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

Christine Powell, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, v. SUBARU OF AMERICA, INC., *et al.*, Defendants.	Case No. 1:19-cv-19114-MJS

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Jeffrey Barr, Arnold Milstein, Allan Zaback, and Brittany Funk ("Plaintiffs") are pleased to present for preliminary approval the proposed Class Action Settlement ("Settlement")[1] entered into between Plaintiffs and Defendants, Subaru of America, Inc. ("SOA") and Subaru Corporation ("SBR") (collectively, "Subaru" or "Defendants"; with Plaintiffs and Defendants, collectively, the "Parties"). The Settlement applies to all persons who purchased or leased, in the United States, model year 2019 through 2022 Subaru Ascent vehicles, model year 2019 through 2022 Subaru Forester vehicles, model year 2020 through 2022 Subaru Legacy vehicles, and model year 2020 through 2022 Subaru Outback vehicles, which were manufactured, imported and/or distributed for sale or lease in the United States by Defendants ("Settlement Class Vehicles"). As discussed below, this Settlement provides robust monetary relief and substantial benefits to the Settlement Class, which consists of present and former owners and lessees of approximately 1.4 million vehicles. The Settlement was the result of more than four years of extensive litigation, including significant motion practice, thirteen depositions, the production and review of tens of thousands of pages of documents, third party subpoenas, written discovery, and additional formal and informal discovery by Class Counsel as well as multiple protracted arm's length mediation sessions among the Parties with a highly respected and experienced mediator, Rod Max of Upchurch Watson White & Max Mediation Group.

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[1] Unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Settlement Agreement, attached as Exhibit 1 to the Declaration of Peter A. Muhic ("Muhic Decl.").

Plaintiffs allege that the Settlement Class Vehicles are defective in that the windshields in the vehicles are unreasonably susceptible to cracking after suffering a minor chip or impact. Plaintiffs have vigorously been pursuing claims under theories of breach of warranty and statutory and common law fraud. Defendants maintain that they manufacture and supply quality Class Vehicles, that the windshields in Class Vehicles are not defective, and that automobile windshields crack for many reasons – often due to external factors. Defendants further maintain that they have met all applicable obligations under the relevant express and implied warranties, and have adhered to all consumer statutes and common law duties, but have chosen to resolve these allegations as a benefit to their customers, as well as to avoid the uncertainty, time, and expense of further prolonged litigation.

The proposed Settlement was reached after more than four years of litigation and was achieved with the assistance of, Rod Max, a respected mediator who is highly experienced with significant class action settlements. The Settlement, described more fully below, provides Settlement Class Members with immediate and valuable relief that directly addresses the alleged defective in the Settlement Class Vehicles. Settlement Class Members will have the opportunity to recoup 100% or more of out of pocket losses caused by the purported defect in the windshields of the Settlement Class Vehicles, and will further benefit significantly from extended warranty coverage on the vehicles for a period of eight years or 100,000 miles, which provides a one-time free replacement windshield (manufactured with an updated process implemented as part of continuous quality improvement) and calibration of the Subaru EyeSight® driver assist systems. The Settlement is eminently fair,

reasonable, and adequate, and complies in all respects with Fed. R. Civ. P. 23 ("Rule 23").

For the reasons set forth herein, Plaintiffs respectfully request that this Court enter an order: (1) granting preliminary approval of the terms of the Settlement contained in the negotiated Settlement Agreement, attached as Exhibit 1 to the accompanying Declaration of Peter A. Muhic ("Muhic Decl."); (2) conditionally certifying the proposed Settlement Class for settlement purposes; (3) conditionally appointing Plaintiffs as the Representative Plaintiffs and Plaintiffs' Counsel, Peter A. Muhic, Edwin J. Kilpela, Jr. and Russell Paul as Settlement Class Counsel; (4) approving the Parties' proposed Class Notice and plan for disseminating the Class Notice (the "Notice Plan"); (5) appointing JND Legal Administration, as the Settlement Administrator; (6) setting deadlines for the filing of any objections to, or requests for exclusion from, the Settlement, and for other submissions in connection with the Settlement approval process; and (7) setting a Final Fairness Hearing date and briefing schedule for Final Approval of the Settlement and for Plaintiffs' application for service awards and attorneys' fees and expenses.

II. PROCEDURAL HISTORY

A. The Litigation

The initial class action complaint in this Action was filed on October 18, 2019 by Christine Powell. ECF 1. Plaintiff Powell filed an amended complaint on October 24, 2019. ECF. 5. On November 12, 2019, Plaintiff Powell and additional plaintiffs filed a second amended complaint on behalf of a putative nationwide class and certain state sub-classes which included additional class vehicles. ECF 12.

Subsequently, after additional lawsuits were filed, this Court consolidated the cases into this Action. ECF 25. Thereafter, on February 6, 2020, sixteen named plaintiffs filed a consolidated class action complaint. ECF 27.

On March 6, 2020, Defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF 32. On April 29, 2020, a later filed action, *Zaback v. Subaru of America, Inc.*, 1:20-cv-02845 (D.N.J), was consolidated into the Action. ECF 38. On May 13, 2020, Defendants filed a supplemental motion to dismiss the *Zaback* claims. ECF 43. On May 28, 2020, Plaintiffs filed their brief in opposition to Defendants' motion to dismiss and supplemental motion to dismiss. ECF 50. On June 15, 2020, Defendants filed a reply in support of their motions to dismiss. ECF 53. On August 7, 2020, Plaintiffs submitted supplemental authority in opposition to the motions to dismiss. ECF No. 58. The Court entered an Opinion and Order on November 24, 2020 dismissing certain claims and upholding all other claims. ECF 64, 65. On December 23, 2020, Plaintiffs filed an amended complaint conforming their claims to the Court's ruling on the motions to dismiss. ECF 69.

Thereafter, the parties negotiated a Confidentiality Order to govern the exchange of discovery materials which was entered on December 28, 2020. ECF No. 71. On January 18, 2021, Defendants filed their Answer to the operative amended complaint. ECF 73. The Parties then proceeded with substantial discovery which initially required the identification and negotiation of appropriate custodians and search terms for electronically stored information, followed by the exchange of written interrogatories and document requests to all Plaintiffs and all Defendants.

Among the over 16,000 documents subsequently produced were significant numbers of documents from SBR which had to be translated into English from Japanese. Plaintiffs also served subpoenas upon third parties, including Safelite Group, Inc. and multiple manufacturers of automobile windshields for records concerning the manufacturing and repair of windshields, as well as a subpoena for documents and a deposition of the former President of the Subaru National Retailer Advisory Board, Wally Sommer. Subaru deposed eleven Plaintiffs. Plaintiffs deposed SOA's former National Service Operations Manager and current Parts Collection Center Manager, Craig Jeffries, on multiple days, in addition to Wally Sommer. Muhic Decl., ¶ 9.

