Steven N. Berk (admitted *pro hac vice*)
steven@berklawdc.com
Matthew J. Bonness (Cal. Bar No. 229226)
matt@berklawdc.com
BERK LAW PLLC
2002 Massachusetts Avenue, NW, Ste. 100
Washington, District of Columbia 20036
Telephone: (202) 232-7550
Facsimile: (202) 232-755

Beth E. Terrell (Cal. Bar No. 178181)
bterrell@tmdwlaw.com
TERRELL MARSHALL DAUDT & WILLIE PLLC
936 North 34th Street, Ste. 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 350-3528

Michael Ram (Cal. Bar No. 104805)
mram@ramolson.com
Jeffrey B. Cereghino (Cal. Bar No. 99480)
jbc@rocklawcal.com
RAM, OLSON, CEREGHINO, & KOPCZYNSKI LLP
555 Montgomery Street, Ste. 820
San Francisco, California 94111
Telephone: (415) 433-4949
Facsimile: (415) 433-7311

Lawrence Deutsch (admitted *pro hac vice*)
ldeutsch@bm.net
Shanon Carson (admitted *pro hac vice*)
scarson@bm.net
Eugene Tompkins (admitted *pro hac vice*)
gtompkins@bm.net
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3062
Facsimile: (215) 875-4604

Attorneys for Individual and Representative Plaintiff VINCE EAGEN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VINCE EAGEN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

AMERICAN HONDA MOTOR CO., INC.,

Defendant.

Case No.: 3:12-cv-01377-SI

Assigned to Hon. Susan Illston
Courtroom: 10

REPLY IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT & AWARD OF ATTORNEYS' FEES & EXPENSES

CLASS ACTION

Complaint Filed: March 19, 2012
Hearing Date: March 21, 2014, at 9:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

Plaintiff Vince Eagen respectfully submits this Reply in support of his Motion for Final Approval of Class Action Settlement & Award of Attorneys' Fees & Expenses ("Final Approval Motion") (Dkt. 99). Plaintiff and Class Counsel have achieved a strong result for the Class, and the Settlement with Defendant American Honda Motor Company, Inc. ("AHM") merits final approval. Class Members overwhelmingly agree. Of the 1.87 million Settlement Class Members, only 210 have submitted timely exclusion requests and only 23,[1] at most, have objected to the Settlement. Supp. Decl. of Steven Berk of March 7, 2014 ("March Berk Decl.") ¶ 7 and Exh. E thereto. In contrast, 7,164 Class Members have filed claims for reimbursements, *id.*, and others may do so through April 10, 2014, *see* Class Notice (Dkt. 93-4) at 5.

Plaintiff's request for attorneys' fees and expenses remains eminently reasonable, as Plaintiff's Final Approval Motion demonstrates. The fees sought will not be paid from a common fund, nor diminish the relief to the Settlement Class in any way. The Parties negotiated the proposed $800,000 fee award at arms' length, with the help of a JAMS mediator, and only after agreeing to relief for the Class. Class Counsel's lodestar, which has only increased since the filing of Plaintiff's Final Approval Motion on January 10, 2014, is significantly greater (more than two times greater) than the proposed fee. Plaintiff does not rely on a multiplier to justify his fee request.[2] Rather, the requested is entirely justified by the hours expended by Class Counsel and the Settlement's significant value to the class of 1.87 million members. The fact that Class

[1] The Parties disagree about which Class Members' letters constitute objections to the Settlement, but Plaintiff has erred towards over-inclusiveness and transparency by filing herewith all letters that could conceivably be construed as comments about or objections to the Settlement, including some letters that do not strictly comply with the procedural requirements for objections set forth in the Class Notice (Dkt. 93-4) at 8-9 and the Court's Order Preliminarily Approving Class Action Settlement (Oct. 9, 2013) ("Preliminary Approval Order") (Dkt. 89) at 5-6.

[2] As of January 10, 2014, the four (4) firms representing Plaintiff and the Settlement Class had expended 3,016 hours pursuing this case, representing a lodestar of $1,667,693.36, and had incurred expenses of $48,098.15. *See* Final Approval Motion (Dkt. 93) at 24; *see also* Exhs. A & B to Decl. of Steven N. Berk of Jan. 10, 2014 ("Jan. Berk Decl.") (Dkt. 93-1); Beth E. Terrell of Jan. 10, 2014 ("Jan. Terrell Decl.") (Dkt. 95) at 6-7; Exh. 2 to Decl. of Michael F. Ram of Jan. 9, 2014 ("Jan. Ram Decl.) (Dkt. 94-2); Exhs. A & B to Decl. of Lawrence Deutsch of Jan. 9, 2014 ("Jan. Deutsch Decl.") (Dkt. 96). Even before deducting expenses, Plaintiff's request is for less than 46% of Class Counsel's lodestar, which continues to rise.

