UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:22-cv-22483-Gayles/Torres

EXPRESS FREIGHT INTERNATIONAL, EFI EXPORT & TRADING CORP., MARDERS, and REDLANDS OFFICE CLEANING SOLUTIONS, LLC, on behalf of themselves and all others similarly situated,

Plaintiffs

v.

HINO MOTORS, Ltd., TOYOTA MOTOR CORPORATION, HINO MOTORS MANUFACTURING U.S.A., Inc., and HINO MOTORS SALES U.S.A., Inc.,

Defendants.

MOTION FOR FINAL SETTLEMENT APPROVAL AND AWARD OF ATTORNEYS' FEES AND COSTS

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I. Introduction

The Settlement is an outstanding result for the Settlement Class.[1] It provides a non-reversionary cash fund of $237.5 million, a robust Extended Warranty valued at $208 million,[2] and a five-year New Parts Warranty in the event of a future recall. All together, these benefits are worth more than ***$445,500,000.00*** and will provide Settlement Class Members with tangible, meaningful relief.

This is significant, both in the aggregate and, perhaps more importantly, on an individual basis. All Settlement Class Members are eligible to receive substantial cash payments, likely in the range of $1,500 to $15,000 per Settlement Class Truck, depending on the number of claims submitted. *See* Settlement Agreement ("SA"), ECF 146-1, ¶ 4.1. No matter the claims rate, every Settlement Class Member who submits a valid claim stands to receive significant compensation.

But that's not all. The Settlement's two warranty provisions provide further benefits to Settlement Class Members beyond the direct cash payments. Of particular note is the Extended Warranty—applicable to every single Settlement Class Truck even without a Settlement claim—which covers nearly two dozen relevant engine systems and emissions components for up to five or eight years from Settlement approval (depending on the part). SA ¶ 4.2 & Ex. B. A leading automotive warranty expert has valued the Extended Warranty at over $208,000,000. *See* Kleckner Decl. §§ 2(a), 7(f)(i)-(iii). The separate New Parts Warranty provides further protection for the Settlement Class Trucks if they are subject to an emissions system recall or repair campaign. SA ¶ 4.3.

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[1] Capitalized terms not defined herein have the same definitions and meanings used in the Class Action Agreement, ECF 146-1 ("Settlement Agreement").

[2] This valuation was provided by Kirk Kleckner, an automotive warranty valuation expert, whom Plaintiffs retained to "independently value the Class Member extended warranty benefits made available from th[e] Settlement." *See* Declaration of Kirk Kleckner ("Kleckner Decl.").

This proposed resolution—reached after extensive pre-filing investigations, contentious litigation and discovery, and intensive settlement negotiations overseen by the Honorable Layn R. Phillips (Ret.)—provides comprehensive benefits that address the Settlement Class Members' interests in numerous, complementary ways. The compensation here also compares favorably to other diesel emissions cases, particularly because this settlement was secured without the benefit of a regulatory finding regarding Hino's alleged misconduct.

In this case, Settlement Class Counsel faced the challenges and risks of litigation alone and on a purely contingent basis. As compensation for the effort, time, and money invested to secure this outstanding settlement, Settlement Class Counsel seek reimbursement of $400,000 in costs, and $78,766,666.67 in fees—which represents less than 17.7%[3] of the Settlement's full value. *See, e.g.*, *Carter v. Forjas Taurus, S.A.*, No. 16-15277, 2017 WL 2813844, at *5 (11th Cir. June 29, 2017) (affirming consideration of warranty valuation in settlement and fees approval); Declaration of Brian Fitzpatrick T. Fitzpatrick ("Fitzpatrick Decl.") ¶¶ 12-13, 27. Such a fee award is "presumptively reasonable," *In re Blue Cross Blue Shield Antitrust Litigation MDL 2406*, 85 F.4th 1070, 1100 (11th Cir. 2023),[4] well below average awards in this Circuit, and easily justified on the facts of this case. *See* § III.C; Fitzpatrick Decl. ¶ 27.

Settlement Class Representatives respectfully ask the Court to certify the Settlement Class, grant final approval to the Settlement, and award $400,000 in reasonable costs and $78,766,666.67 in fees to Settlement Class Counsel for their work in securing this significant result.

[3] This percentage is reached by dividing $78,766,666.67 in attorneys' fees into a denominator of $445,500,000 in settlement value. The denominator includes the $237.5 million in cash compensation plus $208 million in quantifiable Extended Warranty benefits as measured by Plaintiffs' automotive warranty valuation expert. *See* Kleckner Decl. § 2(a); § 7(f)(ii)-(iii); Section III.C.1, below.

[4] Internal citations are omitted throughout unless otherwise indicated.

II. Background

The Court is familiar with the history of this litigation, much of which is detailed in Plaintiffs' preliminary approval briefing. *See* ECF 146 at 2-7. In the interest of efficiency, Plaintiffs incorporate that brief by reference and provide the following summary of key points.

A. The Settlement provides excellent benefits to Settlement Class Members.

As discussed above, the proposed Settlement provides substantial and valuable benefits to the Settlement Class. Direct cash payments out of the $237.5 million Settlement Cash Value are set at a floor of $1,500, but assuming the median national class action claims rate of approximately 10%,[5] each Settlement Class Truck with a valid claim would be allocated ***more than $15,000***.[6] Even with an extremely ambitious (and very rarely achieved) projected claims rate of 50%, each Settlement Class Truck would receive more than $3,000, which is comparable to settlements of similar diesel emissions cases that resolved later in their respective lifecycles (and on arguably stronger records), as discussed below.

Additionally, without the need to submit a settlement claim, all Settlement Class Trucks will automatically receive a robust and transferrable Extended Warranty for periods up to eight years from Settlement approval, eight years from the initial warranty expiration, or ten years from the date of first sale. *See* SA ¶¶ 4.2, 4.4, and Ex. B. Leading warranty valuation expert Kirk

[5] Fed. Trade Comm'n Staff Report, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (Sept. 2019), available at (https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf. (FTC's comprehensive study of class actions, identifying the mean and median claims rates of 5% and 10%, respectively).

[6] If more than one Settlement Class Member submits a valid Claim for the same truck, the original owner (who purchased new) will receive 60% of the funds for that truck, and the remaining 40% will be distributed evenly to or among the other valid claimants. The Settlement Administrator retains discretion to adjust the allocation if a Settlement Class Member owned or leased a Settlement Class Truck for less than six months. SA ¶ 4.1.2.

Kleckner values this Extended Warranty at more than $208,000,000. *See* Kleckner Decl., §§ 2(a), 7(f)(i)-(iii). Mr. Kleckner's valuation work is thorough, reliable, and routinely accepted by courts in large automotive class action settlements like this one. *See, e.g.*, *In re Takata Airbags Prods. Liab. Litig.*, No. 15-MD-2599 (S.D. Fla.), ECF 2162 (order granting motion for final approval of BMW settlement, supported by ECF 2033-2, declaration of Kirk Kleckner), ECF 2385, 2256-4 (same for Nissan settlement); ECF 3121 (order denying motion to exclude testimony of Kirk Kleckner on warranty valuation); *In re ZF-TRW Airbag Control Units Prods. Liab. Litig.*, No. 19-cv-2905-JAK-MRW (C.D. Cal.), ECF No. 843 (accepting Mr. Kleckner's warranty valuations).[7]

Finally, Plaintiffs negotiated a commitment from Hino that if a government-mandated or a government-recommended emissions system recall or repair campaign is issued for the Settlement Class Trucks any time in the next three years, the impacted trucks will automatically receive a transferable New Parts Warranty with five additional years of coverage for any parts repaired, replaced, or modified by that recall or repair. SA ¶¶ 4.3, 4.4.[8] This is a valuable prospective benefit to the Settlement Class that the Settlement secures *in addition* to the $445.5 million in quantified benefits described above.

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[7] *See also In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices, & Prods. Liab. Litig.* ("*EcoDiesel*"), No. 17-MD-02777- EMC, 2019 WL 2554232, at *1 (N.D. Cal. May 3, 2019); ECF 561 (order granting motion for final approval of settlement, supported by ECF 491-4, declaration of Kirk Kleckner on warranty valuation); *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 169 (D. Mass. 2015) (accepting Mr. Kleckner's warranty valuations); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10 ML 02151 JVS (FMOx), 2013 WL 12327929, at *9 n.10 (C.D. Cal. July 24, 2013) (finding Mr. Kleckner's warranty valuation to be "both reliable and relevant").

[8] Importantly, excluded from the Released Claims are Settlement Class Members' rights or ability to participate in any future buyback or repurchase of any Settlement Class Truck that any federal or state government entity recommends or orders Hino to buyback or repurchase post-Settlement for reasons relating to the Released Claims. SA ¶ 11.6.

Importantly, this Settlement is non-reversionary. If there are any funds remaining in the Settlement Cash Value after all valid claims are paid, the Settlement requires a second distribution to Settlement Class Members who submitted valid claims, unless it is economically infeasible to do so. Any modest amount remaining thereafter will be directed to relevant *cy pres* recipients, subject to Court approval. SA ¶ 4.6. This ensures that every dollar the Settlement secures will inure to the benefit of the Settlement Class and the interests advanced in this litigation.

B. The Settlement was secured after extensive litigation and discovery.

The valuable Settlement benefits described above were not easily obtained, as evidenced by the intense, adversarial litigation between the parties before they reached settlement.

The consolidated litigation traces back to March 2022, when Hino issued a press release revealing that it had identified "past misconduct" comprising falsification of engine performance in its certification applications for certain engines sold in Japan. Plaintiffs and their experts undertook their own thorough investigation over the course of the next several months to assess whether and how Hino's misconduct in Japan might translate to their U.S. trucks. In those efforts, unlike other emissions cases, Plaintiffs did not have the benefit of a U.S. regulatory citation to provide a roadmap of Hino's U.S. misconduct, or any admission from Hino regarding the U.S. fleet. Plaintiffs' investigation culminated in a detailed Complaint filed in August 2022 alleging that Hino Japan and its U.S. subsidiaries, HMM and HMS, knowingly misrepresented and withheld information that deceived U.S. regulators, Plaintiffs, and the Settlement Class about the true emissions and related performance in the Settlement Class Trucks, causing Plaintiffs to suffer economic losses. *See* ECF 1. In the months and years that followed, Settlement Class Counsel devoted significant resources to the extensive investigation, litigation, and resolution of the complex issues and claims in this case.

As the docket reflects, the Parties litigated this case intensively. On November 7, 2022, the U.S. Hino entities (HMM and HMS) moved to dismiss the Complaint in a joint 40-page brief, raising potentially case-dispositive defenses such as Article III standing and federal preemption under the Clean Air Act. ECF 68. Plaintiffs researched and drafted a 40-page opposition to defend their claims (ECF 79), and HMM and HMS filed a reply (ECF 89). Then, on December 27, 2022, Hino Japan joined in the domestic Defendants' arguments and moved separately to dismiss on jurisdictional grounds (ECF 80). Plaintiffs prepared an opposition to support their jurisdictional theories (ECF 94), and Hino Japan filed a reply (ECF 97).[9] After the briefing completed, Hino continued to file supplemental authorities purportedly supporting dismissal (ECF 106, 124), and Plaintiffs worked quickly to distinguish them. ECF 110, 131. Hino's pleading challenges remain pending before the Court.

Amid all of this, on December 15, 2022, the U.S. Hino entities also moved to stay discovery during the pendency of their pleading challenges. ECF 73. This motion, if successful, would have effectively frozen the litigation for months or more. Plaintiffs strongly opposed these efforts and ultimately prevailed. *See* ECF 81 (opposition brief), 86 (Order denying stay motion). The Parties then waded through months of negotiations on comprehensive confidentiality and ESI protocols to govern the discovery to follow. ECF 95, 111.

Alongside these lengthy and complicated briefing efforts, the Parties also engaged in extensive document discovery. This included the production and review of approximately 750,000 pages of documents and ESI from Hino, many containing technical presentations and data that

[9] Plaintiffs originally brought claims against Toyota Motors Corporation ("Toyota"), the Japanese corporate grandparent of the U.S. Hino entities, and Toyota also moved to dismiss on personal jurisdiction grounds. ECF 78. After Plaintiffs further investigated Toyota's role in the design, development, and testing for the Settlement Class Trucks, and based on related discovery and information exchanged, Plaintiffs voluntarily dismissed Toyota without prejudice. ECF 98.

Hino provided to U.S. regulators in their investigations. Plaintiffs propounded requests for production and interrogatories to the domestic Hino entities, plus jurisdictional discovery to Hino Japan and Toyota. Plaintiffs further sought and obtained relevant materials from third party DWS Fleet Management and the California Air Resources Board ("CARB") totaling an additional 9,000 pages. Settlement Class Representatives also searched for and provided documents and ESI responsive to Hino's numerous production requests, totaling more than a thousand pages, and assisted Settlement Class Counsel to consult their records, draft, and approve detailed responses to Hino's 35+ Interrogatories, later supplemented on two occasions at Hino's request.

The Parties met and conferred extensively regarding this discovery and a variety of other topics, including Hino's ESI disclosures. These discussions culminated in two multi-hour hearings before Magistrate Judge Torres covering a range of disputed issues, many of which the Court decided in Plaintiffs' favor (including, for example, the scope of relevance and the production of regulatory documents Hino had previously withheld). *See*, *e.g.*, ECF 107, 113, 117, 125 (Plaintiffs' agendas and supporting papers for discovery conferences).

As the litigation progressed, the Parties also pursued a simultaneous resolution track. Pursuant to this district's local rules and this Court's order setting a deadline for mediation (ECF 87), the Parties agreed on the Honorable Layn R. Phillips (Ret.) as mediator and scheduled mediation for July 25, 2023. The Parties then prepared extensively for this formal mediation session, including by exchanging multiple rounds of mediation briefing and communicating regularly with Judge Phillips. Those efforts produced a tentative agreement that launched several additional months of robust confirmatory discovery and ultimately resulted in the Settlement Agreement now before the Court.

III. Argument

A. The Court should grant final approval of the Settlement because it is a fair, reasonable, and adequate resolution of this case.

A "court may approve [a settlement agreement] only after a hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2)). Along with the criteria from Rule 23(e), courts in this Circuit also look to the six *Bennett* factors, which overlap with the federal rule.[10] In this process, the Court's "judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett*, 737 F.2d at 986. "Public policy strongly favors the pretrial settlement of class action lawsuits," *In re U.S. Oil & Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992), which "have the well-deserved reputation as being most complex." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005).

At the preliminary approval phase, the Court considered the proposed agreement and concluded that: (1) "the Settlement is sufficiently fair, reasonable, and adequate as to the Settlement Class Members under the relevant considerations to warrant sending notice of the Settlement to the Settlement Class"; (2) it is "the product of arm's length negotiations by the Parties through an experienced mediator"; and (3) it "is sufficiently fair, reasonable, and adequate" to warrant preliminary approval. ECF 148 ("Prelim. Order") at 2-3. These conclusions apply equally now. Because the Settlement satisfies all relevant criteria, the Court should grant final approval.

[10] The *Bennett* factors are: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Gonzalez v. TCR Sports Broad. Holding, LLP*, No. 1:18-CV-20048-DPG, 2019 WL 2249941, at *3-4 (S.D. Fla. May 24, 2019) (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)).

1. Rule 23(e)(2)(A): Settlement Class Representatives and Settlement Class Counsel zealously represented the Settlement Class.

Settlement Class Counsel and the Settlement Class Representatives fought hard to protect the interests of the Settlement Class. These efforts find no better evidence than the outstanding result they achieved in a Settlement worth over $445.5 million.

As the outcome reflects, Settlement Class Counsel showed dedication to investigating, prosecuting, and resolving this action over the course of nearly two years. *See* Fed. R. Civ. P. 23(e)(2)(A). Settlement Class Counsel undertook significant efforts to pursue and refine the Class's claims. *See* § II.B. They doggedly pursued discovery in dozens of hours of meet and confers about Hino's responses to technical, detailed document requests, and strategically (and successfully) sought the Court's intervention on multiple key issues. Settlement Class Counsel defended against two separate pleading challenges (from the foreign and domestic entities), a process that fleshed out the strengths and vulnerabilities of Plaintiffs' claims. Even after the initial mediation session, Settlement Class Counsel continued their discovery efforts, including through examination of key Hino personnel in Tokyo, Japan. This record meant that Settlement Class Counsel were well-positioned to evaluate the case and to negotiate a fair and reasonable Settlement. *See Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *11 (S.D. Fla. Jan. 31, 2008) ("Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation" where counsel obtained "thousands" of pages of documentary discovery). They have done so.

The Settlement Class Representatives are also actively engaged. Each preserved and collected documents and electronic information related to their claims, worked with counsel to produce them and to prepare responses to detailed Interrogatories, actively monitored the litigation, and worked with counsel to evaluate the terms of the proposed Settlement Agreement.

Settlement Class Counsel Decl. ¶ 23. Each Representative has also expressed their continued willingness to protect the Settlement Class until the Settlement is approved and its administration completed. *Id*. Their interests are aligned and coextensive with those of absent Settlement Class Members, as is the relief they stand to receive. *Id*. ¶ 22. The Settlement Class was and remains well represented.

2. Rule 23(e)(2)(B): The Settlement was reached after extensive, complex litigation as well as informed, arm's-length negotiations (*Bennett* factors four and six).[11]

As the Court observed at the preliminary approval stage, the Settlement "is the product of arm's length negotiations by the Parties through an experienced mediator, former United States District Judge Layn R. Phillips (Ret.) and comes after adequate investigation of the facts and legal issues." Prelim. Order at 3. The arm's length discussions overseen by Judge Phillips and the developed factual record unquestionably support approval here. *See* Rule 23(e)(2)(B); *see also Gonzalez*, 2019 WL 2249941, at *4 (settlement reached after "arm's length" negotiations before a retired U.S. District Court Judge found to be non-collusive).[12]

Settlement negotiations continued after the parties reached an agreement in principle at the mediation. This reflects the technical nature of the negotiations and the parties' efforts to support

[11] *Bennett* factors four and six are: (4) the complexity, expense and duration of litigation and (6) the stage of proceedings at which the settlement was achieved. *Gonzalez*, 2019 WL 2249941, at *3-4.

[12] *See also* Fed. R. Civ. P. 23(e)(2)(B) advisory committee's Note to 2018 amendment ("[T]he involvement of a neutral or court-affiliated mediator . . . may bear on whether [negotiations] were conducted in a manner that would protect and further the class interests."); *Poertner v. Gillette Co.*, 618 F. App'x 624, 630-31 (11th Cir. 2015) (oversight of an experienced mediator supported approval of class action settlement); *Ferron v. Kraft Heinz Foods Co.*, No. 20-CV-62136-RAR, 2021 WL 2940240, at *1 (S.D. Fla. July 13, 2021) (approval where attorneys "proficiently identified the strengths and weaknesses of the issues . . . prior to reaching a settlement through a mediation process overseen by an experienced and well-respected mediator"); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-CV-60649, 2015 WL 5449813, at *11 (S.D. Fla. Sept. 14, 2015) (similar).

them through a parallel investigatory process and information exchanges in confirmatory discovery. This included production of an important set of materials from Hino Japan, which had not previously engaged in discovery due to pending jurisdictional challenges. Settlement Class Counsel Decl. ¶ 14. As part of this process, Settlement Class Counsel traveled to Tokyo, Japan—where the Settlement Class Trucks' engines were developed and tested—to meet with and question key Hino Japan personnel and representatives directly about the alleged misconduct and Hino's internal investigations. *Id.* These investigatory efforts supplemented the already significant record of more than 750,000 pages of documents and ESI produced from Hino in litigation.

This robust exchange of information and documents confirms that the Parties were well-informed and reached the Settlement in a procedurally fair manner. William B. Rubenstein et al., 4 *Newberg on Class Actions* § 13:49 (5th ed. 2012); *see also Jairam v. Colourpop Cosms., LLC*, No. 19-CV-62438-RAR, 2020 WL 5848620, at *6 (S.D. Fla. Oct. 1, 2020) ("formal discovery with Defendant and non-parties" and plaintiffs showed that the parties "were well-positioned to confidently evaluate the strengths and weaknesses of the claims"); *Kukorinis v. Walmart, Inc.*, No. 19-20592-CV, 2021 WL 8892890, at *7 (S.D. Fla. Sept. 20, 2021) (the parties fully briefed a dispositive motion to dismiss on the merits, engaged in informal discovery, and exchanged additional information during the mediation process, which provided class counsel sufficient information to analyze the strengths and weaknesses of the case).[13]

[13] *See also Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV, 2014 WL 5419507, at *2 (S.D. Fla. Oct. 24, 2014) (no evidence of collusion where settlement was reached "after the exchange and production of considerable discovery"); *Fruitstone v. Spartan Race, Inc.*, No. 20-cv-20836, 2021 WL 2012362, at *8 (S.D. Fla. May 20, 2021) (finding no fraud or collusion where negotiations were "informed by extensive discovery obtained by Class Counsel"); *Janicijevic v. Classica Cruise Operator, Ltd.*, No. 20-cv-23223, 2021 WL 2012366, at *5 (S.D. Fla. May 20, 2021) (investigation and review of information provided by defendants prepared counsel for well-informed settlement negotiations); *Gevaerts v. TD Bank, N.A.*, No. 1:14-cv-20744-RLR, 2015 WL

Finally, further demonstrating the lack of collusion, the Settlement is non-reversionary, meaning that *none* of the value obtained for the Settlement Class will revert to Hino if unclaimed.

3. Rule 23(e)(2)(C): The substantial relief from the Settlement is fair, reasonable, and adequate (*Bennett* factors two and three).[14]

This Court already found that "the relief provided to the Settlement Class is adequate taking into account, *inter alia*, the costs, risks, and delay of trial and appeal and the proposed method of distributing compensation to the Settlement Class." Prelim. Order at 3. Nothing has changed to alter that conclusion. This non-reversionary Settlement remains an excellent outcome for the Settlement Class, especially taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of the proposed distribution plan and claims program; and (iii) the fair terms of the anticipated requested award of attorney's fees. *See* Fed. R. Civ. P. 23(e)(2)(C).

As Plaintiffs explained in their preliminary approval motion, the Settlement benefits are likely to match, and even exceed, compensation in settlements of similar diesel emissions cases that resolved later in their respective lifecycles (and on arguably stronger records). *See*, *e.g.*, *EcoDiesel*, 2019 WL 2554232, at *1 (final settlement approval providing a maximum of $3,075 per vehicle *after* surviving motions to dismiss and after the U.S. regulators issued a formal notice of violation); *In re Mercedes-Benz Emissions Litig.*, No. 2:16-cv-881 (KM) (ESK), 2021 WL 7833193, at *3 (D.N.J. Aug. 2, 2021) (settled with the manufacturer for $3,290 per vehicle *after* surviving motions to dismiss). Here, unlike in *EcoDiesel* and *Mercedes*, the U.S. regulators have not weighed in, and Defendants' multiple motions to dismiss remain unresolved. This provides

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6751061, at *7 (S.D. Fla. Nov. 5, 2015) (similar); *Cotter v. Checkers Drive-In Rests., Inc*., No. 8:19-cv-1386-VMC-CPT, 2021 WL 3773414, at *9 (M.D. Fla. Aug. 25, 2021) (similar).

[14] *Bennett* factors two and three are: (2) the range of possible recovery and (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable. *Gonzalez*, 2019 WL 2249941, at *3-4.

strong support for the result here. *See Schulte v. Fifth Third Bank*, No. 09-cv-6655, 2010 WL 8816289, at *3 (N.D. Ill. Sept. 10, 2010) ("[A] comparison of settlements in similar cases is relevant to whether a settlement is fair, adequate and reasonable.").

Apart from the recovery in similar settlements, the result here also compares favorably to Settlement Class Members' potential damages estimates. Although the parties had not progressed to the expert report stage in this case, in *EcoDiesel*, the plaintiffs presented expert testimony on an overpayment "premium" theory that measured the benefit-of-the-bargain losses incurred when plaintiffs paid for over-polluting diesel vehicles. *See* Decl. of Colin Weir, *EcoDiesel*, ECF 327-4, ¶¶ 47-51. The quantified value was about $4,500 per vehicle. *Id.*[15]

These damages from *EcoDiesel* inform the scope of likely damages in this case, too, given the clear similarities in the defendants' alleged misconduct and the resulting injuries to Settlement Class Members.[16] The individual Settlement recoveries here are therefore likely to be a significant percentage of (if not 100%) of Plaintiffs' potential trial recovery, as approximated by the *EcoDiesel* analysis.[17] This strongly supports the proposed resolution. Indeed, a negotiated resolution can be fair, reasonable, and adequate even where it recovers a much lower proportion of available

[15] Experts in *EcoDiesel* also proposed a separate survey-based conjoint study for damages calculations, and performed an illustrative survey to demonstrate that methodology at the class certification stage. Plaintiffs' experts' damages analysis here would also likely have involved a conjoint survey at a later stage, which would be tailored to the medium and heavy duty truck sector, and the distinct facts of this case.

[16] Plaintiffs' damages are the difference in value between the Settlement Class Trucks they reasonably expected and those they actually received. A precise calculation of that difference would ultimately require expert testimony at a later stage of the litigation. At this stage, based on Plaintiffs' Counsel's experience in *EcoDiesel* and other similar automotive cases, the *EcoDiesel* damages amounts serve as apt comparators for potential recovery here, even if not identical.

[17] As explained above, a rare 50% claims rate would yield per-truck compensation of $3,000, and increase up to $15,000 (multiples of the recovery in *EcoDiesel*) at a more typical 10% participation rate.

damages. *See* Fitzpatrick Decl. ¶ 22 (considering the *EcoDiesel* damages model and concluding that even based on a conservative, cash-only valuation without considering the warranty, the Settlement here would still represent an "excellent recovery" of at least "half of the class's possible damages"); *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd* 899 F.2d 21 (11th Cir. 1990) ("A settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery."); *Thorpe v. Walter Inv. Mgmt. Corp*., No. 14-cv-20880-UU, 2016 WL 10518902, at *10 (S.D. Fla. Oct. 17, 2016) (describing as "excellent" and an "outstanding result" a recovery of 5.5% of the class's maximum damages and 10% of the class's most likely damages).

a. The Settlement mitigates the risks, expenses, and delays the Settlement Class would face in pressing through to trial (Rule 23(e)(2)(C)(i) and *Bennett* factor one).[18]

As noted, the Settlement benefits described above are even more impressive given the inherent uncertainties of continuing this litigation. *See Gonzalez*, 2019 WL 2249941, at *4 (*Bennett* factor one, likelihood of success). Numerous, significant hurdles remained.

For example, while Plaintiffs' Complaint states cognizable claims, Plaintiffs are mindful of the various, potentially case-dispositive defenses raised in Hino's motion to dismiss, including challenges over whether the Clean Air Act preempts all of Plaintiffs' claims[19] and claims that this Court does not have personal jurisdiction over Hino Japan. Plaintiffs submit that the better-

[18] *Bennett* factor one considers the "likelihood of success at trial." *Gonzalez*, 2019 WL 2249941, at *3-4.

[19] Various federal courts outside of this District have adopted similar preemption arguments and dismissed the plaintiffs' claims. *See In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851, 866 (6th Cir. 2023); *In re Duramax Diesel Litig.*, No. 1:17-cv-11661, 2023 WL 4493595, at *8 (E.D. Mich. July 12, 2023); *Counts v. Gen. Motors, LLC*, No. 1:16-cv-12541, 2023 WL 4494336, at *8 (E.D. Mich. July 12, 2023); *Hurst v. BMW of N. Am. LLC*, No. 22-3928 (SDW)(AME), 2023 WL 4760442, at *7 (D.N.J. July 26, 2023).

reasoned authority rejects these arguments, including for the reasons articulated in Plaintiffs' opposition briefs (*see* ECF 79 at 12-21; ECF 94 at 2-14). Nonetheless, Hino's arguments presented material risk. Even if Plaintiffs' claims survived the pleading stage, moreover, Plaintiffs faced several years more of litigation and additional procedural hurdles (class certification, summary judgment, *Daubert*, etc.), any of which could have significantly weakened or even ended Plaintiffs' case. Even if they passed through that gauntlet, Plaintiffs would then face the uncertainties of trial, in which "the range of possibility spans from a finding of non-liability to a varying range of monetary . . . relief." *See Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 693 (S.D. Fla. 2014).

