IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHAD UDEEN, MARY JANE JEFFERY, LYDIA RUNKEL, MICHAEL BOLICK, GARY GILPIN, ALICIA SMITH, and SUSAN WILLIAMS, on behalf of themselves and all others similarly situated, Plaintiffs, v. SUBARU OF AMERICA, INC., and SUBARU CORPORATION, Defendants.	No. 1:18-cv-17334-RBK-JS **JURY TRIAL DEMANDED** **CLASS ACTION**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND REQUEST FOR PAYMENT OF ATTORNEYS' FEES, LITIGATION EXPENSES, AND INCENTIVE AWARDS

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I. INTRODUCTION

Plaintiffs and Class Counsel have achieved an excellent nationwide class action settlement that provides substantial relief for consumers who bought or leased a model year 2017-2018 Subaru Impreza, 2018 Outback, 2018 Crosstrek, 2018 Legacy, 2018 Forester, and 2018 BRZ ("Class Vehicles").[1] Under the Settlement Agreement, the warranty applicable to the Starlink infotainment system that is the subject of this litigation will be extended for up to five years or 100,000 miles. Subaru will reimburse consumers to the extent they previously purchased an extended warranty and/or incurred certain Starlink-related expenses. Subaru has also agreed to provide monetary compensation for Class Members who made multiple trips to Authorized Subaru Dealers for qualifying repairs, or who had to wait more than one day to receive a replacement Starlink system during the period when replacement units were on backorder. The parties estimate that the value of these benefits to Class members exceeds $6.25 million.

The terms of the Settlement Agreement were negotiated extensively and at arm's-length between experienced parties and counsel, including during two all-day mediation sessions with Judge Dennis M. Cavanaugh (Ret.). The settlement's fairness was subsequently verified by Class Counsel through confirmatory

[1] Capitalized terms have the same meaning as set forth in the definitions section of the Settlement Agreement dated August 30, 2019. ECF No. 44-1.

discovery, which included taking the deposition of a Subaru designee and reviewing thousands of pages of documents. Following this Court's entry of the Preliminary Approval Order (ECF No. 48), the notice plan was fully executed. While the claims filing period remains open until April 1, 2020, the response by Class members to date has been positive. So far several thousand claims have been filed with only **two** irrelevant objections to the proposed settlement. For the reasons discussed below, and because the criteria under Fed. R. Civ. P. 23(e) are met, Plaintiffs respectfully request that this Court grant final approval.

Pursuant to Rule 23(h) and Sections XIII(1) and (2) of the Settlement Agreement, Plaintiffs also seek entry of an order authorizing the payment from Defendants Subaru of America, Inc. and Subaru Corporation (together, "Subaru") of $1.5 million in attorneys' fees and litigation expenses. This amount was negotiated after the parties had agreed upon all material terms of the settlement and with the assistance of Judge Cavanaugh. Plaintiffs respectfully submit that this figure is reasonable and justified by the results achieved.

Finally, Plaintiffs seek approval of $3,500 incentive award payments to each of the seven Plaintiffs. Each Plaintiff was actively involved in the preparation of the Complaint, provided Class Counsel with relevant documents and information, and assisted Class Counsel in crafting the categories of relief in the settlement. Because the results achieved on behalf of the Class would not have occurred without their

assistance, the requested incentive awards are reasonable and should be approved. Subaru does not oppose the relief sought in this motion.

II. BACKGROUND

A. Nature and History of the Case[2]

This is a putative class action brought by consumers who purchased or leased a Class Vehicle. First Amended Class Action Complaint ("FAC"), ECF No. 24, ¶ 1.[3] Plaintiffs filed this case in state court on November 28, 2018 following an extensive pre-suit investigation by Plaintiffs' counsel that began in approximately April 2018. Subaru then removed the case to this Court. ECF No. 1. On January 31, 2019, Plaintiffs filed the operative FAC. ECF No. 24.

The FAC alleges that Class Vehicles came equipped with defective Subaru Starlink infotainment systems. Among other things, Starlink is designed to provide the display for the backup camera, as well as an interface for making telephone calls, using the GPS navigation system, and accessing radio controls. ¶ 2. The FAC alleges that the Starlink infotainment systems in Class Vehicles are defective because they suffer from a range of technical glitches and failures. ¶ 5. Subaru denied these allegations and filed a motion to dismiss on February 28, 2019. ECF No. 28.

[2] The factual and procedural background of this case is set forth in Plaintiffs' motion for preliminary approval briefing and is repeated here only insofar as relevant to the instant motion. ECF No. 44, at 2-12.

[3] "¶" refers to paragraphs in the FAC.

Subaru's motion to dismiss was fully briefed and *sub judice* when the parties agreed to mediate this matter and, ultimately, resolved the case.

In addition to the motion to dismiss, the parties briefed Subaru's request to stay discovery. On March 3, 2019, following letter briefing from the parties and oral argument, Magistrate Judge Schneider issued an opinion denying Subaru's stay motion, and permitted "limited and focused discovery on core issues" to proceed. *Udeen v. Subaru of Am., Inc.*, 378 F. Supp. 3d 330, 333-34 (D.N.J. 2019). The Court required the parties to further meet-and-confer, and scheduled a Rule 16 conference for April 22, 2019. That conference was subsequently stayed because the parties scheduled mediation with Judge Cavanaugh. ECF No. 35.

B. Settlement Negotiations and Mediation

The parties participated in two mediation sessions with Judge Cavanaugh in Newark, New Jersey on May 6 and May 14, 2019. Prior to these mediations, the parties participated in an in-person meeting in Philadelphia on April 30 where they discussed the strengths and weaknesses of their respective positions, Subaru's warranty claims data and other records, and a potential framework for class-wide resolution. At the first mediation session on May 6, 2019, the parties built upon the progress made at the preliminary April 30 meeting and, by the end of the day and with the assistance of Judge Cavanaugh, had made significant progress. By the conclusion of the second full day of mediation on May 14, 2019, the parties had

reached agreement on all material terms of the settlement. After all material terms of the settlement had been reached, the parties reached agreement on attorneys' fees, litigation expenses, and class representative incentive awards, again with the substantial assistance of Judge Cavanaugh.

On May 30, 2019, after conferring with Magistrate Judge Schneider and advising him of the settlement, the Court issued a scheduling order requiring confirmatory discovery to be completed by July 31, 2019. ECF No. 38.

