UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOMINICK VOLINO, ET AL., Plaintiff, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, ET AL., Defendants. ---------- MICHAEL VERARDO, ET AL., Plaintiff, v. PROGRESSIVE CASUALTY INSURANCE COMPANY, ET AL., Defendants.	Civil Action No. 1:21-cv-6243-LGS Civil Action No. 1:22-cv-01714-LGS

PLAINTIFFS' PETITION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

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I. INTRODUCTION

Class Counsel did excellent work in this litigation—they survived dispositive motions on the pleadings and at summary judgment, secured class certification, and successfully defended a Fed. R. Civ. P. 23(f) petition on appeal, all of which (particularly when taken together) is extremely rare in class litigation. Class Counsel achieved an excellent result by securing 69% of potential compensatory damages, and settlement funds will be paid in cash to class members with *no* need for a claim form and *no* reversion whatsoever—all of which independently (and thus particularly when taken together) are extremely rare in class settlements. Combine unusually skilled prosecution with unusually advantageous benefits, and it is no surprise that Professor Brian Fitzpatrick, today's preeminent expert on attorneys' fees in class litigation, calls this one of the best settlements he has seen in his decades of analysis and academic, empirical work:

> [T]his is one of the top class action settlements I have seen in my nearly 20 years of studying them: It was reached after litigating all the way through summary judgment to the eve of trial; it recovers the vast majority of the class's potential damages; and it will be automatically distributed without the use of claim forms and with no funds reverting to the defendants. Settlements rarely recover such a significant portion of potential damages; class actions rarely are litigated to the eve of trial, through dispositive motions on the pleadings and at summary judgment, and after securing class certification and surviving a 23(f) petition on appeal; and settlements rarely provide compensation directly with no claim-submission process or action required by class members and with no remainder. Certainly, settlements that do *all three* are particularly rare.

Declaration of Brian Fitzpatrick ("Fitzpatrick Decl."), filed contemporaneously with this Petition, at ¶ 6.

Despite this uncommonly successful and skilled representation and result, Class Counsel request a fee award of one-third of the cash settlement – the most common fee percentage in the

Second Circuit, as shown by the empirical studies of Professor Fitzpatrick. *Id.* at ¶ 23 and Figures 1 and 2.

Class Counsel originated the theory of liability in this case—there was no case law addressing the theory of liability at the time this case was filed. And the theory Class Counsel originated is meritorious—it survived motions to dismiss and for summary judgment in this case and other states. Class Counsel skillfully litigated that theory, securing class certification in this case and many others, and successfully defending against appeals in the Second Circuit and others. It was not only skillfully litigated, but diligently so, all the way to the eve of trial in this case. And then Class Counsel secured an extremely beneficial settlement of $48,000,000.00. If any case merits a fee award close to or at the upper range of acceptability, it is this one—indeed, as Professor Fitzpatrick put it, it cannot be argued that "the results here are anything short of spectacular." Fitzpatrick Decl. at ¶ 26. Yet Class Counsel requests the most common percentage rather than one the upper range of acceptability. As such, for reasons more fully explained herein and in the declarations filed by Professor Fitzpatrick, Hank Bates ("Bates Decl."), Class Counsel's Composite Declaration (Exhibit 2 to Bates Decl.), and the Named Plaintiffs' Composite Declaration (Exhibit 4 to Bates Decl.), Class Counsel respectfully submit their request for $16,000,000.00 in attorneys' fees (one third of the Settlement Fund) and $342,766.26[1] in litigation expenses, as well as Service Awards of $10,000.00 per Named Plaintiff, should be granted.

II. LEGAL STANDARD

For settlements secured pursuant to Rule 23, courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement." Fed. R. Civ. P. 23(h).

[1] This amount is significantly less than the estimated $460,000.00 in litigation expenses provided in the Long-Form, Email and Postcard Notices. Bates Decl. at ¶ 39.

The Supreme Court held that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In the Second Circuit, courts can use either the lodestar or the percentage method in awarding attorneys' fees in common fund class actions. *E.g.*, *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 45 (2d Cir. 2000). But, "[t]he trend in this Circuit is toward the percentage method . . . ." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). Professor Fitzpatrick notes that empirical studies show "the lodestar method is now used to award fees in only a small percentage of class action cases." Fitzpatrick Decl. at ¶ 13; *see generally*, *id* at ¶¶ 11-16.

In analyzing the reasonableness of a requested fee amount, the Second Circuit has directed courts to consider the following factors: "(1) the time and labor expended…; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. All such factors support the requested fee here.

III. FACTUAL SUMMARY

A. The settlement benefits are unusually high and beneficial to Class Members.

The contours of the Settlement terms are set forth in the Motion for Preliminary Approval, the concurrently-filed Motion for Final Approval, and the declaration submitted by Hank Bates. This petition incorporates by reference those documents. In short, the Settlement establishes a $48,000,000.00 cash fund, which constitutes 69% of potential compensatory damages, and which will be distributed to Class Members on a pro rata basis without the need for *any* claiming process and without reverting a *single dollar* to Progressive or to a cy pres recipient—instead, after deduction for attorneys' fees, expenses, and Service Awards, every single dollar will be distributed to Class Members. Bates Decl. at ¶ 5; ECF No. 371 at ¶¶ 21-43. Given the significant money

benefits and the procedural framework, Professor Fitzpatrick calls this Settlement "one of the top settlements" he has seen in 20 years of reviewing class action settlements and a "spectacular" result. Fitzpatrick Decl. at ¶¶ 6, 26.