In other words, in reaching this Settlement, Plaintiffs avoided years of additional, costly, and risky litigation in exchange for immediate and significant cash payments and warranties. This principled compromise inured to the clear benefit of the Settlement Class, and this factor strongly favors final approval. Fed. R. Civ. P. 23(e)(2)(C)(i); *Gonzalez*, 2019 WL 2249941, at *5 (settlement approval supported in part by the "potential for expensive and time-consuming litigation absent a settlement"); *Saccoccio*, 297 F.R.D. at 694 (approving class action settlement where "[t]he parties have already expended significant energy and money litigating this case and propounding discovery, and, absent settlement, would have had to expend significant resources in litigating a protracted trial and appeal"); *Lipuma*, 406 F. Supp. 2d at 1323 ("[I]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.").

b. The Settlement distributes compensation through a streamlined and flexible claims process (Rule 23(e)(2)(C)(ii)).

When it comes to distribution, it bears repeating that the Settlement is ***non-reversionary***, meaning that ***no unused funds will revert or be returned to Hino***. This is the most effective way to ensure that Settlement Cash Benefits will go to the Settlement Class.

The Settlement Claims process builds from successes in other automotive settlements and is designed to be straightforward, efficient, and user-friendly. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Settlement Class Members need only submit a short claim form online or by mail (at their choosing), and may be asked to submit basic supporting documentation, *e.g.*, proof of ownership or lease, only where such information is necessary to verify the claim. Settlement Class Members who submit a valid claim will be paid after the Effective Date and will be able to select streamlined e-payments if desired. Moreover, all eligible Settlement Class Trucks will automatically receive the robust Extended Warranty protections without the need for any claim at all. The effort required and safeguards incorporated in this process are proportional to the compensation available and necessary to preserve the integrity of the Claims Program.

c. Settlement Class Counsel seek reasonable attorneys' fees and expenses (Rule 23(e)(2)(C)(ii)).

Settlement Class Counsel's reasonable fee request is detailed below (§ III.C), but in this context it is worth reiterating that "terms of . . . [the] proposed award of attorneys' fees" are fair and reasonable, particularly in light of the substantial recovery for the Settlement Class. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii); *see also* Prelim. Order at 3 ("Settlement Class Counsel's proposed request for attorneys' fees . . . appears reasonable."). Further support comes from the Declaration of Professor Brian T. Fitzpatrick, a law professor at Vanderbilt University who is one of the nation's leading experts on attorneys' fees in class action settlements.

4. Rule 23(e)(2)(D): The Settlement treats Settlement Class Members equitably relative to each other.

The Settlement uses transparent and objective criteria to equitably apportion Settlement Class Member payments and ensures that claims administration is feasible, cost effective, and streamlined for Settlement Class Members. *See* Fed. R. Civ. P. 23(e)(2)(D).

Cash payments for all Settlement Class Trucks with valid claims will be divided evenly (per capita). SA ¶ 4.1. If more than one valid claim is received for the same Settlement Class Truck, the original owner who purchased new will receive 60% of the allocated funds, and the 40% remainder will be distributed evenly to or among the other valid claimant(s). This allocation equitably accounts for the trucks' greater value at their original sale, such that the damages incurred as a relative percentage of vehicle value are also highest for new purchasers. *See In re Blue Cross*, 85 F.4th at 1093 ("[T]he text of the amended rule requires equity, not equality, and treating class members equitably does not necessarily mean treating them all equally."). It also reflects the reality that original purchasers face fewer legal hurdles and arguably present stronger claims for relief. *See id.* at 1093-94 (affirming approval of allocation formula that took into account the "comparative strengths of each class's … claims"); *In re Volkswagen "Clean Diesel" Mktg.*, No. 15-md-02672-CRB, 2022 WL 17730381, at *8 (N.D. Cal. Nov. 9, 2022) (concluding allocation formula was equitable where differing payment amounts "roughly correspond[ed] to the strength of [class members'] claims and the likelihood of damages at trial").

5. Settlement Class Members are engaged and showing support (*Bennett* factor five).

Following preliminary approval, the Parties worked with respected class notice provider and settlement administrator JND to roll out the Court-approved Notice Program, which Plaintiffs' preliminary approval motion described at length. *See* ECF 146 at 30-32. While the Notice Program remains underway, it has been a success thus far and will reach "virtually all Class Members." *See* Declaration of Jennifer Keough ("Keough Decl.") ¶ 37. Plaintiffs will provide the Court with an update on the Notice Plan and the reaction of the Settlement Class in their Reply Memoranda, which they will file in advance of the April 1, 2024, Fairness hearing. *See* Prelim. Order at 12.

In the meantime, Settlement Class Members initial reactions to the Settlement have been positive. With the claims program just opening, Class Members have already submitted nearly 2,500 claims, and the Settlement Administrator is in the process of assisting Settlement Class Members with large vehicle fleets to submit claims for many thousands of additional Settlement Class Trucks. Keough Decl. ¶ 35. In contrast, no Settlement Class Member has yet objected or opted out. *Id.* ¶¶ 32, 34. Together, these are encouraging signs of the Settlement Class's early engagement that Plaintiffs anticipate will yield substantial participation. Although it is early going, this "important factor" also supports final approval. *Saccoccio*, 297 F.R.D. at 694.

* * *

The Settlement is a fair, adequate, and reasonable resolution of the Settlement Class Members' claims, and the Court should grant final approval.

B. The Settlement Class satisfies all requirements of Rule 23 and should be certified.

After considering the relevant Rule 23(a) and 23(b)(3) requirements at the preliminary approval phase, the Court concluded "the Settlement Class, as defined above, meets the requirements for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(3)." Prelim. Order at 3. This remains true, and the Settlement Class should be finally certified for settlement purposes.

1. Rule 23(a)(1): Numerosity is satisfied.

The Settlement Class, which consists of owners and lessees of approximately 104,000 Settlement Class Trucks throughout the United States, unquestionably meets Rule 23(a)(1)'s numerosity requirement. *See* Prelim. Order at 4 (finding "the Settlement Class Members are sufficiently numerous"); *Kilgo v. Bowman Transp.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity

satisfied where plaintiffs identified at least 31 class members "from a wide geographical area"). Numerosity remains satisfied.

2. Rule 23(a)(2): Commonality is satisfied.

"[C]ommonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc*., 568 F.3d 1350, 1355 (11th Cir. 2009); *see also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001) (same). Courts routinely find commonality where, as here, the class claims arise from a defendant's uniform course of fraudulent conduct. *See, e.g.*, *EcoDiesel*, 2019 WL 536661, at *6; *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig. ("VW Clean Diesel")*, No. 2672 CRB (JSC), 2016 WL 4010049, at *10 (N.D. Cal. July 29, 2016) ("Without class certification, individual Class Members would be forced to separately litigate the same issues of law and fact which arise from Volkswagen's use of the [emissions cheating device] and Volkswagen's alleged common course of conduct."); *In re Takata Airbag Prods. Liab. Litig*., MDL No. 2599, 2017 WL 11680208, at *3 (S.D. Fla. Sept. 19, 2017); *In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 673-74 (S.D. Fla. 2011).

Like those cases, the Settlement Class's claims here are rooted in common questions that center on Hino's alleged fraud about emissions tests and performance in the Settlement Class Trucks, and related representations to regulators and consumers, which are common to all Settlement Class Members. *See VW Clean Diesel*, 2016 WL 4010049, at *10; *EcoDiesel*, 2019 WL 536661, at *6. These common questions will, in turn, generate common answers "apt to drive the resolution of the litigation" for the Settlement Class as a whole. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Conversely, "[w]ithout class certification, individual Class Members would be forced to separately litigate the same issues of law and fact which arise from Volkswagen's use of the [emissions cheating device] and Volkswagen's alleged common course of

conduct." *VW Clean Diesel,* 2016 WL 4010049, at *10. Commonality remains satisfied. *See* Prelim. Order at 4.

3. Rule 23(a)(3): Typicality is satisfied.

Under Rule 23(a)(3), "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Plaintiffs' claims are coextensive with those of the absent Settlement Class Members, and Rule 23(a)(3)'s typicality requirement is satisfied because Plaintiffs and absent Settlement Class Members were subjected to the same misconduct by Hino, claim to have suffered the same injuries in paying more for their Settlement Class Trucks than they otherwise would have, and will equally benefit from the relief provided by the Settlement. *See* Prelim. Order at 4 (finding "proposed Settlement Class Representatives' claims are typical of those of the Settlement Class Members"); *see also See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the class members").

4. Rule 23(a)(4): Adequacy is satisfied.

Rule 23(a)(4)'s adequacy requirement is met where, as here, "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This inquiry looks to: (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. *Fabricant*, 202 F.R.D. at 314. The answers remain no and yes, respectively. *See* Prelim. Order at 4 (finding adequacy satisfied for both the Settlement Class Representatives and Settlement Class Counsel at preliminary approval).

5. Rule 23(b)(3): Predominance requirements are met.

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454 (2016); *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (predominance means the impact of common issues is "*more substantial than the impact of individualized issues* in resolving the claim or claims of each class member"). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Tyson Foods*, 577 U.S. at 453. At its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *reversed on other grounds*, 569 U.S. 1015 (2013).

Common questions predominate here because they substantially outweigh issues individual to each Settlement Class Member. Hino's common course of alleged conduct—misconduct in diesel engine emissions tests and resulting representations to regulators and consumers—is central to Plaintiffs' claims. Common, unifying questions include, for example: Hino's practices and procedures for emissions tests and reporting results; what Hino knew about misconduct in its emissions tests, and when it learned that information; whether representations about the Settlement Class Trucks' emissions performance were misleading to reasonable customers; and whether Hino's actions were fraudulent. *VW Clean Diesel*, 2016 WL 4010049, at *12. In sum, Hino allegedly "perpetrated the same fraud in the same manner against all Class Members." *Id.* Predominance remains satisfied. *See* Prelim. Order at 4.

6. Rule 23(b)(3): Class treatment is superior to other available methods for the resolution of this case.

Class treatment here is far superior to the litigation of tens of thousands of individual cases. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998); *see also Wolin v. Jaguar Land Rover N.Am., LLC*, 617 F.3d 1168, 1176 (9th Cir. 2010) ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication."). The maximum damages sought by each Settlement Class Member (in the thousands of dollars), while significant to individuals, are relatively small in comparison to the substantial cost of prosecuting each one's individual claims, especially given the complex and technical nature of the claims at issue.

Class resolution is also superior from an efficiency and resource perspective. Indeed, "[i]f Class Members were to bring individual lawsuits against [Defendants], each Member would be required to prove the same wrongful conduct to establish liability and thus would offer the same evidence." *VW Clean Diesel*, 2016 WL 4010049, at *12. With a Settlement Class associated with over 104,000 Settlement Class Trucks, "there is the potential for just as many lawsuits with the possibility of inconsistent rulings and results." *Id.* "Thus, classwide resolution of their claims is clearly favored over other means of adjudication, and the proposed Settlement resolves Class Members' claims at once." *Id.* Superiority is met here, and Rule 23(e)(1)(B)(ii) is satisfied.

* * *

The Settlement Class meets all relevant requirements of Rule 23(a) and (b). Plaintiffs thus request that the Court confirm the certification of the Settlement Class and the appointment of the Settlement Class Representatives and Settlement Class Counsel.

C. Settlement Class Counsel's requested fee is fair, reasonable and appropriate.

As discussed at length in this brief, this is a strong settlement. Each Settlement Class Truck with a valid claim will receive thousands of dollars in compensation as well as robust extended warranty protections that, if past cases are any guide, are every bit as valuable to Settlement Class Members as the direct cash payments. In the aggregate, the cash benefit totals $237.5 million, and the extended warranty is valued by Mr. Kleckner at over $208 million, which brings the total value of the Settlement to $445,500,000.00. For their work in securing this exceptional result, Settlement Class Counsel seek $78,716,666.67 in fees. The resulting fee percentage (17.67%) is well below average, "presumptively reasonable" under Eleventh Circuit precedent, and easily justified under the facts of this case. The same conclusion follows under even the most conservative valuation of the Settlement. "No matter how you slice it," Settlement Class Counsel's requested fee is fair, reasonable, and appropriate. Fitzpatrick Decl. ¶ 21

1. Properly calculated, the requested fee is "presumptively reasonable."

When a class settlement establishes a calculable monetary benefit, or common fund, attorneys' fees should be awarded based on a percentage of the benefit obtained. *See In re Blue Cross*, 85 F.4th at 1100 ("In a common fund settlement, attorneys' fees 'shall be based upon a reasonable percentage of the fund established for the benefit of the class.'") (quoting *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991)). In calculating the total value of the common fund, courts consider both the cash compensation and, if reasonably quantified, the value of non-monetary benefits. *See, e.g.*, *Carter*, 2017 WL 2813844, at *5 (affirming district court's reliance on the value of a class settlement's enhanced warranty, as estimated by a valuation

expert, to award class counsel attorneys' fees, and recognizing that the enhanced warranty "is itself a significant tangible benefit"); *Ferron*, 2021 WL 2940240, at *19, *22 ("In determining the value of the settlement fund, courts consider the value of any nonmonetary relief in addition to the monetary relief.").[20]

Both monetary and quantifiable non-monetary benefits are relevant here. As noted, in addition to the cash compensation, the Settlement secures significant extended warranty protections for all Settlement Class Trucks. Those benefits were carefully scrutinized by Kirk Kleckner, a seasoned expert in the automotive industry whose extended warranty valuations have been relied upon by numerous courts in similar litigation. Kleckner Decl. ¶ 3(d) (listing relevant cases) & Ex. A (C.V.). Applying his experience to this case, Mr. Kleckner "determined that the value of the Settlement's Warranty Extension exceeds $208,000,000." *Id.* ¶ 2(a). Notably, this analysis does *not* include any valuation of certain covered diagnostic tests, replacement parts (*e.g.*, the OBD sensors), or the New Parts Warranty that would automatically take effect in the event of an emissions-related recall—meaning that Mr. Kleckner's evaluation is, if anything, a conservative

[20] *See also Poertner*, 618 F. App'x at 629-30 (rejecting objector's argument that overlooked "substantial nonmonetary benefit" and therefore constituted a "flawed valuation of the settlement"); *Wilson v. EverBank*, No. 14-CIV-22264, 2016 WL 457011, at *14 (S.D. Fla. Feb. 3, 2016) (measuring attorneys' fees request against total settlement value including injunctive relief); *In re: Checking Acct. Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319391, at *13 (S.D. Fla. Aug. 5, 2013) ("[C]ourts often include the value of [non-monetary] relief in the common fund and award class counsel a percentage of the total fund.") (citing *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003)); *Lipuma v. Am. Express Co.*, No. 04-20314-CIV, 2007 WL 9701671, at *5 (S.D. Fla. Sept. 14, 2007) ("[W]hen determining the total value of a class action settlement for purposes of calculating the attorney's fee award, courts usually consider both the compensatory relief and the economic value of any [non-monetary] relief obtained for the class."); *Perez v. Asurion Corp.*, No. 06-20734-CIV, 2007 WL 2591180, at *4 (S.D. Fla. Aug. 8, 2007) (same); Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 3.13(b) (2010) ("[A] percentage of the fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement.").

quantification of the Settlement's non-monetary benefits. *Id.* ¶ 2(b)-(c); S.A. § 4.3. Thus, for the purpose of evaluating Settlement Class Counsel's fee percentage, the value of the Settlement is at least $445,500,000.00 ($237.5 million cash + $208 million Extended Warranty). Of that, Settlement Class Counsel request $78,716,666.67.

This request is reasonable under any metric. It is just 17.67% of the combined value of the Settlement—far below the mean and median percentages awarded in this Circuit. *See, e.g.*, Fitzpatrick Decl. ¶ 19 (The "average and median awards by district courts in the Eleventh Circuit using the percentage method were 28.1% and 30%, respectively."); *id.* (noting that another well-respected empirical study found a "mean and median of 30% and 33% in the Eleventh Circuit since 2009"). Indeed, just last year, the Eleventh Circuit reiterated that "[i]f a fee award falls between 20 and 25 percent, it is ***presumptively reasonable***," even for a settlement worth billions. *In re Blue Cross*, 85 F.4th at 1100 (emphasis added) (affirming district court's fee award of approximately $626,649,000—or 23.47% of $2.67 billion common fund).[21] At 17.67%, the presumption is even stronger, and nothing in this case rebuts it. The Settlement followed vigorous litigation, resulted from arm's-length negotiations with an experienced mediator, and, most

[21] As Professor Fitzpatrick explains, while some courts in other circuits award lower percentages of bigger recoveries, there is "no evidence" that such a trend has taken hold in the Eleventh Circuit. Fitzpatrick Decl. ¶ 21. "To the contrary," in this Circuit, "25% is supposed to be the 'benchmark' in all cases," including, as *Blue Cross Blue Shield* instructs, in cases worth billions. *Id.* Even in other circuits, attorneys' fee percentages at or near one-third are often approved even for settlements, like this one, worth hundred(s) of millions of dollars or more. *See, e.g.*, *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204 (S.D. Fla. 2006) (31.33% attorneys' fee award in a $1 billion+ settlement); *In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *4 (D. Kan. July 29, 2016) (awarding attorneys' fees of one-third of $974 million settlement); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1115 (D. Kan. 2018) (awarding attorneys' fees of one-third of a $1.5B settlement and collecting authority on "similar fees in megafund cases"); *In re Vitamins Antitrust Litig.*, No. 99-197(TFH), 2001 WL 34312839, at *9 (D.D.C. July 16, 2001) (33.7% awarded of a $365 million settlement).

importantly, provides an excellent outcome for the Settlement Class. This can and should end the inquiry. *See id.* (requiring analysis of the *Johnson* factors only for fee requests exceeding 25%).

2. Even under a more conservative analysis, the requested fee is commonplace and justified by the facts of this case.

Even if the court were to disregard the Extended Warranty valuation (which it should not do), counsel's request would still be fair and well justified under the facts of this case. Measured solely against the cash component, the fees are still only about 33%, which—depending on the dataset—is right at, or only slightly above, the median award in this Circuit. Fitzpatrick Decl. ¶ 19. Thus, as this Court has previously observed, "district courts in the Eleventh Circuit routinely approve fee awards of one-third of the common settlement fund." *Gonzalez*, 2019 WL 2249941, at *6. Indeed, it is a "customary fee for class actions" in this Circuit. *Belin v. Health Ins. Innovations, Inc*., No. 19-CV-61430, 2022 WL 1126006, at *6 (S.D. Fla. Mar. 10, 2022); *see also e.g.*, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294-95 (11th Cir. 1999) (affirming district court fee award of 33 1/3%).[22] This percentage is particularly reasonable in this case given the very significant warranty protections that—if not quantified—at least serve as a "relevant circumstance," or plus factor, that justifies an above-average award. *See, e.g.*, *Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CIV, 2017 WL 9472860, at *10 (S.D. Fla. Nov. 20, 2017)

[22] *See also Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Inc*., No. 15-22782-Civ, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017) (finding 35% fee award reasonable, noting "Courts within this Circuit have routinely awarded attorneys' fees of 33 percent or more of the gross settlement fund"); *Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 WL 5290155, at *5 (S.D. Fla. Sept. 26, 2012), report and recommendation adopted, No. 03-22778-CIV, 2012 WL 5289628 (S.D. Fla. Oct. 25, 2012) (collecting cases and concluding "[t]he average percentage award in the Eleventh Circuit" is "roughly one-third"); *Hanley v. Tampa Bay Sports & Ent. LLC*, No. 8:19-CV-00550-CEH-CPT, 2020 WL 2517766, at *6 (M.D. Fla. Apr. 23, 2020) (one-third is a "benchmark" for attorneys' fees in the Eleventh Circuit); *In re Checking Account Overdraft Litig.*, No. 1:10-CV-22190-JLK, 2020 WL 4586398, at *16 (S.D. Fla. Aug. 10, 2020) (approving fee award of 35% of fund plus expenses).

(awarding 33.4% in fees where "plaintiff submitted no evidence regarding an estimated value" of non-monetary relief) (quoting *Staton*, 327 F.3d at 974)).

That is why Professor Fitzpatrick opined that "it does not matter whether the extended warranties secured by this settlement are included in the settlement valuation or not: if they are included, class counsel is seeking a below-benchmark fee percentage that is easy to justify; if they are not included, class counsel should be awarded an above-benchmark fee percentage to compensate them for the significant non-monetary relief." Fitzpatrick Decl. ¶ 26. Either way, Settlement Class Counsel's request is reasonable and should be approved.

3. The relevant *Johnson* factors confirm the requested fees are reasonable.

Because Settlement Class Counsel's request falls below the range of presumptive reasonableness in this Circuit, the Court need not analyze the twelve *Johnson* factors.[23] *In re Blue Cross*, 85 F.4th at 1100 (courts apply the *Johnson* factors for fee requests that *exceed* 25% of the settlement value). Nevertheless, should the Court choose to consider them, each of the relevant factors demonstrates that what is "presumed" reasonable is actually so on the record here.

[23] The twelve factors are: "(1) the time and labor required; (2) the difficulty of the issues; (3) the skill required; (4) the preclusion of other employment by the attorney because [they] accepted the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242-43 (11th Cir. 2011) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (11th Cir. 2011)). Plaintiffs address all but factors 7 and 11 here, as those two factors are not pertinent.

a. Settlement Class Counsel invested substantial time and labor (factor 1) to secure an outstanding result for the Settlement Class (factor 8).

Settlement Class Counsel began to investigate the alleged emissions misconduct in the Settlement Class Trucks in March 2022. Settlement Class Counsel Decl. ¶ 5. From that point on, they devoted whatever resources were necessary to develop and successfully prosecute Plaintiffs' claims. In all, they spent many thousands of hours throughout fifteen focused months of litigation, and nearly two years with the time to finalize and obtain approval for the Settlement. This was a tremendous effort on multiple fronts, and Settlement Class Counsel staffed the case appropriately to keep the pressure on. Significant time was spent, for example, to:

a. conduct a thorough pre-filing investigation that culminated in a detailed complaint with technical allegations of emissions misconduct and involvement from each of the defendant Hino entities (ECF 1);

b. protect the Complaint from dual pleading challenges from the U.S. Hino entities and Hino Japan (ECF 68, 79, 80, 89, 94, 97, 124, 131);

c. defeat Hino's efforts to stay discovery and hinder Plaintiffs' investigation (ECF 73, 81, 86);

d. serve 67 document requests to the U.S. Hino defendants, plus sets of jurisdictional discovery to the Japanese Hino and Toyota entities (Settlement Class Counsel Decl. ¶ 7);

e. draft numerous discovery dispute letters on key issues, precipitating dozens of hours of video conferences on Hino's discovery responses (*Id.* ¶ 8);

f. present on discovery impasses in two multi-hour hearings before Magistrate Judge Torres, many of which the Court decided in Plaintiffs' favor (ECF 107, 113, 117, 125);

g. analyze documents and ESI produced from U.S. Hino entities, including over 750,000 pages of documents plus substantial additional materials produced from Hino Japan in confirmatory discovery (Class Counsel Decl. ¶ 9-10);

h. subpoena more than 9,000 pages of relevant documents from third parties and regulators (*Id*. ¶ 9);

i. interview Hino Japan personnel and representatives about Hino's alleged misconduct and investigations in Tokyo, Japan, where much of the alleged misconduct occurred (*Id*. ¶ 14);

j. advise named Plaintiffs in preparing responses to Hino's 35+ interrogatories and producing more than a thousand pages of documents in named Plaintiff discovery (*Id.* ¶ 11); and

k. negotiate a complex resolution that provides significant and complementary relief for all Settlement Class Members (*Id.* ¶¶ 13-15).

By any measure, these and other tasks required a substantial resource investment. Settlement Class Counsel's unwavering commitment to provide the time and labor necessary to advance this litigation weighs in favor of the fee request. *See Jairam*, 2020 WL 5848620, at *8 (time and labor were "extensive" and supported fee award where counsel litigated for approximately one year and engaged in formal and third party discovery); *see also Taylor v. Serv. Corp. Int'l*, No. 20-CV-60709-RAR, 2023 WL 2346295, at *7 (S.D. Fla. Mar. 3, 2023) (fees awarded for "considerable time and effort" spent investigating "both before and after the initiation" of the case, and reviewing "an extensive amount of discovery"); *In re Checking*, 2020 WL 4586398, at *18-19 (finding that "considerable" time and labor spent and "excellent results" supported requested fees, further analysis of lodestar was "unnecessary" in light of "the inefficiencies that it creates").

The net result of Settlement Class Counsel's time and labor—over ***$445.5 million dollars*** in benefits obtained for the Settlement Class, plus valuable commitments to further warranty coverage in the event of a future recall—should speak for itself. Likewise at the individual level, Settlement Class Member recovery will likely exceed the compensation obtained in the similar *EcoDiesel* and *Mercedes* MDL settlements, despite the additional challenges faced here. § III.C.2.b, *infra*; *see also*. ECF 146 at 18-19. This outcome is "far better than most," (Fitzpatrick Decl. ¶ 22) and, thus, the "result obtained" factor also weighs heavily in favor of the requested fees. *See Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1255 (S.D. Fla. 2016) (that counsel obtained a "cash common fund" was "especially significant" as a "substantial, tangible, and real

benefit for the class"); *Millstein v. Holtz*, No. 21-CV-61179-RAR, 2022 WL 18024840, at *11 (S.D. Fla. Dec. 30, 2022) (same, where the fund enabled all class members to "recover a portion of their losses").

b. Novel and difficult issues (factor 2) made the case undesirable for other plaintiffs' counsel (factor 10).

This case shares some aspects of past diesel emissions litigations (*see*, *e.g.*, Complaint ¶ 1, 3), but it also presented unique and significant challenges. Settlement Class Counsel rose to meet those challenges, and did so with creativity, tenacity, and steadfast resolve.

Factually, this case was about complicated diesel engine technology, emissions systems, and the evolving regulatory frameworks that applied to them over time. Defendants included three corporate entities (one based in Japan) that played various roles in the manufacture, testing, or sale of the Settlement Class Trucks. Much of the relevant conduct occurred in Hino's emissions laboratories in Japan, where many witnesses were situated. Investigating allegations of years-long misconduct in a foreign laboratory required dogged persistence. To do so, Settlement Class Counsel worked closely with multiple experts to understand the intersection of the emissions regimes in Japan and the United States, and the testing protocols in each country, to inform their document discovery strategy. Plaintiffs then faced difficulties to process Japanese language documents, for which they hired attorneys fluent in Japanese to ensure accurate analysis. Settlement Class Counsel Decl. ¶ 6. These "difficult discovery and liability issues" show that this case "is not '[like] most lawsuits" and support the requested fees. *Waters v. Cook's Pest Control, Inc.*, No. 2:07-cv-00394-LSC, 2012 WL 2923542, at *19 (N.D. Ala. July 17, 2012) (awarding 35% of the settlement fund).

Moreover, unlike many other emissions cases, there was no formal Notice of Violation from the government to guide Settlement Class Counsel's investigation or boost the plausibility of

Plaintiffs' allegations. This made the case even more difficult and less desirable, a reality borne out in the relatively lean group of Plaintiffs' counsel willing to take it on. Emissions cases typically attract large cohorts of firms willing to litigate in the wake of a regulatory finding. For example, more than *thirty* firms applied for a 10-seat PSC in *EcoDiesel*, a case of comparable scale (approximately 100,000 vehicles). *EcoDiesel*, No. 17-md-2777 (N.D. Cal.) at ECF 173. And in *Volkswagen* "*Clean Diesel*," lead counsel and a 21 member PSC were selected from a crowded field of *150* applications. *VW Clean Diesel*, No. 15-md-2672 (N.D. Cal.) at ECF 1084. In this case, the three Settlement Class Counsel firms were the only ones who stepped up to the challenge and could not count on a broad group to share the burdens of complex litigation. They "should be rewarded for taking on a case from which other law firms shrunk." *In re Checking*, 2020 WL 4586398, at *19; *see also Morgan*, 301 F. Supp. 3d at 1257 ("No other law firm has taken the risk to bring this action and tackle these difficult issues.").

Legally, the threat of dispositive preemption arguments also made this a challenging case, particularly so as recent decisions affirmed dismissal of emissions cheating cases on similar grounds. *See, e.g.*, *In re Ford*, 65 F.4th at 866; *see also* Fitzpatrick Decl. ¶ 23 (characterizing preemption as a "serious risk"). Plaintiffs believed they had strong arguments to defeat preemption, but the commercial nature of the Settlement Class Trucks presented new twists. Arguably missing here were the ubiquitous "clean" or "eco" branding and similar consumer-facing representations that supported deceptive marketing claims in other emissions cases. This meant that a well-worn path around preemption through distinct consumer protection violations in misleading marketing was less apparent here. The Settlement Class Trucks' commercial nature also raised unique defenses to statutory consumer protection claims, which defendants argued were limited to

"consumers" and products used for "personal, family, or household purposes." *See, e.g.*, ECF 68 at 32.

