EXHIBIT 2

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

DECLARATION OF WILLIAM B. RUBENSTEIN
IN SUPPORT OF PLAINTIFFS' MOTION
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, WILLIAM B. RUBENSTEIN, state the following:

1. The law firm of Caddell & Chapman has retained me to provide an expert opinion as to the whether the proposed class action settlement is fair, reasonable, and adequate. After setting forth my qualifications to serve as an expert (Part I, *infra*) and briefly describing the underlying litigation (Part II, *infra*), I describe how the Seventh Circuit requires a district court entertaining a proposed class action settlement to undertake a "net expected value" analysis of the proposed settlement, "since a settlement for less than that value would not be adequate."[1] Specifically, the Circuit instructs courts [1] to generate a net expected value of the litigation by "estimating the range of possible outcomes and ascribing a probability to each point on the range;"[2] [2] to then discount that value "to the present using a reasonable interest rate;"[3] and [3]

[1] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002).

[2] *Id.* at 285.

[3] *Id.* at 285.

finally to compare the discounted net expected value to the value of the proposed settlement (Part III(A), *infra*). My Declaration undertakes this analysis, reaching the following conclusions:

- My assessment of the settlement's value to class members shows that the average class member will recover approximately 42.5% of her full claim, meaning the settlement's value, per dollar, is .425 (Part III(B), *infra*);

- My assessment of the other possible outcomes of this litigation, based on review of the specific and significant risks plaintiffs would have faced taking this case to trial, generates a net expected value of .397, the present value of which is .371 when discounted over four years at the current 10-year U.S. Treasury Bond rate (1.68%). This means that the settlement's value is about 15% greater than the net expected value of the litigation. The settlement's value also far outstrips the value of other settlements approved by courts within the Seventh Circuit (Part III(C), *infra*).

Based on this analysis, it is my expert opinion that the proposed settlement clearly meets Rule 23's fair, reasonable, and adequate standard, as interpreted by the Seventh Circuit – indeed, at nearly a 50% return, it is a terrific settlement providing significant value to the class – and hence easily warrants this Court's final approval.

I.
BACKGROUND AND QUALIFICATIONS[4]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin of the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and I was an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the United States Supreme Court, five U.S. Courts of Appeals, and four U.S. District Courts.

[4] My full c.v. is attached as Exhibit A.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., Exhibit A). Much of this work concerns various aspects of class action law. I am the sole author of the leading national treatise on class action law, *Newberg on Class Actions*. For five years (2007-2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise on procedural matters has been recognized by judges, scholars, and lawyers in private practice throughout the country, for whom I regularly provide consulting advice and educational training programs. For four years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation at the annual MDL Transferee Judges Conference on the topic of "Recent Developments in Class Action Law and Impact on MDL Cases." The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation.* In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011-2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the 2001-2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996-1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States; I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. In the past few years, I have been retained as an expert witness in roughly three dozen class action cases and as an expert consultant in about another dozen cases. These cases have been in state and federal courts throughout the United States, including a number of MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, and for objectors.

8. I have been retained in this case to provide an opinion concerning the issues set forth in ¶ 1, above. I am being compensated for my work. That compensation is in no way contingent upon the content of my opinion.

9. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this litigation, a list of which is attached as Exhibit B. I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

II.
THIS LITIGATION[5]

10. This is a breach of warranty case alleging multiple performance problems with Ford's 6.0L diesel engine, an engine Ford used in many of its trucks and other vehicles between 2002-2006. The vast majority of the engine's problems were attributed to several specific component parts – the 6.0L engine's turbochargers, fuel injectors, and exhaust gas recirculation

[5] The facts in this section are culled from the documents listed in Exhibit B.

("EGR") system. Plaintiffs allege that Ford's warranty program was unhelpful in addressing these problems because Ford's authorized dealers failed adequately to address the underlying defects in the 6.0L engine and, instead, attempted merely superficial fixes.

11. Ford denies all liability. Nonetheless, the company, at least implicitly, acknowledged the problems with the engine when, in March 2007, it sued Navistar International Transportation Corporation and International Truck and Engine Corporation, the manufacturer of the 6.0L engine, in Michigan state court.[6] During this litigation, Ford alleged that Navistar was liable for a portion of the warranty and vehicle buyback costs that Ford had incurred in repairing and replacing components of the 6.0L engine. The case ultimately settled in early 2009.[7]

12. In January 2010, plaintiffs filed this action in the U.S. District Court for the Northern District of Illinois. By early 2011 nearly three dozen similar actions had been filed against Ford around the country, and in April 2011 the Judicial Panel on Multidistrict Litigation (JPML) consolidated these actions before this Court as MDL 2223.[8]

13. The litigation was adversarial:

- Ford initially filed a motion to dismiss and a motion to strike the class allegations contained within the complaint. This Court denied the motion to strike as premature and denied in part and granted in part the motion to dismiss, permitting the plaintiffs to file an amended complaint.

- In April 2011, plaintiffs filed a motion for class certification; Ford opposed on the merits and by filing a series of motions for summary judgment, which this Court denied as premature.

- Following consolidation by the JPML, plaintiffs filed a Master Amended Class Action Complaint in July 2011, which Ford answered in September 2011.

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[6] *Ford Motor Company v. Navistar*, Docket number C.A. 07-080067-CK, Michigan Circuit Court for the County of Oakland, Michigan.

[7] *See Navistar and Ford Motor Company Reach New Business Agreement*, NAVISTAR.COM (Jan. 13, 2009), http://media.navistar.com/index.php?s=43&item=225.

[8] U.S. Judicial Panel on Multidistrict Litigation Transfer Order, ECF No. 1.

- Counsel report that, during the discovery process in this case, they took or defended nearly 40 depositions, hired expert witnesses to analyze and test roughly two dozen Ford vehicles containing the 6.0L engine, sent hundreds of interrogatories, and received and reviewed voluminous internal documents produced by Ford.

- In December 2011, plaintiffs successfully moved to quash a subpoena of the firm of one of plaintiffs' experts, Ken Neal.

- Ford filed 14 summary judgment motions and two motions to compel arbitration.

- The parties then engaged in extensive settlement negotiations, reaching a settlement before plaintiffs replied to Ford's motions for summary judgment and before a motion for class certification was filed in the MDL matter.

- On November 13, 2012, this Court preliminarily approved the settlement and set a fairness hearing for May 22, 2013.

14. The Settlement Agreement defines the class as those owners of Ford vehicles containing the 6.0L diesel engine who received a warranty repair to one of the problematic parts during the warranty's 5-year, 100,000 mile operation.[9] Presumably, vehicles that meet that definition can be assumed to contain problematic engines, as the very fact of the engine having had a repair during the warranty period certifies that a Ford-authorized dealer acknowledged a problem not caused by the owner.

15. In exchange for the class releasing its claims against Ford, Ford has agreed to repay class members for repairs made to the problematic parts outside of the initial 5-year, 100,000 mile warranty up to a 6-year/135,000 mile period. The repayment levels are: EGR cooler ($475), oil cooler ($525), EGR valve ($200), turbocharger ($750), and fuel injectors ($375 for the first injector repair/$175 for all subsequent injector repairs). Class members who

[9] Specifically, the definition is:

> All entities and natural persons in the United States (including its Territories and the District of Columbia) who currently own or lease (or who in the past owned or leased) a model year 2003-2007 non-ambulance Ford vehicle sold or leased in the United States and equipped with a 6.0-liter PowerStroke diesel engine that received one or more repairs covered by Ford's New Vehicle Limited Warranty during the vehicle's first five years in service or 100,000 miles, whichever comes first, to a fuel injector; the exhaust gas recirculation ("EGR") valve; the EGR cooler; the oil cooler; or the turbocharger.

do not submit a claim for these out-of-original-warranty repairs, but who paid deductibles for multiple repairs during the original warranty period, may receive $50 payments for their second and each subsequent deductible payment up to $200. To recover, class members must demonstrate their membership in the class by showing a repair during the initial warranty period and then provide documentary proof of the subsequent repairs or deductibles for which they seek compensation.

