

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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GREG MCMAHON and ADAM GOLDBERG,

Plaintiffs,

v.

GENERAC POWER SYSTEMS, INC.,

Defendant.

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Civil Action No. 2:21-cv-05660

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS'  
FEES, COSTS, AND SERVICE AWARDS**

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## I. INTRODUCTION

After investigating this case since July 2019, and litigating it since December 30, 2021, on a wholly contingency fee basis – and successfully negotiating a settlement that creates substantial benefits for a class of current and former owners of approximately 222,000 Class Generators – Plaintiffs now seek an Order that provides for Defendant Generac Power Systems, Inc. (“Generac”) to pay (a) \$1,500,000 to Class Counsel for the payment of their attorneys’ fees and reimbursement of expenses, and (b) \$2,500 to each of the two Class Representatives as Service Awards. Pursuant to Section G(1) of the Settlement Agreement (“SA”), the parties agreed that Generac shall not be obligated to pay amounts in excess of these amounts, and Generac reserved its right to oppose Plaintiffs’ request. The parties negotiated at arms’ length and reached agreement regarding these provisions, with the assistance of a mediator, only after they had agreed upon all other material terms of the SA. Significantly, these payments – if approved – will not reduce or impact the settlement consideration made available to the Class pursuant to the SA. Plaintiffs’ request for attorneys’ fees, costs and service awards was contained in the notice that was provided to Settlement Class Members pursuant to the Notice Plan and is posted on the settlement website. No Settlement Class Member has objected.

As discussed below, given the amount of work performed by Class Counsel, the outstanding results achieved and other applicable factors, Plaintiffs submit that the fee and expense request is reasonable and should be approved. The service awards requested by Plaintiffs are also well within the range of those awards approved by this Court in class action cases and are warranted here to recognize the time and effort Plaintiffs committed to this case, which were integral to its successful resolution. Plaintiffs respectfully request that the Court enter the proposed order submitted herewith granting each of these requests.

## II. FACTUAL BACKGROUND

### A. Plaintiffs' Allegations and Pre-Litigation Investigation

Before filing this Action, Plaintiffs' counsel conducted an extensive investigation into the alleged corrosion of the plenum in the Class Generators. This investigation, which began in July 2019, included interviewing members of the putative class and reviewing their documents, researching consumer reporting on various websites, reviewing Generac's manuals and other materials, analyzing and consulting regarding the technical issues with the fuel plenum, researching potential causes of action, speaking with employees of Generac's authorized service dealerships, communicating with consulting experts in the field of generator systems, examining the parts at issue, and drafting a detailed Complaint.

The named Plaintiffs are residents of Pennsylvania and Virginia. Complaint, ECF No. 1, at ¶¶ 9, 15. Plaintiff McMahon purchased an extended warranty from Generac, which provided him with warranty coverage until 2024. ¶ 11. In December of 2020, Plaintiff McMahon received a letter from Generac that recommended he pay \$80 for an inspection to detect the presence of corrosion along the fuel line, but also stated that he would only be reimbursed if the fuel plenum was found to be "significantly compromised." ¶ 13. Plaintiff McMahon paid the \$80 inspection fee, but Generac did not reimburse him. ¶ 14. In March of 2021, Plaintiff Goldberg received a similar letter from Generac recommending that he pay \$80 for an inspection, which also stated that he would only be reimbursed if the fuel plenum was found to be "significantly compromised." ¶ 19. Plaintiff Goldberg did not pay for the inspection, as he believed Generac should perform it at no cost to him, regardless of its findings. ¶ 20. Plaintiffs' Complaint seeks certification of a Nationwide Class as well as subclasses in Pennsylvania and Virginia. ¶¶ 36-37. The Complaint

alleges claims for violations of the Magnuson-Moss Warranty Act (¶¶ 45-61), as well as for breaches of express warranty (¶¶ 62-66) and implied warranty (¶¶ 67-74).

### **B. History of the Litigation**

Plaintiffs filed the initial Complaint in this Action on December 30, 2021. ECF No. 1. Judge Petrese Tucker granted two extensions to Generac's deadline to respond to Plaintiffs' Complaint. ECF Nos. 7, 11. On May 31, 2022, the Action was reassigned to Judge Gene E.K. Pratter. ECF No. 13. On June 2, 2022, the Action was reassigned to Your Honor. ECF No. 14. On June 6, 2022, the Court entered an additional extension for Generac to respond to Plaintiffs' Complaint, and on September 30, 2022, Generac filed a motion to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6). ECF Nos. 15, 16.

