UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITRUST LITIGATION	CASE NO. 12-MD-02311 HON. MARIANNE O. BATTANI
In Re: OCCUPANT SAFETY SYSTEMS CASES	
THIS RELATES TO: ALL DIRECT PURCHASER ACTIONS	2:12-cv-00601-MOB-MKM 2:16-cv-10002-MOB-MKM

DIRECT PURCHASER PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES, AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

Direct Purchaser Plaintiffs Beam's Industries, Inc., Findlay Industries, Inc., and NM Holdings Co., LLC hereby move the Court, pursuant to Rules 23 and 54 of the Federal Rules of Civil Procedure, for an award of attorneys' fees, litigation costs and expenses, and incentive awards for the Class Representatives, from the proceeds of the settlement with the Toyoda Gosei Defendants and the Tokai Rika Defendants. In support of this motion, Direct Purchaser Plaintiffs rely upon the accompanying brief and the Declarations attached thereto, which are incorporated by reference herein.

Dated: June 18, 2018

Respectfully submitted,

/s/ David H. Fink

David H. Fink (P28235)
Darryl Bressack (P67820)
Nathan J. Fink (P75185)
FINK + ASSOCIATES LAW
38500 Woodward Ave, Suite 350
Bloomfield Hills, MI 48304
Telephone: (248) 971-2500

Interim Liaison Counsel

Steven A. Kanner
William H. London
Michael E. Moskovitz
FREED KANNER LONDON
& MILLEN LLC
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
Telephone: (224) 632-4500

Joseph C. Kohn
William E. Hoese
Douglas A. Abrahams
KOHN, SWIFT & GRAF, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 238-1700

Gregory P. Hansel
Randall B. Weill
Michael S. Smith
PRETI, FLAHERTY, BELIVEAU
& PACHIOS LLP
One City Center, P.O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000

Eugene A. Spector
William G. Caldes
Jonathan M. Jagher
Jeffrey L. Spector
SPECTOR ROSEMAN & KODROFF, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300

Interim Co-Lead Class Counsel

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DIRECT PURCHASER PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES, AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

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3. Should the Court award the Class Representative Plaintiffs incentive awards from the Toyoda Gosei and Tokai Rika settlement funds?

STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Fed. R. Civ. P. 23

Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996)

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I. INTRODUCTION

Through Interim Co-Lead Counsel's and the Plaintiffs' efforts, settlements totaling $38,000,000 with the Toyoda Gosei Defendants ($34,000,000)[1] and the Tokai Rika Defendants ($4,000,000) have been obtained in the *Occupant Safety Systems* case.[2] In addition, the settlement provides for cooperation in the prosecution of the litigation against the remaining Defendant.[3]

Plaintiffs' Counsel have devoted a substantial amount of time and money to pursuing these claims on behalf of the class members. Information obtained from the first two settling Defendants aided in that pursuit.[4] In proceeding against Toyoda Gosei and Tokai Rika the parties engaged in discovery while also embarking on a path to settle the case. Plaintiffs' Counsel and counsel for the Toyoda Gosei Defendants and the Tokai Rika Defendants were able to do so before the end of what promised to be a long and involved discovery process, thus minimizing the burden and expense for all concerned to the extent possible.

Although the case settled without the completion of full-blown discovery from all the Defendants, Plaintiffs' Counsel spent a substantial amount of time obtaining and evaluating a large quantity of information in order to understand and evaluate the strengths and weaknesses of the claims. In pursuing the case, Plaintiffs' Counsel have worked with the Plaintiffs; investigated the

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[1] The Toyoda Gosei Settlement Agreement gives Toyoda Gosei the right to reduce its settlement payment, but in no event to an amount less than $14.25 million, based on valid requests for exclusion by members of the Toyoda Gosei Settlement Class. If opt-outs reach a certain level, Tokai Rika can rescind the settlement.

[2] This motion is submitted by Interim Liaison Counsel and Interim Co-Lead Counsel appointed by the Court.

[3] If the Toyoda Gosei and Tokai Rika settlements are given final approval, only the Takata Defendants will remain in the case. The Takata Defendants have, however, filed for bankruptcy protection. Interim Co-Lead Counsel have been actively involved in the bankruptcy proceeding and in negotiations with the Takata Defendants' attorneys regarding the direct purchasers' claims. The direct purchaser class claim has been categorized as a general unsecured claim. Negotiations are continuing as to whether the claim will be allowed and, if allowed, its amount.