C. Summary of the Settlement Terms

The Settlement has five principle features:

First, Subaru agreed to extend the standard three-year / 36,000-mile warranty to five years / 100,000 miles as it relates to the Starlink system. The parties have estimated that the value of this Starlink-specific extended warranty is $5 per car. Those Class Members who already purchased a Subaru extended warranty will be eligible for a refund of that prorated amount. The total estimated value of this relief to the Class is $2.45 million.

Second, Subaru agreed to tiered monetary compensation ($150 for two repairs or complaints and $300 for three or more repairs or complaints) or a non-cash coupon alternative for Qualifying Repairs. The parties estimate that the value of this component of the settlement is $1.75 million.

Third, Subaru agreed to compensate Class Members $16 per day for the period during which time there was a shortage of Starlink head replacement units. The estimated value of this component of the settlement is $2.08 million.

Fourth, subject to reasonable proof requirements, Subaru will also reimburse Class Members for certain unreimbursed out-of-pocket expenses incurred as a result of the Starlink issues at $45 per day, up to a maximum of $90.

Fifth, Subaru has issued several additional software updates that have, as verified through confirmatory discovery, significantly improved the performance of the Starlink System in Class Vehicles.

The various components of relief above are not disjunctive; Class Members can be eligible to receive any and all categories of relief for which they qualify. In addition to the foregoing, Subaru has agreed to pay – subject to Court approval – reasonable attorneys' fees and litigation expenses in the amount of $1.5 million, and incentive awards to the seven class representatives of $3,500 each.[4]

The Settlement Agreement's terms have since been verified as fair, reasonable, and adequate by Plaintiffs' Counsel through confirmatory discovery. Specifically, Subaru produced (and Plaintiffs' Counsel reviewed) 6,380 pages of documents in response to Plaintiffs' discovery requests. Among other things, these

[4] These amounts will not decrease the relief going to the Class; they will be paid separately by Subaru in addition to the settlement consideration described above.

documents consisted of vehicle service and warranty history for each of the named Plaintiffs; Technical Service Bulletins; warranty claims data; and documents identifying Subaru's internal investigation, analysis, and conclusions.

In addition to reviewing these materials and speaking with their clients and other putative class members, Plaintiffs' counsel conducted a Fed. R. Civ. P. 30(b)(6) deposition of Subaru of America's Field Quality Assurance Manager, John Gray, on July 12, 2019. The substance of Mr. Gray's deposition verified that the terms of the settlement are fair, reasonable and adequate to the Class.

D. The Court's Preliminary Approval Order

On October 4, 2019, the Court granted Plaintiffs motion for preliminary approval of the settlement. ECF Nos. 47, 48. Among other things, the Court found that the settlement was, as a preliminary matter, fair, reasonable and adequate within the meaning of Rule 23 and in satisfaction of the *Girsh* factors. ECF No. 47 at 4-7 (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)), 11-12. The Court also provisionally certified the class for settlement purposes. *Id.* at 7-11. Finally, the Court approved the Class notice plan and scheduled a final approval hearing which is set to occur on March 4 at 9:30 a.m. ECF No. 47 at 11-13.

E. Implementation of the Settlement Notice Plan

Promptly after the Court granted preliminary approval, the parties began working with the Claims Administrator, JND Legal Administration Co. ("JND"),[5] to provide Settlement Class Members with the Court-approved notice in accordance with the Settlement Agreement. JND provided notice of the proposed settlement reflected in the Settlement Agreement pursuant to the Class Action Fairness Act 28 U.S.C. § 1715(b) (the "CAFA Notice") and sent the CAFA Notice and the documents required under 28 U.S.C. § 1715(b)(1)-(8) to the Attorney General of the United States and 52 state Attorneys General via First-Class Certified Mail. Pursuant to the Court approved notice plan, JND mailed a total of 785,913 postcard notices. Of these, only 24,587 came back as undeliverable. Upon additional research, JND mailed an additional 4,552 notices. JND also established a settlement website[6] and a telephone assistance line.

[5] One court recently recognized that "claims administrator, JND, is highly experienced in administering large class action settlements and judgments . . . ." *In re Equifax Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 7841, at *171 (N.D. Ga. Jan. 13, 2020).

[6] https://cms.www.starlinkinfotainment.settlementclass.com/.

III. ARGUMENT

A. The Settlement is Fair, Reasonable, and Adequate

Rule 23(e) requires a determination by the Court that the proposed settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e); *see also In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 534 (3d Cir. 2004) ("*Warfarin II")*. There is a strong judicial policy in favor of resolution of litigation before trial, particularly in "class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 484 (E.D. Pa. 2010) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010)).

The Third Circuit has, "on several occasions, articulated a policy preference favoring voluntary settlement in class actions." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 378 (3d Cir. 2013). Settlements enjoy a presumption that they are fair and reasonable when they are the product of arm's-length negotiations conducted by experienced counsel who are fully familiar with all aspects of class action litigation. *See, e.g.*, *Bredbenner v. Liberty Travel, Inc*., No. 09-cv-00905 (WJM)(MF), 2011 WL 1344745, at *10 (D.N.J. Apr. 8, 2011) ("A class settlement is entitled to an 'initial presumption of fairness' when '(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class

objected.'") (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*GM Pick-Up*")).

The Third Circuit has adopted a nine-factor test to determine whether a settlement is "fair, reasonable, and adequate." These so-called "*Girsh* factors" are:

> (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

GM Pick-Up, 55 F.3d at 785 (citing *Girsh*, 521 F.2d at 157). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Am. Family Enters.*, 256 B.R. 377, 418 (D.N.J. 2000). As discussed below, the settlement satisfies each of these factors and should be approved.

1. The *Girsh* Factors Weigh in Favor of Final Approval

(a) Complexity, expense, duration of continued litigation

The first *Girsh* factor considers "the probable costs, in both time and money, of continued litigation." *In Re: Cendant Corp. Litig.*, 264 F.3d 201, 233-34 (3d Cir. 1992) ("*Cendant II*"). "Where the complexity, expense, and duration of litigation are significant, the Court will view this factor as favoring settlement." *Bredbenner*, 2011 WL 1344745, at *11.