B. Settlement Negotiations

As the parties were preparing for the deposition of Defendants' corporate designee in December 2022, and in light of the substantial information that had been obtained and reviewed by the Parties during discovery, they began to explore prospects for resolution while Defendants continued to produce additional documents responsive to Plaintiffs' requests. On March 31, 2023, this Court stayed the Action so that the Parties could participate in formal arm's length mediation sessions with Rod Max, while also requiring Subaru to continue producing additional discovery to aid the mediation process. ECF. 127. Thereafter, beginning in April 2023, the Parties attended multiple in-person mediation sessions as well as telephonic meetings with Mr. Max, in conjunction with numerous additional settlement discussions among counsel regarding data and information being produced and reviewed. At all times, the settlement negotiations were at arm's length and often spirited. Muhic Decl., ¶ 11. The Parties kept the Court informed of their

progress through regularly scheduled status conferences.

During the course of settlement negotiations, the Parties exchanged confidential engineering/testing information subject to the Confidentiality Order regarding the design of the subject windshields in the Settlement Class Vehicles and Subaru's investigation of product improvements. Plaintiffs conferred with expert consultants regarding the information. Muhic Decl., ¶ 12. The Parties continued their negotiations over the course of many months, exchanging additional information related to the windshield investigation, including warranty and testing data. Based on the formal and informal discovery exchanged, Class Counsel gained a thorough understanding of the strengths and weaknesses of Plaintiffs' claims. Muhic Decl., ¶ 13.

On November 3, 2023, the Parties advised the Court that they had reached an agreement in principle as to all material terms of the Settlement. The Parties did not discuss Plaintiffs attorneys' fees until all substantive terms of the Settlement had been agreed to. Muhic Decl., ¶ 14. Due to the complexity of the Settlement, and to ensure the fairness of all aspects of the Settlement claims process, the Parties expended considerable resources and efforts over the ensuing months confirming certain data and technical issues concerning the windshields and the Class Vehicles, and drafting appropriate language for the Settlement Agreement and Notice, as well as working with the proposed Settlement Administrator and Subaru to insure the Settlement could be properly, fairly and timely implemented. Muhic Decl., ¶ 16.

III. MATERIAL TERMS OF THE PROPOSED SETTLEMENT

A. Warranty Extension With Free Post-Countermeasure Replacement Windshield for Class Vehicles

Effective three business days following the deadline for Class Members to submit Claims for Reimbursement of expenses covered by the Settlement, SOA will extend its New Vehicle Limited Warranty to cover Qualifying Cracks in Settlement Class Vehicles for a period of eight years or 100,000 miles, whichever occurs first, from the In-Service Date of the Settlement Class Vehicle. This Settlement Extended Warranty shall be limited to a one-time replacement of a pre-countermeasure windshield with a post-countermeasure windshield, at which time the Settlement Extended Warranty shall expire. The new windshield will be manufactured with a revised process that substantially reduces the likelihood of a crack/damage occurring to a windshield from a minor impact and residual stress. Declaration of John Gray, attached to Muhic Decl. as Exhibit 2 ("Gray Decl.") at ¶ 3.

The Settlement Extended Warranty will cover all parts and labor costs associated with the replacement of the windshield due to a Qualifying Crack, performed by an Authorized Subaru Dealer, and includes the recalibration of the Eyesight® driver assistance system. The Settlement Extended Warranty is transferable among owners/lessees during its coverage period.

B. Reimbursement of Out-of-Pocket Expenses

The Settlement provides for a fair, equitable, and straightforward claims

process for Settlement Class Members. Under the Settlement, Subaru agrees to reimburse former and current owners and lessees of Settlement Class Vehicles for unreimbursed out-of-pocket expenses for replacing or repairing windshields that suffered damage due to the alleged residual stress. Given the nature of the alleged defect, and the fact that windshields in all vehicles may be damaged in the absence of any defect, the Settlement provides for extraordinary monetary relief when there is appropriate proof that the crack necessitating the prior repair or replacement was caused by the alleged residual stress in the windshield. The Parties dedicated substantial time and efforts devising a fair process for Settlement Class Members to prove that their loss was caused by the alleged defect as opposed to impact damage that would have caused a cracked windshield regardless of any alleged defect.

To qualify for reimbursement, all claimants must first provide sufficient Proof of Repair Expense, which shows evidence the claimant paid for a windshield replacement in a Settlement Class Vehicle. Second, there will be two alternative ways or tiers in which Settlement Class Members can submit proof that their vehicle experienced a Qualifying Crack.[2] Under Tier 1, claimants who provide Proof of

[2] The Parties recognized that the integrity of certain aspects of the claims process in this Action are susceptible to potential abuse or fraudulent claims and therefore have taken steps to ensure that Settlement Class members receive reimbursement for expenses associated with Qualifying Cracks but not for damage that is not reasonably associated with the alleged defect in the windshields. Accordingly, certain portions of the Settlement Agreement and the Gray Decl. identifying the precise nature and physical description of the Qualifying Crack are being redacted

Repair Expense and a photograph of the windshield before a repair was performed which shows that their windshield experienced a Qualifying Crack will be entitled to the following substantial monetary recovery, which is intended to reimburse the Claimants not only for their out-of-pocket losses, but also for the inconveniences they suffered in having to repair or replace their windshield on one or more occasions: (a) One prior repair with a photo of a Qualifying Crack entitles the Settlement Class member to reimbursement of 125% of the costs incurred repairing or replacing the windshield; (b) Two prior repairs with photos of the Qualifying Crack entitles the Settlement Class member to reimbursement of 150% of the costs incurred repairing or replacing the windshield (c) Three or more repairs with photos of Qualifying Cracks entitles the Settlement Class member to reimbursement of

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on the public docket until the deadline for submitting Claims Forms for Reimbursement so that the information cannot be used to support a Claim for reimbursement involving damage to a windshield that is not reflective of damage caused by the alleged defect. *See* Muhic Decl., ¶¶ 16, 17. To ensure that all potential Settlement Class Members have an opportunity to review the unredacted version of the Settlement Agreement and the Exhibits thereto before the deadline to seek exclusion from this Settlement, the unredacted versions of Plaintiffs' Memorandum of Law in Support of Preliminary Approval, along with the Settlement Agreement, and the Exhibits thereto will be filed on the public docket three business days following the deadline for submitting Claims and Claim Forms. S.A. § E. 3. The Settlement Administrator also will post the unredacted version of the Settlement Agreement and the Exhibits thereto on the Settlement Website three business days following the deadline for submitting Claims and Claim Forms. S.A. § E. 4. Any Settlement Class Member who submits a Claim prior to the unredacted version of this Agreement being filed on the public docket may thereafter submit a Request for Exclusion prior to the deadline for such submissions, and such Request for Exclusion will take priority. S.A. § E. 3.

200% of the total costs incurred repairing or replacing the windshield. There is no limit on the total amount of the Tier 1 claims to be paid by Subaru.