Counsel would arguably be entitled to fees greater than $800,000 under either the lodestar/multiplier or a percentage-of-the-fund analysis bolsters the reasonableness of Plaintiff's request. Similarly, Plaintiff's request for a modest incentive award ($1,000), for his service to the Class, is supported by law and the facts (and is not the subject of any objections).

II. FINAL APPROVAL SHOULD BE GRANTED

When considering final approval of a class settlement, a trial court's focus is whether the proposed settlement is "fair, adequate, and reasonable." Fed. R. Civ. P. 23(e); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 62 (9th Cir. 1982). Among the many factors the trial court will consider is the reaction of the class members. *Id.* Plaintiff addressed these factors in his Memo. in Supp. of [his] Final Approval Motion (Dkt. 93) and addressed the few objections that had been received by then. However, because the deadline for objections (February 24, 2014) had not yet passed when Plaintiff filed his Final Approval Motion, Plaintiff once again assesses the class members' reaction.

The content of the objections does not counsel against final approval. Class Counsel fully appreciate the important role that objectors can play in the class settlement approval process and are prepared to respond to the legitimate concerns of any objector. However, given the nature of the Settlement, the significant relief it provides, and the overwhelmingly positive response of the class, none of these objections should be allowed to deprive the Class Members of the benefits they are entitled to receive under the Settlement.

A. The Class Members' Positive Reaction Supports Final Approval

The mere fact that there are some objections to a settlement does not mean that the settlement should be rejected. A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it, and here, the Class Members' response to the Settlement has been overwhelmingly positive. Class Counsel have talked to hundreds of class members, the majority of whom support the Settlement, March Berk Decl. ¶ 3, the Parties' counsel have received at least eight (8) letters supporting the Settlement.[3]

[3] "I like the Settlement …." *See* Exh. E to March Berk Decl. ("Revised Compendium") at 13. "I agree to be a member of the class action. …I wish you success …." *Id.* at 31. "I like the

The twenty-three (23) objectors represent far less than a percent (0.00001225) of the Settlement Class; the 210 opt-outs, *see* March Berk Decl. ¶ 7, represent just one-hundredth of a percent (0.0001). None of the objectors have indicated any intent to appear at the Fairness Hearing. *See* March Berk Decl. ¶ 9 & Revised Compendium. This relative dearth of objections and opt-outs indicates broad, class-wide support for the Settlement that supports final approval. *See Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming final approval of settlement for class of 90,000 with 45 objections and 500 opt-outs); *see also In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).

B. The Objections Lack Merit

At most, twenty-three (23) Class Members have submitted letters objecting to the Settlement.[4] *See* Revised Compendium. While class counsel understand and appreciate the comments and concerns outlined in their objections, none of them counsels against final approval. The objectors did not offer reasonable or workable alternatives to address any alleged weaknesses in the settlement; rather, the theme of the objections is that the Settlement could, in some way, be better. As the Ninth Circuit has explained:

> Of course it is possible … that [a] settlement could have been better. But this possibility does not mean [a] settlement presented [is] not fair, reasonable or adequate. Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but weather it is fair, adequate and free from collusion. In this regard, the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness.

---

settlement and would like to remain a Settlement Class Member ….” *Id.* at 39. “I want to remain a member of the engine misfire law suit [*sic*]. I want to receive full financial benefits as well [as the] warranty extension[] ….” *Id.* at 2. “Please let it be known that I … do not hereby object to any settlement that comes out of this lawsuit ….” *Id*. at 14. “I would be interested in the extended warranty plan ….” *Id.* at 32. “I do wish to be part of this class action suit because [my Class Vehicle] is only getting worse.” *Id.* at 46. “I write to … withdraw my [previous] objection. … I now understand that, if approved, the proposed settlement will provide class members with both (1) the opportunity to claim reimbursement for qualifying out-of-pocket expenses and (2) an extension of their [Class] [V]ehicle’s Powertrain Warranty, as it pertains to the defect, through 8 years from the date of original purchase of lease, with no mileage limitation. I support the proposed settlement.” *Id.* at 33.

[4] *See* n.1 *supra.*

Hanlon v. Chrysler Corp., 150 F .3d 1011, 1027 (9th Cir. 1998).

The Settlement followed a substantial period of investigation, careful evaluation of Plaintiffs' claims, informal discovery, expert consultation, motions practice, settlement discussions, and confirmatory discovery. It also reflects both the strengths and weaknesses of the parties' claims and defenses. Both Parties were forced to make concessions to reach closure. Moreover, the Settlement provides the substantial benefits of requiring AHM to (1) extend the initial powertrain warranty for the Class Vehicles (*hundreds of thousands of which already expired in late 2012 and throughout 2013*) to a total of eight (8) years with no mileage limitation and (2) fully reimburse Class Members for all out-of-pocket expenses associated with the defect.