The challenges did not end there. Looking ahead, Settlement Class Counsel would have to obtain litigation certification of a proposed class across a range of model years and engine types, implicating at least three emissions cheating tactics. Even then, all of the other inherent summary judgment, *Daubert*, trial, and appellate risks posed in complex class litigation awaited. "Class Counsel confronted these issues" from the outset and "nonetheless accepted the case and the risks that accompanied it," which provides still further support for the fees sought. *In re Checking*, 2020 WL 4586398, at *20.

c. With their significant experience in complex class cases (factor 9), Settlement Class Counsel had the skill this case required (factor 3).

Settlement Class Counsel have years of experience in complex class action litigation and a strong track record in other automotive class actions. This includes serving as court-appointed plaintiffs' counsel in the *Volkswagen "Clean Diesel"* MDL, the *EcoDiesel* MDL, and the *Takata Airbag* MDL, as just a few examples of many.[24] Settlement Class Counsel Decl. ¶ 3.

Settlement Class Counsel's considerable experience benefitted the Settlement Class here. Among other things, it facilitated the early retention of technical experts in diesel engines and the emissions regulations. Because they knew where to look and what to look for, Settlement Class Counsel were able to serve targeted discovery right out of the gate and were ready to seek Court intervention proactively when Hino resisted. *Id*. ¶¶ 7-8, 10. Ultimately, this led to favorable rulings

[24] *See* firm resumes for Lieff Cabraser, Baron & Budd, and Podhurst Orseck: https://www.lieffcabraser.com/pdf/Lieff_Cabraser_Firm_Resume.pdf; https://baronandbudd.com/wp-content/uploads/FirmResume10-11-23.pdf; https://www.podhurst.com/landmark-cases/.

for Plaintiffs including on the scope of relevance and on the production of a key tranche of regulatory materials. *Id* ¶ 8. Had Settlement Class Counsel's pursuit of these materials been less targeted or less zealous from the start, the litigation would have undoubtedly drawn out much further, at minimum delaying the meaningful relief now available to the Settlement Class.

This all goes to show that Settlement Class Counsel's qualifications and expertise were valuable assets in this case—a factor that supports their requested fees. *See Millstein*, 2022 WL 18024840, at *13 (approving fee request in part because "Class Counsel . . . ha[d] extensive experience and expertise prosecuting complex class action[s]"); *see also Morgan*, 301 F. Supp. 3d at 1256 (counsel's "skill, sophistication, and creativity" from experience in consumer class actions meant an "excellent settlement" was reached "[d]espite the case's flaws").

Apart from Settlement Class Counsel's own background, Hino's counsel were experienced and highly respected litigators themselves. Their skilled advocacy "required Class Counsel to maintain the highest quality of representation to reach the point of settlement," *Millstein*, 2022 WL 18024840, at *13. This too tips in favor of the fee request here. *See Taylor*, 2023 WL 2346295, at *7 (success in facing "extremely capable counsel" from "a prominent national law firm" supported fee award); *Walco Invs., Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) ("Given the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results.").

d. Settlement Class Counsel brought this action purely on a contingent basis (factor 6), and their work precluded other valuable efforts (factor 4).

Because of the contingent fee structure here, "[f]rom the time Class Counsel filed suit, there existed a real possibility that they would achieve no recovery for the Class and, hence, no compensation." *Millstein*, 2022 WL 18024840, at *12. Settlement Class Counsel thus "took a significant risk in prosecuting this action." *Morgan*, 301 F. Supp. 3d at 1253. Compensation for

attorneys who assume contingent representation should reflect these risks. *Id*. (collecting cases). Without such a "bonus . . . very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money" required. *Id*. For these reasons, "[a] contingency fee arrangement often justifies an increase in the award of attorney's fees." *Millstein*, 2022 WL 18024840, at *11; *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1335 (S.D. Fla. 2001) (same).

This case is no exception. Settlement Class Counsel took on this litigation against well-resourced corporate defendants, represented by a top-tier firm. They devoted nearly two years and many thousands of attorney hours to the investigation, litigation, and settlement of Plaintiffs' claims, and invested approximately $400,000 in reasonable litigation expenses—all with no guarantee of reimbursement.

The resources spent on this case also detracted from Settlement Class Counsel's time and resources available for others. Settlement Class Counsel Decl. ¶ 25. As is necessary to prosecute any complex case, "Class Counsel put off other matters, outsourced work, and declined cases they would otherwise have pursued but for the efforts toward this case. Although Class Counsel successfully resolved this part of the litigation . . . [that] success was by no means assured." *Millstein*, 2022 WL 18024840, at *12. The contingent fee and preclusion of other work also justify the reasonable fee sought.

e. The requested fees are in line with customary and recent awards in similar cases (factors 5 and 12).

As explained above and in the accompanying declaration of Professor Fitzpatrick, the fee percentage requested here is below average, presumptively reasonable, and, even under the most conservative calculation, still within the customary range. *See* § III.C.1-2, supra; *see also e.g.*, *Gonzalez*, 2019 WL 2249941, at *6 (fee awards of "one-third of the common settlement fund" are

"routinely approve[d]"); Fitzpatrick Decl. ¶¶ 15-27. *Johnson* factors five and twelve are also satisfied.

4. Settlement Class Counsel's request for reimbursement of litigation expenses should be approved.

Settlement Class Counsel are "entitled to be reimbursed from the class fund for the reasonable expenses incurred" in pursuing this action. *Behrens*, 118 F.R.D. at 549; *see also* Fed. R. Civ. P. 23(h). This includes expenses that are reasonable, necessary, directly related to the litigation, and normally charged to a fee-paying client. *See, e.g.*, *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 1:04-cv-3066, 2008 WL 11234103, at *6 (N.D. Ga. Mar. 4, 2008) (approving $2.4 million for reimbursement of litigation expenses); *Swift v. BancorpSouth Bank*, No. 1:10-cv-00090, 2016 WL 11529613, at *20 (N.D. Fla. July 15, 2016) (approving application for reimbursement of costs that "were necessarily incurred in furtherance of the litigation of the Action and the Settlement"); *Ressler v. Jacobson*, 149 F.R.D. 651, 657 (M.D. Fla. 1992) (approving requested expenses as reasonable and necessary).

Here, Settlement Class Counsel seek $400,000 in litigation expenses, which includes $368,279.44 they already expended to advance the common benefit, as well as a $31,720.56 that Settlement Class Counsel are responsibly reserving to cover the anticipated costs associated with the future on-the-ground administration and Settlement implementation efforts. Settlement Class Counsel Decl. ¶ 27. At 0.09% of the total Settlement value, these costs are significantly less than the average costs awarded in class action settlements. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248, 267 (2010) (mean and median of 2.8% and 1.7% before 2002 and 2.7% and 1.7% thereafter); Theodore Eisenberg, Geoffrey P. Miller, and Roy Germano, *Attorneys' Fees in Class Action*

Settlements: 2009-2013, 92 N.Y.U. L. Rev. 937, 963 (2017) (mean and median of 3.9% and 1.7% since 2009).

More importantly, these costs are commensurate with the stakes, complexity, and intensity of this litigation. This includes, for example, approximately (1) $140,207.45 to employ technical experts on emissions system functionality, foreign and domestic emissions regulations, and testing processes. These experts worked hand-in-hand with Settlement Class Counsel from the beginning of the case, and their participation was a key factor in enabling counsel to advance the litigation effectively and efficiently. It also includes (2) $189,232.90 for reasonable travel expenses and mediation that were critical to the resolution of this case. These costs were incurred for, among other things, a full-day mediation in New York with an experienced mediator and former federal judge, Layn R. Phillips and his team; a critical settlement and confirmatory discovery trip to meet with Hino personnel in Tokyo; and travel to and from multiple discovery hearings in Miami. An additional (3) $16,930.50 was spent on translation services for the hundreds of thousands of pages produced in Japanese; and (4) $17,784.43 more was spent on legal research services and the electronic database necessary to host the significant volume of produced documents. The remaining costs include (5) $1,253.94 for mailings, messengers, and service of process; and (6) $2,820.22 for telephone, printing, transcripts, filing fees, and other miscellaneous charges. Settlement Class Counsel Decl. ¶ 28.

No doubt, this was a technical case, and it was expensive to prosecute. But, as other courts have recognized, "Class Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent." *Gutierrez v. Amplify Energy Corp*., No. 8:21-CV-01628-DOC(JDEx), 2023 WL 3071198, at *7 (C.D. Cal. Apr. 24, 2023) (quoting *Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31,

2014)). This is true, and Settlement Class Counsel expended only that which they believed was necessary to advance the interests of the Settlement Class. The requested costs are reasonable and should be reimbursed.

IV. Conclusion

Settlement Class Representatives and Settlement Class Counsel respectfully request that the Court certify the Settlement Class and appoint Settlement Class Counsel and Settlement Class Representatives; grant final approval to the Settlement; and award $78,766,666.67 in attorneys' fees and $400,000 in reasonable expenses. Plaintiffs will provide a proposed order with their reply brief.

Dated: January 22, 2024

Respectfully submitted,

/s/ Peter Prieto

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2024, a true and correct copy of the foregoing was furnished by electronic filing with the Clerk of the Court via CM/ECF, which will send notice of electronic filing to all counsel of record.

/s/Peter Prieto
Peter Prieto

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No.: 1:22-cv-22483-Gayles/Torres

EXPRESS FREIGHT INTERNATIONAL, EFI EXPORT & TRADING CORP., MARDERS, and REDLANDS OFFICE CLEANING SOLUTIONS, LLC, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

HINO MOTORS, LTD., TOYOTA MOTOR CORPORATION, HINO MOTORS MANUFACTURING U.S.A., INC., and HINO MOTORS SALES U.S.A., INC.,

Defendants.

_____/

DECLARATION OF SETTLEMENT CLASS COUNSEL IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL AND AWARD OF ATTORNEYS' FEES AND COSTS

We, Roland Tellis, David Stellings, and Peter Prieto declare as follows:

1. Peter Prieto is an attorney licensed to practice before this Court and all courts of the State of Florida, and Roland Tellis and David Stellings are admitted to practice before this Court *pro hac vice*. We are partners in the law firms of Podhurst Orseck, P.A., Baron & Budd, P.C. and Lieff Cabraser Heimann & Bernstein, LLP, respectively. Mr. Tellis, Mr. Stellings, and Mr. Prieto are Settlement Class Counsel for Plaintiffs in the above-captioned matter.

2. The undersigned have personal knowledge of the following facts, and if called as witnesses, could and would testify competently to them.

3. The undersigned each have decades of experience litigating complex class action cases. This includes serving as court-appointed plaintiffs' counsel in multidistrict litigation involving emissions cheating claims and automotive defects, such as the *Volkswagen "Clean Diesel"* MDL (N.D. Cal.), the *FCA EcoDiesel* MDL (N.D. Cal.), and the *Takata Airbags* MDL (S.D. FL.).[1]

4. We make this declaration in support of Plaintiffs' Motion for Final Settlement Approval and Award of Attorneys' Fees and Costs.

Plaintiffs' Investigation, Litigation, and Discovery Efforts

5. On March 4, 2022, Hino revealed that it had identified "past misconduct" that included falsification of engine performance in its tests and applications for certification of certain engines sold in in Japan.[2] After the release of that report and over the next several months, Plaintiffs and their experts investigated whether the misconduct described in the public admissions from Japan impacted Plaintiffs' trucks and other Hino diesel trucks in the United States. Following that extensive pre-filing investigation, and in light of its results, Plaintiffs filed this case on August 5, 2022.

6. Investigating and prosecuting this complex litigation required significant work, effort, and expense. This included robust Rule 12 motion practice, wherein Hino raised potentially case dispositive issues, and Plaintiffs researched and drafted thorough oppositions. After briefing on the motions completed, the parties continued those efforts as Hino continued to file supplemental authorities purportedly supporting dismissal, and Plaintiffs worked quickly to distinguish and oppose them. Those motions remain pending before the Court. Hino also moved to stay discovery during the pendency of its pleading challenges. Plaintiffs strongly opposed, and the Court ultimately denied Hino's motion.

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[1] *See* firm resumes for Lieff Cabraser, Baron & Budd, and Podhurst Orseck: https://www.lieffcabraser.com/pdf/Lieff_Cabraser_Firm_Resume.pdf; https://baronandbudd.com/wp-content/uploads/FirmResume10-11-23.pdf; https://www.podhurst.com/landmark-cases/.

[2] *See* Misconduct concerning Engine Certification – Press Release (March 4, 2022), https://www.hino-global.com/corp/news/assets/1f350e73535af44c2a8c90c2f916eae2.pdf

7. With Hino's stay motion resolved, the parties met and conferred extensively on the terms of the ESI and protective orders, and the terms of a proposed inspection protocol for Plaintiffs' trucks. Plaintiffs served Hino with three sets of substantive document requests, comprised of 67 individual requests, along with additional sets of jurisdictional discovery to the Japanese Hino and Toyota entities.

8. The parties hotly contested the scope and relevance of discovery topics implicated in Plaintiffs' requests. This led to dozens of hours of video meet and confer conferences and the exchange of numerous lengthy and complex discovery dispute letters. These discussions culminated in two multi-hour hearings before Magistrate Judge Torres covering a range of disputed issues, many of which the Court decided in Plaintiffs' favor (including, for example, the scope of relevance and the production of regulatory documents Hino had previously withheld).

9. Hino ultimately produced to Plaintiffs over 750,000 pages of responsive documents and ESI. This included a key corpus of materials that Hino also produced to the U.S. regulators in their investigations. Plaintiffs further sought and obtained relevant materials from third party DWS Fleet Management, which performed testing and analysis for Hino trucks in the U.S., and through a Freedom of Information Act request to the California Air Resources Board ("CARB"), totaling an additional 9,000 pages.

10. To accurately analyze these materials, Plaintiffs had to grasp complicated diesel engine emissions technologies and the evolving regulatory framework in both the U.S. and Japan throughout the relevant time period. To do so, Plaintiffs retained technical experts in diesel engines and emissions regulations and carefully crafted discovery requests to obtain important data files and test documents. Many of the responsive documents that Hino produced included Japanese language materials because the Hino engines sold in the U.S. were developed and tested in Japan. To ensure meaningful and accurate analysis of these documents, Plaintiffs hired attorneys fluent in Japanese to analyze them.

11. Each of the named Plaintiffs responded to Hino's 60+ document requests and conducted thorough searches for documents and responsive ESI. In total, Plaintiffs produced

over a thousand pages of responsive documents. Each Plaintiff also provided detailed responses to Hino's 35+ Interrogatories, and supplemented those responses twice at Hino's request.

12. This extensive factual record—and the many thousands of hours spent developing it—informed Plaintiffs' understanding of the strengths and weaknesses of their claims, and of Hino's defenses.

Settlement Negotiations and the Confirmatory Discovery Process

13. Pursuant to the district's local rules and this Court's order setting a deadline for mediation (ECF 87), the parties conferred and agreed on the Honorable Layn R. Phillips (Ret.) as a mediator, and a July 25, 2023, mediation date. The parties prepared extensively for this mediation and communicated regularly with Judge Phillips in the weeks and months beforehand. At the close of an extended day of arm's length negotiations in the mediation, the parties reached a tentative agreement on the basic terms of a settlement.

14. Several months of further discovery and negotiations followed from that initial agreement. As part of confirmatory discovery, Plaintiffs' counsel traveled to Tokyo, Japan to meet in person with personnel and representatives from Hino Motors Ltd. ("Hino Japan") to obtain further information about the alleged misconduct in Plaintiffs' Complaint and Hino's public admissions and internal investigations. Hino Japan also produced substantial documents in confirmatory discovery, which it previously did not produce in the litigation due to its pending jurisdictional challenges. Plaintiffs analyzed these materials to evaluate the strength of their allegations and vet the parties' settlement positions.

15. The parties engaged in good faith, arm's-length settlement negotiations, as evidenced by the duration of the settlement discussions, the thoroughness of the information exchanged (both before and after the Settlement was reached), oversight from the mediator, and the excellent compensation secured for the Settlement Class.

Settlement Benefits and Anticipated Recovery

16. The Settlement benefits are discussed at length in Plaintiffs' preliminary approval papers and notice documents (ECF 146), as well as in the accompanying brief. In sum, the

Settlement secures a non-reversionary Settlement Cash Value of $237,500,000, a robust Extended Warranty covering nearly two dozen parts and systems for the Settlement Class Trucks' engine and emissions systems, valued by a leading automotive warranty valuation expert at $208,000,000 in additional economic value to Class members. Further, the settlement secures a commitment from Hino to provide a New Parts Warranty if, within three years of the Settlement, Hino engages in a government-mandated or a government-recommended emissions system recall or repair.

17. From the Settlement Cash Value, the Settlement will deliver substantial cash payments to any Settlement Class Member who submits a valid claim. At the close of the claims period, the Settlement Cash Value (after deducting Court-approved attorneys' fees, expenses, and notice and administration costs) will be divided on a per-capita basis among all Settlement Class Trucks for which a valid claim is received. If more than one Settlement Class Member submits a valid claim for the same truck, the original owner (who purchased new) will receive 60% of the funds for that truck, and the remaining 40% will be distributed evenly to or among the other valid claimants.[3]

18. Assuming the median national class action claims rate of approximately 10%,[4] each Settlement Class Truck would be allocated more than $15,000. With a conservative (and rarely achieved) projected claims rate of 50%, each Settlement Class Truck would receive more than $3,000, a recovery comparable to settlements of similar diesel emissions cases that resolved later in their respective litigation lifecycles and on arguably stronger records. *See In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. 17-MD-02777-EMC, 2019 WL 2554232, at *1 (N.D. Cal. May 3, 2019) (*FCA EcoDiesel* settlement providing $3,075

[3] The Settlement Administrator retains discretion to adjust the allocation if a Settlement Class Member owned or leased a Settlement Class Truck for less than six months.

[4] Federal Trade Commission Staff Report, Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns (Sep. 2019), available at https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf (FTC's comprehensive study of class actions, identifying the mean and median claims rates of 5% and 10%, respectively).

capped payment per vehicle); *In re Mercedes-Benz Emissions Litigation*, No. 216 CV 881 KMES(k), 2021 WL 7833193, at *3 (D.N.J. Aug. 2, 2021) (*Mercedes BlueTec* settlement with manufacturer providing $3,290 per vehicle).

19. If there are any funds remaining in the Settlement Cash Value after all valid, complete, and timely claims are paid, the parties anticipate a redistribution of the remaining funds to Settlement Class Members unless and until it is economically infeasible to do so. Finally, subject to Court approval, any final balance will be directed *cy pres* to environmental remediation efforts. This ensures that all of the money secured by the Settlement will inure to the benefit of the Settlement Class and the interests advanced in this litigation.

20. Importantly, Settlement Class Members' rights or ability to participate in any future truck buyback or repurchase program that any federal or state government entity recommends or orders post-Settlement are not released in the Settlement. The timing and likelihood of such a program remain unknown, but the Settlement does not affect Settlement Class Members' right to participate in a future program of this kind and receive additional compensation, should it materialize.

21. In our opinion, based on decades of experience in plaintiffs' complex class action litigation and prior successful resolutions of numerous similar litigations at this scale, this is an excellent result for the Settlement Class. It is particularly so given the stage of the proceedings and the material risks faced by the Class Members if the litigation were to continue through trial and appeal.

The Settlement Class Representatives

22. Plaintiffs, who all seek to be Settlement Class Representatives, have no interests in conflict with the Settlement Class Members.

23. Plaintiffs have actively participated in this litigation from its inception through the date of the Settlement. Each of them also worked with counsel to evaluate the terms of the Settlement Agreement, and has endorsed the Settlement's terms. Each Plaintiff has expressed its

willingness to continue to vigorously protect Settlement Class Members' interests in overseeing the Settlement administration and through any appeals, as they have throughout this litigation.

Class Counsel's Motion for Attorneys' Fees and Expenses

24. Class Counsel represented Plaintiffs and the Settlement Class Members on a purely contingent basis in this case. As such, Class Counsel risked the real possibility that they would receive no compensation for their work or reimbursement for the reasonable expenses they incurred to advance Plaintiffs' claims.

25. Notwithstanding those material risks, and as demonstrated above, Class Counsel dedicated substantial time and labor to this litigation over the course of nearly two years. Our firms' staff and resources are not limitless, and thus the decision to pursue this risky, complex litigation necessarily limited our ability to take on other cases. The net effect of the people, time, and resources we dedicated to this case thus reduced the capacity of our firms to take on other profitable work.

26. As compensation for the effort, time, and money invested to secure the Settlement before the Court, Class Counsel seek $78,766,666.67 in fees. This represents less than 17.7% of the Settlement's calculated economic value.

27. Class Counsel also seek reimbursement of $400,000 in litigation expenses. This includes $368,279.44 in costs already incurred for the benefit of the Class, as well as $31,720.56 in projected costs that Class Counsel reasonably reserves to cover expenses associated with the on-the-ground enforcement and assistance efforts this Settlement will require—including, for example, attending the fairness hearing and protecting the Settlement until after all potential appeals are resolved.

28. The litigation expenses incurred for the benefit of the Class include, for example, approximately (1) $140,207.45 to employ technical experts on emissions system functionality, foreign and domestic emissions regulations and testing processes. These experts worked hand-in-hand with Class Counsel from the beginning of the case, and their participation was a key factor in enabling counsel to advance the litigation effectively and efficiently. It also includes (2)

$189,232.90 for reasonable travel expenses and mediation that were critical to the resolution of this case. These costs were incurred for, among other things, a full-day mediation in New York with very experienced mediator and former federal judge, Layn R. Phillips and his team; a critical settlement and confirmatory discovery trip to meet with Hino personnel in Tokyo; and travel to and from multiple discovery hearings in Miami. An additional (3) $16,930.50 was spent on translation services for the hundreds of thousands of pages produced in Japanese, and (4) $17,784.43 more was spent on legal research services and the electronic database necessary to host the significant volume of produced documents. The remaining costs include (5) $1,253.94 for mailings, messengers, and service; and (6) $2,820.22 for telephone, printing, transcripts, filing fees, and other miscellaneous charges.

29. For these reasons and others discussed in the accompanying brief, we respectfully submit that the attorneys' fees, costs, and expenses requested in the accompanying motion are reasonable.

* * *

30. Based on our significant experience in complex automotive defect and emissions cases like this one, and our work in this case day in and day out for nearly two years, we are confident in the result obtained for Class Members and the process used to reach it.

31. For the foregoing reasons, and those outlined in Plaintiffs' Motion, Plaintiffs seek final approval of the Settlement as well as an award of $78,766,666.67 million in fees and $400,000 in costs.

The undersigned declare under penalty of perjury under the laws of the State of Florida that the foregoing is true and correct. Executed this 22 day of January 2024 at Miami, Florida by Peter Prieto, Encino, California by Roland Tellis, and New York, New York by David Stellings.

/s/ David Stellings
David Stellings

/s/ Roland Tellis
Roland Tellis

/s/ Peter Prieto
Peter Prieto

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Express Freight Int'l, et al. v. Hino Motors, Ltd., et al.

No. 1:22-cv-22483

DECLARATION OF BRIAN T. FITZPATRICK

I. Background and qualifications

1. I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1. I speak only for myself and not for Vanderbilt.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the NYU Journal of Law & Business, the Fordham Law Review, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institute on

Class Actions in 2011, 2015, 2016, 2017, 2019, and 2023, as well as the ABA Annual Meeting in 2012 and 2022. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to membership in the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is still the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See id*. at 812-13. As such, not only is my study based on an unbiased sample of settlements, but the number of settlements included in my study is several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 54 from the Eleventh Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts.[1] I will draw upon this study in this Declaration and I attach it as Exhibit 2.

[1] *See, e.g.*, *In re Stericycle Sec. Litig.*, 35 F.4th 555, 561 (7th Cir. 2022) (relying on article to assess fees); *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (same); *In re Ranbaxy Generic Drug Application Antitrust Litig.*, 2022 WL 4329646, at *5 (D. Mass., Sep. 19, 2022) (same); *de la Cruz v. Manhattan Parking Group*, 2022 WL 3155399, at *4 (S.D.N.Y., Aug. 8, 2022) (same); *Kukorinis v. Walmart*, 2021 WL 8892812,

4. In addition to my empirical works, I have also published many papers on what law-and-economics can tell us about how to create the best incentives for attorneys and others in class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Ford. L. Rev. (2021) (hereinafter "Fiduciary Judge"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "Class Action

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at *4 (S.D.Fla., Sep. 21, 2021) (same); *Kuhn v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *12-13 (M.D. Fla. Mar. 30, 2021) (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2020 WL 6891417, at *3 (S.D.N.Y. Nov. 24, 2020) (same); *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171, at *10 (N.D. Ind. Sept. 18, 2020) (same); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 WL 1786159, at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, No. CV 11-10230-MLW, 2020 WL 949885, 2020 WL 949885, at *52 (D. Mass. Feb. 27, 2020), *appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp.*, No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455 (LGS), 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, No. 15–3509, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F.Supp.3d 167, 172 (D. Mass. 2014) (same); *Tennille v. W. Union Co.*, No. 09–cv–00938–JLK–KMT, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, No. 11–1546, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, No. 2:07–CV 208, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, No. 10 C 816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

Lawyers"). Much of this work is found in a book published in 2019 by the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS. The thesis of the book is that a so-called "private attorney general" is superior to the public attorney general in enforcing the rules that free markets need in order to operate effectively, and that courts should appropriately incentivize class action lawyers to encourage this private attorney general behavior. I will also draw upon this work in this Declaration.

5. I have been asked by class counsel to opine on whether the attorneys' fees they have requested here are reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel and I have attached a list of these documents in Exhibit 3. As I explain, based on the empirical studies and research on economic incentives, I believe the request here is reasonable.

II. Case background

6. The plaintiffs here are individuals and businesses that owned or leased vehicles manufactured by the defendants. They allege that the defendants violated various state consumer protection laws by selling vehicles with manipulated and misrepresented emissions controls. The complaint was filed in August 2022 on behalf of a putative class, and, while numerous motions to dismiss have been pending, the parties engaged in significant discovery, including production and review of hundreds of thousands of pages of documents—many of which were in Japanese—and preparation of experts. The parties have now reached a class-wide settlement. On October 30, 2023, the court certified a settlement class and preliminarily approved the settlement. The parties have now moved for final approval and class counsel have moved for an award of fees and expenses.

7. The settlement class includes, with minor exceptions, "[a]ll persons or entities that purchased . . . or leased" various vehicles "through the date of the Preliminary Approval Order." Settlement Agreement ¶ 2.4. Pursuant to the settlement agreement, the classes will release the defendants from "any and all Claims" that, among other things, relate "in any way" to the "certification testing, fuel economy, emissions, or OBD monitors." *Id*. at ¶ 2.27. In exchange, the defendants will pay the class $237.5 million in cash to be distributed to class members who file valid claims; none of this money reverts back to the defendants. *See id.* at ¶¶ 2.34, 4.1 4.6. In addition, the defendants will provide all class members with extended warranties on relevant engine systems and parts—valued by a warranty expert at $208 million—as well as an additional new parts warranty if the government requires or recommends a recall in the next three years. *See id.* at ¶¶ 4.2, 4.3.

8. Class counsel are now moving for an award of fees equal to $78.77 million. As I explain below, it is my opinion that the request is reasonable in light of the empirical studies and research on economic incentives in class action litigation.

III. Assessment of the reasonableness of the request for attorneys' fees

9. When a class action reaches settlement or judgment and no fee shifting statute is triggered and the defendant has not agreed to pay class counsel's fees, class counsel is paid by the class members themselves pursuant to the common law of unjust enrichment. This is sometimes called the "common fund" or "common benefit" doctrine. It requires the court to decide how much of their class action proceeds it is fair to ask class members to pay to class counsel.

10. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under

this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.* Over time, however, the lodestar approach fell out of favor in common fund class actions. It did so largely for two reasons. First, courts came to dislike the lodestar method because it was difficult to calculate the lodestar; courts had to review voluminous time records and the like. Second—and more importantly—courts came to dislike the lodestar method because it did not align the interests of class counsel with the interests of the class; class counsel's recovery did not depend on how much the class recovered, but, rather, on how many hours could be spent on the case. *See id.* at 2051-52.

11. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is entirely or almost entirely injunctive in nature. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of settlements). The other large-scale academic study of class action fees, authored over time by Geoff Miller and the late Ted Eisenberg, agrees with my findings. *See* Theodore Eisenberg et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) ("Eisenberg-Miller 2017") (finding lodestar method used less than 7% of the time since 2009); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 267 (2010) ("Eisenberg-Miller 2010") (finding lodestar method used only 13.6% of the time before 2002 and less than 10% of the time thereafter and before 2009).

12. The more common method of calculating attorneys' fees today is known as the "percentage" method. Under this approach, courts select a percentage of the settlement fund that

they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage approach has become the preferred method for awarding fees to class counsel in common fund cases precisely because it corrects the deficiencies of the lodestar method: it is less cumbersome to calculate, and, more importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052. This is why private parties—including sophisticated corporations—that hire lawyers on contingency almost always use the percentage method over the lodestar method. *See, e.g.,* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012); Herbert M. Kritzer, RISKS, REPUTATIONS, AND REWARDS 39-40 (1998).

