**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| IN RE SUBARU BATTERY DRAIN PROD. LIAB. LITIG. | No. 1:20-cv-03095-JHR-MJS<br><br>CLASS ACTION |

**PLAINTIFFS' MOTION FOR**
**FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

**PLEASE TAKE NOTICE** that at the Final Fairness Hearing currently scheduled for January 24, 2023, Plaintiffs will move to have the Court grant their unopposed motion seeking entry of an order granting final approval to the class action settlement in this matter.[1]

**PLEASE TAKE FURTHER NOTE** that Plaintiffs will rely on the accompanying Memorandum of Law, joint certification of counsel, and other related materials in support of this motion.

**PLEASE TAKE FURTHER NOTE** that Defendants do not oppose this motion.

[1] Plaintiffs will also request at this hearing that the Court enter an order approving their unopposed motion for attorneys' fees, expenses, and service awards. The motion seeking that relief was filed on October 24, 2022 (ECF No. 91).

Dated: January 10, 2023

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true and correct copy of the foregoing **PLAINTIFFS' MOTION IN SUPPORT OF THEIR MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT** was electronically filed on January 10, 2023 using the Court's NextGen system, thereby electronically serving it on all counsel of record.

*/s/ Matthew D. Schelkopf*
Matthew D. Schelkopf

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW JERSEY**

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|---|---|
| IN RE SUBARU BATTERY DRAIN PROD. LIAB. LITIG. | No. 1:20-CV-03095-JHR-JS<br><br>HON. JOSEPH H. RODRIGUEZ |

# PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT


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## I. INTRODUCTION

Plaintiffs respectfully request the Court grant final approval of the parties' Settlement Agreement ("Settlement" or "SA"), certify the class for settlement purposes, and enter a final judgment dismissing this case with prejudice.[1] The Court preliminarily approved the Settlement on June 23, 2022. The response by the Settlement Class Members has been overwhelmingly positive, Subaru has already devoted substantial resources to implementing the claim process and the agreed-upon extended warranty service, and the settlement otherwise demonstrates that final approval is warranted. The claims period remains open until two months after the Effective Date and Settlement Class Members have already submitted more than 30,000 claims worth more than $10 million in repair reimbursements. Out of hundreds of thousands of Settlement Class Members, just 23 objections to the Settlement were lodged.[2] None of the objections have merit, for the reasons discussed in Section III.B below.

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[1] The SA is available at ECF No. 72-2. Unless otherwise noted, capitalized terms used in this Memorandum are defined in Section II of the SA.

[2] While Class Counsel received 23 objections, only 17 appear to be validly submitted. Under the Court's Preliminary Approval Order, any Class Member who wished to object was required to serve the Court, Class Counsel and Defense Counsel with their objection. (ECF No. 75, ¶¶ 15-16.) Marvin Spatz, Sue and Randall Wimmer, Martha Verbonitz, Anne Parsons, and Elizabeth Essex did not serve their objections in the required manner. Richard Benka's objection (ECF No. 105) was served well after the objection deadline and therefore is also invalid. Thus, although Plaintiffs address the substance of these objections in Section III.B

The parties negotiated their agreement at arm's length, including in several mediation sessions with Hon. Joel Schneider, U.S.M.J. (ret.) over the course of many months. The Settlement provides substantial benefits, including generous cash reimbursements, an extended warranty and other protections, for more than 3.7 million current and former owners and lessees of approximately 2.8 million Settlement Class Vehicles. The Settlement meets all of the final approval criteria under Fed. R. Civ. P. 23(e): it is fair, reasonable and adequate and a "win" for the class. As such, Plaintiffs respectfully request that the Court grant their motion for final approval. A proposed order granting final approval is submitted herewith,[3] accompanied by a list of individuals who timely opted out of the Settlement.

## II. FACTUAL BACKGROUND

### A. Plaintiffs' Allegations and Pre-Litigation Investigation

Plaintiffs sued to obtain relief for themselves and similarly situated individuals who purchased or leased Subaru vehicles that Plaintiffs allege suffer from a uniform defect that can cause a parasitic drain of the vehicle's battery

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of this brief, the Court need not consider them. (SA at § VIII.A.1.) Patrick and Lynn Borden also objected to the Settlement but simultaneously asked to be excluded from the class, which eliminates their standing to object. (ECF No. 84.) *See In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867, at *5 (D.D.C. Mar. 31, 2000).)

[3] Plaintiffs' Counsel previously filed their Unopposed Motion for Attorneys' Fees, Expenses, and Service Awards, and accompanying proposed order, on October 24, 2022. (ECF No. 91.)

power ("Defect"). This drain causes the batteries to fail prematurely, leaving consumers with inoperable vehicles and potentially leaving them stranded. Plaintiffs alleged Subaru knew that the Class Vehicles contained the Defect: large numbers of customers presented their Vehicles to Subaru dealerships for repair, and Subaru issued a series of technical service bulletins attempting to address the battery problems.

Class Counsel filed the action after investigating the alleged Defect in Subaru vehicles dating back to model year 2015. This investigation included interviewing and reviewing documents from hundreds of prospective class members; reviewing various forms of consumer reporting and complaints submitted to the National Highway Traffic Safety Administration ("NHTSA"); reviewing Subaru manuals and technical service bulletins that discuss the alleged Defect; assessing federal motor vehicle regulations regarding safety standards; analyzing Subaru electrical system and battery designs, assisted by experts in the automotive field; supervising those experts' performance of several diagnostic electrical and battery tests; and investigating potential claims for relief. (Joint Certification of Matthew D. Schelkopf, Matthew R. Mendelsohn, and Adam E. Polk ("Joint Cert."), ¶ 15.)

The named Plaintiffs are residents of California, Florida, Illinois, Michigan, New Jersey, New York, Texas, and Washington who purchased Class Vehicles.

(Consolidated Class Action Complaint, ECF No. 18 ("Complaint"), ¶¶ 10-22, 30, 40, 47, 54, 60, 68, 75, 82, 89, 97, 102, 109, 115.) Plaintiffs sought to represent a Nationwide Class and state subclasses of Class Vehicle purchasers and lessees in the Plaintiffs' home states, and asserted claims for breach of express warranty, breach of the implied warranty of merchantability, fraudulent concealment, violations of various state consumer fraud statutes and the federal Magnuson-Moss Warranty Act, and unjust enrichment. (*Id.*, ¶¶ 182-183, 191-380.)

### B. History of the Litigation

Between March 2, 2020 and April 23, 2020, five related cases were filed against Subaru, which the Court consolidated. (ECF No. 9.) Counsel in the related actions conferred over several months and agreed to a stipulated leadership structure with the undersigned serving as Interim Co-Lead Counsel, supported by an experienced Executive Committee and Liaison Counsel. (ECF No. 15.)

On June 18, 2020, Plaintiffs filed their Consolidated Class Action Complaint. (ECF No. 18.) On August 3, 2020, Subaru moved to dismiss, and the Parties fully briefed that motion. (ECF Nos. 34, 38, 39, 42.) While the motion to dismiss was pending, Class Counsel served document requests and interrogatories, and the Parties negotiated a Stipulation Regarding Discovery that outlined the core issues as to which discovery would proceed prior to the Court's ruling on the

motion. (ECF No. 31.) The Parties also negotiated and filed a Discovery Confidentiality Order. (ECF No. 41.)

On March 31, 2021, this Court issued a 67-page Opinion granting in part and denying in part the motion to dismiss. (ECF Nos. 46-47.) On April 28, Subaru filed an Answer to the Consolidated Class Action Complaint. (ECF No. 50.) Following the Court's ruling on the motion to dismiss, the Parties negotiated and filed a Joint Discovery Plan. (ECF No. 63.)

Starting on May 28, 2020, the Parties engaged in informal, formal, and eventually confirmatory discovery. Plaintiffs' discovery efforts included preparing initial disclosures, propounding and responding to interrogatories and requests for production of documents, reviewing numerous documents produced by Subaru, and deposing Subaru's Director of Field Quality, John Gray. (Joint Cert., ¶ 19.)

### C. Settlement Negotiations

On May 12, 2021, the Parties advised the Court of their intent to pursue mediation with Judge Schneider. (ECF No. 52.) The Parties participated in a day-long mediation on July 7, 2021, followed by several additional mediation sessions over the next four months. (Joint Cert., ¶ 20.) In conjunction with the mediation, the Parties exchanged documents subject to Federal Rule of Evidence 408. The documents showed in part Subaru's internal warranty claims analyses, sales figures, efficacy of proposed remedies, and other information relevant to the

alleged Defect and its effects. (*Id.*, ¶ 21.) The negotiations extended through the summer of 2021 and into the fall; at times the Parties appeared to have reached an impasse. (*Id.*, ¶ 20.) But with Judge Schneider's assistance, on November 9, 2021, the Parties reached an agreement in principle to resolve Plaintiffs' class action claims. (*Id.*, ¶ 22.)

The terms of the Settlement are the product of intensive, arm's length negotiations between experienced counsel. (*Id.*, ¶ 6.) Before entering into the Settlement, Class Counsel independently analyzed the nature of the Defect and Subaru's contention that it had implemented measures to address it. (*Id.*, ¶ 7.) Class Counsel consulted automotive engineering experts, studied government reports, interviewed and collected documents from hundreds of class members, and surveyed those consumers regarding the efficacy of the remedial measures discussed below. (*Id.*) Class Counsel also engaged in confirmatory discovery to assess Subaru's contention that it had resolved the Defect, including by deposing Subaru's 30(b)(6) designee, John Gray. (*Id.*)

Mr. Gray testified that from 2015 through 2020, Subaru implemented a variety of countermeasures to mitigate battery drain in Class Vehicles. Subaru equipped certain models with a larger capacity battery, increased charging standards, developed new hardware to prevent battery drain when the power rear gate is left open, and standardized battery testing protocols for its dealerships.

(Joint Cert., Ex. A, Gray Dep. at 163:11-164:5, 117:2-17, 138:14-139:3, 157:11-19, 140:17-142:12.) Mr. Gray also testified, and Subaru's internal documents show, that these measures, coupled with the updated charging logic software—i.e., Engine Control Module ("ECM") reprogramming—being made available to Class Members through the Settlement significantly decrease the chances of the Defect manifesting in Class Vehicles. (*E.g.*, *id.* at 157:11-19.)

### D. The Settlement Class

Upon final approval, the Settlement will provide substantial benefits to the following Settlement Class: All natural persons, who are residents of the continental United States, including Hawaii or Alaska, who currently own or lease, or previously owned or leased, a Settlement Class Vehicle originally purchased or leased in the continental United States, including Alaska or Hawaii.[4]

### E. Settlement Relief for Class Members

Subaru has agreed to provide several forms of relief that address the Battery Drain Defect and its consequences. To date, Settlement Class Members have made claims for reimbursement under the Settlement in excess of $10 million. (Joint Cert., ¶ 38.)

