IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: NAVISTAR DIESEL ENGINE PRODUCTS LIABILITY LITIGATION	)))	Case No. 11 C 2496 MDL NO. 2223

This Document Relates to: All Cases

PLAINTIFFS' RESPONSE TO OBJECTIONS TO CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

Plaintiffs[1] file this Response to the seven objections and six letters filed with the Court that comment on their settlement with Defendant Ford Motor Co., Inc. ("Ford").[2] Given that the objections and letters raise no valid concerns regarding the fairness of the Settlement and that the Settlement represents an excellent for the Class, the Court should grant final approval.

I. Introduction

The Settlement represents a remarkable result for the Class, recovering 40–50% of the value of Plaintiffs' claims without the risk and costs of trial, despite Ford's significant defenses. Reflecting the value of this Settlement, reaction from Class Members has been overwhelmingly positive. Out of approximately 1.1 million Class Members notified of the Settlement, only a tiny fraction have filed actual objections. The Court's docket reflects just seven purported objections (Dkt. 246 [Cooley]; Dkt 250 [Adkerson]; Dkt. 251 [Lash]; Dkt. 259 [Burress]; Dkt. 261 [Neill]; Dkt. 266 [Stevens] & Dkt. 268 [Lewis].) Of these seven, only six can be characterized as actual objections to the Settlement given that Mr. Cooley has now withdrawn his objection. *See* Affidavit of Amy E. Tabor ("Tabor Aff."), attached as Ex. 2. Six people also filed "letters" commenting on the Settlement (Dkt. 243 [Ackerman]; Dkt. 255 [Lehrer]; Dkt. 262 [May]; Dkt. 263 [Walker] Dkt. 267 [Wess]; and Dkt. 269 [Simons].) Of these six letters, only three can even be construed as complaining about the Settlement since Ackerman requests exclusion, May merely encloses a letter previously sent to Ford regarding their experience with their 2004 F250 truck, and Walker expresses support for the Settlement and advises the Court that they would feel "vindicated" if the Settlement is approved. In addition, Plaintiffs' counsel has received over

[1] Plaintiffs are Custom Underground, Inc., John Barrett, Scott and Heather Gray, Frank Brown Towing, Inc., Cecil and Tressie Fulton, Karl Strong, Dinonno Enterprises, Inc., d/b/a Cutting Edge Concrete Cutting, Charles Clark, Georgean Vogt, John Prebish, Steve Santilli, Anthony Mawyer, Gena Boggero, Carl Atwell, Phillip Marcum, and James Hutton.

[2] Plaintiffs appreciate that the Local Rules limit briefs in support of or in opposition to motions to 15 pages. *See* LR 7.1. Plaintiffs have consolidated their responses to thirteen filings in a single brief and have endeavored to be concise.

200 letters commenting on the settlement which were not filed with the Court, the vast majority of which express a desire to participate in the Settlement and support it.

Moreover, all but one of the filed objections and letters fail to meet the Preliminary Approval Order requirements for properly filed objections: three purported objectors supply VINs that are not even Class Vehicles, and several purported objectors fail to state the grounds for their objection, fail to supply proof of ownership, or are otherwise deficient. (*See* Dkt. 242 at 8) (stating that if an objection is not properly filed, the objector "shall be foreclosed from seeking any adjudication or review of the settlement by appeal or otherwise"). (*See* Ex. 1 (summarizing these deficiencies).) Without question, as shown below, even assuming the purported objections did qualify as legitimate under the Court's Preliminary Approval Order, nothing in them detracts from this "terrific" Settlement.[3]

A. The Settlement consideration is fair, reasonable, and adequate in light of the risk to the Class from continued litigation.

1. Some objectors simply fail to understand the relief provided in the Settlement.

Several objections fail to raise any concern that the Court need address because they just get the facts wrong, arguing against supposed limitations on Settlement reimbursements that plainly do not exist. For example, Mr. Burress mistakenly believes that the Settlement relief applies only to repairs that will be made after the Effective Date. (Dkt. 259 at 2.) He objects to the Settlement's time and mileage limitations based on this mistaken belief, wrongly concluding that Class Vehicles that have already passed 6 years or 135,000 miles before the Effective Date will receive no relief. (*Id.*) In fact, Class Members whose vehicles required qualifying repairs

[3] On May 15, Plaintiffs will file with their final approval papers declarations from Professor William Rubenstein, author of *Newberg on Class Actions*, who characterizes the settlement as "terrific," Professor Geoffrey Miller, former Judge Richard Neville, and diesel engine expert Ken Neal.

within the 6-year/135,000 mile limitation can benefit regardless of how long ago these repairs were performed. (Dkt. 236-1 at 13–14.)