13. Reflecting this trend, the Eleventh Circuit held in 1991 that district courts in this Circuit should no longer use the lodestar method in common fund cases, and, instead, should use the percentage method. *See Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991**)** ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund . . . ."). The Eleventh Circuit recently reaffirmed this approach. *See In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, 85 F.4th 1070, 1100 (11th Cir. 2023) ("In a common fund settlement, attorneys' fees '*shall* be based upon a reasonable percentage of the fund established for the benefit of the class.'" (emphasis added)). I will therefore assume that the court will use the percentage method here.

14. Under the percentage method, courts must 1) calculate the value of the benefits conferred by the litigation and then 2) select a percentage of that value to award to counsel.

15. When calculating the value of the benefits, most courts include any benefits conferred by the litigation, whether cash relief, non-cash relief, attorneys' fees and expenses, or

administrative expenses. Although some of these things do not go directly to the class, they facilitate compensation to the class (e.g., notice and administration expenses), provide future savings to the class, or deter defendants from future misconduct by making defendants pay more when they cause harm. Thus, in my opinion, it is appropriate to include them all in the denominator of the percentage method. *See also* Principles of the Law of Aggregate Litigation, *supra*, § 3.13(b) ("[A] percentage of the fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement."); *Lipuma v. Am. Express Co.*, No. 04-20314-CIV, 2007 WL 9701671, at *5 (S.D. Fla. Sept. 14, 2007) ("[W]hen determining the total value of a class action settlement for purposes of calculating the attorney's fee award, courts usually consider both the compensatory relief and the economic value of any [non-monetary] relief obtained for the class."); *Perez v. Asurion Corp.*, No. 06-20734-CIV, 2007 WL 2591180, at *4 (S.D. Fla. Aug. 8, 2007) (same).

16. When selecting the percentage, courts usually examine a number of factors. *See* Fitzpatrick, *Empirical Study, supra*, at 832. In the Eleventh Circuit, courts use 25% as the "'bench mark' percentage fee award" and then adjust it upward or downward "in accordance with the individual circumstances of each case." *Camden I*, 946 F.2d 768, 775. Although "[t]he factors which will impact upon the appropriate percentage . . . in any particular case will undoubtedly vary," the Eleventh Circuit has identified sixteen factors that it has said may be "appropriate[]" or "pertinent" to consider. *Id.* These factors include "[1] the time required to reach a settlement, [2] whether there are any substantial objections . . ., [3] any non-monetary benefits conferred upon the class . . ., and [4] the economics involved in prosecuting a class action," *id.*, as well as the twelve factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974): "[5] the time and labor required; [6] the novelty and difficulty of the questions involved; [7] the

skill requisite to perform the legal service properly; [8] the preclusion of other employment by the attorney due to acceptance of the case; [9] the customary fee; [10] whether the fee is fixed or contingent; [11] time limitations imposed by the client or the circumstances; [12] the amount involved and the results obtained; [13] the experience, reputation, and ability of the attorneys; [14] the 'undesirability' of the case; [15] the nature and length of the professional relationship with the client; [and] [16] awards in similar cases." *Camden I*, 946 F.2d at 772 n.3.

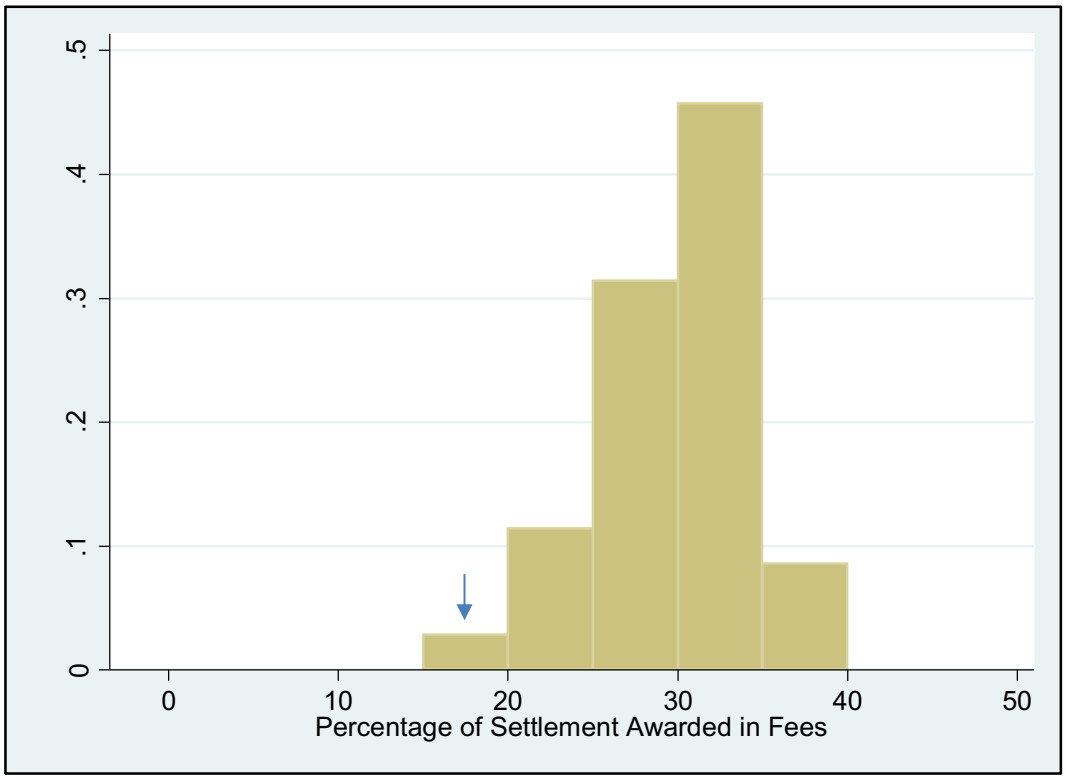
17. Let me begin with the valuation of the settlement benefits. The defendants will pay $237.5 million in cash to the class; none of that money can revert back to them. In addition, the defendants have agreed to extend the warranties of all of the vehicles covered by the settlement. According to class counsel's expert, these extensions are worth $208 million, which would bring the total value of the settlement to $445.5 million. I will include the warranty extensions in the valuation of the settlement, but, in my opinion, it does not matter whether the extensions are quantified and included or not. As I explain, either way, the fee request here is reasonable in light of the empirical studies of class action fees and in light of the research on the economic incentives in class action litigation.

18. Let me turn now to the percentage. Class counsel have requested $78.77 million in fees. This would comprise approximately 17.7% of the above valuation. As the Eleventh Circuit recently concluded, a request that does not exceed the 25% benchmark is "presumptively reasonable." *In re Blue Cross Blue Shield*, 85 F.4th at 1085–86, 1100. Nonetheless, as I explain now, the reasonableness of this request is independently confirmed by the Eleventh Circuit's factors.

19. Consider first the factors that go to the fee awards in other cases: "[9] the customary fee" and "[16] awards in similar cases." In my empirical study, the average and median awards

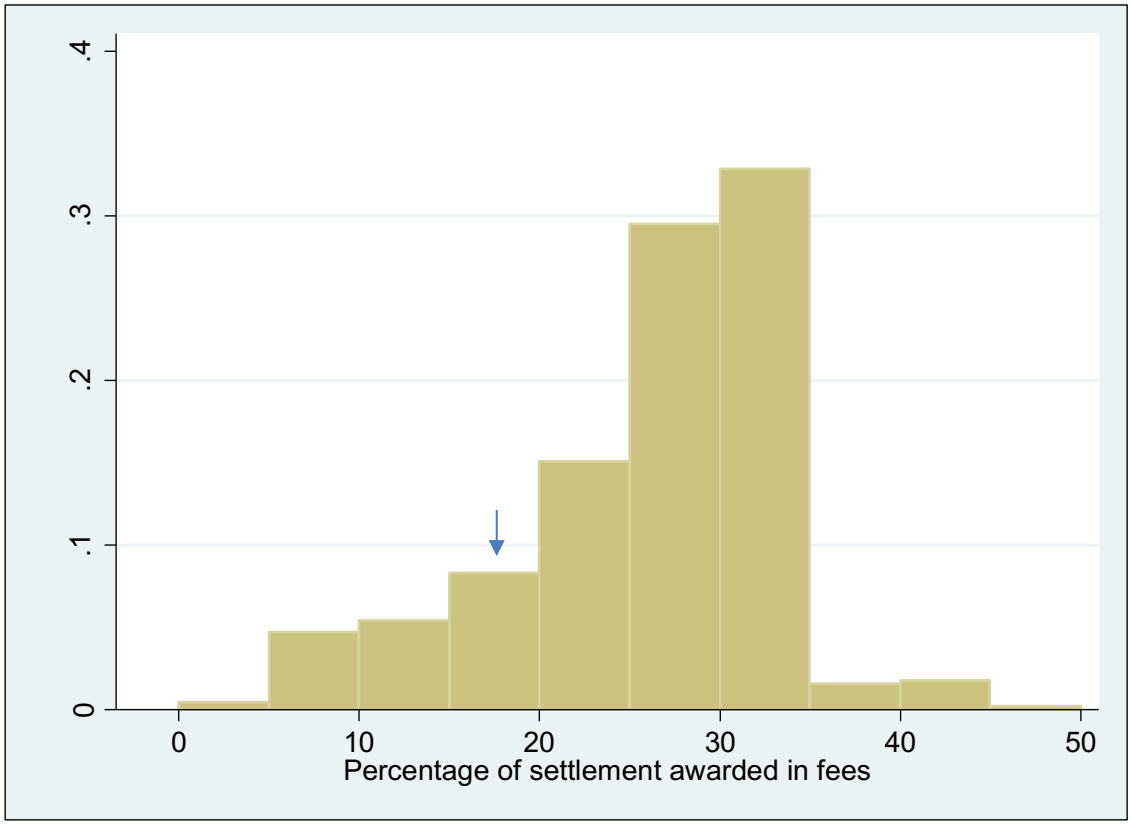
by district courts in the Eleventh Circuit using the percentage method were 28.1% and 30%, respectively. *See* Fitzpatrick, *Empirical Study, supra*, at 836. My data includes in the fee-percentage denominator any non-monetary relief that was quantified and included by the court in the settlement valuation. *See id*. at 826. Thus, my data allows for apples-to-apples comparisons with the settlement here. The data shows that the fee request is far below the average and median in this Circuit. This can be seen graphically in Figure 1, below, which shows the distribution of all of the Eleventh Circuit percentage-method fee awards in my study. In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis); each bar includes the number on its left edge and excludes the number on its right edge. I added an arrow to depict the bar that includes the fee request here. As the figure shows, almost all of the fee awards in this Circuit have exceeded the percentage requested by class counsel. My findings are broadly consistent with the other large-scale studies of class action fees, which suggest that in recent years in the average and median fee percentages in this Circuit may be *even higher still*. *See Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median of 30% and 33% in the Eleventh Circuit since 2009); *Eisenberg-Miller 2010, supra*, at 260 (finding mean and median in the Eleventh Circuit of 21% and 22% before 2009).

Figure 1: Percentage-method fee awards in the Eleventh Circuit, 2006-2007



20. The conclusions are much the same if the fee request is compared to fee awards outside the Eleventh Circuit as well. According to my empirical study, the mean and median nationwide using the percentage method was 25.4% and 25%, respectively. *See* Fitzpatrick, *Empirical Study,* at 833-34, 838. This can again be seen graphically: in Figure 2, below, I show the distribution of all of the percentage-method fee awards in my study along with an arrow again depicting this fee request. The nationwide conclusion is much like the Eleventh Circuit conclusion: the request here is on the low end of fee awards. Again, the other large-scale studies of class action fees have again found much the same, including the possibility that the mean and median percentages are even higher in recent years. *See Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median of 27% and 29% nationwide since 2009); *Eisenberg-Miller 2010*, *supra*, at 260 (finding mean and median of 24% and 25% nationwide before 2009).

Figure 2: Percentage-method fee awards among all federal courts, 2006-2007



21. It should be noted that the settlement here is unusually large. This is notable because my empirical study showed that settlement size had a statistically significant but inverse relationship with the fee percentages awarded by federal courts—*i.e.*, that some federal courts awarded lower percentages in cases where settlements were larger—i.e., in so-called "megafund" cases. *See id*. at 838, 842-44. For example, in settlements between $100 million and $250 million, the average and median fee percentages in my study were 17.9% and 16.9%, respectively; in settlements between $250 million and $500 million, the average and median were 17.8% and 19.5%, respectively. *See id*. at 839. This relationship was found in the other large-scale academic studies as well. *See Eisenberg-Miller 2017, supra*, at 947-48; *Eisenberg-Miller 2010*, *supra*, at 263-65. In my opinion, this practice is a mistake because it provides class counsel with very bad incentives—class counsel can actually end up with less in fees when they recover more for the

class![2]—and many courts do not follow it.[3] Indeed, there is no rule in the Eleventh Circuit requiring the practice. To the contrary, the Eleventh Circuit has said 25% is the "benchmark" in all cases—including multi-billion-dollar cases. *See In re Blue Cross Blue Shield*, 85 F.4th at 1085–86, 1100 (stating that a 25% fee is "presumptively reasonable" even in a $2.67 billion settlement). It is therefore not surprising that I have seen no evidence that settlement size has a statistically significant effect on fee awards in this Circuit.[4] But all of this is largely academic because the fee

[2] *See, e.g.*, *In re Synthroid I*, 264 F.3d 712, 718 (7th Cir. 2001) (Easterbrook, J.) ("This means that counsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients . . . . Why there should be such a notch is a mystery. Markets would not tolerate that effect . . . ."). Consider the following example: if courts award class action attorneys 33⅓% of settlements when they are under $100 million but only 20% of settlements when they are over $100 million, then rational class action attorneys will prefer to settle cases for $90 million (*i.e.*, a $30 million fee award) than for $125 million (*i.e.*, a $25 million fee award). As Judge Easterbrook noted above, no rational client would ever agree to such an arrangement. This is why studies even of sophisticated corporate clients do not report any such practice among them when they hire lawyers on contingency, even in the biggest cases like patent litigation. *See, e.g.,* Schwartz, *supra,* at 360; Fitzpatrick, *Fiduciary Judge's Guide*, *supra*, at 1159-63. In my opinion, courts should not force a fee arrangement on class members that they would never choose for themselves. *See* William B. Rubenstein, Newberg on Class Actions § 13.40 (5th ed. 2020) ("[T]he law requires the judge to act as a fiduciary" for class members).

[3] *See, e.g.*, *In re Cendant Corp. Litigation*, 264 F.3d 201, 284 n. 55 (3d Cir. 2001) ("Th[e] position [that the percentage of a recovery devoted to attorneys fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply." (alteration in original)); *Allapattah*, 454 F.Supp.2d 1185, 1213 (S.D.Fla. 2006) ("While some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method adopted by the Eleventh Circuit . . . . . By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (quoting *Allapattah*); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10ML-02151-JVS, 2013 WL 12327929, at 17 n. 16 (C.D. Cal., Jun. 17, 2013) ("The Court also agrees with … other courts, e.g., *Allapattah Servs*., 454 F. Supp. 2d at 1213, which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class").

[4] When I separated the fee awards in other circuits from the percentage-method fee awards in my dataset from district courts in the Eleventh Circuit, I found no statistically significant relationship between settlement size and fee percentage. It is possible that the reason there was no statistically significant relationship in the Eleventh Circuit between settlement size and fee percentage is because there were so few large settlements in the Eleventh Circuit in 2006 and 2007. Indeed, in my dataset there is only one settlement over $100 million: the $1 billion settlement in *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185 (S.D.Fla. 2006), where the court awarded 31.33% in fees. On the other hand, after I collected my data, a district court in the Eleventh Circuit awarded fees in another large ($445 million) class action settlement in my dataset. *See In re Healthsouth Corporation Securities Litigation*, No. CV-03-BE-1500-S (N.D.Ala., Feb. 12, 2008). This settlement was included in the portion of my empirical study that described settlements, but, because the fees had not yet been awarded at the time I collected my data, it was excluded from the portion of my study that described fee awards. *See* Fitzpatrick, *Empirical Study*, *supra*, at 831 (notes to Table 7). Although it is difficult to calculate the fee percentage actually awarded by the court in *Healthsouth*—because it

request here is perfectly in line even with the megafund data. Thus, no matter how you slice it, in my opinion, this factor supports the fee request here.

22. Consider next the factors that go to the results obtained by class counsel in light of the risks class counsel faced: "[4] the economics involved in prosecuting a class action," "[6] the novelty and difficulty of the questions involved," "[10] whether the fee is fixed or contingent," "[12] the amount involved and the results obtained," and "[14] the 'undesirability' of the case." In my opinion, these are some of the strongest factors supporting the fee request. Class counsel does not have firm estimates of the class's damages in this case because the expert work did not advance that far before settlement was reached. Nonetheless, based on similar cases, it is likely that the overpayment theory would have yielded possible damages of at least $4,500 per vehicle.[5] Given the 104,000 vehicles in the class, that brings the class's total possible damages—assuming everything went the class's way—to at least $468 million. The cash alone in the settlement is over half of that number, and, when the warranties are included, the recovery is nearly 100% of that number. But even if the damages might have been more per vehicle in this case than in the other cases, if class counsel recovered even half of the class's possible damages here, it would be an excellent recovery. Although I do not have data on average recoveries in consumer fraud class actions, compared to the cases where I do have data—securities fraud and antitrust—this level of recovery would be far better than most. *See, e.g.,* Recent Trends in Securities Class Action

depended on the number of claims filed by different classes of plaintiffs—some of the filings in the case suggest that the total fee award would have been around 18% of the settlement. *See In re Healthsouth Corporation Securities Litigation, supra* (awarding 17.5% and another 4% to attorneys for the Stockholder Class and 10% to the attorneys for the Bondholder Class); Bondholder Lead Counsel's Memorandum in Support of Application for An Award of Attorneys' Fees and Litigation Expenses and Reimbursement of Costs to Class Representatives 5 n. 5 (Jan. 24, 2008). Even when this 18% data point is added to the other Eleventh Circuit settlements, there was still no statistically significant relationship between settlement size and fee percentage. Moreover, as far as I am aware, no study since mine has shown a statistically significant effect in the Eleventh Circuit.

[5] *See* ECF No. 146 at 19 (noting that an expert damages model in a case involving similar allegations of emissions violations in diesel trucks calculated overpayment damages of approximately $4,500 per vehicle).

Litigation: 2022 Full-Year Review, at p. 18 (fig. 19), available at https://www.nera.com/publications/archive/2023/recent-trends-in-securities-class--action-litigation--2022-full-.html (finding that the median securities fraud class action between 2013 and 2022 settled for between 1.5% and 2.5% of the most common measure of investor losses, depending on the year); John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 Iowa L. Rev. 1997, 2010 (2015) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 and 2014).

23. Yet, as impressive as the recovery here is, it must be measured against the risks that class counsel faced; if this were a "slam dunk" case, recovering even half of the class's possible damages might not look so impressive. But this was far from a slam dunk case. Most obviously, there was a serious risk that the class would lose the entire case on preemption, as the Sixth Circuit ruled in a similar case. *See In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851, 866 (6th Cir. 2023). But even if preemption could have been surmounted, the overpayment theory of damages is a contested theory in consumer fraud cases. Moreover, even if the court had permitted the theory here, there was still a question whether a jury would agree with the class's proposed overpayment numbers. These are only some of the risks that the class faced here, but, in my opinion, they alone show that class counsel recovered more for the class in this settlement than the risk-adjusted value of their claims. As such, in my opinion, these factors too support class counsel's fee request.

24. Consider next the factors that go to the time it took to litigate and resolve these lawsuits: "[1] the time required to reach a settlement" and "[5] the time and labor required." Although this litigation has not yet transpired as long as the typical class action case does before

it reaches final approval of any settlement, *see* Fitzpatrick, *Empirical Study, supra*, at 820 (finding average and median times to final settlement approval of around three years), in my opinion, class counsel have sufficient experience with similar cases to know that they have litigated this case long enough to be confident that the settlement is a good value for the class. Under these circumstances—i.e., when we know that the settlement is a good value for the class—punishing class counsel with a lower fee percentage because they resolved this case quicker than usual would give them bad incentives: it would tell class counsel that they should drag cases out—and thereby delay compensation to the class—for no good reason. As such, it is my opinion that this factor, too, supports the fee request.

25. Consider the next the factors that go to class counsel's relationship to the class: "[2] whether there are any substantial objections"; "[7] the skill requisite to perform the legal service properly," "[8] the preclusion of other employment by the attorney due to acceptance of the case," "[11] time limitations imposed by the client or the circumstances," "[13] the experience, reputation, and ability of the attorneys," and "[15] the nature and length of the professional relationship with the client." The first of these factors is inapplicable because the deadline for objections has not yet passed, but I have no reason to think that the other factors do not support the fee request as well. It is basic economics that taking on this case prevented class counsel from taking on something else; resources are always finite. Moreover, although I was not privy to the attorney-client relationships here, class counsel count among their number some of the most experienced and highly regarded lawyers in the United States. Finally, their opponents are not slouches either: defense counsel, too, are some of the most highly regarded lawyers in the United States and their clients do not lack for resources.

26. Consider finally factor "[3] any non-monetary benefits conferred upon the class." Most class action settlements do not include non-monetary relief, *see* Fitzpatrick, *Empirical Study, supra*, at 824 (finding that only one quarter of class action settlements included injunctive relief), and the purpose behind this factor is to ensure that class counsel is compensated when they go above and beyond to secure this extra relief. When the non-monetary relief is quantified and included in the value of the settlement—as class counsel propose to do here—this factor takes care of itself because class counsel can then be awarded a percentage of the non-monetary relief. But when the non-monetary relief is not or cannot be included in the valuation of the settlement, courts must look for other ways to incentivize the recovery of this relief. The most common way to do this is to increase class counsel's fee percentage from the cash portion of the settlement. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) ("[W]here the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained[,] courts [may] include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees. When this is not the case, courts should consider the value of the injunctive relief obtained as a 'relevant circumstance' in determining what percentage of the common fund class counsel should receive as attorneys' fees . . . ."). This is why I said at the outset that it does not matter whether the extended warranties secured by this settlement are included in the settlement valuation or not: if they are included, class counsel is seeking a below-benchmark fee percentage that is easy to justify; if they are not included, class counsel should be awarded an above-benchmark fee percentage to compensate them for the significant non-monetary relief. Either way, it is my opinion that the fee request is supported by the Eleventh Circuit's factors. As I noted above, according to the most recent empirical study, the median fee percentage awarded in the Eleventh Circuit may already be 33%—precisely what class counsel have requested if the

warranty extensions they secured are not included in the settlement valuation. *See Eisenberg-Miller 2017*, *supra*, at 951.

27. For all these reasons, I believe the fee award requested here is reasonable in light of the empirical studies and research on economic incentives in class action litigation.

28. My compensation for this declaration was a flat fee in no way dependent on the outcome of class counsel's fee petition.

Nashville, TN

January 19, 2024

Brian T. Fitzpatrick

EXHIBIT 1

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Milton R. Underwood Chair in Free Enterprise*, 2020 to present
- *FedEx Research Professor*, 2014-2015
- *Professor of Law*, 2012 to present
- *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (Cambridge University Press 2021) (ed., with Randall Thomas)

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press 2019) (winner of the Pound Institute's 2022 Civil Justice Scholarship Award)

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Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan, 53 Baylor L. Rev. 289 (2001)

ACADEMIC PRESENTATIONS

Non-Securities Class Action Settlements in CAFA's First Eleven Years, University of Florida Law School, Gainesville, FL (Feb. 6, 2023)

Entrapment of the Little Guy: Resisting the Erosion of Investor, Employee and Consumer Protections, Institute for Law and Economic Policy, San Diego, CA (Jan. 27, 2023)

A New Source of Data for Non-Securities Class Actions, William & Mary Law School, Williamsburg, VA (Nov. 10, 2022)

Can Courts Avoid Politicization in a Polarized America?, American Bar Association Annual Meeting, Chicago, IL (Aug. 5, 2022) (panelist)

A New Source of Data for Non-Securities Class Actions, Seventh Annual Civil Procedure Workshop, Cardozo Law School, New York, NY (May 20, 2022)

Resolution Issues in Class Actions and Mass Torts, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Mar. 11, 2022) (panelist)

Developments in Discovery Reform, George Mason Law & Economics Center Fifteenth Annual Judicial Symposium on Civil Justice Issues, Charleston, SC (Nov. 16, 2021) (panelist)

Locality Litigation and Public Entity Incentives to File Lawsuits: Public Interest, Politics, Public Finance or Financial Gain?, George Mason Law & Economics Center Symposium on Novel Liability Theories and the Incentives Driving Them, Nashville, TN (Oct. 25, 2021) (panelist)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, University of California Hastings College of the Law, San Francisco, CA (Nov. 3, 2020)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, The Judicial Role in Professional Regulation, Stein Colloquium, Fordham Law School, New York, NY (Oct. 9, 2020)

Objector Blackmail Update: What Have the 2018 Amendments Done?, Institute for Law and Economic Policy, Fordham Law School, New York, NY (Feb. 28, 2020)

Keynote Debate: The Conservative Case for Class Actions, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Jan. 24, 2020)

The Future of Class Actions, National Consumer Law Center Class Action Symposium, Boston, MA (Nov. 16, 2019) (panelist)

The Conservative Case for Class Actions, Center for Civil Justice, NYU Law School, New York, NY (Nov.11, 2019)

Deregulation and Private Enforcement, Class Actions, Mass Torts, and MDLs: The Next 50 Years, Pound Institute Academic Symposium, Lewis & Clark Law School, Portland, OR (Nov. 2, 2019)

Class Actions and Accountability in Finance, Investors and the Rule of Law Conference, Institute for Investor Protection, Loyola University Chicago Law School, Chicago, IL (Oct. 25, 2019) (panelist)

Incentivizing Lawyers as Teams, University of Texas at Austin Law School, Austin, TX (Oct. 22, 2019)

"Dueling Pianos": A Debate on the Continuing Need for Class Actions, Twenty Third Annual National Institute on Class Actions, American Bar Association, Nashville, TN (Oct. 18, 2019) (panelist)

A Debate on the Utility of Class Actions, Contemporary Issues in Complex Litigation Conference, Northwestern Law School, Chicago, IL (Oct.16, 2019) (panelist)

Litigation Funding, Forty Seventh Annual Meeting, Intellectual Property Owners Association, Washington, DC (Sep. 26, 2019) (panelist)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, International Class Actions Conference, Vanderbilt Law School, Nashville, TN (Aug. 24, 2019)

A New Source of Class Action Data, Corporate Accountability Conference, Institute for Law and Economic Policy, San Juan, Puerto Rico (April 12, 2019)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, FL (Dec. 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (Nov. 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (Oct. 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (Sep. 11, 2018)

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability*,* Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

Racial Preferences Won't Go Easily, WALL ST. J. (June 1, 2023)

Memo to Mitch: Repeal the Republican Tax Increase, THE HILL (July 17, 2020)

The Right Way to End Qualified Immunity, THE HILL (June 25, 2020)

I Still Remember, 133 HARV. L. REV. 2458 (2020)

Proposed Reforms to Texas Judicial Selection, 24 TEX. R. L. & POL. 307 (2020)

The Conservative Case for Class Actions?, NATIONAL REVIEW (Nov. 13, 2019)

9th Circuit Split: What's the math say?, DAILY JOURNAL (Mar. 21, 2017)

Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

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Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Abstention, Tennessee Attorney General's Office Continuing Legal Education, Nashville, TN (Apr. 13, 2022)

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Legal Studies
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Referee, Supreme Court Economic Review
Reviewer, Aspen Publishing
Reviewer, Cambridge University Press
Reviewer, University Press of Kansas
Reviewer, Palgrave Macmillan
Reviewer, Oxford University Press
Reviewer, Routledge
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights, 2009-2015
Board of Directors, Tennessee Stonewall Bar Association, 2012-2022
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia & California (inactive)

COMMUNITY ACTIVITIES

Board of Directors, Beacon Center, 2018-present; Board of Directors, Nashville Ballet, 2011-2017 & 2019-2022; Nashville Talking Library for the Blind, 2008-2009

EXHIBIT 2

Journal of Empirical Legal Studies
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An Empirical Study of Class Action Settlements and Their Fee Awards

*Brian T. Fitzpatrick**

This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

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[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

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[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

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[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

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[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

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[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

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[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

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[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

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[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

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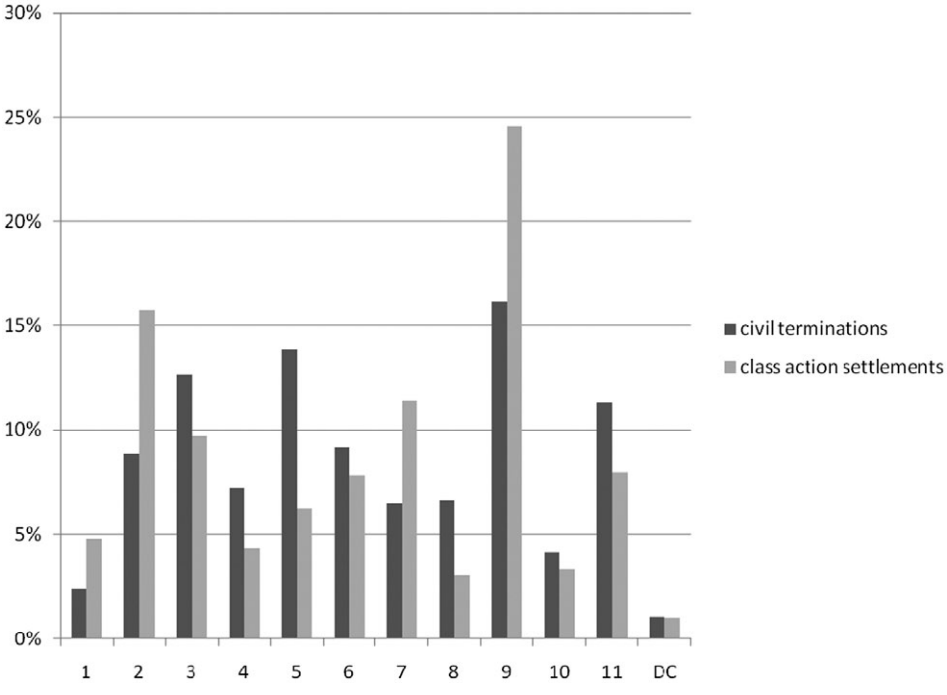
[43]See Eisenberg & Miller, supra note 15, at 59–60.

