

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

LAURA FRANCES HAYS,)
on behalf of herself and all others)
similarly situated,)
)
Plaintiff,)
)
v.)
)
NISSAN NORTH AMERICA, INC.,)
)
Defendant.)

Case No. 4:17-CV-0353-BCW

**CLASS COUNSEL’S MOTION FOR ATTORNEYS’ FEES,
EXPENSES AND SERVICE AWARD TO THE NAMED PLAINTIFF
AND SUGGESTIONS IN SUPPORT THEREOF**

DATED: August 16, 2022

Respectfully submitted,

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Additional Counsel on Signature Page

INTRODUCTION

After the Parties agreed to the substantive terms of this Settlement for the benefit of the Class, the Parties engaged in extensive arm's length negotiations regarding attorneys' fees, the reimbursement of expenses, and payment of a service award to the named Plaintiff. As contemplated by Fed. R. Civ. P. 23(h), the Parties agreed that subject to Court approval, Nissan North America, Inc. will pay Class Counsel \$2,750,000 in attorneys' fees; reimburse Class Counsel's costs of \$184,416.66 and pay a service award to the named Plaintiff of \$6,000. The payment of the fees, expenses, and the service award will have no effect on the Class and will be separately paid by Nissan. Because the fees and expenses are fair, reasonable, and adequate, the Court should approve the agreement of the Parties. Likewise, the Court should approve the modest service award of \$6,000.

This case was heavily litigated for years and many issues were contested. The Parties disputed nearly every issue in the case; engaged in motion to dismiss proceedings; engaged in significant written discovery; took and defended numerous factual and expert depositions; fully briefed and argued motion(s) for summary judgment; fully briefed a contested motion for class certification (including related appellate proceedings under Rule 23(f)); and ultimately completed the extensive process of multiple mediation sessions and multiple settlement conferences before finally agreeing to material terms of a settlement and, later, a Settlement Agreement. *See* Declaration of Matthew L. Dameron (Dameron Decl.), attached hereto.

A. Class Counsel defeats motions to dismiss.

More than five years ago, Hays and Class Counsel filed this action on or about May 8, 2017. Dameron Decl. at ¶ 1. Following the Parties' Rule 26(f) conference, the Parties filed a proposed schedule with the Court and immediately moved to zealously advocating their respective

positions in the litigation. Dameron Decl. at ¶ 4. After months of briefing related to motions to dismiss, the Court ultimately denied Nissan's requested dismissals of the entire case. Dameron Decl. at ¶ 5. Discovery was vigorously pursued after that.

B. The parties conduct significant discovery.

Both Hays and Nissan served multiple rounds of written discovery, including various sets of interrogatories and requests for production of documents. Dameron Decl. at ¶¶ 6-8. These discovery requests specifically targeted the extensive liability issues, damages issues and class certification issues (among several other contentions, defenses and other matters). Following issuance of this written discovery, the parties agreed to a protective order and proceeded with years of written discovery, production of documents and electronically stored information, discovery disagreements, and meet and confer sessions with respect to various discovery related issues. *Id.*

Discovery lasted from approximately August 2017 through the ultimate date of the Settlement. During that nearly five-year time frame, the parties engaged in the following:

- Both sides served and responded to multiple sets of written discovery;
- Though the Parties ultimately resolved many discovery issues short of Court intervention, the Parties engaged in many discovery meet and confer calls and exchanged several written communications regarding discovery disputes;
- Both sides produced many documents. As part of this document production process, Class Counsel also engaged in extensive document review, including review of over 945 separate documents from Nissan alone, consisting of approximately 5,204 pages of materials. Hays' counsel reviewed, analyzed, and annotated these documents within Stueve Siegel Hanson's document management system for use in discovery, certification, and, ultimately, trial;

- The following fact and expert witnesses were deposed: Laura Frances Hays (Plaintiff); Steven Miller (Nissan's Corporate Representative); Anand Kasbekar (Hays' Liability Expert); Edward Stockton (Hays' Damages Expert); Bruce Pound (Nissan's Liability Expert); and David Harless (Nissan's Damages Expert). These depositions lasted for days, and likewise required days of preparations for each such witness;
- Both sides fully briefed a motion for summary judgment on many issues, including supporting declarations and affidavits, materials, disclosures, documents, and depositions. This Court ultimately granted in part and denied in part Nissan's motion for summary judgment; and
- Hays ultimately filed an amended Complaint in response to the Court's order further narrowing the issues and claims for both certification and trial.

