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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

COORDINATION PROCEEDING SPECIAL TITLE (Cal. R. Ct. 1550(b))	Judicial Council Coordination Proceeding Nos. 4298 and 4303
AUTOMOBILE ANTITRUST CASES I, II	CJC-03-004298 and CJC-03-004303
	CLASS ACTION
This document relates to: All Actions	**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS**
	Date: October 5, 2022 Time: 10:00 a.m. Dept: 306 Judge: Honorable Anne-Christine Massullo
	Date Complaint Filed: October 6, 2003 (Consolidated Amended Class Action Complaint)

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Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards is supported by this Memorandum of Points and Authorities and filed concurrently with Plaintiffs' Motion for Final Approval of Settlement with Ford Motor Company of Canada, Ltd. ("Final Approval Motion"). The motions are supported by the Declaration of Todd A. Seaver ("Seaver Decl." or "Seaver Declaration"), detailing the history of the litigation and the work performed, as well as the Declarations of Eric B. Fastiff, Tracy R. Kirkham, Francis O. Scarpulla, R. Alexander Saveri, Judith A. Zahid, and Eric Schachter of A.B. Data Regarding the Status of Notice Efforts, filed herewith.

I. INTRODUCTION

After close to twenty years of hard-fought litigation, including multiple appeals, Plaintiffs have reached a settlement with the sole, remaining Defendant, Ford Motor Company of Canada, Ltd. ("Ford Canada") that, if approved, will bring this litigation to a successful resolution. The Settlement[1] provides $82 million in cash for the benefit of the certified Class of California new automobile consumers in exchange for a release of claims.

Plaintiffs' Counsel request an award of attorneys' fees equal to 33.3% of the Settlement Fund, or $27,306,000. Plaintiffs' counsel's lodestar at historical hourly rates is over $33.8 million; thus, the requested fee award is less than the lodestar amount and will result in a lodestar multiplier of only 0.80. Plaintiffs' Counsel also seek reimbursement of $1,618,823.98 in unreimbursed litigation expenses, and payment of a service award of $5,000 each to three Class Members who were set to be called to testify in the Plaintiffs' case-in-chief when the parties reached the Settlement Agreement just three weeks before the start of trial.

The requested percentage fee is reasonable. Judge Kramer determined that 33.3% was the reasonable and appropriate percentage fee in connection with the prior General Motors of Canada settlement; since then, Plaintiffs' Counsel have invested nearly $10 million in additional attorney time in the case, and they obtained the $82 million Ford Canada settlement by prevailing in two appeals and successfully bringing the case to the eve of trial. In light of the great success Plaintiffs' Counsel have

[1] Unless otherwise indicated, capitalized terms have the same definitions as provided in the March 30, 2022 Settlement Agreement between Plaintiffs and Ford Canada, attached as Ex. A to the Seaver Decl.

achieved by overcoming these considerable challenges, 33.3% remains an appropriate and reasonable percentage fee.

Since 2003, counsel for Plaintiffs prosecuted a private antitrust class action under the Cartwright Act against the largest auto manufacturers in the world, represented by some of the largest, most sophisticated, and most tenacious defense law firms in the world. Plaintiffs' counsel sought to prove an international conspiracy to restrict the flow of exported new vehicles from Canada to the United States that harmed California consumers, without the aid of any United States or Canadian government investigation, let alone indictments or guilty pleas. The contingent-fee litigation promised from the start to involve substantial risk of nonpayment.

However, as the litigation wore on, risks that were practically unthinkable when the cases were first filed in 2003 came to pass, most prominently the global financial crisis resulting in the 2009 bankruptcies of two of the four largest Defendant automakers, General Motors and Chrysler, barring the claims against those Defendants and eliminating them as potential sources of recovery. Other litigation risks manifested themselves in the form of case-specific risks: vacatur on appeal of class certification in the federal multidistrict litigation ("MDL") by a then-landmark First Circuit Court of Appeals decision, the necessity of winning reversal on appeal in the California Court of Appeal of a 2011 summary judgment decision on the element of conspiracy in favor of Ford Canada, the risk involving proof of highly-complex class-wide impact and damages, and the necessity of winning a second appeal of another case-ending judgment from 2017 in Ford Canada's favor, this time on the difficult issues of claim preclusion and issue preclusion.

After persevering for seventeen years, Plaintiffs' counsel successfully returned the case to this Court in 2020, coinciding with the onset of the COVID-19 pandemic, to ready it for a jury trial. The challenges of trial preparation, always substantial in an antitrust conspiracy case, were greatly heightened by long period that elapsed between the events of 1999-2003 at issue in the lawsuit and the trial date. Prior to reaching the Settlement Agreement with Ford Canada just three weeks before the start of the February 2022 trial, Plaintiffs' counsel had to ensure three class representatives of the California Class would be ready to testify at trial and defend their depositions, take depositions of new Ford Canada witnesses, defeat a motion for summary adjudication on the element of causation, defeat a

motion to decertify or modify the Class, make and oppose more than a dozen motions *in limine*, review and designate deposition testimony for scores of witnesses to construct a case-in-chief with few live witnesses, make a motion for judgment on the pleadings, prepare and submit comprehensive jury instructions, select trial exhibits, prepare trial demonstratives, and conduct jury focus groups.

In addition, in the year before trial, Professor Robert E. Hall, Ph.D. of Stanford University ("Prof. Hall"), the main, testifying economic expert who had worked on behalf of Class Counsel and the Class for nearly fifteen years, preparing a half-dozen reports and being deposed for over six days, had to be replaced. Prof. Hall, now aged 79, was simply unable to undertake the rigors of preparing and testifying as the lead economic expert. Plaintiffs' Counsel retained Dr. Janet Netz, a -respected economist and experienced expert witness, and guided Dr. Netz and her team of consulting economists though a voluminous record of prior econometric work and market data, to ready Dr. Netz for pre-trial deposition and trial. Plaintiffs' Counsel opposed and defeated Ford Canada's motion to exclude Dr. Netz's opinions from trial under *Sargon Enter., Inc. v. Univ. of Southern Calif.*, 55 Cal. 4th 747 (2012), which Ford Canada no doubt hoped would effectively end the case before a jury could be chosen.

Nor would the risks have abated at trial. Plaintiffs' Counsel prepared a focused case-in-chief to capture and keep jurors' attention, given that most evidence of the conspiracy would be presented via pre-trial deposition testimony transcripts read to the jury and video-recorded testimony of varying technical quality. Added to the presentation difficulties were the COVID-19 courtroom protocols that, while understandably necessary, would challenge the jurors' ability to focus on complex evidence concerning a conspiracy that occurred from 1999 to 2003. Of course, the most imposing trial risk was the fact that Ford Canada was prepared to combat Plaintiffs' evidence with its own case-in chief, focused on rebutting evidence that any horizontal agreement amongst Ford and its rivals was ever reached and, even if it was, it had no effect because without it, Ford Canada and other automakers' unilateral behavior toward Canadian exports would have been exactly the same in light of their independent policies against such exports that predated the alleged conspiracy. The trial outcome was highly uncertain and, even if successful, Plaintiffs no doubt would have faced post-verdict challenges on appeal, further delaying resolution.

The Settlement Agreement with Ford Canada is before the Court for final approval and, if

approved, this two-decade antitrust litigation will come to a close. The Settlement achieves a valuable cash recovery for the Class of California consumers, and makes it available now, without further delay. The $82 million recovery from Ford Canada on its own represents 15.1% of single damages. It is a robust recovery in light of the outsized risks presented.

For the reasons set for the below, Plaintiffs' Counsel's respectfully request that the Court grant the request for a 33.3% fee award, reimbursement of expenses, and payment of service awards to three Class representatives.