Mr. Burress also mistakenly believes that repairs must be performed at a Ford dealership to qualify for reimbursement under the Settlement. (Dkt. 259 at 4–6.) In fact, there is no such requirement. (Dkt. 236-1 at 5, 13–14.) Thus, this Settlement is nothing like the "coupon" settlements that require class members to deal with the defendant in order to claim compensation. *See Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (observing that coupon settlements have been "widely criticized").

To the contrary, Class Members will receive cash compensation for out-of-pocket expenses paid to any "repair facility" for parts and labor, including the reasonable value of the Class Members' own time spent performing the repair. (Dkt. 236-1 at 7.) Similarly, Mr. Lash[4] apparently misunderstood Ford's agreement not to contest an application for service awards to the Named Plaintiffs up to a total of $150,000 as limiting the total Class recovery to this amount. (*See* Dkt. 251 at 3.) In fact, the Settlement obligates Ford to pay *all* valid claims, without any limitation. The Court should dismiss these points out of hand.

2. The 6-year/135,000 mile limit on the extended warranty period is a fair compromise.

Mr. Burress and Mr. and Mrs. Lehrer object to the 6-year/135,000 mile limits on the Extended Warranty Period under the Settlement. (Dkt. 259 at 2; Dkt. 255 at 1.) Mr. Burress' objection to the 6-year/135,000 mile limits on the Extended Warranty Period appears chiefly based on his misunderstanding that Class Members whose vehicles will have passed these limits

[4] Mr. Lash did not write a formal objection, but only underlined and annotated a copy of the Settlement Notice and mailed this annotated Notice to the Court. He did not supply his contact information, VIN, or proof of ownership; did not sign his objection; and otherwise failed to comply with the Preliminary Approval Order requirements. (Dkt. 242 ¶ 17.) Plaintiffs nevertheless have done their best to respond to Mr. Lash's concerns to the extent they can discern them.

by the Effective Date are not eligible for any compensation, and to that extent his objection can be simply ignored. (*See* Dkt. 259 at 2.) Mr. and Mrs. Lehrer feel that their truck should benefit from the Settlement even though it was seven years old when the oil cooler failed. (Dkt. 255 at 1.) Obviously any Extended Warranty Period must have a cutoff: Plaintiffs will always want it to be longer; Ford will always want it to be shorter; and there must be some compromise. *See Ersler v. Toshiba America, Inc.*, No. 07-cv-2304, 2009 WL 454354, at *2 (E.D.N.Y. Feb. 24, 2009) (approving extended-warranty settlement over objections that the period should have been longer, finding that the agreed warranty extension was a "reasonable compromise"). Here, the one-year extension is substantial, representing 100% of the time extension that, as noted in Plaintiffs' Complaint, Ford offered its premier customers. (Dkt. 233 at ¶¶ 56, 65.) Especially given the number of things that can go wrong in an engine and the increasing difficulty of proving causation the longer vehicles are in service, the 6-year/135,000 mile limitation is reasonable. *See Sugarman v. Ducati N. America, Inc.*, No. 10-cv-05246, 2012 WL 113361, at *4 (N.D. Cal. Jan 12, 2012) (holding that settlement was fair, reasonable, and adequate over the objections of class members who wanted a longer extended warranty period).

3. The set of components covered by the Settlement is fair.

Mr. Simons would like the Settlement to cover repairs to various additional components, including the fan clutch and rocker arm, rather than being tied to just the covered components that Plaintiffs allege were affected by a common design defect. (Dkt. 269 at 1.) The limitation of reimbursements to the covered components is fair, however, because in order to certify a class, Plaintiffs would have had to prove that their claims involve common liability facts. *See Barragan v. Evanger's Dog & Cat Food Co., Inc.*, 259 F.R.D. 330, 334 (N.D.Ill. 2009) (holding that class certification requires at least one common question of law or fact). Engines are complex pieces of machinery that can experience failure for any number of reasons, including

