fed.R.Civ.P. 23(e)(2). To make this determination, the Court examines the "negotiating process leading up to the settlement, i.e., procedural fairness, as well as the settlement's substantive terms, i.e., substantive fairness." *McReynolds v. Richards–Cantave*, 588 F.3d 790, 803–04 (2d Cir.2009) (alterations and quotation marks omitted). "When a settlement is negotiated prior to class certification, as is the case here, it is subject to a higher degree of scrutiny in assessing its fairness." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir.2001).

"With respect to procedural fairness ... a District Court reviewing a proposed settlement 'must pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel ... possessed the [necessary] experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.' " *McReynolds v. Richards–Cantave*, 588 F.3d at 804 (quoting *D'Amato v. Deutsche Bank*, 236 F.3d at 85) (alterations in original). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.' " *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.2005) (quoting MANUAL FOR COMPLEX LITIGATION, Third, § 30.42 (1995)).

With respect to substantive fairness, "the court must compare the terms of the compromise with the likely rewards of litigation." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. at 83 (quotation marks omitted). The Court "must apprise [it]self of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir.1982). While the Court need not conduct a trial on the merits, the Court must nonetheless make "findings of fact and conclusions of law whenever the propriety of the settlement is seriously in dispute." *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir.1983).

II. *The Settlement is Procedurally Fair*

***5** The parties maintain, and the Court agrees, that the settlement agreement is the product of extensive, arm's-length negotiations by parties represented by experienced and talented counsel with expertise in these types of cases. Additionally, although settlement was reached before extensive merits discovery, plaintiffs conducted an investigation prior to commencing the action, retained experts, and engaged in confirmatory discovery in support of the proposed settlement. Nissan produced documents and a Rule 30(b)(6) witness for deposition, Dale Weiss, the senior manager of field quality assurance.

Therefore, the Court believes the settlement is the result of serious, informed, and noncollusive negotiations.

III. *The Settlement is Substantively Fair*

For the reasons set forth below, the Court concludes the settlement is also substantively fair based upon a comparison of the terms of the compromise, including the incentive awards to named plaintiffs and attorneys' fees for plaintiffs' counsel, with the likely rewards of litigation. *See In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. at 83. The Court further concludes the objections raised by a few Class Members do not merit any changes to the terms of the settlement or preclude final approval of the settlement.

A. *Application of Grinnel Factors Weighs In Favor of Settlement*

Courts within the Second Circuit must consider nine factors outlined in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974) to determine whether a proposed class action settlement is substantively fair. See *D'Amato v. Deutsche Bank*, 236 F.3d at 86. The *Grinnell* factors are:

> (1) the complexity, expense and likely duration of the litigation; 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; (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 at 463 (citations omitted); *see also* *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d at 117 (applying Grinnell factors). Here, the Grinnel factors weigh in favor of settlement. *See* *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y.2010) (noting "not every factor must weigh in favor of settlement," to find a settlement substantively fair; "rather the court should consider the totality of these factors in light of the particular circumstances") (internal quotations omitted).

1. *The Complexity, Expense, and Likely Duration of the Litigation*

The third amended and first consolidated class action complaint asserts claims for, among other things, breach of warranty, fraud, unjust enrichment, and violation of state consumer protection statutes.

***6** Were the claims to go forward, plaintiffs would have conducted discovery, some of which would have been directed at Nissan entities in Japan. As counsel explained, this would have been "relatively complex and lengthy and would include detailed discovery regarding the engineering, designing and manufacturing of the vehicles." (P. Br. at 14).

Following discovery, the parties would have proceeded with summary judgment and class certification motions and potentially interlocutory appeals. Indeed, this case would have been vigorously defended and contested by defendant. Nissan contends there are numerous impediments to recovery for plaintiffs in terms of both the merits of the claims and the ability to certify a class for non-settlement purposes. Finally, should the case have proceeded to trial, counsel anticipated a lengthy trial would be required.

Balancing the rewards available to Class Members now with the projected expense and delay of continued litigation, this factor weighs in favor of approval. *See* *In re Marsh ERISA Litig.*, 265 F.R.D. at 138–39 (when settlement cuts short expert discovery, time and expense of additional briefing, and the anticipated delay of trial, post-trial motions and appeals, which all would have reduced the value of the settlement, this factor weighs in favor of approving settlement); *see also* *Careccio v. BMW of N. Am. LLC*, 2010 WL 1752347, *4 (D.N.J. Apr. 29, 2010) (in action alleging defective car tires, this factor weighed in favor of settlement that provided for immediate recovery compared with the potential for protracted and expensive litigation).

2. *The Reaction of the Class to the Settlement*

The reaction of most of the class to the settlement has been positive and in favor of settlement. Approximately 1,549,712 notices were sent to potential Class Members, and Nissan estimates there are approximately 764,277 Class Vehicles. As of the date of the fairness hearing, over twelve thousand individuals had submitted claims for reimbursement compared to only eighty-five individuals who filed objections and 198 individuals who opted-out of the class. Because "only a small number of objections [were] 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 at 118 (quoting 4 NEWBERG § 11.41, at 108); *see also* *Charron v. Pinnacle Group N.Y. LLC*, 874 F.Supp.2d 179, 197 (S.D.N.Y.2012) (concluding "silence and acquiescence of 99% of the Class Members speaks more loudly in favor of approval than the strident objections of the 1% against it").

3. *The Stage of the Proceedings and Amount of Discovery*

Completed

Under this factor, the Court considers whether the parties and their counsel had "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006); *see also McBean v. City of N.Y.*, 233 F.R.D. 377, 386 (S.D.N.Y.2006) (amount of discovery exchanged is not important; rather "what is important is whether the parties have 'a thorough understanding of their case' and the extent to which there are remaining factual 'unknowns' prior to trial") (quoting *Wal–Mart Stores, Inc. v. Visa U.S.A.*, Inc., 396 F.3d at 118)).