[4] The Autoliv and TRW settlements that were approved in 2015 were for a combined $42,016,800.

industry; drafted complaints; reviewed, analyzed, and coded documents; obtained information regarding Plaintiffs' allegations from settling Defendants; conducted in-depth interviews of a Defendant's employees (which were prepared for and for the most part conducted as if they were depositions); prepared and served discovery requests on Defendants; negotiated with Defendants regarding discovery; responded to Defendants' discovery requests; negotiated the four settlements; participated in the Takata bankruptcy proceeding; drafted the settlement agreements and the attendant notices, orders, and preliminary and final approval documents; and worked with the claims administrator in connection with the evaluation of claims and distribution of settlement funds to approved claimants. The work does not, of course, end with final settlement approval, as Plaintiffs' Counsel will be deeply involved in claims processing and the distribution of the Toyoda Gosei and Tokai Rika settlement funds to the class member claimants. Moreover, Plaintiffs' Counsel are still active in the Takata Defendants' bankruptcy proceeding.

Plaintiffs' Counsel now respectfully move for an order awarding: 1) attorneys' fees of 30% of the Toyoda Gosei and Tokai Rika settlement funds; 2) $32,847.34 for litigation costs and expenses incurred by Plaintiffs' Counsel; and 3) incentive awards in the amount of $30,000 for each of the Class Representatives, Beam's Industries, Inc., Findlay Industries, Inc., and NM Holdings Co., LLC. For the reasons set forth herein, Plaintiffs' Counsel respectfully submit that the requested fee, expense, and incentive awards are fair to the class members, Plaintiffs, and Plaintiffs' Counsel, and are reasonable under both well-established Sixth Circuit precedent concerning awards of attorneys' fees in class action litigation and this Court's prior decisions awarding fees, expenses, and incentive awards in the *Automotive Parts Antitrust Litigation*.

II. BACKGROUND AND SUMMARY OF WORK PERFORMED TO DATE BY PLAINTIFFS' COUNSEL

The background of the *Occupant Safety Systems* case is set forth in the Brief in Support of Direct Purchaser Plaintiffs' Motion for Final Approval of Proposed Settlements With Tokai Rika and Toyoda Gosei Defendants and Proposed Plan for Distribution of Settlement Funds, which was filed on June 18, 2018, and will not be repeated in full here. The case began in 2012, and settlements were reached with the Autoliv and TRW Defendants after their motions to dismiss were denied. In 2015 the Court awarded attorneys' fees and reimbursement of expenses in connection with the settlements with the Autoliv and TRW Defendants.[5] The litigation moved forward against the Toyoda Gosei, Tokai Rika, and Takata Defendants.

In litigating the *Occupant Safety Systems* case, Plaintiffs' Counsel have:

- Worked with the Plaintiffs;
- Investigated the occupant safety system industry and drafted and filed complaints against Defendants;
- Reviewed, analyzed, and coded documents;
- Obtained information regarding Plaintiffs' claims from settling Defendants;
- Prepared for and conducted in-depth interviews of employees of a settling Defendant regarding the claims;
- Prepared discovery requests for Defendants and negotiated with Defendants regarding their responses;
- Responded to Defendants' discovery requests;
- Successfully negotiated settlements with the four non-bankrupt Defendants (and are currently in discussions with Takata's bankruptcy counsel) and prepared the settlement agreements;
- Drafted the settlement notices, orders, and the preliminary and final approval briefs seeking approval from the Court for the settlements;

[5] Doc.128 in *In re: Occupant Safety Systems Cases*, 2:12-cv-00601 (July 15, 2015).

- Worked with the claims administrator to design and send notices and claim forms to the members of the Settlement Classes and to create and maintain a settlement website; and

- Worked with the claims administrator to review and evaluate claims and to distribute settlement funds to approved claimants.

Throughout the case Plaintiffs' Counsel have sought to avoid duplication of efforts among the attorneys and to work cooperatively and efficiently with defense counsel and the Court.