[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



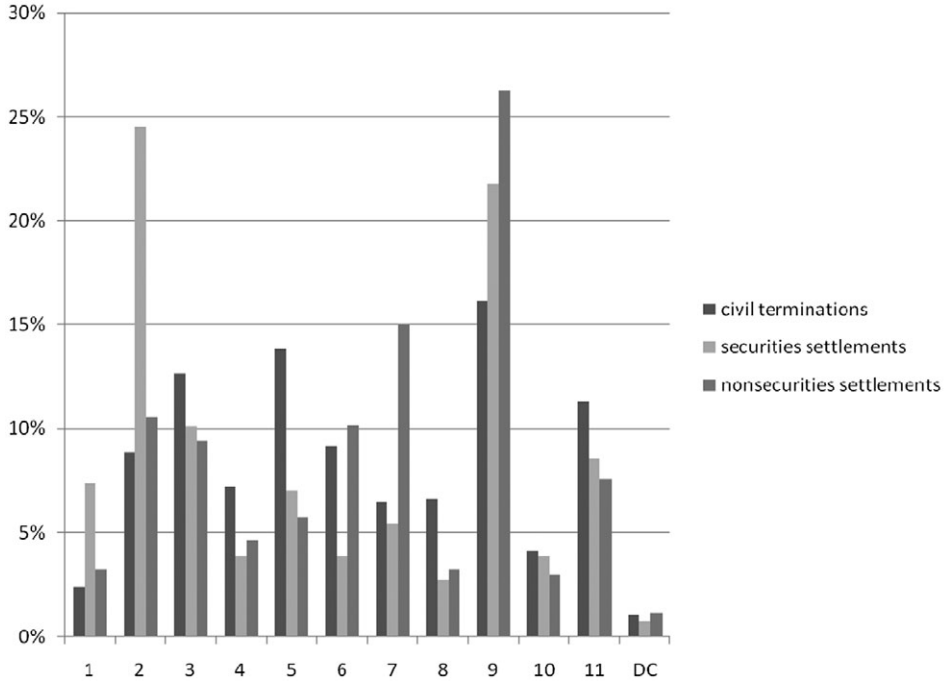
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006* (n = *304*)		*2007* (n = *384*)	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

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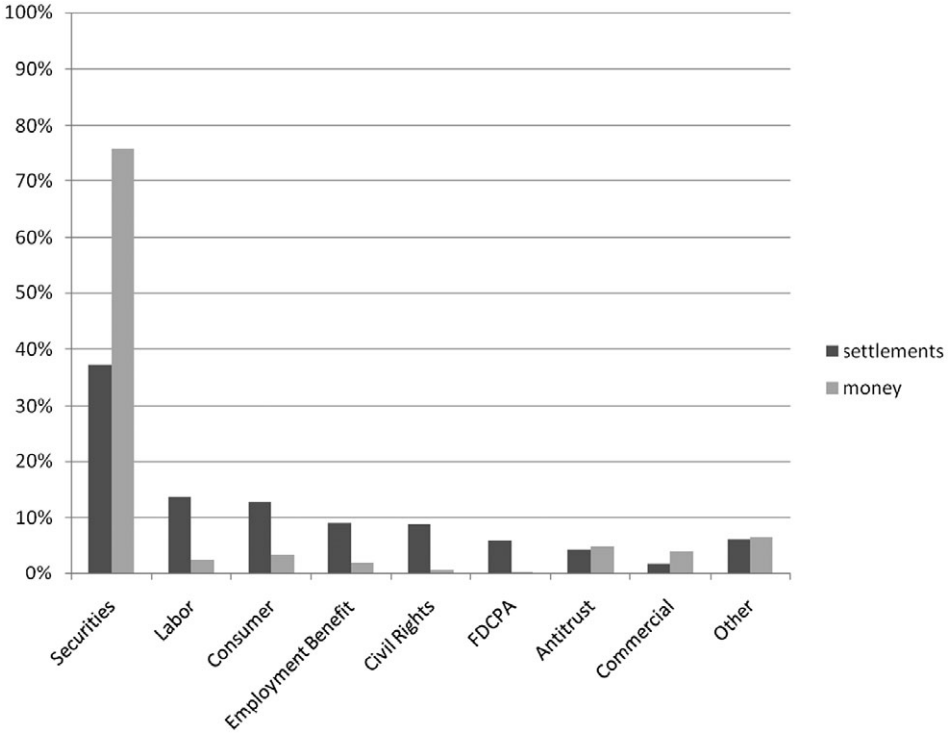
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

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($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

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[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

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[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

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[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

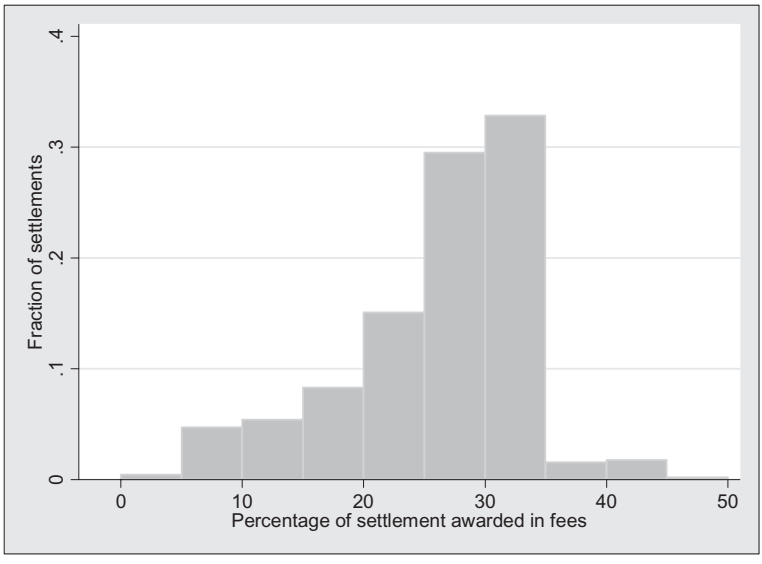
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

SOURCES: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

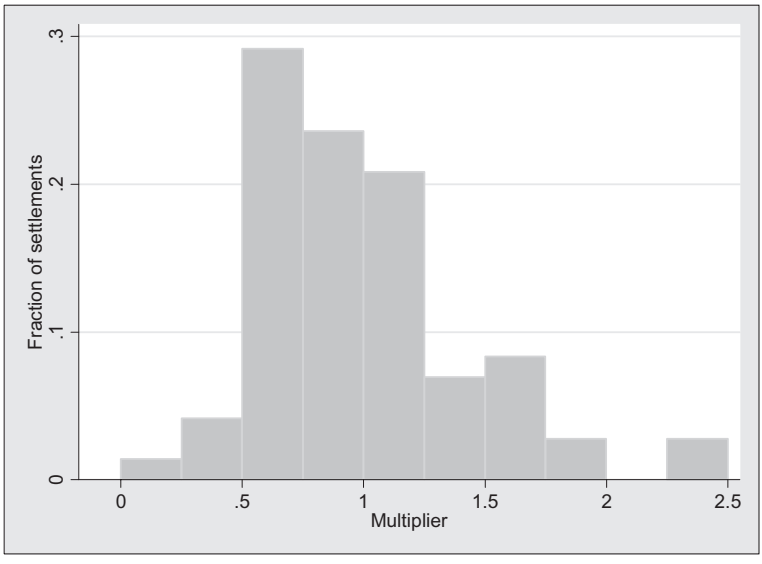
Sources: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

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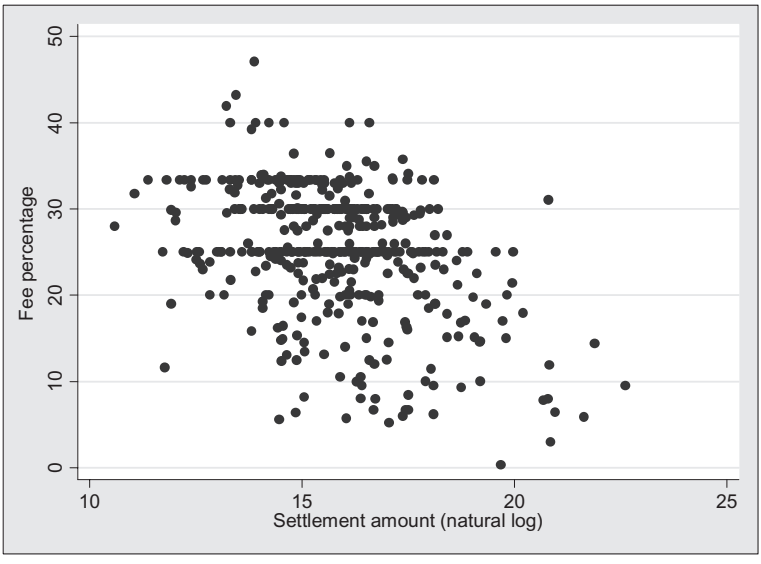
[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

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[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

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appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	−1.77	−1.76	−1.76	−1.41	−1.78
	(−5.43)**	(−8.52)**	(−7.16)**	(−4.00)**	(−8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	−0.630	−0.345	0.657	−1.43	−0.232
	(−0.83)	(−0.49)	(0.76)	(−1.20)	(−0.34)
Settlement class		0.150	0.873	−1.62	0.124
		(0.19)	(0.84)	(−1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	−0.813	2.93	−2.23
		(0.44)	(−0.61)	(1.14)	(−1.98)**
3d Circuit		2.25	4.00	−1.11	—
		(1.99)**	(3.85)**	(−0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	−0.227
		(2.23)**	(2.36)**	(1.46)	(−0.20)
8th Circuit		2.12	−0.759	3.73	−0.586
		(0.97)	(−0.24)	(1.19)	(−0.28)
9th Circuit		—	—	—	−2.73
					(−3.44)**
10th Circuit		1.45	−0.254	3.16	—
		(0.94)	(−0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		−1.65		−4.39	−1.62
		(−0.88)		(−2.20)**	(−0.88)
Employee benefits case		−0.306		−4.23	−0.325
		(−0.23)		(−2.55)**	(−0.26)
Civil rights case		1.85		−2.05	1.76
		(0.99)		(−0.97)	(0.95)
Debt collection case		−4.93		−7.93	−5.04
		(−1.71)*		(−2.49)**	(−1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.

SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

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[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

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[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

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[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

EXHIBIT 3

Documents reviewed:

- Defendants Hino Motors Manufacturing U.S.A., Inc. and Hino Motors Sales U.S.A., Inc.'s Motion to Dismiss Plaintiffs' Complaint (document 68, filed 11/7/22)
- Defendant Toyota Motor Corporation's Motion to Dismiss Plaintiffs' Class Action Complaint (document 78, filed 12/23/22)
- Plaintiffs' Opposition to Defendants Hino Motors Manufacturing U.S.A., Inc. and Hino Motors Sales U.S.A., Inc.'s Motion to Dismiss Plaintiffs' Complaint (document 79, filed 12/23/2022)
- Defendant Hino Motors, Ltd.'s Motion to Dismiss Plaintiffs' Complaint (document 80, filed 12/27/22)
- Reply in Support of Defendants Hino Motors Manufacturing U.S.A., Inc. and Hino Motors Sales U.S.A, Inc.'s Motion to Stay Discovery Pending the Court's Ruling on Defendants' Motion to Dismiss (document 85, filed 1/5/23)
- Defendants Hino Motors Manufacturing U.S.A., Inc. and Hino Motors Sales U.S.A., Inc.'s Reply in Support of Motion to Dismiss Plaintiffs' Complaint (document 89, filed 1/20/23)
- Plaintiffs' Opposition to Defendant Hino Motors, Ltd.'s Motion to Dismiss Plaintiffs' Complaint (document 94, filed 1/31/23)
- Unopposed Motion for Preliminary Approval of Class Settlement and Direction of Notice under Fed. R. Civ. P. 23(e) (document 146, filed 10/27/23)
- Class Action Settlement Agreement (document 146-1, filed 10/27/23) ("Settlement Agreement")

- Declaration of Proposed Settlement Class Counsel in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Class Notice (document 146-2, filed 10/27/23)
- Declaration of Kirk D. Kleckner in Support of Plaintiffs' Motion for Final Settlement Approval and Award of Attorneys' Fees and Costs (filed herewith)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA – MIAMI DIVISION

Case No.: 1:22-cv-22483-Gayles/Torres

EXPRESS FREIGHT INTERNATIONAL, EFI EXPORT & TRADING CORP., MARDERS, and REDLANDS OFFICE CLEANING SOLUTIONS, LLC, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

HINO MOTORS, LTD., TOYOTA MOTOR CORPORATION, HINO MOTORS MANUFACTURING U.S.A., INC., and HINO MOTORS SALES U.S.A., INC.,

Defendants.

_____/

DECLARATION OF KIRK D. KLECKNER IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL AND AWARD OF ATTORNEYS' FEES AND COSTS

KIRK D. KLECKNER, of full age, declares as follows:

1. Valuation Purpose and Scope and Materials Considered

a. This declaration pertains to the valuation of extended warranty benefits provided to Class Members as defined in the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") resolving economic loss claims against Hino Motors Ltd., Hino Motors Manufacturing U.S.A., Inc., and Hino Motors Sales U.S.A., Inc. ("Defendants"). The Defendants and Plaintiffs[1] are collectively referred to as the Parties.

[1] The Plaintiffs are Express Freight International, EFI Export & Trading Corp., Marders, and Redlands Office Cleaning Solutions, LLC.

b. Plaintiffs' Counsel asked me to independently value the Class Member extended warranty benefits made available from this Settlement ("Warranty Extension")[2], subject to the Hypothetical Assumptions outlined below (*See* Section 5).

c. In conducting my work and forming my opinion, I was provided and have considered, in addition to my substantial expertise and experience in warranty extension valuations, the materials identified in Exhibit B. I believe that the information made available to me, taken as a whole, provided sufficient data from which I could draw valid valuation conclusions, subject to the Hypothetical Assumptions (*See* Section 5) and the Valuation Primary Assumptions and Limiting Conditions (*See* Section 8).

d. Profiled below are my Summary of Opinion; Experience and Qualifications; Valuation Approaches; Hypothetical Assumptions; Information Requested and Received; Valuation Methodology and Valuation Conclusion; Valuation Primary Assumptions and Limiting Conditions; and Certifications and Representations.

2. Summary of Opinion

a. Based on the analyses described herein and subject to the Hypothetical Assumptions and other limitations described herein, I have determined that the value of the Settlement's Warranty Extension exceeds $208,000,000.

b. Per Exhibit B of the Settlement Agreement, the Extended Warranty covers certain diagnostic test and scan services and 22 listed components, however, the retail prices for the following services and parts were not available: (1) the diagnostic tests or OBD Diagnostic Scan for malfunctions that trigger the OBD Malfunction Indicator Light, and (2) the replacement OBD sensors for the DPF system. Therefore, the value determined in Section 2.a. does not include the value of the Extended Warranty related to these particular items.

c. Per Section 4.3 of the Settlement Agreement, Defendants will also provide a New Parts Warranty if there is a government-mandated or a government-recommended emissions systems recall or repair campaign within three years of the date of the Settlement Agreement. The value determined in Section 2.a. does not include the value of this potential New Parts Warranty.

3. Experience and Qualifications

a. I am a Certified Public Accountant - Retired in the United States with an MBA. I am an Accredited Senior Appraiser (ASA-BV) from the American Society of Appraisers. I have litigation-related experience in valuing economic losses, damages, and intangible assets.

b. My experience includes seven years as the Chief Financial Officer for a well-respected Top 50 United States automotive dealership group; 19 years with an accounting firm including roles as shareholder, Chief Operating Officer, and Director of Business Valuation and Litigation Support Services; and performing services for hundreds of companies in a wide array

[2] Settlement Agreement Section 4.2

of industries, including but not limited to retail dealerships, property and casualty insurance, warranty insurance, and distribution.

c. As CFO of an automotive dealership group, I worked on service and warranty matters. My duties as CFO included establishing and overseeing extended service contractual relationships, and establishing and overseeing automotive dealer-owned reinsurance entities and structures for extended service warranty contracts and other insurance-related products.

d. My experience as an expert includes numerous warranty extension valuations including the following class action settlement valuation determinations: 1) valuation of the nationwide Warranty Extension and other class member benefits provided for by the Volkswagen and Audi Warranty Extension settlement agreement (VW/Audi) related to extension of the warranty concerning an alleged engine sludge defect[3]; 2) valuation of the Customer Support Program related class member benefits provided for class members nationwide by the Toyota-United States settlement agreement (Toyota-US) related to the warranty extension concerning an alleged unintended acceleration defect[4], and the Customer Support Program in the parallel Toyota-Canadian settlement agreement (Toyota-Canadian)[5]; 3) valuation of the Customer Support Programs related to class member benefits provided under each of the settlement agreements in various vehicle manufacturer Takata Airbag class actions[6]; and 4) valuation of the Extended Warranty benefits provided for class members by the Chrysler-Dodge-Jeep (FCA) EcoDiesel Settlement Agreement related to allegations of emissions cheating in diesel vehicles.[7]

e. My *curriculum vitae is* attached as Exhibit A.

4. Valuation Approaches

a. In valuing intangible assets, valuation analysts typically apply one or more of three common approaches: the Market Approach, the Income Approach, and the Cost Approach.

b. The Market Approach estimates a value for the subject intangible asset based on an analysis of prices that similar intangible assets are sold in the marketplace.

i. For this Warranty Extension valuation, the Market Approach is applicable because extended service contracts ("ESCs")[8] are purchased in the marketplace by

[3] *In re Volkswagen and Audi Warranty Extension Litigation*, Docket No. 1:07-md-01790 (D. Mass.).
[4] *In Re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, United States District Court, Case No. 8:10ML2151 JVS (FMOx) (C.D. Cal.).
[5] Canadian Toyota Unintended Acceleration Marketing, Sales Practices, And Products Liability Litigation Settlement Agreement (various courts)
[6] *In Re: Takata Airbag Products Liability Litigation*, No. Case 1:15-md-02599 (S.D. Fla.) (Settlement Agreements for BMW, Mazda, Subaru, Toyota, Honda, Nissan, Ford, Volkswagen Group, and Audi)
[7] *In re: Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices, and Products Liability Litigation*, Case No. 3:17-md-02777-EMC (N.D. Cal.)
[8] An extended service contract, sometimes called an extended warranty or plan, provides a warranty on certain vehicle parts beyond the coverage of the vehicle's original standard manufacturer warranty. Typical ESC levels of coverage vary from "power train only" up to full "bumper to bumper." The ESC is a contractual agreement between the vehicle owner and the ESC obligor (typically an independent warranty / insurance company or manufacturer

vehicle owners and prior courts have subscribed to the belief that market prices are accurate in assessing the value benefits to the class.[9]

c. The Income Approach may be applicable when the intangible asset is income-producing. In this case, the Warranty Extension does not produce income, so this approach is not applicable.

d. The Cost Approach derives the cost that a developer would incur to create an intangible asset with equivalent utility. The estimate of the retail price that a developer would make the intangible asset available to the marketplace is derived by estimating build-up components that include direct costs, indirect costs, and the developer's profit/opportunity cost, which is an expected "return" on all the costs. The Cost Approach is typically not as accurate as the Market Approach since the Cost Approach is an indirect estimate of the intangible asset's retail price versus the Market Approach utilizes prices directly from the retail marketplace. I did not apply the Cost Approach since reliable marketplace price data was available to apply the Market Approach.

5. Hypothetical Assumptions

a. My professional expertise and experience in vehicle warranty extensions and its applicability to certain class action settlement valuations is the expertise Plaintiffs' Counsel sought for this financial analysis and independent valuation. My industry expertise and experience focus on Light Vehicles (automobiles, minivans, crossovers, sport utility vehicles (SUVs), pickup trucks, and other light trucks). Therefore, I did not have certain data for medium-duty and heavy-duty trucks, and, to my knowledge, National Highway Traffic Safety Administration (NHTSA) vehicle survivability schedules for medium-duty and heavy-duty trucks do not exist.

b. Given the limitations described above in Section 5.a. and on the data available for the preparation of this valuation, Plaintiffs' Counsel provided the following Hypothetical Assumptions:

i. Use the National Highway Traffic Safety Administration Vehicle Survivability and Travel Mileage Schedules for Light Trucks.

ii. Use Light Vehicle retail labor price markups ratios since comparable data is not readily available for medium-duty and heavy-duty trucks.

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affiliated warranty / insurance company). Consumers typically purchase an ESC from a dealer at the point of vehicle purchase.

[9] *See, e.g.*, *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 278 (E.D. Pa. 2003) ("We believe that the benefits to the class are most accurately measured by making an estimation of the Extended Coverage Program's market price. We realize that this figure is difficult to estimate because the Extended Coverage Program–or any similar warranty product–is not on the market. Yet, economists, actuaries, investors and businesspeople must estimate and value risk in all types of market transactions. A warranty is simply the ex ante market price of insuring against a foreseeable risk. Any other measure except the market price would over or underestimate the benefit to the class.").

iii. Use Light Vehicle retail market price relationship ratios between extended service contract prices and used vehicle prices since comparable data is not readily available for medium-duty and heavy-duty trucks.

c. If this valuation had been performed with data specific to medium-duty and heavy-duty trucks instead of using the proxy data for Light Vehicles, the value conclusion may have been different. Nevertheless, the comparable data available for Light Vehicles provides a reasonable approximation to calculate the value of the Settlement Warranty Extension.

6. Information Requested and Received

a. I requested and received the following information from Plaintiffs' Counsel:

i. To make the Warranty Extension valuation determinations:

1. The assumed effective date of the Warranty Extension valuation.

2. A copy of Settlement Agreement (final with exhibits).

ii. To estimate the number of Class Trucks to receive settlement benefits and number of Warranty Extension coverage years:

1. The number of Class Trucks originally sold by Model Year.

2. Class Trucks VIN number ranges by Model and Model Year.

3. For each of the 22 Subject Components listed in Exhibit B of the Settlement Agreement, the Years and Mileage Limitations (e.g., 5-Year / 100,000 mile) for the "Standard Hino Warranty Coverage" referenced in Exhibit B.[10]

4. If the Standard Hino Warranty Coverage varies by the state in which the vehicle was sold (such as California or certain other states that dictate minimum warranty coverage for emissions related systems), the vehicle counts or an estimate of the percentage of Class Trucks sold in those states and what the applicable warranty coverage is for those vehicles.

iii. To gain an understanding of the Warranty Extension claim dollar exposure:

1. Class Trucks' current U.S. average retail labor hours, parts costs, and other costs for the replacement of each Subject Component.

[10] As discussed in Sections 2.b. and 7.f.ii., the retail prices for the replacement OBD sensors for the DPF system were not available. Therefore, the value determined in Sections 2.a. and 7.f.i. does not include the value of these components.

2. Hino's U.S. average per hour dealer warranty labor reimbursement rate for the most recent annual period available.

iv. Confirm Class Trucks excluded under the terms of the Settlement Agreement will be less than one percent of Class Trucks originally sold. Excluded vehicles include: 1) Class Members expected to request exclusion, and 2) vehicles owned by excluded parties (Hino, Judicial Officers, Defendants' Counsel).

7. Valuation Methodology and Valuation Conclusion

a. I considered relevant sections of the Settlement Agreement to identify Warranty Extension coverage terms, limitations, and conditions ("Key Coverage Elements"). The following are Settlement Agreement provisions pertinent to my analysis:

i. "Section 2.45 "Settlement Class Truck" means any on-road vehicle equipped and originally sold or leased in the United States with a Hino engine from engine Model Year 2010 through and including engine Model Year 2019. Eligibility for Settlement Cash Benefits will be determined by VIN, but for illustrative purposes, the Parties expect that this definition includes most, or all of the Hino trucks included in Exhibit A of this Class Action Agreement."

ii. "Section 4.2 Extended Warranty. Defendants shall offer an Extended Warranty to Settlement Class Members in accordance with the terms set forth in Exhibit B."

iii. "Section 4.4 Warranty Transfer. The Extended Warranty and New Parts Warranty described herein shall transfer with the Class Trucks for the entire duration of the warranty periods."

iv. "Exhibit B: Extended Warranty"

1. "A: Parts Coverage"

a. "The Extended Warranty shall cover the cost of all parts and labor needed to repair or replace the components listed below for the corresponding indicated lengths."

b. "The Extended Warranty shall also cover (i) the cost of any diagnostic tests or OBD Diagnostic Scan for malfunctions that trigger the OBD Malfunction Indicator Light (MIL), regardless of whether the malfunction is attributable to a part that is covered under the Extended Warranty, for the greater of 8 years from the date that the Court grants final approval of the Settlement, 8 years from the expiration of the standard Hino warranty coverage for the Settlement Class Truck, or 10 years from the date that the Class Truck was first delivered to the original purchaser or lessee and (ii) the cost of any diagnostic test leading to a repair covered under this Extended Warranty."

c. "Defendants shall not impose on consumers any fees or charges (and must pay any fees or charges imposed on consumers by any authorized dealer in accordance with the applicable agreements with such authorized dealers) related to the warranty service."

d. "Length of Warranty Coverage"

i. For Parts 1 – 3: "Greater of **5 years** from the date that the Court grants final approval of the Settlement, **5 years** from the expiration of the standard Hino warranty coverage for the Settlement Class Truck, or **8 years** from the date that the Class Truck was first delivered to the original purchaser or lessee."

ii. For Parts 4 – 22: "Greater of **8 years** from the date that the Court grants final approval of the Settlement, **8 years** from the expiration of the standard Hino warranty coverage for the Settlement Class Truck, or **10 years** from the date that the Class Truck was first delivered to the original purchaser or lessee."

2. "B: Transferability"

a. "The Extended Warranty coverage remains with the Settlement Class Trucks for the entire duration of the warranty period and is fully transferrable to any subsequent owners."

3. "C: Existing Warranty Coverage:"

a. "The Extended Warranty does not revoke or alter any existing warranties that apply to the Settlement Class Trucks. All existing warranty coverage for the Settlement Class Trucks remains in effect."

b. I considered market retail prices that Light Vehicle owners pay for ESCs. I utilized such market price data to estimate what Class Members would pay to purchase a Hypothetical Extended Service Contract ("Hypothetical ESC") that is equivalent to the financial protection resulting from the existence of the Warranty Extension. This approach has been accepted by many courts and was incorporated in my valuations—upon which the courts and parties relied—in the VW/Audi, Toyota-US, Toyota-Canadian and Takata Airbag related class actions mentioned in Section 3 above. Thus, I employed methods and analyses of a type reasonably relied upon by courts and experts in my field in forming opinions or inferences on the subject.

i. In developing the market (or retail) prices of the Hypothetical ESCs, my

determinations included the following:

1. Defining the Warranty Extension's Covered Components.

2. Deriving a Class Member's current expected Retail Repair Cost to replace the Covered Components if the Warranty Extension did not exist.