Plaintiffs investigated and drafted a response to Generac's motion to dismiss. Due to the advanced stage of settlement negotiations between the parties, the parties sought three extensions of time to extend Plaintiffs' opposition deadline, which the Court granted. ECF Nos. 18-20. The briefing on Generac's motion to dismiss allowed the parties to assess the strengths and weaknesses of further litigation and assisted the parties throughout settlement negotiations.

### **C. The Parties' Settlement Negotiations**

On May 16, 2022, the Parties engaged in an in-person mediation session with Judge Diane M. Welsh (Ret.) at JAMS' Philadelphia office. The Parties made significant progress during that mediation, and continued negotiations over the following eight months with further assistance from Judge Welsh. In connection with the settlement negotiations, the Parties exchanged confirmatory discovery subject to Rule 408 of the Federal Rules of Evidence. After confirmatory discovery and the Parties' protracted negotiations, the Parties executed the Settlement Agreement on February 3, 2023.



The terms of the Settlement Agreement are the result of arm's-length negotiations between experienced counsel for both sides. The Plaintiffs approve of the Settlement Agreement, which provides substantial benefits to the proposed Settlement Class. Class Counsel also independently analyzed the source of the corrosion, consulted with industry experts, and interviewed and collected documents from putative class members. In addition, Class Counsel engaged in additional confirmatory discovery from Generac's Senior Corporate Quality Control Manager on August 10, 2023. SA § J.2.

#### **D. The Settlement Class**

If finally approved by the Court, the Settlement Agreement will provide substantial benefits to the following Settlement Class: (1) all current or former owners of a Class Generator who paid a \$80 Inspection Program fee that was not reimbursed prior to the April 18, 2023, and (2) all current owners of Class Generators that were not inspected pursuant to the Inspection Program prior to the Preliminary Approval Date. SA § A.37. Excluded from the Settlement Class are: (i) Generac, its officers, directors, affiliates, legal representatives, employees, successors, and assigns, and entities in which Generac has a controlling interest; (ii) the judge presiding over the Lawsuit and any member of the Court's staff and immediate family; and (iii) local, municipal, state, and federal governmental entities. *Id.*

#### **E. Relief Benefiting the Settlement Class**

The consideration to the Settlement Class consists primarily of two types of claims: reimbursements for past inspection fees, and one free inspection to Settlement Class Members who have not had an inspection pursuant to the inspection program moving forward. SA § C. To receive either form of relief, Settlement Class Members need only submit a simple, three-page Claim Form; to receive a benefit, some claimants will need to provide certain information in support of

their claim. *See* Exhibit 1 to Settlement Agreement. SA § D.1. Claim Forms can also be submitted both through the Settlement Website and the mail. *Id.*

First, Settlement Class Members who paid for an inspection pursuant to the Inspection Program and the Inspection Notice Letter can file a claim for their unreimbursed, out-of-pocket inspection fee in the amount of \$80.00. SA § C.1. Thus, Settlement Class Members will be made whole for past inspection fees paid pursuant to the Inspection Program.

Second, Settlement Class Members who have not had their plenum inspected through the Inspection Program are eligible to submit a Claim for a cost-free plenum inspection of their Class Generator by an Authorized Service Dealer. SA § C.2. Those Settlement Class Members simply need to attest that they have not had their plenum inspected through the Inspection program and: (i) their Class Generator has not received general maintenance or service from an Authorized Service Dealer since the start of the Inspection Program; or (ii) their Class Generator received general maintenance or service from an authorized service dealer since the start of the Inspection Program but it was nevertheless not examined for corrosion on the plenum surface (along with a supporting narrative statement to that effect); or (iii) that the Class Generator has corrosion on the plenum surface (along with supporting photographic evidence with their Inspection Claim). *Id.* If the inspection reveals corrosion on the plenum surface, that Settlement Class Member will receive a free replacement of the fuel plenum (inclusive of parts and labor) which will be performed by a Generac Authorized Service Dealer. SA § C.3.