Dameron Decl. at ¶¶ 6-9.

C. Class Counsel wins certification after briefing complex, nuanced issues of fact and law.

After various depositions and written discovery, and while still in the discovery and deposition phase of litigation, Hays moved for class certification. Hays's motion was thoroughly supported, vigorously opposed, and presented many issues, nearly all ultimately resolved in Hays' favor by this Court. Dameron Decl. at ¶ 13. After this Court granted class certification, Nissan submitted a petition for interlocutory appellate review to the Eighth Circuit under Rule 23(f); Hays and her counsel opposed the petition. Dameron Decl. at ¶ 13. The Court of Appeals denied Nissan's petition. *Id.*

D. Class Counsel obtains substantial relief for individual class members through settlement.

After significant litigation, including certification of the case as a class action and preliminary appellate proceedings under Fed. R. Civ. P. 23(f), the parties reached this proposed agreement on behalf of the following Class previously certified by this Court:

All persons in Missouri who (1) currently own or lease a Class Vehicle, or (2) who previously owned or leased a Class Vehicle and paid for repairs to rust in a front floor pan of a Class Vehicle

Class Vehicles means model years 2002-2006 Nissan Altima and model years 2004-2008 Nissan Maxima vehicles that are currently registered in Missouri or were previously registered in Missouri at the time of repair to a front floor pan due to corrosion. Dameron Decl. at ¶ 16.

ARGUMENT

I. The Court should approve Class Counsel's attorneys' fees.

The Court may award reasonable attorneys' fees and non-taxable costs that are authorized by the parties' agreement. Fed. R. Civ. P. 23(h) ("the court may award reasonable attorney's fees and nontaxable costs that are authorized by law *or by the parties' agreement*."). Here, Class Counsel negotiated attorneys' fees separate from the relief to be paid to Class members and Nissan agreed to pay Class Counsel \$2,750,000 in attorneys' fees subject to Court approval. The Parties' agreement on fees is entitled to significant deference. *Melgar v. OK Foods*, 902 F.3d 775, 779 (8th Cir. 2018) ("[R]eview of attorneys' fees included in a settlement agreement requires a certain level of deference by the district court to the parties' agreement"); *Barbee v. Big River Steel, LLC*, 927 F.3d 1024, 1027 (8th Cir. 2019) (same regarding settling fees in FLSA settlements). Moreover,

in addition to the strong deference afforded such agreements, the fee is reasonable under the lodestar approach.¹

“Under the ‘lodestar’ methodology, the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount [that] can be adjusted, up or down, to reflect the individualized characteristics of a given action.” *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996). Here, Class Counsel reasonably expended 2,243 hours for a lodestar of \$1,639,054.50 at Class Counsel’s standard hourly rates. *See* Dameron Decl. at ¶ 17; Declaration of Norman E. Siegel at ¶ 8. But that lodestar is entitled to a modest enhancement based on the factors the Court should consider when awarding fees. Those factors include:

1. The benefit conferred on the class;
2. The time, labor and risk to class counsel;
3. The difficulty and novelty of the legal and factual issues of the case
4. The skill of the lawyers involved (for both sides);
5. The reaction of the class; and
6. A comparison between the requested attorneys’ fees and those awarded in similar cases.

See, e.g., Tussey v. ABB, Inc., 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (quoting *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061–62 (D. Minn. 2010)). Here, each of these factors supports the requested award of attorneys’ fees.