Here, due to the factual and legal complexities involved, continued litigation would have been rigorously contested by Subaru, as reflected by Subaru's pending motion to dismiss, and would have been expensive and time-consuming. *See GM Pick-Up*, 55 F.3d at 812 (concluding that lengthy discovery and ardent opposition by the defendant with "a plethora of pretrial motions" were facts favoring settlement, which offers immediate benefits and avoids delay and expense). But for the parties agreeing to settle this matter, significant discovery would have moved forward, including expert and fact witness depositions. The parties also would have engaged in significant motion practice, including a decision on the pending motion to dismiss as well as motions for class certification and summary judgment.

Preparing for and conducting a trial, as well as post-trial motions and appeal would further delay resolution and increase costs. *Warfarin II*, 391 F.3d. at 536 ("it was inevitable that post- trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class").

Under the circumstances, a certain result now—rather than an uncertain result potentially years in the future—weighs in favor of approval of the settlement.

(b) The reaction of the class to the settlement

The second *Girsh* factor "attempts to gauge whether members of the class support the Settlement." *In re Prudential Ins. Co. Am. Sales Pracs. Litig. Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998) ("*Prudential II*"). As noted above, as of

the date of this filing, there have only been two objections to the settlement.[7] Under *Girsh*, such a lack of objections clearly favors approval of a class action settlement. *See Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993) (a "paucity of protestors . . . militates in favor of the settlement."); *In re Prudential Ins. Co. of Am. Sales Pracs. Litig.*, 962 F. Supp. 450, 537 (D.N.J. 1997) (same) ("*Prudential I*"). This *Girsh* factor weighs in favor of final approval.[8]

(c) The stage of the proceedings

The stage of the proceedings is another factor that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *GM Pick-Up,* 55 F.3d at 785. "This factor considers the degree of case development accomplished by counsel prior to settlement." *Bredbenner*, 2011 WL 1344745 at

[7] The first objection is from Julia Bozman, a resident of Maryland. ECF No. 51. Ms. Bozman, however, appears to complain about issues entirely unrelated to this lawsuit. The release in this case would not bar Ms. Bozman from pursuing claims against Subaru related to these issues. Additionally, Ms. Bozman never actually states why she objects to the settlement. Accordingly, Plaintiffs submit that her "objection" does not provide any basis to deny final approval. The second objection is from Faith Brightly, a resident of California. Brightly's objection relates only tangentially to problems with the Starlink system and relates more to an alleged altercation with police. Accordingly, the objection, which should perhaps be treated more like an opt-out, refers to a unique and extreme situation that should not derail the settlement. Indeed, to the extent that these individuals do not actually object, the Court may wish to simply characterize these letters as opt-outs.

[8] Final approval of the settlement is also supported by the small number (119) of opt-out requests received to date. The names and addresses of those Settlement Class Members who elected to opt-out will be attached to the final declaration from JND to be filed prior to the fairness hearing.

*12. Here, Plaintiffs filed a Complaint, the parties provided letter briefing on whether discovery should be stayed, the parties briefed a motion to dismiss, Plaintiffs filed a motion to appoint lead counsel, participated in two mediations, and compiled and served initial disclosures and discovery requests. This settlement was reached after both sides endured the rigors of hard-fought motion practice and litigation. This *Girsh* factor weighs in favor of final approval.

(d) The risks of establishing liability and damages

The fourth and fifth *Girsh* factors should be considered to "examine what potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *Cendant II*, 264 F.3d at 237 (quoting *GM Pick-Up*, 55 F.3d at 814). "The inquiry requires a balancing of the likelihood of success if the case were taken to trial against the benefits of immediate settlement." *In re Safety Components, Inc. Secs. Litig.*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001).

In addition to liability, courts also consider risks associated with proving damages. In *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 256 (D. Del. 2002) ("*Warfarin I*"), *aff'd*, 391 F.3d 516, 537 (3d Cir. 2004), the trial court found that the risk of establishing damages strongly favored settlement, observing that "[d]amages would likely be established at trial through 'a "battle of experts," with each side presenting its figures to the jury and with no guarantee whom the jury

would believe.'" *Id.*; *see also Cendant II*, 264 F.3d at 239 (finding that the risk in establishing damages weighed in favor of approval of the settlement).

Although Class Counsel believe in the merits of their case, we acknowledge the risks associated with proving Subaru's liability and damages, as articulated in Subaru's motion to dismiss. Subaru has defended and would continue to defend zealously against these and other issues if the case proceeded. The settlement, on the other hand, provides the Class with meaningful and significant relief now.

(e) The risks of certifying and maintaining a litigation class through trial

Because the prospects for obtaining class certification have a great impact on the range of recovery one can expect to reap from the class action, *see GM Pick-Up*, 55 F.3d at 817, this Court must measure the likelihood of obtaining and maintaining a certified class if the action were to proceed to trial. *Girsh*, 521 F.2d at 157. Although suitable for certification for the purpose of administering settlement relief, there is always a risk that this Court would find this action not suitable for class certification. *See, e.g., Aichele v. City of L.A.*, No. CV 12-10863-DMG (FFMx), 2015 U.S. Dist. LEXIS 120225, at *6 (C.D. Cal. Sept. 9, 2015) ("There are substantial risks in any class action. Most cases filed as a class action are not certified and many that are can still result in a loss, or in only partial success.").

(f) Defendant's ability to withstand greater judgment

Although there is no dispute that Subaru has ample resources, this factor is generally neutral when the defendant's ability to pay exceeds the potential liability and was not a factor in settlement negotiations. *CertainTeed*, 269 F.R.D. at 489 ("because ability to pay was not an issue in the settlement negotiations, this factor is neutral"). Thus, this factor is neutral.

(g) Reasonableness of the settlement in light of the best possible recovery and all attendant risks of litigation

The final two *Girsh* factors assess the reasonableness of the settlement in light of the best possible recovery, and all the attendant risks of litigation. As set forth herein, the settlement offers real economic benefits to Class members, and continued litigation carries with it inherent risks of non-recovery. As such, all of the applicable *Girsch* factors support approval of the settlement.