#### **F. Attorneys' Fees, Costs, and Service Awards**

Plaintiffs seek attorneys' fees up to \$1,500,000.00. SA § G.1; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."); *Hensley v. Eckerhart*, 461 U.S. 424, 437

(1983). Plaintiffs are also applying for service awards in the amount of \$2,500 to each of the Plaintiffs (\$5,000 total) in recognition of their time, costs, and effort in the Lawsuit. *Id.* Plaintiffs' Attorneys' Fees, Cost and Service Awards will be in addition to the benefits available to the Settlement Class and will not reduce or otherwise affect the benefits made available to Settlement Class Members. Generac has also reserved the right to oppose any Attorneys' Fee, Cost, and Service Award that it considers unreasonable. SA § G.1(b).

### **G. Notice to Settlement Class Members**

The Settlement Agreement includes a comprehensive notice plan, which was paid for by Generac and overseen by KCC Class Action Services, LLC, an experienced Settlement Administrator. SA § A.34. Specifically, for Settlement Class Members that Generac had an email address for, they received notice via email. SA § D.8(a). For Settlement Class Members that Generac did not have an email address for, the Settlement Administrator sent the postcard Notice of Settlement through first class mail. *Id.* For Settlement Class Members eligible to submit a Reimbursement Claim, their addresses were run through the National Change-of-Address Database. *Id.* If the notice was returned undeliverable, the Settlement Administrator performed one advanced address search to re-mail the undeliverable notice. *Id.* Additionally, on a confidential basis, the parties provided the Settlement Administrator with reasonably available information that identifies possible Settlement Class Members from their existing records. *Id.*

In addition, the Settlement Administrator established a Settlement Website ([www.fuelplenumsettlement.com](http://www.fuelplenumsettlement.com)) that provided: (i) information concerning deadlines for filing a Claim Form, and the dates and locations of relevant Court proceedings, including the Final Approval Hearing; (ii) the toll-free phone number applicable to the Settlement; (iii) copies of the Settlement Agreement, the Notice of Settlement, the Claim Form, Court Orders regarding this

Settlement, and other relevant Court documents, which will include Class Counsel's Motion for Approval of Attorneys' Fees, Costs, and Service Awards; and (iv) information concerning the submission of Claim Forms, including the ability to submit Claim Forms electronically using an electronic signature service such as DocuSign through the Settlement Website. SA § D.8(d). The Settlement Website also provides a serial number look-up where consumers can input their Generac home standby generator's serial number to check whether their generator is a Class Generator. *Id.* A toll-free number was also established that can be used to: (i) request the Claims Form, the Notice of Settlement, and this Settlement Agreement; and (ii) obtain information about deadlines for filing a Claim Form, opting out of or objecting to the Settlement, and the scheduling of the Final Approval Hearing. SA § D.8(e).

Generac, through the Settlement Administrator, mailed all notices required by 28 U.S.C. § 1715. SA § D.8(f). Generac also advised its Authorized Service Dealers of the no-cost Inspection Claims available to Claimants and continues to remind them to visually examine fuel systems (including but not limited to plenums) during general maintenance or service visits, and updated the information on its website regarding the Inspection Program. SA § D.8(c). The Settlement Administrator will provide the parties with a declaration detailing all its efforts regarding the Notice Plan and its reach to the Settlement Class, which will be filed as an exhibit to Plaintiffs' motion for final approval of the settlement. SA § D.9.

#### **H. The Release**

In exchange for the foregoing relief, and subject to final approval by the Court, Plaintiffs and Settlement Class Members who do not timely exclude themselves will be bound by a release of all claims arising out of or relating to the claims that were asserted in the Complaint (the "Released Claims"). The Released Claims extend to Generac and its related entities and persons.

The Released Claims will not apply to any claims for death, personal injury, property damage (other than damage to the Class Generators related to the plenum), or subrogation. SA § A.30.

### **I. The Preliminary Approval Order**

On April 18, 2023, the Court issued its Order Granting Preliminary Approval to Class Action Settlement, Provisionally Certifying Settlement Class, Directing Notice to the Settlement Class, and Scheduling Final Approval Hearing (the “Order”). ECF No. 23. The Order set the Final Approval Hearing for 10:00 a.m. on September 27, 2023 in Courtroom 11-A. *Id.* at 9. Settlement Class Members have until August 26, 2023 to either object to or opt-out of the settlement. For Settlement Class Members who do not opt-out, they have until September 25, 2023 to submit claims. While Settlement Class Members can still object or opt-out for approximately two weeks, to date no Settlement Class Members have objected to the settlement and there have only been 11 opt-outs. When compared against the 229,842 notices sent, the opt-outs represent approximately 0.0048% of the Settlement Class. Relevant to this motion, no Settlement Class Members have objected to Class Counsel’s request for fees and costs, or the requested service awards for the Plaintiffs.

