UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMILY PINON, GARY C. KLEIN, KIM BROWN, JOSHUA FRANKUM, DINEZ WEBSTER, and TODD BRYAN, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **MERCEDES-BENZ USA, LLC, and DAIMLER AG,** **Defendants.**	**CASE NO: 1:18-CV-03984-MHC**

MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 30, 2021, at 9:30 a.m. Settlement Class Counsel, on behalf of a proposed Settlement Class of owners and lessees of Mercedes-Benz vehicles defined in the proposed Settlement Agreement, will move pursuant to Rule 23 of the Federal Rules of Civil Procedure for an Order:

1. Granting final approval of the proposed Settlement;

2. Certifying the Settlement Class;

3. Finding that Notice to the Class was directed in a reasonable manner;

4. Granting Plaintiffs' Motion for Attorneys' Fees and Expenses (Dkt. 92), and reserving jurisdiction over the award of Service Awards to the Class Representatives, subject to the Eleventh Circuit's *en banc* review of its decision in *Johnson v. NPAS Solutions, Inc*, 975 F.3d 1244 (11th Cir. 2020) and any further appeals;

5. Reserving jurisdiction with respect to implementation and enforcement of the terms of the Settlement; and

6. Appointing Plaintiffs as Class Representatives and W. Lewis Garrison, Jr., James F. McDonough, Taylor Bartlett, and Travis Lynch of Heninger Garrison Davis, LLC and Stephen Jackson of Jackson & Tucker, P.C. as Class Counsel.

This motion is based on the supporting memorandum; the declarations

submitted herewith and referenced below; the pleadings and papers on file in this action, including those submitted by Plaintiffs in support of Plaintiffs' Motion for Preliminary Approval, Dkt. 70, Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Class Representative Service Awards, Dkt. 92, and any further papers filed in support of this motion, as well as arguments of counsel and all records on file in this matter.

Any term in this motion that is not specifically defined herein shall take on that meaning ascribed to it in the proposed Settlement Agreement (Dkt. 70-1) and the Motion for Preliminary Approval (Dkt. 70).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, by and through Class Counsel, respectfully request the Court enter an order granting final approval of their proposed class action settlement (the "Settlement") with Defendants Mercedes-Benz USA, LLC, and Daimler AG (jointly "Mercedes") to resolve claims that Class Members' vehicles with Mars Red exterior paint is susceptible to the Symptoms Alleged, including peeling, flaking, bubbling, fading, discoloration, or poor adhesion (the "Alleged 590 Mars Red Paint Defect"). The Settlement provides both relief for past costs—in the form of reimbursements to Class Members who filed claims for past out-of-pocket costs— and covers future costs—by establishing an enhanced forward-looking warranty to cover these issues if and as they arise in the future. Critically, Class Counsel's attorneys' fees and expenses will not reduce any of these benefits: they are to be paid by Mercedes on top of, not out of, Class Members' recoveries.

The notice campaign was robust. Direct notice was mailed to 168,995 Class Members on May 28, 2021. *See* Declaration of Jennifer M. Keough, ¶¶ 10-11, attached ("Keough Decl."). JND, the settlement administrator, fielded over 2,100 calls and 708 emails, and over 11,373 unique users visited the Settlement website and registered 54,908 page views. *Id.* at ¶¶ 18-20, 21-22. By the July 27, 2021, claim

deadline, the Settlement's straightforward claim process resulted in 1,532 Claim Forms to reimburse past repair expenses or to claim a future repair for certain past repairs that were previously requested but denied. *Id.* at ¶ 27. Class Members whose vehicles remain within the Settlement's time-and-mileage limitations do not have to file a claim to receive the forward-looking warranty, the total value of which Plaintiffs' expert valued at between $32 and $56 million.

Class Member reaction to the Settlement is overwhelmingly positive. While 1,532 timely claims were filed—and some 70 thousand Class Members benefit from the protections of the extended and enhanced warranty going forward, a total of only 10 Class Members submitted timely and valid opt-outs.[1] Keough Decl., ¶¶ 23-24, 27. Also, ***only eleven Class Members objected to the Settlement—and those eleven are represented (or appear to be covertly represented) by counsel in the Ponzio action that unsuccessfully moved to intervene in this case.*** Dkts. 96-99. Those objections will be addressed no later than fourteen (14) days prior to the Fairness Hearing. *See* Dkt. 90, p. 11. However, none of them raise serious concerns about the fundamental fairness of the Settlement or warrant denying approval of it.

Plaintiffs and the undersigned submit that this Settlement is fair, reasonable,

[1] Opt-out forms were required to be postmarked by July 27, 2021. Accordingly, opt-outs may still be in transit to JND. Class Counsel will update the Court once a final figure is determined.

and adequate, and an outstanding result for the Class. Plaintiffs request that the Court certify the class for settlement purposes, overrule the objections, grant final approval, and enter judgment so Class Members can obtain relief expeditiously.

II. SETTLEMENT TERMS

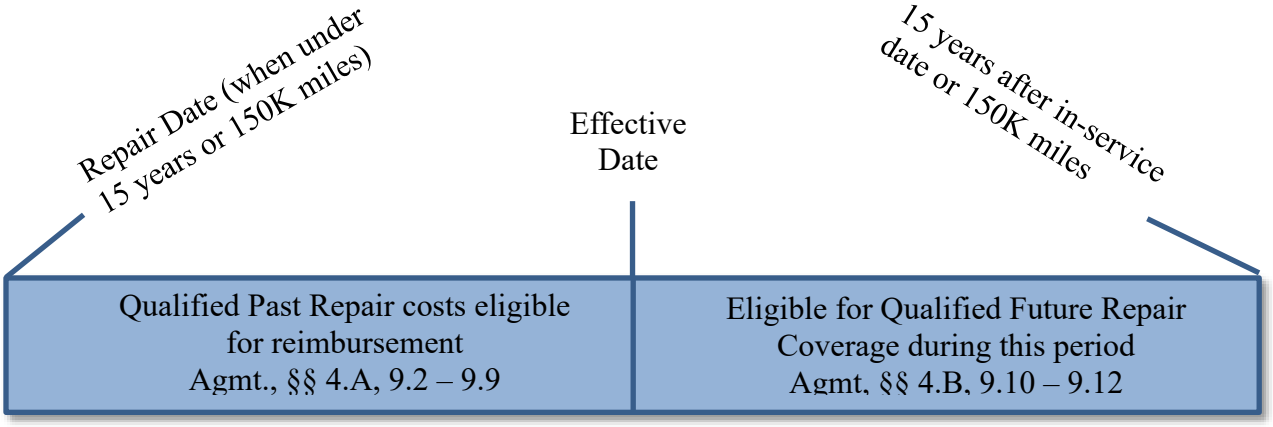
A. THE CLASS DEFINITION

The proposed Class is 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. Subject Vehicles are defined as any Mercedes-Benz vehicle originally painted with 590 Mars Red paint and purchased or leased in the United States. Defendants offered 590 Mars Red paint as an original, exterior color option for the following vehicle types in the United States: C Class (2004-15), CLS (2006-07, 2009, 2014), CLK (2004-09), S Class (2008, 2015, 2017), SL Class (2004-09, 2011-17), GLK Class (2010-15), CL (2005-06, 2013-14), SLS (2014-15), E Class (2005-06, 2010-17), GT (2016-18), G Class (2005, 2011-17), SLC (2017), SLK Class (2005-16), and Maybach 57 (2008).