2. The Relevant *Prudential* and *Baby Products* Factors Also Support Settlement

The Third Circuit has articulated other factors that can be relevant to the evaluation of some, but not all, class action settlements. In *Prudential II*, the Third Circuit identified several additional factors that "are illustrative of additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement's terms." *In re Pet Food Prods. Liab. Litig*, 629 F.3d 333, 350 (3d Cir. 2010). Those additional factors are the following:

> [1] [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; [2] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [3] whether class or subclass members are accorded the right to opt out of the settlement; [4] whether any provisions for attorneys' fees are reasonable; and [5] whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. (citing *Prudential II*, 148 F.3d at 323). Not all of the *Prudential II* factors are relevant to approval in this case but those that are weigh in favor of final approval.

First, the underlying substantive issues in this case are mature. As discussed above, the parties fully briefed a motion to dismiss. Second, all individual Class members are being treated fairly. Third, as discussed above, Class members were provided with robust notice and were given the opportunity to opt-out, which some Class members did. Fourth, the attorneys' fees requested are reasonable, as more fully discussed *infra*. Finally, the claims process is clearly set out in the Settlement Agreement and accompanying papers.

The Third Circuit noted an additional factor in *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d. Cir. 2013), where it examined the degree to which a proposed settlement provided a "direct benefit" to the class. *Id.* at 174; *see also McDonough v. Toys R. Us, Inc.*, 80 F. Supp. 3d 626, 650-51 (E.D. Pa. 2015)

(discussing *Baby Products* factor). Here, Class members who fill out a Claim Form and do not request exclusion receive a direct benefit from the settlement. For all of the foregoing reasons, the settlement satisfies the factors articulated by the Third Circuit and should be approved as fair, reasonable, and adequate.

3. The Notice Program is Constitutionally Sound and Has Been Fully Implemented

To protect the rights of absent Class members, this Court must ensure everyone who would be bound by a class action settlement are provided the best practicable notice. *See* Fed. R. Civ. P. 23(e)(1)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

The form and manner of the Class Notice was negotiated and agreed upon by the parties (with the assistance of the claims administrator), approved by the Court (ECF Nos. 47, 48), and meets these requirements. As detailed above, the notice program involved sending postcard notices via direct mail to everyone for whom contact information was available. The notice provided the best notice practical under the circumstances, giving Class members a full and fair opportunity to consider the terms of the settlement and make a fully informed decision as to whether to participate, object, or opt-out. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173

(1974) (noting that individual notice is preferred method where addresses of class members can be ascertained through reasonable effort). Therefore, the Class Notice fulfilled the requirements of due process and those under Rule 23(c)(2).

4. The Settlement Class Should Be Certified

Finally, the Class should be certified for purposes of final approval of a class settlement. The Court had preliminarily certified the Settlement Class pursuant to Rules 23(a) and (b)(3), and nothing has changed to alter the propriety of that conclusion. Subaru acknowledges that the Rule 23 requirements are satisfied only with respect to settlement of the class claims.

(a) The Rule 23(a) factors are met

The Class meets the requirements of Rule 23(a), which are numerosity, commonality, typicality, and adequacy. *See Warfarin Sodium II,* 391 F.3d at 527.

i. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is "impracticable." *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 73 (D.N.J. 1993). The Class consists of thousands of members, which is more than sufficient to meet this criterion. *Feret v. CoreStates Fin. Corp.,* No. 97-6759, 1998 U.S. Dist. LEXIS 12734, at *18-19 (E.D. Pa. Aug. 18, 1998).

ii. Commonality

"Rule 23(a)(2)'s commonality element requires that the proposed class members share at least one question of fact or law in common with each other." *Warfarin II*, 391 F.3d at 527-28. "Commonality does not require perfect identity of questions of law or fact among all class members. Rather, even a single common issue will do." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015). Here, Plaintiffs submit that Class members share many common issues of law and fact. All of their claims arise from the same alleged defect relating to the same infotainment systems in Class Vehicles. Commonality is satisfied.

iii. Typicality

In considering typicality under Rule 23(a)(3), the court must determine whether "the named plaintiffs[‘] individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001). Typicality does not require that all class members share identical claims. *Id.* So long as "the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is usually established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001).

Each of the Class representatives own or lease Class Vehicles and allege that they suffered the same injury as the other Class members, caused by a uniform defect and course of conduct. As such, the typicality requirement is satisfied.

iv. Adequacy

The adequacy requirement has two components intended to ensure that the absent class members' interests are protected: (a) the named plaintiffs' interests must be sufficiently aligned with the interests of the class, and (b) the plaintiffs' counsel must be qualified to represent the class. *GM Pick-Up,* 55 F.3d at 800. These requirements are satisfied.

As for the first component, the Court must determine whether "the representatives' interests conflict with those of the class." *Johnston*, 265 F.3d at 185. There is no conflict between the proposed Class representatives and Class members because Plaintiffs seek to recover losses stemming from a uniform defect. Plaintiffs have no interests that are in conflict with the Class they seek to represent and their alleged injuries are identical to those suffered by Class members. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 625-27 (1997) (courts look at whether the representatives' interests are in any way antagonistic to or in conflict with those of the class members).

As far as adequacy of counsel, the Class is represented by Chimicles Schwartz Kriner & Donaldson-Smith LLP, Wilentz, Goldman & Spitzer P.A., and Motley

Rice LLC – three law firms with national reputations in the class action field, as demonstrated by the law firm resumes submitted with Plaintiffs' motion for preliminary approval. ECF No. 44. Accordingly, both prongs of the adequacy inquiry are satisfied.

(b) The Rule 23(b)(3) Factors Are Met

In addition to meeting the requirements of Rule 23(a), the Class must satisfy Rule 23(b)(3). Plaintiffs submit that Rule 23(b)(3) is satisfied because questions of law or fact common to Class members predominate over any individual questions. Further, a class action is superior to other available methods for the fair and efficient administration of relief under this class settlement.

i. Predominance

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). As the Supreme Court explained in *Amchem*, "[p]redominance is a test readily met in certain cases alleging consumer fraud . . . ." 521 U.S. at 625. "Common issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class members." *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 187 (D.N.J. 2003).

Plaintiffs submit that the key questions posed in this case—all of which relate to an alleged uniform defect in the Class Vehicles—are common ones. If resolved

in one stroke, those issues would substantially advance the litigation. *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859 (6th Cir. 2013). Subaru acknowledges that predominance is satisfied with respect to the settlement of the class claims.

ii. Superiority

Rule 23(b)(3) also requires that class resolution be "superior to other available methods for fairly and efficiently adjudicating the controversy." FED R. CIV. P. 23(b)(3). The following factors are relevant to the superiority inquiry:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the likely difficulties in managing a class action.