[4] Excluded from the Settlement Class are the employees, officers, or directors of Subaru, affiliated Subaru entities, or Subaru's authorized retailers; all entities claiming to be subrogated to the rights of Settlement Class Members; issuers of extended vehicle warranties; third party issuers; and any Judge to whom the Litigation is assigned. (SA at § III.1.)

### *1. Warranty Extension for Current Owners or Lessees*

(a) *First Battery Replacements*

The Settlement provides enhanced warranty protections to Settlement Class members. Subaru has agreed to extend its existing three year/36,000 mile New Vehicle Limited Warranty for the Settlement Class Vehicles, to cover 100% of the cost for a first battery replacement for a period of five years or 60,000 miles, whichever occurs first. For Settlement Class Vehicles that exceeded five years or 60,000 miles as of the Settlement Notice Date, Subaru extended its New Vehicle Limited Warranty for three months, without regard to mileage, to cover 50% of the Battery Replacement Costs for a first battery replacement. (SA at § V.A.1.)

(b) *Subsequent Battery Replacements*

If the replacement batteries fail, Subaru has agreed to extend its three year/36,000 mile New Vehicle Limited Warranty to cover the costs of a replacement battery. The parameters of the Settlement Extended Warranty for class members will be the greater of Subaru's existing replacement-part warranty or:

(i) 100% of the Battery Replacement Costs (including parts and labor) up to a period of five (5) years or sixty thousand (60,000) miles (whichever comes first) from the In-Service Date of the Settlement Class Vehicle regardless of the number of battery replacements the Settlement Class Vehicle has already received;

(ii) 80% of the Battery Replacement Costs (including parts and labor) up to a period of seven (7) years or eighty-four thousand (84,000) miles (whichever comes first) from the In-Service Date of the Settlement Class Vehicle; or

(iii) 60% of the Battery Replacement Costs (including parts and labor) up to a period of eight (8) years or one hundred thousand (100,000) miles (whichever comes first) from the In-Service Date of the Settlement Class Vehicle.

(SA at § V.A.2.)

(c) *Extended Warranty Customer Reimbursement*

Settlement Class Members who, prior to the Notice Date, purchased a Subaru extended service contract (known as "Added Security") and were not entitled to battery coverage through that program, will receive a warranty extension based on the time and mileage limitations noted above. (SA at § V.A.3.)

***2. Reimbursement for Out-of-Pocket Costs***

Importantly, any Settlement Class Member who has not already been fully reimbursed by Subaru or a third party, will be entitled to reimbursement of their out-of-pocket repair costs for a Qualifying Battery Condition[5] incurred prior to the Notice Date. Additionally, as set forth in the chart provided below, depending on circumstances, Settlement Class Members will receive an additional payment over and above the amounts they paid for expenses related to the alleged defect. Examples of expenses eligible for reimbursement under this provision include, without limitation, out-of-pocket expenses for any battery replacements and/or

[5] The SA defines "Qualifying Battery Condition" as characterizing a "Settlement Class Vehicle in which the battery died (i.e., the battery was discharged beyond the ability to start the Class Vehicle)." (ECF No. 72-2 at p. 16 of 178.)

battery testing and diagnosis performed by an Authorized Subaru Retailer, and out-of-pocket expenses for towing services. Settlement Class Members who had their Class Vehicle serviced and/or repaired at a third-party repair facility also will be entitled to reimbursement of the money they paid for any battery replacements and/or battery testing and diagnosis performed by the third-party repair facility, as well as out-of-pocket expenses for towing services if, prior to those repair-related services, the Class Member presented his or her Vehicle to an authorized Subaru dealership or contacted Subaru's customer service division regarding the battery-related issue. (SA at § V.B.)

The Settlement Agreement provides that reimbursement for a Qualifying Reimbursable Repair will be at the following percentages, with Class Members eligible for greater than 100% reimbursement in some instances:

| **# of Owner Paid Repairs** | **Within 3 years/ 36,000 miles** | **5 years/ 60,000 miles** | **7 years/ 84,000 miles** | **8 years/ 100,000 miles** |
|---|---|---|---|---|
| 1 | 120% | 100% | N/A | N/A |
| 2 | 140% | 125% | 100% | 55% |
| 3+ | 165% | 140% | 120% | 100% |

(SA at § V.B.6.)

### *3. Reimbursement for Extraordinary Circumstances*

In addition to the above-described relief, Settlement Class Members who experienced two or more battery failures within five years and 60,000 miles from the In-Service Date of the Settlement Class Vehicle are also eligible, subject to submission of a claim and appropriate documentation, to receive 140% of Reasonably Related Reimbursable Costs incurred because the Class Member was stranded as a result of a battery failure that occurred prior to the Notice Date. Recoverable expenses include the costs of hotel stays, meals, equipment purchased to sustain battery operation, and other expenses reasonably related to the battery failure. A Class Member who qualifies for payment under this provision will also be entitled to receive a $140 single-use Subaru service voucher, which will remain valid for one year from the date the claim is approved. (SA at § V.C.)

### *4. Reprogramming ("Reflash") and Equivalent Relief*

The Settlement also grants Settlement Class Members who continue to experience the Defect the opportunity to present his or her Class Vehicle to an Authorized Subaru Retailer and receive a free Reflash at the dealership. For all Class Vehicles other than 2015 and 2016 Foresters, the Reflash enhances the ECM charging logic of the batteries in the Settlement Class Vehicles, allowing the Vehicles' alternators to provide additional charge to the batteries. (Joint Cert., Ex. A, Gray Dep. at 61:9-62:23.) Settlement Class Members who already received and

paid for this Reflash are entitled to submit a claim and receive a 100% reimbursement of expenses incurred for the update. (SA at § V.D.)

During the administration of this Settlement, counsel and the parties learned that the Reflash could not be provided to the 2015 and 2016 Foresters because those vehicles do not contain the software that contributes to the battery drain in all other Class Vehicles. (Joint Cert., ¶ 33.) As a result, battery drain in the 2015 and 2016 Foresters is the result of other factors, similar to other Class Vehicles, but without direct relation to the software contained in other Class Vehicles. With the benefit of additional time permitted by the Court, however, Class Counsel and Defense Counsel were able to arrange substitute, equivalent protections for owners and lessees of these vehicles. (ECF Nos. 87, 102; Joint Cert., ¶¶ 34, 35.) First, Subaru agreed to provide an ECM-related service for those vehicles that will remediate any diagnostic trouble codes ("DTCs") stored in the ECM. Second, Subaru also agreed to provide repairs free of charge to address certain DTCs related to battery drain that are found during the ECM-related service. Like the Reflash charging logic, this ECM-related service and associated free repairs of the 2015 and 2016 Foresters directly remediate battery issues, and the owners and lessees of these vehicles also can avail themselves of all other Settlement benefits. (Joint Cert., ¶¶ 34, 35.)

### *5. Costs of Notice and Settlement Administration*

Subaru is responsible for the costs of Class Notice and Settlement Administration. (SA at § V.E.)

### *6. Attorneys' Fees, Expenses, and Service Awards*

On October 24, 2022, Plaintiffs' Counsel submitted their Unopposed Motion for Attorneys' Fees, Expenses, and Service Awards, seeking, subject to the Court's approval, Attorneys' Fees and Expenses of up to $4,100,000. (ECF No. 91.) Subaru has also agreed to pay, subject to Court approval, Service Awards in the amount of $4,000 to each of the 13 named Plaintiffs. (*Id.*) Attorneys' Fees and Expenses, as well as Service Awards, will be in addition to the benefits provided directly to the Settlement Class, and will not reduce or otherwise affect those benefits. (SA at § X.II.)

## F. Notice to Settlement Class Members

The Settlement Agreement includes a comprehensive notice plan that was funded by Subaru and overseen by the experienced Settlement Administrator, JND Legal Administration ("JND"). After the Court granted preliminary approval and directed the provision of notice to the Settlement Class, Class Counsel monitored and participated in the Notice and Administration process to ensure that the Settlement Administrator fulfilled the Settlement Agreement in all respects, and we

will continue these monitoring efforts after final approval. (SA at § VII.B; Joint Cert., ¶ 27.)

Settlement Class Members have been notified of the Settlement by direct mail. Subaru identified Settlement Class Members through its records and provided that information to JND, which verified or updated Class Members' contact information through Experian, a third party that maintains and collects the names and addresses of automobile owners. JND then sent the Notice to the members of the Settlement Class by postcard. In addition, before undertaking these individual mailings, JND conducted an address search through the United States Postal Service's National Change of Address database to ensure the latest address information for Settlement Class Vehicle owners and lessees was used. For each individual Notice returned as undeliverable, JND re-mailed the Notice where a forwarding address was provided. For the remaining undeliverable Notices where no forwarding address was provided, JND performed an advanced address search (e.g., a skip trace) and re-mailed those undeliverable Notices to the extent any new and current addresses were located. (SA at § VII.B.1.)

For the approximately 2.6 million Class Members for whom JND had email addresses, they also received email notice about the Settlement; the email included a hyperlink to the Settlement Website where Class Members could review electronic versions of the Long Form Notice and Claim Form. JND established and

maintains that website, www.subarubatterysettlement.com, which posts the Notice, Claim Form, Settlement Agreement and other relevant documents. Class Counsel have also included a link to the Settlement Website on their law firm's websites.

Subaru has paid, and will continue to pay, the costs of Notice and Settlement Administration, and also directed notice of the settlement to the appropriate state and federal officials under the Class Action Fairness Act, 28 U.S.C. § 1715. (SA at § VII.B.1.)

Notice was sent on September 21, 2022. (*See* ECF No. 75.) Settlement Class Members seeking reimbursement for Qualifying Repairs previously undertaken must submit a Claim Form within 60 days of the Effective Date. The Settlement Agreement also delineates the procedure in the event the Settlement Administrator rejects a claim for reimbursement of out-of-pocket expenses. The Settlement Administrator will provide notice of its decision to any such claimant and provide him or her with 45 days to cure any deficiencies and/or request a Second Review. (SA at § VI.)

### G. Release of Liability

In exchange for the foregoing, Settlement Class Members who do not timely exclude themselves will be bound by a release of all claims arising out of or relating to the claims that were asserted in the Complaint ("the Released Claims"). *See Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994). The

Released Claims will extend to Defendants and their related entities and persons. The Released Claims will not, however, apply to any claims for death, personal injury, property damage (other than damage to Class Vehicles), or subrogation. The Settlement Agreement provides that upon finality, the case will be dismissed with prejudice. (SA at §§ II.29 and XI.)