B. THE SETTLEMENT'S BENEFITS TO CLASS MEMBERS

The Settlement provides two types of benefits to Class Members: (1) reimbursement for qualified past repairs and (2) an enhanced warranty to cover qualified future repairs through Authorized Service Centers.

The Settlement covers qualified repairs that occur during the first 15 years or 150,000 miles of a Class Vehicle's life. Dkt. 70-1, Class Action Settlement Agreement and Release ("Agmt.") § 4. Repairs occurring before the Effective Date are eligible for reimbursement on a sliding scale as past repairs; repairs after the Effective Date are eligible for coverage on a sliding scale as future repairs. *Id.* This structure ensures that every Class Vehicle is covered for the same amount of time or mileage, regardless of where that vehicle currently is in its life cycle.



The percentage of reimbursement or coverage available for a particular repair is on a sliding scale based on the Vehicle age/mileage, as follows:

Vehicle Age Time Period	**Reimbursement/ Coverage Amount**
Category 1: 7 years from in-service date or 100,000 miles (3 year/50,000 mile extension from standard warranty coverage, which is the first of 4 years or 50,000 miles)	100%
Category 2: Class Vehicles not within Category 1 to the earlier of 10 years from in-service date or 150,000 miles (6 year/100,000 miles extension from standard coverage)	50%

Category 3: Class Vehicles not within Category 2 to the earlier of 15 years from in-service date or 150,000 miles (11 year/100,000 miles extension from standard coverage)	25%

Importantly, there is no limit to the number of claims or amount of total money that Mercedes will pay to reimburse qualified past repairs.[2] *Id.* § 5.1.

The Settlement also provides coverage for qualified future repairs, which functions like an extended warranty that covers each Vehicle up to 15 years or 150,000 miles. Class Members whose vehicles remain within the Settlement's time-and-mileage limitations need not submit a claim or other paperwork to receive a qualified future repair. Instead, Class Members can simply bring their Vehicle to an Authorized Service Center, which will determine eligibility and perform the repairs. *Id.* Plaintiffs' expert has estimated that the future-repairs and value of the service contract components of the Settlement has a value between $37.3 and $55.9 million. *See* Declaration of Lee M. Bowron, Kerper and Bowron LLC, Dkt. 92-2, ¶¶ 8-31.

C. ATTORNEYS' FEES WILL BE PAID IN ADDITION TO THE SETTLEMENT AMOUNT AFTER FINAL APPROVAL

Mercedes agreed to pay all attorneys' fees and expenses approved by the

[2] There is a per claim cap, however, on repairs done by an Independent Service Provider (as opposed to an Authorized Service Provider). The reimbursable repair cost of a single repair done by an Independent Service Provider shall not exceed by more than 10% what the same repair would have cost had it been performed at an Authorized Service Center. *Id.* § 4.2.

Court separately from and in addition to the benefits paid to Class Members. Agmt. § 5.3. Class Member recoveries will not be reduced to pay for attorneys' fees or costs. On April 28, 2021, Class Counsel applied for an award of attorneys' fees of $4,750,000, expenses of $75,671.38, and an aggregate service award of $30,000 to be distributed among the six Class Representatives. Dkt. 92. Class Members had the opportunity to review and object to the fee petition as provided for in Fed. R. Civ. P. 23(h). ***Unsurprisingly, the only Class Members that objected are 8 that are represented by counsel that previously attempted to intervene, along with three[3] others who do not claim to be represented by counsel but used forms almost identical to those used by the Ponzio objectors sent by FedEx through counsel for the Ponzio objectors.***

D. NOTICE TO THE CLASS

On May 28, 2021, JND mailed 168,995 postcard notices in the manner and form ordered by the Court. Keough Decl. ¶¶ 10-11.[4] JND also set up a website (https://www.marsredpaintsettlement.com/), which was identified on the post card and provided: the ability for Class Members to electronically file claims, information

[3] One of these three sent through counsel for the Ponzio objectors was untimely. *See* Dkt. 99.

[4] JND identified 178 potential Class Members owning and/or leasing 10 or more Subject Vehicles. *Id.*, at ¶ 11. Postcard Notice was sent to these Class Members with a cover letter identifying the VINs they owned and/or leased. *Id.*

on key dates, links to important documents, a Facts and Questions section with plain language answers to common questions, a VIN lookup tool to confirm membership in the Class, and the short and long-form notices. *Id.* at ¶¶ 14-20.

On July 30, 2021, and pursuant to the Settlement, JND submitted a declaration to be filed with the Court setting forth its due diligence and identifying individuals who submitted a valid and timely request to opt out. *See* Dkt. 70-1, § 8.11; Keough Decl. That declaration states that, as of July 28, 2020, JND had received over 2,100 calls and 708 emails, and over 11,373 unique users visited the Settlement website, registering 54,908 page views. Keough Decl., ¶¶ 18-20, 21-22. Class Counsel also received hundreds of emails and phone calls. As a result, 1,532 claims to reimburse past repair expenses or to claim a future repair for certain past repairs that were previously requested but denied were submitted by the claim deadline. *Id.* at ¶ 27. The submitted claims have an average claimed repair amount of $2,000 to $3,000, excluding claimed amounts of $20,000 or more. *Id.* To date, the costs of claims administration and notice paid by Mercedes is approximately $137,000. *Id.*, at ¶ 3.

E. CLASS REPRESENTATIVE SERVICE AWARDS

Class Counsel requested service awards for the *Pinon* Plaintiff Class Representatives, to be paid by Defendants in addition to the compensation they are otherwise entitled to as a member of the Proposed Class. Class Counsel is aware of

and sensitive to the Eleventh Circuit's recent opinion in *Johnson v. NPAS Solutions, Inc*, which rejected class representative incentive awards. 975 F.3d 1244 (11th Cir. 2020). That remains the law, and unless that changes between now and the Fairness Hearing, the Court cannot approve the requested service awards under *Johnson*.

However, the plaintiff in that case filed a petition for rehearing *en banc*, which has not yet been decided. Whether the initial holding will ultimately stand is unknown, and there is a reasonable likelihood that the case will continue to be challenged even if the Eleventh Circuit upholds the initial ruling. The *Johnson* opinion represents a fundamental change in the law that is absent from any other Circuit in the country. The categorical prohibition on class representative incentive awards is one of great import, particularly given they have been approved in every other Circuit and the U.S. Supreme Court has acknowledged the practice of incentive awards. *See e.g., China Agritech, Inc. v. Resh*, 584 U.S. __, 138 S.Ct. 1800, 1811 n.7 (2018). For this reason, the Plaintiffs respectfully requests that the Court reserve jurisdiction over the requested service awards, subject to the law becoming settled.

III. ARGUMENT

To grant final approval of a class action settlement, the Court must determine that the settlement agreement is "fair, reasonable, and adequate" under Rule 23(e)(2). The 2018 amendments to Rule 23 make clear that the Court should focus

"on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *See* Fed. R. Civ. P. 23(e)(2), 2018 Adv. Cmt. Notes. Accordingly, Plaintiffs analyze Rule 23(e)(2) and rely on case law interpreting the Eleventh Circuit's *Bennett* factors, which are substantially similar.[5] *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *10 (N.D. Ga. Mar. 17, 2020) ("many [*Bennett*] considerations overlap those found in Rule 23(e)(2)").