¹ The preferred percentage-of-the-benefit method is not applicable here because there is no common fund.

A. The benefit conferred to the Class per vehicle is significant.

“The Settlement provides precisely what the actions were filed to obtain—benefits specific to the alleged defect, allowing consumers to [receive full reimbursement] for the cost of repairing” their Nissan vehicle “because of the alleged defect.” *Cleveland v. Whirlpool Corp.*, 2022 WL 2256353, at *10 (D. Minn. June 23, 2022). For current or past owners of Class Vehicles who previously paid for a repair of their floor pan, the settlement provides for reimbursement of those expenses, provided they submit a timely claim and supporting documentation. If the repair was performed at a Nissan dealership, the Class member is entitled to a full refund of the repair cost; if the repair was performed at a location other than a Nissan dealership, the Class member may receive reimbursement up to \$5,000.

For current owners of Class Vehicles who have not paid for a floor pan repair, Nissan has also agreed to an inspection and repair program to continue for one year after the Settlement’s effective date. Under that program, Nissan dealerships located in Missouri will inspect Class Vehicles for free and, if there is corrosion in the front floor pans, repair that corrosion for free. And through the program, owners and lessees are provided rental vehicles (for up to five days) while their Class Vehicle is being repaired. In other words, the Class should receive 100% of their individual damages.

“Moreover, the Released Claims are narrowly tailored and do not alter or affect any other rights or obligations of Settlement Class Members or [Nissan] with respect to their relationship with one another. As such, the result obtained supports the requested award of attorneys’ fees.” *Cleveland*, 2022 WL 2256353, at *10.

B. The time, labor and risk involved was significant.

“Class Counsel brought this case on a fully contingent basis, investing time, effort and money with no guarantee of payment.” *Cleveland*, 2022 WL 2256353, at *9. Indeed, “the Settlement is the product of fact-intensive investigation regarding the defect, the retention of knowledgeable and qualified experts, substantive motion practice, discovery, zealous litigation and arm’s-length negotiations.” *Id.* See Dameron Decl. at ¶¶ 3-14. Thus, this factor supports the requested fee award. *See, e.g., Thornburg v. Open Dealer Exch., LLC*, 2019 WL 3291569, at *5 (W.D. Mo. July 22, 2019) (“In addition, Class Counsel took this matter on a contingency fee basis, and in doing so, assumed considerable risk, including the possibility of no recovery.”); *Shanahan v. Lee Law Offices*, 2019 WL 2603102, at *5 (D. Neb. June 25, 2019) (“But the remaining relevant factors—such as whether a fee is fixed or contingent, and the desirability of the litigation—weigh in favor of the award, given the risk associated with consumer rights litigation.”).

C. The case was novel and difficult.

“This case involved difficult and novel issues. Consumer class actions such as this one raise complex and highly contested legal issues.” *Cleveland*, 2022 WL 2256353, at *10 (collecting cases). Several similar cases filed around the country were dismissed, and this case is the only one that advanced to class certification and settlement. Even after certification, this case would have likely taken years to complete, and success was far from guaranteed. Accordingly, this factor supports the requested attorneys’ fees.

D. The case was litigated by skillful counsel.

The Class Representatives and the Class were represented by Stueve Siegel Hanson LLP, Williams Dirks Dameron LLC, and Dollar Burns Becker & Hershewe. All three firms “have substantial class action experience, including years of experience in complex class-action litigation

and litigation involving defective products.” *Cleveland*, 2022 WL 2256353, at *10. On the other side, Nissan was both “well-funded” and “represented by highly-qualified national attorneys” from Shook Hardy & Bacon. *Tussey*, 2019 WL 3859763, at *3. Thus, this factor supports the requested fee.

E. The reaction of the class has been positive.

To date, no Class Member has objected or opted out. Dameron Decl. at ¶ 21. Class Counsel will update this information prior to final approval.