### H. The Preliminary Approval Order and Response by Settlement Class Members

On June 23, 2022, the Court granted preliminary approval of the Parties' Settlement Agreement, directed the Parties to submit a final approval motion of the Settlement by October 21, 2022, and set a Final Fairness Hearing for November 29, 2022, at 11:00 a.m. (ECF No. 75.) At the request of counsel, the Court extended the period for submitting a final approval motion to January 10, 2023 and reset the Final Fairness Hearing for January 24, 2023. (ECF No. 103.) Settlement Class Members had until November 5, 2022 to object to the Settlement or to request exclusion from the Settlement Class. (Joint Cert., ¶ 32.) Settlement Class Members who did not opt out have until 60 days after the Settlement becomes effective to submit a claim form. (*Id.*) Class Counsel is aware of 23 Settlement Class Members who objected to the Settlement, and there have been 320 requests for exclusion. (*Id.*)

## III. ARGUMENT

### A. The Settlement Is Fair, Reasonable, and Adequate

Court approval is required for the settlement of class actions. Fed. R. Civ. P. 23(e). In order to grant final approval to the proposed class action Settlement, the Court must hold a hearing and find the settlement "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). This determination is guided by a "strong judicial policy in favor of class action settlement." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010). By entering into a voluntary settlement, the parties can benefit substantially by avoiding "costs and risks of a lengthy and complex trial." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). This is particularly true with class action trials. *Id*.

#### *1. Presumption of fairness*

This Settlement meets the criteria for a presumption of fairness, which include: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re National Football League Players Concussion Injury Litig*., 821 F.3d 410, 436 (3d Cir. 2016) (citing and quoting in part *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n.18 (3d Cir. 2001)).

The Settlement is the product of arm's length negotiations that lasted approximately six months under the supervision of the Hon. Joel Schneider,

U.S.M.J. (Ret.), of Montgomery McCracken Walker & Rhoads LLP. During this period of intensive negotiation, Judge Schneider assisted the Parties in five mediation sessions. (*See* Joint Cert., ¶ 20.) "The participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties." *Shapiro v. All. MMA, Inc.*, No. 17-2583 (RBK/AMD), 2018 U.S. Dist. LEXIS 108132, at *6 (D.N.J. June 28, 2018) (citation and internal marks omitted); *see also Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 439, 444 (E.D. Pa. 2008) (stressing the importance of arm's length negotiations and highlighting that the negotiations included "two full days of mediation").

Before reaching the Settlement, Class Counsel independently analyzed the nature of the Defect, assessed the Reflash being provided through the Settlement and Subaru's previous countermeasures to address the Defect, consulted with automotive engineering experts, studied government reports, and interviewed and collected documents from hundreds of class members. (Joint Cert., ¶ 23.) Class Counsel also engaged in confirmatory discovery to assess Subaru's contention that the Reflash and other countermeasures substantially resolve the Defect, including by taking the deposition of Subaru's 30(b)(6) designee, John Gray. The discovery conducted, and Class Counsel's own independent investigation into the alleged Defect, enabled Plaintiffs to gain "a clear understanding of the strengths and

weaknesses of their case," *Udeen v. Subaru of Am., Inc.*, No. 18-17334 (RBK/JS), 2019 U.S. Dist. LEXIS 172460, at *8 (D.N.J. Oct. 4, 2019), and confirm that the Settlement is fair, reasonable, and adequate for the Settlement Class.

Counsel for the Parties are experienced class action litigators and represented their clients vigorously throughout the litigation—in difficult and adversarial discovery as well as through the extended negotiations. Further, the Settlement has received overwhelming support from Settlement Class Members. Out of approximately 2,741,636 Settlement Class Vehicles, notices were mailed to 3,781,638 Settlement Class Members. The total value of claims made thus far exceeds $10 million (Joint Cert., ¶ 38), and substantial time remains to submit claims—Settlement Class Members may make claims until 60 days after the Effective Date (SA at § II.10, V.B.7.a). In addition, there have also been more than 30,000 class members that have requested the ECM reprogramming. In contrast, Plaintiffs have only received 23 objection letters and 320 opt outs.[6] As compared to the number of individual notices, the objection percentage of 0.0006% and opt-out percentage of 0.008% represent a *de minimis* fraction of the Settlement Class.

[6] Not all of the purported requests for exclusion may be complete. The exclusion requests are being reviewed to determine whether they meet the criteria set forth in the Court's Preliminary Approval Order. Plaintiffs will provide the total number of valid opt-outs in a supplemental filing prior to the Final Fairness Hearing.

### *2. The* Girsh *factors*

The Third Circuit has enumerated the following factors for district courts to consider when determining whether a proposed class action settlement merits final approval as fair, adequate, and reasonable:

> (1) the complexity, expense and likely duration of the litigation;
> (2) the reaction of the class to the settlement;
> (3) stage of the proceedings and the amount of discovery completed;
> (4) risks of establishing liability;
> (5) risks of establishing damages;
> (6) risks of maintaining the class action through the trial;
> (7) ability of the defendants to withstand a greater judgment;
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).[7]

With respect to "the complexity, expense, and likely duration of the litigation," the Parties would have engaged in adversarial discovery for many months absent the Settlement. Moreover, the claims in this action involve numerous complex legal and technical issues. Continued litigation would have

[7] The factors recently added to Fed. R. Civ. P. 23(e)(2) substantially overlap with the traditional *Girsh* factors. The new 23(e)(2) factors are: whether the class was adequately represented, whether the proposal was negotiated at arm's length, whether the class members are treated equitably relative to each other, and whether the relief provided for is adequate (based on the costs and delay of trial and appeal, the effectiveness of the claims process, the terms of attorneys' fees, and that any payments in exchange for the withdrawal of objections are disclosed). All of these factors are addressed by the *Girsh* and *Prudential* factors discussed in the main text above. There is no agreement to disclose under Rule 23(e)(3).

been complex, time consuming, and expensive, posing substantial risks to Plaintiffs and the Settlement Class Members. Conversely, if approved, the Settlement provides substantial benefits for the Settlement Class without the delay, risk and uncertainty of continued litigation. *See Yaeger v. Subaru of Am., Inc.*, No. 14-cv-4490(JBS)(KMW), 2016 WL 4541861, at *9 (D.N.J. Aug. 31, 2016) ("The longer the litigation extended, the more the owners of affected class vehicles would suffer. Where motor vehicles have a relatively short lifespan, there is a premium upon promptly finding a remedy for alleged defects to restore full enjoyment of the vehicle."); *Weiss v. Mercedes Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995) (approving settlement that was the "result of an arm's length negotiation between two very capable parties" and where "Mercedes was prepared to contest this class action vigorously."). Further, Plaintiffs maintain that the alleged Defect implicates safety concerns and can leave drivers stranded, adding to the value of the warranty extension for Settlement Class Members.

The second factor also supports approval because the reaction of the class, as measured by the number of objections and opt-outs, is overwhelmingly positive, as already discussed. In addition, as explained in Section III.B below, the objections lack merit. *See Oliver v. BMW of N. Am., LLC*, Civil Action No. 17-12979 (CCC), 2021 U.S. Dist. LEXIS 43290, at *11-12 (D.N.J. Mar. 8, 2021) (finding "the class reaction to the settlement appears to be extremely positive and favorable overall"

where more than 99% of class did not object or opt out); *see also In re Nissan Radiator*, No. 10 CV 7493 (VB), 2013 U.S. Dist. LEXIS 116720, at *17-18 (S.D.N.Y. May 30, 2013) (noting that "[t]he reaction of most of the class to the settlement has been positive and in favor of settlement" where the objection percentage was approximately 0.005%); *Weiss*, 899 F. Supp. at 1301 (presence of 100 objections out of 30,000 class members weighed in favor of settlement); *Yaeger*, 2016 WL 4541861 at *9 (in case involving 577,860 class vehicles, observing that "the overall reaction of the class has been strongly positive" when there were 34 objectors and 2,328 opt-outs).

The third factor, the stage of the proceedings and the amount of discovery completed, further supports approval. As described above, the parties engaged in both formal and confirmatory discovery. Subaru requested documents from the Plaintiffs, which they searched for and produced. Class Counsel deposed John Gray, Subaru's 30(b)(6) designee, in order to evaluate Subaru's contention that it has resolved the defect. Mr. Gray's testimony focused on the various countermeasures that Subaru has implemented to address the alleged defect, which includes a larger capacity battery in certain models, increased standards for charging prior to shipment, newly developed hardware to prevent battery drain when the power rear gate is left open, updates to the charging logic software and ECM reprogramming being provided through the Settlement, and standardized

battery testing protocols for dealerships. (Joint Cert., Ex. A, Gray Dep. at 163:11-164:5, 117:2-17, 138:14-139:3, 157:11-19, 140:17-142:12.) Class Counsel also conducted their own independent investigation into the Defect. (Joint Cert., ¶¶, 7, 23.) Taken together, the discovery completed gave Class Counsel a thorough understanding of the strengths and weaknesses of the case, enabling an accurate assessment of the risk of future litigation in comparison to the relief being furnished to Settlement Class Members. *See Yaeger*, 2016 WL 4541861, at *9-10.

The fourth, fifth, and sixth factors focus on the risk of continued litigation. As noted above, further litigation likely would have been protracted and costly. Class Counsel are experienced litigators of automotive defect class actions, and have pursued many cases that have taken several years to conclude, and some have lasted over a decade factoring in appeals. Before ever selecting a jury, the parties likely would have briefed and argued class certification, briefed a Rule 23(f) appeal, and litigated *Daubert* motions and summary judgment motions in addition to expending considerable resources on electronic discovery, depositions, and expert witnesses. Any successful order on Plaintiffs' motion for class certification likely would have been appealed and/or followed by a decertification motion by Subaru, which is represented by highly skilled counsel. It is therefore unlikely that the case would have reached trial before 2024. By that time, many Settlement Class Members likely would have experienced battery failures without the benefit

of the warranty extensions and reimbursements provided by the Settlement. *See Haas v. Burlington Cty.*, No. 08-1102 (NLH/JS), 2019 U.S. Dist. LEXIS 16071, at *13-14 (D.N.J. Jan. 31, 2019) (granting approval where plaintiffs estimate the time to judgment, including trial, would take another three years); *Yaeger*, 2016 WL 4541861, at *9 (holding that prospect of "protracted motion practice" involving the "nuances of various state laws" as well as "costly discovery" weighed in favor of settlement).

The seventh factor—the defendant's ability to withstand greater judgment—is neutral here. That factor typically only becomes relevant when "the defendant's professed inability to pay is used to justify the amount of the settlement." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 440.

The remaining *Girsh* factors—the range of reasonableness of the settlement, both independently and weighed against the risk of further litigation—confirm that final approval is appropriate. The settlement must be judged "against the realistic, rather than theoretical potential for recovery after trial," *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 323 (3d Cir. 2011), and the Court must "guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise . . . ." *California v. Teva Pharm. Indus.*, No. 19-3281, 2020 U.S. Dist. LEXIS 102992, at *32-33 (E.D. Pa. June 10, 2020); *see also In re Shop-Vac Mktg. & Sales Practices Litig.*, No. MDL No. 2380, 2016 U.S. Dist.