Id.; *see also Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141, 149 (3d Cir. 2008). The superiority inquiry is simplified in the settlement context because the Court need not inquire whether the case, if tried, would pose intractable management problems. *Amchem*, 521 U.S. at 620.

Here, Plaintiffs submit that the settlement is the superior method of resolving the claims. It ensures that the claims of Class members will be resolved efficiently and without further delay. *See O'Brien v. Brain Research Labs, LLC*, No. 12-204, 2012 U.S. Dist. LEXIS 113809, at *27 (D.N.J. Aug. 8, 2012) (finding superiority because, *inter alia*, "denying certification would require each consumer to file suit

individually at the expense of judicial economy"). In contrast, future individualized litigation carries great uncertainty, risk, and costs, and provides no guaranty that injured plaintiffs will obtain necessary and timely compensatory relief at the conclusion. *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 234 (D.N.J. 2005) ("Without question, class adjudication of this matter will achieve an appreciable savings of effort, time and expense, and will promote uniformity of decision on the issues resolved and to which the parties will be bound.").

B. Plaintiffs' Counsel Should Be Awarded Attorneys' Fees

"'In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.'" *In re Comcast Corp. Set-Top Cable TV Box Antitrust Litig.*, No. 09-md-2034, 2019 U.S. Dist. LEXIS 162545, at *44-45 (E.D. Pa. Sept. 24, 2019) (quoting Fed. R. Civ. P. 23(h)). "'Relevant law evidences two basic methods for evaluating the reasonableness of a particular attorneys' fee request—the lodestar approach and the percentage-of-recovery approach. Each has distinct attributes suiting it to particular types of cases.'" *Lincoln Adventures LLC v. Certain Underwriters at Lloyd's*, Civil Action No. 08-00235 (CCC), 2019 U.S. Dist. LEXIS 171917, at *17 (D.N.J. Oct. 3, 2019) (quoting *Varacallo*, 226 F.R.D. at 248). The lodestar method is "preferable" in cases where "'the nature of the settlement evades the precise evaluation needed for the percentage of recovery method.'" *Saini v. BMW of N. Am., LLC*, No. 12-6105

(CCC), 2015 U.S. Dist. LEXIS 66242, at *33 (D.N.J. May 21, 2015) (quoting *GM Pick-Up,* 55 F.3d at 821). The percentage-of-recovery approach, on the other hand, is preferred in common fund cases. *Id.* The district court has discretion as to which methodology to employ. *See Tavares v. S-L Distribution Co.*, No. 1:13-cv-1313, 2016 U.S. Dist. LEXIS 57689, at *40 (M.D. Pa. May 2, 2016).

Because the settlement does not establish a traditional common fund but, instead, creates an uncapped, claims-made settlement with an estimated value of at least $6.25 million, Plaintiffs respectfully submit that this Court should utilize the lodestar methodology. *See Skeen v. BMW of N. Am., Ltd. Liab. Co.*, No. 2:13-cv-1531-WHW-CLW, 2016 U.S. Dist. LEXIS 97188, at *60-61 (D.N.J. July 26, 2016) ("The lodestar method is also appropriate because the settlement award to Class members also does not consist of a single, predetermined, common fund from which a percentage-of-recovery can be easily calculated."); *Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146 (CCC), 2013 U.S. Dist. LEXIS 46291, at *42 (D.N.J. Mar. 22, 2013) ("the combination of reimbursements and software upgrades 'evades the precise evaluation needed for the percentage of recovery method.'") (citation omitted); *Granillo v. FCA US LLC*, Civil Action No. 16-153 (FLW) (DEA), 2019

U.S. Dist. LEXIS 146086, at *7-8 (D.N.J. Aug. 27, 2019) (using the lodestar method in a claims-made automobile defect settlement).[9]

"The lodestar method involves the multiplication of a prevailing market hourly rate, taking into account the experience of the professional and the nature of the professional services provided, by the number of hours reasonably expended in providing those services." *In re Mushroom Transp. Co.*, 486 B.R. 148, 163 (Bankr. E.D. Pa. 2013) (citations omitted). "'There is a strong presumption that the [resulting] 'lodestar' amount is reasonable.'" *Alpha Painting & Constr. Co. v. Del. River Port Auth. of Pa.*, No. 1:16-cv-05141-NLH-AMD, 2019 U.S. Dist. LEXIS 106516, at *14 (D.N.J. June 26, 2019) (quoting *Eichenlaub v. Township of Indiana*, 214 F. App'x 218, 222 (3d Cir. 2007)). "After arriving at this lodestar figure, the district court may, in certain circumstances, adjust the award upward or downward to reflect the particular circumstances of a given case." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). As discussed below, the analysis of the lodestar figure here supports the requested fee award.[10]

[9] As discussed *infra*, even if this Court were to analyze Plaintiffs' attorneys' fee request under the percentage-of-fund methodology, it would still be reasonable.

[10] While Subaru has agreed to the amount of fees and costs sought by class counsel, it takes no position on the methodology used to reach that figure, except to acknowledge that the requested fees and costs are fair and reasonable in relation to the settlement relief.

1. The Number of Hours Billed Is Reasonable

As set forth in the four declarations submitted herewith, Plaintiffs' counsel have billed the following number of hours as of January 24, 2020:

FIRM	HOURS	LODESTAR
Chimicles Schwartz Kriner & Donaldson-Smith LLP	1,511.60	$740,410.00
Wilentz, Goldman & Spitzer, P.A.	249.00	$217,599.50
Motley Rice LLC	51.90	$40,222.50
J. Llewellyn Mathews	14.00	$4,900.00
TOTALS	**1,826.50**	**$1,003,132.00**

The figures above do not account for time spent after January 24, 2020. *See In re Philips/Magnavox TV Litig.*, No. 09-cv-3072 (CCC), 2012 U.S. Dist. LEXIS 67287, at *47 (D.N.J. May 14, 2012) (recognizing that time submitted in connection with a fee petition filed before final approval "does not include the fees and expenses . . . expended after [that date] on tasks such as preparing for and appearing at the fairness hearing").

