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

CHAD UDEEN, MARY JANE JEFFERY, LYDIA RUNKEL, MICHAEL BOLICK, GARY GILPIN, ALICIA SMITH, and SUSAN WILLIAMS, on behalf of themselves and all others similarly situated, Plaintiffs, v. SUBARU OF AMERICA, INC., and SUBARU CORPORATION, Defendants.	No. 1:18-cv-17334-RBK-JS **JURY TRIAL DEMANDED** **CLASS ACTION**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs seek preliminary approval of a class action settlement that will provide benefits valued at more than $6.25 million to the owners and lessees of Subaru vehicles equipped with allegedly defective Starlink infotainment systems. The Class Vehicles eligible to participate in the settlement are model year 2018 Subaru Outback, 2018 Subaru Forester, 2018 Subaru Legacy, 2018 Subaru Crosstrek, 2017-2018 Subaru Imprezas, and 2018 Subaru BRZ (the "Class Vehicles").

As discussed herein, the proposed settlement affords owners and lessees of Class Vehicles an opportunity to be compensated based on multiple visits to a Subaru dealer for a Starlink repair or complaint ($150 for two visits, $300 for three or more visits or, at the class member's election, vouchers that can be used for Subaru service, apparel, or a new vehicle). It also allows them to receive compensation at the rate of $16 per day during the period of time when Starlink replacement head units were on backorder. Subaru continues to issue software updates to address ongoing product development, including a recent release and another update planned for the future. It has also agreed to extend the warranty applicable to the Starlink system from three years/36,000 miles to five years/100,000 miles. Finally, any settlement class members who incurred an out of pocket expense related to Starlink problems not covered by a voluntary recall

conducted under the supervision of the National Highway Safety Transportation Administration will have an opportunity to have up to $90 reimbursed by Subaru to cover costs associated with obtaining alternative transportation.

The settlement was negotiated extensively and at arms-length between experienced parties and counsel on both sides. It included two mediation sessions with Judge Dennis M. Cavanaugh (ret.), and its fairness was verified by class counsel through both litigation and confirmatory discovery. Granting the motion will allow the parties to proceed with the notice plan envisioned by the Settlement, which in turn will allow Settlement Class Members to begin responding to, and taking part in, the Settlement during the months leading up to a final fairness hearing. As set forth below, the proposed settlement meets the criteria for preliminary approval and, therefore, Plaintiffs' motion should be granted.

II. BACKGROUND

A. Nature of the Case

This is a putative class action brought by consumers who purchased or leased one of the Class Vehicles. *See* First Amended Complaint ("FAC") ¶ 1. All Class Vehicles came equipped with a Subaru Starlink infotainment system, which consists of a touchscreen multimedia interface in the front-center console. Among other things, Starlink is designed to provide the display for the backup camera, as

well as an interface for making telephone calls, using the GPS navigation system, and accessing radio controls. FAC ¶ 2.

Plaintiffs allege that the Starlink system is defective. FAC ¶ 5. The problems with the system manifest themselves in various ways, including the following: the backup camera freezes and/or shuts down; audio and radio functions fail; complete system lock-up/error message is displayed on the infotainment system; the display shuts off even though functions of the infotainment system remain working; the radio will not shut off or turn down when backing up; loss of functionality of the navigation system and/or erratic glitches, i.e., navigation system providing inaccurate directions; loss of audio cue or warning sound for various safety features, including the forward collision and blindside detection functions; audio/radio functioning is erratic; and Bluetooth connectivity issues preventing mobile telephones from connecting properly and calls from being made (collectively, the "Starlink Issues"). The FAC alleges that these problems can be distracting to drivers and lead to safety issues. FAC ¶ 69. Defendants have denied those allegations and have filed a motion to dismiss. ECF No. 28.

B. Relevant Procedural History

Plaintiffs originally filed this case in the New Jersey Superior Court in Camden County on November 28, 2018. It was filed after an extensive pre-suit investigation by Plaintiffs' counsel that began in approximately April of 2018. This

investigation included, *inter alia*, speaking with and reviewing documents provided by class members, reviewing information Subaru issued publicly regarding the Starlink System, and investigating potential legal claims and defenses. After Subaru was served with the lawsuit, it removed the case to this Court pursuant to the Class Action Fairness Act on December 18. *See* ECF No. 1.

On January 3, 2019, counsel for Subaru sent a letter to the Court seeking to adjourn a previously scheduled Rule 16 conference, and to stay all discovery pending the disposition of its forthcoming motion to dismiss. *See* ECF No. 10. Magistrate Judge Schneider held conference calls with counsel on January 16 and February 15 to address Subaru's request. *See* ECF Nos. 15, 25.

On March 3, following letter briefing from the parties and oral argument, Magistrate Judge Schneider issued an opinion which denied Subaru's motion to stay, and permitted "limited and focused discovery on core issues." *Udeen v. Subaru of Am., Inc.*, No. 18-17334 (RBK/JS), 2019 U.S. Dist. LEXIS 40049, at *1-2 (D.N.J. Mar. 12, 2019). The Court noted Subaru's acknowledgment that its motion to dismiss did not seek to dismiss all of the claims asserted in the complaint, and agreed that Plaintiffs will be "prejudiced if all discovery is stayed." *Id.* at *3. Magistrate Judge Schneider required the parties to meet and confer further, and scheduled a Rule 16 conference for April 22. The parties had several meet and confer conferences subsequent to the Court's order. The April 22

conference was subsequently stayed when the parties advised the Court that they had scheduled a mediation.[1] ECF No. 35.