B. This case was successfully and extensively litigated.

Class Counsel were able to secure such an unusually successful and beneficial Settlement despite significant headwinds. *First*, the claims in this action were novel and untested, based on an original theory of liability originated by Class Counsel without case law precedent or previous regulatory action. Bates Decl. at ¶¶ 6-9. Not only that, other actions contesting the actual cash value calculation of total-loss vehicles had been brought based on different theories of liability, and many failed, either on the merits or at class certification. *Id*. at ¶¶ 10-11. Indeed, in several of the companion cases brought on the same theories of liability and record evidence as this case, class certification was denied. *Id*. So, the claims at issue were extremely risky and faced a significant chance of no recovery at all.

Second, not only were the claims risky and untested—they were also complex and technical. To prove the claims, Class Counsel retained and worked with experts in numerous fields, including statistics, data analysis, the used auto industry, and the appraisal industry. *Id*. at ¶¶ 13-14. Proving the claims required securing extensive discovery, including spreadsheets containing over one hundred thousand insurance claims, tens of millions of used vehicle sales transactions, and hundreds of millions of individual data inputs, not to mention tens of thousands of physical documents. *Id*. at ¶¶ 14-18. Moreover, Class Counsel's job was made more difficult still by the fact that Progressive and its vendors had deleted or excluded (and failed to retain) millions of transactions where vehicles sold for list price or more. *Id*. at ¶¶ 16-17. Critically, although this practice had been ongoing for decades, Class Counsel were the *first in the country* to seek the underlying data in discovery and uncover the PSA deduction as a sham. *Id*.

Third, not only were the claims brought in this action novel and risky, and not only were they complex and requiring extensive data analysis and discovery, but they were also vigorously defended. Class Counsel successfully opposed multiple motions to dismiss, successfully moved for class certification, defeated a Rule 23(f) appeal; undertook numerous depositions, including two experts and numerous 30(b)(6) depositions of Progressive and its third-party vendors; litigated multiple motions to compel, for summary judgment, and to exclude experts; and completed pre-trial filings and briefing. *Id*. at ¶¶ 13-16; ECF No. 371. All that remained was to try the case. Professor Fitzpatrick notes that this level and breadth of litigation is extremely rare in class action litigation. Fitzpatrick Decl. at ¶¶ 20, 26-30 (noting that his forthcoming study shows that over 90% of class action settlements occur before certification).

Despite those headwinds, Class Counsel were able to secure a Settlement that Professor Fitzpatrick calls one of the best he has ever seen and a "spectacular" result. Fitzpatrick Decl. at ¶¶ 6, 26. If Class Counsel were bringing a case based on well-trod ground with case law precedent, preexisting regulatory action, and so forth, this would still be an excellent settlement. If Progressive had decided early in litigation to amicably resolve the claims through settlement, this would still be an excellent settlement. But neither is true—Class Counsel brought a novel and risky claim without any precedent, uncovered a practice (deleting and excluding vast swaths of data) that was previously unknown, and battled a Fortune 100 defendant that vigorously defended the claims all the way to trial. Yet Class Counsel was still able to secure excellent and beneficial settlement terms.

C. Per this Court's direction, Class Members were notified of the precise amount of the fee award Class Counsel is seeking, and no one has objected.

Per this Court's directive, Class Members were provided Notice of the precise amount Class Counsel would seek in attorneys' fees and costs and in Service Awards to Plaintiffs, as well

as the impact that would have on Class Members' recoveries. ECF No. 378-1 through 6. Notice has now been provided, and direct notice has already reached approximately 93% of Settlement Class Members. *See* Declaration of Cameron Azari, filed contemporaneously with this Petition, at ¶ 17. The final reach of the notice campaign is anticipated to exceed 95%, after skip-tracing efforts conclude for Settlement Class Members whose Postcard Notices were initially returned as undeliverable. *Id.* Thus far, no Class Member has objected to the requested amounts in attorneys' fees, costs, and Service Awards. *Id*. at ¶ 21.

IV. ARGUMENT

A. The requested attorneys' fees of one-third are eminently reasonable under the "percentage of the fund" analysis.

1. The "percentage-of-the-fund" method is the appropriate analysis for determining the reasonableness of the requested fee.

As previously explained, courts in the Second Circuit possess discretion to utilize either the "percentage-of-the-fund" method or the "lodestar" method in assessing the reasonableness of fees to be awarded in a class action settlement. *Goldberger*, 209 F.3d at 45. Under the latter method, "courts award[] class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate, as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors." Fitzpatrick Decl. at ¶ 12. Under the former method, "courts select a percentage of the settlement fund they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product." *Id*. at ¶ 14.

Perhaps unsurprisingly, Professor Fitzpatrick's empirical research shows that the trend—both within and outside the Second Circuit—is for courts to utilize the "percentage" method when analyzing the reasonableness of attorneys' fees in the context of class action common fund settlements. *Id*. at ¶¶ 14-15; *accord Monzon v. 103W77 Partners, LLC*, 13 Civ. 5951, 2015 WL

993038, at *2 (S.D.N.Y. Mar. 5, 2015) ("The trend in the Second Circuit is to use the percentage of the fund method … as it directly aligns the interests of the class and its counsel, mimics the compensation system actually used by individual clients to compensate their attorneys, provides a powerful incentive for the efficient prosecution and early resolution of litigation, and preserves judicial resources.") And the reasons provided by courts for this trend align with Professor Fitzpatrick's explanations as to why it is the preferable method. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 121 (2d Cir. 2005) (The percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation."); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-civ-10240-CM, 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007) ("[T]he percentage method is the most efficient means of compensating the work of class action attorneys. It does not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result."). This Court in particular has acknowledged both the benefits of utilizing the percentage method and the trend towards doing so in the Second Circuit. *See Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2019 U.S. Dist. LEXIS 36942, at *3 (S.D. N.Y. Mar. 7, 2019) (citing *Wal-Mart, Inc.*, 396 F.3d at 121; *McDaniel v. Cty. Of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (noting that the percentage method is the trend in the Second Circuit)).