Under Tier 2, Claimants who do not have photographic proof of the damage suffered to their windshields still have the ability to obtain a significant monetary recovery upon completing a Claims Form Photo Questionnaire. This was an extensively negotiated and carefully crafted procedure which necessarily has to balance the ability of a claimant to submit proof of a Qualifying Crack against Subaru's interest in paying for Qualifying Cracks but not for damage that resulted from impacts that would have cracked the windshields regardless of any alleged defect. Claimants with Proof of Repair Expense but no contemporaneous photograph will use a dynamic website to select a photo that most closely resembles the damage they experienced with their windshield. Six photographs, drawn from a pool of photographs agreed to by the Parties, will be randomly displayed on that dynamic website. Claimants selecting a photo depicting a Qualifying Crack will be entitled to recover 100% of the actual cost incurred for that repair. These claimants must attest under oath to the absence of any photographic evidence of the damage they experienced and that the photo selected most closely resembles the damage their vehicle experienced.

The total payment for Tier 2 claims is subject to a conditional $2 million limit ("Tier 2 Collar"). Based on historical claims and warranty data maintained by

Subaru, the Parties believe that the total value of Tier 2 claims will be below $2 million. Muhic Decl., ¶ 19. If the sum of honored Tier 2 claims does not exceed $2 million, Subaru will pay 100% of each honored claim. S.A. § G. 2(e)(ii)(3)(a). Should the sum exceed $2 million, the reimbursement for each honored claim will be proportionally reduced using the formula: $\text{Reduced Amount} = \text{Original Claim Amount} \times \left(\frac{\text{Payment Collar}}{\text{Total Honored Claims Sum}}\right)$. S.A. § G. 2(e)(ii)(3)(b). In the unexpected event that the volume and dollar amount of claims accepted for Tier 2 payment are of such amount that claimants would receive less than 30% of the approved reimbursement amount submitted, the Parties, with the inclusion of the Settlement Administrator, shall meet and confer to determine why the claims so substantially exceeded projections, and whether there is evidence that the claims process was tainted by fraudulent claims. In such situation, the Parties agree that as part of the meet and confer process, Subaru may be required to engage social media or other appropriate experts at their own expense to ascertain the existence and extent of fraudulent claims. The Parties will work in good faith to insure that, absent clear evidence of fraud, Defendants will supplement the funds available to pay the valid and approved Tier 2 claims such that no successful claimant will receive less than 25% of their approved out of pocket losses submitted. S.A. § G. 2(e)(ii)(3)(c). Claimants who do not meet the requirements of Tier 1 or Tier 2 will not be eligible for reimbursement of past expenses, but they will remain entitled to the benefits of

the Extended Warranty going forward. S.A. § G. 2(e)(ii)(3)(f).

C. Notice, Claim Submission and Administration

The Parties agreed to retain JND Legal Administration as the Settlement Administrator. S.A. § C. 3. Upon approval by the Court, the Settlement Administrator will carry out the Notice Plan (discussed below), disseminate the CAFA notice, administer any requests for exclusion, and administer the Claims process including the review and determination of reimbursement claims pursuant to the Settlement terms, and distribution of payments to eligible Claimants whose claims are complete and have been approved under the Settlement terms. S.A. §§ G. 2.(a), H. 1., 2., I. 1, 2. Pursuant to the Settlement, Subaru will pay all class notice and claim administrative costs, separate and apart from any benefits to which the Settlement Class Members may be entitled. S.A. § C. 3. Thus, none of these costs will be borne by the Class Members in any way.

Class Notice will be the best practicable notice under the circumstances and will comport with all due process requirements. Within 75 days of entry of the Preliminary Approval Order by the Court, the Settlement Administrator will initiate mailing of the Short-Form Notice, substantially in the form attached as Exhibit B to the Settlement Agreement, by first-class mail to the current or last known addresses of all reasonably identifiable Settlement Class Members. The Short-Form Notice will provide, at a minimum: (i) a brief description of the Action, the Settlement Class, and the proposed settlement; (ii) the URL of the Settlement Website and a statement that the website contains the Long-Form Notice and more detailed

information; (iii) the deadline for submitting claims, objections, or requests for exclusion; (iv) the date on which the unredacted version of the Settlement Agreement and Exhibits will be made publicly available;[3] (v) a toll-free number and/or email address for Settlement Class Members to contact the Settlement Administrator for additional information or to request a copy of the Long-Form Notice. S.A. § I. 3.

In addition to mailing the Short-Form Notice, the Settlement Administrator will, with input from counsel for both Parties, establish a dedicated Settlement Website that will include details regarding the Action, the Settlement and its benefits, and the Settlement Class Members' legal rights and options including objecting to or requesting to be excluded from the Settlement and/or not doing anything; instructions on how to contact the Settlement Administrator by e-mail, mail or (toll-free) telephone; copies of the Long-Form Notice, Claim Form, Settlement Agreement, Motions and Orders relating to the Preliminary and Final Approval processes and determinations, and important submissions and documents relating thereto; important dates pertaining to the Settlement including the procedures and deadlines to opt-out of or object to the Settlement, the procedure and deadline to submit a Claim Form for reimbursement, and the date, place and time of the Final Fairness Hearing; and answers to Frequently Asked Questions (FAQs). S.A. § I. 2(a)(vi).

A Long-Form Notice, substantially in the form attached as Exhibit A to the Settlement Agreement, which provides more comprehensive information about the Settlement, will be available on the Settlement website. S.A. § I. 2(a)(i)(2). The

[3] *See* Muhic Decl., ¶ 18.

Long-Form Notice is detailed and complies with Rule 23(c)(2)(B). It "clearly and concisely states in plain, easily understood language" the nature of the action; the Settlement Class definition; the class claims, issues and/or defendant's positions; the Settlement terms and benefits available under the Settlement; Class Counsel's requested fee/expense award, and/or the Plaintiffs' requested service awards; the claim submission process including details and instructions regarding how and when to submit a Claim for reimbursement and the required proof/documentation for a Claim; the release of claims under the Settlement; the manner of and deadline by which Settlement Class Members may object to the Settlement; the manner of and deadline by which a Settlement Class Member may request to be excluded from the Settlement; the binding effect of the Settlement and release upon Settlement Class Members that do not timely and properly exclude themselves from the Settlement; the procedure by which Settlement Class Members may, if they so wish, appear at the final fairness hearing individually and/or through counsel; the settlement website address; how to contact the Settlement Administrator (through the dedicated toll-free number, email or by mail) with any questions about the settlement or requests for assistance, the identities of and contact information for Class Counsel; and other important information about the Settlement and the Settlement Class Members' rights. *See* S.A., Ex. A.

For purposes of identifying Settlement Class Members, SOA shall obtain from its own records and verify with R.L. Polk & Co. (or a reasonable substitute agreed to by Class Counsel) the names and current or last known addresses of Settlement Class Vehicle owners and lessees that can reasonably be obtained, and the Vehicle

Identification Numbers (VINs) of Settlement Class Vehicles. S.A. § I. 2(a)(ii). Prior to mailing the Class Notice, an address search through the United States Postal Service's National Change of Address database will be conducted to update the address information for Settlement Class Vehicle owners and lessees. For each individual Class Notice that is returned as undeliverable, Settlement Administrator shall re-mail the Class Notice where a forwarding address has been provided. For the remaining undeliverable notice packets where no forwarding address is provided, Settlement Administrator shall perform an advanced address search (e.g. a skip trace) and re-mail any undeliverable notices to the extent any new and current addresses are located. S.A. § I. 2(a)(ii).