On January 31, 2019, Plaintiffs filed the operative FAC. *See* ECF No. 24. Subaru filed a motion to dismiss on February 28. *See* ECF No. 28. Plaintiffs filed their motion to dismiss opposition brief on March 18. *See* ECF No. 32. Among other points, Plaintiffs' brief identified four independent grounds which gave rise to a disclosure duty by Subaru, and explained how several recent cases from this Court supported Plaintiffs' allegations that Subaru had knowledge of the defect. Subaru's motion to dismiss was fully briefed and *sub judice* when the parties went to mediation and ultimately resolved the case. On May 30, after conferring with Magistrate Judge Schneider and advising him of the settlement, the Court issued a scheduling order which required confirmatory discovery to be completed by July 31. *See* ECF No. 38.

III. THE MEDIATION SESSIONS WITH JUDGE CAVANAUGH (RET.)

The parties participated in two mediation sessions with Judge Dennis M. Cavanaugh, a former judge of this Court who is presently counsel at the law firm

[1] On January 30, Judge Schneider issued an order appointing Benjamin F. Johns and Andrew W. Ferich of Chimicles Schwartz Kriner & Donaldson-Smith LLP, Kevin P. Roddy of Wilentz, Goldman & Spitzer, PA, and Daniel R. Lapinski now of Motley Rice LLC as interim co-lead counsel for Plaintiffs and the putative class. *See* ECF No. 23.

of McElroy, Deutsch, Mulvaney & Carpenter, LLP. These all-day mediation sessions occurred in Newark, New Jersey on May 6 and May 14. Prior to these mediations, the parties participated in an in-person meeting on April 30 where they discussed the strengths and weaknesses of their respective positions, Subaru's responses to early complaints from consumers about issues with the Starlink System, Subaru's warranty claims data and other records, and the potential framework for a class-wide resolution of the case.

At the first mediation session, the parties built upon their preliminary discussions at their April 30 meeting and, by the end of the day, had made significant progress (with the assistance of Judge Cavanaugh) towards reaching a settlement framework. Thereafter, the parties reached agreement on all material terms of the settlement. By the end of the second full day of mediation, the parties had reached agreement on all material terms of the settlement. And at the end of the process, the parties reached agreement on attorneys' fees, litigation expenses, and class representative incentive awards (again, with the substantial assistance of Judge Cavanaugh).

The settlement's terms have since been verified as fair, reasonable, and adequate by Plaintiffs' Counsel in confirmatory discovery. Specifically, Subaru has produced 6,380 pages of documents in response to Plaintiffs' discovery requests. Among other things, these documents consisted of vehicle service and warranty

history for each of the named Plaintiffs; Technical Service Bulletins; owners' manuals and warranty manuals for each of the Settlement Class Vehicles; warranty claims data for the Settlement Class Vehicles; and documents identifying Defendants' internal investigation, analysis, and conclusions.

In addition to reviewing these materials and speaking with their clients and several putative class members, Plaintiffs' counsel also took a FED. R. CIV. P. 30(b)(6) deposition of John Gray, Field Quality Assurance Manager at Subaru of America, on July 12. The substance of Mr. Gray's deposition verified that the terms of the settlement are fair, reasonable and adequate to the class.

VI. SUMMARY OF SETTLEMENT TERMS

The proposed settlement has five principle features, which are summarized below.

First, Subaru has issued several additional software updates that have significantly improved the performance of the Starlink System in Class Vehicles. The most recent update was released this summer and another update is planned for later this year. Subaru has represented – and Plaintiffs' have verified – that these updates address and largely fix the Starlink Issues which led to the filing of this lawsuit. Gray Dep. 49:18-19 (describing new version released on June 25, 2019); 51:7-52:9, 64:19-22 (discussing how first recall fixed the backup camera problem with the 2017 Impreza and how claims data verifies its effectiveness);

76:18-21 (describing various updates effective for various problems); 151:10-13 (Subaru not aware of anyone who is still experiencing problems and has been verified to have gotten the most recent update).

This lawsuit and the settlement have the additional effect of increasing awareness among class members of the latest software updates since Subaru typically does not notify owners when a new version is released. *See* Gray Depo. 107:10-24. The robust class notice in this case will clearly advise class members how to determine which software version is updated on their vehicle, whether a more recent update is available and, if so, how to obtain it.

Second, Subaru has agreed to extend its standard three year / 36,000 mile warranty to five years / 100,000 miles. This significant enhancement to the warranty ensures that Class Members will be protected if they have additional issues with Starlink in the future, in the unlikely event that the various updates do not cure all of the Starlink Issues. This warranty extension will be limited to issues associated with the Starlink System, and will not address any other feature or component of the Class Vehicles. The parties have estimated that the value of this Starlink-specific extended warranty is $5 per car. Significantly, class members who previously paid for an extended warranty will be eligible for a refund in this amount as part of the settlement. *See* Gray Depo. 160:19-21 (approximately

278,280 class members bought extended warranties). The total estimated value of this relief to the class is approximately $2.45 million.