Regardless of the factors the Court employs, final approval here is appropriate. As the Court has already recognized, the Settlement Class meets Rule 23(a) and (b)(3)'s requirements and should be certified. Dkt. 90 at pp. 4-5.

A. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

In addition to the argument below, Plaintiffs incorporate by reference the facts and arguments made in support of their Motion for Preliminary Approval (Dkt. 70) and their Opposition to the Motion to Intervene (Dkts. 76 and 82).

[5] The *Bennett* factors include: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *See Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011).

1. Rule 23(e)(2)(A): The Class Representatives and Class Counsel Have Vigorously Represented the Class.

Rule 23(e)(2)(A) requires a Court to consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). Courts consider "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases," which "may indicate whether counsel negotiating on behalf of the class had an adequate information base." Adv. Cmt. Note R. 23. Here, the same facts and considerations are present that led the Court to "find[] that it will likely be able to approve, under Rule 23(e)(2), the proposed nationwide Settlement Class as defined above[.]" Dkt. 90, at p. 4.

Here, Class Counsel and the Class Representatives prosecuted this action on behalf of the Class with vigor and dedication for almost three years now, beginning in August of 2018. Counsel briefed and defeated a dispositive motion, conducted substantial discovery (party and third party), engaged experts, conducted vehicle inspections, and served the German manufacturer of the paint at issue with a subpoena. Dkt. 70-5, Declaration of W. Lewis Garrison, Jr., at ¶¶ 12-29 (the "Garrison Decl.") Plaintiffs were informed about the strengths (and weaknesses) of their case via discovery and expert consultation. *Id.*

The Class Representatives were likewise actively engaged—providing Class Counsel with information about their Vehicles, submitting to Vehicle inspections,

and providing records about their Vehicle ownership, service, and maintenance.[6] Accordingly, the Settlement meets the considerations of Rule 23(e)(2)(A).

2. Rule 23(e)(2)(B): The Settlement Resulted from Informed Arm's-Length Negotiations.

Under Rule 23(e)(2)(B), the Court considers whether the Settlement was "negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). "[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Adv. Cmt. Note R. 23. Additionally, the Court may consider "the treatment of any award of attorneys' fees with respect to both the manner of negotiating the fee award and its terms." *Id.*

Here, the close participation of Judge James F. Holderman (Ret.) in multiple mediations underscores the procedural fairness of the Settlement. *See Wilson v. EverBank*, 2016 WL 457011, at *6 (S.D. Fla. Feb. 3, 2016) ("The very fact of [mediator's] involvement—let alone his sworn declaration—weights in favor of approval."); Dkt. 70-3 (Declaration of (Ret.) Judge James F. Holderman).

Further, the parties negotiated attorneys' fees for Class Counsel only after reaching agreement on the terms of relief. Dkt. 70-3 at ¶ 9. This is also indicative of

[6] *See* Dkt. 70-4, Declarations of Emily Pinon, Gary C. Klein, Kim Brown, Joshua Frankum, Dinez Webster, and Todd Bryan (collectively, "Class Rep. Decls.").

a fair and arm's-length process. *See Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (finding that settlement not collusive where "the fee was negotiated separately from the rest of the settlement, and only after substantial components of the class settlement had been resolved"); *In re Progressive Ins. Corp. Underwriting & Rating Practices Litig.*, 2008 WL 11348505, at *2 (N.D. Fla. Oct. 1, 2008). On this basis, the Court stated that the "proposed Settlement appears to be the product of intensive, thorough, serious, informed, and non-collusive mediation overseen by the Honorable James F. Holderman (Ret.) of JAMS." Dkt. 90, at p. 6. This remains true. Accordingly, the Settlement satisfies Rule 23(e)(2)(B).

3. Rule 23(e)(2)(C): The Relief under the Settlement is Outstanding.

Rule 23(e)(2)(C) requires courts to consider whether the relief provided for the class is adequate by considering the "costs, risk, and delay of trial and appeal"; "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims"; "the terms of any proposed award of attorneys' fees, including timing of payment"; and "any agreements to be identified under Rule 23(e)." Fed. R. Civ. P. 23(e)(2)(C)(i)-(iv). Each substantive consideration is satisfied. The Settlement provides substantial relief Class Members, delivered through a clear claims' process for reimbursement, and the Settlement amount is not reduced by attorneys' fees or costs.

a. *Rule 23(e)(2)(C)(i): The relief obtained is substantial, particularly in light of the costs, risks, and delay of trial.*

Under Rule 23(e)(2)(C)(1), the Court must consider the "costs, risk, and delay of trial and appeal." Plaintiffs believe their case is strong, but recognize that litigation is uncertain, making compromise of claims in exchange for the Settlement's certain, immediate, and substantial benefits, including long-term extended warranties, an unquestionably reasonable choice.

Here, from the outset, Mercedes chose to fight on each front. After successfully litigating dispositive motions, endless meet and confers over discovery disputes, obtaining discovery on the German paint manufacturer, and vehicle inspections, Plaintiffs would still have needed to certify their class and faced risks that Mercedes would successfully challenge their damages theories. Even if a class were certified, they faced the risk, expense, and delay of trial and a potential appellate process that could have delayed recovery for years. The immediate value of the Settlement is particularly appropriate here, where, upon the Settlement's Effective Date, Class Members will receive coverage for past and future repairs according to a sliding scale based on the age and mileage of their vehicles. The Settlement therefore meets the considerations of Rule 23(e)(2)(C)(i).

b. *Rule 23(e)(2)(C)(ii): The Claims process was effective.*

Rule 23(e)(2)(C)(ii) asks whether the methods of distribution and claims

processing are effective. Class Members received direct notice of the Settlement claims process and benefits through the Court-approved notice program. Keough Decl. ¶¶ 5-13. The claims process allowed Class Members to be reimbursed for past out-of-pocket repairs and to claim a future repair for certain past repairs that were previously requested but denied,[7] and its success is evidenced by the significant number of claims and interactions Class Members had with JND. *Id*., at ¶¶ 16-27. Therefore, the Settlement meets the criteria of Rule 23(e)(2)(C)(ii).

c. *Rule 23(e)(2)(C)(iii): The terms of the proposed award of attorney's fees prioritizes Class Members.*

Under Rule 23(e)(2)(c)(iii), the Court must consider whether "the terms of any proposed awards of attorneys' fees, including the time of payment" are reasonable. Here, Mercedes will pay Class Counsel's attorneys' fees and expenses separately, without reducing the amounts that Class Members can recover.