***7** Although the parties have not engaged in extensive discovery, as previously noted, the plaintiffs conducted an investigation prior to commencing the action, retained experts, and engaged in confirmatory discovery in support of the proposed settlement. Plaintiffs' experts inspected the Class Vehicles and assisted counsel in analyzing the case. Confirmatory discovery resulted in disclosures by Nissan of documents relating to its internal investigation of the incidents of cross-contamination of engine coolant and transmission fluid. Also included were disclosures of Nissan's projections as to how many vehicles may suffer from the AT Oil Cooler Leak and at what mileages, as well as information concerning estimated costs for repairs.

Based on the record presented, the Court concludes the parties had a sufficient understanding of the strengths and weaknesses of their claims, and they presented a sufficient record to enable the Court to appraise the fairness of the settlement. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 903236, at *10; *see also Heyer v. N.Y.C. Hous. Auth.*, 2006 WL 1148689, at *3–4 (S.D.N.Y. Apr. 28, 2006). Accordingly, this factor also favors approval.

4. 5. 6. *The Risks of Establishing Liability and Damages, and Maintaining the Class Action Through Trial*

"In assessing the Settlement, the Court should balance the benefits afforded to members of the Class and the immediacy and certainty of a substantial recovery for them against the continuing risks of litigation." *Maley v. Del Global Technologies Corp.*, 186 F.Supp.2d 358, 364 (S.D.N.Y.2002).

The settlement provides significant benefits and advantages for the class. According to plaintiffs' counsel, repairs often exceed $4,000 and in some cases can be as much as $8,000. Thus, plaintiffs' counsel contends, even those who will be required to make a co-payment for repairs will still receive a benefit ranging from $1,000 to $5,000. Further, capping out-of-pocket expenses also relieves Class Members of the burden of shopping for the least costly repair. Counsel for plaintiffs concludes the co-pay is also fair and reasonable because "the strength of any Class Member's claim is reduced the more trouble-free miles the vehicle has been driven prior to the defect manifesting." (P. Br. at 12).

These benefits must be balanced against the numerous impediments to a class-wide recovery in the absence of settlement asserted by Nissan. First, Nissan notes many members of the class have not suffered either injury or damages. For example, Nissan asserts the vast majority of Class Members have not experienced the alleged radiator problem, belying any claim that their vehicles were not merchantable as a matter of law. Further, Nissan contends, to the extent a vehicle has not suffered from the AT Oil Cooler Leak, there is no economic loss supporting a remedy under any state consumer statute or under a claim of unjust enrichment. Finally, Nissan contends settlement Class Members whose vehicles suffered from an AT Oil Cooler Leak that falls within the 2010 Extended Warranty period have suffered no damages.

***8** With respect to the express warranty claims, Nissan contends that claims based upon vehicles that suffered the AT Oil Cooler Leak outside the warranty period will not likely succeed because the vehicles outlasted the warranty. The Court previously dismissed plaintiffs' breach of express warranty claims except to the extent that plaintiffs allege the express warranty is unenforceable because the durational limitation is unconscionable. Defendant argues

that claim too must fail because mere allegations of the seller's knowledge—part of the basis for the claim—is insufficient to defeat the warranty limitation.

With respect to implied warranty claims of high-mileage Class Members, Nissan argues (1) the vast majority of these claims would be time-barred under the four year statute of limitations which accrues at the time the vehicle is originally delivered, *see, e.g.*, *Woods v. Maytag Co.*, 2010 WL 4314313, at *2 (E.D.N.Y. Nov. 2, 2010), and (2) because the vehicles have been driven for tens of thousands of miles without difficulty, the vehicles are merchantable as a matter of law. *See, e.g.*, *Sheris v. Nissan N. Am., Inc.*, 2008 WL 2354908, at*5–6 (D.N.J. June 3, 2008). Indeed, the Court dismissed plaintiffs' implied warranty claims as alleged in the first amended class action complaint for these very reasons.

As for state consumer protection claims, Nissan contends the omissions-based claims will depend upon a showing that Nissan was aware of the defect at the time the vehicle was originally sold. Nissan asserts this will be difficult to show because the defect does not generally manifest itself for several years and tens of thousands of miles.

As for the unjust enrichment claims, Nissan contends the existence of the express warranty, lack of express relationship between the Class Members and Nissan, and the fact that vehicles may function for a period longer than the express warranty, will all make these claims difficult to establish.

Finally, although Nissan agrees that the requirements for class certification under Rule 23(a) and (b) are met for purposes of settlement, Nissan contends that proceeding with class litigation absent a settlement would be unmanageable because of the need for individualized proof to establish the elements of many of plaintiffs' claims (e.g., reliance and causation under consumer protections statutes).

Without deciding the merits of Nissan's contentions, the Court agrees that the class faced numerous obstacles to establishing liability and certifying a class. Plaintiffs acknowledge the risks of proceeding with the litigation, especially in light of the fact that Nissan had already made an extension of the warranty up to eight years or 80,000 miles soon after the litigation began. Counsel for plaintiffs further acknowledges the "risk was also acute [ ] because of the factintensive nature of the claims, because consumer class trials are relatively rare and [because] a jury's reaction is unpredictable." (P. Br. at 20).

***9** Balancing the risks of establishing liability and damages, and maintaining the class action through trial, with the benefits afforded to the Class Members and the immediate certainty of the recovery, the Court concludes these factors weigh in favor of approval.