Third, Subaru has agreed to compensate those Class Members who brought their vehicles into an authorized dealer or retailer more than once for a Qualifying Repair of the Starlink system,[2] in accordance with the schedule below:

Number of Qualifying Complaints	Cash Payment Amount
2	$150.00
3 or More	$300.00

Class Members who qualify for either of the two cash categories above alternatively may select either of these non-cash option instead: (a) two coupons valued at $100 each, which can be used for service or merchandise from an authorized Subaru dealer or (b) one coupon valued at $400 which can be used towards the purchase or lease of any new Subaru vehicle. These coupons can be used for, among other things, purchasing Subaru merchandise, vehicle service, purchasing parts and accessories. Gray Dep. 162:12-163:6. Class Members will be eligible for relief under this category if they visited a Subaru retailer or dealer

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[2] Qualifying Repair is defined in the SA as any type of repair, replacement, diagnosis, or inspection of the Settlement Class Vehicle performed by an Authorized Subaru Dealer to address a Qualifying Starlink Malfunction. Visits to a Subaru dealer or retailer for an update to the Starlink system as required by NHTSA Campaign Numbers 17V132000 or 18V935000 do not qualify as a Qualifying Repair because they were made pursuant to NHTSA recalls.

complaining about a Starlink system problem, regardless of whether service was actually performed. The parties estimate that the value of this component of the settlement is approximately $1.75 million.

Fourth, Subaru has also agreed to compensate Class Members for the period of time, between July 1, 2018 and January 31, 2019, during which time there was a shortage of Starlink head replacement units (the "Backorder Period"). Specifically, anyone who (a) owned or leased a Class Vehicle, (b) presented their vehicle to an authorized Subaru dealer during the Backorder Period with an inoperable head unit, (c) an order was placed for a new unit, and (d) the consumer waited at least one day for the replacement head unit, will be eligible to be paid $16 for each day that they waited for a replacement. It is estimated that approximately 9,590 class members fall into this category. *See* Gray Dep. 136:12-16. Given the estimated number of days that this group collectively waited for a replacement head unit, the estimated value of this component of the settlement is $2.08 million.

Fifth, subject to reasonable proof requirements, Subaru has also agreed to reimburse Class Members for certain unreimbursed out-of-pocket expenses incurred as a result of the Starlink Issues. In particular, if a Class Member paid for a rental car, for a taxi, and/or for a ridesharing service (e.g., Uber or Lyft) because their Class Vehicle was unavailable due to a Starlink issue, they will be eligible to be refunded up to $45 per day, up to a maximum amount of $90.

The various components of relief above are not disjunctive; Class Members can be eligible to elect to receive some or all of these categories depending on their circumstances. The Settlement Agreement also gives Subaru the right to augment the settlement at its discretion to provide further benefits to Settlement Class Members, and to provide goodwill benefits to Settlement Class Members as it sees fit.

In addition to the foregoing, Subaru has agreed to pay – subject to Court approval – reasonable attorneys' fees and litigation expenses in the amount of $1.5 million, and incentive awards to each of the seven class representatives of $3,500 each (i.e., $24,500 total). These amounts will not decrease the relief going to the class; they will be paid separately by Subaru in addition to the settlement consideration described above. Notably, these payments were negotiated only after the parties had agreed upon all material terms of the settlement, and were reached after extensive adversarial negotiations at the second mediation with Judge Cavanaugh. All told, as noted above, the parties estimate that the value of the settlement benefits to the Class will exceed $6,250,000.

V. THE CLASS NOTICE PLAN

The Settlement Agreement contains a comprehensive notice plan, to be paid for by Subaru and administered by JND Legal Administration Co. Settlement Class Members will be notified by short-form postcard notice sent to them via direct mail.

Within 60 days after entry of the Preliminary Approval Order the Settlement Administrator shall cause to be mailed, by first class mail to the current or last known addresses of all reasonably identifiable Settlement Class Members, individual short-form notice, which shall direct Settlement Class Members to the settlement website and to the long-form notice, substantially in the form as well as the Claim Form and Request for Exclusion Form.

Subaru will identify Class Members through its records and verify and update the information via R.L. Polk – a third party that maintains and collects the names and addresses of automobile owners – and will send the postcard notice to them by first-class mail. Prior to mailing the Class Notice, an address search through the United States Postal Service's National Change of Address database will be conducted to update the address information for Settlement Class Vehicle owners and lessees. For each individual Class Notice that is returned as undeliverable, Settlement Administrator shall re-mail the Class Notice where a forwarding address has been provided. For the remaining undeliverable notice packets where no forwarding address is provided, Settlement Administrator shall perform an advanced address search (e.g., a skip trace) and re-mail any undeliverable notices to the extent any new and current addresses are located. In addition, Subaru will set up a dedicated website that will include the postcard notice, long form notice, claim form, settlement agreement, and other relevant

documents. Class Counsel will also provide a link to the settlement website on their respective law firm websites. As noted above and in the Settlement Agreement, Subaru has agreed to pay the costs of notice and other settlement administration costs.

