UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WARREN BURCH, JAMES BODLEY, KYLE MATSON, RONALD McCALLUM,	*	
Plaintiffs,	*	
v.	*	**Case No.: 1:17-cv-18**
	*	**Honorable Paul L. Maloney**
WHIRLPOOL CORPORATION,	*	
Defendant.	*	

PLAINTIFFS' UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND FOR CLASS REPRESENTATIVE SERVICE AWARDS AND MEMORANDUM OF LAW IN SUPPORT

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I. INTRODUCTION

On May 15, 2019, this Honorable Court granted preliminary approval to the Class Action Settlement Agreement presented by the parties in this matter. (*Burch* ECF No. 42.) The Settlement Agreement resolves, on a nationwide basis, two (2) class actions which claim that certain dishwashers manufactured by Whirlpool are defective in that the plastic axels on the wheels of the upper dish rack adjuster break, rendering the upper dishwasher rack unusable.[1]

The Settlement Agreement was reached following nearly two and a half years of hard-fought litigation (including dispositive motion practice), voluminous document review, and extensive negotiations with the involvement of a highly experienced and respected mediator. The Settlement addresses the objectives of the litigation and provides as close to full relief as possible to nearly 800,000 consumers nationwide. As discussed in Plaintiff's preliminary approval papers, the Settlement provides substantial class relief tethered to the consumer's damages, including 100% cash reimbursement of repair costs incurred, cash payments ranging from $15 to $90, free repairs, and/or rebates ranging from 10% to 30% on the purchase of certain new Kitchen-Aid appliances. These benefits to the Class could not have been achieved absent Class Counsel's time, effort, and skill, as well as Plaintiffs' active participation in the litigation.

Under the terms of the Settlement Agreement, Whirlpool has agreed to pay, subject to Court approval, Lead Class Counsel R. Brent Irby and Edward Wallace $715,000 for attorneys' fees and $28,000 for reimbursement of litigation expenses incurred, and $400,000 to Class Counsel Scott Carpenter and Rebecca Stanton for attorneys' fees and expenses incurred. (Settlement Agreement, VIII(B).) Whirlpool has also agreed to pay, subject to Court approval,

[1] Those two (2) actions, *Burch* and *Bodley*, have now been consolidated (*Burch* ECF No. 40).

service awards of $2,500 to each of the named Plaintiffs, who are representing the Class in the Settlement, for their time and efforts on behalf of the Class. (*Id*., VIII(C).)

Under the terms of the Settlement, Whirlpool has agreed to pay these attorneys' fees, litigation expenses, and service awards separately from, and in addition to, any amounts or benefits paid to Class Members. (*Id*., VIII(A).) These amounts will not reduce the amount of benefits available to Class Members.

Rule 23(h) of the Federal Rules of Civil Procedure provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). As discussed herein, Plaintiffs respectfully submit that these amounts contemplated by the parties under the Settlement Agreement are reasonable and warranted given the relief that Plaintiffs and Class Counsel have secured for the Class. The attorneys' fees fall within a reasonable range accepted in the Sixth Circuit under either a percentage-of-the-fund analysis or a lodestar analysis. The fee and cost amounts represent a fraction of the total relief made available to all class members, and are commensurate with Class Counsels' total lodestar and costs expended to secure that relief. Class Counsel further submit that the service awards are reasonable in light of Plaintiffs' efforts on behalf of the class, and fall within the range of service awards routinely approved in this Circuit.

For the reasons discussed herein, Plaintiffs and Class Counsel respectfully request that their Motion be granted.

II. BACKGROUND

In this case and in the *Bodley, et al. v. Whirlpool Corporation* action recently consolidated before this Court, Plaintiffs allege that certain Whirlpool-manufactured dishwashers are defective in that the plastic axel used in the upper rack adjusters becomes brittle when

exposed to repeated high temperature wash cycles and can break, causing the dishrack to disconnect from the rail and collapse. (*Burch* ECF No. 13; *Bodley* ECF No. 73.)

Plaintiffs contend that they and other similarly situated consumers incurred out-of-pocket costs in purchasing replacement rack adjusters in an attempt to fix the problem with their dishwashers. (*Id*.) Whirlpool contests these allegations.

A. HISTORY OF THE LITIGATION.

On January 5, 2017, Plaintiff Warren Burch filed his action on behalf of himself and a putative nationwide class in this Court (*Burch* ECF No. 1). Prior to filing, counsel for Plaintiff Burch performed due diligence and pre-filing investigation to ensure the viability of the alleged defect, the claims to be asserted, and class certification. (Ex. 1 hereto, Declaration of R. Brent Irby ("Irby Decl."), ¶6.) Among other things, counsel for Plaintiff Burch thoroughly researched the problem through online resources, other possible court filings, and other consumer resources; interviewed Plaintiff Burch at length, including review and analysis of his documents, photographs, and broken and replaced parts; consulted with an appliance expert about the defect; researched and analyzed other appliance-defect cases involving Whirlpool and other manufacturers; conducted legal research on jurisdictional issues, the legal claims to be asserted, and important issues surrounding class certification; interviewed other consumers whose dishwasher axel incurred the same failure, including review of their documents and photographs; and conducted research online and from other consumer sources related to replacement parts and their costs. (*Id*.)

On March 13, 2017, Whirlpool filed a Partial Motion to Dismiss. (*Burch* ECF No. 7.) Pursuant to Fed.R.Civ.Pro. 15(a)(1)(B), Plaintiff Burch filed an Amended Complaint on April

13, 2017. (*Burch* ECF No. 13.) On May 1, 2017 Whirlpool again filed a Partial Motion to Dismiss, which Plaintiff Burch opposed on May 30, 2017. (*Burch* ECF Nos. 16 & 18.)

On September 12, 2017, a hearing was conducted on Whirlpool's Partial Motion to Dismiss at the WMU Thomas M. Cooley Law School in Grand Rapids. On September 28, 2017, this Honorable Court entered an Order and Opinion granting in full Whirlpool's Partial Motion to Dismiss. (*Burch* ECF No. 22.)

As discussed in more detail in Section II(B) below, shortly after the hearing on the Partial Motion to Dismiss, counsel for Whirlpool and Plaintiff Burch began discussing the possibility of exploring settlement. (Irby Decl., ¶7.) After several discussions and the exchange of relevant information, the parties in *Burch* conducted a mediation with Jonathan Marks of Marks ADR, LLC on December 11, 2017 (*Id.*, ¶8). During the sixteen (16) months that followed, counsel for the parties continued to negotiate in good faith with the substantive involvement of Mr. Marks and while keeping the Court apprised of the status of their settlement efforts. (*Burch* ECF Nos. 28 & 31.)

On September 19, 2017, Plaintiffs James Bodley and Kyle Mason filed their action against Whirlpool in the Northern District of California. (*Bodley* ECF No. 1.) Plaintiffs Bodley and Mason filed their First Amended Complaint on November 6, 2017. (*Bodley* ECF No. 24.) On December 15, 2017, Whirlpool moved to dismiss, stay, or transfer the *Bodley* action to this Court in light of the separate *Burch* class action that had previously been filed in this Court. (*Bodley* ECF No. 34.) On May 24, 2018, the *Bodley* action was transferred to this District and re-assigned to this Court on May 28, 2018. (*Bodley* ECF Nos. 54 & 55.)