Settlement Class members will be directed to submit Claims Forms via the Settlement Website. S.A. § G. 2(a). For each complete claim that is approved, the Settlement Administrator will mail a reimbursement check to the Settlement Class Member within 60 days after the Effective Date of the Settlement. S.A. § H. 1. A. Significantly, the Settlement provides that if a claim and/or its supporting documentation is incomplete or deficient, or qualifies for less than the full amount of the reimbursement sought by the Settlement Class Member, the Settlement Administrator, within 60 days after the Effective Date of the Settlement, will mail the Settlement Class Member a letter or notice outlining the deficiencies and allowing the Class Member to initiate a Second Review of the Settlement Administrator's decision within 30 days upon receipt of the Claim Decision and Option Selection Form. S.A. § H. 1(b). If a Second Review is requested, the Second Review will be made by a senior level employee of Settlement Administrator who is a different employee from the one that

made the initial determination and will be independent of the initial review, and will not involve consultation with the employee who made the initial determination. S.A. § H. 2(d). Defendants shall bear all costs of the Second Review. S.A. § H. 2(h).

Lastly, pursuant to 28 U.S.C. § 1715, the Class Action Fairness Act of 2005, the Settlement Administrator will also provide timely notice to the U.S. Attorney General and the applicable State Attorneys General ("CAFA Notice") so that they may review the proposed Settlement and raise any comments or concerns to the Court's attention prior to final approval. S.A. § I.1(a).

D. Proposed Class Counsel Fees, Litigation Expenses, and Representative Plaintiff Service Awards

After the Parties had already agreed upon all material terms of the Settlement, the Parties engaged in a subsequent mediation with Rod Max in regard to the issues of Representative Plaintiff service awards and Class Counsel's reasonable attorneys' fees and expenses. Muhic Decl., ¶ 14. Pursuant to a mediator's proposal, Defendants have agreed to not oppose (a) Class Counsel's request for attorneys' fees and expenses in the combined aggregate amount of up to and not exceeding $7.25 million, and (b) service awards of $5,000 to each of the four Representative Plaintiffs. Plaintiffs will seek Court approval of these payments before the deadline for Settlement Class Members to file objections, as described in the schedule below. Significantly, the awards for Class Counsel's reasonable fees/expenses and for the Representative Plaintiffs, up to the amounts agreed by the Parties, will not reduce or otherwise have any effect on the benefits the Settlement Class Members will receive. The requested Class Counsel Fees and Expenses and Representative Plaintiff Service

Awards will be the subject of a separate fee motion, to be filed pursuant to the schedule set forth in the Preliminary Approval Order.

IV. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Plaintiffs seek certification of a class for settlement purposes in connection with preliminary approval of the Settlement. Plaintiffs propose, and Defendants do not object to, for settlement purposes only, certification of the Settlement Class, as defined in the Settlement Agreement, namely: All natural persons who are residents of the continental United States as well as Hawaii and Alaska, currently or previously owning or leasing a Settlement Class Vehicle originally purchased or leased in the continental United States, Alaska or Hawaii.[4]

"Rule 23 of the Federal Rules of Civil Procedure allows this Court to certify a class for settlement purposes only." *Chemi v. Champion Mortg*., 2009 WL 1470429, at *6 (D.N.J. May 26, 2009). In the Third Circuit, "a class action—whether certified for settlement or litigation purposes— must meet the class requisites enunciated in Rule 23." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod.*

[4] Excluded from the Settlement Class are: (a) all Judges who presided over the Action and their spouses; (b) all current employees, officers, directors of Defendants and their immediate family members; (c) any affiliate, parent, or subsidiary of Defendants and any entity in which Defendants have a controlling interest; (d) used car dealers; (e) anyone who purchased a Settlement Class Vehicle solely for resale; (f) anyone who purchased a Settlement Class Vehicle with a salvaged title and/or any insurance company that acquired a Settlement Class Vehicle as a result of a total loss; (g) issuers of extended vehicle warranties and service contracts; (h) any Settlement Class Member who, prior to the date of the Settlement Agreement, settled with and released Defendants or any Released Parties from any Released Claims; (i) any Settlement Class Member filing a timely and proper Request for Exclusion from the Settlement Class. S.A. § C.1.

Liab. Litig., 55 F.3d 768, 800 (3d Cir. 1995). "First, the Court must determine whether Plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in Fed.R.Civ.P. 23(a)." *Id.* The requirements of "Rule 23(a) are (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical … of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *In re Pet Food Prod. Liab. Litig*., 629 F.3d 333, at 341 at n. 14 (3d Cir. 2010). If Plaintiffs satisfy these requirements, "the Court must then determine whether the alternative requirements of Rule 23(b)(2) or 23(b)(3) are met." *McGee v. Cont'l Tire N. Am., Inc.,* 2009 WL 539893, at *8 (D.N.J. Mar. 4, 2009). Plaintiffs seek to certify a Settlement Class under FRCP 23(a) and 23(b)(3).

A. The Requirements of Rule 23(a) Are Satisfied for Settlement Purposes

1. Numerosity Is Satisfied

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Numerosity is presumed "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). The Settlement Class is comprised of all owners and lessees of the Settlement Class Vehicles in the continental United States, Hawaii and Alaska. S.A. ¶ C.1. Based on information provided by Defendants, the number of Settlement Class Vehicles is approximately 1.4 million. Muhic Decl., ¶ 15. Accordingly, numerosity is satisfied.

2. Commonality Is Satisfied

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." The test for commonality is "easily met." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). All that is required is that "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). "[C]ommonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members." *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011). A single common question is enough to satisfy the requirements of Rule 23(a)(2). *See Baby Neal*, 43 F.3d at 56; *see also* W. Rubenstein & H. Newberg, *Newberg and Rubenstein on Class Actions (Sixth)*, § 22:69 (2022).

In this case, the commonality requirement is readily satisfied. As attested by John Gray, the Director of Field Quality in the Service and Quality Department of Subaru of America, Inc., in investigating the issue of an alleged windshield defect with the Settlement Class Vehicles, as alleged by Plaintiffs[5], "Subaru's engineers

[5] Plaintiff Jeffrey Barr is a citizen of New Jersey. In November 2018, he leased a new 2019 Subaru Forester in New Jersey. In September 2019, Plaintiff Barr alleges his windshield "suddenly and inexplicably cracked" as he drove on the highway with his wife. As a result, he incurred out of pocket losses of $500 for the replacement of the windshield. Allan Zaback is a citizen of Delaware. Plaintiff Zaback purchased a 2019 Subaru Forester. According to Plaintiff Zaback, his windshield and a replacement windshield cracked for unknown reasons, causing him to incur hundreds of dollars in losses for replacement windshields. Arnold Milstein is a citizen of Florida. In September 2019, he purchased a new Subaru Outback in Florida. In October 2019, Plaintiff Milstein noticed a crack running through his windshield. According to Milstein, he was not aware of any incident that could have caused this damage. Brittany Funk is a citizen of Indiana. In June 2019, she purchased a 2019 Subaru Forester. Plaintiff Funk alleges that when her car had

traced this issue to a combination of two causal factors: (1) the use of a new cowl panel design [in the Settlement Class Vehicles] that does not leave any gap between the panel and the windshield; and (2) the manufacturing process used to shape the windshield glass [in the Settlement Class Vehicles]. In combination, the new cowl panel design and the manufacturing process can cause the windshields to be more prone to residual tensile stress, which can result in a slightly higher chance of a delayed fracture if the windshield is damaged by an outside influence (e.g., a rock strike)." Gray Decl., ¶ 3.