Notice will be sent to class members within 60 days after entry of the Court's Order preliminarily approving this proposed settlement. *See* SA at § VIII(B). For those Settlement Class Members seeking any financial compensation, those Settlement Class Members must submit a Claim Form within ninety (90) days of the Notice Date. Subaru has also agreed to provide notice of the settlement to the appropriate state and federal officials, as required by the Class Action Fairness Act, 28 U.S.C. § 1715.

The Settlement Agreement clearly delineates the procedure in the event that Subaru rejects a claim for any form of financial compensation provided for as part of the settlement. *See* SA at § VII. Subaru will provide notice of its decision to any such claimant, and provide them with an opportunity to cure any defect. Should the claim be rejected in whole or in part, Subaru will advise the claimants of the right to a Second Review. The claimant may then accept Subaru's decision, attempt to cure the deficiency, or initiate a second level review. This Second Review will be made by an employee of the Settlement Administrator who is different from the employee who made the initial determination. If that does not resolve the dispute,

claimants may submit their claims to the Better Business Bureau, whose findings will be final and binding on both parties. Defendants will bear the costs associated with the Second Review, as well as any cost charged by the BBB.

The Settlement Agreement also accounts for any Settlement Class Members who wish to object or exclude themselves from the settlement. Any such request must be made online or postmarked within 45 days after the mailing of notice. The Settlement Agreement requires that any objection or opt-out request contain sufficient information to reasonably demonstrate that the submission is made by a person who actually has standing as a Settlement Class Member.

VI. ARGUMENT

A. The 2018 Amendments to FED. R. CIV. P. 23(e)

The recent amendments to Rule 23 of the Federal Rules of Civil Procedure revised the preliminary approval process for class action settlements. Under the Rule as amended, the Court must determine whether "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." *Du v. Blackford*, No. 17-cv-194, 2018 U.S. Dist. LEXIS 211796, at *21 (D. Del. Dec. 17, 2018) (quoting FED. R. CIV. P. 23(e)(1)(B)). In other words, the question before the Court now is "whether, following notice to the class and a final fairness hearing, the Court will likely be able to: (1) approve the settlement

proposal under Rule 23(e)(2); and (2) certify the proposed class." *Swinton v. SquareTrade, Inc.,* No. 4:18-CV-00144-SMR-SBJ, 2019 U.S. Dist. LEXIS 25458, at *14 (S.D. Iowa Feb. 14, 2019); *accord In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. Jan. 28, 2019). As discussed below, Plaintiffs respectfully submit that all of the requirements for preliminary approval are met here.

B. The Settlement Is Fair, Reasonable, and Adequate

The Third Circuit has, "on several occasions, articulated a policy preference favoring voluntary settlement in class actions." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 378 (3d Cir. 2013). Rule 23 continues to require that a class action settlement be "fair, reasonable, and adequate." *See* FED. R. CIV. P. 23(e)(2). For purposes of determining whether a proposed settlement meets this criteria and should be approved, amended Rule 23(e)(2) directs the Court to consider whether "the class representatives and class counsel have adequately represented the class"; "the proposal was negotiated at arm's length"; "the relief provided for the class is adequate"; and "the proposal treats class members equitably relative to each other." *See id.*

The Advisory Committee Notes make clear that these factors do not displace the "lists of factors" courts have traditionally applied to assess proposed class settlements. Instead, the enumerated factors under Rule 23(e)(2) "focus the court

and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." FED. R. CIV. P. 23(e)(2) (advisory committee's note to 2018 amendment).

Courts in the Third Circuit evaluate whether a settlement is "fair, reasonable, and adequate" using the applicable *Girsh* approval factors:

> (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). Thus, the "Court first considers the Rules 23(e)(2) factors, and then considers additional [*Girsh*] factors not otherwise addressed by the Rule 23(e)(2) factors." *In re Payment Card Interchange Fee*, 330 F.R.D. at 29. Application of both the Rule 23(e)(2) and traditional factors demonstrates that the settlement here is fair, reasonable, and adequate and is in the best interests of the class.

1. The Proposed Settlement Is the Product of Arms-Length Negotiations Among Experienced Counsel.

Under Rule 23(e)(2)(A) and (B), the Court considers whether the class representatives and class counsel adequately represented the class and whether the settlement proposal was negotiated at arm's length. *See In re Payment Card*

Interchange Fee, 330 F.R.D. at 29 (quoting FED. R. CIV. P. 23 advisory committee's note to 2018 amendment) ("Paragraphs (A) and (B) constitute the 'procedural' analysis factors, and examine 'the conduct of the litigation and of the negotiations leading up to the proposed settlement.'"); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) (citation omitted) ("The third *Girsh* factor captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating."). In this case, both Plaintiffs and their counsel are adequate representatives for the settlement class. This Court previously appointed Plaintiffs' counsel interim co-lead counsel (ECF No. 23), and all of the named Plaintiffs have actively participated in both the litigation and settlement proceedings of this case.

