UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERI CALLEN, *et al.,* on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DAIMLER AG and MERCEDES-BENZ USA, LLC,

Defendants.

CASE NO: 1:19-CV-01411-TWT

Judge Thomas W. Thrash, Jr.

ORDER

(1) GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT (DKT. NO. 89)

AND

(2) GRANTING IN PART PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES (DKT. NO. 82)

This matter is before the Court on Plaintiffs' Motion for Final Approval of Class Settlement (Dkt. No. 89) and Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Service Awards to the Class Representatives (Dkt. No. 82). Plaintiffs, individually and on behalf of the proposed Settlement Class, and Defendants entered into a Class Action Settlement Agreement and Release ("Settlement") that, if approved, resolves this litigation (Dkt. No. 77-1).

The proposed Settlement Class is defined as a nationwide class of all current owners, former owners, current lessees, and former lessees of Subject Vehicles who purchased or leased in the United States, except those individuals who timely and properly elected to opt out or who are otherwise excluded pursuant to the terms of the Settlement. Subject Vehicles are defined as any 212 E-Class Mercedes-Benz originally equipped with Burl Walnut Trim (the "Subject Vehicles").

On March 15, 2022, the Court ordered notice directed to the Class and scheduled a Fairness Hearing for August 12. 2022 (Dkt. No. 79). (The Fairness Hearing was subsequently re-scheduled for November 7, 2022; *see* Notice dated June 6, 2022). Notice was sent to the Class *via* the Court-approved notice program, and the Class had an opportunity to respond. As of September 26, 2022, 6,929 claims were submitted for reimbursement past repair expenses or to claim a future repair for certain past repairs that were previously requested but denied (*see* Dkt.

No. 89-1 (Azari Declaration), ¶ 27). The number of claims for reimbursement of past repair expenses is likely to increase as Class Members may still submit claim forms for repairs occurring in the period between the Notice Date and the Effective Date, within 60 days of the date of repair (Dkt. No. 77-1, § 9.4). In addition, only 10 Class Members submitted timely and potentially valid opt-outs, and only two Class Members objected (Dkt. No. 89-1 (Azari Declaration), ¶ 26; Dkt. Nos. 87-88). And all the Class Members who currently own or lease the Class Vehicles are entitled to the benefits of the extended and enhanced forward looking warranty created by the Settlement (Dkt. No. 77-1, § 4.3).

Having considered the Plaintiffs' motions and the Settlement that are unopposed by the Defendants, together with all exhibits and attachments thereto, the record in this matter, and the briefs and arguments of counsel, and good cause appearing, the Court **GRANTS** Plaintiffs' Motion for Final Approval of Class Settlement (Dkt. No. 89) and **GRANTS IN PART** Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Service Awards to the Class Representatives (Dkt. No. 82) for the reasons set forth below.

I. CLASS CERTIFICATION AND SETTLEMENT APPROVAL

When presented with a motion for final approval of a class action settlement, a court first evaluates whether certification of a settlement class is appropriate under

Federal Rule of Civil Procedure 23(a) and (b). Class certification is proper when the proposed class meets all the requirements of Rule 23(a) and one or more subsections of Rule 23(b). Rule 23(a) requires: (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1)-(4). Rule 23(b)(3) requires that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) "a class action (be) superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3).

The Court analyzed these factors in its Preliminary Approval Order (Dkt. No. 79) and finds no reason to disturb its earlier conclusions. Rule 23(a)(1) is satisfied because the Class consists of over 605,027 Class Members and joinder of all Class Members is impracticable (Dkt. No. 89-1 (Azari Declaration), ¶¶ 18). Rule 23(a)(2) is satisfied because there are common issues of law and fact—the alleged common defect across Class Vehicles caused the Symptoms Alleged and Defendants' alleged omissions regarding their 212 E-Class Mercedes-Benz originally equipped with Burl Walnut Trim. Rule 23(a)(3) is satisfied because the Class Representatives' claims are typical of those of Settlement Class Members. Rule 23(a)(4) is satisfied because the Class Representatives and Class Counsel fairly and adequately protected the interests of the Settlement Class. Rule 23(b)(3) is satisfied because the questions

of law or fact common to the Settlement Class predominate over individual questions, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