In his declaration, Professor Fitzpatrick cogently explains why the "percentage of the fund" is preferable to the lodestar method in common fund settlements in general, and in this case in particular. Amongst other reasons, he explains that the lodestar method encourages churning up hours rather than securing the best deal possible for the class even at the expense of future work by the attorneys, sets up a conflict between the interests of the Class (which is to get the best deal possible) with that of the attorneys (which is to increase hours), and needlessly increases judicial

workload. Fitzpatrick Decl. at ¶ 15. Moreover, if the lodestar is appropriate or desirable, it is only when a settlement's benefits are difficult or complicated to value, and, concomitantly, it is difficult to identify what a percentage of that fund (in attorneys' fees) would even be—which is not the case here, given there is no calculation or estimate necessary: Progressive has simply agreed to pay a specific, hard dollar amount, none of which will revert to Progressive. As such, Professor Fitzpatrick opines that "if there is ever a settlement in which it is appropriate to use the percentage method and inappropriate to use the lodestar method," this one "is it." *Id*. at ¶ 16.

As such, Class Counsel focuses primarily on the "percentage" method. And here, the requested fee of one third of the common fund is eminently reasonable. After decades of analyzing class settlements and petitions for attorneys' fees and costs, Professor Fitzpatrick posits that this case represents "one of the top class action settlements" he has ever reviewed. *Id*. at ¶¶ 6, 26. Courts routinely award a one-third fee—indeed, it is the most common fee awarded to class counsel in the Second Circuit. *Id*. at ¶¶ 22-23 and Figures 1 & 2. Class Counsel respectfully submits it is appropriate here, too.

2. The *Goldberger* factors support the requested fee.

Class Counsel are requesting an award of attorneys' fees equal to one-third of the settlement cash fund. This is comfortably within the percentage regularly approved in this Circuit. *See, e.g.*, *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945, at *58-59 (S.D.N.Y. Nov. 30, 2010) ("[F]ederal courts have established that a standard fee in complex class action cases … where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit. . . . District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater."); *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 U.S. Dist. LEXIS 144327, at *26 (S.D.N.Y. Oct. 2, 2013) ("Class Counsel's request for 31.7% of the Fund is reasonable and 'consistent with the norms of class

litigation in this circuit.'") (quoting *McMahon v. Oliver Cheng Catering and Events, LLC*, 2010 U.S. Dist. LEXIS 18913, at *20 (S.D.N.Y. Mar. 2, 2010)); *In re N. Dynasty Mins. Ltd. Sec. Litig.*, No. 20-CV-5917 (TAM), 2024 WL 308242, at *15 (E.D.N.Y. Jan. 26, 2024) (noting a one-third fee "constitutes a proportion routinely approved as reasonable."); *Jenkins v. Nat'l Grid USA Serv. Co., Inc.*, No. 15-CV-1219, 2022 WL 2301668, at *5 (E.D.N.Y. June 24, 2022) (awarding attorneys' fees of 1/3 of $38.5 million common fund plus $1,052,082.50 in expenses); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146, 152 (S.D.N.Y. 2010) (awarding one-third of $35 million settlement fund and $1,270,915.40 in expenses).[2] Indeed, according extensive empirical research conducted by Professor Fitzpatrick, fees of 33.3% are the mode (i.e., the most common) percentage awarded in settlements of size comparable to this one. Fitzpatrick Decl. at ¶¶ 22-23 and Figures 1 and 2. And, it must be said, settlements of this size are often a *far* lesser percentage of potential damages that could be recovered at trial. As Professor Fitzpatrick opines, to secure nearly 70% of potential damages in a consumer class action is rare and a "spectacular" result. *Id*. at ¶¶ 6, 26-28. And the empirical research and case law bears that out. *See infra*, Sec. IV.A.2(ii).

So, the factors relevant to addressing the reasonableness of such fee prescribed by the Second Circuit, along with Professor Fitzpatrick's expert testimony and Mr. Bates's declaration, militate strongly in favor of granting the request and approving the requested fee amount.