II. RELEVANT BACKGROUND TO THE REQUEST FOR FEES AND EXPENSES

A. Coordination of this Action with Federal MDL and other State Actions

The lawsuits that make up this action (the "California Action") were originally filed in 2003 and coordinated before the Honorable Richard J. Kramer. Seaver Decl. ¶5. They followed cases filed in federal courts around the country, which were consolidated in the United States District Court for the District of Maine, before the Honorable D. Brock Hornby. *Id.* ¶6. Parallel actions were also filed in several other state courts ("State Actions"). *Id.*

All the cases were soon coordinated for pre-trial discovery in an unprecedented procedure structured by Judge Hornby and Judge Kramer that was crystalized in a Joint Coordination Order, which was ultimately adopted by all courts where actions were pending: this Court, the federal MDL and the other State Actions. Seaver Decl. ¶¶10-12 & Ex. C ("Joint Coordination Order") & Ex. D (Jan. 13, 2012 Mem. of Opinion & Order on Pltfs.' Application for Attorneys' Fees, Expenses & Incentive Awards ("Kramer 2012 Fee Order"), at 2-3 (describing efficiencies achieved by Joint Coordination Order).

In accordance with the Joint Coordination Order, Plaintiffs' in this Action, the federal MDL action and the State Actions coordinated their pre-trial discovery efforts to the maximum extent possible in order to avoid duplication and to gain efficiencies. Seaver Decl. ¶12. Plaintiffs endeavored to avoid overlap and divided up necessary tasks among the participating firms based on efficiency, skill, and experience, with the goal of unearthing an evidentiary record that could be used in any of the coordinated actions. *Id.* & Ex. D (Kramer 2012 Fee Order), at 3:19-20 ("[I]t is not possible now to divide the attorneys' fees or expenditures amongst the various actions as attributable to one or the other. Far more important, the coordinated pre-trial efforts by Plaintiffs' Counsel produced efficient,

streamlined work and allocation of resources."); *see also In re Auto. Antitrust Cases I & II*, No. A152295, 2019 WL 4670698, at *2, 9-10 (Cal. Ct. App. Sept. 25, 2019), *as modified on denial of reh'g* (Oct. 23, 2019) (describing Coordination and observing "[D]ue to the coordination of discovery, the same body of evidence … was available to both sets [California and federal MDL] of plaintiffs").

The pre-trial discovery was extensive. It included: Plaintiffs' counsel's review of over one million pages of documents produced after nearly ten months of meet-and-confer sessions; 130 percipient witness depositions; letters rogatory litigated and enforced by provincial Canadian courts for documents and testimony from Canadian non-party witnesses and organizations; extensive discovery of transaction data from Defendants and third parties; multiple sets of interrogatories propounded by Plaintiffs and Defendants, including Plaintiffs' expansive responses to Defendants' contention interrogatories (Plaintiffs' responses totaled over 1,800 pages); hundreds of requests for admission; and expert discovery involving reports from nearly over a dozen economic and industry experts, and multi-day depositions of those experts. Seaver Decl. ¶¶13-50.

The pre-trial discovery was utilized to obtain class certification of the current Class in 2009. *Id*. ¶¶51-53.

B. Joint Prosecution and Coordination Agreement

At an early stage in the litigation, counsel for plaintiffs in the MDL action, the California Action and the other State Actions created a management and organization agreement to further ensure the most efficient and effective way to prosecute the parallel federal, California, and other State Actions. The agreement continues to govern efforts of counsel for all plainitffs, contributions to litigation expenses and organization, and it also forms the basis for the efficient and equitable allocation of any fee award that the Court here ultimately may grant.[2]

C. Prior Settlements

There are three prior settlements in this Action and various of the other coordinated actions

[2] In addition to governing the allocation of fee awards generated in any of the coordinated actions, the agreement also provides that any dispute arising regarding fee allocations amongst counsel will be first mediated by the parties and, if unsuccessful, the parties agree to refer any dispute to binding arbitration. Seaver Decl. ¶¶8-9. Consequently, no possible future dispute over the division of the fee award among counsel will ever be before the Court.

which resulted in cash distributions to class members and awards of attorneys' fees and reimbursement of expenses. These prior fee awards and expense reimbursements are described in Judge Kramer's 2012 Fee Order. *See* Seaver Decl. ¶¶117-21 & Ex. D (Kramer 2012 Fee Order).

1. Toyota/CADA Settlements

Judge Hornby in the federal MDL approved two settlements, with defendants Toyota Motor Sales, U.S.A. ("Toyota") and the Canadian Automobile Dealers Association ("CADA"), for $35 million and $700,000 respectively, for a combined $35.7 million (the "Toyota/CADA" settlements), together with prospective injunctive relief and litigation cooperation. Seaver Decl. ¶¶117-119. The Toyota/CADA settlements were nationwide settlements, resolving all the coordinated actions: the federal MDL, this California Action, and the other State Actions. *Id.*

Plaintiffs' counsel requested only a 13.2% attorneys' fee from the Toyota/CADA settlement fund (which, with interest, had grown from $35.7 million to $37.3 million by the time of distribution). Judge Hornby awarded the requested fee, a total of $4.92 million. Seaver Decl. ¶118 & Ex. L (Decision and Order on Motions for an Award of Attorney Fees and Reimbursement of Expenses, No. 03-MD-01532 (D. Me. Feb. 1, 2012), ECF No. 1219 ("Hornby 2012 Fee Order")), at 1, 4, 8. Plaintiffs' counsel intentionally requested a lower fee amount so that they would be in a position to distribute meaningful cash to Toyota/CADA settlement class members who submitted claims. *Id*. ¶118. Judge Hornby found, citing academic literature, that the 13.2% fee request was "below average for most litigation of this complexity" given that "[c]ourts in the majority of antitrust class actions studied, which resulted in recoveries of less than $100 million, awarded a contingent fee of 30% or more, median fee was 33.3%". *Id.* Ex. L (Hornby 2012 Fee Order), at 3-4. Judge Hornby also found that the requested fee was "far below the lodestar amount of $45.9 million" which he recognized was "[u]ndoubtedly … even higher now, given the demands I imposed in connection with altering the plan of allocation."). *Id.* at 4 & n.2.

In connection with the Toyota/CADA settlements, counsel requested 55% of their unreimbursed litigation expenses, an amount equal to $6,270,000, which Judge Hornby approved. Seaver Decl. ¶ 119 & Ex. L (Hornby 2012 Fee Order) at 8.

2. GMCL settlement

The third settlement was entered between defendant General Motors of Canada, Ltd. ("GMCL")

and the Plaintiffs in this California Action and plaintiffs in the three remaining other State Actions (Florida, New Mexico, and Wisconsin). Seaver Decl. ¶120 & Ex. D (Kramer 2012 Fee Order), at 1:6-9. GMCL agreed to pay $20,150,000 for a release of claims from the class members in the four states. *Id.*

In connection with the GMCL settlement, Judge Kramer awarded attorneys' fees representing 33.3% of the settlement fund, an amount totaling $6,709,950. Seaver Decl. ¶121 & Ex. D (Kramer 2012 Fee Order), at 5:1-5. Judge Kramer found the requested 33.3% fee reasonable. Indeed, Judge Kramer found that, even when the $6,709,950 fee was combined with the $4.92 million award of attorneys' fees for the Toyota/CADA settlements, the combined fee awards ($11.63 million) were dwarfed by the more than $54 million lodestar which had been submitted and which Judge Kramer had considered. *Id.* at Ex. D (Kramer 2012 Fee Order), at 5:5-6:3; Suppl. Decl. of Joseph J. Tabacco, Jr. in Supp. of Pls.' Appl'n for Attorneys' Fees, Expenses & Incentive Awards ("Supplemental Tabacco Declaration") (Jan. 13, 2012) (attached as Ex. S to the Seaver Decl.), ¶5.[3]

In addition, Judge Kramer awarded the requested amount for unreimbursed expenses of $5.2 million. Seaver Decl. ¶121 Ex. D (Kramer 2012 Fee Order), at 6:5-18. Combined with the expenses ordered to be reimbursed by Judge Hornby in connection with the Toyota/CADA settlements, the combined $11.47 million in expense reimbursement would nearly, but not completely, reimburse Plaintiffs' counsel's recognized expenses as of 2012. *Id.* The less-than complete reimbursement was not a function of finding any submitted expenses un-reimbursable, but rather of Plaintiffs underestimating their total out-of-pocket expenses in the notice to the GMCL settlement class. *Id.* ¶ 146 & Ex. D (Kramer 2012 Fee Order), at 6:11-13 (finding "If Plaintiffs' Counsel's requests for costs are granted here and in the federal action, counsel will not be fully reimbursed for the approximately $12 million expended in litigating these actions"); *see also, infra*, § III.D.6.

