IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITTRUST LITIGATION	:	Master File No. 12-md-02311
	:	Honorable Marianne O. Battani
	:	
In Re: Wire Harness	:	Case No. 2:12-cv-00102
In Re: Instrument Panel Clusters	:	Case No. 2:12-cv-00202
In Re: Fuel Senders	:	Case No. 2:12-cv-00302
In Re: Heater Control Panels	:	Case No. 2:12-cv-00402
In Re: Bearings	:	Case No. 2:12-cv-00502
In Re: Alternators	:	Case No. 2:13-cv-00702
In Re: Anti Vibrational Rubber Parts	:	Case No. 2:13-cv-00803
In Re: Windshield Wiper Systems	:	Case No. 2:13-cv-00902
In Re: Radiators	:	Case No. 2:13-cv-01002
In Re: Starters	:	Case No. 2:13-cv-01102
In Re: Ignition Coils	:	Case No. 2:13-cv-01402
In Re: Motor Generators	:	Case No. 2:13-cv-01502
In Re: HID Ballasts	:	Case No. 2:13-cv-01702
In Re: Inverters	:	Case No. 2:13-cv-01802
In Re: Electronic Powered Steering Assemblies	:	Case No. 2:13-cv-01902
In Re: Air Flow Meters	:	Case No. 2:13-cv-02002
In Re: Fan Motors	:	Case No. 2:13-cv-02102
In Re: Fuel Injection Systems	:	Case No. 2:13-cv-02202
In Re: Power Window Motors	:	Case No. 2:13-cv-02302
In Re: Automatic Transmission Fluid Warmers	:	Case No. 2:13-cv-02402
In Re: Valve Timing Control Devices	:	Case No. 2:13-cv-02502
In Re: Electronic Throttle Bodies	:	Case No. 2:13-cv-02602
In Re: Air Conditioning Systems	:	Case No. 2:13-cv-02702
In Re: Windshield Washer Systems	:	Case No. 2:13-cv-02802
In Re: Spark Plugs	:	Case No. 2:15-cv-03002
In Re: Automotive Hoses	:	Case No. 2:15-cv-12893
In Re: Power Window Switches	:	Case No. 2:16-cv-03902
In Re: Ceramic Substrates	:	Case No. 2:16-cv-12194

THIS DOCUMENT RELATES TO
AUTOMOBILE DEALERSHIP ACTIONS

AUTO DEALERS' MOTION TO SET ASIDE FUNDS FOR FUTURE REQUESTS FOR CLASS REPRESENTATIVE SERVICE AWARDS

The Auto Dealer Plaintiffs hereby move the Court for approval to set aside funds for future request for class representative service awards in the above matters. This motion is

based upon the argument and authority set forth in the Memorandum submitted in support of this motion.

Dated: October 14, 2016

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THIS DOCUMENT RELATES TO
AUTOMOBILE DEALERSHIP ACTIONS

AUTO DEALERS' MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE FUNDS FOR FUTURE REQUESTS FOR CLASS REPRESENTATIVE SERVICE AWARDS

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Statement of the Issues Presented

1. Should a portion of the current settlements be escrowed for future requests by Auto Dealer class representatives for service awards for their efforts in the cases involved in these settlements?

Controlling or Most Appropriate Authorities

Hadix v. Johnson, 322 F.3d 895 (6th Cir. 2003)

Moulton v. U.S. Steel Corp., 581 F.3d 344 (6th Cir. 2009)

Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299 (6th Cir. 2016)

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Background

The group of Auto Dealer settlements currently before the Court totals nearly $125 million. When added to the first group of Auto Dealer settlements, approximately $184 million has been recovered for Auto Dealers in this litigation. These settlements were achieved through counsel's efforts but only because the dealerships who serve as Auto Dealer class representatives stepped forward to bring claims on their own behalf and on behalf of other new vehicle dealers. In doing so, they put their businesses at risk and, throughout the more than five years these cases have been litigated, were required to weather the relentless discovery demands of the Defendants. The Auto Dealer class representatives have essentially acted as private attorneys general in pursuing the underlying antitrust and consumer protection claims against the Defendants, and their efforts have paid great dividends to absent class member dealerships.