Because the proposed Settlement satisfies Rules 23(a) and (b), the Court must next determine if the proposal is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2). In preliminarily approving the Settlement, the Court analyzed Rule 23(e)(2) and concluded that it would be "likely be able to approve" the Settlement (Dkt. No. 79, at ¶4). Each prong of Rule 23(e)(2) is satisfied. Rule 23(e)(2)(A) is satisfied because the Plaintiffs and Class Counsel vigorously represented the Class. Rule 23(e)(2)(B) is satisfied because the Settlement was negotiated at arm's length by informed counsel acting in the best interests of their respective clients, and with the close participation of a well-respected mediator. Rule 23(e)(2)(C) is satisfied because (a) the relief provided for the Class is outstanding considering the costs, risk, and delay of trial and appeal; (b) direct notice to Class Members was effective; (c) Defendants will pay Class Counsel's attorneys' fees, expenses, and Class Representative Service Awards (to the extent they are awarded as permitted by law) separately, without any reduction of Class Member recoveries; and (d) there are no undisclosed side agreements. Rule23(e)(2)(D) is satisfied because the Settlement treats Class Members equitably by providing the same durational period

of coverage for every Class Vehicle and the same sliding scale of reimbursement or coverage percentage based on the Vehicle's age.

Further, the Court finds that notice was given in accordance with the Preliminary Approval Order (Dkt. No. 79), and that the form and content of that Notice, and the procedures for dissemination thereof, afforded adequate protections to Class Members and satisfy the requirements of Rule 23(e) and due process and constitute the best notice practicable under the circumstances.

On November 7, 2022, the Court held a hearing to consider the fairness, reasonableness, and adequacy of the proposed Settlement, and to consider each of the two objections to the Settlement (Dkt. Nos. 87 and 88). Although these objectors understandably feel like they have been misled by the Defendants, their objections should be overruled. First, it appears that Ms. Dupuy is not a Class Member. Ms. Dupuy's (Dkt. 87) VIN does not reflect that her vehicle is one of the Subject Vehicles, so she is not a Class Member, which is why her vehicle is not included in the Settlement. Her rights are therefore unaffected by the Settlement or its Final Approval and she lacks standing to object. Second, Mr. Ehrlich did not provide his VIN number with his objection, so the Settlement Administrator was unable to confirm whether he is a Class Member. Moreover, by not providing his VIN, he did not comply with the requirements to object to the Settlement, which means his

objection should be disregarded (as his standing is unknown). *See* Dkt. No. 89-1 (Azari Declaration), at Attachment 3 (describing requirements), p. 8; Settlement § 8.13 (same). Even if that were not the case, Mr. Ehrlich's only objection is that the Settlement was not conducted as a recall and repaint at 100% coverage for his 2012 E-550. *See* Dkt. 88. Given the risks of litigation and the fact that every settlement is the product of compromise, it was not realistic to obtain 100% coverage for 10 year old vehicles, and the fact that the Settlement does not provide that remedy does not make it unfair, inadequate, or unreasonable. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."). Accordingly, the Class Member objections are **OVERRULED**.

At their request, the individuals who sought exclusion from the Settlement Class on a timely and proper basis are excluded from the Settlement Class.

The settlement agreement is not an admission by Defendants or by any other released party, nor is this order a finding of the validity of any allegations or of any wrongdoing by Defendants or any released party. Neither this order, the settlement, nor any document referred to herein, nor any action taken to carry out the settlement, may be construed as, or may be used as, an admission of any fault, wrongdoing,

omission, concession, or liability whatsoever by or against the released parties.

II. THE REQUESTED ATTORNEYS' FEES AND EXPENSES

Class Counsel requests an award of $4,456,987.98 in attorneys' fees and $43,012.02 in expenses, as well as service awards in the amount of $65,000 total (Dkt. No. 82). Defendants agreed to pay these amounts on top of, not out of, Class Members' recoveries (Dkt. No. 77-1, §§ 5.3, 5.4). In this Circuit, courts evaluating attorneys' fees in a class action look first to the benefit obtained on behalf of class members. *See Lunsford v. Woodforest Nat'l Bank*, 2014 WL 12740375, at *11 (N.D. Ga. May 19, 2014) ("It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained.") (citing *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991)). Here, the benefits to Class Members take two forms: reimbursement for past payments and a forward-looking extended and enhanced warranty.