problems caused by improper maintenance, ordinary wear-and-tear, or other issues affecting only particular vehicles. Plaintiffs worked extensively with experts to develop evidence that the 6.0L Diesel's Oil Cooler had a common design defect that was a root cause of problems with the other components covered in the Settlement, and that Ford's repairs for these components were inadequate. (*See* Dkt. 256-2 ¶ 55; Dkt. 233 ¶¶ 79–81.) Given the complexity of engine design, the difficult causation issues Plaintiffs faced, and the number of individual defenses available to Ford, it is remarkable that the Settlement covers as many components as it does: extension of reimbursements to additional components is simply unrealistic.

4. The requirement that the failed component must have received a warranty repair is fair.

Mr. Burress objects that many Class Vehicles may not qualify for reimbursements under the Settlement because they did not have a warranty repair to the relevant component. (Dkt. 259 at 3.) This warranty repair requirement, however, is fair for at least two reasons. First, this requirement serves as a proxy simplifying Plaintiffs' task of proving causation: the fact that Ford attempted to repair the component under warranty shows that Ford accepted that the component suffered from some defect not caused by the owner. Second, to prevail on breach-of-warranty claims at trial, Plaintiffs would need proof that they presented the problem to Ford for repair and that Ford failed to adequately repair it. *See, e.g.*, *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 494 (Ill. 1996). It is not unreasonable for the Settlement to require class members to meet this threshold hurdle.

5. Many Class Members who purchased extended warranties incurred out-of-pocket expenses for repairs or deductibles that will be reimbursed under the Settlement.

Mr. Burress objects that persons who purchased extended warranties will not benefit from the Settlement. (Dkt. 259 at 3.) There are many individual issues presented by extended

warranties, however, making them ill-suited for class-wide relief. For example, many extended warranties are sold by third parties and vary widely as to term, conditions, and covered components. Mr. Burress' extended warranty does not cover the EGR valve, for example, one of the covered components under the extended warranty provided here. Nor does it cover non-Ford parts, something else the Settlement does cover. Extended warranties, moreover, often provide even more limited coverage and generally have substantial deductibles, so that Class Members who happened to have extended warranties could still incur covered out-of-pocket expenses for reimbursable repairs. For example, Mr. Cooley appears to have paid such expenses. (*See* Dkt. 246 at 1 (stating that Mr. Cooley paid a $100 deductible for a turbocharger repair that was covered under an extended warranty).)

6. Reimbursement of 50% of Class Members' out-of-pocket costs is an excellent recovery for the Class.

Several objectors would like the Settlement to cover 100% of Plaintiffs' out-of-pocket repair expenses, or even ancillary damages such as consequential damages and diminution in value. Dkt. 246 at 1; Dkt. 250[5]; Dkt. 259 at 8; Dkt. 267 at 8; Dkt. 269 at 1. As much as Plaintiffs might have liked to recover 100% of their pleaded damages, the "essence of settlement is compromise," and thus settlement will not represent a total win for either side. *See In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citing *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)). On average, the reimbursement amounts in the Settlement actually cover roughly 50% of Class Members' out-of-pocket costs for reimbursable repairs, and this is borne out by the experience of the Class Representatives. Dkt. 256-8 ¶¶ 9–12. In the context of this case, particularly considering Ford's potential defenses regarding causation, the

[5] Mrs. Adkerson also did not write a formal objection, but only underlined a copy of the Settlement Notice and sent this underlined Notice to the Court along with a repair invoice. Counsel for Ford has reported that the VIN listed on Mrs. Adkerson's repair invoice is not a Class Vehicle. Nevertheless, Plaintiffs have done their best to interpret Mrs. Adkerson's intentions and respond accordingly.

chance that a class might not be certified, and the possibility of a *Daubert* challenge to Plaintiffs' experts, recovery of 50% of Class Members' out-of-pocket costs for repairs to covered components is a terrific result.