Through this motion, Interim Co-Lead Counsel for the Auto Dealers request that the Court allow 1.5 percent of the current settlements to be set aside for future requests for Auto Dealer service awards. At this time, the Auto Dealers are not requesting specific awards for class representative dealerships. As these cases progress, the Auto Dealers will file a motion on behalf of the class representatives seeking a service award from these settlements. Any funds that are set aside and that the Court does not later award to the class representatives will revert to the common fund out of which distributions will be made to eligible class members who file claims.

The Auto Dealers are mindful of the Sixth Circuit's decision in *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016) and that the Court will carefully

review requests for service awards. The Court is familiar with the substantial discovery Defendants have sought from the Auto Dealers. Responding to that discovery—and the discovery and depositions that remain ongoing—has consumed an enormous amount of the Auto Dealer class representatives' time and resources, and each class representative has put at risk its relationship with its OEM. Any class representative who later seeks a service award from these settlements will provide detailed support in the form of a record of the work they have performed, the resources they have committed, and the risks they have taken in relation to this litigation.

Argument

I. The Court Should Authorize Co-lead Counsel to Set Funds Aside for Future Service Payments to the Auto Dealer Class Representatives.

The Court previously granted service awards to the Auto Dealer class representatives. Class representatives are "an essential ingredient of any class action" and incentive awards are appropriate to induce a business or consumer to participate in worthy class action lawsuits. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). Such "[i]ncentive awards serve an important function, particularly where the named plaintiffs participated actively in the litigation." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006).

The Sixth Circuit recognizes that incentive awards are typically awarded to class representatives for their involvement and effort in successfully prosecuting the lawsuit on behalf of the absent class members. *See Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003) ("Numerous courts have authorized incentive awards...[as] efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class.") Awards encourage members of a class to become class

representatives and reward their efforts, which are undertaken on behalf of the class as a whole. *Id.* Therefore, payment of incentive awards to class representatives is a reasonable use of settlement funds. *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009). Somewhat larger awards have been approved for organizational class representatives because of the greater burden they face in the course of litigation: in most cases they actively participate throughout the discovery process, produce substantial volumes of documents, respond to interrogatories and requests from their counsel; and produce personnel for depositions – all requiring the participation of a number of employees. *See In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 BMC JO, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012); *Brown v. Transurban USA, Inc.,* No. 1:15CV494 (JCC/MSN), 2016 WL 5462714 (E.D. Va. Sept. 29, 2016) (noting that courts have approved much larger service awards in cases where the class representatives played a role in prosecuting the claims on behalf of the class).

District courts in this circuit routinely grant service awards for class representatives whose service has provided a benefit to the absent class members. *See In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-CV-12141-AC-DAS, 2015 WL 1396473, at *5 (E.D. Mich. Jan. 20, 2015) (in a $19 million settlement, award of $50,000 to each class representative); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-CV-83, 2014 WL 2946459 (E.D. Tenn. June 30, 2014) (settlement of direct antitrust action, awarding $50,000 to each class representative); *Connectivity Sys. Inc. v. Nat'l City Bank*, No. 2:08-CV-1119, 2011 WL 292008, at *20 (S.D. Ohio Jan. 26, 2011) (in $10 million settlement, awarding $50,000 each to three named plaintiffs); *Liberte Capital Grp. v. Capwill*, No. 5:99 CV 818, 2007 WL 2492461, at *3 (N.D. Ohio Aug. 29, 2007) (awarding $97,133.83 and $95,172.47 to two named plaintiffs

representing subclasses that received $11 million and $7 million); *Hainey v. Parrott*, No. 1:02-CV-733, 2007 WL 3308027 (S.D. Ohio Nov. 6, 2007) (approving award of $50,000 for each class representative); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535–36 (E.D. Mich. 2003) (awarding $75,000 to each class representative); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913–14 (S.D. Ohio 2001) (granting a $50,000 service award out of a $5.25 million fund); *In re Revco Sec. Litig.*, No. 851, 1992 WL 118800, at *7 (N.D. Ohio May 6, 1992) ($200,000 incentive award to named plaintiff); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving service awards of $50,000 to six class representatives out of a settlement fund of $56.6 million).

The settlements now before the Court provide real and substantial benefits to the absent class members. Service awards would typically be granted to the parties who brought these lawsuits and participated in the complex discovery needed to resolve the cases successfully. The Auto Dealers believe, however, that requests for specific awards from these settlements should be made as the cases progress beyond the present stage. As such, Co-Lead Counsel request that the Court authorize that funds from the current settlements be set aside for future service payments to the Auto Dealer class representatives.