7. *The Ability of the Defendants to Withstand a Greater Judgment*

The inability of a defendant to withstand a greater judgment weighs in favor of approving settlement. "However, the converse is not necessarily true; *i.e.*, the fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y.1997); *see also D'Amato v. Deutsche Bank*, 236 F.3d at 86 (not an abuse of discretion to conclude settlement is fair even though the defendant may withstand a higher judgment when the other *Grinnell* factors weigh heavily in favor of settlement).

Defendant makes no argument concerning this factor one way or the other. However, the Court notes that there is no cap on the recovery to the class. Rather, Nissan is taking the risk that more Class Vehicles will suffer from the AT Oil Cooler Leak requiring repair than anticipated. Thus, although it is impossible to know with certainty at this time what the total benefit to the class is, or what the total judgment being imposed upon Nissan is, it is Nissan that bears the risk of a greater judgment than anticipated.

The Court concludes that this factor neither weighs in favor nor against settlement approval. The fact that Nissan may be able to withstand a greater judgment neither suggests the Class Members are entitled to anything more nor indicates that the settlement is unfair.

8. 9. *The Range of Reasonableness of The Settlement Fund In Light of The Best Possible Recovery and All the Attendant Risks of Litigation*

"[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.1972). Thus, the fairness and reasonableness of the settlement is not judged "in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 762 (E.D.N.Y.1984).

The Court agrees with the parties that the proposed settlement offers substantial benefits to the class. Under the settlement, Class Members receive coverage beyond the terms of Nissan's voluntary extended warranty up to 100,000 miles or 10 years and may re-coup the cost of repairs made prior to settlement subject to certain co-pays. As explained by defendant, "[t]he co-payment requirement reasonably reflects the significant legal obstacles that high-mileage consumers would have faced in securing legal recovery against Nissan. The more miles a vehicle was driven without incident, the less likely the trier of fact would determine that the vehicle was not merchantable or that Nissan breached any express warranty, acted contrary to any representation with regard to the vehicle, or failed to disclose a material fact." (D. Br. at 15). Additionally, Nissan has agreed to pay for notice and claims administration and plaintiffs' attorneys' fees and expenses, and those monies will not in any way reduce the award to plaintiffs.

***10** Given the numerous risks involved with the continued litigation of this case both in terms of the merits of the claims and the ability of plaintiffs to maintain a class action, the inherent risks associated with any complex commercial action including the unpredictability of trial and appeal, and the substantial benefits of the settlement to plaintiffs with respect to both the terms of the settlement and the immediacy of the recovery to plaintiffs, the Court concludes that these factors weigh in favor of approval of the settlement.

B. *Objections*

Once the parties have demonstrated to the satisfaction of the Court that the settlement is fair and reasonable, the burden is on objectors to make a "clear and specific showing that vital material was ignored by the District Court." *City of Detroit v. Grinnell Corp.*, 495 F.2d at 464.

Of the eighty-five objections noticed to counsel, only eight were also sent to the Court as required under Paragraph 13 of the Court approved Notice of Proposed Settlement. Although the Court could overrule the objections not filed with the Court on procedural grounds, the Court will address the merits of all of the objections. Two objections were filed through counsel (the "Zitter Objectors").

Considering all of the objections received by class counsel, eight categories of objections emerge: (1) objection because there is a co-pay or deductible paid by Class Members (64 total objections), (2) objection because benefits are limited to vehicles under 100,000 miles (39 total objections), (3) objection because there is no provision for undiscovered damage that may occur in the future (8 total objections), (4) objection because Nissan never informed consumers previously of the problem (22 total objections), (5) objection because Nissan should have had a recall to fix the defect (19 total objections), (6) objection because Nissan should instead install new replacement radiators on all Class Vehicles (21 total objections), (7) objection because Class Members whose vehicles suffered from the

defect should be entitled to diminished value of the vehicle (6 total objections), and (8) objection to Class Counsel receiving a fee for the work done (7 total objections). These objections will be addressed seriatim.

1. *Objection To The Co-pay Or Deductible*

The largest number of objections was directed at the $2,500 and $3,000 capped co-pays required by Class Members whose vehicles suffer from the AT Oil Cooler Leak between 8 years/80,000 miles and 9 years/90,000 miles and between 9 years/90,000 miles and 10 years/100,000 miles respectively.

Although the Court appreciates that it would have been better for Class Members if they did not need to make any contributions toward the cost of repair, the Court agrees with class counsel and defendant's counsel that the co-payments reflect a reasonable compromise between the risks of further litigation and the benefit of providing immediate relief to Class Members who would not otherwise have received anything absent winning the litigation. In particular, as defense counsel explained, the co-pay requirement reflects the "inverse relationship between the number of trouble-free miles driven by a [Class Member] and the strength of the [Class Member's] claim." (D. Br. at 21).

***11** Further, even with the co-pay requirement, the award to Class Members is still substantial. The anticipated cost for replacement of the parts and labor if a full transmission repair or replacement is required ranges from $4,000 to $8,000. Thus, Class Members whose vehicles suffer from the AT Oil Cooler Leak after 8 years/80,000 miles and before 10 years/100,000 miles may receive a benefit between $1,000 and $8,000.

There is a possibility that some Class Members may receive no monetary value because the value of the repairs needed is less than the $2,500 or $3,000 co-pay. The fact that the damages suffered by some Class Members is less than the agreed upon co-pay does not render the co-pay unreasonable. Rather, as submitted by counsel, in those cases, it is likely the Class Member did not suffer the "severe injury of transmission replacement alleged in this action." (P. Opp to Obj. at 5–6). Further, those Class Members enjoyed the use of their vehicle for a minimum of 8 years or 80,000 trouble free miles.