III. CLASS NOTICE

On May 16, 2018, 1,342 copies of the Notice of Proposed Settlements of Direct Purchaser Class Action with Tokai Rika and Toyoda Gosei Defendants and Hearing on Settlement Approval and Related Matters, and Claim Form (the "Notice") were mailed, postage prepaid, to all potential Settlement Class members identified by Defendants. Further, a Summary Notice of Proposed Settlements of Direct Purchaser Class Action with Tokai Rika and Toyoda Gosei Defendants and Hearing on Settlement Approval and Related Matters (the "Summary Notice") was published in one edition of *Automotive News*, and in the national edition of *The Wall Street Journal,* on May 21, 2018. A copy of the Notice has also been posted on-line at www.autopartsantitrustlitigation.com.[6]

As required by Fed. R. Civ. P. 23(h), the Notice informed the Settlement Class Members that Plaintiffs' Counsel would request an award of attorneys' fees of up to 30% of the settlement funds, as well as payment of expenses and incentive awards from the Toyoda Gosei and Tokai Rika settlement funds. Notice at 1, 2, 5. It also explained how Settlement Class Members could object to the requests. *Id*. Summary notice was published in the national edition of *The Wall Street*

[6] Counsel for Tokai Rika and for Toyoda Gosei have informed Plaintiffs' Counsel that their respective clients fulfilled their obligations under 28 U.S.C. § 1715 (the "Class Action Fairness Act of 2005").

Journal and in *Automotive News*. In addition, a copy of the Notice is posted on-line at www.autopartsantitrustlitigation.com.

The deadline for submission of any objections is July 11, 2018. To date, there have been no objections to the requested fees, expense reimbursements, incentive awards, proposed settlements, or distribution plan. There have also been no requests for exclusion. Plaintiffs' Counsel will provide the Court with a final report on any objections or requests for exclusion before the Fairness Hearing.

IV. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

Federal Rule of Civil Procedure 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." As discussed above, Plaintiffs' Counsel have complied with the requirements of Rule 23(h)(1) and (2), which provide for notice to the class of the attorneys' fees request and an opportunity to object. What remains for the Court to determine is whether the requested fee is reasonable and fair to the class members and Plaintiffs' Counsel under the circumstances. As discussed below, Plaintiffs' Counsel believe their attorneys' fees request of 30% of the settlement funds is fair to the class members, reasonable under the circumstances, and well-supported by applicable law.

A. THE PERCENTAGE-OF-THE-RECOVERY METHOD PREVIOUSLY EMPLOYED BY THE COURT IN THIS MDL IS THE APPROPRIATE METHOD FOR ASSESSING THE FEE REQUEST.

As the Court has previously observed, Sixth Circuit law grants district courts discretion to select an appropriate method for determining the reasonableness of attorneys' fees in class actions. *In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *1 (E.D. Mich. Dec. 28, 2016) (citations omitted). *See generally Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (discussing the advantages and disadvantages of the two methods). In this MDL, the

Court has used the "percentage-of-the-fund" method. *E.g., In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *1 (collecting cases) (holding that "the percentage-of-the-fund … method of awarding attorneys' fees is preferred in this district because it eliminates disputes about the reasonableness of rates and hours, conserves judicial resources, and aligns the interests of class counsel and the class members"). Plaintiffs' Counsel respectfully request that the Court apply the same method here. *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *16 (E.D. Mich. Dec. 13, 2011); *In re Delphi Corp. Sec. Derivative & ERISA Litig.*, 248 F.R.D. 483, 502 (E.D. Mich. 2008).

B. THE REQUESTED FEE CONSTITUTES A FAIR AND REASONABLE PERCENTAGE OF THE SETTLEMENT FUND.

Plaintiffs' Counsel respectfully request a fee of 30% of the proceeds of the Toyoda Gosei and Tokai Rika settlements created by their efforts. As detailed below, there is substantial precedent to support the requested fee. Additionally, Plaintiffs' Counsel request reimbursement of litigation costs and expenses paid or incurred through April 30, 2018.

1. THE REQUESTED FEE AWARD IS WELL WITHIN THE RANGE OF REASONABLENESS.

The requested 30% fee is well within the range of fee awards approved as reasonable by this Court, and many others. To date in the *Automotive Parts Litigation*, the Court has approved several fee awards of 33.3% of the settlement fund in question, finding that percentage to be reasonable. *In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *2 (E.D. Mich. Dec. 28, 2016) (awarding counsel for the Truck and Equipment Dealer Plaintiffs 33.3% of a $4,616,499 settlement fund in the *Wire Harness* and *Occupant Safety Systems* cases); 12-cv-00102-MOB-MKM, Doc. 401 (awarding counsel for the Auto Dealer Plaintiffs 33.3% of a $55,500,504 settlement fund in *Wire Harness*).