### **III. ARGUMENT**

Rule 23(h) of the Federal Rules of Civil Procedure states that in a class action, “the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). “The awarding of fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous.” *In re Philips/Magnavox TV Litig.*, No. 09-3072 (CCC), 2012 WL 1677244, at \*15 (D.N.J. May 14, 2012) (citing *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3d Cir. 2001)). In the context of a settlement of a class action,

the Court is “required to clearly articulate the reasons that support its fee determination.” *Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146 (CCC), 2013 WL 1192479, at \*14 (D.N.J. Mar. 22, 2013) (citations omitted).

Plaintiffs now apply for a total fee and expense award of \$1,500,000.00, which accounts for both the attorneys’ fees for Class Counsel (who have amassed a collective lodestar of \$594,885.00), and the reimbursement of \$11,942.12 in their cumulative litigation expenses. Plaintiffs also request Court approval of an additional \$2,500.00 to be distributed as service awards to each of the Plaintiffs (\$5,000.00 total). Plaintiffs submit that these requests are reasonable in light of the work performed and the results achieved by the Settlement, and the requests are consistent with similar awards recently approved by this Court. The SA is the product of efforts by Class Counsel through phases of investigation and adversarial litigation, in a case involving complex issues of fact and law. In addition, these fees, costs and service awards will be paid separately from (and in addition to) the benefits made available to the Settlement Class. For the reasons that follow, these requests should be approved.

**A. The Fee Request Should be Evaluated Under the Lodestar Method**

Two calculation methods can be used to determine whether a requested attorneys’ fee award in a class action is reasonable: the lodestar method and the percentage of recovery method. *See Teh Shou Kao v. CardConnect Corp.*, No. 16-CV-5707, 2021 WL 698173, at \*8 (E.D. Pa. Feb. 23, 2021). The percentage of recovery method calculates the total recovery the settlement would allocate to the attorneys by dividing the amount of the requested fee by the total amount paid out by the defendant and is appropriate where the value of the settlement can be readily calculated, such as when a common fund is created. *Id.* (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)). The lodestar method uses the number of hours reasonably expended to

determine an adequate fee, which is done irrespective of the monetary value of the ultimate relief achieved for the class. *Id.* (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820-21 (3d Cir. 1995)). The lodestar amount is calculated by multiplying the number of hours reasonably worked by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys. *Id.* (citing *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 216 (E.D. Pa. 2011)); *see also Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). The Court “is not required to engage in this analysis with mathematical precision or ‘bean-counting’” and “may rely on summaries submitted by the attorneys” without “scrutinize[ing] every billing record.” *Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146 (CCC), 2013 WL 1192479, at \*15 (D.N.J. Mar. 22, 2013) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306-07).

Because there is no common fund created through the Settlement, Plaintiffs respectfully submit that the Court should use the lodestar method. *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (finding that the percentage method is “generally favored” in common fund cases because “it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.”); *In re Gen. Motors*, 55 F.3d at 821 (“Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases. Because the lodestar award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class.”).

### B. Class Counsel’s Lodestar Figure is Reasonable

The lodestar method can be boiled down to two steps. The first step is to determine the appropriate hourly rate, based on the attorneys’ usual billing rate and the prevailing market rates in the relevant community. *Liberty Res., Inc. v. City of Philadelphia*, No. CV 19-3846, 2023 WL 3204018, at \*11 (E.D. Pa. May 1, 2023). The second step assesses whether the billable time was reasonably expended in furtherance of the litigation. *Id.* (citing *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 177 (3d Cir. 2001)). Time expended is considered ‘reasonable’ if the work performed was ‘useful and of a type ordinarily necessary to secure the final result obtained from the litigation.’” *In re Schering-Plough/Merck Merger Litig.*, No. 09-1099(DMC), 2010 WL 1257722, at \*17 (D.N.J. Mar. 26, 2010) (quoting *Public Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1188 (3d Cir. 1985)). The lodestar figure is “presumptively reasonable” when it is arrived at from a reasonable hourly rate and a reasonable number of hours expended. *Planned Parenthood of Cent. New Jersey v. Attorney General of the State of New Jersey*, 297 F.3d 253, 265 n.5 (3d Cir. 2002) (citations omitted).<sup>1</sup> Here, the fact that the cap on attorneys’ fees were vigorously negotiated between the parties with an experienced and nationally recognized mediator also supports approval of Plaintiffs’ request. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

The Declaration of Joseph G. Sauder recounts the time and expenses incurred by Class Counsel. Class Counsel billed their time at their current billing rates,<sup>2</sup> and all the billable time was

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<sup>1</sup> The final step in the lodestar analysis, discussed *infra*, is to determine whether to increase or decrease the lodestar amount by applying a lodestar multiple. *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at \*18.