At bottom, these objections amount to a complaint that there is tiered relief, but that alone is not a basis for rejecting a settlement. The question is whether the terms of the settlement as a whole are fair and reasonable, "and not whether every member of the class is fully compensated." *Careccio v. BMW of N. Am. LLC*, 2010 WL 1752347, at *6 (overruling objection to tiered compensation for replacement of tires based on mileage). The Court further notes that members who are not satisfied with the level of compensation provided may opt-out of the class and pursue their own claim. This objection is overruled.

2. *Objection because benefits are limited to vehicles under 100,000 miles*

These objectors complain that the settlement provides no relief to Class Members whose vehicles had more than 100,000 miles as of the date of the notice of settlement. This is also one of several objections raised by the Zitter Objectors.

At bottom, this is an objection to the fact that there is a cut-off, in this case at 10 years/100,000 miles, after which Class Members receive no monetary relief. This is not a basis for finding the settlement is unfair or unreasonable.

First, Class Members with more than 100,000 miles on their vehicles as of January 7, 2013, the date notice of settlement was sent, are not releasing their claims. That means they may pursue claims for damages against Nissan even though this action has been settled. Citing *Henderson v. Volvo Cars of N. Am. LLC*, 2013 WL 1192479, at *8–9 (D.N.J. Mar. 22, 2013), counsel for plaintiffs argue, and the Court agrees, "[t]his is an extraordinary result in a case like this and very rarely achieved." (P. Resp. to Obj. at 10). Indeed, in *Henderson*, there was a similar mileage-based cut-off for receiving reimbursements for transmission

failure due to a different alleged design defect. However, unless class members opted-out of the class, their claims arising from transmission failure after that cut-off were released. Even though claims were being released, the *Henderson* court overruled objections to the cut-off noting class members were free to opt-out of the class. 2013 WL 1192479, at *9. In contrast, here, claims are not released for class members with over 100,000 miles as of January 7, 2013.

***12** Further, negotiating a cut-off at some point was necessary and is reasonable because settlement is the result of compromise and "full compensation is not a prerequisite for a fair settlement." *Henderson v. Volvo Cars of N. Am. LLC*, 2013 WL 11292479, at *9 (quoting *Careccio v. BMW of N. Am. LLC*, 2010 WL 1752347, at *6); *see also Alin v. Honda Motor Corp.*, No. 08–4825, slip op. at 27 (D.N.J. Apr. 13, 2012) ("Honda cannot act as a perpetual insurer for all compressor breakdowns, and they ultimately settled on a sliding scale that ends at eight years and 96,000 miles. It was reasonable to exclude older, more traveled vehicles from coverage, and these objectors are free to opt out of the settlement and pursue new litigation if they so desire."). Similar to objectors in *Henderson* and *Alin*, Class Members here have the ability to opt-out if they do not like the terms of the settlement.

Last, it is not the role of the Court to determine where that cut-off should be and impose that line on the parties. *See McBean v. City of N.Y.*, 233 F.R.D. at 382 (Court serves as a "fiduciary" to protect the interest of absent class members, but even in this role, "it is not the Court's prerogative to pick and choose terms of the settlement, redact portions of the agreement, or substitute terms more to the Court's liking."). The Court determines if the settlement is fair, reasonable and adequate as a whole, *id.*, "not whether some other relief would be more lucrative to the Class." *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 242 (D.N.J.2005). "A settlement is, after all, not full relief, but an acceptable compromise." *Id.*

The Zitter Objectors' arguments to the contrary lack merit. The Zitter Objectors argue: (1) the line drawn was "arbitrary," and (2) the method by which class members with over 100,000 miles as of January 7, 2013, are identified places an unfair burden upon them. The first argument fails for the reasons stated above. A line must be drawn somewhere and the line drawn in this action reflects a compromise by informed counsel appropriately balancing the risks of litigation with immediate rewards to the class. *See Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 65 (S.D.N.Y.2003) ("These ... objectors fail to understand that the form and amounts of benefit provided were arrived at as a result of hard-fought negotiations between experienced class action attorneys. Plaintiffs' counsel, having weighed the risks of proving liability and damages at trial, negotiated ... benefits in an amount and form that, in their judgment, would compensate plaintiffs."); *Brown v. Esmor Corr. Servs., Inc.*, 2005 WL 1917869, at *7 (D.N.J. Aug. 10, 2005) (the "judgment of skilled counsel who have had extensive experience in class action litigation and who have pursued this case with great vigor is entitled to considerable deference").

The Zitter Objectors' second argument fails because the settlement does not place an undue burden on Class Members. To demonstrate that a Class Member is excluded from the release of claims, the Class Member must provide "[a]ppropriate [c]ontemporaneous [d]ocumentation from an automotive repair or service center, odometer disclosure statement, or government agency" establishing that their vehicle had more than 10 years or 100,000 miles, whichever is less, as of the date notice was sent.[FN3] Settlement Agreement ¶ 26. In other words, Nissan need not accept a Class Member's claim that her vehicle had more than 100,000 miles as of January 7, 2013, based on her say-so. She must submit appropriate proof to support her claim.

FN3. The Court clarifies that the relevant date for purposes of determining whether a class member is entitled to relief and what level of tiered relief the class member is entitled to is the date the AT Oil Cooler Leak was diagnosed. *See* Settlement Agreement ¶ 44. Thus, Class Members whose vehicles had more than 10 years or 100,000 miles

> as of January 7, 2013, but who can show that their vehicle was diagnosed with the AT Oil Cooler Leak before the vehicle reached 10 years/100,000 miles are still entitled to submit claims for reimbursement.