16. Ford has also agreed to pay, subject to this Court's approval, $12,800,000 in attorneys' fees, $1,250,000 in costs, and $150,000 in incentive awards to the various class representatives.

III.
THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND THUS WARRANTS FINAL JUDICIAL APPROVAL

A. Governing Legal Standard

17. Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, a federal district court may approve a settlement after a hearing and after finding that the settlement is "fair, reasonable, and adequate."[10] In the *Synfuel* case,[11] the Seventh Circuit instructed district courts that in determining the fairness and adequacy of a settlement for approval, the court must consider:

> [1] the strength of plaintiffs' case compared to the amount of defendants' settlement offer, [2] an assessment of the likely complexity, length and expense of the litigation, [3] an evaluation of the amount of opposition to settlement among affected parties, [4] the opinion of competent counsel, [5] and the stage of the proceedings and the amount of discovery completed at the time of settlement.[12]

[10] FED. R. CIV. P. 23(e)(2).

[11] *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646 (7th Cir. 2006).

[12] *Id.* at 653 (internal quotation marks omitted).

The *Synfuel* court emphasized that the most important factor is the strength of the plaintiffs' case relative to the offered settlement terms,[13] and it directed lower courts, in assessing that factor, to quantify the "net expected value" of the litigation.[14] This Declaration focuses on that analysis, and in so doing, provides extensive analysis of the first two prongs of the *Synfuel* test. The remaining three prongs are easily addressed:

[3] *There is little opposition to the settlement.* A minute portion of the class objected to the settlement – Class Counsel report that more than 1.1 million notices were sent and seven objections were filed with the Court as of May 8, meaning the objection rate is roughly .0006% (and likely smaller, as apparently not all of the objectors demonstrate that they qualify as class members not opting out of the settlement). I carefully reviewed each of the objections, and I am of the opinion that they raise no significant concerns about the reasonableness of the settlement.[15] Class Counsel also inform me that they received numerous letters in support of the settlement.

[4] *Competent counsel support the settlement.* A number of leading national class action law firms with significant class action experience, including Named Plaintiffs' Lead Counsel, Caddell & Chapman, are pursuing this MDL matter. All support the settlement.

[5] *The Stage of the Proceedings.* The settlement comes after significant adversarial litigation and discovery[16] and follows on the heels of Lead Counsel's adversarial litigation of a related case.[17]

With these three factors easily addressed, I now turn to the "net expected value" analysis.

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[13] *Id.*

[14] *Id.* (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002)).

[15] *See also* ¶ 37, *infra.* A number of objectors take issue with attorney's fees. I was not asked to and have not reviewed the fee petition in this matter and hence take no position on these objections.

[16] *See* Part II, *supra.*

[17] *See* ¶ 34, *infra.*

18. In conducting the net expected value analysis, the Seventh Circuit instructs lower courts to quantify this value by "estimating the range of possible outcomes and ascribing a probability to each point on the range"[18] and then discounting those outcomes "to the present using a reasonable . . . interest rate."[19] More specifically, the Circuit explained:

> [T]he parties [could] present evidence that would enable four possible outcomes to be estimated: call them high, medium, low, and zero. High might be in the billions of dollars, medium in the hundreds of millions, low in the tens of millions. Some approximate range of percentages, reflecting the probability of obtaining each of these outcomes in a trial (more likely a series of trials), might be estimated, and so a ballpark valuation derived.
>
> Some arbitrary figures will indicate the nature of the analysis that we are envisaging. Suppose a high recovery were estimated at $5 billion, medium at $200 million, low at $10 million. Suppose the midpoint of the percentage estimates for the probability of victory at trial was .5 percent for the high, 20 percent for the medium, and 30 percent for the low (and thus 49.5 percent for zero). Then the net expected value of the litigation, before discounting, would be $68 million; discounting, depending on an estimate of the likely duration of the litigation, would bring this figure down . . . .[20]

What this explanation demonstrates is that the net expected value analysis should provide a range of expected values, each of which are a particular outcome multiplied by the probability of that outcome, with the "net expected value" being the sum of the possibilities. The Seventh Circuit's own example is set forth in Table 1, below.

[18] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir.2002).

[19] *Id.* at 285.

[20] *Id*.

TABLE 1
Net Expected Value Methodology – Seventh Circuit Example

	Recovery	Probability	Expected Value
High	$5,000,000,000	.5% (.005)	$25,000,000
Medium	$200,000,000	20% (.2)	$40,000,000
Low	$10,000,000	30% (.3)	$3,000,000
Zero	0	49.5% (.495)	0
Total or Net Expected Value		100% (1)	$68,000,000

19. To undertake this net expected value analysis, it is necessary to provide an estimate for each outcome and for the probability that that outcome is likely to occur. Valuation of the class's claims, and assessment of their likely success at trial, is, of course, inevitably inexact. In calling for a net expected value assessment, the *Synfuel* Court noted that "'[a] high degree of precision cannot be expected,'"[21] but that the court should "at least come up with a "'ballpark valuation.'"[22] Because of the preliminary stage at which the fairness of a settlement is evaluated, courts must avoid "resolving the merits of the controversy or making a precise

[21] *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002)).

[22] *Id.* (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002)).

determination of the parties' respective legal rights."[23] Instead of "independent[ly] assess[ing] how much a litigation class's claims would be worth," the question for this Court is merely whether the proponents of the settlement have advanced a valuation of their claims that is "reasonable."[24]

20. I begin my net expected value analysis by looking at the value of the settlement to the class. My analysis suggests that class members will receive about 42.5 cents on each dollar for their claims; with the probability of the settlement at 100%,[25] I estimate the settlement value to therefore approximate .425 (Part B(1), *infra*).[26] To compare the settlement's value to the case's net expected value, I first enumerate the risks of further litigation and then use those risks to identify various other outcomes and assign them probabilities. To supplement this analysis, I also compare this settlement to a similar case and to other settlement values courts have approved (Part III(B)(2), *infra*). These inquiries demonstrate that this settlement is commensurate with the net expected value of the class's claims.

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[23] *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 CV 2898, 2012 WL 651727, at *3 (N.D. Ill. Feb. 28, 2012) (quoting *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985)).

[24] *Id.*.

[25] *See Vought v. Bank of Am., N.A.*, No. 10-CV-2052, 2012 WL 4754723, at *15 (C.D. Ill. Oct. 4, 2012) ("With a settlement, the outcomes are guaranteed; the probabilities . . . are pegged at 100%.").

[26] I undertake the net expected value analysis on a per-claim basis rather than on a class-wide basis. The former calculation has readily available data, while the latter calculation requires a number of additional assumptions, such as the total number of vehicles in the class, the total number of vehicles with problems, the total number of vehicles for which the cause of the problem is attributable to Ford, etc. While those assumptions would enable me to attach a full dollar amount to my analysis, they would essentially be held constant throughout the analysis and would simply wash out in the end. Further, as this is a claims-made settlement, not a common fund, there is no need for a full dollar analysis as there is no full fund value for comparison.

B. The Settlement's Value is Commensurate With the Net Expected Value of the Plaintiffs' Claims

1.
The Full Value of the Plaintiffs' Claims Compared to the Settlement Value

21. Plaintiffs sought a variety of forms of relief in their complaint, and under the settlement, they receive some – though not all – of that relief. The succeeding paragraphs analyze, *seriatim,* the monetary relief, warranty relief, ancillary benefits, and ancillary deficits of the settlement.

22. *Monetary Relief.* The starting point for valuation purposes is the monetary relief. Plaintiffs will receive two forms of monetary relief:

- reimbursement of the ***cost of out-of-warranty repairs*** made to certain component parts of the 6.0L Engine within 6-years/135,000 miles of the initial purchase of the vehicle; or

- reimbursement of the ***deductible payments*** made by class members when similar repairs were conducted within the original warranty period of 5-years/100,000 miles.