II. A Set Aside of 1.5 Percent of the Current Settlements Should Be Allowed for Future Service Award Requests.

At this time, the Auto Dealers request only that funds be set aside from these settlements for potential future service awards. When a request for a service award is made, Plaintiffs will file an appropriate motion and the Court will consider the propriety and amount of any awards based on an evaluation of the following factors:

(1) the action taken by the Class Representatives to protect the interests of Class

> Members and others and whether those actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation.

Enter. Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991); see also *Spine & Sports Chiropractic, Inc. v. ZirMed, Inc.*, No. 3:13-CV-00489, 2015 WL 9413143, at *2 (W.D. Ky. Dec. 22, 2015) (applying identical factors); *Johnson v. W2007 Grace Acquisition I, Inc.*, No. 13-2777, 2015 WL 12001269, at *14 (W.D. Tenn. Dec. 4, 2015) (applying identical factors).

Although the Court is not being asked to approve specific awards to the class representatives now, a preview of the applicable factors supports the set aside request made in this motion. As detailed below, each of the factors considered by courts in the Sixth Circuit will support service awards to the Auto Dealer class representatives.

A. The Auto Dealer Class Representatives Have Vigorously Protected the Interests of Non-Party Dealerships and Have Obtained Remarkable Benefits.

The Court has observed the substantial commitment the Auto Dealer class representatives have had in the pursuit of these cases. If those dealerships had stayed on the sidelines, the class of new car dealerships, which incurred damages as a result of the Defendants' price fixing scheme, would have received no compensation for the damages they incurred. Because of the auto dealership representatives' commitment to this litigation, that is not the case, and a new round of settlements totaling nearly $125 million is presently before the Court. This was possible because the class representatives took the initiative to file these actions and have stayed active in the litigation for five years, as Plaintiffs' counsel doggedly pursued relief for the class. See *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D.

366, 374 (S.D. Ohio 1990) ("All of the class representatives in filing suit . . . took action to protect the interests of the Class Members . . . .").

This MDL is not a collection of cases where the plaintiffs did little before settlements were reached or where the Court has not had an opportunity to evaluate the amount of time and effort the class representatives have contributed. The robust factual record of these cases and the Court's familiarity with that record distinguish these cases from the recent decision of the Sixth Circuit in *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 311 (6th Cir. 2016). The settlements now before the Court are, unlike the settlement at issue in *Shane*, the result of years of hard fought litigation in which the Auto Dealers have been the target of the majority of the Defendants' discovery. The docket in this case is virtually entirely open to the public and to the absent class members, who, like the Court, can evaluate the quality and magnitude of the results reached herein. Service awards to class representatives for their active participation in successful litigation, which has undeniably produced benefits for the class as a whole, are appropriate. *See Feiertag v. DDP Holdings, LLC*, No. 14-CV-2643, 2016 WL 4721208 (S.D. Ohio Sept. 9, 2016) (approval of service awards where the class representative provided key information that assisted with investigating, filing, litigating, and resolving the action).

Nor are the settlements reached – or the payments to absent class members – in these cases inconsequential. To-date, the Auto Dealer class representatives have recovered nearly $184 million with additional settlements already reached. The results achieved and benefits generated, even at this interim juncture, for new car dealerships across the county, have been exceptional and, in many respects, unprecedented. For these reasons, setting aside a portion

of the settlements for potential service awards should be approved.

B. The Auto Dealer Class Representatives Assumed Substantial Direct and Indirect Financial Risk.

Service awards are particularly appropriate where the class representatives undertake substantial direct and indirect risk. *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16 CIV. 3571, 2016 WL 5109196, at *3 (N.D. Ill. Sept. 16, 2016). In *Koszyk*, the court approved service awards to each of the class representatives. The court's rationale for approving the awards included, among other things, the class representatives' willingness to bring the action in their name, to be deposed if necessary, and to testify if there was a trial. In doing so, the class representatives assumed significant risk that "should the suit fail, [they could] find [themselves] liable for the defendant's costs or even, if the suit [was] held to have been frivolous, for the defendant's attorneys' fees." *Id.* at 3 (internal citations omitted). "The incentive reward is designed to compensate [them] for bearing these risks." *Id.*

Likewise, in *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 220 (S.D.N.Y. 2015), the court stated that in calculating service awards, courts should consider: "the personal risk (if any) incurred by the plaintiff applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and of course, the ultimate recovery."