Underscoring the fairness of the 50% recovery, Mr. and Mrs. Lehrer actually use this figure as a benchmark of what the Settlement should provide. *See* Dkt. 255 at 1 ("I feel as though at least half reimbursement is in order and fair.") Mr. and Mrs. Lehrer's repair bill appears to have been higher than average, (s*ee* Dkt. 255 at 2), and Mr. Burress also points out that some Class Members may incur higher costs than the average on which the Settlement reimbursements are based. (Dkt. 259 at 5.) (Of course, some Class Members will also recover more than 50% of their out-of-pocket costs for the repairs in question.) Overall, Class Counsel concluded that the fixed maximum reimbursement amounts by type of repair provided under the Settlement, as opposed to a variable recovery of 50% of the actual costs incurred for each individual repair, would benefit Class members. Class members often have more than one repair performed on a given service visit, and invoices do not always clearly differentiate the charges for each repair, particularly with regard to labor charges. Thus, providing for payment of a fixed percentage of certain specified repairs would be an administrative nightmare and create the potential for numerous disputes in the claims process, many of which could be resolved against class members. The fixed reimbursement amounts will greatly simplify the claims process and promote fairness for the Class. (Dkt. 256-2 ¶ 58.)

The result achieved for the Class is even more remarkable because the Class need not pay any attorneys' fees or costs out of this recovery: Ford has agreed to pay those items separately and in addition to the repair reimbursements. (Dkt. 236-1 at 15–16.) To the extent any value can be ascribed to claims for diminution in value or consequential damages (which are unlikely to be

recovered), the ancillary benefit to the class from not having to pay attorneys' fees and costs at least cancels out any lost value from those items not being included in the Settlement.

7. The Class faced real risks from continued litigation.

Mr. Burress badly misunderstands the risks the Class faced in surviving summary judgment, winning class certification, and ultimately prevailing at trial. (Dkt. 259 at 10–11.)[6] He cites the allegations in Plaintiffs' Complaint regarding liability and class certification as if proof of these allegations were a foregone conclusion. (*Id.*) In fact, however, had counsel not settled and sought judgment for the Class, they would have faced a variety of significant hurdles, most critically class certification, *Daubert*, causation, standing, and other affirmative defenses. Ford had filed 14 summary judgment motions, seeking judgment as a matter of law on nearly all of the named Plaintiffs' claims. (Dkts. 144–203.) If Plaintiffs had prevailed on all of these motions, they would have faced the problem of certifying a class involving numerous potential manageability issues including variations in state law and potential individual issues regarding causation, among other issues. Plaintiffs would then have needed to survive *Daubert* motions challenging their experts' qualifications and, of course, prevail at trial. Even if Plaintiff had won the liability phase at trial, a substantial portion of the Class might have been precluded from recovery through a claims process that could have required them to submit their vehicles for inspection and/or to submit maintenance records. In light of all these risks, the Settlement result is well within the range of, and likely better than, expected trial outcomes.

B. The Settlement structure fairly awards compensation according to each Class Member's injury and damages.

Mr. Neill objects that Class members who did not suffer the injury or damages to be compensated under the Settlement will not receive compensation. (Dkt. 261 at 2–3.) As an

[6] He also fails to realize that Plaintiffs did force Ford to withdraw its motions to seal its First Amended Answer and file an unredacted Answer, which quoted all allegations of this Complaint. (*See* Dkts. 105, 114.)

initial matter, it is worth noting that Mr. Neill and his counsel, Mr. Weinstein, have made the same objection in other cases. *See* Objection to Proposed Settlement, *In re The Progressive Corp.*, No. MDL 1519 (N.D. Fla. Aug. 1, 2006), attached as Ex. 3 (Neill and Weinstein objecting that the settlement "fails to provide relief to the vast majority of the class"); Objection to Proposed Settlement, *Lubitz v. Daimler Chrysler*, No. 05-cv-0186 (N.J. Super. Ct. Sept. 5, 2006), attached as Ex. 4 (Weinstein objecting that "those class members who did not experience pulsation during application of the brakes in their vehicle receive no benefits under the settlement"). Those courts rejected Neill and Weinstein's objections. *See* Final Judgment, *In re The Progressive Ins. Corp. Underwriting and Rating Practices Litig.*, No. MDL 1519 (N.D. Fla. Jan. 3, 2007) (approving settlement agreement); *Lubitz*, 2006 WL 3780789, at *21 (granting motion to approve settlement, finding that "[t]he objectors' position echoes a familiar refrain seen in class action settlements").

