IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

SHAMELL SAMUEL-BASSETT on behalf of herself and all others similarly situated Plaintiff	:	JANUARY TERM, 2001
vs.	:	
KIA MOTORS AMERICA, INC. Defendant	:	NO. 2199

OPINION

Following a jury trial, judgment was entered on behalf of 9,402 class members and against defendant in a total amount of $5,641,200.00. The jury found that the brakes on the Kia Sephia model years 1995 through 2001, needed replacement approximately every 5,000 miles, well below the much higher American standard and violated the express warranty of 36 months or 36,000 miles. The Superior Court affirmed the verdict upon the opinion of the trial court. By Memorandum Opinion dated October 24, 2007, the Superior Court affirmed the class action verdict and remanded "for the filing supplemental Rule 1925(a) opinion with regard to the appeal of the counsel fee award." [1]

On June 6, 2005, counsel for the prevailing party, plaintiff class, timely filed a Petition for award of attorneys' fees and expenses pursuant to 15 U.S.C. §2310(d)(2) seeking attorney's fees in the amount of $4,635,532.00 and costs and expenses in the

[1] Superior Court Memorandum Opinion of October 24, 2007.

amount of $275,153.00. On January 23, 2006, the Court awarded plaintiffs' counsel fees in the amount of $4,125,000.00 and costs and expenses in the amount of $267,513.00.

Together with that petition, counsel filed affidavits from trial counsel, summary spread sheets identifying the work performed by each attorney on the case, the category of work, the amount of time spent on each category and the hourly rates charged. These spread sheets were supported by detailed time records which were at all times available. Incomplete time records produced by defense counsel demonstrated that defense counsel has expended over 7,100 hours in defending the case, and partners had billed at rates ranging from $560.00 to $595.00 higher than the rates requested by plaintiff's counsel.

An evidentiary hearing was held on September 13, 2005, at which time testimony was taken and additional evidence in the form of affidavits were received. Defendant relies upon the testimony of John Marquess to rebut plaintiff's proof. By Order dated January 23, 2006, the Court reduced the requested award of $4,635,532.00 to $4,125,000.00. The Court reduced the award by deducting time attributable to meetings in February in Tampa with in-house counsel, Mr. Waymie and Mr. McClure. The Court eliminated that time because it was an attempt to negotiate a national settlement. Also deducted were time and expenses associated with mediation in California in August, 2005. The Court also eliminated hours spent preparing and filing the fee petition as a ministerial act.

Plaintiffs' counsel were awarded a lodestar or base fee in the amount of $3,000,000.00 and a 1.375 multiplier was applied to determine the award. Expenses as documented were awarded.

To contest the fee petition the defense relied exclusively on the affidavit and testimony of Mr. Marquess, a self-proclaimed "fee auditor." Mr. Marquess is paid to provide insurance companies and other large purchasers of legal services a justification not to pay legal bills by declaring that his idiosyncratic standards for billing explanation detail have not been met. No part of Mr. Marquess's business includes any participation, control or even monitoring of litigation itself. He claims no expertise in reducing costs by the efficient management of litigation and makes no cost-saving suggestions to his client or litigation counsel. Mr. Marquess's only function is to criticize the bills of attorneys who have actually faced a Judge and jury at trial. Apparently Mr. Marquess makes no effort to ascertain a factual basis grounded in the actual litigation for recommending that earned attorney fees not be paid. He has no pretension to knowledge or experience in what counsel for a plaintiff class needs to do to prepare and try a major class action case to verdict. Mr. Marquess does not claim expertise on the staffing requirements of a plaintiff's firm in a class action.[2]

> "Q: Are you qualified, sir, to determine how many lawyers, the quality of lawyers that need to be present in order to try a class action like this?
>
> A: No."

Nonetheless, because the standard for qualifying an expert witness in Pennsylvania is unreasonably lax, requiring only a "reasonable pretension to specialized knowledge,"[3] he is qualified to provide expert opinion testimony in the work for which he is paid. Although qualified to offer "expert opinion testimony," the sincerity with which he conducts his "evaluation," the methodology or lack thereof, the factual basis on which his opinion is based, his candor, self-interest and bias are all matters for the finder

[2] N.T., 9/13/05, p. 200, lines 18-22.
[3] See *Miller v. Brass Rail Tavern*, 664 A.2d 525, 541 Pa. 474 (1995).

of fact to consider in judging credibility and determining whether to accept all or some or none of his testimony.