Mercedes agreed to pay, subject to Court approval, attorneys' fees up to $4.75 million. On April 28, 2021, Class Counsel moved for an award of attorneys' fees,

[7] Notably, Class Members whose vehicles remain within the Settlement's time-and-mileage limitations are not required to submit any claims for forward-looking repairs. Rather, those costs are covered as part of the Settlement. The only future repairs that require a claim form to be submitted are for class members whose vehicles were beyond the Settlement's time and mileage limitations as of the May 28, 2021 notice date, but who can show that they requested and were denied warranty or goodwill coverage for the Alleged 590 Mars Red Paint Defect when the vehicle had less than 150,000 miles and was less than 15 years old.

expenses, and service awards. Dkt. 92. Class Members were given the opportunity to review and comment on or object to Class Counsel's motion for attorneys' fees, as provided by Rule 23(h). *Id*. ***Notably, the only objections came from the Ponzio objectors and the three individuals who objected in coordination with Ponzio counsel.***

Attorneys' fees may be paid following the Court's Final Approval Order and prior to the Settlement's Effective Date, conditioned on Plaintiffs' Counsel stipulated undertaking that they will remit all attorneys' fees if Final Approval or the fees award is modified or vacated. Agmt. § 5.6-5.7; Ex. A. This procedure has been routinely approved. *See, e.g., Pelzer v. Vassalle*, 644 Fed. Appx. 352, 365 (6th Cir. 2016) (attorneys "must repay that amount if the settlement agreement is rejected").

d. ***Rule 23(e)(2)(C)(iv): No undisclosed side agreements exist.***

Under Rule 23(e)(2)(C)(iv), the Court must consider any agreements identified under Rule 23(e)(3) which requires the parties seeking approval of a class action settlement to "file a statement identifying any agreement made in connection with the proposal." There are no agreements to disclose under Rule 23(e)(3) and the Settlement meets the considerations of Rule 23(e)(2)(C)(iv).

4. Rule 23(e)(2)(D): The Settlement treats Class Members Equitably Relative to Each Other.

Rule 23(e)(2)(D) requires the Court to consider whether "the proposal treats

class members equitably relative to each other." This ensures that there is no "inequitable treatment of some class members vis-à-vis others." Adv. Cmt. Note R. 23. As the Court noted in granting preliminary approval, the Settlement "does not improperly grant preferential treatment to the Class Representatives or segments of the Class." Dkt. 90, at p. 6.

That remains so because the Settlement provides the same durational period of coverage for every Vehicle (15 years or 150,000 miles) and the same sliding scale of reimbursement or coverage percentage based on the Vehicle's age/mileage. Courts have approved similarly structured settlements concerning automobile defects. *See, e.g.*, *Amin v. Mercedes-Benz USA, LLC*, No. 1:17-cv-01701-AT, 2020 U.S. Dist. LEXIS 167395, at *6 (N.D. Ga. Sep. 11, 2020) (approving settlement with "sliding scale of reimbursement or coverage percentage based on the Vehicle's age/mileage"); *Sadowska v. Volkswagen Grp. of Am., Inc.*, 2013 WL 9600948, at *6 (C.D. Cal. Sept. 25, 2013) (approving settlement with different eligibility requirements for an extended warranty depending on age of car); *Alin v. Honda Motor Co., Ltd.*, 2012 WL 8751045, at *3 (D.N.J. Apr. 13, 2012) (approving settlement with different coverage for air condition defect depending on time period/mileage of vehicle).

B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS.

The Court previously found it would likely be able to certify the Settlement Class. Dkt. 90 at p. 4. Plaintiffs briefly address these elements below.

1. The Class Meets the Requirements of Rule 23(a).

Under Rule 23(a), the proponent of class certification must show that the Class satisfies (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.

a. *The Class is sufficiently numerous.*

Rule 23(a)(1) is satisfied where, as here, "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). A total of 168,995 unique Class Members were notified of the Settlement. Keough Decl. ¶¶ 10-11. This "meets the numerosity requirement of Rule 23(a)(1)." Dkt. 90, at p. 4; *see also, e.g.*, *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

b. *There are common questions of both law and fact.*

Rule 23(a)(2) conditions certification upon a showing that "questions of law or fact are common to the entire class." *Melanie K. v. Horton*, 2015 WL 1308368, at *4 (N.D. Ga. Mar. 23, 2015). It requires there be "at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1354 (11th Cir. 2009).

Commonality is "generally satisfied when a plaintiff alleges that Defendants have engaged in a standardized course of conduct that affects all class members." *In*

re Checking Account Overdraft Litig., 307 F.R.D. 656, 668 (S.D. Fla. 2015). Here, the Class's claims are rooted in common questions of fact regarding the Alleged 590 Mars Red Paint Defect in Subject Vehicles and Defendants' alleged representations and omissions regarding the alleged defective nature of Mars Red paint (*see* Dkts. 1, 7, 16, and 55) and the Symptoms Alleged are experienced consistently by Class Members. *See* Dkt. 70-5, ¶ 35. These common questions will, in turn, generate common answers "apt to drive the resolution of the litigation" for the Class as a whole. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

c. *The Class Representatives' claims are typical.*

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is met where the plaintiff's claim "arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and his or her claims are based on the same legal theory." *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 690 (N.D. Ga. 2003). The same course of conduct underlying Class Representatives' claims underlie other Class Members' claims: each purchased or leased with expectations that their Class Vehicles would be free from the Symptoms Alleged. *See* Dkts. 1, 7, 16, and 55; *see also Rosen*, 270 F.R.D. at 682 (holding plaintiff typical that alleged same car defect as rest of class). Typicality is satisfied.

d. *The Class Representatives and Class Counsel will fairly and adequately protect the interests of the Class.*

Rule 23(a)(4) requires that the Class Representatives and Class Counsel "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). Both readily satisfy the adequacy requirement. The Class Representatives demonstrated their familiarity with the case's facts and that they understand their duties and fiduciary obligations. *See* Dkt. 70-4, at each Class Representative Declaration, ¶ 3-6. No conflicts exist between the Class Representatives and Class. Class Counsel are qualified to act as serve as Class Counsel under Federal Rule 23(g)(1) given their experience in litigating class action and vehicle defect actions and their work, effort, and expense in bringing and litigating these cases. Accordingly, Rule 23(a)(4) is satisfied, and, for the same reasons, the undersigned respectfully request an appointment as Class Counsel under Fed. R. Civ. P. 23(g)(1).

2. The Class Meets the Requirements of Rule 23(b)(3)

After satisfying Rule 23(a)'s prerequisites, the Court must determine if the Settlement satisfies one of Rule 23(b)'s subparts. Under Rule 23(b)(3), the Court must determine if (i) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. *Common issues of law and fact predominate.*

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). The predominance requirement is satisfied if common issues have a "direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016). As the Court previously held, the "Settlement Class meets . . . the predominance requirements of Rule 23 . . . (b)(3)." Dkt. 90, at p. 4.

The Eleventh Circuit favors class treatment of omission and fraud claims stemming from a "common course" of conduct. *Id.* "Predominance is 'a test readily met in certain cases alleging consumer fraud,' particularly where…uniform practices and misrepresentations give rise to the controversy." *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). Here, questions of law and fact common to the claims of Class Members predominate over any questions affecting only individual members. Specifically, Plaintiffs contend that discovery tended to show that (1) the Class Vehicles' 590 Mars Red paint was defective; (2) that defect is common across Class Vehicles; (3) Mercedes knew this; and (4) Mercedes's

omission of material fact about the defect was likely to deceive a reasonable consumer. *See* Dkt. 70-5, Garrison Decl., ¶ 35; Dkts. 1, 7, 16, and 55. For this reason, the Court's preliminary approval order stated that "the Settlement Class meets the . . . predominance requirement[] of…[Rule 23](b)(3)." Dkt. 90 at p. 4.

b. *Class treatment is superior in this case.*

Rule 23(b)(3) requires that a class be "superior to other available methods for fairly and efficiently adjudicating the controversy." Here, the Eleventh Circuit's non-exhaustive superiority factors are satisfied. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004). First, there is no indication of Class Members seeking to individually control the prosecution of separate actions. Second, the only other lawsuit concerning the alleged defect— *Ponzio, et al. v. Mercedes-Benz USA, LLC et al.*, Case No: 1:18-cv-12544 (D. N.J.) ("*Ponzio*")—is stayed pending final approval here. Third, the Court has been ably handling this litigation and is fully capable of handling actions involving defendants based in this District. Finally, the final factor, manageability, is inapplicable when the certification motion relates to Settlement. *See Amchem Prods.*, 521 U.S. at 620.