Upon transfer of the *Bodley* action to this Court, counsel for Plaintiff Burch reached out to counsel for Plaintiffs in *Bodley* and apprised them of the ongoing settlement efforts and status

in the *Burch* action. (Irby Decl., ¶10.) Upon obtaining approvals and authorizations from Whirlpool, counsel for Plaintiff Burch shared certain documents and information pertinent to settlement with counsel in *Bodley* and invited their substantive involvement and participation in the ongoing settlement negotiations. (*Id*.)

On August 9, 2018, Plaintiffs Bodley and Mason filed their Second Amended Complaint, adding another named Plaintiff, Ronald McCallum. (*Bodley* ECF No. 73.) In response, Whirlpool filed a Motion to Dismiss and a Motion for Partial Summary Judgment. (*Bodley* ECF Nos. 77 & 81.) On January 15, 2019, the parties in the *Bodley* action requested a temporary stay on responsive briefing and consideration of Whirlpool's motions in light of the parties' continued negotiation efforts to settle both the *Burch* and *Bodley* actions, which the Court granted. (*Bodley* ECF No. 90.)

B. SETTLEMENT NEGOTIATIONS AND DISCOVERY.

As stated, shortly after the hearing on Whirlpool's Partial Motion to Dismiss, counsel for Whirlpool and Plaintiff Burch began discussing the possibility of exploring settlement. (Irby Decl., ¶7.) These discussions were prompted by the parties' desire to avoid the expense, uncertainties, and burden of protracted litigation. (*Id*.) To facilitate those discussions, counsel requested, and Whirlpool provided, relevant information and documents pertaining to the alleged defect, including information surrounding the scope and number of dishwashers and models in play; the time period when such dishwashers were manufactured; remedial efforts and customer service efforts by Whirlpool; Whirlpool's internal investigation of the issue; design and costs surrounding replacement axel parts; costs related to parts and labor in replacing broken axels; service incident rates and warranty claims; and identification of class members via Whirlpool's available databases and information. (*Id*.)

After analysis of this information, additional requests, inquiries, and several discussions, the parties elected to schedule a mediation and chose Mr. Marks as the mediator. (*Id*., ¶8.) Mr. Marks is an experienced mediator known nationally for his skill in facilitating resolution of class actions and other complex litigation. Following the exchange of mediation briefs and several telephonic conferences with Mr. Marks, counsel for the parties in *Burch* conducted a mediation in Chicago on December 11, 2017. (*Id*.)

While the parties did not reach an agreement at mediation, they did make strides in formulating the structure of a settlement that would encompass both retroactive relief and prospective relief for the various circumstances of dishwasher owners, depending on the nature of their injury (i.e., those who paid for repairs, those who had free repairs, those who have had no repairs, etc.). (*Id*., ¶9.) In the months following the mediation, counsel continued to negotiate the substantive terms of the relief to the class based on this structure, with counsel for Plaintiff Burch preparing a term sheet of material terms that the attorneys worked from. (*Id*.) Counsel exchanged numerous proposals and edits to the working term sheet and conducted multiple settlement conferences. (*Id*.) Both separately and with the assistance of Mr. Marks, the parties continued extensive negotiations throughout 2018. (*Id*.)

Upon transfer of the *Bodley* action to this District, documents and information pertinent to the ongoing settlement efforts were shared with counsel for *Bodley*, who became substantively involved in the ongoing settlement efforts. (*Id*., ¶10.) For months throughout 2018, the parties exchanged numerous offers and counter-offers, and negotiated the points of each vigorously. (*Id*.) Multiple settlement conferences were conducted among all Plaintiffs' counsel, as well as among counsel for all parties. (*Id*.) Mr. Marks continued to assist with the ongoing settlement negotiations. (*Id*.) Additionally, Whirlpool continued to provide counsel requested information

pertaining to the scope of the effected washers, customer service efforts, and remedial costs. (*Id*.)

By November 15, 2018, the parties had reached an agreement-in-principle on all of the material terms of substantive relief for the Settlement Class, and executed a written term sheet outlining those terms. (*Id*., ¶11.)

After the parties reached this agreement-in-principle on all material terms of substantive relief to the Settlement Class, they began negotiating the amount of attorneys' fees and costs that Whirlpool would pay to Class Counsel (subject to Court approval) and the amount of service awards Whirlpool would pay to the Class Representatives (also subject to Court approval). (*Id*., ¶12.) At all times, the issue of attorneys' fees, costs, and service awards was negotiated separately from, and in addition to, the settlement relief to Class members. (*Id*.) At the outset of fee negotiations, counsel for Plaintiffs provided, at Whirlpool's request, their respective lodestar information to Mr. Marks and Whirlpool's counsel. (*Id*.) Like the other negotiations, these negotiations were conducted at arms-length and with the assistance of Mr. Marks.[2] (*Id*.) Following negotiations, the parties reached agreement in principle on those issues on February 28, 2019. (*Id*.)

After the Settlement terms were reached in principle, but before a final Settlement Agreement was executed, the parties engaged in additional confirmatory discovery. (*Id*., ¶13.) Specifically, Whirlpool produced, and Class Counsel analyzed, over 1,000 pages of documents

[2] Whirlpool, with the assistance of Mr. Marks, negotiated fees and expenses on two (2) separate, but simultaneous, tracks: (1) fees and reimbursement of expenses to Lead Class Counsel R. Brent Irby and Edward Wallace, and (2) fees and reimbursement of expenses to Class Counsel Scott Carpenter and Rebecca Bell-Stanton. (Irby Decl., ¶12.) Counsel for Plaintiffs in *Burch* and *Bodley* coordinated with one another before, during, and after fee negotiations to avoid any duplicative or unnecessary hours in their respective lodestar calculations. (*Id*.)

evidencing additional information surrounding Whirlpool's efforts to address the combined plastic axel and V-Rail design issue from an engineering/root cause perspective, a design perspective, and a service perspective; the number of affected dishwashers by year and model number; costs related to replacement parts and labor; information demonstrating the efficacy of the replacement stainless steel repair kit; and other material analyzed to confirm the fairness of the proposed Settlement. (*Id*.)

C. THE SETTLEMENT.

After multiple exchanges, discussions, and additional points of negotiation, a final and complete Settlement Agreement was executed by all parties on or around April 11, 2019. (Irby Decl., ¶14.) On April 15, 2018 the parties presented the Settlement Agreement in their Joint Notice of Closing Documents (*Burch* ECF No. 39), and on April 16, 2019 the *Bodley* action was consolidated with the *Burch* action for settlement purposes. (*Burch* ECF No. 40.)

Plaintiffs filed their Motion for Preliminary Approval and supporting materials on May 8, 2019. (*Burch* ECF No. 41.) On May 15, 2019, this Honorable Court entered an Order which preliminarily approved the settlement as fair and reasonable, ordered dissemination of class notice, established pertinent briefing deadlines for Plaintiffs' current motion and Motion for Final Approval, set a hearing date of October 15, 2019 for final approval and Plaintiffs' current motion. (*Burch* ECF No. 42.)

Per the Settlement Agreement and the Court's preliminary approval Order, the Settlement Class is defined as:

> All persons in the United States and its territories who (i) purchased a new Class Dishwasher, (ii) acquired a Class Dishwasher as part of the purchase of a home, residence, or structure, or (iii) received as a gift, from a donor meeting those requirements, a new Class Dishwasher not used by the donor or by anyone else after the donor purchased the Class Dishwasher.