Fifteen of the twenty-three objections submitted by Class Members raise concerns about the adequacy of the repairs and the term of the warranty extension, including the stacking of extended warranties. Three objectors seek special damages in addition to the Settlement's other benefits. Two Class Members (including one objector and one non-objecting commenter) express concern about whether the Settlement releases personal injury claims. Four other Class Members each raise issues not expressed by others.[5] [6] [7] [8] Finally, a single class member – Ms. Caren

---

[5] Class Member Christian Stevens objects to the Settlement apparently on the bases of a principled objection to class actions and his trouble-free experiences with his Class Vehicles. (Dkt. 92.) *see also* Revised Compendium at 43-44. Both Plaintiff and AHM have previously addressed his objection (which is deficient in that it fails to disclose both the VINs and approximate dates on which he purchased his Class Vehicles). Final Approval Motion (Dkt. 93) at 11-12; D.'s Submission ISO Final Settlement Approval (Dkt. 102) at 3. Class Member Steven's objection should be overruled.

[6] Class Members David & Rebecca Caldwell objects to the Settlement for its failure to include within the scope of the Settlement their model-year 2006 Honda Odyssey EX. Revised Compendium at 11. Both Plaintiff and AHM previously addressed Mr. & Mrs. Caldwell's objection, explaining that the 2006 Odyssey is not equipped with the VCM-2 feature common to the Class Vehicles and that the literal spark plug ejection of which they complain is not typical of the Engine Misfire that is the subject of the Settlement. Final Approval Motion (Dkt. 93) at 12-13; D.'s Submission ISO Final Settlement Approval (Dkt. 102) at 2 n.3. The Caldwells' objection should be overruled.

[7] Class Member Melvin Scott objects to the Settlement on the basis of his misunderstanding that he must provide supporting documentation bearing the Diagnostic Trouble Codes ("DTC") identified in the Class Notice to obtain reimbursement. Revised Compendium at 41-42. In fact, that is not the case. Class Members can obtain reimbursement of any eligible out-of-pocket expense so long as they provide documentation indicating that an engine misfire

Krahulik – is the only one to object to (1) the procedural requirements to object, opt-out, or claim reimbursement, (2) the fact that the Class Notice did not identify "the total amount of alleged damages" and (3) Plaintiff's request for attorneys' fees.[9] The Court should overrule each of these objections.

1. Objections Concerning the Term of the Warranty Extension, Stacking, and the Scope and Adequacy of Covered Repairs Should Be Overruled.

Some class members have objected that the three-year / unlimited mileage extension of the Powertrain Warranty is insufficient because (a) they believe the warranty should be extended further or (b) they doubt that AHM can permanently remedy the defect for the life of the vehicles. Instead, these objectors propose a variety of longer warranty extensions, including "as long as I own the car," Revised Compendium at 26, "the lifetime of the vehicle," *id.* at 19-20, and "the life of the vehicle," *id.* at 8-9, through a total of "more than 8 years," *id.* at 3, "12 years," *id.* at 6-7, and "20 years," *id.* at 12. One objector concludes that the proposed warranty extension "is too limited when viewed in light of other [m]anufacturer's warranties of 10 years." *Id.* at 21.

---

occurred in a Class Vehicle's cylinder 1, 2, 3, or 4. For instance, proof of payment and a service invoice indicating that a misfire was detected in cylinder 3 (but not bearing code P0301) could serve as adequate supporting documentation. The Class Notice provides that "[t]he … [supporting] documentation MUST indicate … that the repair or replacement was performed in connection with [the] Settlement Class Vehicle's generating the … [codes] P0301, P0302, P0303, or P0304." (Dkt. 93-4 at 6.) Similarly, the Claim Form informs class members that "diagnostic trouble codes … P0301, P0302, P003, or P0304 will *likely* appear on your repair invoice or other documentation," but does not require that they do. (Dkt 93-4 at 12.) It further provides that "Your [supporting] documentation must … include … [i]nformation that shows that the repair [for which you seek reimbursement] was performed … for Engine Misfire (*such as* the appearance of diagnostic trouble codes … P0301, P0302, P0303, or P0304)." *Id.* at 13 (*emphasis added*). Class Member Scott's objection should be overruled.