<sup>2</sup> The hourly billable rates of Class Counsel used to calculate these lodestar values are consistent with the hourly rates routinely approved in complex class action litigation. The court orders granting final approval in both *Yaeger*, 2016 WL 4547126, and *Salcedo v. Subaru of Am., Inc.*, No. 1:17-cv-8173-JHR-AMD, ECF No. 48 (D.N.J. June 5, 2019) approved the billing rates of Sauder Schelkopf attorneys and found the hours billed to be reasonable. In addition, the Court in



necessary to secure the results obtained. From inception through August 9, 2023, Class Counsel's lodestar is \$594,885.00. Class Counsel has also incurred \$11,942.12 in unreimbursed expenses. All of these fees and expenses will be paid from the requested \$1,500,000 fee.

### C. The *Gunter* Factors Confirm the Reasonableness of the Request

In addition to determining the method of calculating the fee award, district courts are also directed to ensure that the fee awarded is reasonable. *In re Cendant Corp. Litig.*, 264 F.3d 201, 283 (3d Cir. 2001). In *Gunter v. Ridgewood Energy Corp.*, the Third Circuit provided a series of non-exhaustive factors for district courts to consider:

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

*Gunter*, 223 F.3d 190, 195 n.1. In addition to these factors, the Third Circuit has listed three other factors that may be relevant: "(1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any 'innovative' terms of settlement."<sup>3</sup> *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 165 (3d Cir. 2006)

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*Henderson* found that Sauder Schelkopf attorneys' "billing rates to be appropriate and the billable time to have been reasonably expended." 2013 WL 1192479, at \*16; *see also Tei Shou Kao*, 2021 WL 698173, at \*11 (observing attorneys' billable rates ranged from \$395 to \$850 per hour and approving fee request).

<sup>3</sup> Plaintiffs submit that these additional factors are neutral here. No government agencies or other groups have been involved, there is no common fund created and thus no percentage fee, and while the Settlement provides substantial benefits, there are not any "innovative" terms.

(internal citations omitted). The *Girsh* factors do not need to be applied in a “formulaic way” and some factors may outweigh the rest. *Teh Shou Kao*, 2021 WL 698173, at \*9 (citation omitted). District courts are directed to “engage in robust assessments of the fee award reasonableness factors when evaluating a fee request.” *Id.* (citing *In re Rite Aid*, 396 F.3d at 302).

As explained below, Plaintiffs submit that the *Gunter* factors weigh in favor of granting their fee request.

***1. The number of persons benefitted***

The Settlement in this case makes substantial relief available to the Settlement Class. There are approximately 222,00 Class Generators and 229,842 notices were sent. Both current and former owners of the Class Generators are eligible to participate in the benefits provided by the Settlement, meaning the relief offered by the Settlement exceeds the total number of Class Generators. Class Counsel have already been contacted by Settlement Class Members who have submitted claims for reimbursement of the \$80 inspection fee as well as Settlement Class members who submitted claims for free inspections of their Class Generators. *See Teh Shou Kao*, 2021 WL 698173, at \*9 (holding “Class counsel adequately prioritized the benefit to the settlement class by negotiating a settlement that provides benefits to many individuals who would most likely have received no benefit otherwise” and stating the “settlement confers a significant benefit considering the size of the settlement class”).