[2] This Court, in resolving class action petitions for attorneys' fees, appears to have a preference to establish a baseline or presumptive percentage based on comparison to similar settlements, and then utilizing the *Goldberger* factors to determine whether an upward or downward deviation from that baseline percentage is justified. Professor Fitzpatrick shows that the baseline percentage is either the exact 33.3% that Class Counsel requests here (if the baseline is the most common occurrence, or "mode") or 25-29% (if the baseline is the median). Fitzpatrick Decl. at ¶¶ 22-24. But even if the baseline were considered to be the 25-29% range, Professor Fitzpatrick explains that because "this is one of the top class action settlements" he has ever reviewed, it "easily justifies" an upward adjustment from the mean/median to the most common fee award of one-third. *Id*. at ¶¶ 6, 25-26, 28-29.

i. Public policy

Starting with the "public policy" factor, Professor Fitzpatrick explains that class actions are desirable public policy particularly where, as here, individual claims "are too small to be viable economically rational (or even viable) to bring on their own…and, even if they were viable, individuals do not have the incentive to invest in one claim the same way a defendant facing many similar claims does." Fitzpatrick Decl. at ¶ 18; *accord Shapiro v. JPMorgan Chase 7 Co.*, No. 11-cv-8331, 2014 WL 1224666, at *24 (S.D.N.Y. Mar. 24, 2014) ("Skilled counsel must be incentivized to pursue complex and risky claims [that protect the public on a contingency basis]."). In such circumstances, it is critical for courts to set fee awards "such that lawyers are incentivized 1) to bring as many *meritorious* cases as possible and 2) to litigate those cases in a way that maximizes the resulting compensation for the class and the deterrence of future wrongdoing." Fitzpatrick Decl. at ¶ 19.

As he explains, both public policy factors strongly favor the requested fee here. *Id*. at ¶¶ 18-21. The meritoriousness of this case—which was based on a theory of liability originated by Class Counsel—is demonstrated by the fact that it survived dispositive motions both on the pleadings and at summary judgment.[3] Fitzpatrick explains that this only occurs in approximately 9% of non-securities class actions. *Id*. at ¶ 20. As to the second element, Fitzpatrick notes that "there is no doubt class counsel's settlement will generate both compensation and deterrence: Class Members will receive millions of dollars of compensation—indeed, they will receive the lion's share of their damages, again a rarity in class action settlements—and every one of these dollars increases Progressive's cost of engaging in misconduct." *Id*. at ¶ 21. As such, his opinion is that

[3] This is particularly notable given that, simultaneously, other litigants brought theories of liability relating to the calculation of actual cash value that were unsuccessful, both on the merits and as to their suitability for class treatment. Bates Decl. at ¶ 10.

the "public policy" factor weighs in favor of finding the requested fee amount to be reasonable. *Id*. at ¶¶ 18-21. This comports with the law in this circuit. See, e.g., *Shapiro*, 2014 WL 1224666, at *24; *Massiah v. MetroPlus Health Plan, Inc.*, 2012 U.S. Dist. LEXIS 166383, at *17 ("Attorneys who fill the private attorney general role must be adequately compensated for their efforts," otherwise the public risks an absence of a "remedy because attorneys would be unwilling to take on the risk") (citing *Goldberger*, 209 F.3d at 51).

Class Counsel skillfully and extensively litigated this case, secured class certification while avoiding dispositive motions directed at their claims, and demanded beneficial settlement terms compensating class members to a significant percentage—both in absolute terms and in comparison to other class settlements—of their potential damages. The public policy interest is to reward such behavior. As such, this factor strongly militates in favor of the requested fee.

ii. Requested fee in relation to the settlement

This factor also strongly favors a fee of one-third. Professor Fitzpatrick asserts "this is one of the top class action settlements I have seen in my nearly 20 years of studying them[.]" Fitzpatrick Decl. at ¶ 6. The empirical data supports his opinion. The settlement in this case is for approximately 69% of potential compensatory damages, Bates Decl. at ¶ 5, which, from the existing data, "is *multiples* of what is typically recovered in a class action settlement." Fitzpatrick Dec. at ¶ 26.

Moreover, as previously explained, courts routinely award 33.3%, which is the "mode" or most common percentage awarded in the Second Circuit. Fitzpatrick Decl. at ¶¶ 22-23 and Figures 1 and 2. It is the most common award and thus comfortably within the range approved in the Second Circuit (and beyond), where courts often approve fees even higher. *Velez*, 2010 U.S. Dist. LEXIS 125945, at *58-59; *In re N. Dynasty*, 2024 WL 308242, at *15; *Jenkins*, 2022 WL 2301668,

at *5; *In re Marsh*, 265 F.R.D. at 146, 152; *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-CV-1152-M, 2018 U.S. Dist. LEXIS 69143, at *9 (N.D. Tex. Apr. 25, 2018) ("[N]umerous courts in this Circuit have awarded fees in the 30% to 36% range"); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 380 (S.D. Oh. 2006) (noting that "[a]ttorneys' fees awards typically range from 20 to 50 percent of the common fund" and collecting cases); *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-cv-95, 2007 U.S. Dist. LEXIS 79606, at *13 (W.D. Mich. Oct. 26, 2007) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery") (quoting *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000)); *City of Providence v. Aeropostale, Inc*., 11 Civ. 7132, 2014 WL 1883494, at *20 (S.D.N.Y. May 9, 2014) (approving fees of one-third of settlement fund, plus litigation expenses); *Guevoura Fund Ltd. v. Sillerman*, No. 18-cv-09784, 2019 U.S. Dist. LEXIS 218116, at *15 (S.D.N.Y. Dec. 18, 2019) (approving request for "a fee award of 33 1/3% of the total settlement fund" and acknowledging that "Class Counsel's request for 33%...is typical in class action settlements in the Second Circuit") (internal citation omitted).