3. Considering the magnitude of the current Retail Repair Cost when deriving the retail price of a one-year Hypothetical ESC that is equivalent to the Warranty Extension.

4. Deriving a reasonable estimate of the retail price of a one-year, zero-deductible, transferrable, extended service contract (ESC) coverage by considering Light Vehicle market-based price data sets.

c. I determined the number of estimated Covered Vehicles for each model year by adjusting the number of Class Trucks originally sold that could benefit from the Settlement for the declining number on the road over time by utilizing Light Truck vehicle survivability data from the National Highway Traffic Safety Administration (NHTSA).

d. I derived the number of Warranty Extension coverage years ("Coverage Years") for each model year by applying the Key Coverage Elements as provided for in the Settlement Agreement and summarized in Section 7.a.i. above.

e. Exhibit D provides the Warranty Extension Valuation Summary and Conclusion, displaying the results from my underlying calculations:

i. Estimated Covered Vehicles: The estimated number of Covered Vehicles (B) that will benefit from the Warranty Extension was derived by considering NHTSA vehicle survivability data (*See* Section 7.c.).

ii. Estimated Coverage Years: The Coverage Years (D) is calculated as the number of Estimated Covered Vehicles by model year (B) multiplied by the number of Estimated Coverage Years that the Warranty Extension would cover for each model year (C) (*See* Section 7.d.).

iii. Estimated Value of Benefits: The Estimated Value of Benefits by Model Year (F) is calculated as the Estimated Coverage Years (D) multiplied by the Estimated Per Year Hypothetical ESC Market Price (E) (*See* Section 7.b.).

f. My Valuation Conclusion for the Warranty Extension:

i. Based on the analyses and subject to the Hypothetical Assumptions and other limitations described herein, I have determined that the value of the Settlement's Warranty Extension exceeds $208,000,000.

ii. Per Exhibit B of the Settlement Agreement, the Extended Warranty covers certain diagnostic test and scan services and 22 listed components, however, the retail

prices for the following services and parts were not available: (1) the diagnostic tests or OBD Diagnostic Scan for malfunctions that trigger the OBD Malfunction Indicator Light, and (2) the replacement OBD sensors for the DPF system. Therefore, the value determined in Section 7.f.i. does not include the value of the Extended Warranty related to these particular items.

iii. Per Section 4.3 of the Settlement Agreement, Defendants will also provide a New Parts Warranty if there is a government-mandated or a government-recommended emissions systems recall or repair campaign within three years of the date of the Settlement Agreement. The value determined in Section 7.f.i. does not include the value of this potential New Parts Warranty.

8. Valuation Primary Assumptions and Limiting Conditions

a. In addition to the Hypothetical Assumptions (*See* Section 5), my analyses, opinions, and conclusion are limited only by the Valuation Primary Assumptions and Limiting Conditions outlined in Exhibit C, which includes, among others, that my calculations assume a Valuation Effective Date of April 1, 2024.

9. Certifications and Representations

a. The statements of fact in this declaration are true and correct.

b. These are my personal, impartial, and unbiased professional analyses, opinions, and conclusion.

c. I do not have any bias, present interest, or prospective interest with respect to this matter, or any bias or personal interest with respect to the parties involved with this assignment.

d. My engagement in this assignment and the compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or any direction in value, the amount of the value opinions, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this valuation. For my work in this matter, I was compensated at my typical hourly rate of $350.

I declare under penalty of perjury under the laws of the State of Florida that the foregoing is true and correct. Executed this 11th day of January, 2024, at Lakewood Ranch, Florida.

KIRK D. KLECKNER

CURRICULUM VITAE OF KIRK D. KLECKNER, CPA-RETIRED MBA ASA-BV

Kirk is currently:

- Principal of ValuationUSA - a valuation, succession planning and litigation support firm serving closely held businesses and their owners www.valuationusa.com

Kirk's experience includes:

- Seven years as Chief Financial Officer for a well-respected Top 50 dealership group known for its world class customer experiences and business processes
- Nineteen years with an accounting firm including roles as shareholder, Chief Operating Officer, and Director of Business Valuation and Litigation Support Services. Kirk provided consulting work for hundreds of companies in an array of industries including but not limited to retail dealership, casualty insurance, distribution, manufacturing, construction, insurance, reinsurance, service, non-profit, bank, retail, tool and die, technology, trucking and warehouse

Kirk is an MBA and is an Accredited Senior Appraiser in Business Valuation (ASA-BV) from the American Society of Appraisers.

Kirk's expertise leverages both his professional and hands-on industry experience as a Chief Financial Officer for a $500 million-dollar business. Kirk's expertise and experience includes buying, selling and integrating of businesses; managing businesses; succession planning, business and intangible asset valuation for strategic transactions; income, gift and estate tax; owner transactions and litigation purposes.

Kirk is a qualified expert witness with experience in complex business litigation, economic damages calculations, business and intangible asset valuation, owner disputes and lost profits. Kirk has testified as an expert and served as a valuation expert in many matters with damage awards exceeding $100,000,000.

Kirk is known nationally for his expertise in the automotive industry. Representative matters include: In re Volkswagen & Audi Warranty Extension Litigation (MDL 1790); In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation (No. 8:10ML2151 JVS); Canadian Toyota Unintended Acceleration Marketing, Sales Practices, And Products Liability Litigation Settlement Agreement (various courts); and In Re: Takata Airbag Products Liability Litigation, Case 1:15-Md-02599 (Settlement Agreements for BMW, Mazda, Subaru, Toyota, Honda, Nissan, Ford, Volkswagen Group, and Audi).

STATEMENT OF QUALIFICATIONS

Academic and Professional Credentials

- **ASA-BV** - Accredited Senior Appraiser-Business Valuation, American Society of Appraisers
- **MBA** - Master of Business Administration, Concentration Finance, University of Minnesota
- **Certified Public Accountant - Retired,** State of Minnesota
- **Bachelor of Arts,** Accounting and Business Administration, Wartburg College

Positions and Experience

Principal – ValuationUSA *(2008)* – Professional services consulting firm specializing in the following areas:

- succession planning, owner wealth accumulation, preservation and transfer planning
- business and intangible asset valuation
- gift and estate tax
- strategic acquisition and divestiture transactions
- value enhancement
- expert opinions – litigation, economic loss / damage analysis and independent opinions / expert testimony

President – Automotive Development Group Capital and Consulting, LLC *(2009)* – Business specializing in helping dealership groups and their owners with profit and valuation enhancement, valuation, expert witness and business succession planning.

Executive Vice President and Chief Financial Officer - Walser Automotive Group*, Minneapolis, MN (2000–2007)* - Automobile dealership group with related leasing, collision repair, reinsurance and real estate operations ($500 million of revenues, fourteen locations and 750 employees)

Chief Operating Officer, Director of Valuation and Consulting Department, and Shareholder - ***Wilkerson, Guthmann + Johnson, Ltd.,*** St. Paul, MN (1981 – 2000) - Public accounting firm with 40 members and offices in St. Paul, Blaine and Minneapolis. *Industries Served:* Auto dealership, casualty insurance, manufacturing, construction, insurance, service, non-profit, bank, retail, trucking and warehouse.

Professional Affiliations

American Society of Appraisers, a Member and an Accredited Senior Appraiser- Business Valuation (ASA-BV) - ASA is an organization of appraisal professionals. The ASA promotes the exchange of ideas and experiences among its members; maintains the Principles of Appraisal Practice and Code of Ethics for the guidance of its members; maintains universal recognition that members of the Society are objective, unbiased appraisers and consultants, and awards professional designations to qualified members.

Minnesota Society of Certified Public Accountants, a Member

Twin Cities Estate Planning Council, a Member

Select Presentations

- *Business Value: What Leads to a High-Performance Manufacturing Business?, 2016* Minnesota Manufacturing Executives, Minneapolis, MN
- *Eight Characteristics of High Value Dealerships, 2014* Michigan Automotive Dealers Conference, Livonia, MI
- *Eminent Domain Asset Identification, Classification and Valuation*, Eminent Domain 2011: Essential Updates and Issues, Hennepin County Bar Association, Minneapolis, MN
- *Eight Characteristics of High Value Dealerships (And Why Dealers Should Care About Them),* 2010 AICPA Auto Dealership Conference, Phoenix, AZ
- *AICPA / ASA Business Conference Review*, American Society of Appraisers, Minneapolis, MN
- *Fourteen Evolving Dealership Strategies,* Chicago Automobile Trade Association / Compli, Chicago; Dealer Driving Force Group, Charlotte, NC
- *Integrating Business Value Creation and Tax Planning,* 2010 Management & Business Advisers Conference, MN Society of CPAs, Minneapolis, MN
- *Tax Reduction Strategies for Today's Business Environment*, M&I Bank
- *What Leads to Dealership High Performance,* The New Dealership Era Symposium Sponsored by Compli and Wells Fargo, Bloomington, MN
- *Business and Real Estate Valuation Timely Opportunities,* Thrivent Financial Annual Meeting, Roseville, MN
- *Business Valuation for Attorneys,* Various
- *Understanding Financial Statements for Attorneys,* Various

Select Appraisal and Litigation Support Education

- S-Corp Valuations: Avoiding the Chaos and Selecting the Proper Methodology, 2021
- 4 Critical Factors to Create Sustainable Growth, 2021
- Aligning Budgets to Strategy, Key to Long Term Profitability, 2020
- Succession Planning and Knowledge Capture/Transfer, 2020
- Advanced Topics in Business Valuation, 2019
- AICPA Global Manufacturers and Controllers Conference, 2019
- Confessions of Two Reluctant Expert Witnesses, 2019
- Economic Damages - Reasonable Certainty, Lost Profits and Intellectual Property 2019
- Valuation for M&A, 2019
- AICPA National Dealership Conference, 2021, 2018, 2016, 2010, 2002
- Appraising Real Estate Centered Entities by Business Appraiser, 2018
- Valuing Small Businesses Worth Less Than $10 Million, 2018
- The Role of IRS Revenue Rulings and Tax Court Cases in Business Valuation, 2018
- The Impact of TCIA on Cost of Capital, 2018
- Key Tax Law Changes That Impact Business Valuation, 2018
- Valuing Non-Controlling Interests in S-Corps For Federal Tax Purposes, 2017
- Best Income Tax, Estate Tax and Financial Planning Ideas, 2017, 2013
- Fairness and Solvency Opinions Advanced Issues and Best Practices, 2017, 2010
- Valuing Undivided Interests in Real Estate, 2016
- A Detailed Look at Terminal Value Estimation, 2016
- Complying With USPAP in the Litigation Setting, 2016
- MNCPA Business Valuation Conference, 2020, 2016, 2015, 2013, 2009, 2008
- MNCPA Annual Tax Conference, 2015, 2009, 2005, 2001, 1999
- ASA Advanced Business Valuation Conference, 2015, 2008
- Discounts for Lack of Marketability, 2015, 2008
- ASAMN Annual Business Valuation Conference, 2015, 2014, 2008
- Price and Value: Discerning the Difference, 2015
- USPAP for Business Valuation, 2020, 2014, 1996
- Michigan CPA Automobile Dealers Conference, 2014
- Buying and Selling a Privately-Owned Business, 2014
- Valuing Early Stage Companies, 2013
- Special Topics in the Valuation of Intangible Assets, 2012
- Using Market Data to Support Real Estate Partnership Discounts, 2012
- Reasonable Compensation, 2011, 2010, 2008
- AICPA National Business Valuation Conference, 2011, 2008
- 20th Annual National Expert Witness Conference, 2011
- Pluris Discount for Lack of Marketability Study Results, 2010
- Valuation Issues in Estate and Gift Tax, 2010
- Reconciling the Lack of Marketability Discount Theories, 2009
- Cost of Capital, 2008
- Multi-Dealership CFO Conference, 2003, 2002

EXHIBIT B – Primary Materials and Information Considered

- Class Action Settlement Agreement, Case No. 1:22-cv-22483-Gayles/Torres, Express Freight International, et al. v. HINO Motors, Ltd., et al., October 27, 2023
- Exhibit A – Settlement Class Truck List
- Exhibit B – Extended Warranty
- VIN List of Sold Class Trucks, November 1, 2023
- Responses to Limited Information Request – December 2023
- HINO Trucks Warranty Policy and Procedures Manual, Section 1 – 2016 and Newer COE Warranty Period, July 2019
- NHTSA https://www.nhtsa.gov/
- *What's in a VIN?* https://uaw.org/standing-committees/union-label/how-to-read-your-vin/
- EPA Emissions Warranties for 1995 and Newer Light-duty Cars and Trucks under 8,500 Pounds GVWR, October 2015
- Results of research regarding U.S. inoperable vehicles and vehicles with salvaged, rebuilt or flood-damaged titles
- Results of research regarding U.S. light truck survivability, age and miles driven
- *Vehicle Survivability and Travel Mileage Schedules*, January 2006. National Highway Traffic Safety Administration
- Various interviews with extended service contract professionals familiar with the U.S. markets
- Various interviews with parts and service professionals familiar with the U.S. vehicle service department pricing, operations and warranty versus retail pricing rates
- Various analyses of retail market price relationships between pre-owned vehicle purchase prices and extended service contract purchase prices
- Various analyses of retail market price relationship between new vehicle purchase prices and vehicle manufacturer new vehicle warranty costs
- New vehicle warranty terms and conditions for various manufacturers
- Allstate vehicle service agreements and prices
- C.N.A. National Warranty Corporation vehicle service agreements and prices
- Protective vehicle service agreements and prices
- Various warranty insurance company state filings showing rate filings and rate manual guidelines
- Extended service contract information for various vehicle manufacturer programs

EXHIBIT C – Valuation Primary Significant Assumptions and Limiting Conditions

- My calculations assume a Valuation Effective Date of April 1, 2024, for the Warranty Extension; if the timing of the final approval date of the Settlement Agreement occurs as expected during the first half of 2024, my valuation conclusions will be materially accurate. The calculations reflect facts and conditions existing as of the date of this declaration. Subsequent events were not considered, and I have no obligation to update this declaration for such events and conditions.
- Information provided by Plaintiffs' Counsel is accurate. I did not audit or verify such information. Accordingly, I provide no guarantee as to the accuracy or completeness of such information.
- I have assumed that the Defendants and their dealership network will honor the intent and terms of the Settlement's Warranty Extension.
- While I believe my valuation conclusions are valid, I reserve the right to submit a revised valuation to consider new information and/or to correct any inadvertent errors or omissions given the complexity of this valuation.
- Possession of this declaration, or a copy thereof, does not carry with it the right of publication of all or part of it, nor may it be used for any purpose by anyone without the previous written consent of ValuationUSA. This valuation is valid only for the purpose specified here.

Exhibit D

Warranty Extension Valuation Summary and Conclusion

Estimated Covered Vehicles		Estimated Coverage Years		Valuation Summary	
Model Year (A)	Number of Vehicles (B)	Average Coverage Years by Model Year (C)	Coverage Years (D) (B X C = D)	Estimated Per Year Hypothetical ESC Market Price (E)	Estimated Value of Benefits By Model Year (F) (D X E = F)
2011	1,800	8.00	14,400	$334.15	$ 4,811,700
2012	3,200	8.00	25,600	$332.77	$ 8,518,800
2013	5,500	8.00	44,000	$329.52	$ 14,499,000
2014	4,700	8.00	37,600	$321.31	$ 12,081,400
2015	7,100	8.00	56,800	$318.36	$ 18,082,900
2016	9,400	8.00	75,200	$318.15	$ 23,924,900
2017	10,300	8.00	82,400	$310.41	$ 25,577,400
2018	10,300	8.00	82,400	$307.39	$ 25,328,600
2019	13,200	8.00	105,600	$304.33	$ 32,137,200
2020	15,400	8.00	123,200	$303.41	$ 37,380,000
2021	2,500	8.00	20,000	$304.18	$ 6,083,500
	83,400		667,200		$208,425,400

Valuation Conclusion **$208,000,000**

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No. 1:22-cv-22483-Gayles/Torres

EXPRESS FREIGHT INTERNATIONAL, et al.,

Plaintiffs,

v.

HINO MOTORS, LTD., et al.,

Defendants.

DECLARATION OF JENNIFER M. KEOUGH REGARDING NOTICE ADMINISTRATION

I, Jennifer M. Keough, hereby declare and state as follows:

1. I am the Chief Executive Officer and President of JND Legal Administration LLC ("JND"). As the CEO and President of JND, I oversee all facets of our company's operations, including monitoring and implementing our notice and claims administration programs.

2. JND is serving as the Settlement Administrator in the above-captioned litigation (the "Action"), as ordered by the Court in its October 30, 2023, Order Granting Preliminary Approval of Class Action Agreement and Directing Notice to the Settlement Class (the "Preliminary Approval Order").

3. I submit this Declaration at the request of the Parties in the Action to describe JND's Class Notice efforts to date and our successful execution of the Notice Plan as detailed in my October 27, 2023, Declaration of Jennifer M. Keough Regarding Notice Program ("Notice Plan Declaration") and approved by the Court in the Preliminary Approval Order. This Declaration is based on my personal knowledge, as well as upon information provided to me by experienced JND employees and the Parties, and, if called upon to do so, I could and would testify competently thereto.

CLASS MEMBER DATA

4. On October 18, 2023, Settlement Class Counsel provided JND with a list of eligible Vehicle Identification Numbers ("VINs") that Defendants compiled for the Settlement Class Trucks. The list contained 104,402 unique VINs.

5. Using the Settlement Class Truck VIN data, JND worked with a third-party data aggregation service to acquire potential Settlement Class Members' contact information from the Departments of Motor Vehicles ("DMVs") for all current and previous owners and registered lessees of the Settlement Class Trucks. The data JND received from the DMVs included Class Members in all 50 states, the District of Columbia, and Puerto Rico.

6. JND then analyzed, de-duplicated, and standardized the data received from the DMVs and promptly loaded it into a secure, case-specific database for the matter. Prior to mailing the Court-approved Postcard Notices, JND performed advanced address research using the USPS

National Change of Address ("NCOA") database[1] to obtain the most current mailing address information for potential Class Members. Included in the analysis was a review of Class Member names and addresses to conform minor discrepancies, such as misspellings of names, that often cause unnecessary duplication and over-noticing of the same Class Member at the same address. For example, some Class Members with large fleets of vehicles appeared in the DMV data dozens to hundreds of times with minor name and address variations that JND was able to conform and consolidate to a single address to send the Notice.

7. JND also conducted a sophisticated email append process to obtain email addresses for as many potential Class Members as possible. The email append process utilized skip tracing tools to identify a reliable email address by which the potential Class Member may be reached. JND then analyzed the email data to identify any undeliverable or otherwise invalid email addresses. To ensure that Email Notice is sent only to email addresses associated with known Class Members, JND adheres to a rigorous matching schema to identify email addresses for which the confidence rating is high and based on a quantum of matching points between the Class Member record input and the potential email addresses returned.

CAFA NOTICE

8. In compliance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, JND compiled a CD-ROM containing the following documents:

A. Class Action Complaint, filed August 5, 2022;

B. Declaration of Jennifer M. Keough Regarding Notice Program, filed October 27, 2023;

C. Class Action Settlement Agreement, filed October 27, 2023; and

D. Order Granting Preliminary Approval of Class Action Agreement and Directing Notice to the Settlement Class, filed October 30, 2023.

[1] The NCOA database is the official United States Postal Service ("USPS") technology product which makes change of address information available to mailers to help reduce undeliverable mail pieces before mail enters the mail stream. This product is an effective tool to update address changes when a person has completed a change of address form with the USPS. The address information is maintained in the database for 48 months.

9. On November 6, 2023, JND mailed the CD-ROM to the appropriate Federal and State officials identified in an enclosed distribution list with an accompanying cover letter, copies of which are attached as Exhibit A.

DIRECT MAIL NOTICE

10. On January 16, 2024, JND mailed 109,371 Postcard Notices via first-class U.S. mail to potential Class Members. A representative copy of the Postcard Notice is attached as Exhibit B. For Class Members with ten or more Settlement Class Trucks, JND mailed the content of the Postcard Notice with an accompanying cover letter that included additional instructions on how to access specialized claim filing assistance. A representative copy of the cover letter is attached as Exhibit C.

11. The Court-approved Postcard Notice informed Class Members of their rights and options under the Settlement, including a summary of the Settlement benefits, the definition of the Class, the deadlines to request exclusion, object, or file a claim for compensation, the date and time of the Fairness Hearing, and how to find more detailed information about the Settlement. It also included a QR code and other links to the Settlement Website, as well as the potential Class Member's VIN, Unique ID, and PIN, which they could use to log in to the online claim portal and file a Claim Form electronically.

12. Any Postcard Notices returned to JND with a forwarding address will be promptly re-mailed to the forwarding address provided. For Postcard Notices returned without a forwarding address, JND will conduct advanced address research using available skip-tracing tools and will promptly re-mail to any verified updated address that is obtained.

13. As of the date of this Declaration, 84 Postcard Notices have been forwarded and 95 Postcard Notices have been returned as undeliverable. JND is conducting advanced address research and will promptly re-mail the Postcard Notice to any verified address that is obtained.

DIRECT EMAIL NOTICE

14. As outlined in the Notice Plan Declaration, Email Notice was used to supplement the direct mail notice campaign. All potential Class Members with a mailing address were mailed

a Postcard Notice, and an Email Notice was also sent if JND was able to obtain a valid email address.

15. On January 9, 2024, JND commenced sending Email Notices to potential Class Members with a valid email address. The Email Notice campaign concluded on January 16, 2024. JND customized the emails for easy access to the Settlement Website and online Claim Form by including a QR code and other links to the Settlement Website throughout the Email Notice. The Email Notice also included the potential Class Member's VIN, Unique ID, and PIN, which they could use to log in to the online claim portal and file a Claim Form electronically.

16. Similar to the Postcard Notice, the Email Notice informed Class Members of their rights and options under the Settlement, including a summary of the Settlement benefits, the definition of the Class, the deadlines to request exclusion, object, or file a claim for compensation, the date and time of the Fairness Hearing, and how to find more detailed information about the Settlement. A representative copy of the Email Notice is attached as Exhibit D. For Class Members with ten or more Settlement Class Trucks, JND sent a tailored Email Notice that included additional instructions on how to access specialized claim filing assistance.

17. As described above, JND adheres to a rigorous matching schema when appending emails to Class Member records. As an email address is a more stable data point for individuals than it is for businesses, it is far more complicated to successfully append email addresses to business entities. This is due to several factors, including the nature of business name/address details and how that information is reflected across different platforms, as well as the difficulty of identifying the specific email address within an organization that is appropriate for legal noticing at a given moment in time. As a result of this dynamic and the fact that this particular Settlement Class is primarily composed of business entities, the population of email contacts produced through the email append process was inherently smaller than the population of physical addresses that was noticed by postcard.

18. As of the date of this Declaration, JND sent a total of 7,250 Email Notices, of which 997 "hard bounced" or were otherwise undeliverable.[2]

SUPPLEMENTAL DIGITAL NOTICE AND INTERNET SEARCH CAMPAIGN

19. On December 15, 2023, JND launched a targeted digital notice effort to supplement the direct notice campaign and extend Class Member reach further. The digital effort ran for four weeks and concluded on January 11, 2024. As described in the Notice Plan Declaration, the digital effort included the Google Display Network (a vast network that reaches over 90% of internet users), Facebook, Instagram, and industry websites *Heavy Duty Trucking* and *Land Line*. The effort was specifically designed to reach potential Class Members by targeting adults 18 years of age or older nationwide for whom any of the following are true:

A. Affinity for truck transport service and/or truck magazines (*Google Display Network*);

B. In-market for Mack trucks, Peterbilt trucks, semi-trucks, Kenworth trucks, classes of trucks, commercial trucks, diesel vehicles (new or used), and/or commercial vehicles (*Google Display Network*);

C. Work in the transportation and/or moving industry (*Facebook/Instagram*);

D. Targeted interests in: commercial driver license training (vocational training), *Diesel Power* or *Heavy Duty Trucking* (magazines/industry publications), diesel engines, diesel trucks, Freightliner trucks, Kenworth trucks, Mack trucks, Peterbilt trucks, truck classification (vehicles), Swift Transportation, Knight Transportation, trucking industry in the United States, and/or UPS Freight (transportation) (*Facebook/Instagram*);

[2] As described in the Notice Plan Declaration, emails that are returned to JND are generally characterized as "Hard Bounces" or "Soft Bounces." A Hard Bounce occurs when an ISP rejects the email due to a permanent reason such as the email account is no longer active. A Soft Bounce occurs when the email is rejected for temporary reasons, such as the recipient's email inbox is full. When an email is returned due to a Soft Bounce, JND attempts to re-send the email up to three more times to secure deliverability. If the Soft Bounce email is still returned after the third re-send, the email is considered undeliverable. Emails that result in a Hard Bounce are also considered undeliverable.

E. Users of the *Heavy Duty Trucking* and *Land Line* publication websites, which are leading sources of information for Corporation, Fleet, and Operation Executives and Managers for For-Hire, Private, and Leasing Fleets (*Heavy Duty Trucking*) and for professional truckers (*Land Line*).

20. Digital notice was served across all devices, with an emphasis on mobile devices. The digital ads included an embedded link that took users who click on the ad directly to the Settlement Website, where they were able to receive more information about the Settlement and file claims for compensation, as outlined below. JND also implemented an internet search campaign to assist potential Class Members with locating the Settlement Website. JND purchased ads tied to keywords related to the Settlement. When those terms were searched, an advertisement with a hyperlink to the Settlement Website appeared on the results page. Representative examples of the digital banner ads are attached as Exhibit E.

21. The Notice Plan Declaration contemplated delivering 4,100,000 digital impressions[3]. As of the date of this Declaration, JND not only delivered the planned impressions, but also delivered an additional 857,144 impressions, for a total of 4,957,144, exceeding the initial proposed total by more than 20%.

SUPPLEMENTAL PRINT NOTICE

22. JND also caused the Publication Notice to be printed in the November/December 2023 issues of the trucking industry print publications *Heavy Duty Trucking*, *Government Fleet*, and *Fleet Owner*. As described in the Notice Plan Declaration, these publications have subscriber bases ranging from 100,000 to over 215,000 and target owner-operators, small to medium fleet owners, company drivers, and others allied to the field. The Publication Notice included a QR code to make it easy for readers to visit the Settlement Website using a cell phone or other mobile

[3] Impressions or Exposures are the total number of opportunities to be exposed to a media vehicle or combination of media vehicles containing a notice. Impressions are a gross or cumulative number that may include the same person more than once. As a result, impressions can and often do exceed the population size.

device. Tearsheets of the Publication Notice as it appeared in each of the trade industry magazines are attached as Exhibit F.

PRESS RELEASE

23. On December 15, 2023, JND caused a press release to be distributed to over 11,000 media outlets nationwide to assist in getting "word of mouth" out about the Settlement. The press release, as distributed, is attached as Exhibit G.

SETTLEMENT WEBSITE

24. On October 31, 2023, JND launched an informational, case-specific Settlement Website at www.HinoUSASettlement.com. The Website provides comprehensive information about the Settlement, including answers to frequently asked questions, contact information for the Settlement Administrator, key dates, and links to important case documents. Linked documents include the Long Form Notice, the Claim Form, and the Class Action Settlement Agreement, among others. The Settlement Website also provides a VIN Lookup feature where potential Class Members can input their VIN to determine whether their vehicle qualifies as a Settlement Class Truck.

25. In addition to providing comprehensive information about the Settlement, the Settlement Website also includes a streamlined online Claim Form for Class Members to submit claims electronically, as well as a downloadable version of the Claim Form for Class Members who prefer to submit a Claim Form by mail.

26. As of the date of this Declaration, the Website has registered more than 9,000 visitors and more than 63,000 page views. JND will continue to update and maintain the Settlement Website throughout the settlement administration process.

TOLL-FREE NUMBER, P.O. BOX, AND EMAIL ADDRESS

27. On October 31, 2023, JND launched a dedicated toll-free telephone line that Class Members can call to obtain information about the Settlement. Pre-recorded answers to frequently asked questions are available 24 hours a day. During business hours, live agents are available to answer callers' questions regarding the Settlement.

28. As of the date of this Declaration, JND has received 144 calls to the toll-free telephone number, of which 47 have spoken with a live agent.

29. JND also established a dedicated email address, info@HinoUSASettlement.com, to receive and respond to Class Member inquiries. As of the date of this Declaration, JND has received 189 emails to this email inbox.

30. JND established a post office box for receipt of Class Member correspondence, paper Claim Forms, objections, and exclusion requests.

OBJECTIONS

31. The Notices informed recipients that any Class Member who wants to object to the proposed Settlement may do so by submitting a written statement on or before February 22, 2024, 115 days after entry of the Preliminary Approval Order.