***13** The Zitter Objectors are correct that this places a burden on Class Members, insofar as they must do something, but the burden is modest and appropriate under the circumstances. First, if a Class Member has any question as to whether she has appropriate documents to demonstrate her vehicle's age or mileage, she may opt-out of the class and achieve the same result (*i.e.*, her claims are not released). Thus, it is the Class Member's choice to accept this burden by staying in the class. If, however, that Class Member does not opt-out, then in return for Nissan's agreeing to exclude her from the release of claims, she must be able to show she qualifies for the exclusion. This would only be necessary if the Class Member actually pursued claims against Nissan and Nissan challenged her ability to do so.

Second, the burden is modest and appropriately placed on the Class Member and not on Nissan. The owner or lessee of the vehicle has access to the "appropriate contemporaneous documentation." Nissan does not. Further, that information should be readily available because each time a car is serviced for an oil change (every 3,000 to 5,000 miles), the mileage is recorded. Indeed, both Zitter Objectors attached appropriate contemporaneous documentation to their objections demonstrating that they are excluded from the release of claims.

The Court also rejects the Zitter Objectors claim that the phrase "appropriate contemporaneous documentation" is ambiguous. Apparently, it was not so ambiguous to prevent the Zitter Objectors from complying with the requirement. Additionally, the Court finds the description is not ambiguous, but rather appropriately flexible and specific as to where an individual might find the kind of documents or evidence necessary to make the required showing.[FN4]

> FN4. The Zitter Objectors also contend the settlement notice is ambiguous because the settlement release excludes Class Members whose vehicle is 10 years old or has 100,000 miles as of the date notice was sent, but no class vehicle could have been more than 10 years old as of the date notice was sent. The Court finds no ambiguity in the language of the settlement or settlement notice merely because no class vehicle had reached 10 years in age by the time notice was sent. This objection is overruled.

This objection is overruled.

3. *Objection because there is no provision for undiscovered damage that may occur in the future*

The gravamen of this objection is that the settlement does not protect Class Members whose vehicles have not suffered from the AT Oil Cooler Leak as of the time of the settlement, but whose vehicles may suffer in the future.

This objection misunderstands the terms of the settlement. First, Class Members whose vehicles have not suffered from the AT Oil Cooler Leak have protection if their vehicle does develop the AT Oil Cooler Leak within 10 years or 100,000 miles, whichever occurs first. Thus, there is protection against the AT Oil Cooler Leak up to a specified cut-off. The only caveat is that should a vehicle develop the AT Oil Cooler Leak in the future within the time and mileage limitation, then the Class Member will have to bring the vehicle to an authorized Nissan dealer for repair in order to retain the benefits of the settlement agreement.[FN5] This objection is overruled.

> FN5. To the extent some objectors objected because they believed the settlement did not provide coverage for the transmission in addition to the radiator, that objection may be dispensed with because under the settlement Nissan has agreed to repair or replace transmissions damaged because of the AT Oil Cooler Leak up to 10 years/100,000

> miles whichever occurs first, and subject to the co-pays.

4. *Objection because Nissan never informed consumers previously of the problem*

To the extent Class Members complain that Nissan did not properly inform customers of this problem, this is not a basis to reject the settlement. This was an allegation underlying the claims brought in this lawsuit and is resolved under the terms of the settlement. Counsel for plaintiffs correctly note that even if the case were to proceed to trial resulting in a jury verdict in favor of plaintiffs, "these objectors would still not receive timely notice of the problem from Nissan." (P. Resp. to Obj. at 20). This objection is overruled.

5. *Objection because Nissan should have had a recall to fix the defect*

***14** Similar to the objections made concerning the co-pays, this objection boils down to a complaint that the settlement does not do enough for plaintiffs. For the same reasons the Court rejected the objections to the co-pays, the Court rejects this objection.

However, to the extent this objection is also based on alleged concerns regarding safety, the objection merits additional discussion. Some objectors assert that the National Highway Traffic Safety Administration ("NHTSA") is conducting an investigation of Nissan for the crosscontamination problem and has the power to issue a recall. Notably, the objectors do not provide any documentation supporting this assertion and counsel for plaintiffs asserts they have no knowledge of any such investigation. Thus, the Court disregards any alleged NHTSA investigation as speculative.

With respect to safety, Nissan asserts the AT Oil Cooler Leak does not present a safety issue. However, if a safety issue should arise resulting in injury, under the settlement, claims based on personal injury are not released.

Because of the exclusion of personal injury claims from the release and the fact that the safety issue is at most speculative at this juncture, this objection does not undermine the fairness, reasonableness or adequacy of the settlement. Accordingly, this objection is overruled.

6. 7. *Objection because Nissan should instead install new replacement radiators on all Class Vehicles, and because those with the defect should be entitled to diminished value of the vehicle as well*

These objections fail to undermine the fairness of the settlement for the same reason the objections based on co-pay requirements and the lack of a recall fail—namely, these objections amount to a complaint that the settlement should have provided more compensation for plaintiffs.

Further, with respect to replacement radiators, plaintiffs' counsel admit this remedy might have been warranted if the radiator failure rate were higher. However, given the actual and projected failure rates, counsel submits, and the Court agrees, the fact Nissan did not agree to replace of all radiators does not undermine the fairness of the settlement.