The requested 30% award is also consistent with a wealth of authority from this Circuit and others approving class action fees in the range of 30% to one-third of a common fund. *See Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. 2007) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery") (internal quotation marks omitted); *Thacker v. Chesapeake Appalachia, L.L.C.,* 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010) ("Using the percentage approach, courts in this jurisdiction and beyond have regularly determined that 30% fee awards are reasonable"). District courts in the Sixth Circuit (and elsewhere) have awarded 30% or more of settlement funds as reasonable attorneys' fees in antitrust cases. For example, this Court awarded 30% of the settlement funds in *Wire Harness* to Direct Purchaser Plaintiffs' Counsel. Doc. 495 in 2:12-cv-00101.[7] Other courts have also awarded fees in that range. *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (one-third of a $19 million fund); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014) (one-third of a $73 million fund); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (one-third of $158.6 million fund); *In re Foundry Resins Antitrust Litig.,* Case No. 2:04-md-1638 (S.D. Ohio Mar. 31, 2008) (one-third of $14.1 million fund); *In re Polyurethane Foam Antitrust Litig.,* 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (30% of a $148.7 million fund); *In re Refrigerant Compressors Antitrust Litig.,* MDL No. 2:09-md-02042 (E.D. Mich. June 16, 2014) (30% of $30 million fund).[8] Plaintiffs' Counsel's fee request is fully supported by these and many other decisions.

[7] The Court has also made fee awards that were lower than the 30% to one-third range. *See Occupant Safety Systems,* 2:12-cv-00601, Doc.128 (25%).

[8] *See, e.g., In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 1:09-cv-07666 (N.D. Ill. Jan. 22, 2014) (awarding one-third interim fee from initial settlement in multi-defendant case); *Standard Iron Works v. Arcelormittal,* 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014)

C. CONSIDERATION OF THE FACTORS IDENTIFIED BY THE SIXTH CIRCUIT SUPPORTS THE REQUESTED FEE.

Once the Court has selected a method for awarding attorneys' fees, the next step is to consider the six factors that the Sixth Circuit has identified to guide courts in weighing a fee award in a common fund case: 1) the value of the benefit rendered to the class; 2) the value of the services on an hourly basis; 3) whether the services were undertaken on a contingent fee basis; 4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; 5) the complexity of the litigation; and 6) the professional skill and standing of counsel involved

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(attorneys' fee award of one-third of $163.9 million settlement); *In re Fasteners Antitrust Litig.*, 2014 WL 296954, *7 (E.D. Pa. Jan. 27, 2014) ("Co–Lead Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions."); *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees" and awarding one-third fee from $150 million fund, a 2.99 multiplier); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. Pa., June 2, 2004) (30% of $202 million awarded, a 2.66 multiplier); *In re OSB Antitrust Litig.*, Master File No. 06-826 (E.D. Pa.) (fee of one-third of $120 million in settlement funds); *Heekin v. Anthem, Inc.*, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (awarding one-third fee from $90 million settlement fund); *In re Ready-Mixed Concrete Antitrust Litig.*, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (approving one-third fee); *Williams v. Sprint/United Mgmt. Co*, 2007 WL 2694029, at *6 (D. Kan., Sept. 11, 2007) (awarding fees equal to 35% of $57 million common fund); *Lewis v. Wal-Mart Stores, Inc.*, 2006 WL 3505851, at *1 (N.D. Okla., Dec. 4, 2006) (awarding one-third of the settlement fund and noting that a "one-third [fee] is relatively standard in lawsuits that settle before trial."); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("[A] one-third fee from a common fund case has been found to be typical by several courts.") (citations omitted), *aff'd*, 534 F.3d 508 (6th Cir. 2008); *In re AremisSoft Corp., Sec. Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to one-half of the settlement fund.") (citations omitted); *Klein v. PDG Remediation, Inc.*, 1999 WL 38179, at *4 (S.D.N.Y., Jan. 28, 1999) ("33% of the settlement fund…is within the range of reasonable attorney fees awarded in the Second Circuit"); *Moore v. United States*, 63 Fed. Cl. 781, 787 (2005) ("one-third is a typical recovery"); *In re FAO Inc. Sec. Litig.*, 2005 WL 3801469, at * 2 (E.D. Pa., May 20, 2005) (awarding fees of 30% and 33%); *Godshall v. Franklin Mint Co.*, 2004 WL 2745890, at *5 (E.D. Pa., Dec. 1, 2004) (awarding a 33% fee and noting that "[t]he requested percentage is in line with percentages awarded in other cases"); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433-44 (E.D. Pa. 2001) (awarding one-third of a $48 million settlement fund).