***2. The absence of objections***

As discussed above, the deadline by which Settlement Class Members may object to the Settlement – including the Motion for Attorneys’ Fees, Costs, and Service Awards – is August 26, 2023. While this fee petition is being filed before the expiration of the objection period, no

objections to either the settlement or Class Counsel’s request for fees and service awards has been received.<sup>4</sup>

The dearth of objections support approval of the requested fee. *McDermid v. Inovio Pharmaceuticals, Inc.*, No. 20-01402, 2023 WL 227355, \*11 (E.D. Pa. Jan. 18, 2023) (finding “there were no objections to the requested fee award” which “favor[ed] approval”); *Teh Shou Kao*, 2021 WL 698173, at \*10 (“The second factor favors approval because no one objected to the fee request after dissemination of the Court-approved notices, which advised settlement class members that the Court would be asked to consider whether the lawyers for the class should be paid ‘up to one-third of the \$7.65 million settlement amount’ and reimbursed for their expenses.”); *Whiteley v. Zynerva Pharms., Inc.*, No. CV 19-4959, 2021 WL 4206696, at \*11 (E.D. Pa. Sept. 16, 2021) (“The lack of any objections is strongly indicative of approval by the Class.”)

### ***3. The skill and efficiency of the attorneys involved***

Regarding the third factor, “Class Counsel’s skill and efficiency is ‘measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.’” *Whiteley*, 2021 WL 4206696, at \*12 (quoting *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at \*16 (E.D. Pa. Jan. 25, 2016)). The purpose and goal of this *Gunter* factor is to ensure “that competent counsel continue to undertake risky, complex and novel litigation” for the benefit of large numbers of class members who might otherwise lack reasonable access to justice. *Gunter*, 223 F.3d at 198.

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<sup>4</sup> Plaintiffs reserve the right to address any objection(s) that may be filed in their motion seeking final approval of the settlement, and will also be prepared to address any questions or concerns the Court may have about any such objection at the Final Approval Hearing.

The results obtained in this case, described fully in Section II(E) is reflective of the vigor and persistence with which Class Counsel prosecuted this litigation against highly skilled defense counsel. *See, e.g., Whiteley*, 2021 WL 42006696, at \*12 (finding a “favorable outcome negotiated with equally experienced opposing counsel” weighed in favor of approval). Class Counsel is experienced in consumer protection litigation and achieved significant benefits for Settlement Class Members here. *See* ECF No. 21-4 (firm resume of Sauder Schelkopf). As such, this factor supports the fee request.

#### ***4. The complexity and duration of the litigation***

This complex class action has lasted over four years since the investigation began and has required extensive work by Class Counsel, including pre-complaint factual investigation, discovery, and months long mediation with Judge Diane Welsh (Ret.) of JAMS, an experienced and nationally recognized neutral mediator who has successfully mediated numerous class actions and complex disputes, to result in a successful conclusion. Several courts have recognized that “any class action presents complex and difficult legal and logistical issues which require substantial expertise and resources.” *Stalcup v. Schlage Lock Co.*, 505 F. Supp. 2d 704, 707 (D. Colo. 2007); *Teh Shou Kao*, 2021 WL 698173, at \*10 (“But for the settlement, litigation of the case’s remaining issues would require substantial further motion practice prior to any trial.”).

Here, Plaintiffs allege claims for breach of express and implied warranties. ECF No. 1, pp. 10-14. As the Court has previously held, litigation regarding “complex questions including whether a claim centered on the breach of an implied contract can be certified” satisfied this *Gunter* factor. *Teh Shou Kao*, 2021 WL 698173, at \*10. The amount of compensation sought by Class Counsel is reasonable when assessed in light of these factors. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (finding district court did not abuse its discretion in holding the

matter was complex due to legal issues involved, duration of the case, discovery, and the necessity of resorting to mediation to reach a proposed settlement).

#### **5. *The risk of nonpayment***

Class Counsel has prosecuted this litigation on a purely contingency fee basis since its inception and the risk of non-recovery was sufficiently substantial to justify the instant fee request. *See O’Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 309 (E.D. Pa. 2003) (“Any contingency fee includes a risk of non-payment. That is why class counsel will be paid a percentage that is several times greater than an hourly fee in this case.”); *Teh Shou Kao*, 2021 WL 698173, at \*10 (“Class counsel undertook representation of Plaintiffs on a contingency basis and . . . had they not achieved a recovery, they would have received no compensation for their efforts”). Indeed, in *In re Ins. Brokerage Antitrust Litig.*, this Court observed that “Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees.” No. 04-5184 (CCC), 282 F.R.D. 92, 122 (D.N.J. 2012) (citations omitted). In addition, Defendants are financially stable and able to pay claims made under the settlement. *See O’Keefe*, 214 F.R.D. at 309 (observing that “[t]his factor more properly addresses the concern that class counsel risks non-payment after securing class recovery because of the precarious financial position of the defendant” and stating “[Mercedes] is financially stable and no one has questioned its ability to pay. This factor is not relevant in this case.”).