As in those cases, Neill and Weinstein's objection is poorly taken here. There is nothing unusual about requiring Class Members to submit claims tying the amount of their recovery, if any, to the extent to which each Class Member suffered the injury at issue in the case to be compensated and the strength of their respective claims. *See Uhl v. Thoroughbred Tech. & Telecomms*, 309 F.3d 978, 986 (7th Cir. 2002) (approving settlement that compensated class members differently according to where their properties were located, holding that "the fact that Cable Side and Non-Cable Side will receive different compensation under the settlement does not make it novel or unfair"); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 589 (N.D. Ill. 2011) (holding that "when real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, it is appropriate to weigh distribution of the settlement in favor of plaintiffs whose claims comprise the set that was more likely to succeed.") The

settlement claims process, which ties each Class Member's recovery to whether and to what extent each Class Member incurred qualifying deductible payments or repair expenses for covered components during the Extended Warranty Period, ensures that the Settlement consideration is apportioned fairly among the Class.

The *Mirfasihi v. Fleet Mortgage Corp.*[7] case, cited by Mr. Weinstein, is not to the contrary. *Mirfasihi* reversed the approval of a settlement based on the district court's inadequate analysis of the claims of class members that the court decided had no value. *Mirfasihi*, 356 F.3d at 783. However, after twice remanding the case for further analysis of these claims, in 2008 the Seventh Circuit eventually agreed with the district court's analysis that the claims were valueless and approved the settlement. *Mirfasihi v. Fleet Mortg. Corp*., 551 F.3d 682, 686–87 (7th Cir. 2008). Thus the *Mirfasihi* decisions simply stand for the proposition that a district court must fully evaluate the strength of class members' claims. Here, unlike in *Mirfasihi*, all Class Members receive a legal entitlement to reimbursement for qualifying repairs. *See In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1003 (E.D. Wisc. 2010) ("The net effect of the warranty benefits is that every class member who still owns his or her lawnmower, except those owning lawnmowers with Honda engines, will receive warranty benefits.") Warranties, like insurance policies, have value whether they are ultimately needed or not. *See id.* at 1007 (valuing extended warranty benefits at $45.7 million and distinguishing warranty benefits from coupon settlements, finding that "[w]arranty benefits are not coupons, to be sure").

Of course, Class Members who did not suffer damages for qualifying post-warranty repairs and had no qualifying deductible payments will not receive reimbursement. This is not

[7] 356 F.3d 781 (7th Cir. 2004).

because the Settlement treats them differently or unfairly, but simply because they did not suffer the kind of injury that the Settlement redresses. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("[A] class will often include persons who have not been injured by the defendant's conduct.") This is an inherent feature of extended warranty-type settlements, which numerous courts have approved as offering fair, reasonable, and adequate relief to the class. *See, e.g., In re Lawnmower*, 733 F. Supp. 2d at 1021 (granting motion for final approval of settlement including extended warranty benefits for owners of lawnmower engines); *Lundell v. Dell, Inc.*, No. 05-cv-3970, 2006 WL 3507938 (N.D. Cal. Dec. 5, 2006) (granting final approval to settlement offering reimbursement of out-of-pocket expenses and limited one-year extended warranty for qualifying repairs as providing "exceptional" benefits to the class).

Mr. Weinstein's attempted reliance on *Acosta v. Trans Union*[8] is similarly off point. In *Acosta*, the district court found that a proposed settlement was unfair because the distinctions between members of the subclass that would receive economic relief and the subclass that would not receive such relief were "arbitrary and bear no relationship to the procedural or substantive limitations on the class members' claims." *Acosta*, 243 F.R.D. at 387. Here, by contrast, the Settlement structure is fair because it appropriately tailors the relief to the relative strength of Class Members' claims. *See Schulte*, 805 F. Supp. 2d at 589 (finding settlement fair, reasonable, and adequate where "allocation of benefits is appropriately tailored to the facts and law at issue"). Mr. Weinstein's client, Mr. Neill, is the perfect example. Apparently Mr. Neill's adverse experience with his Ford 6.0L engine consisted of one $100 deductible over six years. (Dkt. 261 at 10.) Clearly, Mr. Neill's experience with his Class Vehicle was favorable and

[8] 243 F.R.D. 377 (C.D. Cal. 2007).

nothing that could serve as the basis for a claim against Ford (which calls into question the motivation of both Mr. Neill and his counsel, Mr. Weinstein, in making an objection).