Table 2, below, compares the monetary amounts plaintiffs will receive under the settlement to the full value of these claims had they prevailed at trial.[27]

[27] The "full value" amounts are the actual average costs to repair these components, including labor and parts, as attested to by Ford. *See* Decl. Paul Taylor at 7 tbl.3, ECF No. 256-8. This represents the approximate full value of the plaintiffs' claims had they prevailed at trial. It is true that plaintiffs' complaint also requested other forms of relief flowing from Ford's breach of its express and implied warranties – such as rescission or specific performance – but ultimately the plaintiffs would have had to elect their remedies. *See Sharp Structural, Inc. v. Franklin Mfg., Inc.*, 283 F. App'x 585, 589 (9th Cir. 2008) (unpublished) ("Under the doctrine of election of remedies, a party claiming breach of contract must decide whether to seek damages or rescission."); *Winant v. Bostic*, 5 F.3d 767, 775 (4th Cir. 1993) ("Although a party may assert claims for money damages based on fraud, breach of contract, and unfair and deceptive trade practices, he may succeed on only one basis."). It is fair to assume they would have elected cash. It is therefore appropriate to run the *Synfuel* analysis on the cash value alone. *See Vought v. Bank of Am., N.A.*, No. 10-CV-2052, 2012 WL 4754723, at *10 (C.D. Ill. Oct. 4, 2012) ("Plaintiffs have taken the position that at some point before trial, they would need to elect their remedies and opt to pursue their strongest claims . . . . They have therefore conducted a *Synfuel* analysis only for those two claims. Accordingly, this opinion addresses only those two claims.").

TABLE 2
Settlement Value as a Percentage of Full Claim Value

6.0L COMPONENT	FULL CLAIM VALUE	SETTLEMENT VALUE	SETTLEMENT VALUE AS A PERCENTAGE OF FULL VALUE
EGR Cooler	$950	$475	50%
Oil Cooler	$1,050	$525	50%
EGR Cooler and Oil Cooler Together	$1,650	$825	50%
Turbocharger	$1,490	$750	50.3%
EGR Valve	$375	$200	53.3%
First Fuel Injector	$750	$375	50%
Each Additional Fuel Injector	$250	$125	50%
Deductibles paid for warranty repairs	$100	$50 for second and add'l	50% for second and add'l

Table 2 demonstrates that most class members will receive reimbursement of roughly 50% of their out-of-pocket, non-warranty expenses that fell within the settlement's extended warranty period or 50% of the deductibles they paid for repairs under warranty.

23. The 50% valuation is confirmed by analyzing the returns of the named plaintiffs themselves as a rough sampling of what class members will receive. Table 3 sets forth the

recoveries for the named plaintiffs.[28] On *average*, the eight named plaintiffs who qualify for reimbursement of their out-of-pocket, post-warranty repairs will receive reimbursement of 52.9% of their costs. It is reasonable to infer from Table 2 and from the crude confirmatory sample in Table 3 that most class members will receive above 50% of their out-of-pocket expenses for repairs within the settlement extended warranty period.[29]

TABLE 3
Settlement Value for Named Plaintiffs

NAME OF PLAINTIFF	TOTAL EXPENSES WITHIN WARRANTY PERIOD	TOTAL REIMBURSEMENT UNDER SETTLEMENT	PERCENT OF EXPENSES WITHIN WARRANTY PERIOD REIMBURSED
Atwell, Carl	$552.50	$525	95.0%
Barrett, John	$525.58	$200	38.1%
Boggero, Gena	$2,169.60	$1,219	56.2%
Custom Underground	$12,139.32	$6,696	55.2%
Dinonno, Robert	$5,790.83	$3,075	53.1%
Gray, Heather & Scott	$5,172.05	$2,500	48.3%
Marcum, Phillip	$732.83	$361.92	49.4%
Vogt, Georjean	$1,897.69	$750	39.5%
TOTAL	$28,980.40	$15,326.92	52.9%
AVERAGE PLAINTIFF	$3,622.55	$1,915.87	52.9%

[28] This is all based on data that Lead Class Counsel supplied to me. I have undertaken no independent evaluation of these data.

[29] *See Vought v. Bank of Am., N.A.*, No. 10-CV-2052, 2012 WL 4754723, at *12 (C.D. Ill. Oct. 4, 2012) ("presum[ing] that the facts claimed by the [two] named plaintiffs [were] in fact representative of the class" in order to come up with a "rough estimate" of the benefits of a settlement).

24. *Warranty Extension.* The original warranty on the vehicles at issue was 5-years or 100,000 miles, whichever came first. At several points in the complaint, the class noted that Ford had extended its original warranty for certain fleet and other special clients to 6-years/150,000 miles.[30] The class settled for an "extended warranty" – for settlement reimbursement purposes only – of 6-years/135,000 miles. Relative to the extension Ford had granted to its premier customers, therefore, the class achieved 100% of the time extension and 70% of the mileage extension (35,000/50,000).

25. The monetary recovery and warranty extension are tied to one another: the class received 50% of the monetary recovery it sought but not for the full warranty period it sought for all class members. Those class members who drive often likely hit the warranty's mileage limit before they hit its time limit, while those class members who drive infrequently likely hit the time limit before the mileage limit. The frequent drivers receive 35% of their full claim value (50% of their recovery x 70% of the extra warranty miles), while the infrequent drivers receive 50% of their full claim value (50% of their recovery x 100% of the extra warranty time). If we assume that half of the class is in each group, the full class's monetary recovery, adjusted for the success on the warranty extension, amounts to 42.5%, the half-way point between 35% and 50%.

26. *Ancillary Benefits.* In addition to the straight monetary benefits and extended warranty, the settlement benefits the class in terms of ancillary benefits such as fees and costs, as follows:

- *Fees.* Had they prevailed at trial, the class members may have received 100% of their claim value, but absent fee-shifting statutes, they would have had to pay their

[30] Pls.' Am. Master Class Action Compl., ¶¶ 56, 65, ECF No. 233.

attorney's fees out of that fund,[31] likely anywhere from 25-30% of their recovery.[32] By contrast, the settlement has Ford paying plaintiffs' attorney's fees over and above the amounts paid to the class members, meaning that those fees will not come out of the class members' recoveries directly. Thus, those class members whose claims arise under the law of non-fee-shifting states receive significant extra value in not having to pay fees out of their settlements. A class member who gets full value for her claim but has to pay a 30% contingent fee collects only 70%, while a class member in this settlement who collects 50% of her claim's value but pays no fee receives 50%, or about 71% of the fee-paying trial victor (50/70x100=71.4).[33]

- *Litigation Costs.* Everything in the prior paragraph about fees applies as well to costs. Had plaintiffs prevailed at trial, cost-shifting statutes may have required the defendants to pay some, though likely not all, of the plaintiffs' litigation costs.[34] In this settlement, Ford pays all of these costs. For those class members in states with weaker cost-shifting statutes, this too is an extra value of the settlement. Costs average about 3% of the total recovery in large class action cases.[35]

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[31] *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

[32] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 834 (2010) (finding most mean and median settlement fee awards, across litigation areas, to be between 25 and 30 percent); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH § 14.121 (2004) ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund.").

[33] District courts within the Seventh Circuit often assess the adequacy of the settlement's value to the class before attorney's fees are deducted. *See, e.g., In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1021 (E.D. Wis. 2010) (assessing adequacy of a settlement based on the total value of the settlement to the class, including class counsel's fee of $27,675,000, which was deducted from the class's fund). This underestimates the value of the fees to class members in non-fee-shifting situations.

[34] *See, e.g., Boeynaems v. LA Fitness Int'l*, LLC, 285 F.R.D. 331, 335 (E.D. Pa. 2012) (noting in breach of contract and consumer deception class action that costs of discovery "may not necessarily be taxable against Defendant in the event of a successful trial"); *see also Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 164 (3d Cir. 2012) *cert. denied*, 133 S. Ct. 233 (2012) ("[28 U.S.C. § 1920] thus 'define[s] the full extent of a federal court's power to shift litigation costs absent express statutory authority.'" (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86 (1991))).