LEXIS 69345, at *11 (M.D. Pa. May 25, 2016) ("The proposed settlement amount does not have to be dollar-for-dollar the equivalent of the claim . . . . and a satisfactory settlement may only amount to a hundredth or even a thousandth part of a single percent of the potential recovery.") (internal citations and quotations omitted). The Settlement provides excellent relief to the Settlement Class in the form of full out-of-pocket reimbursements for expenses and a significant warranty extension. Moreover, because the Settlement does not provide for a common fund, the recovery of Settlement Class Members will not be reduced *pro rata* based on the number of claimants. Notably, the Settlement's structure approximates the individual claims process that would have followed a successful class trial—but with simplified proof requirements and immediate relief. *See Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 800 (7th Cir. 2013) (explaining that "a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members . . . will often be the sensible way to proceed.") (citations omitted).

#### *3. The* Prudential *factors*

The Third Circuit also permits courts to consider additional factors when evaluating whether to approve a class action settlement. In *In re Prudential*, the Third Circuit identified these further factors that the Court may consider:

> (1) "the maturity of the underlying substantive issues, as measured by the experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages";
> (2) the "existence and probable outcome of claims by other classes and subclasses";
> (3) "the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants";
> (4) "whether class or subclass members are accorded the right to opt out of the settlement";
> (5) "whether any provisions for attorneys' fees are reasonable"; and
> (6) "whether the procedure for processing individual claims under the settlement is fair and reasonable."

*In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 323 (3d Cir. 1998). "Unlike the *Girsh* factors, each of which the district court must consider before approving a class settlement, the *Prudential* considerations are just that, prudential. They are permissive and non-exhaustive . . . ." *In re Comcast Corp. Set-Top Cable TV Box Antitrust Litig.*, 333 F.R.D. 364, 384 (E.D. Pa. 2019) (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013)).

In this case, the first *Prudential* factor supports approval because both the formal discovery and the confirmatory discovery, together with Class Counsel's own independent investigation, have enabled the Parties to gain a strong grasp of the strengths and weaknesses of the case, and the risks of continued litigation. *See id.* ("Here, Class Counsel were able to make an informed decision about the

probable outcome of a trial."). As a result, the parties were able to make a fully informed decision as to these terms of Settlement.

"Factors two and three look at the outcomes of claims by other classes and other claimants." *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2020 U.S. Dist. LEXIS 69614, *67 (E.D. Pa. April 20, 2020). Class Counsel are unaware of other related class actions. Moreover, Class Counsel believe the Settlement is a highly desirable outcome for the members of the Settlement Class, affording them the relief sought in Plaintiffs' Consolidated Class Action Complaint. (*See* Joint Cert., ¶¶ 25, 26, 31.)

Settlement Class Members are free to opt out of the Settlement and pursue their own claims against Subaru if they wish, satisfying the fourth *Prudential* factor. Plaintiffs also respectfully submit that, for the reasons identified in their Unopposed Motion for Attorneys' Fees, Expenses, and Service Awards, the fees sought in this action are reasonable, satisfying the fifth *Prudential* factor.

Finally, under the sixth *Prudential* factor, the procedure for processing claims under the Settlement is fair and reasonable. The warranty extension is automatic for Settlement Class Members with Qualifying Conditions. With respect to claims for expense reimbursements, the claimant need only submit a claim form supported by the relevant documentation. Settlement Class Members have also been provided with Class Counsel's contact information if they have any questions regarding the relief or how to submit a claim. And numerous Class Members have

contacted Class Counsel, both to ask questions and to voice wholehearted approval of the Settlement. (Joint Cert., ¶ 31.)

### B. The Objections Should Be Overruled

Of the approximately 3,781,638 notices sent, only 23 objections have been received to date, representing 0.0006% of the Settlement Class. As explained below, the objections do not provide any basis to deny final approval.

#### 1. To Be Reimbursed for Repairs Performed by Third-Party Repair Facilities, Class Members Must Have Notified Subaru or an Authorized Dealership

The most prevalent objection lodged is to the requirement that, to be eligible for cost reimbursement, a Settlement Class Member must have presented their Settlement Class Vehicle to an authorized Subaru retailer.[8] But this provision requires no more than Subaru's written warranty, which identically requires customers invoking its protections to visit an authorized dealership for the repairs. *See* ECF No. 34-2, at 9 (stating, *inter alia*, that "[w]hen a warranty repair is needed, your vehicle *must* be brought to an Authorized SUBARU Retainer's place

[8] This objection was made by William Stutsman (ECF No. 79), Daniel Mullen (ECF No. 82), Kim Greene (ECF No. 83), Lynn and Patrick Borden (ECF No. 84), Joel Kessler (ECF No. 85), Michael Bishop (ECF No. 90), Ronald Kahn (ECF No. 93), Kyle Lundberg (ECF No. 94), Sanford Rabinowitch (ECF No. 95), Jerome Pfeffer (ECF No. 96), E. Scott Hansen (ECF No. 98), Muriel Saari (ECF No. 101), Richard Benka (ECF No. 105) Marvin Spatz (no ECF entry), Sue and Randall Wimmer (no ECF entry), Martha Verbonitz (no ECF entry), and Anne Parsons (no ECF entry). The objections with no ECF entries will be submitted to the Court prior to the Final Fairness Hearing in a supplemental filing.

of business during normal business hours."). Thus, the Settlement simply maintains this existing requirement—which would apply even if Plaintiffs were to prevail in full on their breach of express warranty claims.

Several of these Class Members also acknowledge that their Class Vehicle was out of warranty when the battery failed, so they had no reason to present the vehicle to Subaru in the first instance. (*See* ECF Nos. 82, 85, 90, 94-95.) But, because their vehicles were out of warranty when the battery failed, these objectors would not be eligible for any warranty relief in litigation. Therefore, the Settlement does not deprive them of any relief that otherwise would have been available to them. *See, e.g.*, *Alin v. Honda Motor Co., Ltd.*, 2012 WL 8751045, at *12 (D.N.J. Apr. 13, 2012) (finding that class settlement with auto manufacturer was reasonable where the "largest category of objections comes from customers whose cars were too old, or had too many miles to be eligible for recovery according to the lines drawn in the agreement"); *Skeen v. BMW of N. Am., LLC*, 2016 WL 4033969, at *9 (D.N.J. July 26, 2016) (stating that "the warranty on Ms. Williams's vehicle . . . has already expired even under the extended terms of the settlement. . . . The Court agrees with Plaintiffs, however, that the Court's job is 'not to determine whether the settlement is the fairest possible resolution.' . . . With regard to the amount of relief offered under the settlement and the Class members receiving that relief, 'lines must be drawn somewhere.'") (citations

omitted). In addition, requiring claimants seeking reimbursement for third-party battery repairs to have first requested service from Subaru serves the purpose of validating such claims; absent such a requirement, for example, any vehicle owner who visited a Pep Boys or Auto Zone store could recover without indication that the battery failed for reasons related to the alleged defect. Moreover, the Settlement does not leave any Class Member empty-handed. Far from it: *all* Settlement Class Members are eligible for the Reflash software update or alternative ECM reprogramming, together with the valuable warranty extensions.

### 2. Subaru Has Adequately Addressed the Defect with Its Technical Corrections

Jesse and Joan Trachtenberg (ECF Nos. 80, 100), Kenneth Jager (ECF No. 81), Allan Solomon (ECF No. 92), Cynthia Nunnemaker (ECF No. 97), and Muriel Saari (ECF No. 101) all object to the settlement on the basis that Subaru should be required to fix the Defect under the Settlement. Yet the Settlement provides precisely this relief. As explained above, Subaru has implemented a number of countermeasures that make it significantly less likely that the Defect will arise in Class Vehicles. These remedial measures include a larger capacity battery in select models, increased standards for charging prior to shipment, newly developed hardware to prevent battery drain when the power rear gate is left open, updates to the charging logic software, ECM reprogramming or equivalent relief, and standardized battery testing protocols for dealerships. Further, it appears that

neither Mr. Jager, Mr. Solomon, nor Ms. Saari have received the updated charging logic. Class Counsel spoke with these objectors to explain the settlement benefits and encouraged them to schedule an appointment to bring their vehicle into an authorized Subaru dealership for the updates. Class Counsel similarly encouraged Jesse and Joan Trachtenberg to take action to obtain the updated charging logic—and based on their November 3, 2022 letter, they did so. Although the Trachtenbergs claim the Reflash was not effective, since that update they have not experienced a battery failure and the voltage of their battery has increased. (*See* ECF No. 100.)

### 3. The Settlement Appropriately Requires That Claims Be Supported by Documentation.

Ms. Greene and Ms. Saari also object to the Settlement's documentation provisions. But the Settlement's requirement of reasonable documentation requires no more—and likely less—than what would be required of claimants on a post-trial posture. *See* Manual for Complex Litigation, Fourth, § 21.66 at p. 331 ("Verification of claims forms by oath or affirmation . . . may be required, and it may be appropriate to require substantiation of the claims (e.g., through invoices, confirmations, or brokers' records)."); *Jackson's Rocky Ridge Pharmacy, Inc. v. Argus Health Sys., Inc.*, No. 2:05-CV-0702-UWC, 2007 WL 9711416, at *2 (N.D. Ala. June 14, 2007) (overruling objections to substantiation "requirement [that] is no more onerous than that to which each of the class members would have been

subjected had they filed a separate lawsuit . . . and prevailed"). In fact, class action settlements often require class members to submit records or other documentary evidence to qualify for payment, particularly when, as here, the payments are substantial. *See, e.g.*, *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *30 (N.D. Ga. Mar. 17, 2020), *aff'd in relevant part*, 999 F.3d 1247 (11th Cir. 2021), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021), *and cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765 (2022) (rejecting objections to "completion and documentation of the claim form," which "procedures are routinely required in other settlements."); *Keegan v. Am. Honda Motor Co, Inc.*, No. 10-cv-09508 MMM (AJWx), 2014 WL 12551213, at *15 (C.D. Cal. Jan. 21, 2014) ("Courts frequently approve settlements that require class members to submit receipts or other documentation" and "find that such a requirement is reasonable and fair") (citing cases); *In re Phenylpropanolamine (PPA) Prods. Liab.*, 227 F.R.D. 553 (W.D. Wash. 2004) (incorporating extensive settlement claim questionnaires requiring supporting documentation).