When a motion is made for individual awards from these settlements, the Auto Dealers will show that the *Raniere* factors have been established because a host of disincentives served to discourage the vast majority of auto dealers from stepping forward

to pursue the claims at issue, especially on a class wide basis. The Auto Dealer class representatives faced risk to their businesses in agreeing to be named plaintiffs in these cases; they have contributed substantial time and effort participating in the prosecution of this litigation; they brought their factual expertise of industry practices to the cases; and they undertook the heavy burden of complying with the Defendants' extensive discovery requests. The efforts of the Auto Dealer class representatives were essential to obtaining the settlements that are now before the Court.

Another significant disincentive, which likely discouraged the vast majority of new car dealerships from stepping forward to serve as named representatives, is the risk the named plaintiffs have taken that their participation in these cases will affect their relationships with their OEMs. The class representatives' businesses are dependent on valuable franchise contracts with the OEMs whose vehicles they sell. These OEMs have longstanding and deep relationships with most of the Defendants, with some of the OEMs even having ownership or joint venture interests in some of the Defendant entities.

The Auto Dealer class representatives took significant risks by prosecuting these claims. Had an OEM taken an adverse action against the dealerships – a possibility that still exists – it could have spelled the end of business for that dealership. In this respect, the service awards contemplated here would reflect risks similar to those faced by employees who place their futures on the line by attempting to vindicate class-wide rights against their employers. In those circumstances, the risk of retaliation makes incentive awards "particularly appropriate." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005) ("[B]y lending his name to the litigation, [the class representative] has, for the benefit of the class as a whole,

undertaken the risk of adverse actions."); *see also Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *12–13 (E.D. Okla. Aug. 16, 2011) (approving $100,000 incentive award to each of five class representatives after finding that they "assumed a significant risk by agreeing to serve as the named plaintiffs in this case, one that other Class Members were not willing to accept despite their support for the lawsuit").

The dealerships' involvement in these cases could have, or may still, affect their position with their respective OEMs. Given the uncertainty regarding the OEMs reaction to this litigation, the dealerships who stepped forward to spearhead claims against Defendants so closely affiliated with the OEMs were courageous indeed. The Auto Dealer class representatives should receive an award that reflects the temerity they have exhibited. *See Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (awarding $300,000 to each class representative and noting "the Class Representatives took risks, bore hardships, and made sacrifices that the absent class members did not.")

Even beyond their franchise agreement, the Auto Dealer class representatives have responded to discovery requests and testified regarding extremely sensitive information, including their finances and sales, all of which is highly confidential information, which dealerships go to great lengths to protect from disclosure. Their participation in these cases has increased the risk that such information will be disclosed to the public and their competitors. This additional risk, borne by each of the class representatives, provides yet another justification for future service awards. *See* William B. Rubenstein, *Newberg on Class Actions* § 17.3 (5th ed. 2016) ("Where the risks are specific and substantial, courts may increase the incentive award accordingly.").

C. The Record in these Cases Leaves No Doubt as to the Considerable Time and Effort the Auto Dealer Class Representatives Have Expended in Prosecuting Their Claims.

The class representative dealerships have already sustained a significant discovery burden and continue to face depositions, additional discovery for a considerable period of time, and potentially trial. The Auto Dealers have been the target of most of the Defendants' discovery and have been deluged with requests for burdensome and commercially sensitive information. They have located and produced hundreds of thousands of documents during discovery, have produced electronic data, have shared their knowledge of the industry, have disclosed their confidential financial information, and have spent time and resources during the litigation.

A significant amount of effort from each of the dealerships has been required to advance this litigation. Such effort requires the dealers to devote employee time away from the day-to-day demands of running their businesses. Service awards are intended to relieve some of this burden and are well-justified in litigation as lengthy and complex as the cases before the Court. These dealers continue to spend considerable time and resources to respond to demands for information about virtually every aspect of their business spanning 15 years.

The Sixth Circuit recently suggested that in some instances it may be necessary for the trial court to order class representatives to provide "specific documentation – in the manner of attorney time sheets – on the time actually spent on the case by each recipient of an [incentive] award," *Shane Group, Inc.*, 825 F.3d at 311. Unlike the cases before this Court, the record in *Shane* was almost entirely sealed and the trial court's analysis in deciding on an

appropriate award was nothing more than a "conclusory" argument that the awards would "compensate the named plaintiffs for their time spent on the case. . . ." *Id.* Given the paucity of facts relied upon in *Shane* to justify the incentive awards, it is understandable that the Sixth Circuit placed a premium upon the production of some memorialization of the time actually spent. However, the cases now before the Court simply do not present the same problems as the record in *Shane*; here, the Court is intimately familiar with facts of this litigation and the roles of each of the parties to this litigation.