Claims for "diminished value" present additional challenges because proving them requires individualized inquiry into the details of negotiated sales demonstrating the diminished value of the vehicle because of the AT Oil Cooler Leak. Indeed, courts have rejected abstract claims for diminution-in-value damages absent allegations of actual or attempted sale at a diminished price. *See* *Briehl v. General Motors Corp.*, 172 F.3d 623, 628–29 (8th Cir.1999) (claims for diminished value of vehicle because of alleged brake defect were "too speculative;" the assertion that "ABS-equipped vehicles are defective and that they have suffered a loss in resale value as a result of the defect is insufficient as a matter of law to plead a claim"). Given the inherent difficulty in valuing and proving these claims, the Court cannot say that the bargained for settlement agreement, which provides tangible benefits to the Class Members beyond the original and extended warranties offered by Nissan, is unfair.

***15** These objections are overruled.

8. *Objection to Class Counsel receiving a fee for the work done*

These objections question the reasonableness of compensating class counsel for their work bringing and settling the case. These objections are overruled for the same reasons the Court awards the agreed upon fee, as set forth below.

C. *Incentive Awards*

"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." *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 124 (S.D.N .Y.2001) (citation omitted).

The settlement agreement provides a $5,000 incentive award to each named plaintiff in addition to what they may receive as members of the class. At the fairness hearing, plaintiffs' counsel represented that the named plaintiffs participated in lengthy interviews with plaintiffs' counsel, submitted documents, reviewed documents, and consulted with counsel concerning the settlement. Based on these representations, the Court finds the incentive award is reasonable and comparable to incentive awards granted in other cases. See, e.g., *McBean v. City of N.Y.*, 233 F.R.D. at 391; *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. at 125 ($2,500 to $85,000 may be reasonable depending on participation in the action).

D. *Attorneys' Fees and Expenses*

An award for attorneys' fees may be assessed using either the lodestar method or a "percentage of fund" method. *McDaniel v. Cnty of Schenectady*, 595 F.3d 411, 417–18 (2d Cir.2010). Under the lodestar method, the court examines the hours billed and multiplies by an appropriate hourly rate. The Court may then add a multiplier based on "other less objective factors" (*i.e.*, risk of litigation and performance of the attorneys). *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir.2000) (internal citations omitted).

Under either method, the Court must be satisfied that the following factors support the reasonableness of the fees assessed: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50 (citation omitted).

On the eve of the fairness hearing, counsel reached an agreement regarding the payment of plaintiffs' attorneys' fees. Plaintiffs' have applied for an award in the amount of the agreed compensation, $1,620,000. Using a percentage-of-the-fund method, this amounts less than ten percent of plaintiffs' estimated settlement fund.[FN6] These fees are to be paid by defendant and do not diminish the benefit to the class under the settlement agreement.

> FN6. At the fairness hearing, defense counsel noted it is difficult to estimate the value of the settlement in this case because the award is open ended and depends upon the number of future claims submitted. However, defendant does not object to the Court's consideration of plaintiff's estimated value of the fund and agrees that the value estimated by plaintiffs falls within a range defendant believes to be accurate. The fund value provided by plaintiffs' counsel is based on the estimated reimbursement to Class Members, the estimated value of repairs to Class Members (based upon repairs already done and repairs projected for just the next year), and the costs of notice and administration of the settlement.

Applying the *Goldberger* factors, the Court concludes the requested fee is reasonable.

1. *Time and Labor Expended by Counsel*

***16** Plaintiffs' counsel represented that they spent over 2,000 hours litigating this case. Their time was spent conducting in-depth investigation into the alleged AT Oil

Cooler Leak in the Class vehicles, working with automotive engineering consultants to analyze the case and inspect exemplar parts, instituting a data collection campaign from putative Class Members, filing and defending several complaints which included claims based on the laws of multiple states and jurisdictions, propounding jurisdictional discovery, negotiating class action settlement, and conducting confirmatory discovery.

The Court finds the time and labor expended by counsel is commensurate with the fees sought. Counsel worked expeditiously to achieve a settlement without protracted litigation and achieved substantial results. This factor supports the award sought.

2. *Magnitude and Complexities of the Litigation*

This nationwide class action involves an alleged defect in three different vehicle models over six model years. The complexity and magnitude of the litigation weigh in favor of the reasonableness of the award sought. *See* *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir.1995) (recognizing complexity of class action involving "web of state and federal warranty, tort, and consumer protection claims").

3. *Risk of the Litigation*

"The most salient [risk considered under this factor] is the attorneys' risk in accepting a case on a contingency fee for, as the Second Circuit has noted '[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.' " *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 164 (S.D . N.Y.2011) (quoting *Grinnell*, 495 F.2d at 470); *see also In re Warner Commc'ns Sec. Litig.*, 618 F.Supp. 735, 748 (S.D.N.Y.1985) (noting 30 month delay in receipt of payment for services rendered weighed in favor or attorney fee award).

Class counsel undertook this litigation on a contingency fee basis. Accordingly, they have carried the risks of this litigation since its inception two year ago. As outlined above, class counsel faced significant challenges establishing liability and certifying a class. Nonetheless, counsel diligently prosecuted the Class Members' claims. This factor weighs in favor of the requested fee.

4. 5. *Quality of the Representation and Requested Fee in Relation to the Settlement*

The quality of counsel's representation "can be measured by a number of factors, including the benefit obtained for the class, the efficiency of plaintiffs' counsel's activities, and the quality of opposing counsel." *In re Warner Commc'ns Sec. Litig.*, 618 F.Supp. at 748.

The Court finds counsel for plaintiffs and defendant were highly skilled, plaintiff's counsel prosecuted this action efficiently, and counsel obtained an excellent result for the class under the terms of the settlement. The requested fee is less than ten percent of the estimated value of the settlement, which is comparable to fees awarded in similar class actions, see *Henderson v. Volvo Cars of N. Am. LLC*, 2013 WL 1192479, at * 18, and is less than the percentage traditionally awarded in class action litigations. *See In re Warner Commc'ns Sec. Litig.*, 618 F.Supp. at 749 (collecting cases).