#### 4. The Benefits Under the Settlement Are Sufficient to Make Settlement Class Members Whole

Several Class Members object to the Settlement because it does not provide certain relief they would have liked to see included. For example, Rosemary O'Toole-Hamman (ECF No. 89) complains there is no compensation for "time,

mileage, tolls and inconvenience." Martha Field (ECF No. 99) suggests the settlement should have provided a replacement battery with "no less than 640 CCA," an indefinite extended warranty without time and mileage limitations, "compensation for future batteries and for reduced resale value of the car," and other relief. Sanford Rabinowitch (ECF No. 95) says additional Subaru vehicles should have been part of this case and settlement. While all of the requests may be understandable, none provides a valid basis to conclude the Settlement agreed to by the parties does not provide reasonable and adequate relief. Indeed, to the extent these objections suggest the warranty should be longer or the Settlement should offer more relief, such objections are typically overruled because the Court is called upon to evaluate whether the proposed settlement is adequate, not whether a hypothetical settlement might be more valuable. *California v. Teva Pharm. Indus.*, No. 19-3281, 2020 U.S. Dist. LEXIS 102992, at *32-33 (E.D. Pa. June 10, 2020) ("[S]ettlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding too large a settlement based on the court's view of the merits of the litigation.") (quoting *In re Aetna Sec. Litig.*, No. MDL 1219, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11 (E.D. Pa. Jan. 4, 2001)); *see also Yaeger*, 2016 WL 4541861, at *17 (noting that "for those in aggravated situations there was the opportunity to opt out of this class and to pursue one's own remedies. That the

proposed settlement does not provide a second 100,000 mile warranty upon the remedial parts is not reason for this Court to reject it."); *Skeen*, 2016 WL 4033969, at *9 ("The limited warranty extension reflects the reality that cars decline in value over time. . . . A warranty extension need not be indefinite to be reasonable.") (citations omitted).

### 5. Counsel's and the Parties' Response to the Bordens' Objections About the Reflash

Patrick and Lynn Borden's objection (ECF No. 84)[9] that the Reflash could not be installed on their 2016 Forester and was the only objection on behalf of the model 2015 and 2016 Foresters. After further investigation and negotiation, the parties agreed to provide current owners of 2015 and 2016 Foresters a substantially equivalent service. (*Id.*, ¶ 35.) Specifically, these Class Members can bring their 2015 and 2016 vehicles to an authorized Subaru service center and have their vehicle's ECM checked for diagnostic trouble codes related to battery drain. (*Id.*) If any such DTCs are found, they will be cleared and any repairs needed to address failures related to the DTCs will be performed, free of charge. (*Id.*) Subaru reduced this offer to writing and is bound by it to the same extent as the rest of the Settlement provisions. (*Id*.) In short, while the technical remedy for 2015 and 2016

[9] The Bordens also asked to be excluded from the class, which eliminates their standing to object. *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867, at *5 (D.D.C. Mar. 31, 2000). As a result, the Court need not consider their objection.

Foresters differs slightly from the technical remedy that applies to other Class Vehicles, those owners have older vehicles that do not have the problematic engine control charging logic; even so, these Class Members are similarly entitled to free services that will address battery drain issues and protect them going forward.

The Bordens also complain that the Defect has given them "unnecessary anxiety and fear of being stranded beyond their control." (ECF No. 84 at p. 2 of 15.) Nonetheless, the Released Claims expressly exclude claims for "death, personal injuries, and property damage[.]" (SA at § II.29.)[10]

**6. The Court Should Award the Requested Attorneys' Fees**

Cynthia Nunnemaker (ECF No. 97) states that Class Counsel "DID NOT earn" their fee and questions whether such reimbursement "was really a payoff from Subaru." Other than making broad complaints about the Settlement, Ms. Nunnemaker does not explain why Class Counsel should not be paid attorneys' fees or reimbursed for the litigation expenses they advanced. In fact, Ms. Nunnemaker is eligible to submit a reimbursement claim for her out-of-pocket expenses under the Settlement. She also confirms that as a result of this Settlement, she presented her vehicle to a Subaru dealer, which tested her battery and replaced it free of charge when the battery failed the test. In addition, the

[10] As permitted by Section VIII.A.5 of the Settlement, the Bordens are scheduled to be deposed January 13, 2023.

dealership performed the Reflash software update free of charge. Ms. Nunnemaker does not claim she experienced a battery failure after these Settlement repairs and acknowledges that as long as "this fixes the problem, [she's] happy with that." (*Id*. at p. 7 of 13.) Accordingly, her objection should be overruled.

### C. The Notice Satisfied Due Process and Rule 23

Under Federal Rule of Civil Procedure 23(e), class members who would be bound by a settlement are entitled to reasonable notice before the settlement may be approved. *See* Manual for Complex Litigation, Fourth, § 30.212. The Court must provide a class certified under Rule 23(b)(3) "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). To satisfy this standard and due process requirements, such notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The Notice that the Court approved was provided to Settlement Class Members. It includes all legal requirements and explains the settlement concisely using clear, simple terms. The notice plan carried out by the Settlement Administrator furnished the Settlement Class Members the best notice practicable

under the circumstances. *See Henderson*, 2013 WL 1192479, at *12-13.

An experienced vendor oversaw the process of compiling the addresses of owners and lessees, and used that information to prepare the Notice that was sent via first-class mail—"the gold standard"—to all Settlement Class Members. *See Good v. Am. Water Works Co., Inc.*, No. CV 2:14-01374, 2016 WL 5746347, at *7 (S.D.W. Va. Sept. 30, 2016) (referring to "direct mail notices" as "the gold standard for class notice"); *Boyd v. May Trucking Co.*, No. EDCV 17-2166 JGB (SHKx), 2019 WL 12763009, at *11 (C.D. Cal. July 1, 2019) (finding "direct mail notice is satisfactory."). In addition, email notice was provided to all Class Members whose emails were in Subaru's database, covering dealership transactions. *See, e.g.*, *Robinson v. Sailormen, Inc.*, No. 1:14CV44-MW/GRJ, 2016 WL 11528450, at *9 (N.D. Fla. Nov. 18, 2016) (approving notice to class members by both U.S. mail and email and stating that, "[i]ndeed, many courts have determined that it is appropriate to send notice to the class via email given that it is efficient and inexpensive."); *Harsh v. Kalida Mfg., Inc.*, No. 3:18-CV-2239, 2019 WL 5257051, at *3 (N.D. Ohio Oct. 17, 2019) (authorizing notice by U.S. mail and email because such dual notice may be "more efficient than waiting until certain mailings are returned as undeliverable"). Notice of the Settlement, and other

relevant documents, also are available on the dedicated Settlement website.[11]

### D. The Court Should Reaffirm Certification of the Settlement Class

In the Preliminary Approval Order, the Court conditionally certified the Settlement Class, concluding that its certification meets the requirements of Rules 23(a) and 23(b)(3). (ECF No. 75, ¶¶ 5, 7.) Nothing relevant to this analysis has changed since the Preliminary Approval Order, and there has been no objection challenging the Court's provisional certification or underlying findings. Thus, Plaintiffs respectfully ask that the Court reaffirm those findings and certify the Settlement Class.

## IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court finally approve the Settlement, certify the Settlement Class, and dismiss the action with prejudice.

Dated: January 10, 2023

Respectfully submitted,

By: */s/ Matthew D. Schelkopf*

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[11] Additional communications to Settlement Class Members are attached as Exhibits 1 and 2 to the proposed final approval order submitted herewith.

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## CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT** was electronically filed on January 10, 2023 using the Court's NextGen system, thereby electronically serving it on all counsel of record.

*/s/ Matthew D. Schelkopf*
Matthew D. Schelkopf

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

| | |
|---|---|
| IN RE SUBARU BATTERY DRAIN PROD. LIAB. LITIG. | No. 1:20-cv-03095-JHR-MJS |

# JOINT CERTIFICATION OF MATTHEW D. SCHELKOPF, MATTHEW R. MENDELSOHN, AND ADAM E. POLK IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

We, Matthew D. Schelkopf, Matthew R. Mendelsohn, and Adam E. Polk (together, "Class Counsel"), hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. Matthew D. Schelkopf is a partner at Sauder Schelkopf, LLC ("Sauder Schelkopf") in Berwyn, Pennsylvania and another attorney of record for Plaintiffs and the Settlement Class. Mr. Schelkopf submits this certification based upon personal knowledge, in support of Plaintiffs' Motion for Final Approval of the Class Action Settlement, and if called to do so, could testify to the matters contained herein.

2. Matthew R. Mendelsohn is a partner at Mazie Slater Katz & Freeman, LLC ("Mazie Slater") in Roseland, New Jersey and one of the attorneys of record for Plaintiffs and the Settlement Class.[1] Mr. Mendelsohn submits this certification based upon personal knowledge, in support of Plaintiffs' Motion for Final Approval of the Class Action Settlement, and if called to do so, could testify to the matters contained herein.

[1] Capitalized terms not otherwise defined herein have the same meanings attributed to them in the Parties' Settlement Agreement ("Settlement" or "SA"). (*See* ECF No. 72-2.)

3. Adam E. Polk is a partner at Girard Sharp LLP ("Girard Sharp") in San Francisco, California and another attorney of record for Plaintiffs and the Settlement Class. Mr. Polk submits this submits this certification based upon personal knowledge, in support of Plaintiffs' Motion for Final Approval of the Class Action Settlement, and if called to do so, could testify to the matters contained herein.

4. Attached hereto as **Exhibit A** is a true and correct copy of transcript excerpts from the deposition of Subaru's Director of Field Quality, John Gray, taken March 3, 2022.

## I. Overview of the Class Action Settlement with Subaru

5. Class Counsel Mazie Slater, Sauder Schelkopf, and Girard Sharp are highly experienced class action litigators who have vigorously represented their clients through this litigation—which included adversarial discovery and protracted mediation negotiations—and have a track record of successfully litigating automotive defect and consumer protection cases. (*See* ECF No. 91-2, ¶¶ 26-28, 48, 60.)

6. The Settlement is the product of arm's length negotiations by experienced counsel for both Parties that lasted approximately six months under the supervision of the Hon. Joel Schneider, U.S.M.J. (Ret.) of Montgomery McCracken Walker & Rhoads LLP.

7. Before entering into the Settlement, Class Counsel independently analyzed the nature of the alleged defect that can cause a parasitic drain of Class Vehicle's battery power (the "Battery Drain Defect" or "Defect"), analyzed the Reflash being provided through the Settlement as well as Subaru's previous countermeasures to address the Defect, consulted with automotive engineering experts, studied government reports, and interviewed and collected documents from hundreds of class members. We also engaged in confirmatory discovery to assess Subaru's contention that the Reflash and other countermeasures substantially resolve the Defect, including by taking the deposition of Subaru's 30(b)(6) designee.

8. Class Counsel's experience, the discovery we conducted, and our independent investigation into the alleged Defect enabled us to become familiar with the relative risks and rewards of the Settlement in relation to trial.