Given the copious record of these cases, declarations by the class representatives summarizing the time devoted to the litigation and the risks associated with this litigation will constitute a basis on which the Court may fairly determine the propriety of any requested awards. See *In re Dun & Bradstreet*, 130 F.R.D. at 374 (accepting class representative affidavits to support incentive awards). When specific awards are requested, the Auto Dealer class representatives will provide the Court with specific examples and support for the time and effort they have committed to these cases.

D. The Service Awards Will Not Result in a "Bounty."

The first two groups of Auto Dealer settlements will provide, on average, tens of thousands of dollars to a dealership that submits a valid claim. Some of the large dealership groups are expected to receive hundreds of thousands of dollars as absent class members. In these circumstances, future service awards, when added to the service awards already provided for by the Court, will remain well within the range of reasonable awards permitted in this Circuit. Even when coupled with the service awards already allowed by the Court, additional awards to the Auto Dealer class representatives will be appropriate. *Dallas v.*

Alcatel-Lucent USA, Inc., No. 09-14596, 2013 WL 2197624, at *10 (E.D. Mich. May 20, 2013) (Edmunds, J.) ("Class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone.").

In *Shane,* the Sixth Circuit cautioned against the approval of awards that appear to be nothing more than a "bounty for bringing suit." This concern is especially acute where "incentive payments . . . make the class representatives whole, or even more than whole; for in that case the class representatives have no reason to care whether the mechanisms available to unnamed class members can provide adequate relief." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (quotation omitted). On the other side of the equation, "[t]he propriety of incentive payments is arguably at its height when the award represents a fraction of a class representative's likely damages; for in that case the class representative is left to recover the remainder of his damages by means of the same mechanisms that unnamed class members must recover theirs." *Id.*

On the present record, "[t]he propriety of [the proposed] incentive payments" before this Court "is arguably at its height" because even with the service awards, the class representatives stand to recover less than many absent class members and thus remain motivated "to care about the adequacy of relief afforded unnamed class members." *In re Dry Max Pampers Litig.*, 724 F.3d at 722. There is no indication that the Auto Dealer class representatives have or will sacrifice the interests of absent class members in order to collect a service award "bounty."

Future requests for service awards will also satisfy the concept of "proportionality,"

which other courts have identified as a standard by which to evaluate service payments. In essence, this guideline "consider[s] the proportionality between the incentive payment and the range of class members' settlement awards." *Smith v. Am. Greetings Corp.*, No. 14-CV-02577-JST, 2016 WL 2909429, at *10 (N.D. Cal. May 19, 2016). When they submit requests for future awards, the Auto Dealer class representatives expect to be able to show that some class members will receive hundreds of thousands of dollars for their claims without having any involvement in the case and without taking on any risk. The sum of the awards to the Auto Dealer class representatives will be well within the acceptable range of proportionality for service payments. *See Deatrick v. Securitas Sec. Servs. USA, Inc.*, No. 13-CV-05016-JST, 2016 WL 5394016, at *8 (N.D. Cal. Sept. 27, 2016) (allowing incentive payment of $1,500 where the average class member would collect $44).

Conclusion

For the foregoing reasons, Interim Co-Lead Counsel for the Auto Dealers respectfully requests that the Court grant their motion to set aside, in escrow, 1.5 percent of the current settlements for potential future service awards. Any funds not used for such awards will be distributed to the dealerships eligible for monetary relief and who file valid claims in these settlements.

Dated: October 14, 2016

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Interim Co-Lead Counsel for the Automobile Dealer Plaintiffs

CERTIFICATE OF SERVICE

I, Gerard V. Mantese, hereby certify that I caused a true and correct copy of **AUTO DEALERS' MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE FUNDS FOR FUTURE REQUESTS FOR CLASS REPRESENTATIVE SERVICE AWARDS** to be served via e-mail upon all registered counsel of record via the Court's CM/ECF system on October 14, 2016

Gerard V. Mantese
Gerard V. Mantese