[35] *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL L. STUD. 248, 274 (2010) (reporting that "in 232 cases from 1993 to 2002 for which cost data were available, mean costs were 2.8 percent of the

27. *Ancillary Deficits.* The class's relief does not deliver full value, does not extend to all original class members, and does not allow for recovery without filing a claim:

- *Unrecovered damages.* The plaintiffs sought but will not recover several forms of relief – most prominently, certain forms of consequential damages, such as towing expenses, lost profits, and diminution in value. The settlement's value should be adjusted to account for this, but those forms of relief were less likely to be recovered after trial than were actual damages.[36] For example, while some automobile defect class action *settlements* have included reimbursement for towing expenses,[37] a court is highly unlikely to order the defendant to pay the cost of additional "reserve" vehicles, increased salary expenses to hire additional mechanics, or increased tools and parts expenses.[38] Similarly, punitive damages, though sought, were unlikely to be awarded in this breach of warranty case.[39]

- *Non-recovering vehicle owners.* Some of the complaints that pre-dated MDL consolidation identified a proposed class that included all 6.0L diesel trucks; the MDL class definition includes only those trucks that had a Ford-authorized warranty repair during the initial warranty period. This means that some vehicle owners will not receive relief from this settlement. However, the new class definition is a decent proxy for causation – trucks having had an initial Ford-authorized repair are likely those with bad engines – such that defining the class in this manner saves significant causation inquiries for the vast majority of injured class members. Furthermore, the initial vehicle owners not included here release nothing by this settlement.

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recovery," and "in 304 cases with necessary data from 2003 to 2008, mean costs were 2.7 percent of the recovery").

[36] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 63 n.7 (3d ed. 2002) (noting that despite lessening of traditional hostility to consequential damages in contract and tort, such damages "are more likely to raise issues of causation, foreseeability, remoteness, and the like, and rules for dealing with these issues are often stated as limits on consequential damages").

[37] *See, e.g., Castillo v. Gen. Motors Corp.*, No. CIV. 07-2142 WBS GGH, 2008 WL 8585691 (E.D. Cal. Sept. 8, 2008).

[38] In addition, Ford expressly disclaimed such incidental and consequential damages in its original warranty, which may limit recovery for class members owning used vehicles. *See, e.g.*, Def. Mem. Supp. Summ. J. Directed to Claims of Carl Atwell 13, ECF No. 166.

[39] *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 579 (N.D. Ill. 2011) (beginning its *Synfuel* analysis by "[s]etting aside the specter of punitive damages"); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 762 n.1 (3d ed. 2002) ("It is still the general rule that punitive damages cannot be awarded for breach of contract."); *id.* at 764 n.6 (noting that punitive damages were awarded in between 3.3% of tort cases in which the plaintiff won and 6.3% of contract cases in which the plaintiff won).

- *Claiming process.* Class members will have to file claims instead of having their money sent directly to them, a process that will reduce the class's overall recovery. However, some such process would have followed any judgment as well, since each vehicle suffered particularized problems and each class member would have had to identify those problems to claim from the settlement. So, the claiming process itself is something of a constant.

28. *Summary of Value of Settlement.* My analysis demonstrates that the class is receiving roughly 50% of the full value of its claims; when adjusted for the absence of complete relief in extending the warranty, that value comes down to about 42.5%. Additionally, some class members then benefited significantly from having their attorney's fees and costs paid; yet the class also lost some value by not recovering some of the more tangential remedies they sought. I will assume that the ancillary benefits and the ancillary deficits of the settlement are a wash and hence conclude that it is fair to estimate that the settlement delivers between 40-50% of the claims' value to the class. This conclusion then poses the question of whether a settlement value in this range is commensurate with the net expected value of the plaintiffs' claims and hence a fair, reasonable, and adequate settlement value.

2.
The Settlement Value Is Commensurate with the Case's Net Expected Value and Hence Fair, Reasonable, and Adequate

29. To compare the settlement's value to the case's net expected value, I first enumerate the risks of further litigation and then use those risks to identify "the range of possible outcomes and ascrib[e] a probability to each point on the range."[40] I then adjust this to a present value to account for the fact that it would have taken the class several years to secure any of these possible outcomes. To supplement this net expected value analysis, I also compare this settlement to a similar automobile defect settlement and to settlement values courts have approved in other cases.

[40] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir.2002).

30. *Risks of further adjudication.* Had counsel not settled and sought judgment for the class, they would have faced a variety of significant hurdles, most critically class certification,[41] *Daubert*, causation, standing and affirmative defenses,[42] and weak claims:

- *Certification.* Plaintiffs constitute a nationwide class raising state law breach of warranty and fraud claims. Three manageability problems are immediately present. *First*, in many states, to prevail on such claims, a plaintiff must show notice and/or reliance; such showings are often considered individual in nature, and as such, the individual issues in a breach of warranty class may predominate over the common issues, rendering the suit unmanageable.[43] *Second*, some states permit a presumption of reliance, so sub-classes may have been formed that would have been more easily certified; however, that would have required a 50-state choice of law analysis that, while sometimes successful,[44] is nonetheless complex and plausibly certification-defeating.[45] *Third*, Ford's defenses presented individualized causation issues that, even if limited to a separate, post-liability trial phase, would have created further manageability concerns, plausibly defeating certification for trial purposes.[46] The

[41] *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 582 (N.D. Ill. 2011) ("In addition to . . . defenses on the merits, absent settlement, Plaintiffs would be required to overcome a contested class certification proceeding.").

[42] *Id.* at 579 ("The [second] step in determining the fairness of the settlement is to discount the value of the class's claims based on the various defenses available to the defendant.").

[43] *See In re Gen. Motors Corp. Dex-Cool Products Liab. Litig.*, 241 F.R.D. 305, 324 (S.D. Ill. 2007) ("The Seventh Circuit Court of Appeals has warned repeatedly in recent years against the certification of unwieldy multistate classes, holding that the difficulties inherent in applying the laws of numerous states to the class claims defeat both predominance and manageability.").

[44] *See Allen v. Am. Honda Motor Co., Inc.*, 264 F.R.D. 412, 429-30 (N.D. Ill. 2009), *vacated on other grounds*, 600 F.3d 813 (7th Cir. 2010).

[45] *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) ("A nationwide class in what is fundamentally a breach-of-warranty action, coupled with a claim of fraud, poses serious problems about choice of law, the manageability of the suit, and thus the propriety of class certification."); *Barden v. Hurd Millwork Co., Inc.*, 249 F.R.D. 316, 321 (E.D. Wis. 2008) (explicitly refusing to certify, on manageability grounds, a subclass consisting of individuals residing in states requiring pre-litigation notice but not reliance).

[46] *See In re Gen. Motors Corp. Dex-Cool Products Liab. Litig.*, 241 F.R.D. 305, 326 (S.D. Ill. 2007) (finding that putative class action alleging defective coolant was unmanageable, thereby failing the predominance inquiry, because "issues of individual owner maintenance of vehicles must be addressed; for example, if the injuries at issue in this case are, as [the defendant] contends, simply the result of failure by the members of the proposed class to maintain proper

plaintiffs' chances of having this nationwide class certified for trial were far from 100%.[47]

- *Daubert*: The plaintiffs had retained several experts, but their testimony had not, at the time of settlement, been approved under the *Daubert*[48] standard; at least some doubt remained as to whether plaintiffs' expert testimony could be introduced at trial.[49] This testimony would have been crucial to plaintiffs' ability to prove that the defective design of the 6.0L engine, and Ford's failure to properly diagnose and rectify that design, was the cause of the problems experienced by class members.[50]

- *Causation*: Ford's motions for summary judgment, which were pending at the time of settlement, highlighted additional risks that the named plaintiffs (and other class members) faced in going to trial. Ford alleged that the named plaintiffs improperly maintained, improperly used, or improperly modified their vehicles, such as by "chipping" their electronic control units,[51] or that proof of causation was lacking.[52] In order to overcome Ford's contention that such modifications were the actual cause of the inferior performance of class members' 6.0L engine components, class members

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levels of coolant in their vehicles, this would preclude a finding that [the allegedly defective coolant] is a defective product").

[47] That said, all of these problems were problems of managing the case for trial. Such concerns need not be taken into consideration in certifying a settlement class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . . "). There is, therefore, no reason that this Court cannot certify this case for settlement purposes.