Moreover, class resolution is superior from an efficiency and resource perspective. *See Mohamed v. Am. Motor Co., LLC*, 320 F.R.D. 301, 317 (S.D. Fla. 2017) ("issues involved in Plaintiff's claim and the allegations he uses to support

same would be, for all intents and purposes, identical to those raised in individual suits brought by any of the members of the modified class."). Superiority and the other requirements of Rule 23 are met, making certification appropriate.

C. PLAINTIFFS HAVE COMPLIED WITH ALL APPROVAL FACTORS

1. Plaintiffs Have Provided Adequate Notice under Rule 23(b)(3) and Rule 23(c)(2)(B)

Rule 23(b)(3) class actions must satisfy the notice provisions of Rule 23(c)(2), and upon settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal[.]" The notice program conformed to the mandates of Rule 23 and due process. Rule 23(c)(2) prescribes the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). "The ultimate goal of giving notice is to enable Class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or make claims." Adv. Cmt. Note R. 23.

Here, Plaintiffs implemented the notice plan that the Court stated was "the best notice practicable under the circumstances" and satisfies all requirements provided in Rule 23(c)(2)(B) and due process. Dkt. 90 at pp. 6-7; *see generally* Keough Decl. Further, the Notices included the information required under Rule 23(c)(2)(B): they informed Class Members of the nature of the action, the class

definition, the class claims, that a Class Member could enter an appearance through an attorney, that the Court will grant timely exclusion requests, the time and manner for requesting exclusion and submitting objections, and the claims being released upon final approval. Dkt. 90 at pp. 6-7; Dkt. 70-7 (Exs. B to E). As noted above, the notice campaign was also substantively successful. *See, supra,* Section II.D. Accordingly, the notice process was adequate under Rule 23(c)(2).

2. Only Eleven Class Members Objected to the Settlement.

Objections to proposed class settlements are governed by the procedures set forth in Fed. R. Civ. P. 23(e)(5). Out of some 1,115000 Class Members, only eleven objected. *See* Dkts. 96-99. Those eleven are represented by or acting in coordination with *Ponzio* counsel and will be addressed, as required by the Court. Needless to say, these objectors largely raise the same meritless arguments that were made in the Motion to Intervene—though more ornately adorned—and their objections should be overruled because, while they may be in the best interest of *Ponzio* counsel, they are "hardly in the best interests of the class." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D. Ga. 1993); *see also 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."). The objections should be

overruled.

3. The Positive Response of Class Members to the Settlement Favors Final Approval.

The "miniscule number of objectors in comparison to the class size is entitled to significant weight in the final approval analysis." *In re Equifax*, 2020 WL 256132, at *10 (388 objections in 147 million person class). *See also In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, 2016 WL 6902351, at *4 (N.D. Ga. Aug. 23, 2016) (five timely objections out of tens of millions of class members supports approval). Further, 1,532 Class Members made claims to reimburse past repair expenses or to claim a future repair for certain past repairs that were previously requested but denied, and over ten thousand contacted the Settlement Administrator, visited the Settlement website, and are aware of their right to reimbursement going forward. This positive reaction is entitled to significant weight.

IV. CONCLUSION

Plaintiffs respectfully request that the Court: (1) overrule the objections and grant final approval of the proposed Settlement; (2) certify the Settlement Class; (3) find that Notice to the Class was directed in a reasonable manner; (4) grant Plaintiffs' Motion for Attorneys' Fees and Expenses (Dkt. 92), and reserve jurisdiction over the award of Service Awards to the Class Representatives, subject to the Eleventh Circuit's *en banc* review of its decision in *Johnson v. NPAS Solutions, Inc.*, 975 F.3d

1244 (11th Cir. 2020) and any further appeals; (5) reserve jurisdiction with respect to implementation and enforcement of the terms of the Settlement; and (6) appoint Plaintiffs as Class Representatives and W. Lewis Garrison, Jr., James F. McDonough, III, Taylor C. Bartlett, and Travis Lynch of Heninger Garrison Davis, LLC and Stephen Jackson of Jackson & Tucker, P.C. as Class Counsel.

Respectfully submitted this the 30th day of July, 2021.

/s/ James F. McDonough, III
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Email: steve@jacksonandtucker.com

Counsel for the Pinon Plaintiffs and Proposed Class Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing document to be electronically-filed with the Clerk of Court using this Court's CM/ECF system, which caused it to be served this day on all counsel of record who have consented to receive electronic service.

Respectfully submitted this the 30th day of July, 2021.

/s/ James F. McDonough, III
James F. McDonough, III
(GA Bar No. 117088)

LOCAL RULE 7.1(D) COMPLIANCE CERTIFICATE

Pursuant to L.R. 7.1(D), this certifies that the foregoing document complies with the font and point selections approved by L.R. 5.1(C). The foregoing document was prepared using Times New Roman font in 14 point.

Respectfully submitted this the 30th day of July, 2021.

/s/ James F. McDonough, III
James F. McDonough, III
(GA Bar No. 117088)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMILY PINON, GARY C. KLEIN, KIM BROWN, JOSHUA FRANKUM, DINEZ WEBSTER, and TODD BRYAN, on behalf of themselves and all others similarly situated, Plaintiffs, **vs.** MERCEDES-BENZ USA, LLC, and DAIMLER AG, Defendants.	CASE NO: 1:18-CV-03984-MHC The Honorable Mark H. Cohen

DECLARATION OF JENNIFER M. KEOUGH REGARDING NOTICE ADMINISTRATION

I, Jennifer M. Keough, declare and state as follows:

1. I am Chief Executive Officer of JND Legal Administration LLC ("JND"). As CEO of JND, I oversee all facets of our company's operations, including monitoring and implementing our notice and claims administration programs. This Declaration is based on my personal knowledge, as well as upon information provided to me by experienced JND employees and counsel for the Plaintiffs and Defendants ("Counsel"), and if called upon to do so, I could and would testify competently thereto.

2. JND is the Court-appointed Settlement Administrator in the above captioned action ("Action"), per the Court's March 29, 2021 Order Granting Preliminary Approval of Proposed Class Action Settlement Agreement ("Preliminary Approval Order"). Dkt. 90. I submit this Declaration to report on the implementation of the Notice Program,[1] as outlined in my Declaration Regarding Proposed Notice Program, dated December 21, 2020 (the "Initial Declaration").

3. As of July 30, 2021, JND approximates the total cost of this administration to be $137,000.

CAFA NOTICE

4. As set forth in my Declaration Regarding Notice Pursuant to Class Action Fairness Act of 2005, on December 30, 2020, JND mailed notice of this Class Action Settlement to the United States Attorney General and to the appropriate State officials.

DIRECT NOTICE

5. Defendants provided JND with a list of all eligible Vehicle Identification Numbers ("VINs") representing the Subject Vehicles included in the Agreement. Agmt. § 1.35.