"The time expended by counsel is 'reasonable' if it is attributable to 'work that is 'useful and of a type ordinarily necessary' in pursuing the litigation.'" *Granillo*, 2019 U.S. Dist. LEXIS 146086, at *12 (citation omitted). The number of hours billed by Plaintiffs' counsel was reasonable and necessary for the

effective prosecution of this case. As set forth above, this case included extensive pre-complaint investigation, comprehensive motion practice, discovery disputes, conference calls with and correspondence to Magistrate Judge Schneider,[11] the taking of a corporate designee's deposition, speaking with and interviewing dozens of Class members, preparing for and participating in two mediation sessions, and reviewing thousands of pages of documents. The number of hours billed here are, thus, reasonable and should be approved. *Henderson*, 2013 U.S. Dist. LEXIS 46291, at *45 (finding, in a case where the Chimicles law firm was lead counsel, that counsel's "billable time to have been reasonably expended."); *In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at *47 (same). [12]

2. The Hourly Rates Are Reasonable

"In reviewing the reasonableness of counsel's hourly rate, '[t]he court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Granillo*, 2019 U.S. Dist. LEXIS 146086, at *9-10 (citation omitted). "The burden of establishing the

[11] ECF Nos. 17, 22, 27.

[12] This Court has stated that it "is not required to engage in this analysis with mathematical precision or 'bean-counting.'" *Henderson*, 2013 U.S. Dist. LEXIS 46291, at *43-44 (quoting *In re Rite Aid*, 396 F.3d at at 306). Instead, the Court may rely on summaries submitted by the attorneys; the Court is not required to scrutinize every billing record." *Id.* at 306-07.

reasonableness of the requested rate is on the applicant, and an attorney's usual billing rate is a good starting point for assessing reasonableness, though it is not dispositive." *Id.* at *10 (citation omitted).

As also set forth in the accompanying declarations, the hourly rates in this case average from $237.50 for paralegals, $475 for associates, and $723 for partners. *See* Declarations of Benjamin F. Johns, Daniel A. Lapinski, Kevin Roddy, and J. Llewellyn Mathews. These are consistent with hourly rates that have been approved by the Third Circuit and this Court. *See Henderson*, 2013 U.S. Dist. LEXIS 46291, at *45-47 (finding that hourly billing rates – including those of the Chimicles firm – ranging from $175-$700 "are entirely consistent with hourly rates routinely approved by this Court in complex class action litigation"); *In re Elk Cross Timbers Decking Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 15-0018 (JLL) (JAD), 2017 U.S. Dist. LEXIS 223038, at *20 (D.N.J. Feb. 27, 2017) ("The Court has reviewed Plaintiffs' Counsel's submissions [including those of the Chimicles firm] in support of their request for attorneys' fees and costs, including their time summaries and hourly rates, and finds that the request for attorneys' fees is reasonable and appropriate and the hourly rates of each firm are likewise reasonable and appropriate in a case of this complexity."); *P. Van Hove BVBA v. Universal Travel Grp., Inc.*, No. 11-2164, 2017 U.S. Dist. LEXIS 97909, at *36-37 (D.N.J. June 26, 2017) (finding an average hourly rate of $644 to be reasonable). As detailed in the above-

referenced declarations, these law firms' respective rates have been approved in other cases. They should, likewise, be approved here.

3. The *Gunter/Prudential* Factors Confirm the Reasonableness of the Fee Request

"The Third Circuit 'require[s] district courts to clearly set forth their reasoning for fee awards so that [the Circuit Court] will have a sufficient basis to review for abuse of discretion.'" *Granillo*, 2019 U.S. Dist. LEXIS 146086, at *20-21 (citation omitted). "To that end, the Third Circuit has encouraged district courts to perform a 'cross-check' of a fee award using an alternative fee calculation method." *Id.* at *21 (citation omitted). "Thus, after utilizing a lodestar method to award attorneys' fees, a court should cross-check the proposed fee award using the percentage of recovery method." *Id.*

The non-exhaustive list of so-called *Gunter* factors that district courts are to consider are as follows:

(1) the size of the fund created and the number of persons benefitted;
(2) the presence or absence of substantial objections to the settlement terms and/or fees requested by counsel;
(3) the skill and efficiency of the attorneys involved;
(4) the complexity and duration of the litigation;
(5) the risk of nonpayment;
(6) the amount of time spent by plaintiffs' counsel; and
(7) the awards in similar cases.

In re Philips/Magnavox TV Litig., 2012 U.S. Dist. LEXIS 67287, at *48. "The district court need not apply these *Gunter* fee award factors in a formulaic way." *Id.*

"Certain factors may be afforded more weight than others." *Id.* Subsequent to *Gunter,* the Third Circuit added three additional factors that may be considered:

(1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations,
(2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained, and
(3) any "innovative" terms of settlement.

Beneli v. Bca Fin. Servs., 324 F.R.D. 89, 108 (D.N.J. 2018) (citing *Prudential*, 148 F.3d at 338-40). Each of the relevant factors support the fee request here.

(a) Class Counsel obtained substantial benefit

As noted above, the parties estimate that the value of the settlement benefits to the class exceed $6.25 million. By any measure, the monetary and non-monetary relief made available under the settlement confers a substantial benefit for the Class. *See Granillo,* 2019 U.S. Dist. LEXIS 146086, at *24 (D.N.J. Aug. 27, 2019) (finding that class action settlement which provided an extended warranty and cash or trade-in vouchers conferred "a substantial benefit on the settling Class Members . . . .").

(b) The Class responded favorably to the settlement

As discussed above, there have been two objections filed to date.[13] In addition to being meritless, this represents an infinitesimally small percentage of the class members. In contrast, there have been thousands of Claim Forms submitted to date. This response from the Class supports the reasonableness of the attorneys' fee request. "As numerous district courts have held, the dearth of objections 'strongly supports approval of the requested fee.'" *Beneli,* 324 F.R.D. at 108 (citations omitted); *see also Saini*, 2015 U.S. Dist. LEXIS 66242, at *39 (same).

It is also noteworthy that none of the state Attorneys General or other government officials who received notice of the settlement pursuant to CAFA, 28 U.S.C. § 1715(b), have objected to the amount of attorneys' fees being requested (or to any other term of the settlement). *See George v. Acad. Mortg. Corp.*, 369 F. Supp. 3d 1356, 1373 (N.D. Ga. 2019) (citation omitted) ("Not one CAFA notice recipient objected to the settlement, which also weighs in favor of its approval here.").