The success of his business depends upon pretending that paperwork rather than legal work is the proper criteria for judging legal fees. In this case his testimony revealed he made no effort to ascertain the requirements of, or the work performed in the actual litigation he supposedly evaluated. His criticism of the fee award requested is restrictive to the point of irrelevancy:

> "Q: Your complaint is with the format of the bills or the content of the time records; is that right?
>
> A: That would be generally accurate, yes."[4]

> "Q: You don't know one way or another whether we actually expended the time that we claimed, do you?
>
> A: That's correct.
>
> Q: Sir, do you know one way or another whether the time expended by Mr. Francis, Mr. Donovan, Myself and or colleagues was reasonably necessary in order to conduct and prevail in this litigation?
>
> A: Now you've said reasonably necessary. You're talking about the necessity of the work you've done, just so I'm clear, no." [5]

Substantively, Mr. Marquess claimed that plaintiff's fee request should be reduced by 86% to $662,667.15 for a case which has been hotly litigated for 5 years, removed by the defense to Federal Court, remanded to state court on the motion of the defense, tried to verdict and whose docket entries in State Court alone consisted of 47 pages.

He claims this reduction should be made solely because he was incapable of determining the exact work performed. His inability to "determine" whether plaintiffs'

[4] N.T., 9/13/07, p.202, lines 14-17.
[5] N.T., 9/13/07. p.203, lines 6-10, 19-25.

counsel actually performed the documented legal work is the result of a biased analysis and inadequate review.

His testimony also demonstrated a cavalier disregard for legitimate expert inquiry, and a callous insouciance to candor on the witness stand. His testimony was disingenuous, evasive and ultimately self-contradictory. Although he admitted that plaintiff class needed two partner level attorneys, two associates and one paralegal to represent them at trial[6], he refused to concede that any compensation should be awarded for trial work even to that limited extent.

His explanation for refusing any fee for the two partners, two associates and a paralegal which were needed was paperwork:

"Q: So the reason your calculations allowed for zero fee for any attendance at trial is because it's not sufficiently documented as to what attorneys did, is that it?

A: Yes."[7]

He even specifically refused to concede that Mr. Donovan, lead counsel from the inception of the case should receive a fee for his trial work. To justify that "opinion," he feigned innocence and ignorance:

"Q: Mr. Donovan, based on your understanding of his participation in this case, would it be reasonable for him to sit through the whole trial?

A: I would say so."[8]

"Q: Is that included in the $366,956.55 that you think his firm, as documented, has earned?

A: No, I would add that back into that figure.

Q: Why didn't you?

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[6] N.T., 9/13/05, p. 169, lines 21-24.
[7] N.T., 9/13/05, p. 171, line 22.
[8] N.T., 9/13/05, p.176, line 25-p.177, line 5.

A: Because I don't have the answers even sitting here today as to who attended the trial and why they attended.

Q: You don't have any records of when Mr. Donovan claims to have attended trial?

A: ...sure, I do.

Q: Then why didn't you add that in? Why do you say to the Court yeah, I can do that, but you didn't do it before you took the witness stand....?

A: Because I don't know why all of these people attended and what roles they played.

Q: I'm talking about Mr. Donovan, the named partner who handled this case as you know from the orders, from virtually from the beginning in State Court, Federal Court in State Court again. I asked you whether you had an opinion, a professional opinion as to whether or not he should have been at trial and you said yes.

A: I thought you asked me if I would have expected him to be there." [9]

He did not review the trial transcript to evaluate trial time. He made no effort to determine whether the attorneys and assistants present in the courtroom had specialized knowledge of the case or the location or significance of critical documents, which may have become relevant.

This opinion that no fee should be awarded for any plaintiff's attorney at trial was reiterated to the point of absurdity:

"Q: Do you not recognize that some attorney needed to be in court throughout the trial in order to win?

A: Absolutely.