A presumption of fairness is available when the settlement was negotiated by experienced and informed counsel assisted by a respected mediator. *See, e.g.*, *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 435 (3d Cir. 2016). This approach is consistent with the principle that "settlement of litigation is especially favored by courts in the class action setting." *In re Insurance Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013). "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.*

Alliance MMA, Inc., No. 17-2583 (RBK/AMD), 2018 U.S. Dist. LEXIS 108132, at *6 (D.N.J. June 28, 2018) (quoting *Alves v. Main*, No. 01-789 (DMC), 2012 U.S. Dist. LEXIS 171773, at *73 (D.N.J. Dec. 4, 2012)).

This presumption should apply here given that experienced counsel on both sides of the deal endorse the settlement, and it followed two all-day mediation sessions with a respected neutral party. *See* FED. R. CIV. P. 23(e)(2) advisory committee's note to 2018 amendment (advising that "the involvement of a neutral . . . mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Demmick v. Cellco P'ship*, No. 06-2163 (JLL), 2015 U.S. Dist. LEXIS 192723, at *19-20 (D.N.J. Apr. 20, 2015) ("[T]he use of a mediator with respect to the present settlement is persuasive evidence that the negotiations were hard-fought, arms-length affairs.").

To negotiate a fair and reasonable settlement, class counsel must be "aware of the strengths and weaknesses of their case." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 435. The parties in this case reached their settlement after Plaintiffs had gained a thorough understanding of the relevant law through complex motion practice and of the relevant facts through review and analysis of documents produced by Subaru, as well as a designee deposition. Class Counsel here conducted sufficient informal factual discovery and also had a "grasp of the

legal hurdles that [Plaintiffs] would need to clear in order to succeed on their" claims. *Id.* at 436. These factors support granting the settlement.

2. The Settlement Treats All Class Members Fairly.

"A district court's 'principal obligation' in approving a plan of allocation 'is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 326 (3d Cir. 2011) (quoting *Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir. 1983)). The proposed settlement categories and terms satisfy this standard. The settlement treats all class members fairly and equally in relation to the strengths of their claims. Each is invited to submit a Claim Form, and the settlement establishes a uniform, objective method for distributing awards that accounts for structural differences relating to claim value.

For purposes of setting recovery amounts, the Plan of Allocation makes common-sense distinctions between: (1) class members who waited for a replacement head unit during the Backorder Period and those who did not; (2) those who went to a Subaru dealer multiple times for Starlink problems; and (3) those who incurred out of pocket expenses. The Plan of Allocation fairly protects the interests of all parties in targeting relief to the most injured class members, while at the same time providing other relief (warranty extension and software update) to all owners and lessees of Class Vehicles. In sum, the settlement ensures

the class members will be treated equitably relative to each other and should be approved as fair, reasonable, and adequate.

3. The Relief Under the Proposed Settlement Is Adequate.

In determining whether the class-wide relief is adequate under Rule 23(e)(2)(C), the Court considers "the costs, risks, and delay of trial and appeal"; "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims"; "the terms of any proposed award of attorney's fees, including timing of payment"; and "any agreement required to be identified under Rule 23(e)(3)."[3]

First, the costs, risks, and delay of trial and appeal factor subsumes several *Girsh* factors, "including (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial." *In re Payment Card Interchange Fee*, 330 F.R.D. at 36. The complexity and expense of this case in light of the risks Plaintiffs faced in maintaining this litigation weighs heavily in favor of approval.

[3] There are no side agreements to disclose under Rule 23(e)(3). Moreover, this Court has observed that at preliminary approval, consideration of the reaction of class members is premature. *See Shapiro v. Alliance MMA, Inc.*, No. 17-2583 (RBK/AMD), 2018 U.S. Dist. LEXIS 108132, at *8 (D.N.J. June 28, 2018).

Courts have recognized that "[a]pproval of a class settlement is appropriate when 'there are significant barriers plaintiffs must overcome in making their case.'" *Mendoza v. Hyundai Motor Co.,* No. 15-cv-01685-BLF, 2017 U.S. Dist. LEXIS 9129, at *15 (N.D. Cal. Jan. 23, 2017) (citation omitted). Likewise, it is "well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *In re: Cathode Ray Tube (CRT) Antitrust Litig.,* No. MDL No. 1917, 2016 U.S. Dist. LEXIS 88665, at *184 (N.D. Cal. July 7, 2016) (internal quotation marks and citation omitted).

In this case, Subaru has vigorously denied liability from the outset. Plaintiffs would likely have faced considerable risks obtaining class certification or prevailing on summary judgment. *See, e.g., Neale v. Volvo Cars of N. Am., LLC*, Civil Action No. 10-4407 (JLL), 2017 U.S. Dist. LEXIS 201309, at *25 (D.N.J. Dec. 6, 2017) (denying, without prejudice, a motion for class certification in an alleged automobile defect case); *Haag v. Hyundai Motor Am.*, 330 F.R.D. 127, 133 (W.D.N.Y. 2019) (finding that common issues did not predominate in an automobile defect class action, as "there is no basis for the Court to infer that a reasonable consumer—let alone an entire class of consumers—would have demanded a lower purchase or lease price if they were informed that they might have to perform [auto part] replacement and maintenance . . . earlier than they

otherwise expected."); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 326 (C.D. Cal. 2016 ("The settlement the parties have reached is even more compelling given the substantial litigation risks in this case."). *See also, Coba v. Ford Motor Co.,* No. 17-2933, 2019 U.S. App. LEXIS 22315, at *15 (3d Cir. July 26, 2019) ("…a warranty that limits its coverage to defects in "materials" and "workmanship" does not, without more, apply to defects in 'design.'").