on both sides. *E.g., Bowling v. Pfizer, Inc.*,102 F.3d 777, 780 (6th Cir. 1996); *In re Wire Harness Cases*, 2:12-cv-00101 (E.D. Mich.) (Doc. 495), at 3-5. When applied to the facts of this case, these factors indicate that the fee requested constitutes fair and reasonable compensation for Plaintiffs' Counsel's efforts in creating the settlement fund.

1. PLAINTIFFS' COUNSEL SECURED A VALUABLE BENEFIT FOR THE CLASS.

The result achieved for the class is the principal consideration. *E.g., Delphi,* 248 F.R.D. at 503. Here, as more fully discussed in Plaintiffs' brief filed in support of final approval of the settlements, Plaintiffs' Counsel have achieved an excellent recovery of $38 million for the Settlement Class, which may be reduced to no less than $18.25 million based upon the level of opt-out requests from the Toyoda Gosei Settlement Class.

2. THE VALUE OF THE SERVICES ON AN HOURLY BASIS CONFIRMS THAT THE REQUESTED FEE IS REASONABLE.

The value of the services on an hourly basis supports the requested fee award. When fees are awarded using the percentage-of-the-fund method, this Court and others have applied a lodestar "cross-check" on the reasonableness of a fee calculated as a percentage of the fund. *In Re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 754 (S.D. Ohio 2007); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *18. Use of a lodestar cross-check is optional, however, and because it is only a check, the court is not required to engage in detailed scrutiny of time records. *Cardinal*, 528 F. Supp. 2d at 767. Here, the amount of time Plaintiffs' Counsel have expended since the inception of the case in 2012 makes clear that the fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery, and does not constitute a "windfall." *See id.* To the contrary, here the lodestar cross-check reveals that the requested fee constitutes a reasonable multiplier on Plaintiffs' Counsel's lodestar.

To calculate the lodestar a court must first multiply the number of hours counsel reasonably expended on the case by their reasonable hourly rate. *See Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). Here, as described above, a very substantial amount of time had to be spent by Plaintiffs' Counsel litigating the case and achieving the settlements. At all times, these tasks were managed with an eye toward efficiency, and avoiding duplication.

As the Declarations submitted by the law firms set forth,[9] Plaintiffs' Counsel have expended 25,017.55 hours from the inception of the case through April 30, 2018. Applying the historical rates charged by counsel to the hours expended yields a "lodestar" value of $8,544,289.74.[10]

Here, the ultimate amount of the settlement funds is dependent on the level of opt-outs from the Toyoda Gosei settlement. Therefore, at this time it would be speculative to predict the final total amount of these two settlements, which may be $38 million, $18.25 million, or, more likely, somewhere in between. After the deadline for requests for exclusion and prior to the date of the hearing on the fee request, Plaintiffs will file a supplemental report in which they will report to the Court the final amount of the settlements after any opt-out reductions, and the resulting multiplier on their lodestar that the requested fee represents.

Positive multipliers vary, but in the Sixth Circuit they have been as high as 6. *Cardinal*, 528 F. Supp. 2d at 767-68 (approving multiplier of 6, and observing that "[m]ost courts agree that the typical lodestar multiplier" in a large class action "ranges from 1.3 to 4.5."). In *Prandin,* 2015

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[9] The Declarations are attached as Exhibit 1.

[10] The United States Supreme Court has held that the use of current rates, as opposed to historical rates, is appropriate to compensate counsel for inflation and the delay in receipt of the funds. *Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989); *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987). Plaintiffs' Counsel have nevertheless submitted their lodestar information at their lower historical rates, rather than at their current (higher) rates.

WL 1396473, at *4, the fee award amounted to a 3.01 multiplier. Plaintiffs' Counsel will report to the Court regarding opt-outs and any affect they may have on the amount of the settlements prior to the date of the hearing on the fee request.