***17** This fee is also reasonable in light of the lodestar cross check. Under the lodestar method, the Court reviews the reasonableness of attorneys' fees in terms of both the hourly rate and amount of time expended. With respect to the reasonableness of the hourly rate, the Court may consider the prevailing market rates "for similar services by lawyers of reasonably comparable skill, experience and reputation." *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir.1998) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984)). The Court may also rely on its own knowledge of private firm hourly rates. *Miele v. N.Y. State Teamsters Conference Pension & Ret. Fund*, 831 F.2d 407, 409 (2d Cir.1987).

Plaintiffs' counsel expended 2,543.71 hours working on this case. The breakdown of work completed by firm

was as follows:

Firm	Total Hours	Lodestar
Kantrowitz Goldhamer & Graifman, P.C.	896.01	$573,755.85
Stull Stull & Brody	840.00	$625,535.00
Mazie Slater Katz & Freeman, LLC	522.40	$259,056.00
Sheena Law Firm	188.20	$188,084.75
Harris and Ruble	97.10	$58,329.00
Total	**2,543.71**	**$1,704,760.60**

Multiplying the hours worked by the billing rates charged by the attorneys at each firm yields a lodestar of $1,704,760.60. Thus, the requested fee is lower than the lodestar figure presented by counsel. The Court has reviewed the detailed summaries of the work provided by each firm and concludes the hours expended were reasonable. Additionally, the Court finds the rates charged fall within the prevailing market rates "for similar services by lawyers of reasonably comparable skill, experience and reputation." *Gierlinger v. Gleason*, 160 F.3d at 882. For example, the hourly rates charged by Kantrowitz Goldhamer & Graifman, P.C. ranged from $785 (partner) to $595 (senior associate). Similarly, the hourly rates charged by Stull Stull & Brody ranged from $795 (partner) to $675 (associate). And the hourly rates charged by Mazie Slater Katz & Freeman, LLC ranged from $795 (partner) to $325 (associate), with the bulk of the work being handled by a partner who charged $525 per hour. Accordingly, a lodestar cross check confirms the reasonableness of the requested fee.

The Court concludes these factors weigh in favor of the requested fee.

6. *Public Policy Considerations*

Public policy favors reasonable attorney fee awards to encourage attorneys to prosecute merit-based class actions on a contingent fee basis. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d at 54 (public policy can justify denying a contingency award when a case is risky only because it is of questionable merit); *see also Chavarria v. New York Airport Serv., LLC*, 875 F.Supp.2d 164, 178 (E.D.N.Y.2012) (public policy favored award in wage and hour fee case); In *re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 593 (S.D.N.Y.2008) (public policy favors award in securities litigation).

7. *Conclusion*

***18** Because the *Goldberger* factors support the requested fee award, the application of plaintiff's counsel is GRANTED in full. With respect to expenses, "[c]ounsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *Careccio v. BMW of N. Am. LLC*, 2010 WL 1752347, at *7 (citation omitted). Upon review of the documented expenses submitted, the Court finds the request is reasonable. Accordingly, the application for an award of expenses is also GRANTED in full.

II. *Certification of the Putative Class*

The Court may certify a class for settlement purposes provided the requirements of Rule 23(a) and (b) are met. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619–21 (1997); *see also In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir.2011). Under Rule 23(a) the class must satisfy four elements: numerosity, commonality, typicality, and adequacy of representation. Fed.R.Civ.P. 23(a); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1437 (2010). Plaintiffs must then meet at least one of the three subsections of Rule 23(b). *In re Am. Int'l Group, Inc. Sec. Litig.*, 689 F.3d 229, 238 (2d Cir.2012). Plaintiffs

and defendant seek to certify this settlement class pursuant to Rule 23(b)(3), which permits class certification when "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

A. *Rule 23(a)*

1. *Numerosity*

Rule 23(a)(1) requires the Court find "the class is so numerous that joinder of all members is impracticable." Courts have found this requirement met by a class consisting of forty or more members. *See, e.g.*, *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir.1993) (citing 1 NEWBERG ON CLASS ACTIONS: A MANUAL FOR GROUP LITIGATION AT FEDERAL AND STATE LEVELS § 3.05, at 141–42 (2d ed.1985)). Other factors relevant to whether joinder is impracticable include "considerations of judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." *Id.*

This requirement is easily met here because Nissan estimates there are 764,277 class vehicles and the putative class is nationwide.

2. *Common Questions of Law and Fact*

Rule 23(a)(2) requires a showing of "questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' " *Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Plaintiffs' claims must depend on a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

***19** As described by plaintiffs' counsel, the following factual and legal issues are common to this class: "[W]hether the Class Vehicles contain design and manufacturing defects that caused coolant from the radiators to contaminate the transmission system, damaging the drivetrain and requiring repair and replacement of the transmission, valve body, radiator and associated components." (P. Br.27). The Court agrees the commonality requirement is satisfied.

3. *Typicality*

Rule 23(a) (3)'s "[t]ypicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 252 (2d Cir.2011) (quoting *Robidoux v. Celani*, 987 F.2d at 936). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Citigroup Pension Plan Erisa Litig.*, 241 F.R.D. 172, 178 (S.D.N.Y.2006) (citation omitted). It is not required that the underlying facts be identical for all class members. Instead, the typicality requirement "requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Tsereteli v. Residential Asset Securitization Trust 2006–A8*, 283 F.R.D. 199, 208 (S.D.N.Y.2012) (quotation marks omitted).