[1] All capitalized terms not defined herein have the meanings given to them in the Class Action Settlement Agreement and Release.

6. JND then sent the VINs for the Subject Vehicles to the Department of Motor Vehicles ("DMVs") to gather mailing addresses for potential Class Members. The DMVs cross-referenced the VINs in their databases for vehicle transaction information and provided JND with related mailing addresses and contact information for potential Class Members.

7. Prior to mailing the Postcard Notice, JND reviewed the mailing data provided by the DMVs to identify any undeliverable addresses and duplicate records based on name and address.

8. Prior to mailing the Postcard Notice, JND updated the potential Class Member addresses using the USPS National Change of Address database.[2]

9. JND loaded the VIN and contact information into a case-specific database for the Settlement. A unique identification number ("Unique ID") was assigned to each Settlement Class Member to identify them throughout the administration process.

[2] The NCOA database is the official USPS technology product which makes change of address information available to mailers to help reduce undeliverable mail pieces before mail enters the mail stream. This product is an effective tool to update address changes when a person has completed a change of address form with the USPS. The address information is maintained on the database for 48 months.

10. On May 28, 2021, JND mailed, via the United States Postal Service ("USPS"), the Court-Approved 4"x6" Postcard Notice to 168,817 potential Settlement Class Members. A representative copy of the Postcard Notice is attached as **Exhibit A**.

11. JND identified 178 potential Settlement Class Members owning and/or leasing 10 or more VINs. The Postcard Notice was sent to these Class Members with a cover letter identifying the VINs they owned and/or leased.

12. The Postcard Notice provided Class Members with the following information: (i) the definition of the Class; (ii) a summary of the settlement benefits; (iii) direction for how to file a claim; (iv) options regarding the Settlement, including the option to file a claim, submit an exclusion request, file an objection or do nothing; and (v) where to go to obtain more detailed information about the Settlement. The Postcard Notice also informed Class Members of the relevant deadlines regarding their options, as well as the date of the final approval hearing. In addition, to the extent a portion of the Class may speak Spanish as their primary language, the Postcard Notice included a direction to visit the Settlement Website to view the notice in Spanish.

13. For each Notice Packet that was returned as undeliverable, JND re-mailed all Notice Packets where a forwarding address was provided. For the

remaining undeliverable Notice Packets where no forwarding addresses were provided, JND performed an advanced address search (e.g., a skip trace) and re-mailed any undeliverable Notice Packets to the extent any new and current addresses were located. Where new addresses were not located, JND re-mailed Notice Packets to the initially provided addresses.

SETTLEMENT WEBSITE

14. On May 28, 2021, pursuant to Section 8.8 of the Settlement, JND established a case-specific Settlement Website www.MarsRedPaintSettlement.com ("Settlement Website"), which features a page with answers to frequently asked questions ("FAQs"), contact information for the Settlement Administrator, including an email contact form, Class Action Settlement deadlines including the data and time of the Fairness Hearing, and links to important case documents, including the Long Form Notice, the Postcard Notice, the Reimbursement Claim Form, the Settlement Agreement, and other important Court Documents. Each Class Member document is available on the Settlement Website in both English and Spanish.

15. The Settlement Website features a VIN lookup page to allow potential Class Members to enter their VIN to find out if their vehicle is included in the Settlement.

16. The Settlement Website features an electronic version of the Reimbursement Claim Form that allows Claims to be submitted electronically and any required documentation to be uploaded electronically to the Settlement Website.

17. The Settlement Website was optimized for mobile visitors so that information loaded quickly on mobile devices and was also designed to maximize search engine optimization through Google and other search engines. Additionally, keywords and natural language search terms were included in the Settlement Website's metadata to maximize search engine rankings.

18. As of July 28, 2021, the Settlement Website has tracked a total of 11,373 unique users who registered 54,908 page views. JND will continue to update and maintain the Settlement Website throughout the claims administration process.

19. JND also established and maintains a dedicated email address, info@MarsRedPaintSettlement.com, ("Settlement Email Address") to receive and respond to Settlement Class Member inquiries.

20. As of July 28, 2021, JND has received 708 emails to the Settlement Email Address. JND will continue to maintain the Settlement Email Address throughout the claims administration process.

TOLL-FREE TELEPHONE LINE

21. On May 28, 2021, JND established the toll-free telephone number that Settlement Class Members can call to obtain information about the Settlement. Callers have the option to listen to an Interactive Voice Response system or to speak to a live agent. The toll-free number is accessible 24 hours a day, 7 days a week, with an option to speak directly with JND call center associates during business hours.

22. As of July 28, 2021, the toll-free number has received 2,100 calls. JND will continue to maintain the toll-free number throughout the claims administration process.

OBJECTIONS

23. The Postcard Notice informed Settlement Class Members that anyone who wished to object to the Settlement could do so by filing an objection with the Court (and serving it on Class Counsel and Defense Counsel) on or before July 27, 2021. As of July 28th, 2021, JND is aware of four (4) objections from eleven Class Members being filed with the Court.

REQUESTS FOR EXCLUSION

24. The Postcard Notice informed Settlement Class Members that any Settlement Class Member who wished to exclude themselves from the Settlement

was required to notify the Settlement Administrator, in writing, of their intent to opt out postmarked no later than July 27, 2021. As of July 30, 2021, JND has received ten (10) timely and valid exclusion requests. A list of those persons or entities who have submitted timely requests to exclude themselves from the Settlement is attached hereto as **Exhibit B**.

CLAIMS RECEIVED

25. The Postcard Notice informed Settlement Class Members that anyone who wanted to participate in the Settlement and receive reimbursement for Qualified Past Repairs could do so by submitting a Claim Form (online or postmarked) by July 27, 2021 for repairs that occurred before May 28, 2021 and within 60 days of the date of repair for repairs that occurred after May 28, 2021 and before the Effective Date.

26. The Postcard Notice informed Settlement Class Members that anyone who wanted to participate in the Settlement and receive reimbursement for Qualified Future Repairs if their Subject Vehicle had 150,000 miles or more or was 15 years or more from the original in-service date as of May 28, 2021, and they were previously denied warranty or goodwill coverage for a qualifying repair at a time the Subject Vehicle had both fewer than 15 years from the original in-service date and fewer than 150,000 miles, could do so by submitting a Reimbursement Claim Form (online or postmarked) by July 27, 2021.

27. As of July 28, 2021, JND has received 1,532 Claim Forms, of which 1,426 were submitted electronically online and 106 were submitted via email or mail. As of July 29, 2021, the average claimed reimbursement amount per Qualified Past Repair (excluding claimed amounts of $20,000 or more) is between $2,000 and $3,000.

28. JND will continue to provide regular reports to the parties with updates as to claims received, approved and deficient claims, and other relevant details regarding our administration of the Settlement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed July 30, 2021, at Seattle, Washington.

By: 

Jennifer M. Keough

EXHIBIT A

LEGAL NOTICE BY ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

If you have purchased or leased in the United States a Mercedes-Benz vehicle originally painted with Mars Red or Fire Opal (collectively, "590 Mars Red") paint, you could get benefits from a class action settlement.

Para una notificación en español, visite www.MarsRedPaintSettlement.com.