Q: But your opinion as to how much they've earned does not include any fee for that one attorney who absolutely had to be in court in order to win the case, correct?

A: Yes."[10]

[9] N.T., 9/13/05, p.177, line 6-p.178, line 18.

Mr. Marquess changed his testimony within minutes: He said:

> "We have a question about any day in which a time keeper charges over 12 hours."[11]

But reversed that opinion in the very next answer:

> "Q: Do you think it's questionable for a trial attorney to spend more than 12 hours a day at work on a day when he's in trial before a judge who's going to be in court seven or eight hours and is going to insist that court be in session for seven or eight hours the next day?
>
> A: No, no, I don't think that...." [12]

And then tried yet a third opinion:

> "I think once you get over 16 hours a day, I think that time becomes suspect."[13]

He even tried to pretend that he had couldn't verify Mr. Feldman's legal experience because he could not find his firm's internet homepage:

> "A: I tried to find you online. I tried to find your website."
>
> Q: Well if you tried to find my website, sir, were you successful?
>
> A: I called your office and asked what the website was and I think it was Free Credit Report, dot com, or something to that effect. It wasn't Feldman, et. Cetera."[14]

This risible attempt at obfuscation was revealed for what it was when after pretending for a page and a half of recorded testimony that he could not answer whether he had reviewed the Feldman law firm website he finally had to admit that he had.

Nonetheless, having obviously known that Mr. Feldman was one of the most successful and respected trial lawyers in Philadelphia, and had been elected by his peers to become Chancellor of the Bar of Philadelphia, Mr. Marquees persisted in his obviously

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[10] N.T., 9/13/05, p. 183, lines 5-16.
[11] N.T., 9/13/05, p. 221, line 21.
[12] N.T., 9/13/05, p. 221, line 24-p.222, line 9.
[13] N.T., 9/13/05, p. 222, line 22.
[14] N.T., 9/13/05, p. 230, line 20-p.231, line 4.

disingenuous and biased opinion that as lead trial counsel in a class action trial, he should be awarded the same fee the defense paid an inexperienced associate.

The Court as finder of fact must evaluate the truthfulness and accuracy of expert opinion. No one takes the stand entitled to be believed. The court must consider the accuracy and effectiveness of an expert's methodology, the bias or prejudice with which the analysis was performed, and the manner in which the witness testified including the sincerity or 'evasiveness" with which the witness answered questions. A finder of fact must evaluate how the expert "looked, spoke and acted while testifying." Mr. Marquess's testimony fails on every standard of evaluation. His testimony was totally lacking in candor, without any credibility, and is rejected.

Mr. Marquess's opinion is totally and entirely rejected on the basis that he had no pretense to knowledge of what a plaintiff's firm needs to do to prepare and try a class action jury trial to verdict and failed to seek any appropriate factual basis to evaluate the work performed in this case. His testimony is rejected as grossly lacking in necessary and readily obtainable facts.[15] His testimony lacks all credibility, providing misleading and transparently disingenuous answers in a conscious effort to obfuscate.[16]

In *Rode v. Dellarciprete*,[17] the Third Circuit Court of Appeals reviewed a trial attorneys' fee award in a civil rights action. The Third Circuit outlined general legal principles to properly guide a determination of reasonable attorneys' fees. The Third Circuit held that in a statutory fee case, the party seeking attorneys' fees has the initial

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[15] See Pa. R. Evid. 705.

[16] Although Mr. Marquess tried to avoid saying what fees should be awarded, he could easily calculate the never previously expressed opinion that out of a requested fee of $4,635,532, he believed that only a fee of $662,667.15 was warranted.

[17] 892 F.2d 1177 (3d Cir. 1990). This claim had been brought under 42 U.S.C. 2000e-3 which prohibits unlawful employment practices. Much like the WPCL, 42 U.S.C. 1988 provides that in civil rights actions, the court, in its discretion, determines a reasonable attorney's fee.

burden of proving that its fee request is reasonable. To meet this burden, the fee petitioner must submit evidence which supports both the hours worked and the rates claimed.[18] Once the fee petitioner has met this initial burden however, the burden shifts to the party opposing the fee award to challenge the reasonableness of the requested fee with sufficient specificity.[19]

Defendant requests reductions to Plaintiffs' base fee on the basis of the testimony of Mr. Marquess.[20] Mr. Marquess's review of the case was biased and intentionally factually restricted. The Court rejects the concept that an expert is nothing more than a hired gun who applies "expertise" to whatever material is provided by counsel without any responsibility to request available information reasonably required to render an honest, valid opinion.[21]

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[18] *Id.* at 1183. *See also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates").