Further, it should be noted that courts in this District and Circuit have approved similar fee percentages even where settlements recovered far less of the potential damages. *See, e.g.*, *Hicks v. Morgan Stanley & Co.*, 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890 (S.D.N.Y. Oct. 24, 2005) (approving 30% of settlement fund as attorneys' fees where settlement was for 2.4% of plaintiffs' estimated potential damages); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002) (approving 33.3% in attorneys' fees in case where 41% of potential damages were secured by settlement); *James v. China Grill Mgmt.*, 18 Civ. 455 (LGS), 2019 U.S. Dist. LEXIS 72759 (S.D. N.Y. Apr. 30, 2019) (awarding 30% of settlement fund in attorneys' fees where

settlement constituted 16% of total potential damages); *Moreno*, 2019 U.S. Dist. LEXIS 36942, at *9 (approving 30% attorneys' fees award where settlement fund secured approximately 34% of total damages); *Burns v. Falconstor Software, Inc.*, No. 10 CV 4632 (ERK), 2014 U.S. Dist. LEXIS 203061 (E.D.N.Y. Apr. 11, 2014) (approving fees of 33.3% of settlement fund where settlement secured 17.4% of potential damages). Surely, then, a settlement that awards double (or more than double) concrete benefits compared to these settlements merits a fee in the same range. And not only is the total cash amount secured for Class Members (69%) unusually high, but Class Members do not have to undergo a claim process and not a single dollar will revert to Progressive, a procedural structure that Professor Fitzpatrick notes is "rare." Fitzpatrick Dec. at ¶ 27. So, a fortori, even if an award of one-third in this case could be considered an upward adjustment to the mean/median benchmark percentage (as opposed to a mode benchmark), it is eminently reasonable, for all the reasons Professor Fitzpatrick explains. *Id*. at ¶ 25 (testifying that "this case easily justifies an award on the higher end of the spectrum").

The requested fee here is well within the normative amount assessed in private litigation and approved in the context of class action settlements. And no Class Member has objected to the requested fee, after being provided notice of the amount Class Counsel is seeking per this Court's directive. As such, this factor militates strongly in favor of the requested fee. *Id*. at ¶¶ 22-25.

iii. Magnitude and complexities of the litigation

The next factor is the magnitude and complexities of the litigation, which also militates in favor of the requested fee here. "[C]lass actions have a well deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998)

(cleaned up); *see also Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *73 ("It is well settled that class actions are notoriously complex and difficult to litigate."). As a result, "federal courts have established that a standard fee in complex class action cases … where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez*, 2010 WL 4877852, at *21 (collecting cases).

Buttressing this point is that this was no ordinary class action. The theory of liability in this case was originated by Class Counsel. Bates Decl. at ¶¶ 7-9. There was no playbook to follow, no templates from previous cases to borrow, no case law precedent serving as a basis. *Id*. On all discovery, briefing, appeals, and litigation, Class Counsel was starting from scratch. *Id*. As Professor Fitzpatrick put it, "[t]o achieve unusually excellent results should be rewarded even in the normal course of events—to do so with an innovative and unprecedented theory of liability and course of litigation is even more worthy." Fitzpatrick Dec. at ¶ 28;[4] *see also Sos v. State Farm Mut. Auto. Ins. Co.*, No: 6:17-cv-890-PGB-LRH, 2021 U.S. Dist. LEXIS 52898, at *10 (M.D. Fla. Mar. 19, 2021) (agreeing an upward adjustment was called for in a case that involved "novel areas of law" and "[m]ultiple rounds of class certification briefing and summary judgment briefing, as well as extensive class, fact, and expert discovery"). As such, the complexity of this litigation strongly supports the requested fee percentage.

So, too, does the magnitude of the litigation. This case required detailed, extensive, and comprehensive analysis of expansive discovery, including dozens of spreadsheets containing over one hundred thousand insurance claims and millions of data inputs. Bates Decl. at ¶¶ 13-20. Class

[4] As discussed in the next section, the novelty and unproven nature of the claims is also highly relevant to the "risks of litigation" factor.

Counsel had to comprehensively analyze significant forensic data, tens of thousands of documents, retain multiple experts and work with them in their analysis and opinions, and comprehend complicated data systems and topics of expertise including the used car market and appraisal standards. *Id*. Progressive also vigorously litigated this case. Class Counsel successfully briefed multiple motions to dismiss, class certification, a Rule 23(f) appeal, summary judgment, numerous *Daubert* motions, and extensive pre-trial filings. *Id.* at ¶ 13. And they had to do so without any preexisting playbook to follow. Yet, Class Counsel were able to navigate the litigation, successfully secure class certification and avoid summary judgment, successfully defend a Rule 23(f) appeal, litigate this case to the eve of trial, and then secure a highly favorable settlement. In other words, notwithstanding the novelty and complexities of Plaintiffs' claims, Class Counsel, through extensive factual investigation and targeted discovery, were able to skillfully and efficiently negotiate a successful resolution on behalf of the Settlement Class.

As such, this factor strongly favors approval of the attorneys' fees sought here. Fitzpatrick Decl. at ¶¶ 26-29.

iv. Risk of litigation

The attendant risks of litigation in this case were significant, and, as such, this factor strongly favors the requested fee amount. To the extent that one-third is considered an upward deviation from the benchmark—and again, Professor Fitzpatrick opines that one-third is the mode or most common percentage in the Second Circuit for similar settlements—it is easily justified given the significant risk of no recovery in this action. This is critical given that the risk of litigation is perhaps the most important factor in determining whether a requested fee is reasonable and whether attorneys can secure an upward enhancement. *See, e.g.*, *Zink v. First Niagara Bank, N.A.*, No. 13-CV-01076-JJM, 2016 U.S. Dist. LEXIS 179900 (W.D.N.Y. Dec. 29, 2016) ("In

determining a reasonable attorney fee award in a class action, the risk of success is perhaps the foremost factor to be considered in determining whether to award an enhancement."); *see also Olaechea v. City of New York*, No. 17-CV-4797 (RA), 2022 WL 3211424, at *14 (S.D.N.Y. Aug. 9, 2022) ("[C]ontingency risk ... must be considered in setting a reasonable fee." (citing *Goldberger*, 209 F.3d at 53)); *In re Marsh ERISA Litig*., 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