D. The Second 10-Year Stage of the Action (2012-2022)

1. Summary Judgment and Appeal, 2011-2016

Following the final approval of the Toyota/CADA settlements, which served to wind down the

[3] The lodestar cross-check performed by Judge Kramer in connection with the GMCL settlement included additional fees incurred after the cut-off date for the fee proceedings before Judge Hornby in the federal MDL. Seaver Decl. Ex. D (Kramer 2012 Fee Order), at 5:10, 8:7-13.

federal MDL, and after the final approval by Judge Kramer of the GMCL settlement in 2012, the only remaining defendants were Ford Motor Co. ("Ford U.S."), Ford Canada, American Hoda Motor Co., Inc. and Honda Canada Inc. ("Honda"), and Nissan North America Inc. ("Nissan"). Seaver Decl. ¶¶56-65 & Ex. D (Kramer 2012 Fee Order), at 4:6-16. The litigation against Ford was focused on the California Cartwright Act claim in this Court, on behalf of a certified Class of California consumers.[4]

Ford U.S., Ford Canada, Honda, and Nissan moved for summary judgment in this Court, arguing that no reasonable jury could find that any one of them entered an unlawful conspiracy. The combined summary judgment briefing, statements of fact, and evidentiary objections spanned thousands of pages and four days of hearings before Judge Kramer. *Id*. The Court granted summary judgment to Honda and Nissan, and after further hearings, also to Ford Canada and Ford U.S. *Id* ¶¶ 61-65.

Plaintiffs in 2012 appealed the summary judgments granted to Ford Canada and Ford U.S. Seaver Decl. ¶¶69-71. Soon afterward, Ford U.S. and Ford Canada sought to tax their costs against Plaintiffs, and Plaintiffs opposed. Ultimately Judge Kramer ordered Plaintiffs to pay Ford's Bill of Costs in the amount of $199,464.98. *Id.*¶ 66.

With the 2012 summary judgments for the remaining Defendants the risk profile of the overall litigation had dramatically changed for the worse. As a matter of sound appellate strategy, Plaintiffs limited the appeal of the Ford U.S. and Ford Canada summary judgments; as a result, the Ford entities were the lone defendants from which any potential recovery could come. There could be no recovery from any other entity, and while up to that point Ford U.S. and Ford Canada had shown zero interest in resolving the case prior to trial, they now had judgments in their favor. There was zero probability of resolving what was left of the case through settlement. Moreover, the appeal of Fords' summary judgments on such a fact-intensive issue as proof of an unlawful conspiracy, or "meeting of the minds," promised to be challenging. At the time, "difficult" odds of success was the most charitable way to view Plaintiffs' chances. Moreover, Ford was seeking to collect nearly $200,000 in costs from Plaintiffs, which counsel for Plaintiffs expected to advance if the appeal of the Bill of Costs order was

[4] Ford was successful over the course of several years in winning judgment in all the various other State Actions on *res judicata* grounds.

unsuccessful. Seaver Decl. ¶¶66, 88-01.. So the risk of continued litigation had risen, while the chances of any recovery had sunk.

Plaintiffs' appellate briefing was substantial. It required preparation of a massive record and a comprehensive distillation of the record for the appellate panel, which was unfamiliar with the lawsuit. Against these odds, Plaintiffs' won a major appellate victory. In a landmark 2016 decision, the Court of Appeals affirmed summary judgment for Ford U.S. but *reversed* as to Ford Canada. Seaver Decl. ¶¶69-72. *In re Auto. Antitrust Cases I & II*, 1 Cal. App. 5th 127, 172-73 (2016).

2. Summary Judgment on Impact/Causation, Entry of Judgment on Claim Preclusion, and Appeal, 2016-2019

The case, now against only Ford Canada, returned to this Court, where Judge Karnow took over the case when Judge Kramer stepped down from the Complex Department.

Ford Canada immediately moved for summary judgment on the element of causation/impact. Another hard-fought battle on summary judgment ensued, with substantial briefing, statements of fact, and oral argument. Judge Karnow denied Ford Canada's summary judgment motion in 2017. Seaver Decl. ¶¶74-78. Judge Karnow set a trial date and the parties began pre-trial activities.

Ford Canada also moved in 2017 for entry of judgment on *res judicata* (claim preclusion) grounds, and on issue preclusion grounds, contending that the federal MDL judgment barred Plaintiffs' action. After briefing and oral argument, Judge Karnow denied judgment on issue preclusion grounds, but granted judgment to Ford Canada on claim preclusion grounds. *Id*. ¶¶ 79-80.

Once more, the Court had entered a case-ending judgment in favor of Ford Canada. Once more, Plaintiffs appealed, and in 2019 won reversal of the judgment. Seaver Decl. ¶¶88-91. This second appeal, like the first one, required substantial effort to brief. There were numerous legal issues relating to whether the federal MDL judgment had any preclusive effect, including choice of law, privity of parties, waiver, whether the two actions involved the same claims, federal constitutional and statutory limits on the MDL's court's jurisdiction over plaintiffs' claims, and due process limitations on the use of claim preclusion to extinguish claims of absent class members.

3. 2020-2022: More Summary Adjudication, Class Certification, *Sargon*, and Preparation for Trial

The case against Ford Canada was remanded to this Court in 2020. The Court set the start of trial for February 7, 2022, and the parties engaged full-bore in pre-trial preparation. One of the first things Ford Canada did was to move for an order modifying the Class definition, to carve off Class Members' purchases of Fords, Hondas, and Nissans on the grounds that Ford U.S., Honda, and Nissan had each obtained summary judgment on the element of conspiracy, and so no injury could result from Class Members' purchases of those vehicles. Plaintiffs vigorously briefed their opposition to Ford Canada's motion, which would have sharply limited Ford Canada's potential liability. The Court heard oral argument and denied Ford Canada's motion. Seaver Decl. ¶93.

It was in this period that Plaintiffs' Counsel learned that their lead, testifying expert economist, Prof. Hall of Stanford University, could not continue in a testifying role to due to the passage of time and his advanced age. Seaver Decl. ¶¶97 & Ex. J (Declaration of Joseph J. Tabacco, Jr. in Support of Plaintiffs'Opposition to Ford Canada's Motion to Exclude Plaintiffs' Expert Dr. Janet Netz, Oct. 27, 2021) at ¶¶2-8. Plaintiffs' Counsel were forced at the eleventh hour to replace Prof. Hall and the team of consulting economists at Cornerstone Research. Fortunately, Plaintiffs' Counsel retained Dr. Janet Netz to testify at trial and a team of consulting economists and analysts at the firm applEcon, LLC ("applEcon"). *Id*. Plaintiffs disclosed their new testifying expert and at substantial effort and expense prepared Dr. Netz for a pre-trial deposition.

Ford Canada likewise disclosed which of its expert witnesses would testify at trial, and disclosed two testifying economists (Dr. Kevin Murphy and Dr. Howard Marvel) and one foreign (U.K.) law expert, Dr. Philip Marsden. Plaintiffs deposed Drs. Murphy and Marvel, and unsuccessfully moved to exclude Dr. Marsden under *Sargon*, 55 Cal. 4th 747. Seaver Decl.¶102.

Ford Canada moved, yet again, for summary adjudication on the element of causation/impact. Plaintiffs submitted comprehensive legal briefing and produced substantial, admissible record evidence in their Statements of Fact to oppose Ford Canada's motion. After oral argument, the Court denied the motion. Seaver Decl. ¶94.