As of September 26, 2022, 6,929 claims were submitted for reimbursement past repair expenses or to claim a future repair for certain past repairs that were previously requested but denied (Dkt. No. 89-1 (Azari Declaration), ¶ 27). The reimbursement requests will likely increase as claims are submitted for repairs that occurred between the Notice Date and the Effective Date (Dkt. No. 77-1, § 9.4).

Lee M. Bowron, an experienced actuary with Kerper and Bowron LLC, analyzed the Settlement and calculated the range of the economic impact of the Settlement for Class Members (Dkt. No. 82-2, ¶¶3-7 (Bowron Declaration)). Mr. Bowron estimated the value of the future-repairs/service contract components of the Settlement at between $34.5 and $51.7 million. (*Id.*, at ¶¶8-26). The hours expended by Class Counsel were substantial, but they were also reasonable and necessary, with 4959.1 attorney hours and 754 non-attorney hours spent. *See* Dkt. No. 82-1, at ¶ 9.

As noted above, Class Counsel requests the Court enter an order granting attorneys' fees for their work in the amount of $4,456,987.98 in total, payable by Defendants, for creating the Settlement valued at between $34.5 million and $51.7 million. In this case, the attorneys' fees requested by Class Counsel do not reduce the benefits available to the Class because they are offered in addition to, and separate and apart from, the benefits to the Class. Dkt. No. 77-1 at pp. 14-15. Additionally, Class Counsel seeks an Order approving payment by Defendants for their expenses, in the total amount of $43,012.02. *See* Dkt. No. 82-1, ¶¶ 9, 12-14. Thus, the total payment requested is equal to $4,500,000 for payment of Class Counsel's attorney fees and its expenses in prosecuting this action.

"To determine the fee percentage from a constructive fund, courts add the requested fee and expenses to the denominator." *See Amin v. Mercedes-Benz USA,*

LLC, No. 1:17-cv-01701-AT, 2020 U.S. Dist. LEXIS 167395, *14 (N.D. Ga. Sep. 11, 2020); *In re: Arby's Rest. Grp., Inc. Data Sec. Litig.*, No. 1:17-CV-1035-WMR, 2019 WL 2720818 (N.D. Ga. June 6, 2019); *In re: Domestic Air Transp. Antitrust Litig*., 148 F.R.D. 297, 354 (N.D. Ga. 1993); Manual for Complex Litigation (Fourth) § 21.7 (2004). Adding the fee and expense request ($4.5M) to the lowest estimate of the Settlement value ($34.5 million) results in a total constructive fund value of $39M. The requested fee is, at most, 13% of the of the constructive fund.

This fee percentage falls well below the "average percentage fee award in this Circuit" which is "now at or above 30%, as 'courts within this Circuit have routinely awarded attorneys' fees of *33 percent or more* of the gross settlement fund.'" *Cabot E. Broward 2 LLC v. Cabot*, 2018 WL 5905415, at *7 (S.D. Fla. Nov. 9, 2018) (quoting *Fernandez v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2017 WL 7798110, at *4 (S.D. Fla. Dec. 18, 2017)).

Class Counsel's fee request is reasonable under the *Johnson* and *Camden I* factors. *See Camden I*, 946 F.2d at 775; *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). Specifically: (a) Class Counsel spent extensive time and labor litigating the case; (b) the case presented several novel and difficult questions, particularly those of a highly technical nature; (c) the case required a high level of skill and experience; (d) the requested fee is less than the

customary percentage in contingent cases; (e) the case is being prosecuted on a purely contingent-fee basis; (f) the Settlement provides outstanding benefits; (g) the fee award is in line with—if not substantially lower than—awards in other class actions; and (h) Class Counsel faced a high degree of risk of no recovery. Class Counsel's request for $4,456,987.98 in fees is hereby **GRANTED**.