[19] *Id., citing Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989).

[20] N.T., 4/5/07, p. 51, lines 5-11.

[21] The integrity and honesty of expert witnesses is the bedrock of the Federal philosophy of Evidence incorporated in part into the Pennsylvania Code of Evidence Rule 703. Pennsylvania Rule 703 permits an expert to transcend the rules incorporated into all other rules of evidence by relying on material "inadmissible" into evidence if they testify that it is "routinely used in their profession." The professional witness testifying without integrity, saying whatever their masters pay them to say, makes a mockery of the integrity of our system of justice. Pennsylvania Rule 705 requires that the expert reveal rather than obfuscate or conceal his factual basis. Pennsylvania Rule 705 requires an expert to testify as to "the facts or data on which the opinion or inference is based." Numerous appellate Court decisions have rejected expert opinion testimony not appropriately grounded on facts of records. In, *Viener v. Jacobs*, 834 A.2d. 546 (Pa. Super 2003) expert evaluation testimony was precluded because that expert's factual understanding was not supported by evidence of record. The Superior Court said: "It is well settled that expert testimony is incompetent if it lacks an adequate basis in fact." In *Jones v. Wilt*, 871 A.2d. 210 (Pa. Super 2005) expert opinion grounded in facts not supported by any evidence as to the intent of the decedent was precluded saying: "It is well settled law ....that an expert may not express his opinion upon facts which are not warranted in the record regardless of the expert's skill and experience." In *Kelly v. Thachery*, 874 A.2d. 649 (Pa. Super 2005) expert testimony was rejected in a products liability case because it was grounded in an inaccurate understanding that defendants "had control of the rigging and hoisting." Since the facts did not support the expert's assumptions, the opinion was stricken. In *Hutchinson v. Penske*, 876 A.2d. 978 (Pa. Super 2005) expert testimony as to the crashworthiness of the cab of a truck was inadequately grounded upon National Highway Traffic Safety Administration Reports, University of Michigan Transportation Research Institute reports and Society of Automotive Engineers Reports. The testimony was stricken because there was no demonstration that any of the accidents or vehicles which formed the factual basis for these reports were similar to the accident before the court.

Pennsylvania cases address the standards for the award of attorney's fees. In addition there are Pennsylvania and Federal court cases evaluating and awarding attorney fees under comparable fee-shifting statutes. The reasoning of those opinions is instructive.

To determine reasonable fees to be awarded, the court must determine whether the hours claimed by the fee petitioner were actually and reasonably expended[22] and whether the hourly rate requested is reasonable. A reasonable hourly rate is calculated based on the prevailing market rates in the relevant communities, and comparing the rates requested by the prevailing party with rates of lawyers of reasonably comparable skill, experience and reputation. The court must then multiply the reasonable hourly rate by the reasonably required hours expended. This calculation reveals a base attorney fee sometimes called a lodestar fee. The Court finds that the rates requested by plaintiffs' counsel, the work performed and the allocation of work performed by lead counsel, partner-level counsel, associates, and support personnel is reasonable for a plaintiffs consortium of law firms litigating, on a contingent basis, a class action of this magnitude against a determined and well-financed defendant.

The court has discretion to adjust the lodestar. A party seeking an adjustment to the lodestar has the burden of proving that an adjustment is appropriate. The court can

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While the basic principal of law that an expert opinion has value only if the jury accepts the facts on which it is based (Standard Civil Jury Instruction 5.31) has received renewed interest subsequent to adoption of the Pennsylvania Rules of Evidence, it is not a new concept. In 1998 the Supreme Court rejected expert testimony that a bicycle was defective because the bicycle which the expert had examined had been materially altered after the accident. *Factor v. Bicycle Technology, Inc.*, 707 A.2d. 504 (Pa. 1998). It is also obvious that an expert may not bootstrap facts into the record through purported analysis or opinion. *See Commonwealth v. Smith*, 861 A.2d. 892 (Pa. 2004).