Class Counsel undertook this case on a purely contingency basis, meaning that, if this litigation had been unsuccessful, Class Counsel would have earned no attorneys' fees at all, and, in fact, would have borne the significant costs of litigation. Bates Decl. at ¶ 6. And this litigation carried *significant* risk of non-recovery. *Id*. at ¶¶ 7-12. Obviously, any case bringing a novel and untested theory of liability is inherently risky, as there is no case law precedent on which to rely. *Id*.; *see also* Fitzpatrick Decl. at ¶ 28; *accord Blondell v. Bouton*, No. 17 CV 372 (RRM)(RML), 2021 U.S. Dist. LEXIS 164292 (E.D.N.Y. Aug. 30, 2021) (observing that "[t]he risk of zero recovery" is "especially present" where there are numerous issues that are "novel and untested"). But beyond the inherent riskiness of novel and untested litigation, this case carried even more risks, given that cases contesting ACV calculations of total-loss vehicles under different theories of liability had been brought in various jurisdictions, and many failed, some on the merits and others at class certification (or both). Bates Decl. at ¶¶ 9-11. Just as Class Counsel anticipated, Progressive relied heavily on these cases and argued they required this Court to, respectively, deny class certification and grant Progressive summary judgment. *Id*.; *see also In re N. Dynasty*, 2024 WL 308242, at *12 (recognizing an "increased risk that class certification might be denied" where a defendant contests a motion for class certification). This Court was the first to rule on a motion

to certify classes challenging PSA deductions under Class Counsel's theory. While most courts have since (correctly, in Class Counsel's view) agreed with this Court's analysis on class certification, other courts have parted ways and denied insureds' motions for class certifications. Bates Decl. at ¶ 11 (citing cases). So, not only did Class Counsel have to litigate a complex, technical, and data-intensive case, but they did so knowing there was a significant risk—borne out in other cases—of non-recovery. Indeed, recall that at the time this case was filed, Class Counsel had *no knowledge* that Progressive and its vendors were deleting and excluding data to manufacture support for the PSAs—Class Counsel were the first in the country to uncover that practice. *Id*. at ¶ 17.

As such, the "risk of litigation" factor strongly supports the requested fee. Fitzpatrick Decl. at ¶ 26-28. Indeed, even if one-third is considered an upward deviation from the benchmark, the significant risk of this novel, untested, and original litigation—which was also highly complex and data-intensive—would strongly militate in favor of such upward enhancement.

v. Quality of representation

Given the previously discussed factors—the novel, complex, and risky nature of this litigation, as well as the complicated data analysis and need for numerous expert opinions—the "quality of representation" factor also militates in favor of the requested fee. *Id*. at ¶ 26-28. Professor Fitzpatrick opines that Class Counsel exhibited the type of "innovative representation"—absent any case law precedent, navigating the hurdles of unsuccessful total-loss cases under alternative theories of liability, and without any preexisting regulatory involvement—that courts "should reward." *Id*. at ¶ 29.

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig*.,

689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010); *Noto v. 22nd Century Grp., Inc.*, No. 19-CV-01285-JLS-MJR, 2023 WL 7107840, at *11 (W.D.N.Y. Oct. 17, 2023) ("In considering the requested fee, the Court also looks to the quality of the representation of Lead Counsel as well as the quality of opposing counsel."); *Cornwell v. Credit Suisse Grp.*, No. 08-CV-03758(VM), 2011 WL 13263367, at *2 (S.D.N.Y. July 20, 2011) ("The standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by plaintiffs' attorneys."). Class Counsel achieved an exceptional result in this case while facing well-resourced and highly-experienced defense counsel from King & Spalding. *See In re Marsh ERISA Litig*., 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

Finally, "the quality of representation is best measured by results, and that such results may be calculated by comparing the extent of possible recovery with the amount of actual verdict or settlement." *Goldberger*, 209 F.3d at 55. And here, Professor Fitzpatrick opines that the Settlement here is "one of the top class action settlements" he has ever seen and is a "spectacular" result. Fitzpatrick Decl. at ¶¶ 6, 26. Put together, then, this case was novel, untested, and carried significant risks; the litigation involved extensive data and thousands of documents, requiring analysis of millions of data inputs; and Progressive vigorously defended the claims and the propriety of class certification through skillful and experienced defense counsel, all the way to the eve of trial. Yet, despite all that, Class Counsel secured a Settlement Agreement constituting an unusually high percentage of potential damages and a rare structure—with no claiming process and no reversion to Progressive whatsoever—such that Professor Fitzpatrick (a preeminent class action expert) considers it "one of the top" settlements he has ever analyzed. Achieving this

required skillful and experienced attorneys. As such, this factor also strongly favors the requested fee.

vi. Time and labor expended

Finally, the "time and labor expended" factor also supports the requested fee amount. Fitzpatrick Decl. at ¶ 30. As Professor Fitzpatrick points out, the vast majority of class actions are resolved or settled prior to class certification—he notes that an upcoming study he has conducted will show that over 90% of class actions are resolved (whether via dismissal or settlement) prior to class certification. *Id*. Here, however, Class Counsel litigated the case through dispositive motion practice, class certification briefing, a Rule 23(f) petition, the entirety of the discovery period, summary judgment, and to the eve of trial.