To prevail, Plaintiffs would have had to withstand Subaru's pending motion to dismiss, obtain class certification, likely defend a certification order on appeal under Rule 23(f), survive inevitable motions for decertification and for summary judgment, and prevail at trial and any subsequent appeal. By comparison, the proposed settlement provides certain and relatively timely relief to the consumers comprising the class. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) ("difficulties in proving the case" favored settlement approval); *Aguirre v. DirecTV, LLC*, No. CV 16-06836 SJO (JPRx), 2017 U.S. Dist. LEXIS 221840, at *44 (C.D. Cal. Oct. 6, 2017) (risk posed by summary judgment and continued litigation supported approval).

In contrast to the uncertainty and delays attendant to continued litigation, this settlement "provides a significant, easy-to-obtain benefit to class members" in the form of a cash payment to any Class Vehicle purchaser or lessee with a valid claim as well as benefits including a warranty extension to class members. *In re*

Haier Freezer Consumer Litig., No. 5:11-CV-02911-EJD, 2013 WL 2237890, at *4 (N.D. Cal. May 21, 2013); *see also Ebarle v. Lifelock, Inc.*, No. 15-CV-00258-HSG, 2016 WL 234364, at *8 (N.D. Cal. Jan. 20, 2016) (settlement that provides immediate benefits to class members has value compared to the risk and uncertainty of continued litigation).

Second, as discussed above, the plan's proposed method of distributing relief to the class is not unduly burdensome, yet deters fraudulent claims. *See* FED. R. CIV. P. 23(e)(2)(C)(ii).

Third, the amount of Plaintiffs' attorneys' fees and litigation expenses are reasonable. *See* FED. R. CIV. P. 23(e)(2)(C)(iii). The proposed order submitted herewith provides for Plaintiffs to file their motion for attorneys' fees and expenses before the expiration of the objection period.

Fourth, the ability of Subaru to withstand a greater judgment is neutral, at most, in this case. This *Girsh* factor is "most 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.

Fifth, the settlement is in the range of reasonableness in light of the best possible recovery and all the attendant risks of continued litigation. *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 440 (quoting Warfarin, 391 F.3d at 538) ("In evaluating the eighth and ninth *Girsh* factors, we ask 'whether the

settlement represents a good value for a weak case or a poor value for a strong case.'"). Thus, the eighth and ninth *Girsh* factors weigh in favor of approval.

Considering Rule 23(e) factors and the additional *Girsh* factors, the proposed settlement is fair, adequate, and reasonable.

C. The Court Will Be Able to Certify the Class For Purposes of Settlement

Plaintiffs seek to certify a class comprised of:

> All residents of the continental United States or Hawaii or Alaska who currently own or lease, or previously owned or leased, a 2017-2018 Impreza, 2018 Outback, 2018 Forester, 2018 Legacy, 2018 Crosstrek, or 2018 BRZ originally purchased or leased in the continental United States, including Alaska or Hawaii. Excluded from the Settlement Class are SOA, SBR, SOA's employees, SBR's employees, employees of SOA's and/or SBR's affiliated companies, SOA's and SBR's officers and directors, dealers that currently own Settlement Class Vehicles, all entities claiming to be subrogated to the rights of Settlement Class Members, issuers of extended vehicle warranties, and any Judge to whom the Litigation is assigned. *See* SA at § III

When a class has not been certified before settlement, the Court considers whether "it likely will be able, after the final hearing, to certify the class." FED. R. CIV. P. 23(e)(1) advisory committee's note to 2018 amendment; *see In re Payment Card Interchange Fee*, 330 F.R.D. at 50. As discussed below, the Court will likely be able to certify the proposed settlement class in connection with final approval.

1. The Class Members Are Too Numerous to Be Joined.

For certification of a class to be appropriate, its members must be so numerous that their joinder would be "impracticable." FED. R. CIV. P. 23(a)(1). There are approximately 514,000 Class Vehicles in the United States. Gray Dep. 45:14. Numerosity, therefore, is readily satisfied. *See, e.g.*, *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012) (noting that classes exceeding 40 are sufficiently numerous).

2. There Are Common Questions of Law and Fact.

Rule 23 next requires common questions of law or fact. FED. R. CIV. P. 23(a)(2). "Meeting this requirement is easy enough," *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 427, as commonality is satisfied if "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Id.* at 426-27 (quoting *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013)). The common questions in this case include, *inter alia*, whether the Subaru Starlink system is defective, whether Subaru had knowledge of the alleged defect (and if so, when), and whether Subaru had a legal duty to disclose the alleged defect. These questions are common to the class, capable of class-wide resolution, and "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 427 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Thus, the commonality requirement is met. *See Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146

(CCC), 2013 WL 1192479, at *4 (D.N.J. Mar. 22, 2013) ("Several common questions of law and fact exist in this case, including whether the transmissions in the Class Vehicles suffered from a design defect, whether Volvo had a duty to disclose the alleged defect, whether the warranty limitations on Class Vehicles are unconscionable or otherwise unenforceable, and whether Plaintiffs have actionable claims.").