[48] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

[49] *Cf. Allen v. Am. Honda Motor Co., Inc.*, 264 F.R.D. 412, 423-38 (N.D. Ill. 2009) (expressing doubts as to plaintiff's expert testimony concerning alleged motorcycle defect), *vacated on other grounds*, 600 F.3d 813 (7th Cir. 2010).

[50] *Careccio v. BMW of N. Am. LLC*, No. CIV. A. 08-2619, 2010 WL 1752347, at *4 (D.N.J. Apr. 29, 2010) (upholding settlement of tire defect case in part because the class's claims would "involve numerous complex legal, engineering and economic issues, and would have required, *inter alia*, significant expert testimony at trial").

[51] *See, e.g.*, Def. Mem. Supp. Summ. J. Directed to Claims of Charles Clark 8-9, ECF No. 146; Def. Mem. Supp. Summ. J. Directed to Claims of Anthony Mawyer. 5-7, ECF No. 158.

[52] *See, e.g.*, Def. Mem. Supp. Summ. J. Directed to Claims of Steven Santilli 9, ECF No. 150; Def. Mem. Supp. Summ. J. Directed to Claims of John Prebish 13, ECF No. 154; Def. Mem. Supp. Summ. J. Directed to Claims of Frank Brown Towing, Inc. 5-6, ECF No. 162.

may have been required to submit their vehicles for inspection or to submit detailed maintenance records. Even assuming the class was successful in litigating the first phase of the trial – whether the 6.0L engine exhibited a common defect and whether that defect breached the Ford warranty – a significant number of class members may thus have been unable to recover due to their inability to prove that the damages they suffered were caused by the alleged defect. Moreover, those who could prove causation would face higher costs of recovery due to the arduous proof required. The class's state statutory claims, many of which require proof of material misrepresentations or omissions, unfair or deceptive acts, or reliance, could have presented similar difficulties of proof for many class members.[53]

- *Affirmative defenses*: Ford also asserted standing concerns[54] as well as several affirmative defenses – statute of limitations,[55] failure to provide notice for breach of express warranty,[56] and compelled arbitration[57] – which it presumably would have vigorously litigated were this suit to continue.

- *Weak claims:* Ford asserted that its 5-year/100,000 mile warranty for the 6.0L diesel engine was equivalent or superior to that offered by competing automakers.[58] Establishing unconscionability would therefore have been challenging, even putting aside the difficulty of classwide proof of the circumstances surrounding the offer and acceptance of Ford's express warranty. Moreover, even if the class were to obtain a declaration that the terms of Ford's express warranty were unconscionable, a court would have been unlikely to strike that term entirely. Instead, given the discretion that courts generally have pursuant to state law to "limit the unconscionable clause's

[53] *See, e.g.,* Def. Mem. Supp. Summ. J. Directed to Claims of Charles Clark 13-15, ECF No. 146; Def. Mem. Supp. Summ. J. Directed to Claims of Steven Santilli 10-13, ECF No. 150; Def. Mem. Supp. Summ. J. Directed to Claims of Anthony Mawyer 12-15, ECF No. 158; Def. Mem. Supp. Summ. J. Directed to Claims of Frank Brown Towing, Inc. 11-14, ECF No. 162.

[54] *See, e.g.*, Def. Mem. Supp. Summ. J. Directed to Claims of Charles Clark 6-8, ECF No. 146; Def. Mem. Supp. Summ. J. Directed to Claims of DiNonno Enterprises 10, ECF No. 182.

[55] *See, e.g.*, Def. Mem. Supp. Summ. J. Directed to Claims of John Prebish 3-8, ECF No. 154; Def. Mem. Supp. Summ. J. Directed to Claims of Anthony Mawyer 11-12, ECF No. 158.

[56] *See, e.g.,* Def. Mem. Supp. Summ. J. Directed to Claims of Charles Clark 9, ECF No. 146.

[57] *See, e.g.*, Def. Mem. Supp. Mot. Compel Arbitration Directed to Claims of James Hutton and Heather and Scott Gray 6-13, ECF No. 197.

[58] *See* Decl. Kareem Touami at 3, *Custom Underground, Inc. v. Ford Motor Company*, No. 10cv127 (N.D. Ill. Apr. 9, 2011).

application so that an unconscionable result will be avoided," a far more likely course would have been the insertion of marginally more generous durational terms.[59]

In sum, plaintiffs faced significant hurdles in securing complete relief following a trial.

31. *Other possible outcomes.* The risks identified in the preceding paragraphs track a series of other possible outcomes in the lawsuit – "call them high, medium, low, and zero"[60] – all of which sum to a net expected value lower than that for which counsel has settled the plaintiffs' claims:

- *High value.* If plaintiffs had won at trial and suffered neither causation nor claiming problems, their claims would be worth their full value. There is a very small chance that this outcome would have occurred, given all of the aforementioned hurdles, the fact that no claims are sure winners, and that there would very likely have been a required claiming process. The plaintiffs' claims at this high end would have been worth their full value. I assign a 5% chance[61] to this "complete victory" outcome because I think it unavoidable that there would have been some claiming process whereby each vehicle owner would have had to demonstrate the particularized harm to her vehicle, pushing the outcome to the next option.

- *Medium value.* If the plaintiffs had prevailed on liability at trial, their claims would be worth full value; yet each plaintiff would then have had to overcome Ford's assertion of individualized defenses – including proving that the particular vehicle's problems were caused by Ford's negligence – in order to secure payment of a claim. Assuming a portion of the class either had causation issues or did not want to go through the process of proving causation, those successful claims would then be reduced to no value. If a third of the claims had these types of causation problems, the class-wide effect would be to make a victory here worth 67 cents on a dollar. I assign a 50% chance to this "liability proven/causation required" outcome. I am therefore estimating that this outcome is 10 times more likely than the high value option, which captures my sense that there is but a 1 in 10 chance that a court, having assigned liability, would simply have handed out money to all class members (high value option) without making class members demonstrate the harm their vehicle suffered (this option). At 50%, this is also, in my estimate, the most likely outcome of full litigation in this matter.

[59] *See* 8 WILLISTON ON CONTRACTS § 18:17 (4th ed.).

[60] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002).

[61] The probabilities I assign could be expressed as the midpoint of a range of percentage estimates for the probability of each outcome. *Id.* For instance, this 5% is the midpoint in my estimate that the odds of this outcome fall somewhere between 0%-10%.

- *Low value.* If the plaintiffs failed to get their experts qualified to testify under *Daubert*, they would have had a significantly more difficult time convincing a fact-finder that the 6.0L engines exhibited problematic performance traceable to a defective component or design. Their claims at that point would likely have been worth close to nothing, maybe 10 cents on a dollar. I have not analyzed the quality of plaintiffs' experts, but given that the ultimate issue is a car design, I am assuming that the plaintiffs were able to retain qualified experts and hence conclude that there is maybe a 1/8 chance they would lose on *Daubert*. I therefore assign a 12% chance to this "lose *Daubert*" outcome.

- *Zero value.* If the class had not been certified, the net expected value of this case would essentially be zero.[62] Failing at the certification stage – and thus achieving the zero outcome – was plausible due to the numerous manageability concerns noted earlier. I assign a 33% chance to this "no certification" outcome as it is my expert opinion that this class should be certified (hence I give it a 2:1 chance), but I acknowledge the many doctrinal hurdles in that analysis in this Circuit.[63]

These possible outcomes are set forth in Table 4, below. Table 4 demonstrates that the sum of the four possible outcomes – the net expected value of the litigation – is .397.

[62] Of course, the named plaintiffs might then have continued their individual suits, but absent class members would recover nothing.

[63] *See also Amer. Int'l Group, Inc. v. ACE INA Holdings, Inc.*, 2012 WL 651727 at * 4 (N.D. Ill. 2012) (noting that parties put possibility that litigation class would not be certified at 35%), *appeal dismissed sub nom., Safeco Ins. Co. of America v. American Intern. Group, Inc.*, 710 F.3d 754 (7th Cir. 2013).