F. The requested award is similar to other awards.

Courts in this circuit routinely approve similar lodestar multipliers. *See, e.g., Keil v. Lopez*, 862 F.3d 685, 702 (8th Cir. 2017) (approving a 2.7 lodestar multiplier in a class action alleging defective pet food); *Cleveland*, 2022 WL 2256353, at *10 (approving a 1.75 lodestar multiplier in a case alleging a defective washing machine); *Thornburg*, 2019 WL 3291569, at *5 (approving a 1.3 lodestar multiplier despite no monetary relief to the class).

In this case, Class Counsel has expended \$1,639,054.50 in lodestar through July 31, 2022, which consists of 2,243 hours billed at Class Counsel’s standard hourly rates. The fee award of \$2,750,000 constitutes an approximate multiplier of 1.67—well within the range previously approved by this Court. This multiplier is particularly appropriate where the attorneys’ fees are not being deducted from the recovery available to the Class, and the attorneys’ fees were negotiated after the Parties had reached agreement on the material terms of the settlement. Moreover, Class Counsel will continue to work on the case through final approval, including working with Class members as needed well after final approval resulting in increasing lodestar and decreasing multiplier. In sum, all the factors support the reasonableness of the requested fee and thus it should be approved.

II. The Court should approve Class Counsel’s reasonable litigation expenses.

Separate from Class Counsel’s reasonable fee, Class Counsel incurred litigation expenses of \$184,416.66. *See* Dameron Decl. at ¶ 20; Siegel Decl. at ¶ 15. Each of these expenses is of the kind and character counsel typically bills to clients and that are not absorbed into overhead. These expenses include, but are not limited to: Internal Print & Copy charges; Delivery Service charges; Postage charges; Meal charges; Court fees; Transcript/Video charges; Experts/Consultants’ charges; Process Servers charges; Online Research (PACER) charges; Online Research (Westlaw) charges; Airfare charges; InterCall Conferencing charges; Federal Express/UPS charges; Ground Transportation charges; and Lodging charges. Nissan has agreed to reimburse up to \$225,000 of those expenses and charges. And under the Settlement agreement, these expenses will be paid separately and on top of the other settlement benefits. Even in a common fund case counsel “may recover those expenses that would normally be charged to a fee paying client.” *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008) (internal quotation marks omitted). And here, by contrast, the Class will see no reduction in their benefit. *See Thornburg*, 2019 WL 3291569, at *5 (granting Class Counsel’s request for award of costs from defendant).

III. The Court should approve the Class Representative’s service award.

Class Representative Plaintiff Hays also seeks a service award of \$6,000 for serving as the Class Representative. This award is reasonable. “Courts often grant service awards to named plaintiffs in class action suits to promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits.” *Caliguiri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017). And “courts in this circuit regularly grant service awards of \$10,000 or greater.” *Id.* To determine the reasonableness of an award, courts consider “the actions the plaintiffs took to

protect the interests of the class, the degree to which the class has obtained a benefit from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.” *Cleveland*, 2022 WL 2256353, at *11.

Here, Hays (1) initiated the litigation in consultation with her counsel; (2) actively participated in the litigation, including providing documents, answering discovery and submitting to a deposition; (3) personally attended the early mediation held in December 2017; and (4) monitored the ongoing negotiations in 2021 and ultimately approved the settlement. Dameron Decl. at ¶ 10. This award is particularly reasonable considering it is paid separately from the class benefits. *Accord Shanahan*, 2019 WL 2603102, at *5 (awarding \$9,000 in total service awards from defendant).

CONCLUSION

For the reasons set forth above, the Court should GRANT Class Counsel’s Motion for Attorneys’ Fees, Expenses and Service Award to the Named Plaintiff.

DATED: August 16, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August 2022, the foregoing was filed using the Court's CM/ECF System, which will provide notice of the same to all counsel of record.

/s/ Matthew L. Dameron

Counsel for Plaintiff and the Settlement Class