Even if the Class were to prevail at trial, some claims procedure would likely be required to assess whether and to what extent each Class Member suffered compensable damages, and there would certainly be some time/mileage cutoff for claims (as well as possible requirements to show causation and/or provide maintenance records that could be significantly more onerous than the claims procedure under the Settlement). To achieve the same or better result without the risks and expense of further litigation is in no way unfair to the class; to the contrary, it is an excellent result. *See In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 (S.D.N.Y. 2000) (holding that settlement claims procedure weighed in favor of settlement where claims process required less demanding standard of proof than would be required at trial).

C. The scope of the release is appropriately tailored to the facts at issue.

Mr. Burress objects that the Settlement release should not include claims against Ford dealerships. (Dkt. 259 at 7.) Courts within the Seventh Circuit recognize that "[a]llowing for the broad release of related claims is in accord with the general policy in favor of the settlement of class litigation." *Smith v. Spring Commc'n Co.*, No. 99-cv-3844, 2003 WL 103010, at *2 (N.D. Ill. Jan. 10, 2003). A settlement may release all claims based on the "identical factual predicate" as the litigated claims. *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 273 (7th Cir. 1998). Here, Ford could hardly have been expected to settle this litigation if doing so would have left the door open for these same issues to be re-litigated against its affiliated dealers, and the scope of the release is therefore reasonable. *See Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 109 (2nd Cir. 2005) (holding in suit against credit-card companies that release extending to the defendants' member banks, who were not parties to the litigation, was reasonable where to do otherwise "would have invited relitigation of the same factual allegations

against the banks"). Moreover, since the dealers were not named as a defendant class in the litigation, there has been no tolling of the applicable state statutes of limitation, even to the extent the *American Pipe* doctrine provides such protection (which varies widely from state to state). Therefore, all or virtually all such claims are likely already barred by applicable statutes of limitation.

D. The requested attorneys' fees and expenses are fair in light the amount of work performed and the complexity of this case.

Mr. Ackerman, Mr. Burress, Mr. Neill, Mr. Stevens, and Mr. and Mrs. Lewis object to the amount of attorneys' fees Ford has agreed to pay. (Dkt. 243; Dkt. 259; Dkt. 261; Dkt. 266; Dkt. 268). While reciting in a perfunctory manner that the fees are too high, none of these objectors seriously disputes that, as shown in Plaintiffs' fee application that was filed two weeks before the objection deadline, Plaintiffs' counsel reasonably spent over 20,000 hours litigating this case or that the requested fee represents only a 1.25 multiplier of counsel's lodestar. (*See* Dkt. 256-1 at 7–24.) The Court should therefore disregard these objections.

Mr. Burress and Mr. Neill object to the use of the lodestar method to calculate the requested attorneys' fee. (Dkt. 259 at 12; Dkt. 261 at 5.) It is well established, however, that the Court has discretion to use either the lodestar or the common-fund method in awarding fees. *See Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir.1991) (holding that district court acted within its discretion in choosing lodestar approach for awarding fees). The lodestar method is most appropriate here because, as the Settlement contains no cap on the Class's recovery, there is no precise number from which to take a percentage for purposes of applying the common-fund method. *In re Rite Aid*, 396 F.3d 294, 300 (7th Cir. 2005) (holding that "[t]he lodestar method is more typically applied . . . in cases where the nature of the recovery does not allow the determination of the settlement's value required for application of the percentage-of-recovery

method"); *see also Grays Harbor Adventist Christian School v. Carrier Corp.*, No. 05-cv-05437, 2008 WL 1901988, at *1 (W.D. Wash. April 24, 2008) (holding that where "[s]ettlement relief will be paid on a claims made basis with no cap to the relief available, consideration of attorneys' fees lends itself more readily to the lodestar method").

Mr. Burress and Mr. Neill also include a pro-forma objection that the amount of the attorneys' fee somehow lessened the relief available to the Class. (Dkt. 259 at 12; Dkt. 261 at 5.) Their objection is not tied in any way to the specific facts of this case, but only voices the general suspicion, commonly raised by objectors, that class counsel may have an incentive to accept a lower Settlement value in exchange for the defendant's agreement to pay a higher fee. (*Id.*) Here, however, Plaintiffs and their counsel structured the Settlement process to guard against any such trade-off. At their first two-day mediation session with Judge Neville, Plaintiffs and Ford discussed and reached agreement on only the terms of the Class recovery, deferring the question of attorneys' fees and expenses to what ultimately proved to be a series of separate, contentious mediation sessions, also with Judge Neville. (Dkt. 265-2 ¶¶ 54–55.) By postponing fee negotiations until an agreement on the merits was achieved, the parties prevented any possibility of a tradeoff between merits and fees.