[8] Class Member Uneala Stovall objects to the Settlement because, it seems, she misunderstands her eligibility for relief. Revised Compendium at 45. She writes, "I object to the limitations and to the limited options of my legal rights and options [*sic*] in this settlement. Although I do not currently have a claim to submit, I do not wish to exclude myself … because of the possibility of a future claim. I feel I'm entitled to an automatic warranty extension as well as reimbursement if this claim arises in the future." *Id.* Indeed, if the Settlement is approved and becomes final, Ms. Stovall will receive automatically receive the warranty extension through 8 years / unlimited miles (which, in turn, will moot the issue of reimbursement for that period). Class Member Stovall's objection should be overruled.

[9] Plaintiff addresses the sole objection concerning Plaintiff's fee request – that of objector Caren Krahulik – below at Section III, *infra*, "Plaintiff's Fee Request Should be Granted."

In reviewing and ultimately rejecting these objections, the focus must be on how Class Members were positioned *before the Settlement*; not after. Of course, the warranty extension could always be longer – 5 years, 8 years, 15 years -- and perhaps other manufacturers do offer longer warranties. But given the strengths and weaknesses of the case, a total warranty of 8 years with no mileage limitation is surely reasonable, fair, and adequate. Furthermore, there is no rule requiring that all class members benefit to the same extent. Indeed, there are many ways in which class members will benefit from the Settlement. As an example, those who are eligible for reimbursement will obtain more relief than those who have never suffered an eligible out-of-pocket expense; but that fact does not make the Settlement unreasonable or inadequate.

Additionally, four (4) Settlement Class Members who purchased extended warranty plans for their respective vehicles object on the basis that they purchased extensions for their Settlement Class Vehicles' warranties and desire that their Settlement Class Vehicles' Powertrain Warranties are extended by additional years. One such objector purchased a 2-year / 20,000 mile extension through 7 years or 80,000 miles. *See* Revised Compendium at 15-16. Another objector purchased a 2-year / 5,000 mile extension through 7 years or 65,000 miles, *see id.* at 29-30; while another purchased a 1-year extension through 6 years total, *see id.* at 6-7. *See also id.* at 17. These objectors argue that the settlement should be modified to stack the proposed 3-year extension on top of the extended warranties they previously purchased.

Furthermore, the proposed warranty extension provides a not-insignificant benefit to the objectors who had purchased warranty extensions: an *additional* 1-year extension of their Settlement Class Vehicles' Powertrain Warranties (as they pertain to Engine Misfire)*, as well as* the elimination of the mileage cap. As an example, a vehicle driven 12,000 miles per year will accumulate 96,000 miles in 8 years – 16,000 and 31,000 miles beyond the mileage limitations by which the objectors' current extended warranties are capped. Thus, the proposed warranty extension through 8 years / *unlimited miles* still provides a significant benefit to Settlement Class Members who have already purchased extended warranties. More importantly, the proposed extension provides ample time for the defect to manifest *and* for AHM to remedy the condition, free-of-charge, under warranty – a primary goal of the lawsuit.

More importantly, a settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (settlement amounted to only "a fraction of the potential recovery")). "Compromise is inherent and necessary in the settlement process. Thus, even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Wershba v. Apple Computer,* 91 Cal. App. 4th 224, 250 (6th Dist. 2001) (citing *Rebney v. Wells Fargo Bank* 220 Cal. App. 3d 1117, 1139 (1st Dist. 1990) (settlements found to be fair and reasonable even though monetary relief was "relatively paltry") (quotations and internal marks omitted). Where settlement class members are "close to being made whole," it is appropriate to overrule objections and approve the settlement. *Id.* at 251 (citations omitted).

Other objectors express concern that the Settlement does not extend to include oil consumption issues they report experiencing with their Class Vehicles, for example: "I would like to request that repair costs associated with [DTC] P3497 be added to the reimbursable expenses for this engine defect." Revised Compendium at 27. One such objector proposes that "the [Settlement] include a change to the engine replacement criteria and that is 'replace the engine when the engine oil burn/consumption rate is approximately one quart or more per 2,000 miles of travel'." *Id.* at 37; *see also id.* at 4-5. These objectors, however, have not been privy to the discovery undertaken by Plaintiff; nor do they appear to appreciate the difficulty of certifying a class defined in part by an "approximate[]" rate of oil consumption or of pursuing a claim premised, in part, on the existence a standard for oil consumption.

The risks associated with maintaining a class action through trial are a relevant criterion in evaluating the reasonableness of a proposed settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Here, there were a number of obstacles facing Plaintiff if this action did not settle, and those obstacles remain. Sept. Berk Decl. (Dkt. 75-1) ¶¶ 8-13. During the course of this litigation, Class Counsel consulted with three automotive experts, each of which refused to opine on a standard rate of oil consumption for consumer automobiles. March Berk Decl. ¶ 5. It is these

concerns, as well as the confirmatory discovery produced by AHM, that led Class Counsel to ultimately dismiss (without prejudice) Plaintiff Soto's claims concerning oil consumption in his 4-cylinder vehicle and to amend Plaintiff Eagen's allegations concerning oil consumption in his 6-cylinder Settlement Class Vehicle. Because there were sound reasons for agreeing to a settlement that did not concern oil consumption, these objections should be overruled.