Ford Canada moved under *Sargon*, 55 Cal. 4th 747, to exclude Plaintiffs' expert economist, Dr. Netz, from testifying at trial. For this critical motion, the parties' briefing and arguments were highly

technical, involving complex econometric methods, including a model of consumer demand known as "Nested Logit Model." In addition, Ford Canada attacked the damages methodology utilized by Dr. Netz, including her use, as an analgous benchmark, of the European Union's imposition of automobile market regulations that loosened new vehicle export restraints as between Ireland and the United Kingdom. The Court held oral argument and denied Ford Canada's *Sargon* motion. Seaver Decl. ¶101.

Plaintiffs' Counsel expended hundreds of hours to review pre-trial deposition transcripts and videos of scores of witnesses to carefully select testimony to publish or show the jury at trial that provided foundation for key documentary evidence or explained actions by Ford Canada and other witnesses. Seaver Decl. ¶¶105-06. Plaintiffs' Counsel was forced to resurface and otherwise rehabilitate old and damaged DVD-ROMs on which the video deposition testimony had been stored for upwards of 15 years, salvaging most but not all of the video testimony. *Id*. Ultimately, deposition testimony designated by Plaintiffs included the pre-trial deposition testimony of non-party Canadian vehicle exporters, and executives from Ford Canada, Toyota Canada, Chrysler Canada, Chrysler U.S., General Motors, Honda Canada, and Nissan Canada, as well as CADA and other Canadian trade associations. *Id*. The parties duly filed their exhibit lists, witness lists, and exchanged designated deposition testimony and objections. *Id*.

Plaintiffs took the depositions of two new Ford Canada witnesses disclosed on Ford Canada's trial witness list, and Ford Canada took the depositions of three Class Members who Plaintiffs disclosed on their trial witness list and defended at deposition: named Plaintiffs Jason Gabelsberg and W. Scott Young, and Class Member Lindsay (Medigovich) Humphrey. Seaver Decl. ¶103.

Plaintiffs moved for judgment on the pleadings on the question of whether the case, at trial, should unfold as a "*per se*" antitrust case or a "rule of reason" case. This issue had critical implications as to whether Ford Canada could, or could not, offer business-justification evidence to justify any horizontal agreement that Plaintiffs might prove. It also would determine whether the jury should apply a *per se* or "rule of reason" standard in judging Ford Canada's liability. The Court held oral argument and denied the motion with leave for Plaintiffs to renew it at trial. Seaver Decl. ¶95. Leaving the issue unresolved meant that the parties negotiated their settlement in the shadow of this large uncertainty.

The parties also spent considerable time drafting and conferring on jury instructions, which were

submitted to the Court with several key instructions subject to dispute. Seaver Decl. ¶107. Likewise, the parties each filed motions *in limine* on evidentiary issues ranging from the straightforward to the highly complex. The Court heard oral argument and ruled on every motion. Finally, the parties prepared and submitted final pre-trial briefs. *Id*. ¶¶96, 108.

4. Settlement

As more fully discussed in Plaintiffs' Motion for Final Approval, the parties engaged in a last-ditch mediation session on January 14, 2022 with the Honorable Edward A. Infante (Ret.), and reached an agreement to settle. Ford Canada agreed to pay $82 million cash in a non-reversionary Settlement in exchange for a release of claims. It took weeks more and another mediation with Judge Infante to reach a final, written agreement, one week before the February 7, 2022 trial date.

5. The Law Firms Which Litigated This Action After The 2012 Summary Judgments For Defendants

From the 2012 summary judgments for the remaining Defendants onward, the litigation was spearheaded by six San Francisco-based law firms: Berman Tabacco (formerly Berman DeValerio), Cooper & Kirkham, Saveri & Saveri, Lieff Cabraser, Zelle LLP, and Law Offices of Francis O. Scarpulla. Seaver Decl. ¶131. When the case approached trial in 2021-22, the Zelle and Scarpulla firms voluntarily withdrew from further active participation and financial support. *Id*. Throughout the 2012-2022 period, as evidenced and measured by the investment of time and money, Berman Tabacco chaired the overall pre-trial litigation effort and was the lead trial counsel. Since 2012, the six law firms advanced substantial, additional expenses, mostly related to expert opinion testimony and for aspects of trial preparation, and expended an additional $9,842,434.25 in collective lodestar based on 13,510.05 hours of billable attorney and paraprofessional time. *Id*.

III. ARGUMENT

A. The Requested 33.3% Attorneys' Fee is Reasonable

"The benchmark in determining attorney fees is reasonableness." *Karton v. Ari Design & Construction, Inc*., 61 Cal. App. 5th 734, 744 (2021), *modified on reh'g* (Mar. 29, 2021). Here, Plaintiffs' Counsel's request for a 33.3% fee of the $82 million Settlement Fund ($27,306,000 as

presently calculated) is reasonable under any standard.[5] The one-third percentage fee is well within the reasonable range for antitrust cases of this size and complexity, and the lodestar multiplier of 0.80 confirms the percentage fee of 33.3% is reasonable by showing that the percentage fee requested by Plaintiffs' counsel is substantially less than their lodestar fee amount.

Where, as here, a class action settlement creates a common fund, a reasonable fee may be calculated as a percentage of the common fund. *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 486, 489 (2016). A court may determine if a requested percentage-of-the fund attorneys' fee request is within the reasonable range in common fund cases, and perform a lodestar cross-check to ensure the percentage fee is reasonable. *Id.* at 503-04. The goal is the "award of a reasonable fee to compensate counsel for their efforts." *Id.* at 504.

As this Court has explained, an award of one-third of a common fund settlement in a contingency fee class action is "common in this [Complex] department and in California state court." *UFCW & Emp'rs Ben. Trust v. Sutter Health*, No. CGC-14-538451, 2021 WL 5027180, at * 6 n.20 (Cal. Super. Ct. San Francisco Cty. Aug. 27, 2021) (observing that a 32% fee request "is within the reasonable range"). Courts routinely find that a 33.3% fee is "facially reasonable" and "not … uncommon." *Ha v. Google, Inc.*, No. 116cv290847, 2018 WL 1052448, at *2 (Cal. Super. Ct. Feb. 7, 2018). A percentage fee of 33.3% is typically found to be "average." *Thomas v. Universal Home Care, Inc.*, No. BC600623, 2018 WL 1751693, at *5 (Cal. Super. Ct. L.A. Cty. Jan. 11, 2018) (citing *In re Consumer Priv. Cases*, 175 Cal. App. 4th 545, 558 n.13 (2009) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.")); *see also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) (finding "[percentage] fee awards in class actions average around one-third of the recovery") (citation omitted); *Marine v. Giltner Inc.*, No. BC587123, 2017 WL 6888559, at *4 (Cal. Super. Ct. L.A. Cty. Sept. 19, 2017) (finding fee request of one-third "is within the average range" and observing "private contingency fee agreements are routinely 30% to 40% of the recovery"). Indeed, in the seminal California decision

[5] The request is for 33.3% of the Settlement Fund, which is defined in paragraph 1.cc. of the Settlement Agreement as "eighty-two million United States dollars ($82,000,000.00) and all interest earned thereon after becoming Escrow Funds." *See* Seaver Decl. Ex. A (Settlement Agreement) at ¶1.cc.

establishing the propriety of a percentage fee cross-checked by a lodestar multiplier, the California Supreme Court affirmed the reasonableness of an attorneys' percentage fee award of one-third of the settlement recovery in a contingency fee class action, cross-checked by a lodestar multiplier of 2.03-2.13. *See Laffitte*, 1 Cal. 5th at 487, 506.