The work done by Plaintiffs' Counsel is described above and in the separate firm Declarations. Plaintiffs' Counsel submit that the hours expended on this case since inception, while substantial, are reasonable. Indeed, one of the recognized benefits of using the percentage-of-the-fund method is that it better aligns the interests of class counsel with the interests of class members and eliminates any incentive to unnecessarily expend hours. Here, Plaintiffs' Counsel were efficiently able to achieve an excellent recovery for the class members without burdening the Court or the parties with unnecessary expenditures of time, effort, or money.

3. THE REQUESTED FEE IS FAIR AND REASONABLE GIVEN THE REAL RISK THAT PLAINTIFFS' COUNSEL COULD HAVE RECEIVED NO COMPENSATION FOR THEIR EFFORTS IF THE LITIGATION HAD NOT BEEN SUCCESSFUL.

The settling Defendants are represented by highly experienced and competent counsel. Absent the settlement, Plaintiffs believe that these Defendants and their counsel were prepared to defend this case through trial and appeal. Litigation risk is inherent in every case, and this is particularly true with respect to class actions. Therefore, while Plaintiffs are optimistic about the outcome of this litigation, they must acknowledge the risk that either Toyoda Gosei or Tokai Rika, or both, could prevail with respect to certain legal or factual issues, which could result in reducing or eliminating any potential recovery.

In light of this reality, the risk factor attempts to compensate class counsel in contingent fee litigation for the possibility that they may end up receiving less than their normal hourly rates, or even nothing at all. *See, e.g. Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *overruled on other grounds*, *Int'l Woodworkers of Am. AFL-CIO and its Local No. 5-376 v. Champion Intern.*

Corp., 790 F.2d 1174 (5th Cir. 1986); *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *19 (risk of non-payment a factor supporting the requested fee). Tokai Rika did not plead guilty to bid rigging or price fixing of occupant safety systems. And, while Toyoda Gosei did pled guilty to antitrust violations with respect to certain parts, the Department of Justice did not seek recovery for the class members, leaving that up to Plaintiffs' Counsel. As this Court has observed, success is not guaranteed even in those instances where a settling defendant has pleaded guilty in a criminal proceeding brought by the DOJ, which is not required to prove impact or damages. *See, e.g., In re Automotive Parts Antitrust Litig.,* 12-MD-02311, 2:12-cv-00103, Doc. No. 497, at 11 (E.D. Mich. June 20, 2016).

There was certainly a risk that Plaintiffs' Counsel would recover nothing, or an amount insufficient to support a fee that covered their lodestar (as happened in *Wire Harness,* where the fee awarded corresponded to much less than half of the lodestar). Further, the case is not over, as proceedings in the Takata bankruptcy continue. Therefore, the risk of non-payment is another factor that supports the requested fee. *In re Wire Harness Cases*, 2:12-cv-00101 (E.D. Mich.) (Doc. 495), at 4.

4. SOCIETY HAS AN IMPORTANT STAKE IN THIS LAWSUIT AND IN AN AWARD OF REASONABLE ATTORNEYS' FEES TO CLASS COUNSEL.

It is well established that there is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes in antitrust class actions] in order to maintain an incentive to others . . . Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at

bar counsels in favor of a generous fee . . . Society also benefits from the prosecution and settlement of private antitrust litigation." *In re Cardizem*, 218 F.R.D. 508, 534 (E.D. Mich. 2003) (internal quotation marks omitted). *Accord, Delphi,* 248 F.R.D. at 504.

The DOJ did not seek restitution from the settling Defendants because it has recognized that civil cases potentially provide for the recovery of damages by injured purchasers. In this regard, the substantial recovery Plaintiffs' Counsel have obtained makes it clear that antitrust violations will be the subject of vigorous private civil litigation that will deter similar future conduct. Since society as a whole gains from competitive markets free of collusion, Plaintiffs' Counsel's work benefitted the general public.

5. THE COMPLEXITY OF THIS CASE SUPPORTS THE REQUESTED FEE.

The Court is well aware that "[a]ntitrust class actions are inherently complex . . . ." *In re Cardizem*, 218 F.R.D. at 533. S*ee also In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *19; *In re Linerboard Antitrust Litig.,* 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome.") (citations and internal quotation marks omitted). With respect to complexity, this case was no exception. Plaintiffs' Counsel and the Court have already grappled with a variety of complex issues in this case, and there would have been more to address later in the absence of the settlements.