32. As of the date of this Declaration, JND has not received and is not aware of any objections having been submitted.

REQUESTS FOR EXCLUSION

33. The Notices also informed recipients that any Class Member who wishes to opt out of the Settlement may do so by submitting a written request for exclusion on or before February 22, 2024, 115 days after entry of the Preliminary Approval Order.

34. As of the date of this Declaration, JND has not received and is not aware of any requests for exclusion having been submitted.

CLAIM FORMS

35. As of the date of this Declaration, JND has received 2,497 Claim Form submissions. JND has also received inquiries from 50 vehicle fleets expressing intent to file claims representing many thousands of Settlement Class Trucks, and JND is in the process of assisting those vehicle fleets with submitting their claims.

CONCLUSION

36. As of January 16, 2024, JND completed the Direct Notice component of the Settlement Class Notice Program as described in the Notice Plan Declaration and in satisfaction of the Substantial Completion Date ordered by the Court in the Preliminary Approval Order.[4]

37. In my opinion, the Notice Plan as designed and executed constitutes the best practicable notice to the Settlement Class under the circumstances of this case and will provide notice to virtually all Class Members. I will provide a supplemental declaration to the Court prior to the Final Approval Hearing with updated information regarding the implementation of the Notice Plan and the claims administration process.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this on January 22, 2024, at Seattle, Washington.

JENNIFER M. KEOUGH

[4] The Preliminary Approval Order required Substantial Completion of Direct Notice within 75 days after entry of the Preliminary Approval Order. As the Order was entered October 30, 2023, the date 75 days later was Saturday, January 13, 2024. The Settlement Agreement at Section 19.13 provides that a time period ending on a Saturday, Sunday, or Federal Holiday shall be extended to the end of the next day that is not one of the aforementioned days. The next such day was Tuesday, January 16, 2024, as Monday, January 15, 2024, was Martin Luther King, Jr. Day.

EXHIBIT A

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK PALO ALTO
SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Andrew Soukup

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asoukup@cov.com

November 6, 2023

By FedEx and USPS Priority Express

To: All "Appropriate" Federal and State Officials Per 28 U.S.C. § 1715
(see attached distribution list – Appendix B)

Re: Notice of Proposed Settlement Pursuant to the Class Action Fairness Act (28 U.S.C. § 1715) in *Express Freight International, et al., v. Hino Motors, Ltd., et al.*, No. 1:22-cv-22483 (S.D. Fla.)

To whom it may concern:

On October 27, 2023, a proposed class-action settlement was filed in the above-captioned action (the "*Express Freight*" Action). The Court preliminarily approved that settlement on October 30, 2023. Pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, Defendants Hino Motors Ltd., Hino Motors Manufacturing U.S.A., Inc., and Hino Motors Sales U.S.A., Inc. (collectively "Hino") hereby provide notice of the proposed Settlement Agreement. Relevant documents, where available, are included on the enclosed CD accompanying this Letter.

In accordance with 28 U.S.C. § 1715(b), Hino states as follows:

1. Complaint (28 U.S.C. § 1715(b)(1))

The complaint in this action, originally filed on August 5, 2022 in the United States District Court for the Southern District of Florida, is included as Exhibit A on the enclosed CD accompanying this letter. All other pleadings and records filed in the *Express Freight* Action are also available through the federal government's PACER service at http://www.pacer.gov.

2. Judicial Hearing (28 U.S.C. § 1715(b)(2))

On October 30, 2023 the Court entered a Preliminary Approval Order of the Settlement Agreement. The Court has scheduled a Fairness Hearing for April 1, 2024 at 10:00 a.m. If and when the Court reschedules the Fairness Hearing, or schedules any other hearing, the date of such hearings and other relevant information will be posted on the settlement website (www.HinoUSASettlement.com) and also available through PACER. Other than the Fairness Hearing, no other hearings are pending in this matter.

3. Proposed Notice (28 U.S.C. § 1715(b)(3))

The proposed notice plan is outlined in Section 9.1 of the proposed class-action agreement filed on October 27, 2023 (the "Settlement Agreement") and in the Declaration of Jennifer M.

Keough and the exhibits accompanying that declaration.[1] The proposed notification to Settlement Class Members will be conducted by the Settlement Administrator. The Settlement Administrator will maintain a website with relevant notice and information regarding the case, including the Settlement Agreement and its exhibits, at www.HinoUSASettlement.com. The notice includes direct notice to Settlement Class Members, to the extent feasible, by compiling a list of Vehicle Identification Numbers associated with each Settlement Class Truck and working with third party data aggregation services to acquire contact information from the Departments of Motor Vehicles for all previous owners and registered lessees of the Settlement Class Trucks. Furthermore, the Settlement Administrator will cause digital advertisements to be placed through search engines, social media websites, and industry websites. The Settlement Administrator will further place notice in leading industry publications as well as distribute a press release to over 11,000 media outlets nationwide. The Settlement Administrator will further operate a 24-hour toll free helpline with live operators during regular business hours. The proposed notification that will be distributed to Settlement Class Members will include a process for exclusion or objecting to the settlement.

The Declaration of Jennifer M. Keough and the exhibits to that declaration, which contain the notices that are intended for distribution to Settlement Class Members, are included as Exhibit B on the enclosed CD accompanying this Letter.

4. Proposed Settlement Agreement (28 U.S.C. § 1715(b)(4))

The Settlement Agreement, including all exhibits, is included as Exhibit C on the enclosed CD accompanying this Letter.

5. Other Agreements (28 U.S.C. § 1715(b)(5))

On July 25, 2023, Settlement Class Counsel and counsel for Hino executed a term sheet. That term sheet has been completely superseded by the Settlement Agreement.

Hino understands that Settlement Class Counsel intends to separately execute an escrow agreement with Citi Private Bank pursuant to Section 12 of the Settlement Agreement. The Parties have agreed that Settlement Class Counsel will execute in the future guaranties requiring the prompt return of any attorney's fees or expenses disbursed from the escrow account prior to the Effective Date in the event the Settlement Agreement is reversed on appeal or any other order is entered requiring the return of all or a portion of such attorneys' fees or expenses.

There are no other agreements between Settlement Class Counsel and counsel for Hino.

6. Final Judgment (28 U.S.C. § 1715(b)(6))

No final judgment or notice of dismissal has been entered in the *Express Freight* Action.

[1] Capitalized terms not defined herein are defined as in the Settlement Agreement.

7. Estimate of Class Members (28 U.S.C. § 1715(b)(7)(B))

The proposed Settlement Class includes owners and lessees of Hino trucks equipped and originally sold or leased in the United States with a Hino engine from engine Model Year 2010 through and including engine Model Year 2019. Given the volume of sales at issue — which Hino estimates to include approximately 103,965 trucks — it is not feasible to provide the name and state of residence for each of the Settlement Class Members covered by the proposed settlement. Appendix A contains a table which provides a reasonable estimate of the number of Settlement Class Trucks sold in each state and the estimated proportionate share of the claims of such members to the entire settlement. The method for determining Settlement Class Member distributions is set forth in Section 4 of the Settlement Agreement.

8. Related Judicial Opinions (28 U.S.C. § 1715(b)(8))

On October 30, 2023, the Court entered an Order granting preliminary approval of the Settlement Agreement and directed notice be sent to the Settlement Class in accordance with the Settlement Agreement. That Order is included on the enclosed CD as Exhibit D. Any further judicial opinions issued relating to the proposed settlement after the date of this Letter will be posted on the settlement website (www.HinoUSASettlement.com) and also available through PACER.

Please contact me if you have any questions about the proposed settlement. In addition, if you believe that this notice does not satisfy the requirements of 28 U.S.C. § 1715, please contact me immediately so that Hino can address any concerns or questions you might have.

Sincerely,

/s/ Andrew Soukup

Andrew Soukup

Counsel for Defendants Hino Motors Ltd., Hino Motors Manufacturing U.S.A., Inc., and Hino Motors Sales U.S.A., Inc.

Enclosure (CD)

APPENDIX A
Reasonable Estimate of Allocation of Settlement Class Members and Claims Across Each State or U.S. Territory

STATE	Estimated Number of Trucks Sold	Estimated Proportionate Share of Settlement Class and Claims
Alaska	1	0.00%
Alabama	1,632	1.57%
Arkansas	332	0.32%
Arizona	1,068	1.03%
California	12,343	11.87%
Colorado	612	0.59%
Connecticut	1,338	1.29%
District of Columbia	0	0.00%
Delaware	868	0.83%
Florida	4,746	4.56%
Georgia	1,829	1.76%
Hawaii	38	0.04%
Iowa	228	0.22%
Idaho	75	0.07%
Illinois	1065	1.02%
Indiana	538	0.52%
Kansas	5,183	4.99%
Kentucky	74	0.07%
Louisiana	561	0.54%
Massachusetts	2,447	2.35%
Maryland	908	0.87%
Maine	344	0.33%
Michigan	1,045	1.01%
Minnesota	969	0.93%
Missouri	2,343	2.25%
Mississippi	405	0.39%
Montana	0	0.00%
North Carolina	2,208	2.12%
North Dakota	25	0.02%
Nebraska	370	0.36%
New Hampshire	873	0.84%
New Jersey	7,411	7.13%

STATE	Estimated Number of Trucks Sold	Estimated Proportionate Share of Settlement Class and Claims
New Mexico	259	0.25%
Nevada	396	0.38%
New York	7,736	7.44%
Ohio	3,066	2.95%
Oklahoma	153	0.15%
Oregon	376	0.36%
Pennsylvania	17,576	16.91%
Puerto Rico	390	0.38%
Rhode Island	1,978	1.90%
South Carolina	899	0.86%
South Dakota	11	0.01%
Tennessee	1,402	1.35%
Texas	9,337	8.98%
Utah	307	0.30%
Virginia	783	0.75%
Vermont	75	0.07%
Washington	688	0.66%
Wisconsin	1,775	1.71%
West Virginia	4,879	4.69%
Wyoming	0	0.00%

APPENDIX B

Express Freight CAFA Notice Letter Service List

Service by FedEx and USPS Priority Express	
Treg R. Taylor Office of the Attorney General 1031 W 4th Ave Ste 200 Anchorage, AK 99501	Steve Marshall Attorney General's Office 501 Washington Ave Montgomery, AL 36104
Tim Griffin Office of the Attorney General 323 Center St Ste 200 Little Rock, AR 72201	Kris Mayes Office of the Attorney General 2005 N Central Ave Phoenix, AZ 85004
CAFA Coordinator Office of the Attorney General Consumer Protection Section 455 Golden Gate Ave., Ste 11000 San Francisco, CA 94102	Phil Weiser Office of the Attorney General Ralph L. Carr Judicial Building 1300 Broadway, 10th Fl Denver, CO 80203
William Tong Office of the Attorney General 165 Capitol Ave Hartford, CT 06106	Kathy Jennings Delaware Department of Justice Carvel State Office Building 820 N French Street Wilmington, DE 19801
Ashley Moody Office of the Attorney General State of Florida PL-01 The Capitol Tallahassee, FL 32399	Chris Carr Office of the Attorney General 40 Capitol Sq SW Atlanta, GA 30334
Anne E. Lopez Department of the Attorney General 425 Queen Street Honolulu, HI 96813	Brenna Bird Office of the Attorney General Hoover State Office Building 1305 E. Walnut Street Rm 109 Des Moines, IA 50319
Raúl R. Labrador Office of the Attorney General 700 W. Jefferson St, Suite 210 Boise, ID 83720	Kwame Raoul Office of the Attorney General James R. Thompson Center 100 W. Randolph St Chicago, IL 60601
Todd Rokita Office of the Attorney General Indiana Government Center South 302 W Washington St 5th Fl Indianapolis, IN 46204	Kris W. Kobach Office of the Attorney General 120 SW 10th Ave 2nd Fl Topeka, KS 66612

Service by FedEx and USPS Priority Express	
Daniel Cameron Office of the Attorney General Capitol Building 700 Capitol Ave Ste 118 Frankfort, KY 40601	Jeff Landry Office of the Attorney General 1885 N. Third St Baton Rouge, LA 70802
CAFA Coordinator General Counsel's Office Office of Attorney General One Ashburton Pl, 20th Floor Boston, MA 02108	Anthony G. Brown Office of the Attorney General 200 St. Paul Pl Baltimore, MD 21202
Aaron Frey Office of the Attorney General 6 State House Station Augusta, ME 04333	Dana Nessel Department of Attorney General G. Mennen Williams Building, 7th Fl 525 W Ottawa St Lansing, MI 48933
Keith Ellison Office of the Attorney General 445 Minnesota St Suite 1400 St. Paul, MN 55101	Andrew Bailey Attorney General's Office Supreme Court Building 207 W High St Jefferson City, MO 65101
Lynn Fitch Office of the Attorney General Walter Sillers Building 550 High St Ste 1200 Jackson, MS 39201	Austin Knudsen Office of the Attorney General Justice Building, Third Fl 215 N. Sanders Helena, MT 59601
Josh Stein Attorney General's Office 114 W Edenton St Raleigh, NC 27603	Drew H. Wrigley Office of the Attorney General State Capitol, 600 E Boulevard Ave Dept. 125 Bismarck, ND 58505
Mike Hilgers Attorney General's Office 2115 State Capitol Lincoln, NE 68509	John Formella Office of the Attorney General NH Department of Justice 33 Capitol St. Concord, NH 03301
Matthew J. Platkin Office of the Attorney General Richard J. Hughes Justice Complex 25 Market St 8th Fl, West Wing Trenton, NJ 08611	Raúl Torrez Office of the Attorney General Villagra Building 408 Galisteo Street Santa Fe, NM 87501
Aaron Ford Office of the Attorney General Old Supreme Court Building 100 N Carson St Carson City, NV 89701	CAFA Coordinator Office of the Attorney General 28 Liberty St 15th Fl New York, NY 10005

Service by FedEx and USPS Priority Express	
Dave Yost Attorney General's Office State Office Tower 30 E Broad St 14th Fl Columbus, OH 43215	Gentner Drummond Office of the Attorney General 313 NE 21st St Oklahoma City, OK 73105
Ellen F. Rosenblum Oregon Department of Justice Justice Building 1162 Court St NE Salem, OR 97301	Michelle Henry PA Office of the Attorney General Strawberry Square 16th Fl Harrisburg, PA 17120
Peter F. Neronha Office of the Attorney General 150 S Main St Providence, RI 02903	Alan Wilson Office of the Attorney General Rembert C. Dennis Bldg 1000 Assembly St Rm 519 Columbia, SC 29201
Marty Jackley Office of the Attorney General 1302 E Highway 14 Ste 1 Pierre, SD 57501	Jonathan Skrmetti Office of the Attorney General 500 Dr Martin L King Jr Blvd Nashville, TN 37219
Ken Paxton Office of the Attorney General 300 W. 15th St Austin, TX 78701	Sean D. Reyes Office of the Attorney General Utah State Capitol Complex 350 North State St Ste 230 Salt Lake City, UT 84114
Jason S. Miyares Office of the Attorney General 202 N. Ninth St. Richmond, VA 23219	Charity R. Clark Attorney General's Office 109 State St. Montpelier, VT 05609
Bob Ferguson Office of the Attorney General 1125 Washington St SE Olympia, WA 98501	Josh Kaul Attorney General's Office P.O. Box 7857 Madison, WI 53707
Patrick Morrisey Office of The Attorney General State Capitol, 1900 Kanawha Blvd E Building 1 Rm E-26 Charleston, WV 25305	Bridget Hill Office of the Attorney General 109 State Capitol 200 W 24th St Rm W109 Cheyenne, WY 82002
Brian Schwalb Office of the Attorney General 400 6th St NW Washington, DC 20001	Merrick Garland Office of the U.S. Attorney General U.S. Department of Justice 950 Pennsylvania Ave NW Washington, DC 20530

Service by FedEx and USPS Priority Express	
Fainu'ulelei Falefatu Ala'ilima-Utu Department of Legal Affairs Exec Ofc Bldg, 3rd Fl P.O. Box 7 Utulei, AS 96799	Douglas B. Moylan Office of the Attorney General Administration Division 590 S Marine Corps Dr, Suite 901 Tamuning, GU 96913
Edward Manibusan Office of the Attorney General Administration Building P.O. Box 10007 Saipan, MP 96950	Domingo Emanuelli Hernández Dpto. de Justicia de Puerto Rico Calle Teniente César González 677 Esq. Ave. Jesús T. Piñero San Juan, PR 00918
Ariel Smith Office of the Attorney General 3438 Kronprindsens Gade GERS Building 2nd Fl St. Thomas, VI 00802	Joses R. Gallen Department of Justice P.O. Box PS-105 Palikir Pohnpei State, FM 96941
Richard Hickson, Attorney General C/O Marshall Islands Embassy 2433 Massachusetts Ave NW Washington, DC 20008	Ernestine K. Rengiil Office of the Attorney General P.O. Box 1365 Koror, PW 96940

EXHIBIT B

A federal court authorized this Notice. This is not a solicitation from a lawyer.

Purchasers and Lessees of certain Hino trucks can claim cash from a $237.5 million settlement.

Estimated payments range from $1,500 - $15,000 per Class Truck.

You are receiving this notice because records indicate you may qualify for this class action settlement.

Questions?
Visit www.HinoUSASettlement.com or
Call 1-888-256-6150

Hino USA Settlement
c/o JND Legal Administration
PO Box 91473
Seattle WA 98111

«Barcode»

Postal Service: Please do not mark barcode

«Full_Name»
«CF_CARE_OF_NAME»
«CF_ADDRESS_1»
«CF_ADDRESS_2»
«CF_CITY», «CF_STATE» «CF_ZIP»
«CF_COUNTRY»

You are receiving this notice because you may be a Settlement Class member in a proposed class action settlement in a lawsuit called *Express Freight International, et al., v. Hino Motors, Ltd., et al.*, No. 1:22-cv-22483 (S.D. Fla.). Settlement Class members include current or former owners/lessees of certain Hino Trucks. A list of the Settlement Class Trucks and other important information and case documents is available on the Settlement Website at www.HinoUSASettlement.com.

The Settlement provides **$237.5 million** to resolve claims that the emission levels in certain Hino trucks were misrepresented and exceed regulatory limits. Hino denies the claims but has decided to settle. The Court has not decided who is right.

You have been identified as a potential Settlement Class member. The purpose of this notice is to inform you of the proposed class action settlement so you may decide what to do. Your legal rights under the Settlement are affected even if you do nothing, so please read this notice carefully.

The compensation available for each Settlement Class Truck is likely to range from $1,500 to $15,000 per Settlement Class Truck, depending on the volume of claims submitted and court-awarded fees and costs. If multiple Settlement Class members submit a valid claim for the same Settlement Class Truck, 60% of the compensation for that Settlement Class Truck will be allocated to the original owner who purchased the truck new, and the remaining 40% will be allocated to or divided evenly among the other Settlement Class member(s).

The Settlement also provides a robust extended warranty that covers various emissions control system components, and further warranty protections if there is an emissions system recall or repair campaign in the next three years. Please visit www.HinoUSASettlement.com for more information.

How do I get a payment?

You must submit a claim to receive a settlement payment. The claim form asks for basic information and takes just a few minutes to complete. To submit your claim online, please scan your individual QR code below or visit www.HinoUSASettlement.com and enter your unique ID and PIN. You can also download a claim form on the Settlement Website or call to request a form, and submit your claim by mail. The fastest option is to submit your claim online.

You should submit your claim now. Claim forms must be electronically submitted or postmarked no later than **June 15, 2024**. This schedule may change, so please visit the Settlement Website regularly for updates.

What are my other options?

You may object to or exclude yourself from the Settlement by **February 22, 2024**. If you exclude yourself, you will not receive any settlement payments and you will not release any of the claims that this Settlement resolves. If you do not exclude yourself from the Settlement, you will be bound by the Court's orders and judgments like all other Class members, even if you do not file a claim. If you wish to object, the Court will consider your views in deciding whether to approve or reject this Settlement. If the Court does not approve the Settlement, no settlement payments will be sent, and the lawsuit will continue. You cannot object if you exclude yourself from the Settlement. For information on how to object or exclude yourself, visit www.HinoUSASettlement.com.

What happens next?

The Court will hold a hearing on **April 1, 2024**, to consider whether to grant final approval of the Settlement and award fees and costs to the attorneys representing the class (known as "Settlement Class Counsel"). Settlement Class Counsel will ask the Court to award up to 33.33% of the Settlement Cash Value (i.e. up to $79,158,750) to cover reasonable attorneys' fees plus expenses they incurred in litigating this case and securing this Settlement. You do not need to attend this hearing, but you are welcome to attend at your own expense. The hearing date may change, so please check the Settlement Website regularly for updates.

Questions? Visit www.HinoUSASettlement.com, call toll-free 1-888-256-6150, email info@HinoUSASettlement.com, or write Hino USA Settlement, c/o JND Legal Administration, PO Box 91473, Seattle WA 98111.

YOUR VIN:	XXXXXXXXXXXXXXXX
YOUR UNIQUE ID:	<<Unique_ID>>
YOUR PIN:	XXXXXXXX

PLEASE REFER TO YOUR UNIQUE ID AND PIN TO FILE A CLAIM

Carefully separate this Address Change Form at the perforation

Name: _____

Current Address: _____

_____

_____

PLACE STAMP HERE

Address Change Form

To make sure your information remains up-to-date in our records, please confirm your address by filling in the above information and depositing this postcard in the U.S. Mail.

Hino USA Settlement
c/o JND Legal Administration
PO Box 91473
Seattle, WA 98111

EXHIBIT C

Hino USA Settlement
c/o JND Legal Administration
PO Box 91473
Seattle, WA 98111

Hino Emissions Class Action Settlement – Claim Filing Assistance for Owners or Lessees of 10 or more Settlement Class Trucks

Dear [NAME],

You are receiving this letter because you may be eligible for compensation in a proposed class action settlement in a lawsuit called *Express Freight International, et al., v. Hino Motors, Ltd., et al.*, No. 1:22-cv-22483-Gayles/Torres (S.D. Fla.). The Settlement provides compensation to owners and lessees of certain Hino trucks (called the "Settlement Class Trucks"), and the estimated payments range from **$1,500 - $15,000** per truck.

The Court granted preliminary approval of the Settlement on October 30, 2023, and ordered notices to be sent to potential Class Members, like you, to inform them of their legal rights under the Settlement. For more information about the Settlement, including your rights and options and the deadlines to exercise them, please review the enclosed, Court-ordered notice. You may also find up-to-date information related to the Settlement at www.HinoUSASettlement.com.

DMV records indicate that you may have owned or leased 10 or more Settlement Class Trucks. As further described in the enclosed notice, you will need to submit a claim for these trucks to seek compensation under the Settlement. A special process has been established to facilitate the bulk filing of claims for Class Members with 10 or more Settlement Class Trucks. To submit a bulk claim, please contact us by email at info@HinoUSASettlement.com, or call 1-888-256-6150, and a representative specializing in bulk claims will assist you.

Under the current schedule, claims must be submitted by **June 15, 2024**. This schedule may change, so please visit the Settlement Website regularly for updates.

Please read the enclosed legal notice to learn about your rights and options under the Settlement, including important deadlines. For additional information about the proposed Settlement, please visit the Settlement Website at www.HinoUSASettlement.com.

Regards,

Hino Emissions Class Action Settlement Administrator

EXHIBIT D

From: info@HinoUSASettlement.com
To: [Class Member email address]
Subject: Hino Class Action Settlement Notice

COURT-APPROVED LEGAL NOTICE

This is an official, Court-approved Notice about a class action settlement.

Please review the important information below.

Questions?

Visit
www.HinoUSASettlement.com
or Call 1-888-256-6150

Hino USA Settlement
c/o JND Legal Administration
PO Box 91473
Seattle, WA 98111

HINO EMISSIONS CLASS ACTION SETTLEMENT NOTICE

Purchasers and Lessees of certain Hino trucks may qualify for a payment in a $237.5 million class action settlement.

Estimated payments range from $1,500 - $15,000 per Class Truck.

PLEASE REFER TO YOUR UNIQUE ID AND PIN TO FILE A CLAIM		
YOUR VIN:	**YOUR UNIQUE ID:**	**YOUR PIN:**
XXXXXXXXXXXXXXXXX	<<Unique_ID>>	XXXXXXXX

Dear [Class Member Name],

You are receiving this notice because you may be a Settlement Class member in a proposed class action settlement in a lawsuit called *Express Freight International, et al., v. Hino Motors, Ltd., et al*., No. 1:22-cv-22483 (S.D. Fla.). A list of the Settlement Class Trucks and other important information and case documents is available on the Settlement Website at www.HinoUSASettlement.com.

Settlement Class Members include all persons or entities that purchased or leased a Settlement Class Truck through October 30, 2023. Settlement Class Trucks include any on-road vehicle equipped and originally sold or leased in the United States with a Hino engine from engine Model Year 2010 through and including engine Model Year 2019. Eligibility for Settlement Cash Benefits will be determined by VIN, but for illustrative purposes, the Parties expect that the Settlement Class includes most or all of the following Hino trucks:

- Hino 155 (Model Years 2013-2020)
- Hino 195 (Model Years 2013-2020)
- Hino 238 (Model Years 2011-2020)
- Hino 258 (Model Years 2011-2020)
- Hino 268 (Model Years 2011-2020)

- Hino 338 (Model Years 2011-2020)
- Hino XL7 (Model Year 2020)
- Hino XL8 (Model Year 2020)
- Hino L6 (Model Year 2021)
- Hino L7 (Model Year 2021)

The Settlement provides **$237.5 million** to resolve claims that the emission levels in certain Hino trucks were misrepresented and exceed regulatory limits. Hino denies the claims but has decided to settle. The Court has not decided who is right.

You have been identified as a potential Settlement Class Member. The purpose of this notice is to inform you of the proposed class action settlement so you may decide what to do. Your legal rights under the Settlement are affected even if you do nothing, so please read this notice carefully.

The compensation available for each Settlement Class Truck is likely to range from $1,500 to $15,000 per Class Truck, depending on the volume of claims submitted and court-awarded fees and costs. If multiple Settlement Class members submit a valid claim for the same Settlement Class Truck, 60% of the compensation for that Settlement Class Truck will be allocated to the original owner who purchased the truck new, and the remaining 40% will be allocated to or divided evenly among the other Settlement Class member(s).

The Settlement also provides a robust extended warranty that covers various emissions control system components, and further warranty protections if there is an emissions system recall or repair campaign in the next three years. Please visit www.HinoUSASettlement.com for more information.

HOW DO I GET A PAYMENT?

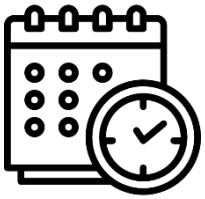
You must submit a claim to receive a settlement payment. The claim form asks for basic information and takes just a few minutes to complete.

To submit your claim online, please click the “File A Claim” link or scan your individual QR code below. You can also visit www.HinoUSASettlement.com and enter your unique ID and PIN. If you would like to submit your claim by mail, you can download and print the claim form on the Settlement Website or call to request a form. The fastest option is to submit your claim online.

You should submit your claim now. Claim forms must be electronically submitted or postmarked no later than **June 15, 2024**. This schedule may change, so please visit the Settlement Website regularly for updates.

FILE A CLAIM

HOW DO I SUBMIT MY CLAIM ONLINE?

PLACEHOLDER Visit the Settlement Website at www.HinoUSASettlement.com or scan the QR code above.	 Insert your Unique ID and PIN, fill out the claim form and submit.	 Under the current schedule, the deadline to file your claim is **June 15, 2024.** **You should submit your claim now.**

WHAT ARE MY OTHER OPTIONS?

You may object to or exclude yourself from the Settlement by **February 22, 2024**.

If you exclude yourself, you will not receive any settlement payments and you will not release any of the claims that this Settlement resolves. If you do not exclude yourself from the Settlement, you will be bound by the Court's orders and judgments like all other Class Members, even if you do not file a claim.

If you wish to object, the Court will consider your views in deciding whether to approve or reject this Settlement. If the Court does not approve the Settlement, no settlement payments will be sent, and the lawsuit will continue. You cannot object if you exclude yourself from the Settlement.

For information on how to object or exclude yourself, visit www.HinoUSASettlement.com.

WHAT HAPPENS NEXT?

The Court will hold a hearing on **April 1, 2024**, to consider whether to grant final approval of the Settlement and award fees and costs to the attorneys representing the class (known as "Settlement Class Counsel"). Settlement Class Counsel will ask the Court to award up to 33.33% of the Settlement Cash Value (*i.e.* up to $79,158,750) to cover reasonable attorneys' fees plus expenses they incurred in litigating this case and securing this settlement. You do not need to attend this hearing, but you are welcome to attend at your own expense. The hearing date may change, so please check the Settlement Website regularly for updates.