* * *

> "Class Dishwasher" means a Whirlpool-manufactured, KitchenAid-brand dishwasher manufactured with a Plastic Premium Adjuster in combination with a V-Rail System between October 2010 and the Notice Date.

(Settlement Agreement, I(MM) & (H).) The Settlement Class includes approximately 799,000 members. (Irby Decl., ¶15.)

As stated, the parties crafted comprehensive class benefits that are tethered to the damages incurred by class members, and include:

> • For settlement class members who incurred past damages in paying out of pocket for a repair of their upper rack adjuster, they can make a claim to receive a 100% cash reimbursement of documented repair costs. (Settlement Agreement, IV(B)(6)(c) & (8)(c).) Class members who cannot document repair costs can submit a signed declaration attesting to such repairs and payments and receive a cash payment ranging from $15 to $90 depending on the type of repair received; or, at their election, rebates ranging from 15% to 25% off the purchase price of certain new KitchenAid brand appliances[3], including a 25% rebate on KitchenAid brand dishwashers. (Settlement Agreement, IV(B)(6)(d) & (8)(d).)
>
> • For settlement class members whose dishwasher still contains the plastic rack upper adjuster at issue, on a going forward basis they can make a claim for a free stainless steel replacement rack adjuster kit and free installation should they incur a failure within twelve (12) months of receiving class notice. (*Id.*, (B)(6)(e)(1).) For months thirteen (13) to twenty-four (24) following class notice, and regardless of whether they incur a failure or not, these settlement class members can elect to make a claim for a free stainless steel replacement rack adjuster kit, or a $15 cash payment, or rebates ranging from 10% to 30% on the purchase price on a KitchenAid stand mixer or blender. (*Id.*, IV(B)(6)(e)(2).)

[3] The range of MSRPs for the rebate-eligible appliances under the Settlement is: (a) KitchenAid brand **dishwashers** = $849 to $2,199, with an average MSRP of $1,214; (b) KitchenAid brand **blenders** = $129 to $1,299, with an average MSRP of $595; (c) KitchenAid brand stand **mixers** = $259 to $749, with an average MSRP of $556. (Irby Decl., ¶16.)

- Settlement class members who previously received a free repair of their dishwasher with the stainless steel replacement adjuster are eligible to receive a 15% rebate on the purchase of a KitchenAid brand stand mixer. (*Id.*, IV(B)(10)(c).)

Per the Court's preliminary approval Order, class notice has been disseminated. Since then, Lead Class Counsel have regularly monitored settlement administration and responded to many class member inquiries, which counsel will continue to do throughout the settlement process. (Irby Decl, ¶17.)

III. ARGUMENT

A. CLASS COUNSELS' REQUESTED AWARD OF ATTORNEYS' FEES IS REASONABLE AND WELL-SUPPORTED.

1. Legal Standard.

The Federal Rules of Civil Procedure expressly authorize that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h) (emphasis added); *see also, Office & Prof'l Employees Int'l Union v. Int'l Union, United Auto, Aerospace & Agric Implement Workers of Am.*, 311 F.R.D. 447, 459 (E.D.Mich. 2015) (where an attorney fee provision in a settlement agreement between the parties is reasonable, Rule 23(h) grants the Court authority to provide attorney's fees consistent with that provision) (citing Fed.R.Civ.P. 23(h)).

Federal courts at all levels encourage litigants to resolve fee issues by agreement whenever possible. As the United States Supreme Court explains, "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Johnson v. Georgia Hwy. Exp., Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally

arrive at a settlement as to attorney's fees."); *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 67 F. Supp. 819, 829 (D. Mass. 1987) ("Whether a defendant is required by statute or agrees as part of the settlement of a class action to pay the plaintiffs' attorney's fees, ideally the parties will settle the amount of the fee between themselves."). Accordingly, courts regularly approve agreed-upon attorney's fee awards paid by the defendant, rather than the class members, especially where that amount does not decrease the benefit obtained for the class. *E.g.*, *In re LG/Zenith Rear Projection Television Class Action Litig.*, 2009 WL 455513, at *8-9 (D.N.J. Feb. 18, 2009) (approving agreed upon attorney's fee award that did not diminish the fund); *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1652303, at *4 (D.N.J. June 5, 2007), *aff'd*, 579 F.3d 241 (3d Cir. 2009) (same); *see also McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006) (granting class counsel full amount of fees agreed to by defendant where the attorney's fees were separate from the class settlement and did not diminish the class settlement); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (same).

When "awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done, as well as for the results achieved." *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)). In the context of a class action settlement, courts in the Sixth Circuit have available "two methods for calculating attorney's fees: the lodestar and the percentage of the fund." *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. Appx 496, 497 (6th Cir. 2011). "District courts have discretion 'to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them'." *Id.* (quoting *Rawlings*, 9 F.3d at 516).

Under the percentage of the fund method, "the court determines a percentage of the settlement to award class counsel." *Gascho*, 822 F.3d at 279 (quoting *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 922 (N.D. Ohio 2003)). Under the lodestar method, the number of hours reasonably spent on the litigation are multiplied by a reasonable hourly rate. *Id*.

The Sixth Circuit has noted that there are advantages and drawbacks to each method. *Rawlings*, 9 F.3d at 516-517. The advantages of the percentage of the fund method are that: "it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation." *Id*. With the lodestar method, "the listing of hours spent and rates charged provides greater accountability…[and] also encourages lawyers to assess the marginal value of continuing work on the case, since the method is tied to hours and rates, and not simply a percentage of the resulting recovery." *Id*. But "the lodestar method has been criticized for being too time-consuming of scarce judicial resources." *Id*.; *see also Stanley v. U.S. Steel Co.*, 2009 WL 4646647 at *1 (E.D. Mich. Dec. 8, 2009) ("[the percentage method] decreases the burden imposed on the court by eliminating a full-blown, detailed, and time-consuming lodestar analysis.").

The Sixth Circuit has observed a "trend towards adoption of a percentage of the fund method in [common fund] cases." *Rawlings*, 9 F.3d at 515. Other courts in the Sixth Circuit have "indicated their preference for the percentage of the fund method in common fund cases." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003); *see also Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972 *4 (W.D. Mich. Oct. 26, 2007) (finding that when damages for individual class members are relatively modest, the percentage of the fund

recovery method is favored because it rewards counsel for taking on a case which might not otherwise be economically feasible.).

An award of attorney's fees in common fund cases need only be "reasonable under the circumstances." *Rawlings*, 9 F.3d at 516. The court must consider and discuss the relevant factors that determine reasonableness, which include: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974).

Here, the attorney's fees agreed to by the parties are reasonable under either a percentage of the fund analysis or a lodestar analysis.

2. The Requested Fee is Reasonable Under a Percentage of the Fund Analysis.

"When conducting a percentage of the fund analysis, courts must calculate the ratio between attorney's fees and benefit to the class. Attorney's fees are the numerator and the denominator is the dollar amount of the Total Benefit to the class (which includes the benefit to the class members, the attorney's fees, and may include costs of administration)." *Gascho*, 822 F.3d at 282.