To date, Class Counsel has expended 5,379.6 hours litigating this case.[5] Bates Decl. at ¶ 34. And this is despite that Class Counsel were careful to exercise billing judgment, carefully crafting a litigation plan and dividing up tasks and responsibilities amongst the various attorneys to avoid duplicative or unnecessary time expenditure. *Id*. at ¶¶ 26-28. Moreover, Class Counsel's work is not finished—based on their experience and history in working on settlements and final approval, Class Counsel estimate they will expend approximately 150 hours on the remaining tasks to be done in this litigation (including preparing the motion for final approval, which is not counted in the hours submitted), assuming final approval is granted. *Id.* at ¶ 36. So, as Professor Fitzpatrick explains:

> Even more exceptional, as I noted above, very few class actions survive both a motion to dismiss and summary judgment, and even fewer are litigated to the eve of trial. Indeed, given the procedural maturity, I am surprised this case reached settlement as quickly as it

[5] Also, this only includes hours devoted to the *Volino* case. Class Counsel also subsequently brought companion cases across the country, and the time devoted to those cases were interconnected and useful to this case as well. Bates Decl. at ¶ 37.

> did, as most cases this developed would mean that settlement was not achieved for many years. That this case matured (and then settled) so quickly is a testament to the vigilance of Class Counsel and the Court. Of all the Second Circuit's fee factors, this one, in my opinion, is the one that most strongly favors an upper-end fee percentage. The reason for this is as follows: If class action lawyers receive the same fee percentage when they settle early as they do when they go all the way to the eve of trial, then they will never go to the eve of trial; they will settle early for less….This is why many clients in the market for contingency representation choose fee percentages that escalate as the litigation matures…Class Counsel not only declined to settle early, they also did not let the case drag on—instead, they litigated fiercely but also quickly, and then secured a favorable settlement.

Fitzpatrick Decl. at ¶ 30 (citation omitted).

As such, this factor strongly militates in favor of approving the requested amount in attorneys' fees.

B. Attorneys' fees are also reasonable and appropriate under a lodestar crosscheck.

Finally, courts can apply a lodestar crosscheck in determining the reasonableness of fees. Under the lodestar method, courts assess "a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate, as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors." Fitzpatrick Decl. at ¶ 12. To be clear, as Professor Fitzpatrick opined, "if there is ever a settlement in which it is appropriate to use the percentage method and inappropriate to use the lodestar method, this settlement, in my opinion, is it." *Id*. at ¶ 16. Nevertheless, a lodestar crosscheck also "strongly supports the fee request." *Id*. at ¶ 31.

Here, the lodestar, utilizing rates consistent with those approved by the Southern District of New York for attorneys of similar experience and for similar litigation—including some of the specific timekeepers submitting lodestars here—is $5,485,782.25. Bates Decl. at ¶¶ 30-34 (citing Composite Class Counsel Declarations). Mr. Bates detailed the careful and precise manner in

which Class Counsel divided roles and responsibilities amongst the various attorneys. *Id*. at ¶ 26. And each declarant attorney averred as to specific additional cuts in hours expended to ensure there was not any duplicative or unnecessary hours expended. *Id.* at ¶ 27; *see also generally* Composite Class Counsel Declarations.[6] This equates to a multiplier of 2.85 (if the 150 hours estimated to conclude this litigation is credited) to 2.92 (if no such time is credited). *Id*. at ¶¶ 35-36.

This is consistent with multiplier amounts approved in this District. *See, e.g.*, *In re Telik*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("[L]odesar multiples of over 4 are routinely awarded by courts…"); *Maley*, 186 F. Supp. 2d at 369 ("[A] multiplier [as high as] 4.65 [is] well within the range awarded by courts in this Circuit and courts throughout the country."); *Asare v. Change Grp. of N.Y., Inc.*, 2013 U.S. Dist. LEXIS 165935 at *51 (S.D.N.Y. Nov. 15, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (approving attorneys' fees representing a 6.3 times multiplier on class counsel's regular hourly rates); *Velez*, 2010 U.S. Dist. LEXIS 125945, at *23 (recognizing a "multiplier of 2.4 times the hourly fees already incurred. . . . [as] well within (indeed, at the lower end) of the range of multipliers accepted within the Second Circuit."). *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *53-54 (S.D.N.Y. Apr. 25, 2016) (approving attorneys'

[6] The timekeeper summaries were based on contemporaneous time records regularly prepared and maintained by each of the Class Counsel firms in the usual course and manner of those firms. Bates Decl. at ¶ 31. Because those time entries consists of thousands of pages, Class Counsel are not submitting them here, but are willing to do so *in camera* if the Court wants to review all the time entries. *See, e.g.*, *In re Tremont Secs. Law, State Law & Ins. Litig.*, 699 Fed. Appx. 8, at n.13 (2d Cir. 2017) (holding that district courts are permitted to "rely on summaries that are based on voluminous contemporaneous records" rather than requiring submission of each individual time entry).

fees reflecting a "lodestar multiplier of just over 6."). And here, Class Counsel undertook the case on a purely contingent basis. Bates Decl. at ¶ 6.