Mercedes Mars Red Settlement
c/o JND Legal Administration
PO BOX 91223
Seattle, WA 98111

[QR/printedID]

[MAILING BARCODE]
[NAME]
[ADDRESS1]
[ADDRESS2]
[CITY], [STATE], [ZIP]

A proposed Settlement has been reached in a class action lawsuit known as *Prior et al. v. Mercedes-Benz USA, LLC et al.*, U.S.D.C., N.D. Ga. Case No. 18-CV-03984, claiming that Mercedes-Benz vehicles with Mars Red or Fire Opal (collectively, "590 Mars Red") paint may experience peeling, flaking, or bubbling of the exterior clearcoat. Defendants deny any wrongdoing. The Settlement resolves the case and provides benefits to Class Members. **This notice is a summary. For more information, visit www.MarsRedPaintSettlement.com.**

WHO IS INCLUDED: All current owners, former owners, current lessees, and former lessees of Mercedes-Benz vehicles purchased or leased in the United States originally painted 590 Mars Red.

SETTLEMENT BENEFITS: The Settlement provides two types of benefits: reimbursement for Qualified Past Repairs and coverage for Qualified Future Repairs relating to bubbling, peeling or flaking of the exterior clearcoat. The amount of reimbursement and coverage depends on how many miles or years have passed since the vehicle's in-service date. Subject to restrictions, coverage is up to 15 years or 150,000 miles, whichever comes first. To get Qualified Future Repairs, simply take your vehicle to a Mercedes Authorized Repair Center. If your vehicle already is 15 years old or more or has 150,000 miles or more and meets certain conditions, you should file a claim to seek Qualified Future Repairs. If you have already paid for a qualifying repair or need a qualifying repair now (and get the qualifying repair made), you need to file a claim for Qualified Past Repairs. Details and terms and conditions are at www.MarsRedPaintSettlement.com.

YOUR OPTIONS: You can exclude yourself ("opt out"), object to the Settlement, file a claim, or do nothing. The deadline to opt out or object is July 27, 2021. If you do not opt out, and the Court approves the Settlement, you will release your claims against Defendants. The Court will hold a hearing on August 30, 2021 to decide whether to approve the Settlement. You may attend. The deadline to file a claim depends on the claim option you are filing, but could be as early as July 27, 2021.

MORE INFORMATION: Read the detailed Notice, Motions for Approval and Attorneys' Fees, and Settlement Agreement at www.MarsRedPaintSettlement.com.

EXHIBIT B

JND LEGAL ADMINISTRATION

Mercedes Mars Red Paint Settlement - Timely and Valid Exclusions

	JND ID Number	Name	City/ State	Postmark Date
1	DMR6P94XYW	RICHARD SMITH	CELEBRATION, FL	7/1/2021
2	DATCM3NXH6	SHERRI WILLIAMSON	CELEBRATION, FL	7/1/2021
3	D6YPZ54FMN	JUDITH A. CHAPMAN	EDWARDSVILLE, IL	7/22/2021
4	DZK8YWJ7QG	JOSE BARAJAS	RIVERSIDE,CA	7/26/2021
5	DEZXTM8UNW	KAREN GUERRERO	RIVERSIDE,CA	7/26/2021
6	D7BE8QDN95	WILLIAM C. RUGGIERO	FORT LAUDERDALE, FL	7/26/2021
7	DD5AWE6S8F	MARIA ALJAKSINA	WALLED LAKE, MI	7/27/2021
8	DZ4L8ES3BY	ALOMA JACKSON	VENETA, OR	7/27/2021
9	DJ76SQWVFR	THADDAEUS JACKSON	VENETA, OR	7/27/2021
10	DEN85XQG6T	SUSAN LYNN SMITH	BONITA SPRINGS, FL	7/27/2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMILY PINON, GARY C. KLEIN, KIM BROWN, JOSHUA FRANKUM, DINEZ WEBSTER, and TODD BRYAN, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **MERCEDES-BENZ USA, LLC, and DAIMLER AG,** **Defendants.**	**CASE NO: 1:18-CV-03984-MHC**

[PROPSED] FINAL JUDGMENT

WHEREAS, the Court granted Preliminary Approval of Class Settlement and Direction of Class Notice on March 29, 2021, Dkt. 90; and

WHEREAS, the Court granted Final Approval of Class Settlement on _____, 2020, Dkt. ___;

IT IS HEREBY ORDERED:

1. All capitalized terms shall have the same meaning ascribed to them in the Class Action Settlement Agreement and Release ("Settlement") attached as Ex. A hereto.

2. The Settlement Class consists of 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 Mercedes-Benz vehicle originally painted with 590 Mars Red paint and purchased or leased in the United States. Defendants offered 590 Mars Red paint as an original, exterior color option for the following vehicle types in the United States: C Class (2004-15), CLS (2006-07, 2009, 2014), CLK (2004-09), S Class (2008, 2015, 2017), SL Class (2004-09, 2011-17), GLK Class (2010-15), CL (2005-06, 2013-14), SLS (2014-

15), E Class (2005-06, 2010-17), GT (2016-18), G Class (2005, 2011-17), SLC (2017), SLK Class (2005-16), and Maybach 57 (2008).

3. All Class Members are bound by the Settlement, the release contained therein, and this Final Judgment.

4. The Released Parties are forever discharged and released from all Released Claims.

5. The Court dismisses on the merits and with prejudice the claims in the Action asserted against Defendants, with each party to bear its own costs and attorneys' fees, except as provided in the Court's Final Approval of Class Settlement and Attorneys' Fees, Expenses, and Service Awards (if any) to the Class Representatives, and as provided in the Settlement.

6. Without affecting the finality of the judgment, the Court reserves and continues jurisdiction with respect to the implementation and enforcement of the terms of the Settlement, the claims process for Qualified Past Repairs and Qualified Future Repairs, the distribution of claim payments for Qualified Past Repairs, and the payment of Attorneys' Fees and Expenses to Class Counsel and the payment of Service Awards (if any) to the Class Representatives, and over this Judgment.

7. Plaintiffs, Class Members, and Defendants irrevocably submit to the exclusive jurisdiction of this Court for the resolution of any matter arising out of or

relating to the Settlement, the Order Granting Final Approval of Class Settlement, or this Judgment. All applications to the Court with respect to any aspect of the Settlement, the Order Granting Final Approval of Class Settlement and payment of Attorneys' Fees and Expenses to Class Counsel and the payment of Service Awards (if any) to the Class Representatives, or this Judgment shall be presented to and determined by the United States District Court Judge Mark H. Cohen for resolution, or, if he is not available, any other District Court Judge designated by the Court.

8. All Class Members are permanently barred and enjoined from instituting or continuing the prosecution of any action asserting Released Claims against Released Parties.

9. In the event that the provisions of the Settlement, the Order Granting Final Approval of Class Settlement, or this Judgment are asserted by Defendants or other Released Party as a ground for a defense, in whole or in part, to any claim or cause of action, or are otherwise raised as an objection in any other suit, action, or proceeding by a Class Member or Releasing Party, the Released Party shall be entitled to an immediate stay of that suit, action or proceeding until after this Court has entered an order or judgment determining any issues relating to the defense or objections based on such provisions, and no further judicial review of such order or judgment is possible.

10. The Court finds under Federal Rule of Civil Procedure 54(b) that judgment should be entered and that there is no reason for delay. The Clerk is directed to enter this Judgment forthwith.