TABLE 4
Expected Values of Different Outcomes

Possible Outcome	Average Claim's Value at This Outcome	Likelihood of This Outcome	Average Claim's Expected Value at This Outcome
Winning Liability No Causation Problems	1 (High)	5%	.050
Win Liability, 1/3 Class Has Causation Problems	.67 (Medium)	50%	.335
Lose *Daubert*	.1 (Low)	12%	.012
Lose Certification	0 (Zero)	33%	0
Net Expected Value		100%	.397

32. To receive the litigation's net expected value, the plaintiffs would have had to have prevailed at trial and had their trial victory affirmed following post-trial motions and appeals. Those events would likely have taken several years, particularly as there may likely have been a post-liability damage/claiming phase to the lawsuit.[64] The time value of money is an

[64] *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 961 (N.D. Ill. 2011) ("Were the Class Members required to await the outcome of a trial and inevitable appeal, however, they would not receive benefits for many years, if indeed they received any at all.").

important component of this settlement.[65] Using the assumption that this case would have taken an additional four years had it been tried (including a post-liability claiming phase) and appealed, and discounting by the current 10-year U.S. Treasury Bond rate (1.68%),[66] the .397 net expected value adjusts to a present value of .371.[67]

33. My analysis of the settlement's features, above, showed that the settlement returns 42.5% of an average claim, or .425. The settlement's value (.425) is therefore commensurate with – indeed higher than – the net expected value or sum of the various possible trial outcomes (.397); when that net expected value is discounted for time (.371), the present settlement's value is 15% greater than the net expected value. Notably, as the settlement's value is higher than the sum of the other potential outcomes, it therefore also provides class members more value than the likely outcome of further litigation in this matter. The strength of the settlement's value as compared to these other outcomes well supports its reasonableness.[68]

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[65] *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) ("A major benefit of the settlement is that Class Members may obtain these benefits much more quickly than had the parties not settled.").

[66] *Id.* at 572 (approving discounting to present value "at a rate of 3.50% (to correlate with the 10–year U.S. Treasury Bond)").

[67] This calculation was performed here: http://www.calculatorpro.com/calculator/present-value-calculator/. This analysis assumes that the class would have been unlikely to recoup prejudgment interest following a successful trial outcome; if such interest were available, "discounting might wash out of the picture altogether." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002).

[68] *See, e.g., In re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 376 (N.D. Ill. 2011) (approving a settlement after noting that "in the absence of settlement" the class may have faced "a number of highly unfavorable outcomes" including "a finding of no liability from this Court or the Seventh Circuit," and the assertion by the defendant of "affirmative defenses and . . . several potential factual hurdles . . . any of which, if successful, could result in no relief to the Settlement Class").

34. *Comparable Settlement.* In late 2006, a putative class action – *Williams A. Ambulance, Inc., et al. v. Ford Motor Company*[69] – was filed in the U.S. District Court for the Eastern District of Texas concerning the same 6.0L engines at issue in this matter but limited solely to ambulances equipped with that engine. The suit involved several motions to dismiss before ultimately being settled in February 2009. The settlement, which was finally approved by the district court on July 2, 2009, provided relief similar to the relief in this case. Table 5 presents a side by side comparison of the two cases.

[69] *Williams A. Ambulance, Inc., et al. v. Ford Motor Company*, No. 06-cv-00776-MAC (E.D. Tex. 2006).

TABLE 5
Comparison of Ambulance Settlement to Truck Settlement

FORM OF RELIEF	**AMBULANCES (*WILLIAMS*)**	**TRUCKS (*IN RE NAVISTAR*)**
Reimbursement of repairs made within extended warranty period	100%	~50%
Extension of warranty period	Engine warranty was extended to **6-years/120,000** miles. Warranty for identified engine components receiving **two** or more repairs within the limits of the original warranty extended to **6-years/150,000** miles.	Cost to repair identified engine components would be reimbursed up to **6-years/135,000** miles if those components received **one** or more repairs within the limits of the original warranty.
Deductible reimbursement	Third and all subsequent deductibles are reimbursed $100.	Second and all subsequent deductibles are reimbursed $50, up to a maximum of $200.
Replacement of engine	100% within 6 years or 120,000 miles 50% within 135,000 miles 25% of the costs within 150,000 miles.	50% of the repair cost of covered components that received a repair within limits of original warranty.
Towing charges	Towing charges for 3rd and all subsequent tows were reimbursable	None.
Attorney's fees, costs	Paid by Ford.	Paid by Ford.
Notice/settlement administration	Paid by Ford	Paid by Ford.

This settlement is not as good as the *Williams* settlement, but several factors distinguish the cases:

- The ambulance class was significantly smaller. Class Counsel inform me that about 10,000 notices were sent in that case and about 1.1 million in this case. It was easier for Ford to settle at higher levels for a smaller class.

- Ford likely had special interest in keeping that class satisfied as ambulance owners would typically purchase multiple vehicles.

- The case was settled closer in time to the release of the 6.0L engine.

- Ford made additional express representations in its sale of the engines relating to their fitness for use as ambulance engines.[70]

- Ambulance owners, being in the business of owning these vehicles, likely have better maintenance records than the average consumer.

These factors significantly decreased in that case the primary risks inherent in this case (certification and causation). In sum, given the better settlement that the *Williams* plaintiffs secured, the value for which they settled – closer to 100% of their claims' value – suggests that the 50% settlement range here is somewhat low, though the variables noted above help explain the difference.

35. *Settlement Values in Other Cases.* District courts within the Seventh Circuit have concluded that the relief afforded by a settlement can be substantially less than a class's hypothetical recovery – as low as 4.4% to 13.6% of the expected post-trial recovery.[71] Indeed, this Court concluded that a settlement affording just 10% of plaintiffs' maximum post-trial recovery would be acceptable after surveying the "[n]umerous courts [that] have approved settlements with recoveries around (or below) this percentage."[72] These numbers are commensurate with the scant empirical data on typical settlement values.[73] In short, even if the

[70] *See* Plaintiffs' Fourth Am. Class Action Compl. at ¶¶ 12, 14-15, *Williams A. Ambulance, Inc., et al. v. Ford Motor Compan*y, No. 06-cv-00776-MAC (E.D. Tex. Feb. 19, 2009).

[71] *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1008 (E.D. Wis. 2010) (concluding that settlement was reasonable in light of plaintiff's estimate that settlement was 4.4% to 13.6% of value of full post-trial recovery and defendant's estimate that settlement was 27% to 163% of value of full post-trial recovery).

[72] *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011).

[73] *See, e.g., In re Rite Aid Corp. Securities Litigation*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (approving testimony that cited a study showing that "settlements since 1995 of securities class actions 'have recovered between 5.5% and 6.2% of the class members' estimated losses'" (citing LAURA SIMMONS, CORNERSTONE RESEARCH, SECURITIES LAWSUITS: SETTLEMENT STATISTICS

settlement value here – 42.5% – is discounted for the fact that not 100% of the class will claim, it still is easily consistent with the settlement values approved by courts in similar cases.

36. In sum, while one comparable settlement proved more beneficial for a better-situated class of plaintiffs, the settlement value in this matter approximates the net expected value of *these* plaintiffs' claims and far exceeds settlement values regularly approved in other cases. It is well within the realm of reasonableness.[74]

37. The reasonableness of the settlement's value here is further supported by the fact that Class Counsel – having litigated the *Williams* ambulance case – were remarkably familiar with the claims in the case. They did not settle this case without developing those claims or without very specific knowledge of the strengths and weaknesses of their case. The settlement raises none of the red flags, or "suspicious circumstances," identified by the Seventh Circuit in *Reynolds v. Beneficial Nat'l Bank.*[75] There is no concern here of a collusive settlement; indeed, the very fact that the Judicial Panel on Multidistrict Litigation consolidated all outstanding cases

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FOR POST–REFORM ACT CASES 4 (1999))). *See also* Lisa Klein Wager & Adrienne M. Ward, *Securities Class Actions: A Company's Bad News Gets Worse*, BUS. L. TODAY, July-Aug. 2002, at 15, 18 (noting that for securities class actions "the median settlement is less than 6 percent of investors' alleged losses"); Denise N. Martin, Vinita M. Juneja, et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 STAN. J.L. BUS. & FIN. 121, 141 (1999) (noting that for securities class actions settled between January 1991 and June 1998, the average proportion of settlement amount to claimed damages was 14% and the average proportion of settlement to alleged investor losses was 9%).