Plaintiffs' allegations arise from the same common nucleus of operative facts and all members of the proposed Settlement Class would cite the same common evidence to prove their claims — in particular, whether the Settlement Class Vehicles have a design defect that causes the windshields to be unreasonably susceptible to cracking. Such questions are common to classes alleging automobile defects.[6] These questions are common to the class, capable of class-wide resolution, and "will

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14,000 miles on it, her windshield cracked for unknown reasons, and caused her to incur $500 in out of pocket losses. *See* ECF 69.

[6] *See e.g., Udeen v. Subaru of Am.,* 2019 WL 4894568, at *5 (D.N.J. Oct. 4, 2019) (commonality satisfied where there were numerous common questions regarding whether the class vehicles were defective); *Henderson v. Volvo Cars of N. Am., LLC*, 2013 WL 1192479, at *4 (D.N.J. Mar. 22, 2013) (commonality satisfied where there were several common questions, "including whether the transmissions in the Class Vehicles suffered from a design defect, whether Volvo had a duty to disclose the alleged defect, whether the warranty limitations on Class Vehicles are unconscionable or otherwise unenforceable, and whether Plaintiffs have actionable claims"); *Alin v. Honda Motor Co.,* 2012 WL 8751045, at*5 (D.N.J. April 13, 2012)(finding commonality and predominance satisfied where "class vehicles allegedly suffer from defects that cause their air conditioning systems to break down, although there are differences as to how the breakdowns occur").

resolve an issue that is central to the validity of each one of the claims in one stroke." *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d at 427 (3d Cir. 2016) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

3. Typicality Is Satisfied

Typicality judges the sufficiency of the named plaintiffs as representatives of the class. *Baby Neal*, 43 F.3d at 57. A plaintiff's claim is typical if it challenges the same conduct that would be challenged by the class. *See In re Centocor, Inc.,* 1999 WL 54530, at *2 (E.D. Pa. Jan. 27, 1999). The Third Circuit endorses a "common sense definition" of typicality which "focuses on the legal and/or factual stance assumed by the class representative as compared with that of the class members." *Weiss v. York Hosp.*, 745 F.2d 786, n. 36 (3d Cir. 1984). Here, the claims of Plaintiffs and all Settlement Class Members are typical because they arise under substantially similar warranty and consumer protection laws and stem from a common alleged defect with the windshields and a common course of conduct by Defendants in supplying the vehicles. *See, e.g.*, *Skeen v. BMW of N. Am., LLC*, 2016 WL 70817, at *6 (D.N.J. Jan. 6, 2016) (typicality satisfied where class suit alleged defendants "knowingly placed Class Vehicles containing the alleged defect into the stream of commerce and refused to honor its warranty obligations"); *Alin*, 2012 WL 8751045, at *6 (typicality established where the named plaintiffs each owned or lease one of the vehicles at issue and were damaged as a result of the defect at issue).

4. The Settlement Class Is Adequately Represented

Representative parties must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To evaluate adequacy, the Court considers whether

the named plaintiff has "the ability and the incentive to represent the claims of the class vigorously, that [they have] obtained adequate counsel, and there is no conflict between the [named plaintiffs'] claims and those asserted on behalf of the class." *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). Here, adequacy is readily met.

The core analysis for the adequacy of representation is whether the plaintiff has diligently pursued the action and whether plaintiff has interests antagonistic to those of the Settlement Class. Here, the Class Representatives' interests are all aligned with those of the Settlement Class. The Class Representatives all remained informed and cooperated with counsel in the conduct of the litigation, they all assisted in responding to written discovery requests and in producing documents, they were all deposed, they all remained in contact with counsel during the course of settlement discussions and they all have approved the terms of the Settlement. Muhic Decl., ¶ 20.

Second, the Class Representatives have no interest adverse or "antagonistic" to the absent Class Members. Each of the Class Representatives purchased or leased a Settlement Class Vehicle and claims to have experienced a cracked windshield due to the alleged defect in the Settlement Class Vehicles. *See* ECF 69, and footnote no.5, *supra*. Plaintiffs have no interests antagonistic to the other Settlement Class Members and will continue to vigorously represent the interests of the Settlement Class. The interests of Plaintiffs and other Class Members are aligned in seeking to maximize the recovery to the Class Members due to the alleged defect. *See In re Philips/Magnavox Television Litig.*, 2012 WL 1677244, at *6 (D.N.J. May 14, 2012)

(plaintiffs adequately represent the interests of class where they purchased the same allegedly defective televisions as the rest of the class and were allegedly injured in the same manner).

Further, the Class Representatives have retained counsel with significant class action experience, in particular, consumer and automotive class actions. *See* Muhic Decl., ¶¶ 4-6, Declaration of Russell Paul, ¶¶ 4-6; Declaration of Edwin J. Kilpela. Jr., ¶¶ 4-5. *See also Bredbenner v. Liberty Travel, Inc.*, 2010 WL 11693610, at *4 (D.N.J. Nov. 19, 2010) ("Plaintiffs' attorneys are qualified, experienced, and generally able to conduct the proposed litigation"); *In re Prudential Ins. Co. of Am. Sales Pracs. Litig.*, 962 F. Supp. 450, 519 (D.N.J. 1997) ("Plaintiffs' team of legal counsel is comprised of preeminent class action attorneys from throughout the country, many of whom have been qualified as lead counsel in other nationwide class actions."). The capabilities and performance of Class Counsel under Rule 23(a)(4) are evaluated based upon factors set forth in Rule 23(g). *See New Directions Treatment Servs. V. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007); *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010). Significantly, pursuant to Rule 23(g), Class Counsel were appointed Interim Co-Lead Counsel early in this Action. ECF 26. While managing this litigation, Class Counsel have spent a substantial amount of time investigating the issues in this action, including interviewing numerous vehicle owners about their experiences, conducting depositions and formal discovery, performing substantial research into the specifications of the Settlement Class Vehicles, reviewing testing results and warranty information, consulting with technical and warranty experts, personally attending a comprehensive vehicle

inspection, thoroughly analyzing the circumstances of the alleged condition and the costs of repair, and mediating and negotiating the terms of the Settlement with Defendants over a prolonged period of time. Muhic Decl., ¶¶ 7-9, 11-14.