#### **6. *The amount of time devoted by Class Counsel***

As of August 9, 2023, Plaintiffs have spent 795 hours of contingent work litigating this matter.<sup>5</sup> A summary of the work performed to date is identified in the section addressing the fourth

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<sup>5</sup> Class Counsel will submit their detailed time to the Court *in camera* prior to the Final Fairness Hearing.

*Gunter* factor and in Section II, *supra*. In addition, Class Counsel anticipates they will spend a significant amount of additional time answering questions from Settlement Class Members, assisting Settlement Class Members with the claims process, and auditing denied claims for reimbursement. Based on Class Counsel's extensive experience with similar settlements, it is anticipated hundreds of additional hours will be spent managing and monitoring the settlement. This reported time does not include the future work that will be associated with claims, final approval, and settlement administration. *See Yaeger*, 2016 WL 4547126, at \*2 ("This does not include fees for services to be rendered to the class in the future, such as monitoring and enforcement of the administration of Settlement Agreement."); *Henderson*, 2013 WL 1192479, at \*15, n.11 (same). This commitment of time and effort supports the fee request.

#### **7. *The awards in similar cases***

A review of district court cases within the Third Circuit demonstrates that the fee request here is reasonable and appropriate, and on par with similar consumer protection class action settlements. *See, e.g., O'Keefe v. Mercedes-Benz USA*, 214 F.R.D. 266, 304 (E.D. Pa. 2003) (\$4,896,783.00 in fees awarded in class action involving alleged automotive defect); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (attorneys' fee award of \$11,250,000.00 was fair and reasonable in class action settlement involving allegations of violation of Lanham Act and New Jersey Consumer Fraud Act in connection with alleged defect); *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 718 (W.D. Pa. 2015) (awarding \$1,500,000 fee request in case related to alleged improper practices related to flood insurance); *Flores v. Express Servs., Inc.*, No. CV 14-3298, 2017 WL 1177098, at \*4 (E.D. Pa. Mar. 30, 2017) (awarding \$1,914,750 fee and expense request in case involving alleged violations of Fair Credit Reporting Act). Accordingly, this and the other *Gunter* factors strongly support granting the requested fee.

**D. The Requested Multiplier is Reasonable.**

A lodestar multiplier “attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys’ work.” *In re Diet Drugs*, 582 F.3d 524, 540 n. 33 (3rd Cir. 2009). First, the Court multiplies the applicable hours by the attorneys’ hourly rates to get a lodestar amount. The lodestar multiplier is then obtained by dividing the proposed fee award by the lodestar amount. *In re Insurance Brokerage Antitrust Litig.*, 579 F.3d at 280; *Schwartz v. Avis Rent a Car Sys., LLC*, No. 11-4052 (JLL), 2016 WL 3457160, at \*12 (D.N.J. June 21, 2016) (“Next, the Court divides the proposed fee award by the calculated lodestar figure, which provides a number known as the ‘multiplier.’”); *Whiteley*, 2021 WL 4206696, at \*14.

In this case, the lodestar multiplier sought is reasonable. Class Counsel are reporting their lodestar using a method by which hours expended by each attorney are multiplied by the attorney’s hourly rate. Courts routinely find in complex class action cases that a multiplier of one to four of counsel’s lodestar is fair and reasonable. *In re Prudential*, 148 F.3d at 341. The Third Circuit has observed that it has “approved a multiplier of 2.99 in a relatively simple case.” *Milliron v. T-Mobile United States*, 423 Fed. Appx. 131, 135 (3d Cir. 2011) (citing *Cendant PRIDES*, 243 F.3d at 742); *see also Boone v. City of Philadelphia*, 668 F. Supp. 2d 693, 714-15 (E.D. Pa. 2009) (approving multiplier of 2.3).

After subtracting Class Counsel’s expenses of \$11,942.12, Class Counsel’s requested fee award (\$1,488,057.88) yields a 2.50 multiplier of Class Counsel’s actual lodestar (\$594,885.00). The 2.50 multiplier sought here is well within this range, is reasonable, and Plaintiffs respectfully request that the Court approve it. *See Whiteley*, 2021 WL 42006696, at \*12 (approving 2.69 lodestar multiplier “well within the range of reasonableness recognized by courts”); *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 718 (W.D. Pa. 2015) (approving 2.83 multiplier and

granting \$1,500,000 fee request); *Merino v. Wells Fargo & Co.*, No. 16-cv-07840, ECF Nos. 137-1, 144 (D.N.J. Jan. 15, 2020) (3.66 multiplier); *Schuler v. Medicines Co.*, No. 14-1149 (CCC), 2016 WL 3457218, at \*10 (D.N.J. June 23, 2016) (awarding 3.57 multiplier as reasonable under Third Circuit precedent).