Class Counsel's request for expenses of $43,012.02 is appropriate and is granted "as a matter of course" in common fund cases. *Gonzalez v. TCR Sports Broad. Holding, LLP*, 2019 WL 2249941, at *6 (S.D. Fla. May 24, 2019). Class Counsel submitted attorney declarations detailing their expenses, which totaled $43,012.02 (Dkt. No. 82-1, at ¶ 13). Class Counsel's request for $43,012.02 in expenses is hereby **GRANTED**.

III. THE REQUESTED SERVICE AWARDS TO CLASS REPRESENTATIVES

Finally, Plaintiffs request a $65,000 aggregate service award for the 13 class representatives, with individual awards equaling $5000. In prior times, Courts "routinely approve(d) service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class." *In re: Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT, 2020 U.S. Dist. LEXIS 118209, *174, 2020 WL 256132, *40 (N.D. Ga. Mar. 17, 2020). However,

in 2020 the Eleventh Circuit in *Johnson v. NPAS Solutions, Inc*. rejected the practice of awarding incentive awards to class representative. 975 F.3d 1244 (11th Cir. 2020). Recently, *en banc* review by the Eleventh Circuit was denied, albeit with four dissenters. *See* 43 F.4th 1138 (11th Cir. Aug. 3, 2022). It is also expected that plaintiffs in that case will file a petition to the Supreme Court of the United States to grant a *writ of certiorari*. As such the Court cannot approve the requested service awards, which are, therefore **DENIED WITHOUT PREJUDICE.** However, the Court **RESERVES JURISDICTION** over the requested service awards, subject to any further appeals until such time the law on class representative service awards is settled.

IV. CONCLUSION

Accordingly, the Court hereby orders, adjudges, finds, and decrees as follows:

1. The Court hereby **CERTIFIES** the Settlement Class and **GRANTS** the Motion for Final Approval of the Settlement. The Court fully and finally approves the Settlement in the form contemplated by the Settlement Agreement (Dkt. No. 70-1) and finds its terms to be fair, reasonable and adequate within the meaning of Fed. R. Civ. P. 23. The Court directs the consummation of the Settlement pursuant to the terms and conditions of the Settlement Agreement.

2. The Court **CONFIRMS** the appointment of W. Lewis Garrison, Jr., and Taylor C. Bartlett of Heninger Garrison Davis, LLC and James F. McDonough, III of Rozier Hardt McDonough PLLC as Class Counsel.

3. The Court **CONFIRMS** the appointment of the Settlement Class Representatives named in the Settlement Agreement.

4. The Court **GRANTS** Class Counsel's request for attorneys' fees and costs, and **AWARDS** Class Counsel $4,456,987.98 in attorneys' fees and $43,012.02 in expenses to be paid by Defendants separate from the relief available to the Class, in the time and manner prescribed by the Settlement.

5. The Court **DENIES** the Class Representatives request for an aggregate service award of $65,000 consisting of $5000 to each Class Representative and reserves jurisdiction over the award of Service Awards to the Class Representatives, subject to any further appeals until such time the law on class representative service awards is settled.

6. The Court hereby discharges and releases the Released Claims as to the Released Parties, as those terms are used and defined in the Settlement Agreement.

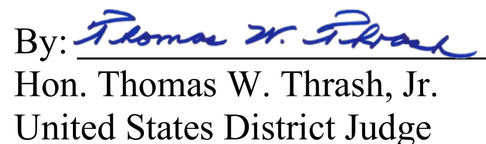
7. The Court hereby permanently bars and enjoins the institution and prosecution by Class Plaintiffs and any Class Member of any other action against

the Released Parties in any court or other forum asserting any of the Released Claims, as those terms are used and defined in the Settlement Agreement.

8. The Court further reserves and retains exclusive and continuing jurisdiction over the Settlement concerning the administration and enforcement of the Settlement Agreement and to effectuate its terms.

A separate judgment consistent with this Order will issue pursuant to Fed. R. Civ. P. 58.

DATED: November 7, 2022

By: 
Hon. Thomas W. Thrash, Jr.
United States District Judge