Mr. Ackerman argues that Class Counsel's fees should be reduced in proportion to the number of opt-outs or the number of claims filed. (Dkt. 243 at 1.)[9] Because Plaintiffs' fee request is based on the lodestar method, requesting only a modest 1.25 multiplier (a multiplier which necessarily decreases as this litigation continues), the number of class members filing claims is relevant only to the extent the value of the settlement may be used as a "cross-check" against the lodestar fee. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). In any case,

[9] Mr. Ackerman's letter is not properly considered an objection because he states that he chooses to be excluded from the Settlement Class. (Dkt. 243 at 1.) Plaintiffs have nevertheless responded to the concern he raises in case such response might be helpful to the Court.

only approximately 1,300 Class Members (for claims relating to about 3,500 vehicles), or 0.2% of the Class, have opted out, and the overwhelming support this Settlement has received, including approximately 150 letters sent to counsel expressing a desire to participate in the Settlement and support for it, suggests that the claims rate will be high.

Mr. Stevens' fee objection is so conclusory that it raises no real issue and requires no more response. (Dkt. 266 at 10.) Mr. and Mrs. Lewis' statement is similar, except that it also incorrectly states that "[n]o one is getting anything but lead counsel in this case and it is unfair." (Dkt. 268 at 1.) Putting aside the puzzling question of what interest Mr. and Mrs. Lewis might have in the distribution of fees among Plaintiffs' counsel, the fee will be distributed according to the procedure which this Court has already approved in the Court's Order Regarding Management of Timekeeping, Attorneys' Fees, and Cost Reimbursement Issues. (Dkt. 18.) Thus, none of the fee objections raises any substantive concern.

E. The requirement that objectors disclose other class-action settlement objections is reasonable.

Mr. Neill and his counsel Mr. Weinstein and Mr. Stevens object to the requirement in the Preliminary Approval Order that, in order to have standing to seek review of the Settlement on appeal, objectors must list the cases in which they have filed or participated in objections to class action settlements within the past five years. (Dkt. 261 at 5–8; Dkt. 266 at 1; *see* Dkt. 242 at 7.) Mr. Neill and Mr. Weinstein not only objected, but baldly refused to comply with the Court's Order, taking the position that their history of objecting in other cases is "irrelevant" and that disclosure of this information would unfairly "punish" them. (Dkt. 261 at 5–6.)[10]

There is nothing unusual or unfairly punitive, however, about supplying the Court with information about previous cases. For example, the Federal Rules require that expert witnesses

[10] Plaintiffs reserve their right to move to strike Mr. Neill's objection and/or to contest any attempt by Mr. Neill or Mr. Weinstein to appeal the court's judgment based on this refusal to comply with the Court's order.

who will testify must disclose a list of the cases in which they have testified during the previous four years. FED. R. CIV. P. 26(a)(2)(B)(v). Like the Rules' disclosure requirement for experts, requiring objectors to disclose their recent case history does not "punish" them or prevent them from fulfilling their role in litigation; to the contrary, it enhances this role by ensuring that courts have the appropriate information to evaluate each opinion and assign it due weight.

Federal courts often consider the history of professional objectors who lodge objections for improper purposes, *i.e.*, not in a good faith effort to protect their clients or class members, but only to extract a fee by threatening to delay Class Members' recovery with a meritless appeal. *See, e.g., In re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 383 (N.D. Ill. 2011) (describing a frequent objector's history of filing meritless bad faith objections to class action settlements); *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010) ("concur[ring] with the numerous courts that have recognized that professional objectors undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients"); *Devlin v. Scardelletti*, 536 U.S. 1, 23 n.5 (2002) (citing a district court's critique of "'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests").