As the Sixth Circuit noted in *Gascho*, "…calculation of the denominator is necessarily case specific. To reach a resolution satisfactory to all parties, litigants may agree to cash and non-cash settlement components. Calculating the ratio between attorney's fees and benefit to the class must include a method for setting the denominator that gives appropriate consideration to all components that the parties found necessary for settlement." *Id*.

Like here, the class settlement in *Gascho* contained a claims-made structure with no upper cap on relief. *Id*. at 273-274. After a thorough analysis of controlling and pertinent authority from the U.S. Supreme Court, the Sixth Circuit, and other Courts of Appeals, the Sixth Circuit in *Gascho* held that the value of the benefit to the class in a claims-made settlement can be based upon the total relief class counsel makes available to class members, "whether or not they exercise it." *Id*. at 278 & 286-288, quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S. Ct. 745 (1980); *see also Does 1-2 v. Déjà Vu Consulting, Inc.*, 925 F.3d 886, 898 (6th Cir., June 3, 2019) (affirming the district court's rejection of an objector's challenge to attorney's fees as being disproportionate to the recovery of the class because the common fund value was allegedly overinflated, and affirming that the value of the common fund depends on the entire "benefit to the class" created by the settlement).

Here, the Settlement Class includes approximately 799,000 members. (Irby Decl., ¶15.) ***All*** class members are entitled to one or more of the benefits available, depending on their circumstances. The Settlement makes a variety of benefits available, including a 100% cash reimbursement of repair expenses incurred, a cash payment of $15 or $90, free repairs and replacement parts, and rebates ranging from 10% to 30% on the purchase price of certain new KitchenAid appliances.

Based on discovery produced, only a small section of the Settlement Class, roughly 7%, are entitled only to rebate relief: Group 5, those class members who received a repair with a free stainless steel replacement part, who are eligible to receive a 15% rebate on the purchase price of a KitchenAid brand stand mixer. (Settlement Agreement, IV(B)(10)(c).) The remaining 93% of the Settlement Class are entitled to cash (or rebate relief at their election), and/or free repairs. Taking just the lowest-valued benefit available for these class members - - - $15 cash - - - the

value of the benefit to the class is $11,146,050. (799,000 x .93 = 743,070 class members x $15 = $11,146,050.) When attorney's fees, expenses, and cost of notice and settlement administration are added back to the available class benefit,[4] the Total Class Benefit under this analysis is $12,989,050 ($11,146,050 + $1,143,000 total fees/costs + $700,000[5] = $12,989,050 Total Class Benefit). The Settlement Agreement's $1,143,000 total fee and expense award equates to less than 9% of the Total Class Benefit which, as discussed below, is far below the percentages routinely approved in Michigan and throughout the Sixth Circuit.

To further show the reasonableness of the total fee and expense award under this analysis, even if a "mid-point" calculation of the available class benefit were employed as the district court did (and the Sixth Circuit affirmed) in *Gascho*,[6] then the total fee and expense award would equate to 15% of the Total Class Benefit ($11,146,050 ÷ 2 = $5,573,025 mid-point + $1,143,000 total fees/costs + $700,000 notice/admin costs = $7,416,025 Total Class Benefit. $1,143,000 ÷ $7,416,025 = Fees constituting 15.4% of Total Class Benefit). Likewise, even if these calculations were applied just to the 500,000 Settlement Class members to whom direct notice was sent,[7] the total fee and expense award would equate to 13% of the Total Class Benefit

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[4] *See Gascho*, 822 F.3d at 282 and footnote #2; *see also Van Horn*, 436 Fed.Appx. at 501; *see also Lonardo v. Travelers Indem. Co.*, 706 F.Supp. 2d 766, 802-803 (N.D.Ohio 2010) (when a settlement agreement provides for the class defendant to pay costs for notice and settlement administration, those amounts are included in the Total Class Benefit).

[5] The estimated cost for class notice and settlement administration is between $700,000 and $750,000. (Irby Decl., ¶17.)

[6] *See also Van Horn* and *Lonardo, supra*, where district courts likewise used a "mid-point" calculation of available benefits.

[7] Of the 799,000 class members, approximately 500,000 have been sent direct notice via contact information obtained through Whirlpool's warranty registration and customer service records. (Irby Decl., ¶17.)

if a "mid-point" calculation of available benefits was not employed,[8] and 21% if a "mid-point" calculation of available benefit was employed.[9]

Again, these calculations do not take into account (1) the fact that Settlement Class Members are entitled to more than just $15[10] and (2) the additional rebate-based relief available to Group 5 Settlement Class Members.

The percentages calculated above are reasonable and well within ranges regularly and routinely approved by courts throughout the Sixth Circuit. *See, e.g., Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972 at *4 (approving an award of 33%, including costs and expenses, and noting that "[e]mperical studies show that . . . fee awards and class actions average around 1/3 of recovery.") (internal quotes removed)); *Underwood v. Carpenters Pension Trust Fund – Detroit and Vicinity*, 2017 WL 655622 at *15 (E.D.Mich. Feb. 2, 2017) (awarding 28% of the common fund); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188 at *19 (E.D.Mich. Dec. 13, 2011) ("30% appears to be fairly well-accepted ratio . . . ."); *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 832 (E.D. Mich. 1998) ("The 'benchmark' percentage . . . has been 25% [of the fund] . . . ."); *Simpson v. Citizens Bank*, 2014 WL 12738263 at *6 (E.D.Mich. Jan. 31, 2014) ("Class Counsel's request for 33% of the common fund created by their efforts is well within the benchmark range and in line with what is often awarded in this

[8] 500,000 x .93 = 465,000 direct notice class members x $15 = $6,975,000 + $1,143,000 fees/costs + $700,000 notice/admin costs = $8,818,000 Total Class Benefit. $1,143,000 ÷ $8,818,000 = .1296.

[9] 465,000 x $15 = $6,975,000 ÷ 2 = $3,487,500 mid-point + $1,143,000 fees/costs + $700,000 notice/admin costs = $5,330,550 Total Class Benefit. $1,143,000 ÷ $5,330,500 = .2144.

[10] For example, some class members can receive a 100% cash reimbursement of any out-of-pocket expenses incurred; others can receive a $90 cash payment; and all class members have some form of rebate relief available to them, which can have value well over $100.

Circuit."); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387 at *3 (E.D.Tenn. July 11, 2012) (approving fee request where "attorneys' fees requested represent one-third of the settlement fund . . . the percentage requested is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit."); *Bourne v. Ansara Rest. Group, Inc.*, 2016 WL 7405804 at *3 (E.D. Mich. Dec. 22, 2016) (approving "a third of the potential gross recovery and creation of the common benefit fund" in FLSA class action); *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 at *4 (E.D.Mich. Jan. 20, 2015) (awarding one-third of the settlement fund as "fair and fully justified," "within the range of fees ordinarily awarded," and "within the range of fee awards in settlement of this type."); *Allan v. Realcomp II, Ltd.*, 2014 WL 12656718 at *2 (E.D.Mich. Sept. 4, 2014) (finding award of one-third of the common fund reasonable); *Roberts v. Shermeta, Adams & VonAllmen, P.C.*, 2015 WL 1401352 at *10 (W.D.Mich., March 26, 2015) (finding 25% of recovery reasonable); *Kinder v. Northwestern Bank*, 2012 WL 2886688 at *8 (W.D.Mich. June 5, 2012) (awarding 25% under a percentage of the fund approach); *Coulter-Owens v. Rodell, Inc.*, 2016 WL 5476490 at *6 (E.D.Mich. Sept. 29, 2016) (finding that 25% "comports with our precedent within the Sixth Circuit"); *Gooch v. Life Inv'rs. Ins. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012) ("The majority of common fund fee awards fall between 20% and 30% of the fund."); *Martin v. Trott Law, P.C.*, 2018 WL 4679626 at *8 (E.D.Mich. Sept. 28, 2018) ("The attorney's fee represents 33.3% of that denominator, which is within the range of percentage fees that have been approved in complex consumer class actions.").