B. The Requirements of Rule 23(b)(3) Are Satisfied for Settlement Purposes

1. Common Issues of Law and Fact Predominate

Rule 23(b)(3)'s predominance inquiry "'tests whether [a] proposed class[ ] [is] sufficiently cohesive to warrant adjudication by representation.'" *Marchese v. Cablevision Sys. Corp.*, 2016 WL 7228739, at *2 (D.N.J. Mar. 9, 2016) (citation omitted). There is "a 'key' distinction between certification for settlement purposes and certification for litigation: when taking a proposed settlement into consideration, individual issues which are normally present in litigation usually become irrelevant, allowing the common issues to predominate." *Id.*; *see Amchem Prod., Inc. v. Windsor*, 521 U.S. 591,618 (1997).

For settlement purposes, common questions of law and fact, such as whether the Settlement Class Vehicles contained the same alleged defective condition and whether Settlement Class Members sustained cognizable harm, predominate over questions that may affect individual Settlement Class Members. *See, e.g.*, *Henderson,* 2013 WL 1192479, at *6 (predominance met where "t]he Class Members share common questions of law and fact, such as whether Volvo knowingly manufactured and sold defective automobiles without informing consumers…[and] liability in this case depends on Volvo's alleged conduct in manufacturing and selling the Class Vehicles").

Rule 23(b)(3) also requires a showing that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The superiority requirement is met where adjudicating claims in one action is "far more desirable than numerous separate actions litigating the same issues." *In re Ins. Brokerage Antitrust Litig.,* 579 F.3d 241, 259 (3d Cir. 2009); *see Marchese*, 2016 WL 7228739, at *2 (finding that certification of a class for settlement purposes is more efficient than separate litigation of numerous individual claims). Here, the proposed Settlement delivers prompt, certain relief while avoiding the substantial judicial burdens and the risk of inconsistent rulings that would arise from repeated adjudication of the same issues in individual actions. *See Henderson*, 2013 WL 1192479, at *6 ("To litigate the individual claims of even a tiny fraction of the potential Class Members would place a heavy burden on the judicial system and require unnecessary duplication of effort by all parties.) Given the technical nature and relatively small size of the claims, "[i]t would not be economically feasible for the Class Members to seek individual redress," *id*., thus showing the superiority of resolving the claims on a class basis.

V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS WARRANTED.

A. Standard for Preliminary Approval in the Third Circuit

The Third Circuit favors settlement of class action litigation. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("Settlement Agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts."). Where the parties can

resolve the litigation through good faith and arms-length negotiations, judicial resources can be preserved, and the public interest is furthered. *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 n.16 (3d Cir. 1993); *In re Pet Food Prods. Liab. Litig.,* 629 F.3d 333 (quoting *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 535 (3d Cir. 2004)) ("We reaffirm the 'overriding public interest is settling class action litigation.'"). To be sure, "[c]ompromises of disputed claims are favored by the courts." *Lachance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997) (citing *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910)).

Settlement spares the litigants the uncertainty, delay and expense of a trial, while simultaneously reducing the burden on judicial resources. This is particularly true "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Parks v. Portnoff L. Assocs.*, 243 F. Supp. 2d 244, 249 (E.D. Pa. 2003) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 784 ("*GM Trucks*")); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 535 ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged"); *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (the court "encourage[s] settlement of complex litigation 'that otherwise could linger for years'").

In class actions, the "court plays the important role of protector of the [absentee members'] interests, in a sort of fiduciary capacity." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,*55 F.3d at 784. The ultimate determination whether a proposed class action settlement warrants approval resides in the Court's discretion. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The

Third Circuit has adopted the following four-factor test to determine the preliminary fairness of a class action settlement: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.[7] *In re Gen. Motors Corp. Pick-Up Fuel Tank Prod. Liab. Litig.*, 55 F.3d at 785. If such factors are satisfied, the settlement is presumed to be fair. *Id.* Preliminary approval of a proposed settlement is granted unless the proposed settlement is obviously deficient. *See Jones v. Com. Bancorp, Inc.*, 2007 WL 2085357, at *2 (D.N.J. July 16, 2007); *Udeen*, 2019 WL 4894568, at *2 (internal quotation omitted). *See also Rudel Corp. v. Heartland Payment Sys., Inc.*, 2017 WL 4422416, at *2 (D.N.J. Oct. 4, 2017) (applying "obviously deficient" standard to preliminary approval of class action settlement). Generally, "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible

[7] At the final approval stage, courts in the Third Circuit apply a more rigorous nine factor *"Girsh"* analysis to assess the fairness, adequacy, and reasonableness of the proposed class action settlement. Specifically, the Court would review the settlement in light of the factors established by *Girsh*, 521 F.2d at 157: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risk of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005).

approval, preliminary approval is granted." *Udeen*, 2019 WL 4894568 at *2 (internal quotation omitted). As set forth below, these standards certainly are met here.

B. The Settlement Is Fair, Reasonable, and Adequate Under Rule 23

1. The Settlement Is the Product of Arms-Length Negotiations Between Experienced Counsel and Entitled to a Presumption of Fairness

Under Rule 23(e)(2)(A) and (B), the Court should "consider whether the settlement is proposed by experienced counsel who reached the agreed-upon terms through arms-length bargaining." *Alves v. Main*, 2012 WL 6043272, at *9 (D.N.J. Dec. 4, 2012). "A settlement is presumed fair when it results from 'arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Udeen*, 2019 WL 4894568, at *2 (citation omitted). This presumption applies here because this settlement was only reached after months of arm's length negotiation between the Parties. Muhic Decl., ¶ 13. Moreover, negotiations regarding service award to the Representative Plaintiffs and attorneys' fees did not begin until the terms of the Settlement for the Class were agreed to. Muhic Decl., ¶ 14.

In addition, Class Counsel for all parties are experienced in litigating class action cases, including automotive class actions such as this one, and only entered into the Settlement Agreement after diligently exploring the strengths and weaknesses of the case. *See* Muhic Decl., ¶¶ 4-6, Declaration of Russell Paul, ¶¶ 4-6; Declaration of Edwin J. Kilpela. Jr., ¶¶ 4-5. Courts recognize that the opinion of experienced counsel supporting a settlement is entitled to considerable weight. *See Glaberson v. Comcast Corp.*, 2014 WL 7008539, at *4 (E.D. Pa. Dec. 12, 2014) (a

settlement is presumed to be fair "when the negotiations were at arm's length, there was sufficient discovery, and the proponents of the settlement are experienced in similar litigation"); *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."). Here, Class Counsel have made a considered judgment based on adequate information derived from an exchange of information with Subaru, as well as their independent research and investigation, that the Settlement is not only fair and reasonable, but an extremely favorable result for the Class. *See* Muhic Decl., ¶ 22, Declaration of Russell Paul, ¶ 10; Declaration of Edwin J. Kilpela. Jr., ¶ 8. Class Counsel's beliefs are based on their deep familiarity with the factual and legal issues in this case and risks associated with continued litigation. This further weighs in favor of the fairness of the settlement. *See* W. Rubenstein & H. Newberg ,*Newberg and Rubenstein on Class Actions*, § 13:13 (6th ed. 2022) (noting that courts usually adopt an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval.). As such, this factor weighs in favor of preliminary approval.