2. Objections Concerning Special Damages Should Be Overruled.

Three objectors seek amendment of the Settlement to provide for special damages they have suffered or anticipate suffering. "The settlement … does not cover the significant non-repair costs that occur both in direct payments ([e.g.], towing) and time …" Revised Compendium at 38. "I … was forced to sell [my Class Vehicle] … [and] was at a loss of $13,051 to purchase a new car …. It is my strong opinion that Honda should reimburse me for the loss I suffered from the sale …." *Id*. at 40. "I believe the [S]ettlement … should provide for reimbursement of not only engine repair costs, but also of any other costs incurred directly as a result of the misfire issue[,] [including] towing costs[,] … additional gas[,] and toll costs …." *Id.* at 18.

Class Counsel sympathizes with Class Members who have incurred such expenses as a result of the defect. However, the identification, valuation, and proof of such special damages for potentially tens of thousands of Class Members with myriad individual facts is likely well beyond the scope of the class action mechanism. Class Members who conclude that their special damages outweigh the benefits of the Settlement and justify the risk and expense of individual litigation opposite AHM had the option to exclude themselves from the Settlement and preserve all of their claims. While it is understandable that these objectors want to both enjoy the relatively certain benefits of the Settlement *and* preserve their individual claims, a class action settlement necessarily necessitates a compromise. As such, these objections should be overruled.

3. Concerns About Personal Injury Claims Are Unfounded.

Two class members – one objector and one class member who approves of the settlement – have inquired with Class Counsel about whether the Settlement Agreement releases personal injury claims stemming from the operation of a Class Vehicle. Objector Nicolas Procos

"approve[s] of the proposed extended warranty," but "understand[s] that [he is] not giving up [his] right to pursue additional claims against [AHM] in the event that [Engine Misfire] … re-occur[s] [resulting in injury] to passengers in [his] [Class Vehicle] or any other vehicle." Revised Compendium at 38. Class Member Michael Berman affirmatively expressed his "wish to participate in the class and obtain the warranty extension," but "would not release potential personal injury claims … from alleged [Engine Misfire]." *Id.* at 10. Messrs. Procos and Berman's have a valid concern, but the Settlement Agreement (Dkt. 73-1) should allay their fears.

The Settlement provides for class relief "in exchange for the dismissal of the Litigation, with prejudice, of the Released Claims." *Id.* at 10. The Released Claims consist of

> any and all claims, actions, causes of action, rights, demands, suits, debts, liens, contracts, agreements, offsets or liabilities, including but not limited to tort claims, claims for breach of contract, breach of the duty of good faith and fair dealing, breach of statutory duties, actual or constructive fraud, misrepresentations, fraudulent inducement, statutory and consumer fraud, breach of fiduciary duty, unfair business or trade practices, restitution, rescission, compensatory and punitive damages, injunctive or declaratory relief, attorneys' fees, interests, costs, penalties and any other claims, whether known or unknown, alleged or not alleged in the Litigation, suspected or unsuspected, contingent or matured, under federal, state or local law, which the Named Plaintiffs and/or any Settlement Class Member had, have or may in the future have with respect to any conduct, act, omissions, facts, matters, transactions or oral or written statements or occurrences prior to the Effective Date of this Settlement Agreement *relating to or arising out of Engine Misfire, including causes or symptoms thereof, as asserted in the Litigation by the Named Plaintiffs and/or Settlement Class Members* including, without limitation, causes of action for violations of Cal. Bus. & Prof. Code § 17200, *et seq.*, Cal. Civ. Code § 1750, *et seq*. and similar claims under the statutes and common law of other states as well as claims for unjust enrichment and breach of warranty, *subject to the exclusions in Section V , Paragraph D*.

Id. at 7-8 (*emphases added*). Personal injury claims are carved out of the release in two ways.

First, the Released Claims are limited to those "relating to or arising out of Engine Misfire, including causes or symptoms thereof, as asserted in the Litigation by the Named Plaintiffs and/or Settlement Class Members …." *Id.* Never did Plaintiff Eagen or (now dismissed) Plaintiff Soto

allege facts or assert claims concerning personal injury of any sort. *See* Compl. (Dkt. 1); 1st Am. Compl. (Dkt. 11); 2d Am. Compl. (Dkt. 81). Second and more clear-cut, the Released Claims are subject to the express exclusions of Section V, Paragraph D, Settlement Agreement (Dkt. 73-1) at 20-21, including "claims for personal injuries" and "claims of damage to property alleged to have been caused by Engine Misfire (except for claims of damage to any Settlement Class Vehicle itself …[)]." Class Member who participate in the Settlement reserve all personal injury claims.