3. The Requested Fee is Reasonable Under a Lodestar Analysis.

Lead Class Counsel R. Brent Irby and Edward Wallace respectfully contend that the attorney's fees to them contemplated under the Settlement Agreement ($715,000) are reasonable under the lodestar method, whether used as a cross-check or the primary means of analysis.[11]

Since September 2016, the firms of Lead Class Counsel (Wexler Wallace and McCallum, Hoaglund & Irby) have devoted 1,467.4 hours to investigating, litigating, and settling this matter. (Irby Decl., ¶¶23-24; Ex. 2, Declaration of Edward Wallace "Wallace Decl.", ¶11.) The tasks and efforts to which those hours were devoted are described in the declarations of Lead Class Counsel and referenced in Section II herein. The tasks and time devoted to this matter have been documented by Lead Class Counsel in detailed time records maintained since the outset.[12] (*Id*.) Lead Class Counsel have reviewed all time records and worked to exclude any hours as duplicative or unnecessary. (*Id*.)

These hours do not account for additional time and work that will be required of Lead Class Counsel going forward, including briefing and preparation for final approval, responding to class member inquiries, overseeing administration of the Settlement, addressing objections (if any), and dealing with any other issues as the settlement process plays out. (Irby Decl., ¶30.)

The considerable amount of time and effort expended by Lead Class Counsel has resulted in a meaningful settlement while preserving judicial resources. Lead Class Counsel respectfully

[11] It is Lead Class Counsel's understanding that additional Class Counsel from the *Bodley* action, Scott Carpenter and Rebecca Bell-Stanton, are providing a separate supplemental submission addressing their lodestar.

[12] Lead Class Counsel will be subsequently filing a Motion to Submit (their) Time Records Under Seal for the Court's review *in camera*, as those records include matters subject to the attorney-client privilege and the work-product privilege. (Irby Decl., ¶21.) If allowed, Lead Class Counsel are respectfully requesting that they be permitted to submit those time records by August 13, 2019, which is the deadline for submissions in support of final approval.

submit that the hours recorded in this case, as reflected in the supporting documentation and time records sought to be filed under seal, are reasonable and were necessary to the resulting settlement. (Irby Decl., ¶21.) *Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 995 F.Supp. 2d 835, 841 (S.D.Ohio 2014) ("In determining the reasonableness of hours spent, the Court should not engage in a *post hoc* critique of strategic decisions that Class Counsel may have made in good faith during the course of the case. [L]itigation is not an exact science, and the determinative issue is whether the task was reasonable in view of the ultimate goal of the case.")

The following tables summarize the lodestar of Lead Class Counsel at their regular, current hourly rates that they would charge to clients in non-contingent cases:

P – Partner, A – Associate, OC – Of Counsel, PL – Paralegal, (#) – Years in Practice

Wexler Wallace, LLP

Name	Position	Hours	Rate	Lodestar
Edward Wallace	Partner (24)	161.40	900.00	$145,260
Kenneth A. Wexler	Partner (35+)	0.20	900.00	$180.00
Mark R. Miller	Partner (15)	0.90	750.00	$675.00
Mark J. Tamblyn	Of Counsel (24)	62.40	750.00	$46,800.00
Amy E Keller	Associate (11)	12.10	485.00	$5,868.50
Adam Prom	Associate (5)	83.30	340.00	$28,322.00
Umar Sattar	Associate (3)	7.60	575.00	$4,370.00
Christopher Bogusch	Paralegal (4)	8.90	295.00	$2,625.50
TOTAL		**336.80**		**$234,101.00**

McCallum, Hoaglund & Irby, LLP

Biller	**Hours**	**Rates**	**Amount**
RBI (P-21)	987.2	$550	$542,960.00
SBH (A-5)	120.9	$325	$ 39,292.50
LM (PL)	22.5	$150	$ 3,375.00
Total	**1130.6**		**$585,627.50**

(Irby Decl., ¶24; Wallace Decl., ¶11.)

Here, Lead Class Counsel are highly regarded members of the bar who are among the most experienced and successful in the country in the fields of consumer class actions, products liability, and complex litigation. (Wallace Decl., ¶¶3-10 and Wexler Wallace resume attached thereto; Irby Decl., ¶¶19-20.) The market for highly skilled, experienced, and resourceful attorneys prosecuting large class action cases is national in scope. (Ex. 3 hereto, Declaration of Charles F. Behler "Behler Decl.", ¶14.) Lead Class Counsels' regular billing rates are reasonable and appropriate for attorneys with such skill, experience, and resources handling a large, national class action in Michigan. (*Id*.) As set forth in the declaration of Michigan attorney Charles F. Behler (Ex. 3 hereto), it was reasonable for Plaintiff Burch to secure representation from Lead Class Counsel, although out-of-state attorneys, for a national consumer class action case of this magnitude based on their training, experience, performance, and depth of resources. (Behler Decl., ¶15.) To be sure, Whirlpool's lead counsel throughout all aspects of the litigation and

settlement were from an out-of-state, prominent national law firm (Wheeler Trigg O'Donnell, LLP) known for its skill and experience in complex litigation and larger class action cases.[13]

Lead Class Counsel respectfully contend that their retention and accompanying billing rates are reasonable and warranted under the circumstances. In complex litigation, reasonable hourly rates may be determined with reference "to national markets, an area of specialization, or any other market [the court believes] is appropriate to fully compensate attorneys in individual cases. "*McHugh v. Olympia Entm't, Inc.*, 37 Fed. Appx. 730, 740 (6th Cir. 2002) ("A court's choice not to apply local market rates for attorney fees is not an abuse of discretion."); *see also In re UnumProvident Corp. Derivative Litigation*, 2010 WL 289179 at *6 (E.D. Tenn. Jan. 20, 2010 (approving rates charged by out-of-town counsel where the case involved complex questions of law and defendants were represented by large, out-of-state firms) (citing *Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995)); *In re Ford Motor Co. Spark Plug and 3-Valve Engine Prods. Liab. Litig.*, 2016 WL 6909078 at FN3 (N.D.Ohio Jan. 26, 2016) (explaining that "[i]t was reasonable to employ counsel from outside this District to prosecute this case because of the national scope of the litigation . . . and the highly-specialized and talented opposing counsel," and "elect[ing] to utilize the national hourly rates"); *Brian A. v. Hattaway*, 83 F. App'x 692, 695 (6th Cir. 2003) (panel affirmed the use of New York billing rates for out-of-town counsel based on a finding that "there was no local attorney or coalition of local attorneys who had the resources, expertise, or willingness to bring" the class action lawsuit).