Nor does the request for an award of 33.3% here implicate either of the two potential weak points of the percentage approach highlighted by the California Supreme Court. The first is the caveat that the percentage fee approach may encourage too-early a settlement. That is, the percentage fee approach may "provide incentives to attorneys to settle for too low a recovery because an early settlement provides them with a larger fee in terms of the time invested." *Laffitte*, 1 Cal. 5th at 490. If there is a case that belies that warning, it is this one. Plaintiffs' Counsel here persevered through twenty years of litigation against formidable adversaries and innumerable setbacks and complexities to obtain a valuable cash recovery for injured California consumers. The window for an "early settlement" closed some 15-19 years ago. The availability of a percentage fee here did *not* result in a settlement with Ford Canada that was too early or for too little.

Second, "[w]here the class settlement is for a very large amount," the percentage fee method "may be criticized as providing counsel a windfall in relation to the amount of work performed." *Laffitte*, 1 Cal. 5th at 490. While $82 million is a substantial settlement recovery and a valuable result here, it is not a settlement recovery that qualifies as a "very large amount" such that it veers into so-called "megafund" territory.[6] And while 33.3% of the $82 million cash recovery is a substantial fee, as discussed in more detail below, the lodestar multiplier here is only 0.80, which ensures that if the requested fee is awarded, counsel are not in line to receive a "windfall."

Other assurances of the 33.3% fee request's reasonableness in connection with the Ford Canada settlement are the independent determinations made by Judge Kramer and Judge Hornby, respectively, regarding the reasonableness of the percentage fees requested in connection with the prior GMCL settlement and Toyota/CADA settlement. Ten years ago, in 2012, Judge Kramer determined that 33.3%

[6] *See UFCW*, 2021 WL 5027180, at *5, 14 (finding common fund recovery of $575 million qualified as a "very large class settlement" necessitating a critical assessment of the 30% requested fee and determining 26.5% fee against a 1.63 lodestar multiplier was reasonable).

was a reasonable percentage fee in this litigation, finding the percentage fee is "consistent with fee awards in similar cases, consistent with the market for contingent litigation of this nature, and is reasonable and appropriate under the circumstances of this case." Seaver Decl. Ex. D (Kramer 2012 Fee Order), at 8:9-13. The ten years of litigation that has taken place since Judge Kramer's determination only enhances the reasonableness of the requested percentage fee.

Likewise, in 2012 Judge Hornby also held that, even as Plaintiffs' counsel requested a below-market 13.2% fee, the actual market rate for contingent-fee antitrust class actions like this one is 30%-40%. Seaver Decl. Ex. L (Hornby 2012 Fee Order), at 3-4 (finding 13.2% requested fee is "below average for most litigation of this complexity" because for most antitrust class actions with below $100 million settlement recovery the "median fee was 33.3%"); *id.* at Appendix (reviewing sources indicating market rate percentage fee for complex antitrust class actions is 30%-40%). In connection with the Toyota/CADA settlement, Plaintiffs' counsel requested the below-market rate 13.2% fee not because a higher, one-third fee from the $37.3 million settlement fund would have been unreasonable, but because by seeking a below-market fee percentage while obtaining reimbursement of millions of dollars of out-of-pocket expenses, there would be enough of the settlement's cash corpus remaining to make a meaningful distribution to the nationwide settlement class, which was a priority for both Judge Hornby and Plaintiffs' counsel. *Id.* ¶118 & Ex. L (Hornby 2012 Fee Order), at 4 (observing that with the 13.2% fee and expense reimbursement "the plaintiff class therefore will obtain 70% of the recovery … and both individual car purchasers and fleet purchasers will recover measurable amounts as a result"). Prioritizing expense reimbursement also helped continue the litigation against Ford Canada and the other remaining Defendants.

The percentage fee request here of 33.3% is reasonable under California law and in the circumstances of this case.

B. A Lodestar Cross-Check Confirms the Reasonableness of the 33.3% Fee Request

To ensure the reasonableness of a fee under the percentage-of-the-recovery method, courts may "cross check" the proposed award against counsel's lodestar. *Laffitte*, 1 Cal. 5th at 504. The lodestar is calculated by "multiplying the number of hours reasonably expended" by each attorney or paraprofessional by their "reasonable hourly rate[s]" and totaling the amounts for all timekeepers. *Id.* at

489 (citation omitted). To arrive at the imputed "multiplier," the court divides the requested percentage fee award by the lodestar amount. The resulting number is the "multiplier."*Id.* at 487.

According to the California Supreme Court, "[T]he ratio of the percentage-based fee to the lodestar-based fee implies a multiplier, and that implied multiplier can be evaluated for reasonableness. If the implied multiplier is reasonable, then the cross-check confirms the reasonableness of the percentage-based fee." *Laffitte*, 1 Cal. 5th at 496.

As set forth below, the lodestar multiplier here is 0.80, *i.e.*, the requested percentage fee award is less than the value, at historical billing rates, of the time expended by Plaintiffs' Counsel. The 0.80 multiplier is reasonable on its face and confirms that the requested 33.3% fee appropriately reflects the degree of time and effort expended by counsel on behalf of the Class. Only when the requested percentage fee award far exceeds the lodestar fee, *i.e.*, when the multiplier is substantially greater than 1.0, can the lodestar multiplier cross-check call into question the reasonableness of the percentage fee award. *See Laffitte*, 1 Cal. 5th at 505 (explaining that the "focus" of the lodestar multiplier cross-check is "on the general question of whether the [percentage] fee award appropriately reflects the degree of time and effort expended by the attorneys.").

1. The lodestar multiplier calculation

In support of the request for attorneys' fees in connection with the Ford Canada Settlement, Plaintiffs' Counsel are only relying on the carefully vetted and peer-reviewed time from inception of the case to June 30, 2022 of the six law firms that had primary responsibility for completing this litigation over the last ten years.[7] This presentation will obviate the need for the Court to review and consider the lodestars of the more than fifty other law firms that participated in the litigation in the period of roughly 2003 to 2011. Submissions of those firms' respective hours billed, hourly rates, and total lodestars were received by Judge Kramer in connection with the GMCL settlement. They are summarized in the Declaration of Craig C. Corbitt in Support of Plaintiffs' Application for Attorneys' Fees, Expenses &

[7] Summaries of the work performed, billed hours and applicable hourly rates are contained in the accompanying Declaration of Todd A. Seaver (Berman Tabacco), Tracy R. Kirkham (Cooper & Kirkham) ("Kirkham Decl."); R. Alexander Saveri (Saveri & Saveri) ("Saveri Decl."); Eric B. Fastiff (Lieff Cabraser) ("Fastiff Decl."); Judith A. Zahid (Zelle LLP) ("Zahid Decl."); and Francis O. Scarpulla (Law Offices of Francis O. Scarpulla) ("Scarpulla Decl.").

Incentive Awards (Dec. 5, 2011) and the Supplemental Tabacco Declaration, which are Exhibits R and P, respectively, to the Seaver Declaration.

The six-firm lodestar totals $33,876,093 on 75,478 billed hours. Seaver Decl. ¶132, Table #3. The hourly rates are *historical* hourly rates. Seaver Decl. ¶135 & Kirkham Decl., Saveri Decl.; Fastiff Decl., Zahid Decl, and Scarpulla Decl.. The average hourly rate for all the presented lodestar is $448 per hour ($33,876,093 divided by 75,478 hours).

With the six firms' lodestar total of $33,876,093, a percentage fee award of 33.3% in the amount of $27,306,000 yields a fractional lodestar multiplier of 0.80. A lodestar multiplier less than 1.0, like the multiplier here, means that the requested percentage fee award is less than the lodestar fee. Even lodestar multipliers considerably higher than this one are typically viewed by courts as confirming the reasonableness of the percentage fee amount. *See Laffitte*, 1 Cal. 5th at 487 (affirming percentage fee award where "multiplier needed to reach the requested fee … [is] 2.03 to 2.13"); *Google*, 2018 WL 1052448, at *2 (finding lodestar multiplier of 2.1 confirms reasonableness of 33.3% fee award); In California, "Multipliers can range from 2 to 4 or even higher." *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 229 (2001), *disapproved on other grounds by Hernandez v Restoration Hardware, Inc.*, 4 Cal. 5th 260, 269 (2018); Order Awarding Attorneys' Fees and Costs, *In re Pharmaceutical Cases I, II, III*, No. 962294, slip op. at 3 (San Francisco Super. Ct. Apr. 30, 1999) (approving multiplier of 5.23 in antitrust class action) (attached as Ex. V to the Seaver Decl.).