3. Plaintiffs' Claims Are Typical of the Class.

"Typicality ensures the interests of the class and the class representatives are aligned 'so that the latter will work to benefit the entire class through the pursuit of their own goals.'" *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182-83 (3d Cir. 2001) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)). Typicality does not require that every class member "share identical claims," *id.*, but only that plaintiffs' and "class members' claims arise from the same course of events and each class member makes similar legal arguments to prove the defendant's liability," *Atis v. Freedom Mortg. Corp.*, No. 15-03424 (RBK/JS), 2018 U.S. Dist. LEXIS 189586, at *20 (D.N.J. Nov. 6, 2018).

In this case, Plaintiffs and class members have the same types of claims stemming from the same alleged violations related to the same allegedly defective product. Typicality, therefore, is established. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d at 428 (holding typicality met where plaintiffs "seek

recovery under the same legal theories for the same wrongful conduct as the [classes] they represent").

4. Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interests of the Class.

Two questions are relevant to adequacy of representation under Rule 23(a)(4): "(1) whether Plaintiffs' counsel is qualified, experienced, and able to conduct the litigation; and (2) whether any conflicts of interest exist between the named parties and the class they seek to represent." *Atis*, 2018 U.S. Dist. LEXIS 189586, at *21 (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 312 (3d Cir. 1998)). Plaintiffs and their counsel do not have any conflicts with class members and have vigorously prosecuted this case.

a. Class Counsel Are Well Qualified.

Rule 23(g) sets forth the criteria for evaluating the adequacy of Plaintiffs' counsel:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class . . . .

FED. R. CIV. P. 23(g)(1)(A). Interim Class Counsel are well qualified to serve as Class Counsel. Collectively, they have decades of experience successfully

representing plaintiffs and classes in complex class action litigation, including in consumer product defect cases. *See, e.g., Henderson v. Volvo Cars of N. Am., LLC,* Civil Action No. 09-cv-4146(DMC)(JAD), 2010 U.S. Dist. LEXIS 151733, at *4 (D.N.J. Nov. 1, 2010) (appointing the Chimicles law firm as interim lead counsel); *In re Nexus 6P Prods. Liab. Litig.,* No. 5:17-cv-02185-BLF, 2019 U.S. Dist. LEXIS 106192, at *5 (N.D. Cal. May 3, 2019) (same, and noting that the firm has "significant expertise in prosecuting consumer class actions, [and] ha[s] committed the necessary resources to represent the Settlement Class . . . ."); *Longo v. Am. Honda Motor Co.*, Case No. 08-0475 (D. Md.) (appointing Wilentz firm as interim co-lead counsel) *In re Ford Explorer Cases*, Sacramento County Superior Court, JCCP Nos. 4266 & 4270 (appointing Wilentz firm as interim co-lead counsel). And, as noted above, the Court previously appointed these attorneys to interim co-lead counsel positions in this case. Adequacy is thus satisfied.

b. Plaintiffs Have No Conflicts of Interest and Have Diligently Pursued the Action on Behalf of the Other Class Members.

"A named plaintiff is 'adequate' if his interests do not conflict with those of the class." *Shapiro*, 2018 U.S. Dist. LEXIS 108132, at *14-15. Plaintiffs have agreed to serve in a representative capacity, communicated diligently with their attorneys, gathered relevant documents and produced to their attorneys, and helped prepare the allegations in the Complaint. Plaintiffs will continue to act in the best

interests of the other class members; there are no conflicts between Plaintiffs and the class. *See, e.g.*, *id.* (holding adequacy requirement met where the plaintiff had no interests antagonistic to the class).

5. The Requirements of Rule 23(b)(3) Are Met.

As to the predominance and superiority requirements, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems…for the proposal is that there will be no trial." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (explaining that Rule 23(b)(3)(D) drops out of the analysis). Indeed, the Third Circuit has noted that it is "more inclined to find the predominance test met in the settlement." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 434 (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 304 n.29 (3d Cir. 2011)). As set forth below, the predominance and superiority requirements are met here.

a. Common Issues of Law and Fact Predominate for Settlement Purposes.

The predominance inquiry tests the cohesion of the class, "ask[ing] whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). Predominance is ordinarily satisfied, for settlement purposes, when the claims arise

out of the defendant's common conduct. *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 299-300 (3d Cir. 2011) ("[T]he focus is on whether the defendant's conduct was common as to all of the class members."); *Yaeger v. Subaru of Am., Inc.*, No. 1:14-cv-4490 (JBS-KMW), 2016 U.S. Dist. LEXIS 117193, at *19-20 (D.N.J. Aug. 31, 2016) (predominance satisfied for purposes of settlement where Subaru vehicles had an allegedly common, undisclosed design defect); *Mendez v. Avis Budget Grp., Inc.*, No. 11-6537 (JLL), 2017 U.S. Dist. LEXIS 190730 (D.N.J. Nov. 17, 2017) ("[I]n cases where it is alleged that the defendant made similar misrepresentations, non-disclosures, or engaged in a common course of conduct, courts have found that said conduct satisfies the commonality and predominance requirements.").