Although Lead Class Counsel believe the circumstances warrant their lodestar calculation at their regular rates for national class litigation of this nature, they are also cognizant of the fact

[13] "…WTO serves as national class action counsel to Whirlpool and has handled over 50 class actions for that company alone." www.wtotrial.com/class-actions.

that this Court has utilized lower hourly rates in this District. Lead Class Counsel respectfully submit that a lodestar analysis substantiates the reasonableness of the fee award to them even if lower rates are utilized in Lead Class Counsel's lodestar calculation, as shown in the analysis below.

As described more fully in the Declaration of Charles F. Behler, rates of $550 and $675, respectively, for Lead Class Counsel R. Brent Irby and Edward Wallace would be considered reasonable for attorneys of their training, experience, and caliber practicing as complex class action litigators in Michigan in 2019. (Behler Decl.)

As stated, Mr. Wallace's current billing rate is $900 an hour (Wallace Decl., ¶11.) Mr. Wallace's firm, Wexler Wallace, LLP, is nationally recognized as a leading firm in complex class action and multidistrict litigation. (Wallace Decl., ¶¶3-9 and Wexler Wallace resume attached thereto.) Mr. Wallace has specialized in complex class action litigation for over two decades and has served as lead or co-lead class counsel in several consumer product defect actions across the nation. (*Id*.) Mr. Wallace and his firm are among the most experienced and successful in the country in the fields of consumer class actions, mass torts, products liability, and complex litigation. (*Id*.)

Lead Class Counsel respectfully submit that a rate of $675 is in line with the market rate in Western Michigan for lawyers of similar ability, reputation, experience, and resources as Mr. Wallace and his firm. (Behler Decl.) Although in an upper percentile of the State Bar of Michigan's 2017 Economics of Law Practice Survey, there is reason and justification for that placement, as set forth more fully in the declaration of Charles F. Behler. (*Id*.) An attorney with the extent of Mr. Wallace's (and his firm's) resources and depth of experience to handle a national class action of this size would command a premium in the Western District of Michigan.

(*Id*., at 15.) Lead Class Counsel's research and due diligence has indicated, and Mr. Behler's declaration substantiates, that there are no other plaintiff's firms in Kalamazoo with the extent of resources and depth of experience to handle a large class action of this magnitude on a national basis.[14] (*Id*.) Nor did Lead Class Counsel's research and due diligence reveal any consumer class action cases filed by an attorney or firm from the Western District that were either litigated or settled on a nationwide basis against a major American manufacturer like Whirlpool, which is likewise substantiated by Mr. Behler. (*Id*.) Thus, as stated previously, it was reasonable for Plaintiff Burch to retain counsel outside of the Western District to pursue this matter.

In prior cases, this Court has approved of proposed rates from a higher percentile of the State Bar of Michigan's Survey. *See, e.g., Stryker Corporation v. Prickett*, 2016 WL 7048813 at *4 (W.D. Mich. Dec. 5, 2016) (utilizing a 95th percentile range when rate not challenged by defendant); *Duran v. Sara Lee Corporation*, 2014 WL 12279518 at *2 (W.D. Mich. March 5, 2014) (same); *Harshaw v. Bethan Christian Services*, 2011 WL 13196675 at *6 (W.D. Mich. Jan. 11, 2011) (using 90th percentile rates); *Streamline Packaging Systems, Inc. v. Vinton Packaging Group, Inc.*, 2008 WL 227851 at *3 (W.D. Mich. Jan. 25, 2008) (using rate above 95th percentile).

A $675 rate for lawyers practicing in this District with comparable skill, experience, and depth of resources as Mr. Wallace and his firm is also consistent with Michigan rates reported in the U.S. Consumer Law Attorney Fee Survey Report.[15] Per that Report, a consumer lawyer practicing in Grand Rapids falling within the 95th percentile charges an average hourly rate of

[14] Accordingly, Lead Class Counsel's references to Michigan rates from the State Bar of Michigan's 2017 Survey, as well as from the U.S. Consumer Law Attorney Fee Survey, encompass the Grand Rapids region, when applicable.

[15] www.nclc.org/images/pdf/litigation/tools/atty-fee-survey-2015-2016.pdf.

$700, and $525 for the 75th percentile. (Behler Decl., ¶22.) As set forth in Mr. Behler's declaration, this Survey provides a more appropriate benchmark for Michigan rates in a case such as this given its specific focus on rates related to consumer litigation and class action law in Michigan areas. (*Id*.)

A rate of $550 is also reasonable for lawyers practicing in this District with comparable skills, training, and experience as co-Lead Class Counsel R. Brent Irby and his firm. (*Id*., ¶3.) Mr. Irby's regular billing rate is $550 per hour. (Irby Decl., ¶24.) In the last two (2) national class actions Mr. Irby has settled in federal court, his rates have been approved at $550 and $525.[16] (*Id*.) Mr. Irby's firm, McCallum, Hoaglund & Irby, LLP is a boutique firm specializing in consumer litigation and class actions. (*Id*.) Mr. Irby's firm, while smaller than Wexler Wallace, also has a reputation for being well-versed in consumer class actions and complex litigation, both nationally and statewide. (Irby Decl., ¶¶19-20.) Mr. Irby and/or his partners have served as lead or co-lead counsel in several class action matters throughout the country, including appliance/product-related consumer class actions. (*Id*.) Mr. Irby regularly lectures at consumer/class action-related seminars across the country, and since 2013 Mr. Irby has served as an adjunct professor at the University of Alabama School of Law, teaching Class Actions/Complex Litigation, as well as Damages. (*Id*.)

As set forth in the declaration of Mr. Behler and accompanying materials, an attorney with Mr. Irby's ability, skill, and depth of experience to handle a national class action of this size would command a premium in the Western District of Michigan and should be evaluated in a high percentile for hourly rates. (Behler Decl., ¶17.) Accordingly, a rate of $550 would be in

[16] *Chambers v. Merrill Lynch & Co., Inc.*, Case No. 10-cv-07190-NRB, United States District Court, Southern District of New York ($550 an hour rate); *Grasso v. Electrolux Home Products, Inc.*, Case No. 8:16-cv-00911-CEH-TGW ($525 an hour rate).

line with the market rate in Western Michigan for lawyers of similar ability, experience, and resources. (*Id*., ¶3.)

Thus, even if reduced hourly rates were used in Lead Class Counsel's calculation, a lodestar analysis still coobarates the reasonableness of Lead Counsel's fee request. Indeed, in large, complex class actions like this one, "courts routinely apply lodestar multipliers to determine the final award." *Underwood v. Carpenter's Pension Trust Fund – Detroit and Vacinity*, 2017 WL 655622 at *14 (E.D.Mich. Feb. 17, 2017). As the Sixth Circuit has recognized, "enhancing the lodestar with a separate multiplier can serve as a means to account for the risk an attorney assumes in taking a case, the quality of the attorney's work product, and the public benefit achieved." *Rawlings*, 9 F.3d at 516. "[T]he primary reason for awarding a multiplier is to account for the risk counsel undertook in taking the case." *Hillson v. Kelley Services, Inc.*, 2017 WL 3446596 at *5 (E.D.Mich. Aug. 11, 2017); Newburg on Class Actions, §15:87 (5th ed.) (providing that the "simple answer" for "why class counsel would ever get a positive multiplier" is that "most class action lawyers undertake class suits on a contingent fee basis."). Here, Lead Class Counsel took on this national class action case on a contingency fee basis, risking their time, money, and resources against a formidable adversary, and stood to gain nothing if unsuccessful. (Irby Decl., ¶27.)