2. There Has Been Sufficient Discovery

Proposed Class Counsel obtained sufficient discovery to enter into the proposed Settlement on a fully informed basis. First, prior to filing suit, Class Counsel conducted an investigation into the origins and nature of the issues reported by owners of the vehicles who had contacted them and who had reported various

incidents to NHTSA. Then, after significant motion practice in regard to the legal theories asserted by Plaintiffs, the parties negotiated a protective order and a carefully considered ESI protocol, and then evaluated and selected numerous ESI custodians from Subaru before crafting comprehensive ESI search terms. In response to Plaintiffs' requests, Subaru produced in excess of 16,000 pages of documents, along with responses to written interrogatories. These documents included warranty data and records of testing, including stress testing of windshields, overseen by SBR. Muhic Decl., ¶¶ 9-10.

Further, Plaintiffs served subpoenas upon Safelite Group, Inc. and multiple automotive glass manufacturers for records and information regarding the manufacturing, testing and supplying of windshields that were supplied to Subaru. Plaintiffs reviewed thousands of pages of documents produced in response to those subpoenas. Plaintiffs also served a subpoena for documents and a deposition of the former President of the Subaru National Retailer Advisory Board, Wally Sommer. Subaru deposed eleven Plaintiffs, and Plaintiffs deposed the former National Service Operations Manager and current Parts Collection Center Manager, Craig Jeffries, on multiple days, in addition to Wally Sommer. Muhic Decl., ¶ 9.

Based on this discovery, Class Counsel gained an understanding of both the strengths and weaknesses of Plaintiffs' claims and the viability of Subaru's corrective actions. In particular, both sides would face considerable risks were the litigation to proceed. In contrast to the complexity, delay, risk, and expense of continued litigation, the proposed Settlement will produce certain, prompt and substantial benefits for the Settlement Class.

The immediacy and certainty of the significant benefits provided by the Settlement supports granting preliminary approval. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 103 (D.N.J. 2012) ("By reaching a favorable Settlement . . . Class Counsel have avoided significant expense and delay and have also provided an immediate benefit."). While it is important to remember that "settlement is a compromise," the proposed Settlement is reasonable and confers a substantial benefit on the Settlement Class, namely the ability to recover 100% or more of costs incurred previously for repairing or replacing cracked windshields as well as an 8 year/100k mile warranty providing a free replacement windshield of improved quality should a Settlement Class Member suffer future damage to their windshield caused by the alleged defect.

As a result, the 8th and 9th *Girsh* factors are also fulfilled because these factors involve analyzing the outcome of the Settlement in comparison to the potential risks of litigation. *See e.g., In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 440 ("In evaluating the eighth and ninth *Girsh* factors, we ask 'whether the settlement represents a good value for a weak case or a poor value for a strong case.'") (citation omitted).

The benefit provided to the Settlement Class is substantial, addresses the alleged defect/condition that is the basis of Plaintiffs' complaint, is in line with similar automotive class-action settlements, and is fair, reasonable, and adequate. *See e.g., Udeen*, 2019 WL 4894568, at *1 (preliminarily approving a settlement that reimbursement of certain repair-related expenses); *Parrish v. Volkswagen Grp. of Am., Inc.*, No. 8:19-cv-01148 (C.D. Cal. Jan. 27, 2022), ECF 81 (preliminarily

approving class action settlement, which provided a reimbursement for previous out of pocket costs of specified transmission-related repairs, to owners and lessees of certain 2019 Volkswagen Jetta or 2018, 2019, or 2020 Volkswagen Tiguan vehicles); *Patrick v. Volkswagen Grp. of Am., Inc*., No. 8:19-cv-01908 (C.D. Cal. Mar. 10, 2021), ECF 72 (finally approving class action settlement, which provided reimbursement for previous out of pocket costs for repairs of specified engine stalling issues, to owners and lessees of certain 2019 and 2020 Volkswagen Golf GTI or Jetta GLI vehicles equipped with manual transmissions suffering from an alleged engine stalling defect); *In re Volkswagen Timing Chain Prod. Liab. Litig.,* No. 2:16-CV-02765 (D. N.J. Dec. 14, 2018), ECF 235 (finally approving class action settlement for allegedly defective timing chain tensioners which provided reimbursement of repair costs); *Saint v. BMW of N. Am., LLC*, 2015 WL 2448846 (D.N.J. May 21, 2015) (finding settlement that provided a warranty extension of three months and a reimbursement program to owners or lessees of service demo vehicles was fair reasonable and adequate and finally approving class-action settlement).

3. The Proponents of the Settlement Are Experienced in Similar Litigation

As set forth herein and in the declarations of Class Counsel appended to this motion, proposed Class Counsel are highly experienced and skilled in handling complex class actions, including automotive class actions such as this. Proposed Class Counsel have served in leadership positions in many class actions and have successfully obtained meaningful recoveries for consumers through class litigation.

Accordingly, this factor strongly supports granting preliminary approval.

4. Plaintiffs Intend to Respond to and Resolve Any Objections

The fourth factor cannot be fully evaluated before the Class Notice has been disseminated to the Class informing Settlement Class Members of the proposed Settlement and its terms. However, Class Counsel is committed to responding to and resolving any concerns from Class Members made known to them prior to the Final Fairness Hearing. Moreover, because the Settlement provides for such robust relief both by way of the extended warranty and for reimbursement of out-of-pocket costs of past repairs/replacements of windshields, in addition to the potential to receive inconvenience damages, Class Counsel anticipate minimal objections, if any.

5. The *Girsh* Factors Support Preliminary Approval

Although the foregoing analysis is sufficient for the Court to grant preliminary approval, courts sometimes consider the final approval factors to mitigate any potential issues in the future. *Udeen*, 2019 WL 4894568, at *3.[8] The Third Circuit directs district courts to analyze the following nine factors at the final approval stage:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and

[8] Rule 23(e) was amended in December 2018 to specify uniform standards for settlement approval. Courts in this district have continued to apply the same legal standards to preliminary approvals after the 2018 amendments. *See*, *e.g.*, *Udeen*, 2019 WL 4894568; *Smith v. Merck & Co.*, 2019 WL 3281609 (D.N.J. July 19, 2019). Further, "[t]he 2018 Committee Notes to Rule 23 recognize that, prior to this amendment, each circuit had developed its own list of factors to be considered in determining whether a proposed class action was fair[.]" *Huffman v. Prudential Ins. Co. of Am.*, 2019 WL 1499475, at *3 (E.D. Pa. Apr. 5, 2019) (citing Fed. R. Civ. P. 23(e)(2), Advisory Committee Notes). "[T]he goal of the amendment is not to displace any such factors, but rather to focus the parties [on] the 'core concerns' that motivate the fairness determination." *Id.* In this Circuit, the *Girsh* factors govern the analysis.