The *Initial Public Offering* opinion specifically found evidence of bad faith or vexatious conduct by objectors, and noted that other courts have found three objectors' counsel, *including Jeffrey Weinstein*, to be "serial objectors" and forced them to post bonds in order to appeal the approval of a class action settlement. *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 294. The *Initial Public Offering* opinion cited an unreported decision wherein Mr. Weinstein was ordered to post a bond after he "stated that he would withdraw his objection if Class Counsel

made a donation to a charity he selected." *Id.* at 294 n.22 (citing *Turner v. General Elec. Co.*, No. 06 Civ. 186, Slip Op. at 2 (M.D.Fla. Oct. 12, 2006)). Even more troubling, according to the sworn declaration of class counsel in *Turner*, Mr. Weinstein offered to drop the objection only if he was compensated, then, when told that the Rules prohibit undisclosed agreements in class actions, said that he could "work around the rules." (Declaration of Scott Weinstein, *Turner v. General Elec. Co.*, Case No. 2:05-cv-00186 (M.D. Fla. Oct. 12, 2006), attached as Ex. 5, at ¶ 8.) He then proposed a $125,000 contribution to a specific charity and stated that "his relationship with the charity was such that he would be able to share in the proceeds of the 'contribution.'" (*Id.*) These are the kinds of facts that Mr. Weinstein would attempt to sweep under the rug as "not relevant" to the Court's evaluation of his objection. Because such facts are plainly relevant, and their disclosure can cause no prejudice to (indeed, it benefits) the Class, the Preliminary Approval Order requirements are fair.

F. Persons not in the Class lack standing to object.

In addition to the substantive deficiencies of the points they attempt to raise, and the fact that Mr. Stevens' objection is so conclusory that it fails to give adequate notice of the basis for his objection, the Court should not consider Messrs. Adkerson, Lash, and Stevens and Mr. and Mrs. Lewis valid objectors because the information they submitted does not show that they own, or have ever owned, a Class Vehicle. *See Carnegie v. Household Int'l, Inc.*, 445 F. Supp. 2d 1032, 1035 (N.D. Ill. 2006) (holding that objectors lacked standing because they were not members of the class).

Mr. Stevens states that he owned two Ford F-250 trucks and supplies two VINs but does not include a certificate of title or any proof of ownership (as required by the Preliminary Approval Order.) (Dkt. 266 at 3; *see* Dkt. 242 ¶ 17.) The Class Notice that Mr. Stevens included with his objections is addressed to "Parkhouse Motors," not Mr. Stevens. While

Mr. Stevens states that he owns Parkhouse Motors, mere ownership of an entity, even if proven, would not give Mr. Stevens standing to object without any evidence that he himself owned a Class Vehicle. Moreover, Counsel for Ford has informed Plaintiffs that the VINs Mr. Stevens submitted do not appear on the list of Class Vehicles.

Mr. and Mrs. Lewis and Mrs. Adkerson also supply the VINs of Ford vehicles they owned. (Dkt. 268 at 1; Dkt. 250 at 6.) Counsel for Ford has informed Plaintiffs that these VINs do not appear on the list of Class Vehicles.[11] Mr. Lash does not supply his VIN. (Dkt. 251.) The Court should therefore not consider Mr. Stevens, Mr. and Mrs. Lewis, Mrs. Adkerson, or Mr. Lash valid objectors.

II. Conclusion

For the reasons stated above, the Court should reject the concerns raised by the objections and letters commenting on the Settlement.

Dated: May 8, 2013

Respectfully submitted,

By: /s/ Michael A. Caddell

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MDL LEAD COUNSEL FOR PLAINTIFFS

[11] Mr. and Mrs. Lewis' objection is also deficient in that it was not timely filed with the Court. It appears that Mr. and Mrs. Lewis sent a letter to their lawyer Mr. Rego on the objection deadline, April 24, and that he later forwarded that letter to the Court, where it was not received until April 29, five days after the deadline had passed. (*See* Dkt. 268.) In addition, it is worth noting that Mr. and Mrs. Lewis admit that they installed an EGR delete kit on their vehicle, making it non-compliant with EPA regulations and raising issues regarding potential difficulties they might have showing causation or potential affirmative defenses Ford might have against their claims. (*Id.*)

CERTIFICATE OF SERVICE

I hereby certify that, on May 8, 2013, this document was filed electronically via the Court's ECF system and thereby served on all counsel of record.

/s/ Cynthia B. Chapman
Cynthia B. Chapman