"Most courts agree that the typical lodestar multiplier in a large class action ranges from 1.3 to 4.5." *In re Cardinal Health Sec. Litigs.*, 528 F.Supp. 2d 752, 767-78 (S.D.Ohio 2007). Federal courts in Michigan regularly and routinely apply lodestar multipliers in this range in large class action cases like the current action. *See Underwood*, 2016 WL 806707 at *14 ("The court believes that a case of this sort would justify a multiplier of at least 3, which is well within the normal range."); *In re Pradin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 at *4

(E.D.Mich. Jan. 20, 2015) (finding multiplier of 3.01 to be "reasonable in light of what has been routinely accepted as fair and reasonable in complex matters"); *Hillson*, 2017 WL 3446596 at *5 (applying a multiplier of 4); *Coulter-Owens*, 2016 WL 5476490 at *6 (awarding a lodestar cross-check multiplier of about 2.05 times the hourly billing amount supplied by Plaintiffs' Counsel); *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 244 (E.D.Mich. 2016) ("The requested fee of $21 million represents a multiplier of 1.9, which the Court finds to be well within an acceptable range."); *Bailey v. AK Steel Corp.*, 2008 U.S. Dist. LEXIS 18838 at *8 (S.D.Ohio Feb. 28, 2008) ("The multiplier [of 3.04] is fully warranted given the complexity of the case, the attendant risks, the size of the settlement recovered, and class counsels' continuing obligations to the class, and it is well within the range of multipliers awarded in similar litigation.").

Here, even if reduced hourly rates for Lead Class Counsel were used in their lodestar calculation, their fee request still falls within an accepted range of reasonableness or, at a minimum, would still produce a lodestar multiplier that is well within the range regularly accepted and approved as reasonable in Michigan federal courts.

For these reasons, a lodestar analysis confirms that the fees contemplated under the Settlement Agreement fall within a reasonable range accepted in the Sixth Circuit.

4. <u>Other Relevant Factors Support Class Counsels' Fee Request</u>.

Each of the *Ramey* factors demonstrate the reasonableness of Class Counsels' fee request.

a. Value of the Benefits Rendered to the Class.

As Plaintiffs described in their Memorandum in Support of Preliminary Approval, the Settlement provides substantial value to the class, particularly considering Plaintiffs' likelihood of success on the merits.

Here, the Settlement provides substantial relief for all 799,000 Class Members that is specific to their damages, and constitutes significant recovery for the Settlement Class. Again, the alleged defect at issue surrounds the plastic wheel axel in the plastic rack adjuster assembly used in combination with the V-Rail design.[17] This alleged defect in the upper rack adjusters can be fixed or repaired with the replacement of the plastic upper rack adjuster with a stainless steel rack adjuster assembly. The proposed Settlement offers full retroactive relief to those consumers who paid out of pocket for repairs to their upper rack adjuster, as well as comprehensive and meaningful prospective relief to those who received free repairs or have had no repairs. As described above, the Settlement has no upper-cap on the amount of monetary relief available to class members, and the Total Class Benefit is valued in the millions of dollars.

The value of the settlement benefits are even more pronounced in light of the substantial litigation risks the settlement class faces. Notably, Whirlpool's Partial Motion to Dismiss in the *Burch* action was granted in full. Plaintiffs face not only substantial risk with respect to the merits of their claims, but also on the issue of certification of a nationwide class.

As Class Counsels' efforts have resulted in significant benefit to settlement class members, this factor weighs heavily in favor of the requested fee award.

[17] Notably, Whirlpool has taken the position that the alleged defect at issue is not covered under its express warranty, and this Court agreed. (*Burch* ECF Nos. 16 & 22.) Arguably, the proposed Settlement provides warranty relief to Class Members that they otherwise would not be entitled to receive.

b. Contingent Fee Basis, and Value of Services Rendered.

From the outset of this case to the present, prosecution of this action has involved financial risk for Class Counsel. *See Lonardo*, 706 F. Supp. 2d at 796 ("This factor accounts for the substantial risk an attorney takes when he or she devotes substantial time and energy to a class action despite the fact that it will be uncompensated if the case does not settle and is dismissed."). Class Counsel litigated this matter on a wholly-contingent basis, placing at risk their own resources with no guarantee of recovery over a period of nearly three (3) years and counting. (Irby Decl., ¶27.) *Simpson v. Citizens Bank*, 2014 WL 12738263 at *7 ("Only the most experienced plaintiffs litigation firms would risk the time and expense involved in bringing this action in light of the possibility of a recovery at an uncertain date, or of no recovery at all. Apart from the risk of no recovery, the deferral of fees in such an undertaking while at the same time advancing possibly hundreds of thousands of dollars in expenses would deter most firms.").

That risk manifested in an enormous amount of attorney time and money invested in prosecuting this case on behalf of the Class, as demonstrated in the lodestar analysis above. The value of the services rendered by Class Counsel favors approval of the fee award contemplated under the Settlement Agreement.

c. Society's Stake In Awarding Attorneys Who Produce Such Benefits In Order To Maintain An Incentive To Others.

"In evaluating the reasonableness of a fee request, the court also must consider society's stake in rewarding attorneys who produce a common benefit for class members in order to maintain an incentive to others." *In re Delphi Corp. Sec. Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 503 (E.D.Mich. 2008); *see also Cardizen*, 218 F.R.F. at 534 ("Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this benefits society.").

"Attorneys who take on class action matters serve a benefit to society and the judicial process of enabling . . . small claimants to pool their claims and resources." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1043 (S.D.Ohio 2001). Moreover, "[s]ociety's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals," *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387 at *5 (E.D.Tenn. May 17, 2013), such as prosecuting tort claims regarding allegedly defective products. *See In re Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, 2016 WL 4765679 at *21 (N.D. Ill. Sept. 13, 2016) ("Congress has determined that it is in the public interest to 'encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.' 15 U.S.C. §2310(a)(1). Thus, this settlement encourages manufacturers to expeditiously identify and cure defects in their products, regardless of whether the defect manifests itself in every item sold.").

Ultimately, the public has in interest in compensating Class Counsel here, because recoveries in this case are far too small if pursued on an individual basis, leaving only contingency-fee class actions as a mechanism to pursue viable claims. There is an important societal stake in rewarding such advocacy. Thus, this factor supports the fee award contemplated under the parties' Settlement Agreement.

d. The Complexity Of The Litigation.

Large class action cases are inherently more complex and challenging, making litigation of them both difficult and time consuming. Product/appliance defect cases like this are not easy to litigate, particularly on a classwide basis. Establishing the Rule 23 elements is challenging on any level, particularly for a multi-state or nationwide class. Here, the varying damages of class members would have made the manageability and certification of a contested class very

challenging. Based on Class Counsels' prior experience in product class cases, these class-related issues would involve detailed and expensive expert analysis and damages models.

Likewise, establishing liability on the merits would be equally difficult and complex. Establishing liability would involve technical and engineering issues and discovery pertaining to the defective part, and undoubtedly would involve complex expert testimony and *Daubert* challenges. Indeed, in conducting their due diligence for settlement purposes, Class Counsel have already received and analyzed thousands of technical documents pertaining to the defect at issue, remedial efforts, and design and costs surrounding replacement axel parts. (Irby Decl., ¶¶7, 10 & 13.)