The lodestar multiplier here serves the goal of the lodestar cross-check by layering an objective measure of the work performed onto the assessment of the reasonableness of a 33.3.% fee. *Laffitte*, 1 Cal. 5th at 504. The 0.80 multiplier, showing that the requested 33.3% fee is less than the lodestar amount, is *prima facie* evidence of the reasonableness of the requested fee, because it is unquestionable that the multiplier is *not* "far outside the normal range" (indeed, it is below the normal range) and so the requested percentage fee will *not* "reward counsel for their services at an extraordinary rate." *Id*. Should the Court agree that 33.3% is a reasonable percentage fee from the $82 million Ford Canada Settlement, the multiplier of 0.80 indicates there is no reason for the Court "to reexamine its choice of a percentage."

Id.[8]

2. Counsel's hours and rates are reasonable

Counsel expended a reasonable number of hours on this litigation. Hours are reasonable if "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. James H. Matthews & Co.*, 682 F.2d. 830, 839 (9th Cir. 1982) (citation omitted). In determining the reasonableness of hours, the court may consider "the entire course of the litigation." *Vo v. Las Virgenes Mun. Utility Dist.*, 79 Cal. App. 4th 440, 447 (2000).

Plaintiffs' Counsel conducted a detailed review of the time records submitted by the six law firms. This review included a line-by-line assessment of whether each time entry: (1) included a complete description of the work conducted; (2) represented a task necessary to the prosecution of this action; and (3) reflected an appropriate length of time for that task. Seaver Decl. ¶134. Following this review, Plaintiffs' Counsel determined that 75,478 of the hours recorded across the six firms were reasonable and necessary to the advancement of this litigation. *Moore*, 682 F.2d. at 839.

Plaintiffs' counsel's hourly rates are reasonable. The historical rates billed for attorneys range from $200 to $1,325 per hour. Plaintiffs' counsel's hourly rates are set forth in the Declarations supporting this motion. *See* Seaver Decl. ¶132, Exs. M, N; Zahid Decl. ¶¶3-8, Exs. B (at Ex. B thereto) & C; Kirkham Decl. ¶¶3-8, Ex. C; Saveri Decl. ¶¶3-8, Exs. B (at Ex. B.1.B. thereto) & C; Fastiff Decl. ¶¶4-10, Ex. C; Scarpulla Decl. ¶¶3-9, Exs. B & C. These rates are reasonable given the substantial experience of Plaintiffs' counsel in complex class actions and antitrust litigation. *Id.*[9]

[8] The proper focus of Plaintiffs' counsel's fee request is on the $82 million Ford Canada settlement, its benefits to the Class, Plaintiffs' counsel's time and effort that contributed to that settlement, and the reasonableness of the 33.3% fee award that Plaintiffs' counsel requests from the Ford Canada settlement. Nevertheless, if the Court believes the other settlements and fee awards should be taken into account, including them only further demonstrates the reasonableness of the fee award requested here. Combining the total amount of all settlements, all previous fee awards and the award requested here, and the total lodestar for all firms yields the following: Total settlements = $139.45 million ($37.3 million + $20.15 million + $82 million); total fee awards = $38.93 million ($4.92 million + $6.71 million + $27.3 million); total lodestar = $63.79 million ($54 million pre-Dec. 2011 + $9.79 million post-Dec. 2011). Using these totals, the combined percentage fee award is 27.9% ($38.93 million ÷ $139.45 million) and the combined multiplier is 0.61 ($38.93 million ÷ $63.79 million). Each of these is even lower than the comparable figure for the Ford Canada settlement alone (*i.e.*, 33.3% and 0.80), further demonstrating the reasonableness of the total fees awarded to Plaintiffs' counsel.

[9] With regard to the range of historical hourly rates billed, a relevant consideration is the fact that the litigation has spanned twenty calendar years. In a legal profession where attorneys change law firm

C. The Fee Request of 33.3% Cross-Checked by the 0.80 Multiplier Is Supported By All of the Factors That Warrant Fee Enhancement

When a fee is determined by the percentage method or the lodestar method, the fee request's reasonableness can be assessed by consideration of factors such as "the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Laffitte*, 1 Cal. 5th at 489; *see also UFCW*, 2021 WL 5027180, at *9 & 6 n.21 (considering percentage fee request in light of "information on contingency [risk], novelty, and difficulty, together with the skill shown by counsel, the number of hours worked, and the asserted hourly rates").

1. Quality of representation and labor expended by counsel

The high quality of representation the Class received and the labor counsel expended strongly supports the requested fee. The six law firms committed over 74,000 hours of work, matching the skill and tenacity at every stage of the litigation of some of the finest antitrust defense counsel in the world retained by the largest automakers in the world. To persevere for two decades in pursuit of a valuable recovery for the Class meets the highest of quality standards. Counsel dedicated substantial resources to the prosecution of the case, which enabled counsel to achieve the $82 million cash Settlement with Ford Canada, which will deliver real value to the Class of California vehicle purchasers.[10] Among other

affiliation in a fluid, national job market, here the core group of litigators have stuck with this case and stuck with this Class for the duration. This continuity of individual lawyers over decades is remarkable. For example, attorney Todd Seaver started working on this case in its pre-filing investigation phase in October 2002, when as a junior associate he billed at a rate of $225 per hour. Today, Mr. Seaver is a partner in the same firm and his 2022 rate has likewise risen to $970 per hour. Other examples include Joseph J. Tabacco, Jr. (2007 rate of $655 per hour and $1085 per hour in 2022) (Seaver Dec. Exs. N,P) (*id.*); Matthew D. Pearson (2012 rate of $350 per hour and $825 per hour in 2022) (*id.*); Judith Zahid (2003 rate of $240 per hour and $900 per hour in 2021) (Zahid Decl. Exs. B (at Ex. B thereto) & C). While the hours billed on this case may have carried a relatively higher hourly rate in the most recent years, that is because the former junior lawyers with relatively lower hourly rates who worked on the case in its earliest years were still the attorneys working on the case in more recent years, and indeed would have been the lead trial attorneys. The Class benefitted from this core group of litigators' intimate knowledge of the facts, law, and record evidence, which translated into an overall cost-efficient expenditure of hours compared to a situation in which attorneys new to the case have to get up to speed. Consequently, the hourly rates that rose over the years were an apt reflection of the value the core litigators gave the Class and is reflected in the litigation outcome.

[10] The $82 million settlement reached in this case represents an excellent outcome for the Class. Antitrust class actions are notoriously difficult and expensive to prosecute. *See Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (noting that antitrust class actions "are notoriously complex, protracted, and bitterly fought"). The Settlement ultimately reached with Ford Canada is also an especially extraordinary result, in that it is significantly larger than the three prior settlements approved as fair and reasonable in this case. Indeed, the Ford Canada Settlement is larger than those

things, counsel for the Class:

- Analyzed over one-million pages of documents produced after nearly ten months of meet-and-confer sessions;
- Deposed 130 percipient fact witnesses to obtain evidence of an illegal conspiracy, explored the intricacies of cross-border automobile sales and distribution, and obtained pricing and discounting information and data;
- Litigated and enforced letters rogatory in Canadian provincial courts for documents and testimony from Canadian non-party witnesses and organizations;
- Obtained extensive discovery of transaction data from Defendants and third parties;
- Pursued and responded to multiple sets of interrogatories propounded by Plaintiffs and Defendants, including Plaintiffs' expansive responses to Defendants' contention interrogatories (Plaintiffs' responses totaled over 1,800 pages);
- Served and obtained hundreds of requests for admission;
- Selected and prepared Plaintiffs' economic experts;
- Engaged in comprehensive and far-reaching expert discovery involving reports from nearly over a dozen economic and industry experts, and multi-day depositions of those experts;
- Won class certification for the California Class;
- Litigated summary judgment motions filed in this Court by Ford, GM Canada, Honda, and Nissan on the element of conspiracy, involving thousands of statements of fact, evidentiary objections, and over four full days of hearings;
- Litigated Ford's bill of costs;
- Won reversal on appeal of the summary judgment on element of conspiracy obtained by Ford Canada, and successfully opposed Ford Canada's petition for review to the California Supreme Court;
- Successfully opposed Ford Canada's motion for summary judgment on the element of causation/impact;
- Litigated Ford Canada's motion for entry of judgment on *res judicata* grounds;
- Won reversal on appeal of the *res judicata* judgment obtained by Ford Canada, and afterwards successfully opposed Ford Canada's petition for review to the California Supreme Court;
- Opposed Ford's writs of execution served on named Plaintiffs to collect nearly $200,000 in

three settlements *combined*, and is for the sole benefit of the California Class, unlike the other two settlements which benfitted consumers nationwide (Toyota/CADA) or for multiple states in addition to California (GMCL). Moreover, the $82 million settlement represents a strong value when compared to what Plaintiffs could have achieved at trial—representing 15.1% of single damages.

costs taxed to Plaintiffs in connection with Ford U.S.'s award of litigation costs;

- Defeated Ford Canada's motion to modify the Class and carve off purchases of Fords, Hondas, and Nissans from the Class;
- Defeated Ford Canada's motion for summary adjudication on the elements of causation and damages;
- Defeated Ford Canada's *Sargon* motion to exclude Plaintiffs' testifying economic expert witness' opinions;
- Deposed Ford Canada's newly disclosed testifying expert economists in advance of trial;
- Deposed Ford Canada's newly disclosed fact witnesses in advance of trial;
- Defended the depositions of the three Class members who would testify in Plaintiffs' case-in-chief;
- Expended hundreds of hours to prepare for trial: designated deposition testimony; selected exhibits; litigated motions in limine; conducted all-day jury focus group; prepared trial demonstratives;
- Litigated Plaintiffs' motion for judgment on the pleadings on whether the standard for Ford Canada's liability was *per se* or the Rule of Reason;
- Prepared and submitted jury instructions; and
- Prepared final pre-trial brief.

Seaver Decl. ¶¶10-108. The time and labor will continue as counsel aids in the administration of the Settlement Agreement and claims process. Counsel will not separately seek payment for that labor.

2. Novelty and complexity of issues

Consideration of the novelty and complexity of the issues also supports the requested fee. To begin with, the United States Court of Appeal for the First Circuit, when deciding the interlocutory appeal of the federal MDL court's order certifying statewide damage classes, observed that Plaintiffs' theory of antitrust causation and impact in this case was "novel" and "complex," necessitating careful review in light of the "novelty and complexity of the theories [and] evidence." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26-27 (2008).

Antitrust cases in general present complex issues of proof. As but one example of the complexity of proof that figured in this case at class certification, summary judgment, and would have featured at trial, was the proof of causation/impact. The outcome of the entire case with regard to causation and damages turned on the question of what the "but-for" world would have looked like without the

conspiracy entered into by Ford Canada, Toyota Canada, Chrysler Canada, and GM Canada to suppress the supply of Canadian exports to the U.S. (assuming Plaintiffs proved that conspiracy at trial). This issue was the subject of countless motions, expert testimony on the Nested Logit Model, and thousands of hours of attorney time and the time of courts and judges—Judge Hornby, Judge Kramer, Judge Karnow, and this Court.

In short, this case wanted for nothing in terms of novelty and complexity.

3. Contingent risk of nonpayment

The representation of the Class has been on an entirely contingent basis. From the outset of representation to the day of settlement, the risk of nonpayment was extraordinarily high. Plaintiffs' counsel brought an antitrust class action that challenged the way in which the major automakers fundamentally structure their U.S.-Canadian supply and pricing practices. Plaintiffs' antitrust challenge sought to change how automakers did business when enjoying integrated, cross-border supply markets but confronting diverse demand markets. At its outset, the nature of the case promised that counsel would have to carry millions of dollars in out-of-pocket costs at risk of total loss. It was clear from the beginning that success meant overcoming difficult questions of proof and prevailing on novel legal theories at every stage leading up to and through trial and beyond, with no guarantee of any payment whatsoever.

Often, antitrust cases, especially conspiracy cases, are considerably aided by parallel government investigations that use the governments's considerable powers and resources to develop an extensive factual record. Not so here. Counsel brought the case without any benefit of government investigation, either by the U.S. or Canadian governments, let alone any indictments or guilty pleas. No one but Plaintiffs' counsel unearthed the evidence of the alleged horizontal conspiracy and undertook to litigate for a recovery for California consumers.

The characteristics of this case meant the risk of nonpayment was present from the start and remained present even as counsel ultimately advanced over $13 million in litigation expenses at risk of total loss. In *In re Remeron Direct Purchaser Antitrust Litigation*, No. Civ. 03-0085 FSH, 2005 WL 3008808 (D.N.J. Nov. 9, 2005), Judge Hochberg emphasized that an attorneys' fee determination in an antitrust class action must emphasize the risk of nonpayment, remarking on "the sometimes undesirable

characteristics" of contingent-fee antitrust class actions. *Id.* at *14. Those include "the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high." *Id.*

Nor did the risk of nonpayment lessen over time. Even with the Toyota/CADA settlement and GMCL settlement, in the last ten years, the six law firms undertook to persevere in the litigation against Ford, and rolled the dice to advance significant out-of-pocket costs as well as substantial attorney time. Plaintiffs' counsel won two appeals of case-ending judgments, and thoroughly prepare the case for trial, expending an additional 13,510 hours and $9,843,434 million in lodestar in the process, all in the face of the significant risk that none of their work over the last ten years would be compensated. Seaver Decl. ¶132, Table #2.

The contingent nature of the fee and the extraordinarily high risk of nonpayment strongly favor the requested fee award.

D. Counsel's Expenses Are Reasonable and Should Be Reimbursed

Counsel requests reimbursement of $1,618,823.98 of further out-of-pocket litigation expenses reasonably and necessarily incurred in connection with the prosecution of this action on behalf of the Class. This expense amount is less than the noticed amount of costs. *See* Ex. A to the Decl. of Eric Schachter of A. B. Data in Supp. of Pls.' Mot. For Prelim. Approval of Settlement (Apr. 6, 2022) ("Schachter Prelim. Approval Decl.") (notice to class indicated counsel would seek reimbursement of expenses "up to" $2 million).

Under the common fund doctrine, counsel may obtain reimbursement of reasonable litigation expenses. *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977) (citing *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975)). Courts routinely reimburse class counsel for costs incurred in prosecuting civil actions on a contingent basis. *See, e.g., UFCW*, 2021 WL 5027180, at *1 (awarding over $13 million in costs); *Smokeless Tobacco Cases I-IV*, J.C.C.P. Nos. 4250, 4258, 4259, 4262 (Super. Ct. San Francisco County, Mar. 12, 2008) (awarding $913,464.20 in costs).

1. Economic expert expenses

The expenses are reflected in detail in ¶¶138-47 of the Seaver Declaration. The vast majority of the expenses relate to economic experts and the analysis supporting the testifying expert. Owing to the

length of the litigation, Plaintiffs' original testifying expert economist, Prof. Hall of Stanford University had to be replaced, along with the supporting economic consulting staff at Cornerstone Research. Seaver Decl. Ex. J (Tabacco Decl.), at ¶¶4-8. Professor Hall informed counsel in the summer of 2021 that he was simply unable to undertake the rigors of testifying as Plaintiffs' lead economic expert. This resulted in Plaintiffs having to retain a new expert and they were fortunate to retain Dr. Janet Netz and her support staff at applEcon. A first task for Dr. Netz and her team was to review the voluminous records pertinent to Dr. Netz forming an opinion in the case. This review included the review of the eight different, detailed, and technical reports prepared by Prof. Hall beginning with his first report in July 2005 and ending with his last report in 2009. Dr. Netz also collected all of the supporting market data and other information in order to replicate and critically assess the statistical and econometric models that Prof. Hall had utilized to form his opinions. In addition, Prof. Hall was deposed four times over six days, and Dr. Netz analyzed that testimony. For their part, Defendants in this action had retained eleven experts, including eight economists, all of whom produced one or more reports and all of whom Plaintiffs deposed. Dr. Netz and her team at applEcon had to understand the various points and propositions contained in the defense experts' reports and depositions, and to prepare rebuttals to those points.