Plaintiffs and the proposed Class Members share the same claims arising from the same factual and legal circumstances—namely, all Class Members owned Class Vehicles containing the same vehicle platform and which utilize the same radiator/transmission cooler components and thus suffered from the same alleged AT Oil Cooler Leak. Therefore, the typicality requirement is also met.

4. *Adequacy of Representation*

"The adequacy inquiry under Fed.R.Civ.P. 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. [A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Products, Inc. v. Windsor*, 521 U .S. 591, 625–26 (1997) (internal citations and quotations omitted). "Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir.2011) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir.2006)). "Not every conflict among subgroups of a class will prevent class certification—the conflict must be 'fundamental' to violate Rule 23(a)(4)." *Id.*

"A conflict concerning the allocation of remedies amongst class members with competing interests can be fundamental and can thus render a representative plaintiff inadequate." *Dewey v. Wolkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir.2012). "Where such a conflict does exist, it can be cured by dividing the class into separate 'homogeneous subclasses ... with separate representation to eliminate conflicting interests of counsel.' " *In re Literary Works*, 654 F.3d at 249–50 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999)).

***20** Counsel for plaintiffs and defendant contend the named plaintiffs have no conflicts of interest with the Class Members and the interests of named plaintiffs are commensurate with those of the Class Members.

The Zitter Objectors contend there is a conflict between named plaintiffs and Class Members with over 100,000 miles as of the date notice was sent because there are no named plaintiffs that fall into that category, and the settlement provides no relief to those plaintiffs. The Court disagrees.

First, plaintiffs' counsel clarified at the fairness hearing that David and Phyllis Johnson's vehicle had over 100,000 miles as of the date notice was sent. Thus, plaintiffs with these kinds of claims were represented at the settlement table.

Second, the cases the Zitter Objectors rely upon are inapposite. In *Amchem Products, Inc. v. Windsor*, the proposed settlement covered current and future asbestos-related claims. 521 U.S. at 597. The Supreme Court affirmed the Third Circuit's decision to vacate the class because the interests of class members with current claims did not align with the interests of class members with future claims. *Id.* at 626. The former wanted "generous immediate payments," whereas the latter wanted an "ample, inflation-protected fund for the future." *Id.* Despite the disparity in the interests of the two categories of plaintiffs, "the terms of the settlement reflect[ed] essential allocation decisions designed to confine compensation and to limit defendants' liability." *Id.* at 627.

In *In re Literary Works*, the Second Circuit determined that the "ingredients of conflict identified in *Amchem"*—namely, confined compensation and limits on defendants' liability—were also present because the settlement was capped and made " 'essential allocation decisions' among categories of claims." 654 F.3d at 251 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. at 627). In *In re Literary Works*, plaintiffs, freelance authors, sued publishers for unauthorized electronic publication of their works (i .e., copyright infringement). Claims were divided into three categories and the settlement was capped. The third category of claims, Category C claims, was subject to a *pro rata* reduction to the extent the total of all claims sought exceeded the agreed upon settlement cap. Thus, it was possible that no Category C claims would be paid at all. All of the named plaintiffs held all three categories of claims. None of the named plaintiffs held only Category C claims. Additionally, the settlement released defendants from any further litigation.

In contrast, here, the "ingredients of conflict" identified in *Amchem*, are not present. Compensation is not confined and there are no limits on defendant's liability with respect to Class Members with more than 100,000

miles as of the date notice was sent because those Class Members are not releasing their claims.

The Court concludes the named plaintiffs adequately represented the interests of the Class Members and there is no conflict warranting the imposition of sub-classes with separate representation of counsel.

B. *Rule 23(b)*

***21** Rule 23(b)(3) requires the Court find "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As the Court of Appeals has stated, "[c]lass-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc .*, 306 F.3d 1247, 1252 (2d Cir.2002).

The Court agrees with the parties' assertions regarding the predominance inquiry. Specifically, it appears to the Court that the issues of proof are common to all members of the class and such issues predominate over any issues any individual Class Member may have. In addition, it appears the prosecution of this case as a class action would uphold the Court's interest in a fair and efficient adjudication better than a joint action among the putative class would.

In light of the foregoing, the Court grants certification of this action as a class action for purposes of this settlement.

C. *Notice to Class Members*

"The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal–Mart Stores, Inc. v. Visa U.S.A ., Inc.*, 396 F.3d at 113–14. Pursuant to Rule 23(c)(2)(B), the Court must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The notice "must be of such nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance." *McReynolds v. Richards–Cantave*, 588 F.3d at 804 (citation omitted).

Here, notice to the class was adequate. The notice was sent by first class mail, postage prepaid by Nissan and contained all of the required information. Nissan obtained the Class Members' addresses via their vehicle registration information and a the third party administrator selected by the parties sent class notice on January 7, 2013, five months before the fairness hearing affording ample time for those interested to make an appearance. Notice was sent to 1,549,712 potential Class Members. Additional notices were also sent to individuals upon request. *See* Declaration of Patrick M. Passarella.

CONCLUSION

***22** For the foregoing reasons, the Courts GRANTS the parties' joint motion, certifying the class for settlement purposes, and finally approving the settlement agreement. The Court also GRANTS the application for an award of attorneys' fees in the amount of $1,620,000, reimbursement of litigation expenses in the amount of $36,499.43, and incentive awards of $5,000 for each of the named plaintiffs.

The Clerk of the Court is instructed to terminate the motion. (Doc. # 94).

An appropriate order accompanies this opinion.

SO ORDERED:

S.D.N.Y.,2013.
In re Nissan Radiator/Transmission Cooler Litigation
Slip Copy, 2013 WL 4080946 (S.D.N.Y.)

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