9. Without the Settlement, the Parties likely would have continued adversarial discovery for many months. The claims at issue involve complex legal and technical issues, and continuing litigation would have been time consuming, expensive, and risky. By contrast, if approved, the Settlement will provide substantial and timely benefits for the Settlement Class without the delay, risk, or uncertainty of continued litigation.

10. The Settlement achieved by the Parties has received overwhelming support from Settlement Class Members. Corresponding to the approximately

2,741,636 Settlement Class Vehicles, notices were mailed to 3,781,638 Settlement Class Members. Out of these millions of Class Members, Plaintiffs have received only 23 objection letters and 320 opt outs. As compared to the number of individual notices, the objection percentage of 0.0006% and opt-out percentage of 0.008% represent miniscule fractions of the Settlement Class.

11. Class Counsel believe that the attorneys' fees sought in this action are reasonable for the reasons set forth in Plaintiffs' Unopposed Motion for Attorneys' Fees, Expenses, and Service Awards. (ECF No. 91.)

12. Given the recovery provided and the potential for an unfavorable trial, a denial of class certification, or a reversal on appeal, Class Counsel respectfully submit that this Settlement is fair, reasonable, and adequate.

## II. Overview of Litigation and Legal Services Provided to the Class

13. This action was brought by Plaintiffs Amy Burd, Walter Gill, David Hansel, Glen McCartney, Roger Baladi, Tamara O'Shaughnessy, Anthony Franke, Matthew Miller, Steven Stone, Howard Bulgatz, Mary Beck, David Davis, and Colin George on behalf of themselves and a putative class of all persons or entities in the

United States, who currently own or lease, or previously owned or leased, a Class Vehicle.[2]

14. Plaintiffs alleged that the approximately 2.8 million Class Vehicles contain a Defect that causes parasitic drain of battery power. Plaintiffs further alleged that the resulting drain causes premature battery failure, an event that can leave drivers and their passengers stranded.

15. Before filing this action, Class Counsel conducted an in-depth investigation into the alleged Battery Drain Defect. Our investigation included interviewing and reviewing documents from hundreds of prospective class members; studying various sources of consumer reporting; monitoring the National Highway Traffic Safety Administration ("NHTSA") website, on which consumers were reporting incidents related to the alleged defect; analyzing Subaru manuals and technical service bulletins that discussed the alleged defect; reviewing federal motor vehicle regulations regarding safety standards; identifying potential defendants; researching causes of action and other cases involving similar defects; and consulting with automotive engineering experts.

[2] The Class Vehicles include model years ("MY") 2015-2020 Subaru Outback, MY 2015-2020 Forester, MY 2015-2020 Legacy, MY 2015-2020 WRX, and MY 2019-2020 Ascent.

16. The named Plaintiffs are residents of New Jersey, New York, California, Florida, Illinois, Michigan, Texas and Washington, and each Plaintiff alleged that his or her Class Vehicle experienced the Battery Drain Defect. The Complaint proposed certification of a Nationwide Class and subclasses of vehicle purchasers and lessees in the Plaintiffs' home states. Plaintiffs asserted claims for violations of various state consumer fraud statutes and the Magnuson-Moss Warranty Act, and also alleged claims for breach of express warranty, breach of the implied warranty of merchantability, common law fraud, and unjust enrichment.

17. Certain of the Plaintiffs filed their initial complaint on March 20, 2020. After additional cases were filed, the Court consolidated all related cases and set a briefing schedule for the appointment of lead counsel. (ECF No. 9.) Counsel in the various related actions conferred and agreed to a stipulated leadership structure with the undersigned to serve as Interim Co-Lead Counsel, supported by an experienced Executive Committee and Liaison Counsel. (ECF No. 15.)

18. On June 18, 2020, Plaintiffs filed their Consolidated Class Action Complaint. (ECF No. 18.) On August 3, 2020, Subaru moved to dismiss, and the Parties fully briefed that motion over the following months. (ECF Nos. 34, 38, 39, 42.) On March 31, 2021, the Court issued a 67-page Opinion granting in part and denying in part Subaru's motion. (ECF Nos. 46-47.) On April 28, Subaru answered the Consolidated Class Action Complaint. (ECF No. 50.)

19. Since May of 2020, the Parties have engaged in various types of party and non-party discovery. Plaintiffs served initial disclosures, propounded and responded to interrogatories and requests for production of documents, reviewed documents produced by Subaru, and took the 30(b)(6) deposition of Subaru's Director of Field Quality, John Gray.

## III. Settlement Negotiations, Terms, Notice, and Claims Administration

20. On May 12, 2021, the Parties advised the Court that they intended to pursue mediation. The parties participated in a full-day mediation with the Hon. Joel Schneider, U.S.M.J. (Ret.) on July 7, 2021. They subsequently participated in several additional mediation sessions over the next four months. On multiple occasions, the Parties appeared to have reached impasse. Nonetheless, we persisted with our efforts to negotiate fair and adequate terms for the affected drivers.

21. The Parties also exchanged confirmatory discovery subject to Federal Rule of Evidence 408. The documents obtained by Plaintiffs in that process contained Subaru's warranty claims analyses, sales data, the efficacy rates of various remedial measures, and additional information concerning the alleged Defect and its effects.

22. On November 9, 2021, as a result of extensive negotiations under Judge Schneider's supervision, the Parties reached a settlement in principle to resolve Plaintiffs' class action claims.

23. Before entering into the Settlement Agreement, Class Counsel assessed the Defect, examined government reports, consulted with respected automotive experts, surveyed class members regarding the efficacy of the measures Subaru had implemented to mitigate the defect, interviewed hundreds of class members, and reviewed their documents.

24. On March 3, 2022, Class Counsel deposed Subaru's 30(b)(6) designee, John Gray, to assess Subaru's contention that it has resolved the alleged defect.

25. The Settlement provides substantial benefits to the proposed Settlement Class. This class includes: All natural persons, who are residents of the continental United States, including Hawaii or Alaska, who currently own or lease, or previously owned or leased, a Settlement Class Vehicle originally purchased or leased in the continental United States, including Alaska or Hawaii. Excluded from the Settlement Class are (a) those claims for personal injury and/or property damage (claims for a Qualifying Battery Condition or Qualifying Battery Failure in a Settlement Class Vehicle are included regardless of whether they additionally experienced personal injury or property damage for which they do not make a claim; however, those additional claims for personal injury and/or property damaged shall be deemed excluded from the Settlement Class) and/or subrogation; (b) all Judges who have presided over the Action and their spouses; (c) all current employees, officers, directors, agents and representatives of Defendants, and their family members; (d)

any affiliate, parent or subsidiary of Defendants and any entity in which Defendants have a controlling interest; (e) anyone acting as a used car dealer; (f) anyone who purchased a Settlement Class Vehicle solely for the purpose of resale; (g) anyone who purchased a Settlement Class Vehicle with salvaged title and/or any insurance company who acquired a Settlement Class Vehicle as a result of a total loss; (h) any insurer of a Settlement Class Vehicle; (i) issuers of extended vehicle warranties and service contracts; (j) any Settlement Class Member who, prior to the date of the Settlement Agreement, settled with and released Defendants or any Released Parties from any Released Claims; (k) any Settlement Class Member that files a timely and proper Request for Exclusion from the Settlement Class; and (l) third party issuers.

26. For the benefit of the Settlement Class Members, Subaru has agreed to provide several forms of valuable relief that address the issues raised by the litigation, including (a) a warranty extension for current owners and lessees, (b) reimbursements for out-of-pocket expenses, (c) compensation for extraordinary circumstances, (d) a free software update for qualifying Class Vehicles and ECM-related service for qualifying 2015 and 2016 Foresters, (e) payment for class notice and claims administration, and (f) payment of attorneys' fees, expenses and incentive awards according to Court order.

27. The Settlement Agreement includes a comprehensive notice plan, to be paid for by Subaru and overseen by the experienced Settlement Administrator: JND

Legal Administration ("JND"). Class Counsel have regularly monitored and participated in the Notice and Administration process to ensure that JND is acting in accordance with the Settlement Agreement, and will continue these monitoring efforts after final approval.

28. Subaru first identified Settlement Class Members through its records and provided that information to JND, which verified or updated the contact information through Experian, a third party that maintains and collects the names and addresses of automobile owners. JND then sent direct mail notice to the members of the Settlement Class.

29. JND also performed an address search through the United States Postal Service's National Change of Address database to ensure use of the latest address information for Settlement Class Vehicle owners and lessees. If an individual Notice was returned as undeliverable, JND forwarded it where a forwarding address had been provided. If no forwarding address was provided, JND performed an advanced address search (e.g., a skip trace) and re-mailed undeliverable Notices if any new and current addresses were located.

30. JND also emailed a notice containing a hyperlink to the Settlement Website and electronic versions of the Full Notice and Claim Form to the approximately 2.6 million Class Members for whom Subaru maintained an email address. In addition, JND established and maintains a dedicated settlement website,

https://www.subarubatterysettlement.com/, that posts the detailed Notice, Claim Form, Settlement Agreement, and other relevant documents. Class Counsel have included a link to the Settlement Website on their respective law firm's websites.

31. The Notice approved by the Court provides Settlement Class Members with Class Counsel's contact information if they have any questions regarding the relief or how to submit a claim. Numerous Settlement Class Members have contacted Class Counsel with questions and to express their satisfaction with the Settlement.

32. The deadline for opt-outs and objections was November 5, 2022. Out of a class of 3.7 million members, 23 individuals have objected to the Settlement (although only 17 are valid), and 320 have asked to be excluded from the class. Settlement Class Members who did not opt out have until 60 days after the Settlement becomes effective to submit a claim form.

## IV. The 2015 and 2016 Foresters

33. During the administration of the settlement, Counsel and the parties learned that the 2015 and 2016 Foresters do not have the programming that raised a charging logic issue in other Class Vehicles. As a result, the 2015 and 2016 Foresters cannot receive the same Reflash provided by the Settlement to other Class Vehicles.

34. Counsel to Parties thereafter engaged in protracted discussions on providing substitute, equivalent relief to 2015 and 2016 Forester owners and lessees,

and those further negotiations delayed the administration of the Settlement. To facilitate resolution of these issues, the Parties requested, and the Court granted, extensions of time for filing Plaintiffs' Motion for Final Approval of the Class Action Settlement and continuances of the Final Fairness Hearing. (ECF Nos. 87, 88, 102, 103.)

35. After extensive discussions on this issue, Subaru has agreed to provide these Settlement Class Members with a service related remedy equivalent to the Reflash that all other Class Members can obtain. The ECM-related service for the owners and lessees of 2015 or 2016 Foresters allows these Class Members to bring their vehicles to an authorized Subaru service center and have their vehicle's ECM checked for diagnostic trouble codes ("DTCs") related to the battery drain. If any related DTCs are located, such DTCs will be cleared and any repair required to address the failures related to the DTCs will be performed, free of charge. Subaru has confirmed the availability of this relief to Class Counsel in writing, and this addendum to the Settlement Agreement is fully enforceable, like the rest of the agreement. Accordingly, any owner or lessee of a 2015 or 2016 Forester authorized to receive the free repair will be provided this relief.