Questions? Visit www.HinoUSASettlement.com or Call 1-888-256-6150

EXHIBIT E

Marvel star Jonathan Majors convicted of assault stemming from fight with then-girlfriend inside NYC car service

A Manhattan jury has convicted Jonathan Majors on charges stemming from a fight with his then girlfriend Grace Jabbari inside a hired car.

Why 'Leave the World Behind' viewers think the Obamas are sending a warning with movie

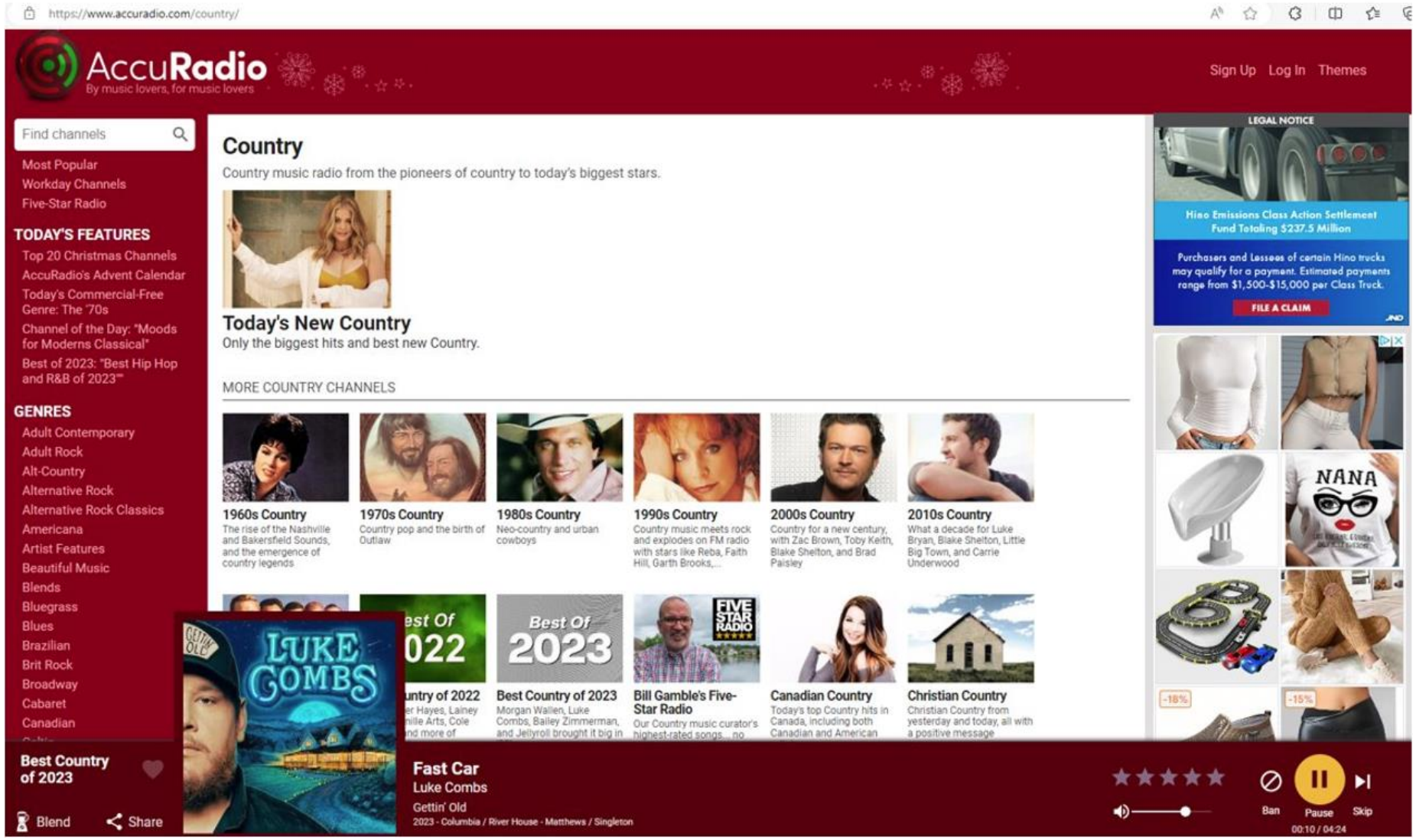
Former college hoops star, ex-NBAer dead at 52

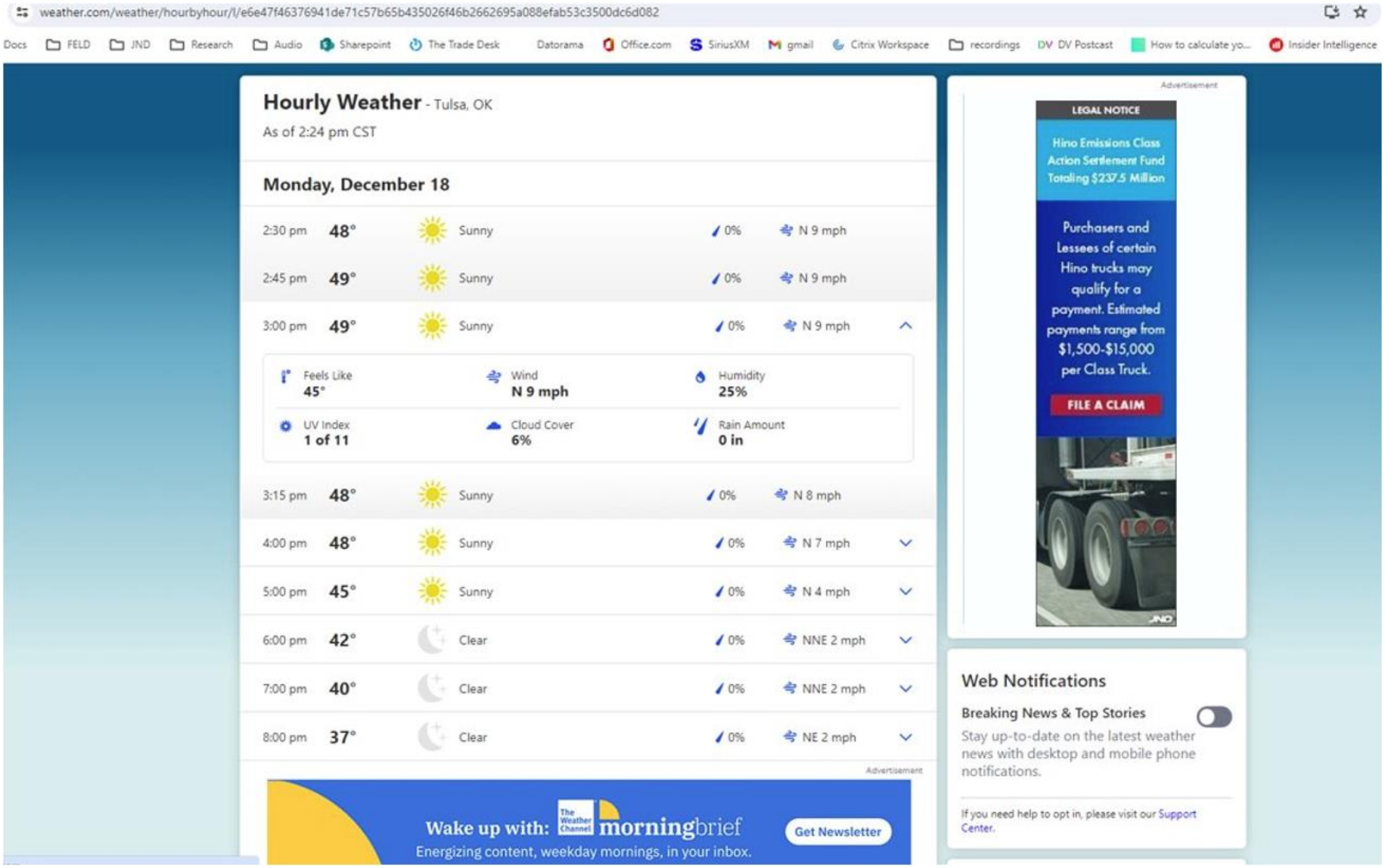
Sandra Day O'Connor's body lies in repose as justices, VP Harris pay respects to Supreme Court's first female member

Smash and nab **Tough luck:**

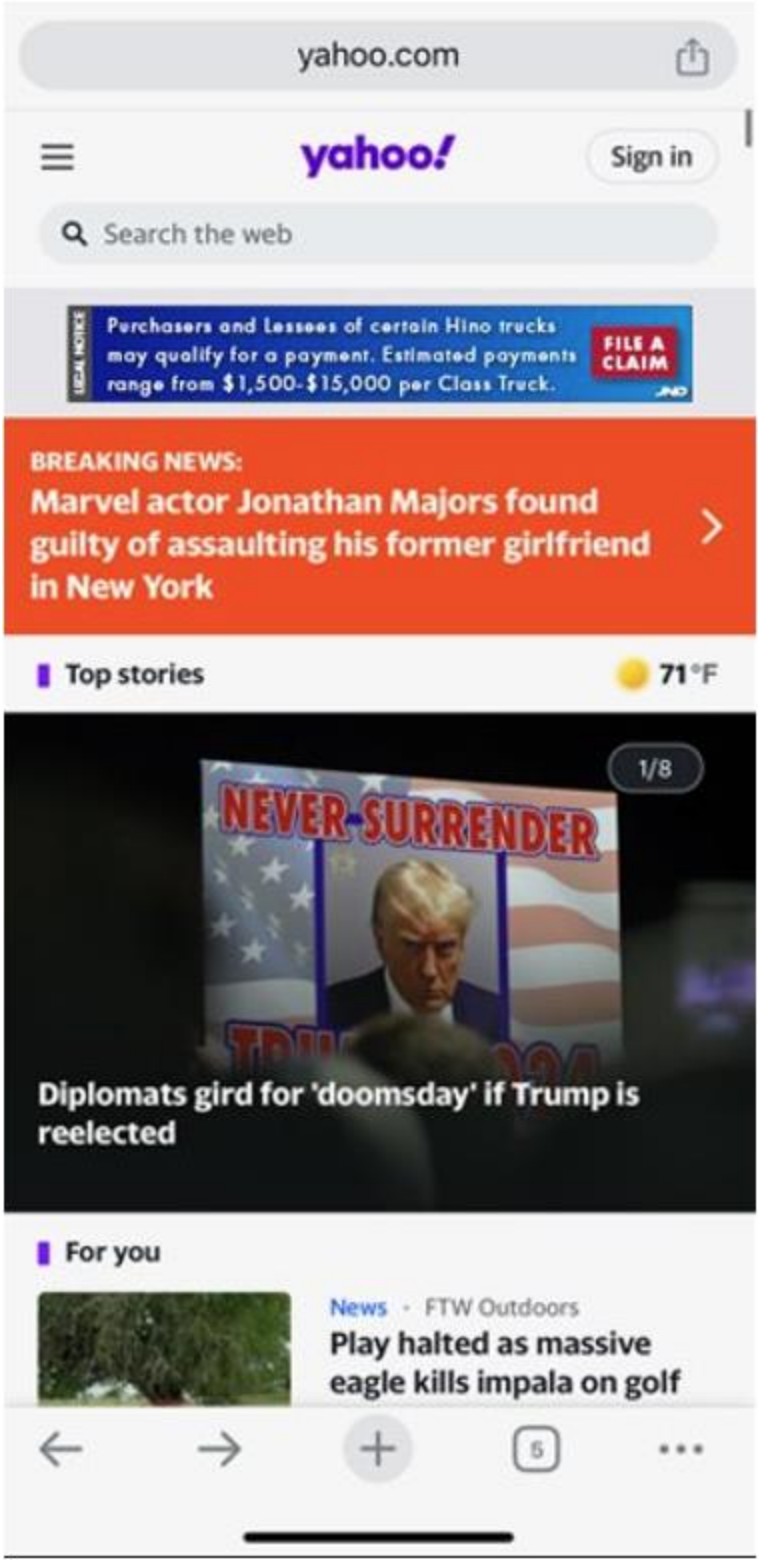
TRENDING NOW

Escort who caters to Wall Street


https://www.accuradio.com/country/
AccuRadio
By music lovers, for music lovers
Sign Up
Log In
Themes
Find channels
Most Popular
Workday Channels
Five-Star Radio
TODAY'S FEATURES
Top 20 Christmas Channels
AccuRadio's Advent Calendar
Today's Commercial-Free Genre: The '70s
Channel of the Day: "Moods for Moderns Classical"
Best of 2023: "Best Hip Hop and R&B of 2023""
GENRES
Adult Contemporary
Adult Rock
Alt-Country
Alternative Rock
Alternative Rock Classics
Americana
Artist Features
Beautiful Music
Blends
Bluegrass
Blues
Brazilian
Brit Rock
Broadway
Cabaret
Canadian
Country
Country music radio from the pioneers of country to today's biggest stars.
Today's New Country
Only the biggest hits and best new Country.
MORE COUNTRY CHANNELS
1960s Country
The rise of the Nashville and Bakersfield Sounds, and the emergence of country legends
1970s Country
Country pop and the birth of Outlaw
1980s Country
Neo-country and urban cowboys
1990s Country
Country music meets rock and explodes on FM radio with stars like Reba, Faith Hill, Garth Brooks,...
2000s Country
Country for a new century, with Zac Brown, Toby Keith, Blake Shelton, and Brad Paisley
2010s Country
What a decade for Luke Bryan, Blake Shelton, Little Big Town, and Carrie Underwood
Best Of 2023
Best Country of 2023
Morgan Wallen, Luke Combs, Bailey Zimmerman, and Jellyroll brought it big in
Bill Gamble's Five-Star Radio
Our Country music curator's highest-rated songs... no
Canadian Country
Today's top Country hits in Canada, including both Canadian and American
Christian Country
Christian Country from yesterday and today, all with a positive message
LEGAL NOTICE
Hino Emissions Class Action Settlement Fund Totaling $237.5 Million
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
NANA
LUKE COMBS
Best Country of 2023
Blend
Share
Fast Car
Luke Combs
Gettin' Old
2023 - Columbia / River House - Matthews / Singleton
Ban
Pause
Skip
00:10 / 04:24


weather.com/weather/hourbyhour/l/e6e47f46376941de71c57b65b435026f46b2662695a088efab53c3500dc6d082
Docs
FELD
JND
Research
Audio
Sharepoint
The Trade Desk
Datorama
Office.com
SiriusXM
gmail
Citrix Workspace
recordings
DV Postcast
How to calculate yo...
Insider Intelligence
Hourly Weather - Tulsa, OK
As of 2:24 pm CST
Monday, December 18
2:30 pm 48° Sunny 0% N 9 mph
2:45 pm 49° Sunny 0% N 9 mph
3:00 pm 49° Sunny 0% N 9 mph
Feels Like 45°
Wind N 9 mph
Humidity 25%
UV Index 1 of 11
Cloud Cover 6%
Rain Amount 0 in
3:15 pm 48° Sunny 0% N 8 mph
4:00 pm 48° Sunny 0% N 7 mph
5:00 pm 45° Sunny 0% N 4 mph
6:00 pm 42° Clear 0% NNE 2 mph
7:00 pm 40° Clear 0% NNE 2 mph
8:00 pm 37° Clear 0% NE 2 mph
Advertisement
Wake up with: The Weather Channel morningbrief
Energizing content, weekday mornings, in your inbox.
Get Newsletter
Advertisement
LEGAL NOTICE
Hino Emissions Class Action Settlement Fund Totaling $237.5 Million
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
JND
Web Notifications
Breaking News & Top Stories
Stay up-to-date on the latest weather news with desktop and mobile phone notifications.
If you need help to opt in, please visit our Support Center.


3:19
cnn.com
politics
Live TV
Mackey for "sharing a joking meme about Hillary Clinton several years ago. Nobody ever heard of anything like that."
LEGAL NOTICE
Hino Emissions Class Action Settlement Fund Totaling $237.5 Million
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
JND
While the former president criticized the legal action taken against Mackey, Trump Jr. lauded the content featured on Mackey's Twitter feed. He praised Mackey on his December 7 podcast as "maybe my favorite Twitter account of all time" and said the Biden administration wanted the former


yahoo.com
yahoo!
Sign in
Search the web
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
BREAKING NEWS:
Marvel actor Jonathan Majors found guilty of assaulting his former girlfriend in New York
Top stories
71°F
1/8
NEVER SURRENDER
Diplomats gird for 'doomsday' if Trump is reelected
For you
News · FTW Outdoors
Play halted as massive eagle kills impala on golf


2:59
Search Facebook
Class Action Notice
Sponsored
Hino Emissions Class Action Settlement Fund Totaling $237.5 Million
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
www.hinousasettlement.com
Hino Settlement
Learn more
1
Like
Comment
Share
Home
Video
Friends
Marketplace
Notifications
Menu


5:55
Class Action Notice
Sponsored
Hino Emissions Class Action Settlement Fund Totaling $237.5 Million
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
Learn more
See more


3:09
Liked by katiecouric and 2,870 others
katiecouricmedia Pope Francis has formally approved allowing priests to bless same-sex... more
View all 77 comments
Class Action Notice
Sponsored
Hino Emissions Class Action Settlement Fund Totaling $237.5 Million
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
Learn more
Because you watched a reel from the_bananadiaries


3:00
Class Action Notice
Sponsored
Hino Emissions Class Action Settlement Fund Totaling $237.5 Million
Purchasers and Lessees of certain Hino trucks may qualify for a payment. Estimated payments range from $1,500-$15,000 per Class Truck.
FILE A CLAIM
LEARN MORE

Why Microgrids May Solve Trucking's Electric Infrastructure Logjam

HN

HDT Headline News <HDTHeadlineNews@t.bobitenews.com>
To: Jeremy Parsons

Mon 12/18/2023 3:02 AM

Dec 18, 2023

HDT Truckinginfo

DAILY E-NEWS

Can Microgrids Speed the Transition to Electric Trucks? (Video)

Joshua Goldman, vice president of E-mobility at microgrid and DER deployment advisor Xendee, says off-grid energy sources offer resiliency from power outages while helping to level the cost of electricity supplied by utility companies. Could a microgrid kickstart your transition from diesel to BEV?

READ MORE

TRIP: By Value, Trucks Moved 72%

NEWS

Why Quality Drivers and Safety Compliance are Key for Best Trucking Insurance Rates

Hiring quality drivers and focusing on safety compliance are key ways to reduce insurance costs for trucking companies.

ARTICLE

SPONSORED BY VERIZON CONNECT

How AI Video Telematics Boosts Driver Safety and Helps to Avoid Unnecessary Costs

NEWS

Cummins Agrees to Pay Record-Setting Emissions Penalty

Restroom access bill touted at House hearing

DECEMBER 15, 2023 • Mark Schremmer

Rep. Troy Nehls, R-Texas, used a recent House subcommittee hearing as an opportunity to tout his bill that would aim to ensure restroom access for truck drivers.

In June, Nehls and Rep. Chrissy Houlahan, D-Pa., introduced the bipartisan Trucker Bathroom Access Act. The goal of HR3869 is to make sure that truck drivers are allowed to use a restroom facility while they are waiting for freight to be loaded or unloaded.

The bill does not require businesses to construct new restrooms. Instead, it would only mandate that truck drivers be granted access if a business has a restroom available to their customers or employees.

At a Wednesday, Dec. 13 Highways and Transit subcommittee hearing, Nehls asked FMCSA Administrator Robin Hutcheson for her support of the bill.

EXHIBIT F

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key points you want to get across. Provide a detailed breakdown of anticipated costs, projected savings, and potential return on investment to demonstrate the value of the proposed budget.

Tackling AI Today for a More Efficient Tomorrow

Within the realm of ChatGPT, government fleets can leverage ChatGPT and external coding assistance to create a plan for more cost savings and long-term benefits.

Start with ways to optimize route planning making ChatGPT do the work to analyze various factors such as traffic patterns, road conditions, and fuel efficiency data to provide improved route suggestions. By using this information, fleets can plan more fuel-efficient routes, reducing fuel consumption and costs.

ChatGPT can also be integrated with fleet management systems to analyze vehicle data and provide proactive maintenance recommendations. It can also assist in developing personalized training programs for drivers, providing tips on eco-driving techniques and fuel-saving strategies. Additionally, it can provide real-time feedback to drivers based on their driving patterns, encouraging fuel-efficient behaviors.

To do this, ask ChatGPT to compare and contrast the advantages and disadvantages of alternative fuel options like EVs and hybrid technologies against traditional gasoline-powered vehicles. Prompt it to consider factors such as environmental impact, fuel efficiency, maintenance costs, infrastructure requirements, and government incentives.

To get a cost-benefit analysis, request ChatGPT to assess the financial aspects of adopting alternative fuel options. Through a prompt, ask it to analyze upfront costs, operational expenses, potential savings in fuel consumption, tax incentives, and long-term cost-effectiveness.

Take Advantage of the Available System

There are more than enough prompts to go around when it comes to ChatGPT, but nothing beats firsthand experience. Start plugging in questions related to the fleet and find the best ways to use this technology for future benefit.

As more reports predict that emerging technologies such as AI-powered chatbots will dominate customer interactions, government fleets that integrate ChatGPT gain a competitive advantage in the ever-evolving digital landscape.

By embracing AI technologies early on, fleets can future-proof operations and stay at the forefront of technological advancements. This positions government fleets to adapt to evolving expectations so that when change does come, the operation can still run efficiently.

And just like a 60s TV show, nothing lasts forever and now is the time to embrace today's technology for the future of fleet.

Trucker Path's Chris Oliver and Women in Motion's Brenda Neville.

Parking safely

Travel facilities that offer women a sense of safety can be difficult to locate. Trucker Path and ATA's Women in Motion are ready to help.

by Josh Fisher

Statistically, women are safer truck drivers, but finding travel facilities that they feel safe at is harder. American Trucking Associations' Women in Motion partnered with driver app Trucker Path to help drivers find safe facilities.

Women in Motion Co-chair Brenda Neville told *FleetOwner* that women drivers' "No. 1 issue that kept coming up was safety—they wanted to go somewhere they felt safe." Women drivers make up 12.1% of professional drivers, according to the 2023 Women In Trucking Index. Truck parking was the industry's No. 2 concern, according to the American Transportation Research Institute's critical issues report.

Women drivers are looking for well-lit parking, easy access to bathrooms, security, and Internet access, according to Neville. "It's amazing what any driver has to deal with when they're trying to park," she added. "It's not only that there is a shortage—but if you really look at some of these places across the United States, some are not the most secure either."

Trucker Path added features to its mobile navigation app to help female drivers find safer, secure truck parking. Spots meeting seven safety criteria are marked with the Women in Motion logo. They must have lighted parking, lighted bathroom access, lighted lounge areas, 24/7 access to shower facilities, laundry facilities, maintenance, and onsite security. The app encourages drivers post updates on facility conditions.

"We try to put as much of that information in their hands—and it's done through crowdsourcing," Chris Oliver, Trucker Path CMO, said. All of the information and data they collect is derived from users—"and they know that," he explained.

Trucker Path's community of one million users is 9% female. When a driver using the app enters one of about 20,000 truck parking locations across the country, the app asks the driver a question to gauge how much parking is available. "When you have a million people telling you that all the time, it starts to become very actionable," Oliver said. FO

EXHIBIT G

Purchasers and Lessees of certain Hino trucks may qualify for a payment in a $237.5 million class action settlement

NEWS PROVIDED BY
JND Legal Administration →
15 Dec, 2023, 16:25 ET

SEATTLE, Dec. 15, 2023 /PRNewswire/ --

A proposed settlement has been reached in a class action lawsuit called *Express Freight International, et al., v. Hino Motors, Ltd., et al*., No. 22-cv-22483-Gayles/Torres (S.D. Fla.) (the "Settlement"). This Notice provides a summary of your rights and options.

A federal court authorized this Notice. This is not a solicitation from a lawyer.

WHAT IS THIS LAWSUIT ABOUT?

Express Freight International, EFI Export & Trading Corp., Marders, and Redlands Office Cleaning Solutions, LLC, (together, "Plaintiffs" or "Settlement Class Representatives") allege that Hino Motors Ltd., Hino Motors Manufacturing U.S.A., Inc., and Hino Motors Sales U.S.A., Inc. (together, "Defendants" or "Hino") misrepresented emission levels and exceeded regulatory limits with certain Hino trucks. Defendants deny Plaintiffs' claims but have decided to settle. The Court has not decided who is right. Instead, the parties have agreed to the Settlement to avoid the costs, risk, and delays associated with continuing this complex and time-consuming litigation.

WHO IS AFFECTED?

The Settlement Class consists of all persons or entities that purchased or leased a Settlement Class Truck through October 30, 2023. Settlement Class Trucks include any on-road vehicle equipped and originally sold or leased in the United States with a Hino engine from engine Model Year 2010 through and including engine Model Year 2019. A list of Settlement Class Trucks can be found at www.HinoUSASettlement.com. Excluded from the Settlement Class are Defendants' officers, directors, and employees; Defendants' affiliates and affiliates' officers, directors, and employees; Defendants' distributors and distributors' officers, directors, and employees; Released Parties; judicial officers and their immediate family members and associated court staff assigned to this case; and all those otherwise in the Settlement Class who or which timely and properly exclude themselves.

WHAT CAN YOU GET FROM THE SETTLEMENT?

If approved, the Settlement will provide compensation and other valuable benefits to Settlement Class Members. These benefits include a **$237,500,000** Settlement fund to pay Settlement Class Members who submit a valid claim; a robust extended warranty that covers the repair or replacement of various emission control system component parts, including the cost of any diagnostic test leading to the repair; and a New Parts Warranty if there is a government-mandated or government-recommended emissions system recall or repair campaign involving the Settlement Class Trucks in the next three years.

After deducting Settlement Class Counsel Attorneys' Fees and Costs and Settlement Administration Costs, the remaining Settlement Cash Value will be allocated evenly, on a per-capita basis, among all Settlement Class Trucks for which the Settlement Administrator has received a valid Settlement Claim. **The compensation available for each Settlement Class Truck is likely to range from $1,500 to $15,000 per Class Truck, depending on the volume of claims submitted and court-awarded fees and costs.** If more than one Settlement Class Member submits a valid Settlement Claim for the same Settlement Class Truck, then 60% of the compensation for that Settlement Class Truck will be allocated to the original owner who purchased the truck new, and the remaining 40% will be allocated to or divided evenly among the other Settlement Class Member(s) that submit a valid Settlement Claim for that same truck.

Please visit www.HinoUSASettlement.com for more information.

HOW DO I GET A PAYMENT?

You must submit a claim to receive a settlement payment. The claim form asks for basic information and takes just a few minutes to complete. To submit your claim online, visit www.HinoUSASettlement.com. If you would like to submit your claim by mail, you can download and print the claim form on the Settlement Website or call to request a form. The fastest option is to submit your claim online.

You should submit your claim now. Claim Forms must be electronically submitted or postmarked no later than **June 15, 2024**. This schedule may change, so please visit the Settlement Website (www.HinoUSASettlement.com) regularly for updates.

WHAT ARE MY OTHER OPTIONS?

You can exclude yourself from the Settlement or object to the Settlement by **February 22, 2024**.

If you exclude yourself, you will not receive any settlement payments and you will not release any of the claims that this Settlement resolves. If you do not exclude yourself from the Settlement, you will be bound by the Court's orders and judgments like all other Class Members, even if you do not file a claim.

If you wish to object, the Court will consider your views in deciding whether to approve or reject this Settlement. If the Court does not approve the Settlement, no settlement payments will be sent, and the lawsuit will continue. You cannot object if you exclude yourself from the Settlement.

For details on how exclude yourself or object, go to www.HinoUSASettlement.com.

WHAT IF I DO NOTHING?

If you do nothing, you will not get a payment from the Settlement, but your Settlement Class Truck will still receive the Extended Warranty and be eligible for the New Parts Warranty. You will also be bound by all terms of the Settlement, which means you will not be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against Defendants about the legal issues in this case.

WHAT HAPPENS NEXT?

The Court will hold a hearing on April 1, 2024 at 10 am to consider whether to grant final approval of the Settlement and award fees and costs to the attorneys representing the Settlement Class (known as "Settlement Class Counsel").

Settlement Class Counsel will ask the Court to award up to 33.33% of the Settlement Cash Value (*i.e.* up to $79,158,750) to cover reasonable attorneys' fees plus expenses they incurred in litigating this case and securing the Settlement. You do not need to attend this hearing, but you are welcome to attend at your own expense.

HOW DO I GET MORE INFORMATION?

Visit www.HinoUSASettlement.com; call toll-free 1-888-256-6150; email info@HinoUSASettlement.com; or write Hino USA Settlement, c/o JND Legal Administration, PO Box 91473, Seattle WA 98111.

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