(c) Class Counsel brought the matter to a successful resolution

Class Counsel's action in bringing this litigation to a successful conclusion is perhaps the best indicator of the experience and ability of the attorneys involved. *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) ("the single

[13] Plaintiffs reserve the right to address any subsequent objections that may be filed in advance of the March 4, 2020 fairness hearing.

clearest factor reflecting the quality of the class counsels' services to the class are the results obtained"). The quality of the work which has been presented to the Court, Counsel respectfully submit, speaks for itself. Facing the substantial risk of further litigation and delay, Class Counsel's results here are substantial. The fact that a case settles, as opposed to proceeding to trial, "in and of itself, is never a factor that the district court should rely upon to reduce a fee award. To utilize such a factor would penalize efficient counsel, encourage costly litigation, and potentially discourage able lawyers from taking such cases." *Gunter*, 223 F.3d at 198. Further, Class Counsel invested significant time to achieve this result.

The quality and vigor of opposing counsel is also relevant in evaluating the services rendered by Class Counsel. *In re Ikon Office Solutions, Inc. Securities Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). Here, Subaru was represented by able counsel at Ballard Spahr LLP, who vigorously opposed discovery and sought to have Plaintiffs' complaint dismissed. ECF No. 28. ". . . [T]he fact that Class Counsel achieved this Settlement for the Class in the face of formidable legal opposition further evidences the quality of their work, which weighs in favor of approval of the attorneys' fee award." *Granillo,* 2019 U.S. Dist. LEXIS 146086, at *27. This *Gunter* factor also supports the fee application.

(d) The case raised complicated factual and legal issues

Cases involving allegedly defective automobile component are inherently complex: "federal courts have . . . recognized that suits alleging defects involving motor vehicles often involve complicated issues of individual causation . . . ." *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 271 (E.D. Pa. 2013) (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 604 (3d Cir. 2012)). This case also involved numerous legal issues such as those related to class certification, likely contested discovery issues, choice of law, and Subaru's defenses on the merits. *In re MyFord Touch Consumer Litig.*, No. 13-cv-03072-EMC, 2019 U.S. Dist. LEXIS 53356, at *24-25 (N.D. Cal. Mar. 28, 2019). This factor clearly supports the requested fee.

(e) Class Counsel faced a risk of non-payment

Class Counsel undertook this action on an entirely contingent basis. *See Skeen*, 2016 U.S. Dist. LEXIS 97188, at *81 ("The fifth *Gunter* factor – risk of nonpayment – weighs in favor of approving the award sought by Plaintiffs because Class Counsel undertook this case on a contingency basis and accepted the potential risk of non-payment.").

This case involved numerous risks, such as those related to class certification, expert witnesses, summary judgment, and trial. As Judge Edward M. Chen recently stated in a similar "infotainment" consumer class action brought against Ford, "there are several deficiencies in Plaintiffs' case that could jeopardize their recovery at

trial." *In re MyFord Touch Consumer Litig.*, 2019 U.S. Dist. LEXIS 53356, at *31. Yet, despite these risks, Class Counsel were able to achieve significant immediate relief to the Class, including substantial monetary benefits. This supports the requested fee. *See Granillo*, 2019 U.S. Dist. LEXIS 146086, at *28 ("Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees.").

(f) Class Counsel devoted significant time and resources

Another *Gunter* factor looks at counsel's time devoted to the litigation. *See In re Ocean Power Techs., Inc.*, No. 3:14-CV-3799, 2016 U.S. Dist. LEXIS 158222, at *89 (D.N.J. Nov. 15, 2016). From case inception through January 24, 2020, Class Counsel have expended 1,826.50 hours, incurred $1,003,132 in attorneys' fees and advanced $14,601.43 in out-of-pocket expenses. *See* Declarations of Johns, Lapinski, Roddy, and Mathews. This includes, *inter alia*: the time spent preparing and filing the initial and amended complaints, researching complex issues of law, briefing a motion to dismiss, briefing, arguing and largely prevailing on a motion to stay discovery, preparing for and participating in two all-day mediation sessions, taking a Rule 30(b)(6) deposition, reviewing thousands of pages of documents, finalizing the settlement, researching and briefing preliminary and final approval, communicating with Class members, and preparation for the preliminary and final approval hearings.

(g) The request is consistent with awards in similar cases

The requested $1.5 million fee and expense award is consistent with amounts approved in this Court in similar cases. *See, e.g.*, *Henderson*, 2013 U.S. Dist. LEXIS 46291, at *13 (approving $3 million in fees and expenses in class action providing class members with reimbursements and warranty extensions in connection with alleged automotive defects); *Alin v. Honda Motor Co.*, No. 08-4825 (KSH) (PS), 2012 U.S. Dist. LEXIS 188223, at *64 (D.N.J. Apr. 12, 2012) (awarding fees of $2.4 million in automotive defect class action); *Yaeger v. Subaru of Am., Inc.*, No. 14-4490(JBS), 2016 U.S. Dist. LEXIS 117193, at *4 (D.N.J. Aug. 31, 2016) (awarding fees of $1.5 million in a class action alleging an engine defect).

While Plaintiffs seek attorneys' fees pursuant to the lodestar method, this Court can verify the reasonableness of that request by doing a percentage-of-recovery analysis. *In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at *44 (agreeing that "lodestar method is appropriate in this case" but going on to "perform a percentage-of-recovery analysis to cross-check the lodestar analysis and ensure the reasonableness of the fee."). Here, dividing the amount requested for fees and expenses ($1.5 million) by the estimated value of the total benefits ($7.75 million) yields 19.4%. Deducting the $14,601.43 in expenses from the figure in the numerator (totaling $1,485,398.57 in a net fee sought) results in 19.2%.[14] This is on

[14] Even if the amount of attorneys' fees and expenses are not included in this calculation, the resulting percentage from dividing $1.5 million into $6.25 million (24%) is still at the bottom end of the range that has been approved in the Circuit.

the lowest end of the "range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; fee awards generally range from 19% to 45% of the settlement fund." *P. Van Hove BVBA*, 2017 U.S. Dist. LEXIS 97909, at *34 (citations omitted); *see also Badia v. HomeDeliveryLink, Inc.*, No. 2:12-6920 (WJM), 2015 U.S. Dist. LEXIS 129033, at *23-24 (D.N.J. Sep. 25, 2015) (". . . the 33% award represents a multiplier of less than 1.59. . . . After considering the complexity and length of this case, along with the fact that courts in this circuit have approved fee requests where the multiplier was much higher, . . . Class Counsel's fee request is reasonable"). It is reasonable here too.