6. SKILL AND EXPERIENCE OF COUNSEL.

The skill and experience of counsel on both sides of the "v" is a factor that courts may consider in determining a reasonable fee award. *E.g., Polyurethane Foam,* 2015 WL 1639269, at * 7; *Packaged Ice,* 2011 WL 6219188, at *19. When the Court appointed Kohn, Swift & Graf, P.C., Preti, Flaherty, Believeau & Pachios, L.L.P., Freed Kanner London & Millen, L.L.C., and

Spector Roseman & Kodroff, P.C. as Interim Lead Counsel, it recognized that they have the requisite skill and experience in class action and antitrust litigation to effectively prosecute these claims. In addition, when assessing this factor, courts also may look to the qualifications of the defense counsel opposing the class. Here, the quality of defense counsel at Baker Botts L.L.P. and Baker & Miller PLLC is top-notch. These firms have excellent reputations in the antitrust bar, significant experience, and extensive resources at their disposal.

But in the final analysis, as a district court in Florida has observed, "[t]he quality of work performed in a case that settles before trial is best measured by the benefit obtained." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir 1990). As explained *supra*, a very substantial cash benefit was obtained for the Settlement Classes in this case, which provides the principal basis for awarding the attorneys' fees sought by Plaintiffs' Counsel.

Given the excellent result achieved, the complexity of the claims and defenses, the work performed by Plaintiffs' Counsel, the real risk of non-recovery (or recovery of less than the $38 million settlement amount), formidable defense counsel, the delay in receipt of payment, the substantial experience and skill of Plaintiffs' Counsel, the reasonable multiplier on the lodestar, and the societal benefit of this litigation, a 30% attorneys' fee award from the settlement funds would be reasonable compensation for Plaintiffs' Counsel's work.

V. THE COURT SHOULD AUTHORIZE INTERIM LEAD COUNSEL TO DETERMINE FEE ALLOCATIONS

Plaintiffs' Counsel have worked collectively on this litigation under the supervision of Interim Lead Counsel appointed by the Court. This Court and courts generally have approved joint fee applications that request a single aggregate fee award, with allocations to specific firms to be determined by the lead counsel, who know the most about the work done by each firm and the

relative contribution each firm has made to the success of the litigation.[11] Interim Lead Counsel have directed this case from its inception and are best "able to describe the weight and merit of each [counsel's] contribution." *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *17-18 (citation omitted, alteration in original); *see also In re Copley Pharm., Inc. Albuterol Prods. Liab. Litig.*, 50 F. Supp. 2d 1141, 1148 (D. Wy. 1999), *aff'd*, 232 F.3d 900 (10th Cir. 2000). From an efficiency standpoint, leaving the allocation to Interim Lead Counsel makes good sense, because it relieves the Court of the "difficult task of assessing counsels' relative contributions." *In re Prudential Ins. Co. Amer. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 329 n. 96 (3d Cir. 1998); *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173 (3d Cir. 2005) (lead counsel given substantial authority to allocate fees awarded by Court).

Plaintiffs' Counsel therefore request that the Court approve the aggregate amount of the fees requested, with the specific allocation of the fee among firms to be performed by Interim Lead Counsel. *See Polyurethane Foam, supra.* To the extent that there are disputes that cannot be resolved by counsel, the Court would retain the jurisdiction necessary to decide them. *See In re Automotive Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *8 (E.D. Pa. Jan. 3, 2008) (co-lead counsel to allocate fees, but the court retained jurisdiction to address any disputes).

VI. REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES

Plaintiffs' Counsel respectfully request an award of litigation costs and expenses in the amount of $32,847.34. As the court stated in *In re Cardizem*, "class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of

[11] *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (noting "the accepted practice of allowing counsel to apportion fees amongst themselves"); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357 (N.D. Ga. 1993) ("Ideally, allocation is a private matter to be handled among class counsel").

claims and in obtaining settlement, including expenses incurred in connection with document productions, travel and other litigation-related expenses." 218 F.R.D. at 535. The expenses incurred by each law firm are set forth in the Declarations attached as Exhibit 1. These expenses were reasonable and necessary to pursue the case and to obtain the substantial settlements reached in this litigation.