Moreover, Class Counsel's lodestar multiplier will be further reduced over time. Consumer class actions involve a significant amount of work assisting class members with the claims process to ensure it functions as intended. The claims period does not close until September 25, 2023. Even after the claims period closes, Class Counsel anticipates communicating with class members regarding the status of their claims and other settlement related issues. *See, e.g., Whiteley v. Zynerva Pharms., Inc.*, No. CV 19-4959, 2021 WL 4206696, at \*14 (E.D. Pa. Sept. 16, 2021) ("Moreover, Class Counsel is expected to perform additional work in connection with this case following this Court's approval. As such, the multiplier will likely be lower by the time this matter is closed and Class Counsel's work is completed.").

#### **E. Class Counsel's Expenses are Reasonable**

Courts within the Third Circuit have found that "[c]ounsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *Schuler v. Medicines Co.*, No. 14-1149(CCC), 2016 WL 3457218, at \*11 (D.N.J. June 24, 2016); *accord In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. at 125 (recognizing the same principle, and approving an expense request of \$394,192.76).

In this case, Class Counsel have incurred \$11,942.12 in properly documented expenses for the common benefit of the Settlement Class Members. *See* Declaration of Joseph G. Sauder, ¶¶ 14-16. The requested expenses will be paid from the total \$1,500,000 fee and expense request.



Class Counsel put forward these necessary out-of-pocket costs without assurance that they would ever be repaid. The requested amount is therefore reasonable, and Plaintiffs respectfully request that the Court approve it. *See, e.g., In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at \*19 (approving expenses that were “adequately documented and reasonably and appropriately incurred in the prosecution of the case.”).

#### **F. The Service Awards are Modest and Should be Approved**

The service provided by the Class Representatives in this action should not go without financial recognition. As the Third Circuit explained:

Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class. The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws.

*Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333, n.65 (3d Cir. 2011).

The Settlement recognizes the valuable contributions made by the Plaintiffs by providing them with service award payments of \$2,500. The Plaintiffs were integral to the resolution of this litigation, and were catalysts to achieving this result for the Class. They participated in numerous conferences and meetings with their attorneys, searched for and produced documents to their attorneys that were relevant to their claims in the litigation, and participated in the numerous and significant developments in the case. And like Class Counsel’s fee and expense request, these service awards will be paid separate from the consideration in the settlement, and will not reduce the benefits available to any Settlement Class Member. *See In re LG/Zenith Rear Projection TV Class Action Litig.*, No. 06-5609 (JLL), 2009 WL 455513, at \*9 (D.N.J. Feb. 18, 2009) (approving service award that “will not decrease the recovery of other class members.”).

Consistent with the law and the terms of the SA, it is appropriate to make these service

payments to the class representatives. *See Tei Shou Kao*, 2021 WL 698173, at \*11 (approving \$15,000 service award payments to the three plaintiffs and stating “[a]bsent the class representatives’ participation, there would have been no case, and settlement class members would have had to pursue their claims alone”); *Yaeger*, 2016 WL 4547126, at \*4 (approving \$3,500 service award to each of nine class representatives for a total of \$31,500); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. at 125 (approving service awards totaling \$85,000 – which amounted to \$5,000 to each of the class representatives); *Henderson*, 2013 WL 1192479, at \*19 (approving service awards between \$5,000 to \$6,000 each of six class representatives). Plaintiffs respectfully request that the Court approve the requested service awards here.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court award Class Counsel the payment of \$1,500,000.00 in attorneys’ fees and expenses, and approve the payment of \$2,500 in service awards to each of the two Plaintiffs. A proposed order granting this requested relief is submitted herewith.

DATED: August 11, 2023

Respectfully submitted,

By: /s/ Joseph G. Sauder  
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*Class Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS* was filed via the Court's CM/ECF system, thereby electronically serving it on all counsel of record.

*/s/ Joseph G. Sauder* \_\_\_\_\_  
Joseph G. Sauder