Indeed, this Court, in *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344 (S.D.N.Y. 2014), held that a multiplier of 5.2 was "large, but not unreasonable" and approved it. *Id*. at 347, 353. And here, as stated repeatedly herein, Class Counsel secured an excellent and "spectacular" result that is one of the "top class action settlements" Professor Fitzpatrick has analyzed. Fitzpatrick Decl. at ¶¶ 6, 26. So, a lodestar crosscheck multiplier of 2.85-2.92 further confirms the reasonableness of the fee request. *Id*. at ¶¶ 30-31.

C. Service Awards

Service awards are "common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs." *Reyes v. Altamarea Group, LLC*, 10-CV-6451(RLE), 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011). Reasonable service awards fulfill the important purpose of compensating plaintiffs for the time they spend, the risks they take, and "encourage[s] class representatives to participate in class action lawsuits." *Moses v. N.Y. Times Co*., 79 F.4th 235, 253 (2d Cir. 2023) ("[O]ur clear precedent … permits district courts to approve fair and appropriate incentive awards to class representatives."); *Massiah*, 2012 WL 5874655, at *8. Here, the participation of Plaintiffs was critical to the ultimate success of the case. Plaintiffs spent significant time protecting the interests of the Settlement Classes and advancing the claims against Progressive through their involvement in this case. *See* Exhibit 4 to Bates Decl. (Composite Plaintiffs' Declarations). Plaintiffs devoted significant time to tasks such as: assisting Class Counsel in investigating their claims by providing information necessary to draft and file their respective complaints; gathering documents in response to

discovery requests; sitting for deposition; communicating and keeping in regular contact with Class Counsel throughout the litigation; and preparing to testify live at the trial of this action. *Id*.

On these facts, Service Awards of $10,000.00 are eminently reasonable. Fitzpatrick Decl. at ¶¶ 33-35; *accord In re LIBOR-Based Fin. Instruments Antitrust Litig*., 11-MD-2262(NRB), 2018 WL 3863445, at *2 (S.D.N.Y. Aug. 14, 2018) (approving incentive awards of $25,000.00 for each of the five named plaintiffs); *Dornberger v. Metro. Life Ins. Co*., 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (noting case law supports service payments of between $2,500.00 and $85,000.00); *Moreno*, 2019 U.S. Dist. LEXIS 36942, at *9 (approving $10,000.00 award); *see also Asare*, 2013 U.S. Dist. LEXIS 165935, at *40 ("Courts routinely find service awards of $10,000.00 reasonable in class action cases."); *Buffington v. Progressive Advanced Ins. Co.*, No.: 7:20-CV-07408 (VB), 2024 U.S. Dist. LEXIS 139838 (S.D.N.Y. Aug. 6, 2024) (approving service award of $10,000.00 in auto total-loss class action). As Professor Fitzpatrick explained, not only is this amount "well below average" in empirical studies, adjusting for today's dollars, but, in his opinion, the Named Plaintiffs here would be justified in seeking a higher award given that "the far more advanced maturity of this case suggests the awards should be upper-end awards." *Id*.

Moreover, the Class Members were provided notice that Plaintiffs would be seeking up to $15,000.00 in Service Awards, and none has objected. As such, Class Counsel respectfully submit this Court should approve the requested Service Awards of $10,000.00 to each Named Plaintiff, which are lower than what Class Members were informed they might seek.

D. Costs

In addition to attorneys' fees, reimbursement of expenses to counsel from the common fund is appropriate. *See In re Arakis Energy Corp., Sec. Litig.*, No. 95 CV 3431, 2001 U.S. Dist. LEXIS 19868, at * 17 n. 12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant

expense requests in common fund cases as a matter of course"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 178 (S.D.N.Y. 2007) ("Counsel is entitled to reimbursement from the common fund for reasonable litigation expenses."). Class Counsel seek reimbursement of litigation costs and expenses of $342,766.26. Bates Decl. at ¶ 38. This is less than the $460,000.00 that Class Members were informed Class Counsel may seek as costs and expense reimbursement in this Action. Bates Decl. at ¶ 39. Class Counsel aver that these costs were reasonable and necessary to the prosecution of this Action. *Id*. Moreover, such costs, which constitute just 0.02% of the Settlement Fund, are less than the amount of costs that courts have deemed reasonably expended in other litigation, both as a raw number and as a percentage of the fund. *See, e.g.*, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 14-CV-7126 (JMF), 2018 U.S. Dist. LEXIS 202526 (S.D.N.Y. Nov. 29, 2018) (approving costs and expenses of over $18 million); *In re Sadia S.A. Sec. Litig.*, 2011 U.S. Dist. LEXIS 149107, at *8 (S.D.N.Y. Dec. 28, 2011) (approving costs and expenses constituting 3% of the settlement fund as reasonable).

V. CONCLUSION

For the reasons stated herein, Plaintiffs' respectfully request the Court grant this Petition and enter an order awarding Class Counsel $16,000,000 in attorneys fees and $342,766.26 in litigation expenses, and award $10,000 each to Plaintiffs John Plotts, James England, Kevin Lukasik, Lori Lippa, Zachary Goodier, Michael Verardo, and Lorenzo Costa for their service to Settlement Class Members.

Dated: November 4, 2024

Respectfully submitted,

/s/ Hank Bates

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CERTIFICATE OF SERVICE

I certify that on November 4, 2024, I electronically transmitted the foregoing document with the Clerk of the Court using the CM/ECF system, which will provide electronic mail notice to all counsel of record.

/s/ Hank Bates
Hank Bates