> the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 157. All of the *Girsh* factors that the Court can analyze at this stage support preliminary approval.[9]

As to the first factor, the complexity, expense, and likely duration support preliminary approval because, without the Settlement, the parties would be engaged in contested motion practice and adversarial litigation for years. The claims advanced on behalf of the Settlement Class Members involve complex technical, engineering and legal issues. Continued litigation would be complex, time consuming and expensive, with no certainty of a favorable outcome. The Settlement Agreement secures substantial benefits for the Settlement Class while avoiding the delays, risks and uncertainties of continued litigation.

The third factor, the stage of the proceedings and the amount of discovery completed, also supports preliminary approval. The parties have exchanged voluminous, detailed information regarding the alleged windshield defect. In addition, Class counsel have conducted their own extensive independent investigation into the alleged defect and have further informed themselves through discovery in this Action. The formal and informal discovery that has been completed has allowed Class counsel to understand the strengths and weaknesses of their case,

[9] The reaction of the class cannot be evaluated until after notice is issued to the Class Members pursuant to the Settlement.

and to analyze the risks of future litigation in comparison to the relief offered by the Settlement. Muhic Decl., ¶ 13. *See Udeen*, 2019 WL 4894568, at *3 (finding such facts sufficient for preliminary approval).

The fourth, fifth, and sixth factors all analyze the risks of continued litigation. If the Parties had been unable to resolve this case through the Settlement, the litigation would likely be protracted and costly. Class Counsel have litigated many automotive class actions that have taken several years to conclude. Before ever approaching a trial in this case, the parties likely would have briefed, and the Court would have had to decide, further discovery-related motions, a motion for class certification (along with a potential Rule 23(f) appeal), motions for summary judgment, as well as *Daubert* motions and other pre-trial and trial-related motions. Additionally, considerable resources would have been expended on discovery, depositions, and expert witnesses. It is therefore unlikely that the case would have reached trial before 2026, with post-trial activity to follow. *See Haas v. Burlington Cnty.*, 2019 WL 413530, at *6 (D.N.J. Jan. 31, 2019) (granting approval where plaintiffs estimate the time to judgment, including trial, would take another three years).

Moreover, there is a risk of not obtaining class certification should this action be litigated rather than settled. Defendants would likely argue that there are individualized issues concerning Class Members' circumstances with their windshields which, if litigated, could substantially if not completely bar many Settlement Class Members' claim and/or recovery. In the context of a class settlement, these potential impediments do not preclude certification of a nationwide

Settlement Class because the Court is not faced with the significant manageability problems of a trial. *See Amchem Prods., Inc.*, 521 U.S. at 620 (individual issues that may preclude class certification in litigation do not preclude class certification for settlement purposes, since manageability at trial is no longer a concern).

Courts routinely find the seventh factor – the defendant's ability to withstand greater judgement – to be neutral, as it is here. Such a factor is typically only relevant when "the defendant's professed inability to pay is used to justify the amount of the settlement." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 440. This not a factor here.

Finally, the remaining *Girsh* factors – the range of reasonableness of the settlement both independently and weighed against the risk of further litigation – support preliminary approval. The settlement must be judged "against the realistic, rather than theoretical potential for recovery after trial." *Sullivan*, 667 F.3d at 323. In conducting the analysis, the court must "guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Litig.*, 55 F.3d at 806; *see also In re Shop-Vac Mktg. & Sales Pracs. Litig.*, 2016 WL 3015219, at *2 (M.D. Pa. May 26, 2016) ("The proposed settlement amount does not have to be dollar-for-dollar the equivalent of the claim…and a satisfactory settlement may only amount to a hundredth or even a thousandth part of a single percent of the potential recovery.") (internal citations and quotations omitted). While this is not a common fund settlement, the settlement provides significant relief to the Class

Members in the form of out-of-pocket reimbursements for Qualified Repair Expenses up to 100% or more of the expenses incurred, along with a robust and meaningful warranty extension for the windshields. Finally, the Class Notice expense, claim administration expense, counsel fees/expenses and/or service awards are paid by Defendants without reducing, in any way, any Settlement Class Member's available benefits.

VI. THE COURT SHOULD APPOINT PLAINTIFFS' COUNSEL AS SETTLEMENT CLASS COUNSEL

Fed. R. Civ. P. 23(g) requires a court to appoint class counsel. In appointing class counsel, the Court "must" consider:

- the work counsel has done in identifying or investigating potential claims in the action;
- counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- counsel's knowledge of the applicable law; and
- the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The court "may" also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Proposed Class Counsel, Peter A. Muhic, Edwin J. Kilpela, Jr. and Russell Paul satisfy this criteria. Class Counsel expended substantial time, effort, and expense prosecuting this Action and negotiating this Settlement. Class Counsel are highly skilled and knowledgeable concerning consumer law and class action practice. As confirmed by the result obtained in this case, Class Counsel have made the investment and have the experience to represent the Class vigorously.

Accordingly, the appointment of the proposed Class Counsel under Rule 23(g) is warranted.

VII. THE NOTICE PROGRAM SHOULD BE APPROVED

In an action certified for settlement purposes under Rule 23(b)(3) "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In Re Nat'l Football League Players Concussion Injury Litig*., 821 F.3d at 435.

As set forth in detail above, the Notice Plan for this Settlement includes: (1) mailing a Short-Form Notice to the Settlement Class; (2) establishing a Settlement Website to allow Settlement Class Members to obtain information regarding the Settlement and access important documents regarding the Settlement, including a Long-Form Notice; and (3) a toll-free number to provide Settlement Class Members with information regarding the Settlement. The manner of providing Notice and the content of the Class Notice herein fully satisfies Rule 23, due process, and constitutes the best notice practicable under the circumstances and should, therefore, be approved. *Udeen*, 2019 WL 4894568, at *7; *Patrick*, 2021 WL 3616105, at *5 ("The Court has reviewed the Class Notice Plan and finds that the Settlement Class Members will receive the best notice practicable under the circumstances and that the Class Notice Plan comports with Rule 23 and due process.").

VIII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request the Court enter an Order: (1) granting preliminary approval of the Settlement; (2) conditionally certifying the proposed Settlement Class for settlement purposes; (3) conditionally appointing Plaintiffs as the Representative Plaintiffs and Plaintiffs' Counsel, Peter A. Muhic, Edwin J. Kilpela, Jr. and Russell D. Paul as Settlement Class Counsel; (4) approving the Parties' proposed Class Notice forms and Notice Plan for disseminating the Class Notice; (5) conditionally appointing JND Legal Administration, as the Settlement Administrator; (6) setting deadlines for the filing of any objections to, or requests for exclusion from, the Settlement, and for other submissions in connection with the Settlement approval process; and (7) setting a Final Fairness Hearing date and briefing schedule for Final Approval of the Settlement and Plaintiffs' application for service awards and attorneys' fees and expenses.

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Respectfully submitted,

/s/ Peter A. Muhic

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