To the extent the Court deems these Class Members' concerns about the release of personal injury claims to constitute objections, they should be overruled.

4. Class Member Krahulik's Objections Should Be Overruled.

Ms. Caren Krahulik is the only Class Member to object to (a) the procedural requirements to object, opt-out, or claim reimbursement, (b) the fact that the Class Notice did not "inform the [C]lass [M]embers as to the total amount of alleged damages" and (c) Plaintiff's request for attorneys' fees.[10] [11] The Court should overrule each of Ms. Krahulik's objections.

a. Procedural Requirements to Object, Opt-Out, or Claim Reimbursement

Ms. Krahulik takes issue with the procedural requirements for objecting and opting-outs, and, similarly, for claiming reimbursement. For each reimbursement claim, the Class Notice requires that Class Members submit their Class Vehicle's Vehicle Identification Number ("VIN"), its approximate date of purchase, and with each claims for reimbursement, "a copy of a repair invoice or receipt (or other documentation) …." Class Notice (Dkt. 93-4) at 5. She characterizes these requirements as "too onerous" and as "inappropriately discourag[ing] class members from

[10] Plaintiff addresses the sole objection concerning Plaintiff's fee request – that of objector Krahulik – below at Section III, *infra*, "Plaintiff's Fee Request Should be Granted."

[11] Ms. Krahulik has states that she "[does] not intend to appear that the [fairness] hearing," yet challenges the Court's ability to condition appeal by an objector on attendance at the hearing. Revised Compendium at 25. The rule is well established, though, as necessary to preserve the manageability of class actions. *See Devlin v. Scardelleti*, 536 U.S. 1, 11 (2002) ("[t]he power [of non-named class members] to appeal is limited to those … who have objected during the fairness hearing. This limits the class of potential appellants considerably[,] [and] [a]s the longstanding practice of allowing nonnamed class members to object at the fairness hearing demonstrates, the burden of considering the claims of this subset of class members is not onerous.").

exercising [their] rights." Revised Compendium at 23. She incorrectly states that the "the [Class] [N]otice states that anyone who wishes to opt[-]out or object must provide detailed information such as the purchase date …." (Instead, the Class Notice requires only that objectors or opt-outs provide the "*approximate date* of purchase." Class Notice (Dkt. 93-4) at 6-7, 8-9 (*emphasis added*).) She reasons that this might impose a hardship on Class Members who "[can]not remember the purchase date" and prior owners of Class Vehicles who incurred expenses eligible for reimbursement, but no longer have access to their Class Vehicle to find its VIN; and she suggests that the Court order the revision and re-distribution of the Class Notice. *Id.*

Class Counsel are concerned with the ability of Class Members to obtain benefits or otherwise exercise their rights to opt-out and object without unnecessary burden. The Settlement, however, imposes reasonable and minimal burdens on Class Members seeking to object or opt-out – nothing more. Ms. Krahulik's letter demonstrates the requirements are easily met.

Furthermore, in the interest of the integrity of the class action mechanism and claims process, it is reasonable to limit settlement to those class members who can provide proof that they are eligible for settlement relief. *See* 3 David G. Leitch, Gary L. Sasso, and D. Matthew Allen, Successful Partnering Between Inside and Outside Counsel § 60A:47 (noting it is "entirely reasonable to require individual class members to come forward with proof of eligibility to share in the settlement akin to what they would have had to produce in a trial on their claims"). Without requiring class members to provide proof of eligibility, the possibility of fraud increases.[12]

[12] Ms. Krahulik also argues that AHM should identify all repairs expenditures eligible for reimbursement by querying (*or subpoenaing*) all Honda dealers and then make direct reimbursement without requiring Class Members to affirmatively make claims. Revised Compendium at 24. Undoubtedly, having AHM send reimbursement checks to every class member with eligible out-of-pocket expenses would have enhanced an already valuable benefit to many Class Members; *but not all*. It would confer no benefit on Class Members who had eligible repairs completed by independent or third-party mechanics; nor would direct payment benefit those whose repair work, for whatever reason, was not coded with the qualifying DTCs.

Nevertheless, Plaintiff sought direct mail reimbursement during numerous settlement discussions. March Berk Decl. ¶ 6. In the end, however, securing a strong settlement with modest compromises was worth more than risking impasse concerning this issue.