[74] *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 980 (N.D. Ill. 2011) ("Naturally, the settlement does not provide for a full recovery of legal damages; but that is the hallmark of compromise. Given the very considerable litigation risks that would be faced by the Class at trial, the amount of the settlement cash fund is very much within the 'range of reasonableness' required for judicial approval." (quoting *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 131 (S.D.N.Y. 1997), *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997))).

[75] *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 284 (7th Cir. 2002).

in this MDL proceeding means that the defendant could not have engaged in a reverse auction, playing class counsel in different cases off against one another – there was only this case.[76] Similarly, while the *Manual for Complex Litigation* directs courts to look for any of nine red flags when asked to approve a class action settlement,[77] none are present here. The only two that are even arguably applicable are easily distinguished:

- The *Manual* highlights settlements "releasing claims of parties who received no compensation in the settlement."[78] Two objectors – ECF No. 259 at 2; ECF No. 261 at 1-2 – err in asserting that the settlement suffers this problem. All class members receive, at least, the benefit of the extended warranty, and, while the period may have expired for most, any qualifying costs they incurred during the extended period will now be compensated. That the warranty may not have assisted them if their engine did not go bad during its extended time period does not mean they received no benefit; it simply means that they did not need to utilize the benefit they did receive because they suffered no harm. If a warranty alone provides no value, plaintiffs would have no cause of action for its breach.

- The *Manual* also highlights settlements "treating similarly situated class members differently."[79] This settlement itself does not treat class members differently from one another. But the comparison to the ambulance case suggests that two different groups of 6.0L diesel engine purchasers received disparate value for their claims in separate cases pursued by the same counsel. The two groups were, however, differently situated, as explained in ¶ 34, above. It is likely that the present class benefited from the knowledge counsel gained undertaking the ambulance matter, and highly unlikely, given the scope and duration of this litigation, that counsel undersold

[76] *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1006 (E.D. Wis. 2010) ("First, a reverse auction could not have occurred because I appointed class counsel for purposes of this MDL proceeding without any input from defendants.").

[77] *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.61 (2004) (listing as red-flags: reverse auctions; coupon settlements; manipulation of class allegations; cumbersome eligibility requirements; different treatment of similarly situated class members; releasing parties not contributing to the settlement; releasing claims of class members who receive no compensation; setting attorney's fees based on a very high value ascribed to nonmonetary relief; and assessing class members for fees in excess of their damages). As noted above, *supra* note 15, I was not asked to and have not reviewed the fee petition in this matter and hence take no position on any fee concerns.

[78] *Id.*

[79] *Id.*

> this class's claims in return for a higher value in the ambulance matter. This conclusion seems particularly accurate given that this case was not brought until nearly a year after conclusion of the ambulance case and that this case is an MDL consolidation of many cases, meaning that lead counsel's capacity to undersell it would have been significantly constrained by the many co-counsel involved.

In short, well-respected, competent counsel settled this case after significant adversarial litigation and nothing about the settlement raises the types of concerns courts are instructed to be watchful for in reviewing proposed settlements.

IV.
CONCLUSION

38. I have opined that:

- the settlement provides class members with an average of approximately 42.5% of their claims' value; and
- the settlement's value (.425) is 15% greater than the discounted net expected value of the litigation (.371) and dramatically better than other settlement values regularly approved by district courts in the Seventh Circuit.

This analysis supports the conclusion that the settlement is clearly fair, reasonable, and adequate.

I declare under penalty of perjury under the laws of the Commonwealth of Massachusetts and the laws of the United States that the foregoing is true and correct.

May 14, 2013
Cambridge, Massachusetts

William B. Rubenstein

EXHIBIT A

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ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law — 2011-
Professor of Law — 2007-2011
Bruce Bromley Visiting Professor of Law — 2006-2007
Visiting Professor of Law — 2003-2004, 2005-2006
Lecturer in Law — 1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law — 2002-2007
Acting Professor of Law — 1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law — 1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law — 1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor — Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel — 1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk — 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern — Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

♢ *Sole Author,* NEWBERG ON CLASS ACTIONS (4th ed. updates since 2008 and 5th ed. (2011-2015))

♢ *Invited Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law (2010-2013)

♢ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation,* Philadelphia, Pennsylvania

♢ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ *"Expert's Corner" (Monthly Column), Class Action Attorney Fee Digest,* 2007-2011

♢ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

♢ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

♢ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

Expert Witness

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care Alliance and Crenshaw v. Astrazeneca Pharm. LLP, et al.*, Civil Action No. 05-0269 BLS2, Massachusetts Superior Court, Suffolk County (2013))

♢ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

♢ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New*

Hamshire Med. Malpractice Joint Underwriting Assoc., Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

◊ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action (*Lauriello v. Caremark,* Case No. 03-CV-03-6630, Circuit Court for Jefferson County, Alabama (2012))

◊ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

◊ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W, U.S. Dist. Ct., Western District of Oklahoma (2011))

◊ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill,*Case No. 3:10-CV-02269-O-BK, U.S. Dist. Ct., Northern District of Texas (2011))

◊ Retained as an expert witness in fee-related dispute (*Furth v. Furth,* Case No. C11-00071-DMR, U.S. Dist. Ct., Northern District of California (2011))

◊ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

◊ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657, U.S. Dist. Ct., Eastern District of Louisiana (2010))

◊ Submitted expert witness declaration concerning fee application in securities case (*In re Amicas Inc. Shareholder Litigation,* Civil Action No. 10-412BLS2, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement (*Parkinson v. Hyundai Motor America, Inc.,* Case No. 06-cv-00345, U.S. Dist. Ct., Central District of California (2010))

◊ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart,* Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart,* Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222, U.S. Dist. Ct., Central District of California (2010))

◊ Submitted an expert witness declaration concerning fairness of settlement provisions and processes

(*White v. Experian Information Solutions, Inc.*, Case No. 05-CV-1070, U.S. Dist. Ct., Central District of California (2010))

♢ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute (*Elihu v. Toshiba America Information Systems, Inc.*, Case No. BC328566, California Superior Court, LosAngeles County (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811, U.S. Dist. Ct., Eastern District of Missouri (2009))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No. 1735, U.S. District Court for the District of Nevada (2009))

♢ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, MDL Docket No. 1796, U.S. District Court for the District of Columbia (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842, U.S. Dist. Ct., District of Rhode Island (2009))

♢ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

♢ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, U.S. Dist. Ct., District of Columbia (2008))

♢ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

♢ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif*, Case

No. KC034700, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB, U.S. Dist. Ct., E.D. Ky. (2008))

♢ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.*, JAMS Arbitration No. 1220026252 (2007))

♢ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.*, Civil Action No. 06-11033 PBS, U.S. Dist. Court, D. Mass. (2007))

♢ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (WOB) U.S. Dist. Court, E. D. Kentucky (2007))

♢ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.*, No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

♢ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

♢ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

♢ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL, U.S. Dist. Court, C.D. California (2006))

♢ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

♢ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.*, Missouri Circuit Court, St. Louis, MO (2005))

♢ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2000))

♢ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

♢ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City*, Case No. Civ. 2001-1827-C, U.S. Dist. Ct., W. Dist. Oklahoma (2002))

Expert Consultant

♢ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,

No. 2:13-cv-00192-JAK-MRW, U.S. Dist. Ct., C. Dist. of California (2013))

♢ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, U.S. Dist. Court, E.D. La. (2012-))

♢ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation*, MDL No. 2323, Case No. 2:12-md-02323-AB, U.S. Dist. Ct., Eastern District of Pennsylvania (2012))

♢ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102, U.S. Dist. Court, S.D. N.Y. (2009))

♢ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733, U.S. Dist. Court, S.D. Iowa (2008))

♢ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 CAS (VBKx), U.S. Dist. Court, C.D. California (2008))

♢ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.*, Civil No. 08-04194, U.S. Dist. Court, E.D. Pennsylvania (2008))

♢ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit)

♢ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

♢ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

♢ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

♢ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari*, Supreme Court of California (2006))

♢ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re Diet Drugs (Phen/Fen) Products Liability Litigation*, U.S. Dist. Court, E. D. Pa. (2006))

♢ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

♢ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, Case No. CV-98-00402-CBM, U.S. Dist. Ct., Central Dist. Cal.)