IT IS SO ORDERED

DATED: _____ By _____
Hon. Mark H. Cohen
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMILY PINON, GARY C. KLEIN, KIM BROWN, JOSHUA FRANKUM, DINEZ WEBSTER, and TODD BRYAN, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **MERCEDES-BENZ USA, LLC, and DAIMLER AG,** **Defendants.**	**CASE NO: 1:18-CV-03984-MHC**

[PROPOSED]
ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT [DKT. 100] AND GRANTING IN PART PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES [DKT. 92]

This matter is before the Court on Plaintiffs' Motion for Final Approval of Class Settlement [Dkt. 100] and Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards to the Class Representatives [Dkt. 92]. 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. Dkts. 70-1.

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 Mercedes-Benz vehicle originally painted with 590 Mars Red paint and purchased or leased in the United States. Defendants offered 590 Mars Red paint as an original, exterior color option for the following vehicle types in the United States: C Class (2004-15), CLS (2006-07, 2009, 2014), CLK (2004-09), S Class (2008, 2015, 2017), SL Class (2004-09, 2011-17), GLK Class (2010-15), CL (2005-06, 2013-14), SLS (2014-15), E Class (2005-06, 2010-17), GT (2016-18), G Class (2005, 2011-17), SLC (2017), SLK Class (2005-16), and Maybach 57 (2008).

On March 29, 2021, the Court ordered notice directed to the Class and scheduled a Fairness Hearing for August 30, 2021. Dkt. 90. Notice was sent to the

Class via the Court-approved notice program, and the Class had an opportunity to respond. As of July 28, 2021, 1,532 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. 100-1 (Keough 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, May 28, 2021, and the Effective Date, within 60 days of the date of repair. Dkt. 70-1, § 9.4. In addition, only 10 Class Members submitted timely and potentially valid opt-outs, and only eleven Class Members objected.[1] See Dkt. 100-1, ¶ 24. 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. 70-1, § 4.4.

Having considered the Parties' motions and the Settlement, 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 and **GRANTS IN PART** Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards[2] to the Class Representatives [Dkt. 92] for the reasons set forth below.

[1] One Class Member filed an untimely objection. Dkt. 99.

[2] For the reasons below, the Court denies without prejudice the request to grant the Class Representative Service Awards and reserves jurisdiction over the request.

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 and finds no reason to disturb its earlier conclusions. Dkt. 90. Rule 23(a)(1) is satisfied because the Class consists of over 168,000 Class Members and joinder of all Class Members is impracticable. See Dkt. 100-1, ¶¶ 10-11. 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 590 Mars Red Paint. 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. 90, 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. Rule

23(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/mileage.

Further, the Court finds that notice was given in accordance with the Preliminary Approval Order, Dkt. 90, 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 August 30, 2020, the Court held a hearing to consider the fairness, reasonableness, and adequacy of the proposed Settlement, and to consider each of the eleven objections to the Settlement. *See* Dkts. 96-99. These objections were brought by counsel in the *Ponzio* action, which previously attempted to intervene in this action. *Ponzio* counsel (and the three objectors coordinating with them) rebuke almost every aspect of the Settlement, critiquing the Settlement's failure to address diminution in value, characterizing the Settlement as a "coupon" settlement, arguing that Class Counsel and the Class Representatives are inadequate, alleging the Settlement is a product of collusion and reverse auction, claiming that the Settlement treats Class Members inequitably and disparately, and arguing that the Settlement fails to satisfy even a single *Bennett* factor. *Id.*

These objectors effectively raise the same arguments that were made in the Motion to Intervene and that were rejected. While those argument may be in the best interest of Ponzio counsel, they are "hardly in the best interests of the class." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D. Ga. 1993); *see also 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. Class Counsel **SHALL** submit a comprehensive list of those individuals on or before September 6, 2021.

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, EXPENSES, AND SERVICE AWARDS TO CLASS REPRESENTATIVES

Class Counsel requests an award of $4.75 million in attorneys' fees and $75,671.38 in expenses, as well as service awards in the amount of $30,000 total. Dkt. 92. Defendants agreed to pay these amounts on top of, not out of, Class Members' recoveries. *See* Dkt. 70-1 §§ 5.3, 5.4. The *Ponzio* objectors objected to the attorneys' fees and requests for service awards. 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 July 28, 2021, 1,532 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. 100-1, ¶ 27. Based on the claims filed to date, the value of the cash reimbursements for past payments could, if each claim is verified, range from $3.1 million to $4.6 million (representing the 1,532 repairs submitted through Class Members' claims multiplied by the average repair

amount of $2000 to $3000). Dkt. 100-1, ¶ 27. The reimbursement amount will likely increase as claims are submitted for repairs that occurred between the Notice Date and the Effective Date. *See* Dkt. 70-1, § 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. *See* 92-2, ¶¶3-7 (Bowron Declaration). Mr. Bowron estimated the value of the future-repairs/service contract components of the Settlement at between $37.3 and $55.9 million. *See id.*, at ¶¶8-39.

Combining these two components results in a total value of the Settlement for the Class of between $40.4 million and $60.5 million. In addition, Defendants are paying all costs of claims administration and notice, a total to date of approximately $137,000.[3] Dkt. 100-1, ¶ 3.

To determine the fee percentage from a constructive fund, courts add the requested fee and expenses to the denominator. *See In re Arby's Rest. Grp., Inc. Data Sec. Litig.*, 2019 WL 2720818, at *2 (N.D. Ga. June 6, 2019) (determining the "total benefit to the class" by "adding the requested fee, litigation expenses, and the cost of administration to the $2 million aggregate cap for claims"). Here, the combined total of the two Settlement components and notice and claims

[3] That number will increase as the Claims Administrator completes its work verifying and paying claims and assisting Class Members.

administration costs paid by Mercedes is $40.54 million and $60.64 million, and adding the $4.75 million in fees and $75,671.38 in expenses takes that number to $45.3 million to $65.4 million. Class Counsel's requested fee of $4.75 million thus represents between 7.3% and 10.5% of the gross constructive settlement 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 $4.75 million in fees is hereby **GRANTED**.

Class Counsel's request for expenses of $75,671.38 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 $75,671.38. Dkt. 92-1, at ¶ 13. Class Counsel's request for $75,671.38 in expenses is hereby **GRANTED**.

Finally, Plaintiffs request a $30,000 aggregate service award for the six class representatives, with individual awards equaling $5,000. 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*, 2020 WL 256132, at *40. 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). *Johnson* remains the law, and unless that changes, the Court cannot approve the requested service awards. The aggregate service award of $30,000 is therefore **DENIED WITHOUT PREJUDICE.** However, the Court **RESERVES JURISDICTION** over the requested service awards, subject to the Eleventh Circuit's *en banc* review of *Johnson* and any further appeals until such time the law on class representative service awards is settled.

III. 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 (Dkts. 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., James F. McDonough, III, Taylor C. Bartlett, and Travis Lynch of Heninger Garrison Davis, LLC and Stephen Jackson of Jackson & Tucker, P.C. 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 $4.75 million in attorneys' fees and $75,671.38 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 WITHOUT PREJUDICE** the Class Representatives request for an aggregate service award of $30,000 consisting of $5,000 to each Class Representative and reserves jurisdiction over the award of Service Awards to the Class Representatives, subject to the Eleventh Circuit's *en banc* review of *Johnson v. NPAS Solutions, Inc*., 975 F.3d 1244 (11th Cir. 2020) and any further appeals

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: _____ By _____
Hon. Mark H. Cohen
United States District Judge