All class members purchased or leased Class Vehicles containing an allegedly common defect with the Starlink system, which Subaru is alleged to have fraudulently concealed. Common questions of law therefore predominate for settlement purposes. Fraudulent concealment, a cause of action available to all class members, itself "includes a similar set of elements: (1) misrepresentation or omission of a material fact, (2) a duty to disclose, (3) intent to induce reliance and/or defraud, (4) some form of reliance, and (5) resulting damages." *See, e.g.*, *In re Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg. & Sales Practice Litig.*, No. 1:16MD2743 (AJT/TRJ), 2017 WL 2911681, at *7 (E.D. Va.

July 7, 2017); *see also Sullivan*, 667 F.3d at 303 (internal citation and quotations omitted) (holding "state law variations are largely irrelevant to certification of a settlement class"); *In re NFL Players' Concussion Injury Litig.*, 307 F.R.D. 351, 380 (E.D. Pa. 2015), *aff'd* 821 F.3d 410, (holding predominance met for fraudulent concealment claims as defendant's "knowledge and conduct" was "[c]entral to this case").

Further, common questions of fact abound with respect to Plaintiffs' warranty, unfair trade practices, and consumer protection counts: whether the vehicles are defective; whether Subaru should have disclosed the existence of the alleged defect, and if so, when and where; whether the allegedly concealed information was material to a reasonable consumer; and whether class members sustained harm as a result of Subaru's conduct. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 314 (3d Cir. 1998) (noting that cases involving "a common scheme to defraud" readily meet predominance test); *Yaeger*, 2016 U.S. Dist. LEXIS 117193, at *19-20 (noting that whether a defect exists, whether it is covered by warranty, and what compensation class members are due are common questions that predominate); *In re Philips/Magnavox TV Litig.*, No. 09-3072 (CCC), 2012 U.S. Dist. LEXIS 67287 (D.N.J. May 14, 2012) ("Class Members share common questions of law and fact, such as whether Philips knowingly manufactured and sold defective televisions

without informing consumers and when Philips obtained actual knowledge of the alleged defect."); *Alin v. Honda Motor Co.*, No. 08-4825 (KSH) (PS), 2012 U.S. Dist. LEXIS 188223, at *12 (D.N.J. Apr. 12, 2012) (superiority satisfied where "class vehicles allegedly suffer from defects that cause their air conditioning systems to break down, although there are differences as to how the breakdowns occur.").

In contrast, the individual questions mostly relate to damages and are less important; the "focus of the predominance inquiry is on liability, not damages." *Pollak v. Portfolio Recovery Assocs., LLC*, 285 F. Supp. 3d 812, 845 (D.N.J. 2018) (quoting *Smith v. Suprema Specialties, Inc.*, No. 02-168, 2007 U.S. Dist. LEXIS 30001, at *30 (D.N.J. 2007)). Thus, common questions predominate for settlement purposes.

b. A Class Action Is a Superior Means of Resolving This Controversy.

The Rule 23(b)(3) superiority inquiry "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 434 (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004)).

Here, given the relatively low amount of the individual claims, class members are unlikely to bring individual lawsuits against Subaru. Furthermore,

because the class members number in the hundreds of thousands, class-wide resolution of their claims in a single action is efficient. *See Atis*, 2018 U.S. Dist. LEXIS 189586, at *22-23 (finding superiority satisfied where "individual claims of class members are relatively small in monetary value," management issues were "less likely" given common questions that predominated, and there were no other litigations concerning the controversy); *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 435 (citation omitted) (superiority satisfied where "the [s]ettlement avoids thousands of duplicative lawsuits and enables fast processing of a multitude of claims").

For these reasons, consistent with Rule 23(e)(1)(B), the Court will likely be able to certify the settlement class in this case.

D. The Proposed Class Notice and Plan for Dissemination Are Reasonable and Should Be Approved.

Rule 23(e)(1)(B) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." In an action certified under Rule 23(b)(3), the Court must "direct to class members 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). "Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting

out of the class." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 435 (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013)).

The notices presented here fully comply with Rule 23 and the due process mandates. Using plain language, the proposed notices provide all information required under Rule 23(c)(2)(B). As discussed above, the proposed notice program provides for direct mail postcard notice, with skip traces to be conducted and remailing to be attempted for any undeliverable notices returned. The settlement website will be a useful resource for class members—it will post the Claim Form, the long-form notice, and key pleadings in the case, including the attorneys' fee application once it is filed. The Settlement Administrator will also establish a toll-free number for class members to call with questions. This plan provides the best notice practicable under the circumstances. *See In re Ins. Broker Antitrust Litig.*, 297 F.R.D. 136, 152 (D.N.J. 2013) (finding notice via postcards to be sufficient).

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) grant preliminary approval; (2) certify the settlement class pursuant to FED. R. CIV. P. 23(a) and (b)(3); (3) direct notice to the settlement class; and (4) set a schedule for settlement proceedings, including the final fairness hearing.

Dated: August 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed with the Clerk using the Court's ECF system and therefore served electronically on all registered counsel of record on August 30, 2019.

/s/ *Benjamin F. Johns*
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