♢ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

♢ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, U.S. Dist. Ct., Central Dist. Cal., *appeal dism. as moot*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (20011))

♢ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

♢ NEWBERG ON CLASS ACTIONS (William B. Rubenstein, Alba Conte, Herbert B. Newberg) (sole author of supplements to 4th edition since 2008 and of 5th ed (forthcoming, 2011-2015))

♢ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

♢ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

♢ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

♢ *The Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

♢ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

♢ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

♢ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle*, 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

♢ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

◊ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

◊ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorneys Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

◊ *Supreme Court Round-Up*, 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel*, 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

◊ *Why The Percentage Method?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix*, 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

◊ *The "Lodestar Percentage:" A New Concept For Fee Decisions?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

♢ *How Transparent Are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data, in* CAN INCREASED TRANSPARENCY IMPROVE THE CIVIL JUSTICE SYSTEM? (tentative title, joint publication of RAND Corporation and UCLA School of Law) (2008) (with Nicholas M. Pace)

♢ *The Public Role in Private Law Enforcement: Visions from CAFA* (forthcoming)

♢ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

♢ *The American Law Institute's New Approach to Class Action Objectors' Attorneys Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

♢ *The American Law Institute's New Approach to Class Action Attorneys Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

♢ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

♢ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

♢ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

♢ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

♢ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

♢ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

♢ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Hirsh)

♢ *The Fairness Hearing: Adversarial and Regulatory Approaches,* 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

♢ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action,* 74 U.M.K.C. L. REV. 709 (2006)

♢ *On What a "Private Attorney General" Is – And Why It Matters,* 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

♢ *The Concept of Equality in Civil Procedure,* 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

♢ *A Transactional Model of Adjudication,* 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) *(*excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

◊ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013 (forthcoming)

◊ *Class Action Remedies*, ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013 (forthcoming)

◊ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda*, Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013 (forthcoming)

◊ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013 (forthcoming)

◊ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell*, UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

◊ *Litigation's Mirror: The Procedural Consequences of Social Relationships*, Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

◊ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases*, MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard*, ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?*, ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits*, ALI-ABA 10th Annual National Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

◊ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

◊ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

◊ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion*, No. 09-893, 131 S. Ct. 1740 (2011))

◊ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

◊ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

♢ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Consumer Class Action

♢ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.*, 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

♢ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation*, 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

♢ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

♢ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

♢ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

♢ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

♢ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

♢ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

♢ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

♢ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

♢ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding for

university student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

◊ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

◊ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

◊ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

◊ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

◊ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
◊ *Play It Straight*, NEW YORK TIMES, October 16, 2004
◊ *Hiding Behind The Constitution*, NEW YORK TIMES, March 20, 2004
◊ *Toward More Perfect Unions*, NEW YORK TIMES, November 20, 2003 (with Brad Sears)
◊ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
◊ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

◊ Massachusetts (2008)
◊ California (2004)
◊ District of Columbia (1987) (inactive)
◊ Pennsylvania (1986) (inactive)
◊ U.S. Supreme Court (1993)
◊ U.S. Court of Appeals for the First Circuit (2010)
◊ U.S. Court of Appeals for the Fifth Circuit (1989)
◊ U.S. Court of Appeals for the Ninth Circuit (2004)
◊ U.S. Court of Appeals for the Eleventh Circuit (1993)
◊ U.S. Court of Appeals for the D.C. Circuit (1993)
◊ U.S. District Courts for the Central District of California (2004)
◊ U.S. District Court for the District of the District of Columbia (1989)
◊ U.S. District Court for the District of Massachusetts (2010)
◊ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

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Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

In re: Navistar Diesel Engine Products Liability Litigation
Docket No. 11 C 2496, MDL NO. 2223
United States District Court for the Northern District of Illinois, Eastern Division

1. Letter from Michael E. Ackerman, Dkt. 243 (Mar. 1, 2013)
2. Objection of Craig Wilson Cooley, Dkt. 246 (Mar. 12, 2013)
3. Objection of Adkerson Consulting, Coy Adker, Dkt. 250 (Mar. 15, 2013)
4. Objection of Harrison Lash, Dkt. 251 (Mar. 16, 2013)
5. Letter of Rory Lehrer, Dkt. 255 (Mar. 19, 2013)
6. Objection of Robert G. Burress, Dkt. 259 (April, 23, 2013)
7. Objection of Michael A. Neill, Dkt. 261 (Apr. 24, 2013)
8. Letter of Glenn K. & Rhonda P. May, Dkt. 262 (April 19, 2013)
9. Letter of Jerome & Connie Walker, Dkt. 263(April 13, 2003)
10. Objection of David Stevens, Dkt. 266 (April 24, 2013)
11. Letter of Anthony Wess, Dkt. 267 (Apr. 24, 2013)
12. Objection of Mark & Rhonda Lewis, Dkt. 268 (April 29, 2013)
13. Letter of Michael Simons, Dkt. 269 (Apr. 18, 2013)
14. Declaration of Paul M. Taylor, Ph.D., P.E. Regarding Potential Counts of Class Vehicles and Individual Part Repair Costs (Apr. 9, 2013)
15. Preliminary Approval Order (Nov. 14, 2012)
16. Stipulation and Agreement of Settlement (Nov. 1, 2012)
17. Plaintiffs' Amended Master Class Action Complaint (Oct. 25, 2012)
18. Plaintiffs' Confidential Mediation Statement (Apr. 30, 2012)
19. Plaintiffs' Separate Statement of Uncontroverted Material Facts in Support of Opposition to Defendant's Motions for Summary Judgment (Apr. 2012)
20. Declaration of Richard P. Cassetta in Support of Ford Motor Company's Motion for Summary Judgment No. 1 (Charles Clark) (Feb. 23, 2012)
21. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Charles Clark (Feb. 23, 2012)
22. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Steven Santilli (Feb. 23, 2012)
23. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of John Prebish (Feb. 23, 2012)
24. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Anthony Mawyer (Feb. 23, 2012)
25. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Frank Brown Towing, Inc. (Feb. 23, 2012)
26. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Carl Atwell (Feb. 23, 2012)

27. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Phillip Marcum (Feb. 23, 2012)
28. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of John Barrett (Feb. 23, 2012)
29. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Custom Underground, Inc. (Feb. 23, 2012)
30. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Di Nonno Enterprises, Inc. (Feb. 23, 2012)
31. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Cecil and Tressie Fulton (Feb. 23, 2012)
32. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Karl Strong (Feb. 23, 2012)
33. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Georjean Vogt (Feb. 23, 2012)
34. Defendant Ford Motor Company's Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings Directed to Claims of James Hutton and Heather and Scott Gray (Feb. 23, 2012)
35. Defendant Ford Motor Company's Memorandum in Support of Motion for Summary Judgment Directed to Claims of Gena Boggero (Feb. 23, 2012)
36. Plaintiffs' Master Class Action Complaint (July 29, 2011)

Custom Underground, Inc. v. Ford Motor Company
Docket No. 10-cv-00127
United States District Court for the Northern District of Illinois, Eastern Division

37. Declaration of Kareem Touri (Apr. 19, 2011)
38. Declaration of Ken Neal (Apr. 8, 2011)
39. Memorandum in Support of Motion for Class Certification (Apr. 8, 2011)
40. Plaintiffs' Third Amended Class Action Complaint (Oct. 29, 2010)

Williams A Ambulance, Inc. et al. v. Ford Motor Company
Docket No. 06-cv-00776-MAC
United States District Court for the Eastern District of Texas, Beaumont Division

41. Plaintiffs' Fourth Amended Class Action Complaint (Feb. 19, 2009)
42. Declaration of Michael A. Caddell in Support of Plaintiffs' Motion for Preliminary Approval of Proposed Settlement (June 25, 2009)