VII. INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES ARE WARRANTED

Plaintiffs' Counsel also respectfully request that the Court award Beam's Industries, Inc., Findlay Industries, Inc., and NM Holdings Co., LLC $30,000 each for their services to the Settlement Classes. The Sixth Circuit has noted that incentive awards may be appropriate under some circumstances, although it has never explicitly approved or disapproved of them. it. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 311 (6th Cir. 2016); *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). In surveying decisions from other courts, the Court of Appeals in *Hadix* explained:

> Numerous courts have authorized incentive awards...These courts have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class. Yet applications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.

Hadix, 322 F.3d at 897 (internal citations omitted).

This is not a case where the class representatives compromised the interests of the class for personal gain. None of the class representatives were promised incentive awards. Each settlement was negotiated by Plaintiffs' Counsel and then presented to the class representatives for their review and approval without discussion of incentive awards, which evinces that such awards were not the reason the representative plaintiffs approved these settlements. *Hillson v. Kelly Servs. Inc.*,

2017 WL 279814, at *6 (E.D. Mich. 2017). Moreover, this is not a case where the requested incentive awards will dwarf the amounts that class members will receive through the claims process; indeed, some class members may receive hundreds of thousands or even millions of dollars.[12]

The Class Representatives devoted time and effort in representing the interests of the class members, including but not limited to the following:

- Communicating with counsel to discuss preservation of electronic and hard-copy documents and taking steps to implement preservation plans;
- Communicating with counsel to discuss collecting documents for review and potential production to Defendants;
- Working with counsel to respond to interrogatories served by Defendants;
- Reviewing pleadings and keeping apprised of the status of the litigation; and
- Reviewing the details of, and conferring with counsel regarding settlements.

The requested incentive awards are lower than those awarded in other cases. Depending on the circumstances, incentive awards of $30,000 or more are common in lengthy, highly complex antitrust cases such as this. As an example, on December 7, 2015, the Court awarded $50,000 to each of the Auto Dealer class representatives "for their effort and service to the members of the settlement classes in bringing these cases and helping move the cases to settlements that benefit the absent class members." 2:12-cv-00102, Doc. 401 at. 5. The Court also authorized $50,000

[12] In cases where courts have rejected incentive awards, the awards were so disproportionately large relative to the cash benefits to the class that they called the class representative's adequacy into question. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (reversing $1000 payments to representatives when class members received "nearly worthless injunctive relief"); *Machesney, v. Lar-Bev of Howell, Inc.*, 2017 WL 2437207, at *11 (E.D. Mich. Jun. 2017) (rejecting $15,000 incentive payment that was "30 times more than the maximum that any class member could receive under the proposed settlement"). The same is not true here.

awards to the direct purchaser class representatives in the *Wire Harness* case. *See also In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *5 (granting class representatives awards of $50,000 each); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, at *1 (same). The Class Representatives put in time and effort and provided commendable service on behalf of the class members to create the settlement funds. The requested awards are fair to the class and appropriate.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for an Award of Attorneys' Fees, Litigation Costs and Expenses, and incentive awards to the Class Representatives.

Dated: June 18, 2018

Respectfully submitted,

/s/ David H. Fink

David H. Fink (P28235)
Darryl Bressack (P67820)
Nathan J. Fink (P75185)
FINK + ASSOCIATES LAW
38500 Woodward Ave, Suite 350
Bloomfield Hills, MI 48304
Telephone: (248) 971-2500

Interim Liaison Counsel

Steven A. Kanner
William H. London
Michael E. Moskovitz
FREED KANNER LONDON
& MILLEN LLC
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
Telephone: (224) 632-4500

Joseph C. Kohn
William E. Hoese
Douglas A. Abrahams
KOHN, SWIFT & GRAF, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 238-1700

Gregory P. Hansel
Randall B. Weill
Michael S. Smith
PRETI, FLAHERTY, BELIVEAU
& PACHIOS LLP
One City Center, P.O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000

Eugene A. Spector
William G. Caldes
Jonathan M. Jagher
Jeffrey L. Spector
SPECTOR ROSEMAN & KODROFF, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300

Interim Co-Lead Class Counsel and Settlement Class Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, I electronically filed the foregoing document with the Clerk of the court using the ECF system, which will send notification of such filing to all counsel of record registered for electronic filing.

/s/ David H. Fink
David H. Fink (P28235)
Darryl Bressack (P67820)
FINK + ASSOCIATES LAW
38500 Woodward Ave, Suite 350
Bloomfield Hills, MI 48304
Telephone: (248) 971-2500