36. For any Settlement Class Member who owns or leases a 2015 or 2016 Subaru Forester and previously completed a Warranty Authorization Form, Counsel proposes that JND would send an e-mail notification that he or she may receive the

ECM-related service if they are experiencing a Qualifying Battery Condition as defined by the Settlement Agreement. Attached as **Exhibit 2** to the Proposed Final Order and Judgment is a copy of the proposed email notification JND will send.

37. Counsel further proposes JND update the Frequently Asked Questions and Detailed Notice on the Settlement Website to notify class members of the ECM-related service individual who own or lease a 2015 or 2016 Subaru Forester may receive. Attached as **Exhibit 1** to the Proposed Final Order and Judgment is a copy of the proposed adjustments JND will make to the Settlement Website.

## V. Claims Submitted to Date

38. To date, Settlement Class Members have submitted over 30,000 claims for reimbursements worth more than $10 million in repair reimbursements.

* * *

39. Based on the facts stated above and the points and authorities set forth in the accompanying motion, Plaintiffs respectfully request that the Court grant final approval of the proposed class action settlement.

We hereby declare under penalty of perjury that the foregoing is true and correct. Executed on January 10, 2023.

By: */s/ Matthew D. Schelkopf*
Matthew D. Schelkopf

By: */s/ Matthew R. Mendelsohn*
Matthew R. Mendelsohn

By: */s/ Adam E. Polk*
Adam E. Polk

# EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

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|---|---|
| IN RE SUBARU BATTERY DRAIN PRODUCTS LIABILITY LITIGATION | Case No. 1:20-cv-03095-JHR-JS |

_____

VIDEOCONFERENCE DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR SUBARU OF AMERICA - JOHN GRAY

| | |
|---|---|
| DATE: | Thursday, March 3, 2022 |
| TIME: | 12:00 p.m. |
| LOCATION: | Remote Proceeding<br>700 East Gate Drive<br>Mount Laurel, NJ |
| REPORTED BY: | Arkady Sandoval, Notary Public |
| JOB NO.: | 5112509 |

A P P E A R A N C E S

ON BEHALF OF PLAINTIFFS:

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A P P E A R A N C E S (Cont'd)

ON BEHALF OF DEFENDANTS SUBARU OF AMERICA, INC. AND SUBARU CORPORATION:

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ALSO PRESENT:

Terri Claybrook, Associate General Counsel at Subaru of America (by videoconference)

61?

A Yes. I -- I think I see it now. Are you talking about the very last time where it says, "However, the output is insufficient for this function"?

Q That's correct.

A Yes, it's referring back to the first sentence where it talks about the alternator output.

Q So is this state of charge issue that's being discussed on this page -- is it a battery sensor issue, primarily, or is it an issue with the actual battery?

A It's -- it's an issue with the control logic in the engine control module. The battery sensor is merely sharing data on the -- the state of the battery, the temperature, the state of charge. That information's being fed back to the engine control module, which, in turn, controls when the alternator is turned on to charge and turned off, and how much. It can control, you know, not only on or off, but also how much. It could be anywhere from lightly charging to, you know, fully charging.

Q Okay. If you flip over to the next page, it's titled Countermeasure 1.

A Okay.

Q Which is -- the first sentence there states that it's to improve the difference in SOC by changing the supplemental charge control. Do you see that?

A Yes.

Q And it looks like to me this is increasing the lifespan of the battery. Is that correct?

A Not the lifespan, but it's increasing the state of charge level that the battery's maintained at.

Q So what does the second graph at the bottom of the page reflect then?

A Yeah, that's -- what it's saying is by doing that, you're going to be increasing the -- the lifespan of the battery.

Q And do you know what 70 to 100 refer to at the bottom there?

A Let's see. It says, "Relation between the average state of charge and repeat charge/discharge life," where lifespan percentage is the left column and the X axis is the state of charge. So 70 to 100 would be the state of charge level.

Q And was this countermeasure implemented?

A Yes.

Q If you flip over to the second page -- or the next page in the slide deck discusses the second

A No, these are battery types.
Q That's right. I'm sorry. Okay. So under "In Production," it lists a couple of different things. The first that I see is it references the increase from 52.7Ah to 54.7Ah, which is what we just discussed; right?
A Yes, they're talking about doing a sort to -- before the batteries are shipped to SIA, that they would be sorted. And only those with a 54.7Ah charge would be accepted for shipment.
Q Okay. And it says that it was estimated that that would be implemented at the end of July at Clarios. Is that right?
A Yes.
Q And that was implemented, to the best of your knowledge?
A Yes.
Q Second, in the next one down it says that it's considering recharging at a third-party. Do you know what that's referring to?
A That's related to service parts that were made by Clarios. They were looking at ways to potentially increase the supplied charge on the replacement battery.
Q And who would be the third-party recharging?

Outback, it's the Clarios battery. The LN2.

Q Are those the only Subaru vehicles that support that stop start functionality. Is that correct?

A We currently have it on -- currently, we have it on our -- some of our Crosstrek models.

Q Okay. But of the class vehicles, specifically.

A Correct. Of the -- of the class vehicles, yes. It's Forester, and Legacy and Outback. Ascent does not have start stop.

Q And neither would the WRX. Is that right?

A That's correct.

Q All right. The fourth item is new hardware with modified software to prevent battery drain when PRG is left open in Outback, Forester and Ascent.

So I know you mentioned the new hardware, and we looked at the modified software.

What is the new hardware again, if you can recall?

A It -- the -- that particular module cannot be reprogrammed on the vehicle. So in order to get the modified software, you actually have to replace the physical module. And that's why it's a new hardware.

Q And I'm guessing the new module has the modified software on it pre-programmed?
A Yes, that's correct.
Q And, again, the Legacy and the WRX do not have the power rear gate. Is that correct?
A That's correct. They have trucks.
Q All right. And the fifth is improved pre-retail vehicle disciple and retailer testing practices. Do you see that?
A Yes.
Q And I believe we discussed this in one of the prior QIM slide decks. Is that correct?
A Yes, that's the reinforcement of the retailer storage and maintenance processes.
Q Are there any other pre-retail vehicle disciplines or retailer testing practices that have been implemented that we have not discussed today?
A No.
Q So we have covered everything. Okay. All right. Could you flip to the last page in this for me, which is --
MR. WALTERS: Joe?
MR. KENNEY: Sure.
MR. WALTERS: Just so we are clear, I think that the witness is probably focused on the

pre-retail aspects of that.

We haven't, really, talked about the testing practices; right? In terms of --

THE WITNESS: Oh, the service -- service testing.

MR. WALTERS: Right.

THE WITNESS: Oh, no. We haven't talked about that. No, we have not.

MR. WALTERS: Right.

THE WITNESS: We're talking strictly about prior to retailer delivery.

MR. WALTERS: Exactly.

THE WITNESS: Not servicing the vehicle.

MR. KENNEY: Okay.

BY MR. KENNEY:

Q Well, while we are on that subject, what has changed about this Subaru retailer testing practices?

A We've also been working with our retailers to, again, reinforce using appropriate test practices with the Midtronics test equipment to ensure that they're applying it properly, and following up on the result appropriately.

There were some concerns that we found through random audits of claims data compared with

data received from the Midtronics testers that indicated there were some situations where retailers were testing the battery, and when it was found to be good recharge, they were not properly, fully recharging the battery. They were just allowing the -- the test to complete.

So we worked with those retailers that were identified to make sure that they understood they needed to create space and capacity to be able to ensure that those batteries were fully recharged before they were returned to the customer.

Q Were retailers also just replacing batteries without performing the testing?

A That was another piece too, yes. They artificially inflated the claims information. Again, a lot of times -- we talked about previously in the earlier presentations -- they talk about those low mileage failures early in the life of the vehicle. Shortly -- you know, within a year after delivery. And in a lot of those cases there were retailers who were not following proper policy.

You know, we -- we have a very generous, goodwill policy that would allow them to replace those batteries, and they could claim them under goodwill. With no questions asked, we would -- we would take the

claim.

But unfortunately, they were putting those into warranty claim data for whatever reason, whether it was misunderstanding of the policy or, you know, I'm not sure what. But mostly, misunderstanding of the policy.

So that was also reinforced with them as well to ensure that they are -- you know, they're welcome to replace batteries, but not to put them under warranty unless they are justified to be replaced under warranty. In other words, a -- a failed battery test result.

Q Other than those two tests that we just discussed, is there anything else that was changed or are those the primary ones?

A Those were -- those were, really, the primary ones. I mean, there were some other very small ancillary issues with improper testing where they would test the battery as many times as it look 'til they got a failed result, or used a golden battery to test and get a failed result that they could claim under warranty. But those were very rare cases.

Q What's a golden battery?

A A battery that's already failed. So they

model years further reduced the claims rate to 3.16 percent in the 2019 and 1.17 percent in the 2020. Is that correct?

A Yes, it is.

Q And how would you categorize those failure rates; 3.16 percent and 1.17 percent?

Would those be consistent with the failure rates that SBR was seeing in the Panasonic batteries?

A I would think so, yes. I mean, the Forester in '20 does have the Panasonic battery.

Q All right. Let's flip down to the WRX, which is on page four of that exhibit.

So, again, just kind of looking at the data, in aggregate it looks like the reflash -- the reprogramming -- dropped the claims rate dramatically down to probably an average of somewhere around 4 percent across the three different model years. Would you agree with that?

A Yes, I would.

Q Let's scroll down to the Ascent next. So under the Ascent it states that unlike the other class vehicles, the 2019 to 2020 Ascent vehicles all received the reflash and the higher capacity battery in production. The improvement in 2020 was masked by the pandemic influences. Do you see that?

A Yes, I do.

Q And in the second sentence in references economic pressures of the pandemic. Do you know what that's referring to?

A Again, it -- it's talking about the relation between the retailer and the customer and, again, their desire to keep the customers happy.

Q All right. If you can scroll down to interrogatory number three for me.

A Okay.

Q This asks Subaru to set forth with specificity whether installing the larger capacity batteries as compared to the OEM battery is a component of repairing the defect in the vehicles.

And I take from its response that incorporates its response to interrogatory number one and number two that that answer is yes. Is that correct?

A I would say it's definitely a component, yes.

Q Okay. And why is that?

A Because the additional capacity of the battery will provide to help compensate for some of the omissions already outlined. The more extended storage and just providing additional storage capacity

within the battery to help reduce the possibility of discharge, even in the event of inadvertently -- the customer inadvertently leaving lights on and things like that. It's more likely to be captured and recovered with the additional capacity in the battery.