[22] *Rode*, 892 F.2d at 1183. The court may also reduce the hours claimed by the number of hours that were spent litigating unsuccessful claims that were distinct from claims on which the party succeeded. Although the Plaintiffs in this case were not successful on all claims, the claims were intertwined and not distinct. The defense resistance to discovery permeated the entire case.

adjust the lodestar by applying a contingency multiplier if the case was taken on a contingent basis.[23] A contingency multiplier is warranted if the Court concludes that this contingent fee case poses significantly higher risks to counsel than hourly fee cases, and requires a determination of what contingent fee would be necessary to attract competent counsel and, whether the prevailing party would have faced substantial difficulties finding counsel without the potential of an adjustment because of the risk taken.[24]

The Pennsylvania Superior Court addressed just such an adjustment in the case of *Signora v. Liberty Travel, Inc.*, involving attorneys' fees under the WPCL.[25] The *Signora* trial court applied a contingency multiplier to the earned attorneys' fees. Examining the fee awarded, the Superior Court considered the degree of success as a critical consideration. The Superior Court in *Signora* specifically affirmed the discretion of the trial Court to adjust the lodestar fee because of the contingency of the fee.

The *Signora* Court analyzed Pennsylvania Rule of Civil Procedure 1716 controlling the award of counsel fees in class action litigation.[26] Pennsylvania Rule of Civil Procedure 1716 reads:

> "In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors: (1) the time and effort reasonably expended by the attorney in the litigation; (2) the quality of the services rendered; (3) the results achieved and benefits conferred upon the class or upon the public; (4) the magnitude, complexity and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent on success."

Other relevant factors include the size of the fund created, the number of persons benefited; the skill and efficiency of the attorneys involved; the complexity and duration of the litigation; the risk of nonpayment; the amount of time devoted to the case by

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[23] *Signora v. Liberty Travel, Inc.*, 886 A.2d 284 (Pa. Super. 2005).
[24] *Rode*, at 1184.
[25] 886 A.2d 284 (Pa. Super. 2005).
[26] *Id.* at 293.

plaintiffs' counsel; and awards in similar cases. In *Logan v. Marks*[27], the Superior Court said:

> "A comparison of the size of the award to the objectives of the litigation is highly relevant to determining the degree of success obtained, the critical inquiry in determining the reasonableness of a requested fee."

In *Signora* the Superior Court found that class counsel's records and attorney resumes had properly substantiated the hourly rate requested and using the "lodestar" method properly granted class counsel a 1.5 contingency multiplier to that base or lodestar fee.[28] Courts have frequently found a multiplier of three or greater to be reasonable in contingency class action litigation. In this case, a multiplier of 1.375 was properly used to calculate the award..

Plaintiffs' counsel herein have *prima facie* demonstrated that their requested attorneys' fees and costs incurred are reasonable for the litigation of this case. Plaintiffs' attorney team has extensively detailed the time expended by lawyers and paralegals over years of litigation. Plaintiffs' counsel has submitted extensive evidence of the work performed. The qualifications of the individual lawyers and firms involved have been documented.

Having presided over this litigation, this Court can personally confirm the extensive work, time, and effort devoted by both sides and specifically plaintiffs'

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[27] 704 A.2d 671, 673 (Pa. Super. 1997).
[28] *Signora*, 886 A.2d at 293-294.

lawyers, pre-certification, at certification[29], pre-trial, trial and post-trial. The reasonableness of Plaintiffs' fee request is established by its detailed documentation and these observations.

BY THE COURT

11/14/07
DATE

MARK I. BERNSTEIN, J.