Similarly, it is reasonable to impose on both objectors and opt-outs simple requests, such as verifying the approximate date of purchase and their Class Vehicle's VIN, to verify that they are actually Settlement Class Members. This is important with respect to objectors so that non-parties with interests adverse to the Settlement Class do not delay final approval and relief that the Class Members support. In the same vein, it is important to verify the identities of individuals submitting exclusion requests, since the submission of an exclusion request will have the very real consequence of depriving the owner or lessee of a Class Vehicle of the benefits of the Settlement. Permitting opt-outs by telephone or e-mail, as Ms. Krahulik suggests, can be far more difficult to authenticate and more susceptible to fraud.

Objecting (and potentially) delaying relief to over one million consumers should not come without some restrictions. Similarly, the distribution of reimbursement should be accompanied by some check to verify identify and eligibility. The Settlement's procedural requirements strike balances that are reasonable and should be affirmed. Thus, this objection should be overruled.

b. Notice Regarding the Value of the Settlement

Second, Ms. Krahulik takes issue with the fact that the "[Class] [N]otice fail[ed] to inform the [C]lass [M]embers [of] the total amount of alleged damages," arguing that, as a result, "it [was] impossible to determine whether the [Settlement was] fair." Revised Compendium at 24. While it is true that the Class Notice did not quantify the value of the settlement, Ms. Krahulik's suggestion is disingenuous. While the total value of the Settlement is relevant to the determination of whether Plaintiffs' fee request is reasonable, a portion of the value to many *individual* Settlement Class Member was already known to them: the amount of out-of-pocket expenses they incurred. Furthermore, all Class Members had they opportunity to learn about the projected value of the proposed warranty extension ($39.9 million) by accessing Plaintiff's Preliminary Approval Motion and Memorandum in support thereof, which was publicly available on the Settlement's administrative website – www.enginemisfiresettlement.com – of January 17, 2014, *see* March Berk Decl. ¶ 4, more than five (5) weeks before objections and opt-outs were due on February 24, 2014. Furthermore, the Class Notice encouraged Class Members seeking more

information about the scope, benefits, and mechanics of the Settlement to contact Class Counsel by letter or telephone, which hundreds did. *Id.* ¶ 3.

III. PLAINTIFF'S FEE REQUEST SHOULD BE GRANTED

A. The Class Members' Positive Reaction Supports the Fee Requested

As discussed above, the small numbers of objections (23) and opt-outs (210), and the large number of claims (7,164), suggest that the Settlement Class overwhelmingly supports the settlement. *See Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004).

B. Ms. Krahulik's Objection to Plaintiff's Fee Request Lacks Merit

Class Counsel has moved for an award of attorneys' fees and expenses to be paid separate and apart from the benefits to Class Members. The Parties negotiated Class Counsel's fees and expenses only after agreeing on all other aspects of the settlement. Sept. Berk Decl. (Dkt. 75-1) ¶ 19. Class Counsel agreed to seek, and AHM agreed not to contest, an award of attorneys' fees and expenses of no more than $800,000 and an incentive award for Plaintiff Eagen of $1,000. Settlement Agreement (Dkt. 73-1) at 3-4, 19-20. Approval of the settlement is not contingent upon any award. *Id.*

Nevertheless, objector Krahulik argues that the fee request is "excessive" in two ways. Revised Compendium at 24-25. First, she contends that the proposed warranty extension is "a coupon-type benefit," simply because it "is not a cash benefit." *Id.* at 24. Ms. Krahulik asserts that a Class Member can derive value from the warranty extension only if he or she "knows about the paper benefit[] and remembers to use it." *Id.* As a result, Ms. Krahulik reasons, the Court should not consider the estimated extended warranty costs to Honda ($39.9 million, *see* Exh. D. to Jan. Berk Decl. (Dkt. 98-3)) as part of the class fund. Instead, Ms. Krahulik continues, Plaintiffs' fee request should be weighed against only the value of "the actual redemptions" *i.e.*, "the value of the actual repairs that are provided free of charge during the extended warranty period" and the "cash benefits" of reimbursements for past out-of-pocket expenses, which, she supposes, are unlikely to add up to much. *Id.*

As an initial matter, Ms. Krahulik is flatly wrong in her assertion that extended warranties are coupons. They are not. *The defining characteristic of a coupon is that it can only be used in*

connection with an additional purchase. The warranty extension here requires no additional purchase and has a quantifiable value. Second, Ms. Krahulik is simply incorrect about the potential value of reimbursements. ("[T]he proposed $800,000 fee is likely to far exceed 25% of the cash reimbursements." *Id.*) Instead, as of March 7, 2014, the Settlement Administrator had received 7,164 claims for reimbursement, of which it had reviewed 789 and fully or partially approved some 754 – 95.6% – authorizing reimbursements totaling $221,872.04 (an average per claim of $294.26). At this, rate, it is likely that the total reimbursements of out-of-pocket expenses will eclipse $2 million[13], particularly if the Class Members continue to submit claims ahead of the April 10th deadline. And while the $800,000 fee might exceed 25% of the total reimbursements, the proper sum against which to assess the reasonableness of the fees is the total of the reimbursements and the value of the extended warranty.