(h) The Remaining *Prudential* Factors Support the Request.

The results achieved here can be squarely traced to this lawsuit. While Subaru conducted voluntary recalls for *some* of the Starlink issues in *some* of the Class Vehicles, this settlement is the only method that provides monetary (and additional non-monetary) relief to consumers for the various Starlink problems alleged in the Complaint. There has been no relevant government proceeding and no similar lawsuits have been filed. Moreover, the settlement contains several features that could be categorized as innovative. For example, as set forth above and in the Settlement Agreement, the Class members are afforded several different types of relief that are non-cumulative, including that Class members will have the option to select a cash or vouchers, and that Subaru has agreed to reimburse Class members

who had already paid for an extended warranty. Likewise, compensation for days spent without a functioning system is somewhat novel. Finally, the percentage fee being sought is below the customary recovery in an individual action. *See Yedlowski v. Roka Bioscience, Inc.*, No. 14-CV-8020-FLW-TJB, 2016 U.S. Dist. LEXIS 155951, at *68 (D.N.J. Nov. 10, 2016) ("If this were an individual action, the customary contingent fee would likely range between 30 and 40 percent of the recovery.") (citations omitted). These factors also support the fee request.

4. The Court Should Approve a Modest Lodestar Enhancement

As noted above, this Court has the discretion to enhance the fee award through a lodestar multiplier. This enhancement attempts to "'to account for the contingent nature or risk involved in a particular case and the quality of the attorneys work." *Granillo*, 2019 U.S. Dist. LEXIS 146086, at *19. The multiplier is the quotient of the proposed fee award divided by the lodestar amount. *Id.* "The Third Circuit has recognized that '[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied . . . .'" *Beneli v. Bca Fin. Servs.*, 324 F.R.D. 89, 107 (D.N.J. 2018) (quoting *In re Prudential*, 148 F.3d at 341). As noted by this Court, the Third Circuit has "approved a lodestar multiplier of 2.99 in a case it described as 'relatively simple in terms of proof' in which 'discovery was virtually nonexistent[,]'" *Mirakay v. Dakota*

Growers Pasta Co., Civil Action No. 13-cv-4429 (JAP), 2014 U.S. Dist. LEXIS 148694, at *39 (D.N.J. Oct. 20, 2014).

The 1.48 multiple sought here ($1,485,398.57 in a net fee sought divided by $1,003,132 in lodestar) is below what has been approved in other cases and should be approved here as well. *See P. Van Hove BVBA*, 2017 U.S. Dist. LEXIS 97909, at *37 (approving 2.24 multiple and noting that '[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'") (quoting *Yedlowski*, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at *19); *In re LG/Zenith Rear Projection TV Class Action Litig.*, No. 06-5609 (JLL), 2009 U.S. Dist. LEXIS 13568, at *24 (D.N.J. Feb. 18, 2009) ("lodestar multipliers in class action cases are found reasonable if they range from 2 to 4").

C. Class Counsel Should be Reimbursed for Their Litigation Expenses

"'Counsel 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.'" *Skeen*, 2016 U.S. Dist. LEXIS 97188, at *82. "Courts have held that photocopying expenses, telephone and facsimile charges, postage, and expert witness fees are all reasonably incurred in the prosecution of a large litigation." *Id.; see also Yedlowski*, 2016 U.S. Dist. LEXIS 155951, at *69 (mediation fees are reimbursable). "Reimbursement of similar expenses is routinely

permitted." *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007 (FSH), 2005 U.S. Dist. LEXIS 27011, at *92 (D.N.J. Sept. 13, 2005) (citation omitted).

As submitted in detail in the attached declarations, Class Counsel have collectively incurred $14,601.43 in expenses. These various expenses are associated with taking a deposition, attending two private mediation sessions, and various printing and photocopying, and mailing expenses. As with the lodestar figure, these expenses are under-inclusive because they do not account for case-related expenses incurred after this date. The $14,601.43 in expenses is reasonable, will not reduce the recovery to the Class, and should be approved.

D. The Court Should Approve the Requested Incentive Awards

Plaintiffs' Counsel also request that this Court approve a $3,500 incentive award for each of the seven Class representatives. *See* SA § (XIII)(2). "'The purpose of these [incentive award] payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws.'" *Granillo*, 2019 U.S. Dist. LEXIS 146086, at *30 (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011)). Courts "routinely approve" the payment of incentive awards for these reasons. *Henderson*, 2013 U.S. Dist. LEXIS 46291, at *57 (citation omitted).

Like Plaintiffs' fee and expense request, the incentive awards will be paid separately from the Settlement relief and will not reduce the recovery to any Class member. *See In re LG/Zenith Rear Projection TV Class Action Litig.*, 2009 U.S. Dist. LEXIS 13568, at *25 (approving incentive award that "will not decrease the recovery of other class members."). Each of the Class Representatives expended considerable effort on behalf of the Class by locating, sorting, and producing all records related to their vehicles, and working with Class Counsel to prosecute the case and obtain the settlement. Each Plaintiff put forth their name to this action, which received publicity over the course of the case. The $3,500 sought for each Plaintiff is thus appropriate, and consistent with (and in many cases less than) awards previously approved by this Court. *See Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 395 (D.N.J. 2012) (approving $10,000 incentive awards to class representatives); *In re Elk Cross Timbers Decking Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2017 U.S. Dist. LEXIS 223038, at *20-21 (incentive awards of $4,000 plus additional $500 per class representative whose endured a decking inspection).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (1) grant final approval of the settlement; (2) approve Plaintiffs' request for $1.5 million in attorneys' fees and expenses; and (3) approve Plaintiffs' requested incentive awards. Subaru does not oppose these requests.

Dated: January 31, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed with the Clerk using the Court's ECF system and therefore served electronically on all registered counsel of record on January 31, 2020.

/s/ *Benjamin F. Johns*
Benjamin F. Johns