[29] While the Court did not preside over the aborted Federal Court sojourn, it notes that the plaintiffs twice proved that class certification was proper.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHAMELL SAMUEL-BASSETT on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	**JANUARY TERM 2001**
v.	)	**NO. 2199**
KIA MOTORS AMERICA, INC.,	)	
Defendant.	)	**CLASS ACTION**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff Shamell Samuel-Bassett ("Plaintiff") began this action in January 2001, by filing a Class Action Complaint in the Philadelphia Court of Common Pleas, alleging violations by Kia Motors America, Inc. ("KMA") of the Magnuson-Moss Warranty Improvement Act, 15 U.S.C. § 2310 ("MMWA").

2. KMA removed the action to the United States District Court for the Eastern District of Pennsylvania.

3. Plaintiff filed a motion to remand, which KMA opposed.

4. The federal district court denied the motion to remand.

5. Discovery commenced, including the exchange of documents, responses to interrogatories and document requests, the taking of numerous depositions, and discovery motions.

6. Plaintiff filed her motion for class certification.

7. KMA filed a brief and appendix in opposition to the motion.

8. Plaintiff filed a reply brief and appendix.

9. Each party filed Surreply Memoranda .

10. By Memorandum Opinion dated December 13, 2002, District Judge Curtis Joyner granted class certification. *Samuel-Bassett v. Kia Motors America, Inc.*, 212 F.R.D. 271 (E.D. Pa. Dec 13, 2002) certifying a Pennsylvania class.

11. KMA filed a Petition for Interlocutory Appeal pursuant to Rule 23(f) of the Federal Rules of Civil Procedure with the United States Court of Appeals for the Third Circuit, which Plaintiff opposed.

12. The Third Circuit granted the Petition, and set a briefing schedule.

13. The parties engaged in extensive briefing before the Third Circuit.

14. Before oral argument, the Third Circuit requested briefing on the issue of subject matter jurisdiction and the propriety of KMA's removal of the case from state to federal court.

15. On February 5, 2004, the Third Circuit issued a Memorandum Opinion vacating the District Court's class certification order, and directed the district court to reexamine the issue of federal jurisdiction. 357 F.3d 392, 403 (3d Cir. 2004).

16. Upon return to the federal District Court, the parties stipulated, and the District Court ordered, a remand to the Philadelphia Court of Common Pleas, where the case had been originally filed and removed by defendant KMA.

17. Upon remand, Plaintiff re-filed the motion for class certification and supplemented that motion with additional materials.

18. The parties exchanged Pre-hearing Memoranda, including exhibits, depositions, expert reports and other materials.

19. In July 2004, this Court conducted a two-day evidentiary hearing on Plaintiff's Motion for Class Certification.

20. Prior to the class certification hearing, KMA disclosed that it would be calling Y.S. Sohn, an engineer from its Korean corporate parent, Kia Motors Corporation ("KMC"), as a witness. This Court ordered that Mr. Sohn and a Warranty Department official, Neil Barbalato, appear for a deposition by Plaintiff's counsel prior to the hearing.

21. Plaintiff's counsel took two days of deposition testimony from Y.S. Sohn and one day of deposition testimony from Neil Barbalato immediately prior to the class certification hearing.

22. Live testimony at the class certification hearing was provided by experts for the parties.

23. Plaintiff's engineering expert, R. Scott King, provided testimony supporting class certification.

24. KMA's engineering expert, Roger L. Newsock, provided opinions in opposition to certification.

25. By Order dated September 17, 2004, this Court, like the federal district court, certified a Pennsylvania class of Kia Sephia purchasers and lessees.

26. The Superior Court has affirmed that Order.

27. Plaintiff's counsel prepared and filed a form of notice to be provided by mail to members of the class.

28. KMA opposed Plaintiff's form of notice, and moved for reconsideration and certification of an interlocutory appeal of the class certification decision.

29. Plaintiff's counsel filed oppositions to KMA's motions.

30. KMA moved to stay the case, pending a petition to the Superior Court for interlocutory review of the class certification decision.

31. Plaintiff filed a brief opposing the motion for a stay.

32. Plaintiffs commenced merits discovery, serving document requests, interrogatories, and requests to admit.

33. The Court heard and ruled upon multiple motions concerning KMA's discovery responses and objections.

34. In November 2004, the Court modified Plaintiff's form of class notice and directed that the notice be provided by mail to all persons identified by KMA's warranty records.