Q So if the primary countermeasure is the reflash, I guess, this would be a secondary countermeasure?

A Yes. I'd say -- I think you can say that.

Q All right. Can you turn to interrogatory number four for me?

So this asks how the larger capacity battery remedies the defect. And here, again, Subaru incorporates its previous responses.

Is there any reasons as to how the larger capacity batteries remedies the defect that we have not discussed yet today?

A No, I don't believe so.

Q All right. Let's look at interrogatory number five. This asks for Subaru to list which class vehicles received the large capacity batteries.

So I know we looked at the chart that you had put together in Excel. Other than the change that we would make the Ascent, which would receive the 620 cold crank amp batteries now; are there any other

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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|---|---|
| IN RE SUBARU BATTERY DRAIN PROD. LIAB. LITIG. | No. 1:20-cv-03095-JHR-MJS<br><br>**[PROPOSED] FINAL ORDER AND JUDGMENT** |

This matter came before the Court for hearing pursuant to the Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, dated June 23, 2022 ("Preliminary Approval Order"), on the motions of Plaintiffs for approval of proposed class action settlement with Defendants Subaru of America, Inc. and Subaru Corporation (collectively, "Defendants") and approval of attorneys' fees, expenses, and service awards. Due and adequate notice having been given of the Settlement as required by the Preliminary Approval Order, the Court having considered all papers filed and proceedings conducted herein, and good cause appearing therefor, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. This Final Order and Judgment incorporates by reference the definitions in the Settlement Agreement with Defendants dated April 29, 2022 (the

"Agreement"), and all defined terms used herein have the same meanings ascribed to them in the Agreement.

2. This Court has jurisdiction over the subject matter of the Action and over all Parties thereto.

3. The Court reaffirms and makes final its provisional findings, rendered in the Preliminary Approval Order, that, for purposes of the Settlement, all prerequisites for maintenance of a class action set forth in Federal Rules of Civil Procedure 23(a) and (b) are satisfied. The Court hereby makes final its appointments of Class Counsel and the Class Representatives and certifies the following Settlement Class: All natural persons, who are residents of the continental United States, including Hawaii or Alaska, who currently own or lease, or previously owned or leased, a Settlement Class Vehicle originally purchased or leased in the continental United States, including Alaska or Hawaii. Excluded from the Settlement Class are (a) anyone claiming personal injury, property damage (other than damage to a Settlement Class Vehicle that is the subject of a Qualifying Battery Condition or Qualifying Battery Failure) and/or subrogation; (b) all Judges who have presided over the Action and their spouses; (c) all current employees, officers, directors, agents and representatives of Defendants, and their family members; (d) any affiliate, parent or subsidiary of Defendants and any entity in which Defendants have a controlling interest; (e) anyone acting as a used car dealer; (f) anyone who

purchased a Settlement Class Vehicle solely for the purpose of resale; (g) anyone who purchased a Settlement Class Vehicle with salvaged title and/or any insurance company who acquired a Settlement Class Vehicle as a result of a total loss; (h) any insurer of a Settlement Class Vehicle; (i) issuers of extended vehicle warranties and service contracts; (j) any Settlement Class Member who, prior to the date of the Settlement Agreement, settled with and released Defendants or any Released Parties from any Released Claims; (k) any Settlement Class Member that files a timely and proper Request for Exclusion from the Settlement Class; and (l) third party issuers. For purposes of this Order and the Settlement, Settlement Class Vehicles means model year 2015-2020 Outback, 2015-2020 Forester, 2015-2020 Legacy, 2015-2020 WRX, and 2019-2020 Ascent.

4. Pursuant to Federal Rule of Civil Procedure 23(e), the Court hereby grants final approval of the Settlement and finds that it is, in all respects, fair, reasonable, and adequate and in the best interests of the Settlement Class. Specifically, the Court has analyzed each of the factors set forth in Fed. R. Civ. P. 23(e)(2), *Girsh v. Jepson*, 521 F.2 153, 157 (3d Cir. 1975) and *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 323 (3d Cir. 1998) and finds the factors support final approval of the settlement, including, including an assessment of the likelihood that the Class Representatives would prevail at trial; the range of possible recovery; the consideration provided to Settlement Class Members as compared to

the range of possible recovery discounted for the inherent risks of litigation; the complexity, expense, and possible duration of litigation in the absence of a settlement; the nature and extent of any objections to the settlement; the stage of the proceedings and the amount of discovery requested; the risk of establishing liability and damages, the ability of the defendants to withstand a greater judgment, the range of reasonableness of the settlement; the underlying substantive issues in the case; the existence and probable outcome of claims by other classes; the results achieved; whether the class can opt-out of the settlement; whether the attorneys' fees are reasonable, and whether the procedure for processing claims is fair and reasonable.

5. The Court finds the factors recently added to Fed. R. Civ. P. 23(e)(2) substantially overlap with the factors the Third Circuit has enumerated in *Girsh* and *In re Prudential*, and that each supports final approval of the settlement.

6. The Court also "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members," and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, Settlement Class Members share a common legal grievance arising from Defendants' alleged failure to disclose or adequately disclose material facts about the Settlement Class Vehicles. Common legal and factual questions predominate over any individual

questions that may exist for purposes of this settlement, and the fact that the Parties are able to resolve the case on terms applicable to all Settlement Class Members underscores the predominance of common legal and factual questions for purposes of this settlement. In concluding that the Settlement Class should be certified pursuant to Rule 23(b)(3) for settlement purposes, the Court further finds that a class action is superior for purposes of resolving these claims because individual class members have not shown any interest in individually controlling the prosecution of separate actions. Moreover, the cost of litigation likely outpaces the individual recovery available to any Settlement Class Members. *See* Fed. R. Civ. P. 23(b)(3)(A). Accordingly, the Court finds that, for purposes of this settlement, Rule 23(b)(3) has also been satisfied.

7. The Court finds that notice of this Settlement was given to Settlement Class Members in accordance with the Preliminary Approval Order and constituted the best notice practicable of the proceedings and matters set forth therein, including the Settlement, to all Persons entitled to such notice, and that this notice satisfied the requirements of Federal Rule of Civil Procedure 23 and of due process.

8. The Court directs the Settlement Administrator to update the Frequently Asked Questions and Detailed Notice on the Settlement Website in the same form attached hereto as **Exhibit 1**.

9. The Court further directs the Settlement Administrator to send an e-mail notification in the same form attached hereto as **Exhibit 2** to any Settlement Class Member who owns or leases a 2015 or 2016 Subaru Forester and previously completed a Warranty Authorization Form prior to the Settlement Administrator updating the Settlement Website consistent with Paragraph 8 of this Order.

10. The Court directs the Parties and the Settlement Administrator to implement the Settlement according to its terms and conditions.

11. Upon the Effective Date, Releasing named Plaintiffs and all Releasing Class Members shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever released, relinquished, and discharged the Releasees from all Released Claims.

12. The Persons identified in **Exhibit 3** hereto requested exclusion from the Settlement Class as of the Exclusion Deadline. These Persons shall not share in the benefits of the Settlement, and this Final Order and Judgment does not affect their legal rights to pursue any claims they may have against Defendants. All other members of the Settlement Class are hereinafter barred and permanently enjoined from prosecuting any Released Claims against Defendants in any court, administrative agency, arbitral forum, or other tribunal.

13. Neither the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Settlement, is or may be deemed to be or may

be used as an addition of, or evidence of, (a) the validity of any Released Claim, (b) any wrongdoing or liability of Defendants, or (c) any fault or omission of Defendants in any proceeding in any court, administrative agency, arbitral forum, or other tribunal.

14. Without affecting the finality of this Judgment, this Court reserves exclusive jurisdiction over all matters related to administration, consummation, enforcement, and interpretation of the Settlement, and this Final Order and Judgment, including (a) further proceedings, if necessary, on the application for attorneys' fees, reimbursement of litigation expenses, and service awards for named Plaintiffs; and (b) the Parties for the purpose of construing, enforcing, and administering the Settlement. If any Party fail(s) to fulfill its or their obligations under the Settlement, the Court retains authority to vacate the provisions of this Judgment releasing, relinquishing, discharging, barring and enjoining the prosecution of, the Released Claims against the Releasees, and to reinstate the Released Claims against the Releasees.

15. If the Settlement does not become effective, then this Judgment shall be rendered null and void to the extent provided by and in accordance with the Agreement and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement.

16. The Court has considered each of the objections, and finds that they are unpersuasive and therefore overrules all of them.

17. The Court hereby enters a judgment of dismissal, pursuant to Federal Rule of Civil Procedure 54(b), of the claims by the Settlement Class Members, with prejudice and without costs, except as specified in this order, and except as provided in the Court's order related to Plaintiffs' Unopposed Motion for Attorneys' Fees, Expenses, and Service Awards. The Clerk of the Court is directed to close this docket.

**IT IS SO ORDERED.**

DATED: _____

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HON. JOSEPH H. RODRIGUEZ
UNITED STATES DISTRICT JUDGE

Any Settlement Class Member who experiences a Qualifying Battery Condition and has not already received the Reflash and completes the "Request for Extended Warranty Battery Service Form," available on the Warranty Authorization Form page of this website, is entitled to receive the Reflash during the approved Retailer visit at no charge through the duration of the Extended Warranty period. For 2015 and 2016 Subaru Foresters, which were not affected by the alleged issue with the engine control charging logic, for Qualifying Battery Conditions, the Subaru retailer will instead scan the vehicle's Engine Control Module to determine whether certain diagnostic trouble codes related to the charging system, low voltage, or the power rear lift gate are detected. If the specific codes are identified, then the Subaru retailer will provide the associated repair and clear the stored codes, at no charge. Settlement Class Members may also call toll-free 1-855-606-2625 or email info@SubaruBatterySettlement.com to assess whether they experienced a Qualifying Battery Condition and if so, to be assigned an appropriate Retailer to receive the Reflash. Settlement Class Members who already received and paid for the Reflash and were not previously reimbursed, are entitled to 100% reimbursement for expenses incurred for the Reflash.

You recently completed a Warranty Authorization Form for your Subaru Forester on the Settlement Website, www.SubaruBatterySettlement.com, in connection with the class action settlement. At that time, Subaru retailers were not prepared to provide a free Reflash service for your Subaru Forester because 2015 and 2016 Subaru Foresters were manufactured with different engine control charging logic than the other Class Vehicles. If you are experiencing a Qualifying Battery Condition as defined by the Settlement Agreement, Subaru retailers are now prepared to provide a free ECM-related service of equivalent value to the Reflash service, which involves scanning your Subaru Forester's Engine Control Module to determine whether certain diagnostic trouble codes related to the charging system, low voltage, or the power rear lift gate are detected. Subaru will provide the repair associated to those specific codes and clear the stored codes, at no charge to you.