Before she could offer opinions in this case, Dr. Netz and her team performed their own independent analysis and verification of the methodologies employed and conclusions reached by Prof. Hall. While reaching substantially the same conclusions and opinions as Prof. Hall, there were differences.

Dr. Netz prepared for and gave a full day of pre-trial deposition testimony under examination by Ford Canada. Finally, Dr. Netz and her team assisted counsel in preparing for the depositions of the two economic expert witnesses that Ford Canada disclosed a few months prior to trial.

Suffice to say that all of the work undertaken by Dr. Netz and her staff was necessary and took significant time and effort, and resulted in invoicing of over $700,000 which counsel has paid and for which counsel now seek reimbursement. Seaver Decl. ¶140.

2. Trial graphics and jury consultants

A second large category of expenses relates to the preparation of trial exhibits and trial

presentations and demonstratives. This work was performed in conjunction with counsel by well-regarded trial graphic experts and was critical to the proper preparation of the case for trial, and totaled $7,055. Seaver Decl. ¶141.

Other significant expense categories included the employment of jury consultants and the associated work undertaken with jury focus groups. For this work, counsel retained Chopra Koonan Litigation Consulting, which resulted in total billings of $17,460. Seaver Decl. ¶142.

3. Court reporters, videography

Other categories of expenses include expenditures for court reporters and videographers for depositions and for court hearings, and the various costs related to the two major appeals to the California Court of Appeal, and Ford's efforts to appeal both decisions to the California Supreme Court and the United States Supreme Court. Seaver Decl. ¶143.

4. Ford U.S.' Bill of Costs

Another significant cost was the Ford U.S. Bill of Costs that was taxed against Plaintiffs in the amount of just over $199,956.81, and which cost counsel advanced on behalf of Plaintiffs by payment to Ford. Seaver Decl. ¶¶66, 88-91, 144 & Ex. U at Ex. 3.

5. Mediator services

Finally, a considerable cost, but modest relative to the results achieved was Plaintiffs' share of the JAMS mediation fees for the outstanding services of Judge Edward A. Infante (ret.) who masterfully guided the parties through three rigorous, all-day mediation sessions that resulted in the $82 million settlement now before the Court, which totals $16,536.47. Seaver Decl. ¶145-46.

6. Previously Unreimbursed Expenses

Reimbursement is sought now for $495,173.32 of expenses incurred before 2012 for which counsel were not able to seek reimbursement in connection with the Toyota/CADA and GMCL settlements. *See* Seaver Decl. ¶146. The reason that $495,173.32 of reasonable and necessary expenses could not be reimbursed from the prior settlements is that through a clerical error, counsel underestimated the total expenses actually incurred when they asked the Court to approve Notice the Toyota/CADA and GMCL Settlement Classes. The notices stated that counsel would request reimbursement of expenses in the amounts of $6.27 million and $5.2 million, respectively, from the

Toyota/CADA and GMCL settlements, totaling $11.47 million. *Id.* ¶146 (citing Ex. P (Tabacco Decl. Jan. 13, 2012), at ¶8); & Ex. Q (Order Granting Preliminary Approval of Proposed Settlement, Conditional Class Certification and Directing Dissemination of Notice to California Class). at Ex. C, at 1)). However, the necessary and reasonable expenses ultimately totaled $11,965,173.32, as documented to the Court. *Id*. ¶146 (citing Ex. P (Tabacco Decl. Jan. 13, 2012), at ¶ 8), a difference of $495,173.32.

This shortfall of expense reimbursement was recognized by Judge Kramer in this Court's order approving attorneys' fees and expenses in connection with the GMCL settlement.

> Plaintiffs' counsel have incurred approximately $12 million in costs to prosecute this action, the federal action, and the other various state actions … The court is aware that Plaintiffs' counsel have sought reimbursement of $6.27 million from the proceeds of the Toyota and CADA settlements in the federal action … If Plaintiffs' counsel's requests for costs are granted here and in the federal action, counsel will not be fully reimbursed for the approximately $12 million expended in litigating these actions.

Seaver Decl. ¶147 & Ex. D (Kramer 2012 Fee Order), at 6:5-13.

As the sum was expended and unreimbursed for the last ten years, the Class benefitted from the paid costs (overwhelmingly for expert expenses) and it is proper to reimburse Class counsel now, out of the Ford Canada settlement proceeds.

E. The Requested Service Awards are Merited and Reasonable

Counsel request that service awards of $5,000 each be paid to the two named Plaintiffs (Jason Gabelsberg and W. Scott Young) and one Class member (Lindsay Humphrey) who were disclosed on Plaintiffs' trial witness list and who were set to testify at trial in February 2022. If awarded, these payments totaling $15,000 represent a tiny fraction of the $82 million settlement, and were disclosed to Class Members through the Court-approved Class Notice. *See* Schachter Prelim. Approval Decl. Ex. A.

Courts consider some or all of the following factors when determining whether to pay a service award:

- Actions, if any, taken by the class representative to protect the interests of the class;
- The degree to which the class benefited from those actions;
- The effort the class representative expended in pursuing the litigation;
- The risk to the class representative in commencing suit, both financial and otherwise;
- The notoriety and personal difficulties encountered by the class representative;

- The duration of the litigation; and
- The personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

See Robert I. Weil (Ret.) & Ira A. Brown, California Practice Guide: Civil Procedure Before Trial, ¶14:146.10 (2012) (citing *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009)); *Bell v. Farmers Ins. Exch.*,115 Cal. App. 4th 715, 726 (2004); *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1394 (2010).

Mr. Gabelsberg, Mr. Young, and Ms. Humphrey were all deposed before trial. Seaver Decl. ¶128. Mr. Gabelsberg and Mr. Young have been named Plaintiffs in this Action since 2003, while Ms. Humphrey was a named Plaintiff in the federal MDL, but voluntarily dismissed her Carwright Act claim from the federal MDL without prejudice in 2009 in order to have her claim litigated in California state court as part of the certified California Class. *Id*.

All three took action to protect California Class Members by participating in pre-trial discovery, sitting for deposition, producing documents, and keeping abreast of litigation events for an extraordinarily long time. Their willingness to appear at trial to testify, during the Omicron wave of the COVID-19 pandemic no less, was of critical importance to the Class. Without their testimony, Plaintiffs' case could have been subject to a motion for a directed verdict, or the litigation class could have been subject to decertification without class representatives' testimony at trial.

Most significantly, the named Plaintiffs took a financial risk in the case. When Ford U.S. succeeded in taxing Plaintiffs for its taxable costs in the amount of over $199,000, Ford U.S. sought to collect that money from the named Plaintiffs *personally*. The issue was litigated before Judge Karnow in 2017, as Ford at first refused a tender of payment by counsel on behalf of Plaintiffs, and personally served Plaintiffs with writs of execution at their homes to collect the Bill of Costs. Ultimately, the vindictive strategy of Ford U.S. was stopped by Judge Karnow, who ordered Ford U.S. to accept the tendered payment of the over $199,000 from Plaintiffs' counsel, who advanced these costs on behalf of their clients. Seaver Decl. ¶¶66,130.

The Court should grant the request for payment of these modest service awards in recognition of the twenty-year service these individuals made to the Class.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs' Counsel respectfully request the Court grant the requested 33.3% attorneys' fee award, reimburse expenses in the amount of $1,618,823.98, and order payment of three service awards totaling $15,000 from the Settlement Fund.

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Respectfully submitted,

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