35. The Court denied KMA's motions for reconsideration, certification for appeal and motion for a stay.

36. KMA filed a Petition with the Superior Court for extraordinary interlocutory review of the class certification order and asked that court to stay the case.

37. Plaintiffs filed an opposition to KMA's Petition.

38. In January 2005, the Superior Court denied KMA's Petition and its motion to stay.

39. After receiving a list of purchasers and lessees from KMA, Plaintiff's counsel retained the accounting firm of RSM McGladrey to provide notice to the class members as mandated by the Court's November order. That firm printed and mailed the notice and prepared and filed an Affidavit of Mailing and a Praecipe Re Opt-outs from the Class. Over 10,000

individual notices were mailed to the class members in Pennsylvania, advising them of the pendency of the action and their inclusion in the Class.

40. After accounting for opt-outs and fleet purchasers, the parties eventually stipulated that 9,402 persons in Pennsylvania properly remained in the Class.

41. Plaintiffs began preparing the case for trial on the merits in December 2004.

42. Plaintiffs retained and worked with their damages expert; arranged for and purchased the license on the Kelley Blue Book data required for damages analyses; assembled print and other ads for the Kia Sephia automobiles; provided documents and materials to their engineering expert; catalogued, reviewed and summarized documents contained on over 20 document discovery disks produced by KMA; obtained and digested deposition transcripts from other cases pending against KMA concerning the Sephia brakes; and began the difficult process of negotiating deposition and other discovery, prior to filing motions to compel.

43. In February 2005, Plaintiff filed and argued several discovery motions, and opposed several motions filed by KMA.

44. In February 2005, the Court ordered a Pre-trial Conference for February 28, 2005, requiring the parties to prepare and exchange extensive Pretrial Memoranda beforehand.

45. KMA's Pretrial Memoranda, disclosed a number of witnesses and documents that had not been previously disclosed.

46. Plaintiff filed additional discovery motions and undertook to arrange additional depositions at remote locations.

47. Pretrial Conferences took place on February 28 and March 3. The Court set May 16 as the date of trial.

48. Between March 3 and May 16, plaintiff's counsel devoted their efforts to preparing the case for trial, including the preparation of motions *in limine*, proposed jury instructions, deposition designations, exhibit binders and lists, demonstrative aids, proposed jury verdict forms, witness appearance dates, depositions of KMA's listed witnesses, review and analysis of the new expert reports from KMA's new engineering experts and their damages expert, and a trial plan.

49. Plaintiff's counsel filed oppositions to KMA's motions *in limine* and motion to bifurcate.

50. The parties took nearly one dozen additional depositions.

51. Plaintiff's counsel traveled to Southern California.

52. Plaintiff's counsel obtained documents from the California class action pending against KMA concerning the same claims as alleged in this case.

53. KMA retained fifteen lawyers and paraprofessionals from two law firms to defend the case.

54. At trial, Plaintiff called eight witnesses, including engineering and damages experts and several former employees and corporate designees of KMA.

55. Plaintiff offered and the Court admitted over thirty exhibits, most of which were internal KMA or KMC documents.

56. Plaintiff published KMA admissions and stipulations, including a stipulation as to the number of class members.

57. Plaintiff's counsel cross-examined at least six witnesses presented by KMA, but had prepared for the cross-examination of another twenty witnesses that KMA had listed in its Pre-trial Memorandum, whom KMA never produced at trial.

58. The jury received the case in the afternoon of Thursday, May 26.

59. On May 27, 2005, the jury returned a verdict in favor of Plaintiff and the 9,402 class members in the amount of $5,641,200, representing $600 per class member:

> Question No. 3:
>
> Did the defendant fail to remedy the common defect without charge after being given an opportunity to cure the problem? **YES**
>
> Question No. 5
>
> State the amount of damages, if any, sustained by each Class member
> b) For repair expenses, reasonably incurred, as a result of defendant's breach of warranty.
>
> **$600.00**.

60. Based on KMA's stipulation that the number of class members was 9,402 after accounting for opt-outs, the Court, in the presence of the jury and all counsel recorded a Class verdict of $5,641,200 (9,402 x $600).