However, the majority of the value to the Settlement Class is in the proposed warranty extension. Although it appears that (1) Ms. Krahulik's understanding of a coupon benefit is misinformed, *see In re. HP Inkjet Printer Litig.*, 716 F.3d 1173, 1177-79 (9th Cir. 2013), and (2) that she misunderstands the nature of the $39.9 million figure, her conclusion is ultimately correct: the Court should assess the value of the Settlement as the sum of (a) the reimbursements provided to the Settlement Class Members for Out-of-Pocket Expenses and (b) the "value of the … repairs … provided free of charge during the extended warranty."

It seems that Ms. Krahulik might be under the impression that $39.9 million is the collective 'retail price' of the warranty extension. Instead, ***$39.9 million represents AHM's best projection of the additional costs it will incur making repairs, free of charge, pursuant to the proposed warranty extension.*** *See* Exh. D. to Jan. Berk Decl. (Dkt. 98-3). Even if $39.9 million represents AHM's "worst case scenario" and the costs of the repairs actually performed total just one-quarter that (which there is no reason to suspect will be the case) – just $10 million – Plaintiff's fee request of $800,000 would constitute only 8% of the fund.

[13] If the Settlement Administrator continues to fully or partially approve all 7,164 claims received thus far at a rate of 95.6%, it will approve 6,849 claims for full or partial reimbursement. At an average reimbursement of $294.26, the total value likely to be reimbursed is $2,015,386.74.

Under both the lodestar and percentage-of-the-fund analyses, Plaintiff's fee request is extraordinarily reasonable given Class Counsel's significant investment and the substantial, tangible value that the Settlement represents to the Settlement Class.

IV. CONCLUSION

For the reasons stated herein Plaintiff respectfully requests that the Court enter the [Proposed] Final Approval Order and Judgment (Dkt. 93-2) (i) granting final approval of the proposed settlement, as set forth in the Settlement Agreement, as fair, reasonable, and adequate pursuant to Fed. R. Civ. P. 23; (ii) finally certifying the Settlement Class; (iii) appointing, for settlement purposes only, Named Plaintiff Vince Eagen and Class Counsel as representative of and attorneys for the Settlement Class; (iv) confirming the ongoing appointing, for settlement purposes only, of American Honda Motor Co., Inc., as Settlement Administrator; (v) finding that the Notice was the best practicable under the circumstances and satisfied all Constitutional and other requirements; (vi) confirming Settlement Class Members who have timely submitted requests for exclusion; (vii) dismissing the action pursuant to the terms and conditions of the Settlement Agreement; (viii) retaining jurisdiction over the enforcement and implementation of the Settlement Agreement and any amendments thereto; (ix) awarding Plaintiff an Incentive Award of $1,000 to compensate him for his time and effort on behalf of the Settlement Class and (x) awarding Class Counsel a Class Counsel Fees & Expenses Award of $800,000.

DATE: March 7, 2014

BERK LAW PLLC
Attorneys for Individual and Representative Plaintiff
VINCE EAGEN

By: /s/ Matthew J. Bonness

MATTHEW J. BONNESS, CSB #229226
Email: matt@berklawdc.com
STEVEN N. BERK, *Admitted P.H.V.*
Email: steven@berklawdc.com
BERK LAW PLLC
2002 Massachusetts Ave., NW, Suite 100
Washington, District of Columbia 20036
Telephone: (202) 232-7550
Facsimile: (202) 232-7556

CERTIFICATE OF SERVICE

I, Matthew J. Bonness, hereby certify that on March 7, 2014, I electronically filed the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT & AWARD OF ATTORNEYS' FEES & EXPENSES** with the Clerk of the Court using the Court's CM/ECF system which will send notification of such filing to the following:

Michael L. Mallow, CSB #188745
Email: mmallow@loeb.com
Denise A. Smith-Mars, CSB # 215057
Email: dmars@loeb.com
Michael B. Shortnacy, CSB #277035
Email: mshortnacy@loeb.com
LOEB & LOEB LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, California 90067
Telephone: (310) 282-2000
Facsimile: (310) 282-2200

Attorneys for Defendant

DATE: March 7, 2014

BERK LAW PLLC

By: /s/ Matthew J. Bonness
Matthew J. Bonness, CSB #229226
Email: matt@berklawdc.com
2002 Massachusetts Avenue, NW, Suite 100
Washington, DC 20036
Telephone: (202) 232-7550
Facsimile: (202) 232-7556

Attorneys for Individual and Representative Plaintiff Vince Eagen