Thus, the complexity of the litigation weighs in favor of the requested fee award.

e. The Professional Skill And Standing Of Counsel Involved On Both Sides.

"In any given case, the skill of legal counsel should be commensurate with the novelty and complexity of the issues, as well as the skill of opposing counsel." *Simpson v. Citizen Bank*, 2014 WL 12738263 at *7.

Class Counsel are highly experienced and successful practitioners in consumer class actions, products liability, and complex litigation. (Irby Decl.; Wallace Decl. and firm resume attached thereto.) As stated, Lead Class Counsel has litigated and settled large product/appliance defect class actions nationally on prior occasions. Class Counsel used their extensive knowledge and experience obtained from prior cases and applied it to the instant action in order to achieve a fair and reasonable settlement. Moreover, the attorneys representing Whirlpool throughout the litigation and settlement process are highly skilled, resourceful, and experienced in large class action cases.

In sum, this factor favors approval of the fee request.

B. THE COURT SHOULD AWARD LEAD CLASS COUNSEL $28,000 IN EXPENSES.

Whirlpool has agreed to pay $28,000 as reimbursement for expenses incurred by Lead Class Counsel. (Settlement Agreement, VIII(B).) A Court approving a class action settlement may "award reasonable . . . nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In determining whether to award expenses, "[t]he key question is whether . . . expenses are of a type billed separately to the client, i.e., not absorbed in the attorney's hourly rate as overhead." *Moore v. Menasha Corp.*, No. 1:08-CV-1167, 2013 U.S. Dist. LEXIS 10126, at *16 (W.D. Mich. Jan. 25, 2013) (citation omitted); *Currier v. PDL Recovery Grp., LLC*, No. 14-12179, 2017 U.S. Dist. LEXIS 131278, at *3 (E.D. Mich. Aug. 17, 2017); *see also In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) (costs and expenses should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay").

Lead Class Counsel seek reimbursement for costs and expenses typically billed to paying clients. As set forth in the accompanying declarations, their expenses include photocopying, travel, legal research, mediation fees, and other related expenses. *See* Exs. 1 & 2; *see also Moore*, 2013 U.S. Dist. LEXIS 10126 at *16 (quoting *Gradisher v. Check Enforcement Unit, Inc.*, No. 1:00-CV-40, 2003 U.S. Dist. LEXIS 753, at *26 (W.D. Mich. Jan. 22, 2003) ("Courts have found that expenses ordinarily charged to clients include photocopying, travel, telephone costs, postage, and computer-assisted legal research.")). Furthermore, these expenses were "reasonable and necessary expenses" incurred in connection with the successful prosecution of this litigation. (Exs. 1 & 2.) *Rankin v. Rots*, No. 02-CV-71045, 2006 U.S. Dist. LEXIS 102024, at *7 (E.D. Mich. June 27, 2006) (allowing reimbursement of "reasonable and necessary expenses," such as postage, travel, filing fees, expert fees, and legal research). As such, they are

routinely awarded in this Circuit. *See, e.g.*, *Mich. Laborers' Health Care Fund v. Her Constr., Ltd. Liab. Co.*, No. 1:12-CV-307, 2013 U.S. Dist. LEXIS 20476, at *15 (W.D. Mich. Feb. 15, 2013); *Moore*, 2013 U.S. Dist. LEXIS 10126 at *16; *see also Rikos v. P&G*, No. 1:11-cv-226, 2018 U.S. Dist. LEXIS 72722, at *28 (S.D. Ohio Apr. 30, 2018); *In re Delphi Corp. Sec.*, 248 F.R.D. 483, 505 (E.D. Mich. 2008); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at 534-35. Lead Class Counsel's costs and expenses in the amount of $28,000 should be awarded here, too.

C. SERVICE AWARDS OF $2,500 TO THE CLASS REPRESENTATIVES ARE APPROPRIATE.

Under the Settlement, the named Plaintiffs request incentive awards of $2,500. Courts have recognized that "incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) (collecting cases); *United States v. Granados*, 142 F.3d 1016, 1016 (7th Cir. 1998) (explaining that "an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"). In deciding whether an incentive award is appropriate, courts may consider, among other things, "whether the actions of the named plaintiffs protected the interests of the class members and have inured to the substantial benefit of the class members," and "the amount of time and effort expended by the named plaintiffs in pursuing the class action litigation." *See In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 275 (S.D. Ohio 1997). Incentive awards are "typically justified" in circumstances where, as here, "the named plaintiffs expend[ed] time and effort beyond that of other class members in assisting counsel with the litigation. . ." *Id.* at 273.

Named Plaintiff Warren Burch's efforts and participation created a substantial benefit for the Class. He assisted Lead Class Counsel by: providing documentary and photographic evidence related to the issues with his dishwasher; answered questions related to the

circumstances surrounding the defect and any remediation efforts undertaken to address the defect; reviewed and approved the accuracy of the complaint allegations; participated in negotiating the terms of the settlement; and communicated with counsel at least twenty-five (25) times on matters related to this litigation. (Ex. 4, Declaration of Warren Burch.) Nearly 800,000 Class members will be able to receive monetary and/or non-monetary relief as a result of his efforts. Courts in this Circuit have awarded incentive payments to named plaintiffs who have similarly participated in litigation. *See, e.g.*, *Mullins v. S. Ohio Pizza, Inc.*, No. 1:17-cv-426, 2019 U.S. Dist. LEXIS 11019, at *16-17 (S.D. Ohio Jan. 17, 2019) (incentive awards may be justified where named plaintiffs "actively review[] the case and advis[e] counsel in the prosecution of the case"); *Rikos*, 2018 U.S. Dist. LEXIS 72722 at *29 (authorizing $2,500 incentive awards to class representatives who assisted counsel by, among other things, "providing information and documents to their counsel, remaining informed and involved throughout the lengthy litigation, . . . contacting and consulting their counsel concerning the litigation, [and] reviewing pleadings and the Settlement Agreement, . . ."); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 U.S. Dist. LEXIS 55836, at *11 (E.D. Mich. June 27, 2006) (awarding incentive payment for similar participation).

The named Plaintiffs' efforts warrant the $2,500 incentive awards requested here. The amount is proportional to Plaintiffs' participation in the litigation, and falls within the range of service awards routinely approved in this Circuit. *See, e.g., Griffin v. Flagstar Bancorp, Inc.*, 2013 WL 6511860 (E.D.Mich. December 12, 2013) (finding $5,000 awards to the two (2) class representatives reasonable); *American Copper & Brass, Inc. v. Lake City Indust.*, 2016 WL 6272094 (W.D.Mich. March 1, 2016) (awarding named plaintiff an incentive fee of $10,000);

Spine & Sports Chiropractic, Inc. v. ZirMed, Inc., 2015 WL 9413143 (W.D.Ky. December 22, 2015) (finding that a $5,000 incentive award would neither be excessive nor unfair to the class).

CONCLUSION

For these reasons, Plaintiffs and Class Counsel respectfully request that their Motion be granted.

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CERTIFICATE OF SERVICE

This is to certify that on July 9, 2019, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which automatically notifies counsel as follows:

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