61. KMA never objected to this calculation or to the entry of this classwide verdict. *Samuel-Bassett v. Kia Motors America, Inc.*, 2006 WL 3949458 at 7, 52, 53 (Dec. 28, 2006).

62. Over the course of six years of litigation, including appellate work in two different appellate courts, two separate class certification proceedings, countless motions and cross-motions, multiple trips to California for discovery matters, complex expert work, extensive communications with class members, an intensive two-week jury trial that ended with a very favorable result for Plaintiff and the Class, contentious post-trial work, including a contested fee hearing, Plaintiff's counsel actually expended over 9,100 hours in attorney and paralegal time to prosecute the claims.

63. Within ten days after the Court recorded the verdict, Plaintiff filed a Petition for an Award of Attorney's Fees and Expenses Pursuant to 15 U.S.C. § 2310(d)(2) ("Petition").

64. In support of the Petition, Plaintiff filed affidavits from three trial counsel, Michael D. Donovan, Alan Feldman and James A. Francis, together with summary spreadsheets identifying the attorney performing the work, the category of the work, the amount of time spent on each category, and the hourly rate charged for the tasks.

65. The spreadsheets were supported by detailed time records specifying the dates and descriptions of the specific tasks performed by each attorney and law firm employee. Plaintiff offered to make the time and expense records available for inspection by the Court.

66. The Petition and the Affidavits of Class Counsel set forth in narrative detail the extensive and multi-year efforts devoted by Plaintiff's attorneys to the litigation.

67. The Petition specified that as of June 3, 2005, Class Counsel had expended 8,294.3 hours in attorney and paralegal time to prosecute the class claims.

68. These hours multiplied by appropriate and reasonable hourly rates represent a base fee or "lodestar" of $3,046,296.

69. As detailed in the Affidavits, the hourly rates charged by Class Counsel have been approved by a number of state and federal courts in similar class action cases.

70. The Petition noted that all of the hours and work devoted to the case were reasonably incurred due to the positions taken by KMA in litigating this action and the complex nature of the class action proceedings.

71. In addition to this lodestar, Plaintiff's counsel also set forth the out-of-pocket litigation expenses and court costs they had incurred and advanced in the litigation: "$263,051.99."

72. The vast majority of those expenses were for class notice costs, expert fees, deposition and other transcription costs, document copying, trial exhibit costs, data base

licensing fees, computerized legal research fees, travel and meeting expenses, and telephonic deposition services.

73. All costs were reflected on the books and records of Plaintiff's counsel and were supported by invoices received from and due to third party providers, including court reporters, notice administrators and experts.

74. KMA filed an Answer to Plaintiff's Petition in which it challenged virtually every aspect of the request for an award of reasonable attorneys' fees and expenses and sought discovery of Class Counsels' time records and deposition testimony of the attorneys who had worked on the case.

75. On July 5, 2005, Plaintiff filed a Reply Memoranda together with five Affidavits of prominent Philadelphia attorneys attesting to the hourly market rates charged by Plaintiff's counsel and supporting the Petition filed on behalf of Plaintiff. The Reply Memoranda also sought discovery of the hourly rates and hours expended by KMA in connection with the defense of Plaintiff's claims.

76. At a hearing on July 6, 2005, this Court set an evidentiary hearing on the Fee Petition for August 25, 2005 and directed the parties to exchange their detailed time and expense records.

77. The parties exchanged their time and expense records.

78. Due to the unavailability of one of KMA's counsel, the August hearing was continued to September 13, 2005.

79. While the fee application was pending, KMA continued its efforts to have the verdict set aside or reduced, requiring significant additional time on the part of Plaintiff's counsel.

80. Between May 27, 2005 and September 13, 2005, Plaintiff's counsel devoted over 800 additional hours to the litigation.

81. Counsel briefed, argued and submitted detailed findings of fact and conclusions of law with respect to the Class's claims for equitable relief.

82. Plaintiff's counsel analyzed and researched KMA's initial and supplemental post-trial motions (totaling over 60 pages), reviewed and summarized the class certification and trial transcripts of over 1,000 pages, and prepared and filed a 52 page brief in opposition to the post-trial motions.

77. KMA served extensive discovery requests, deposition notices and notices to attend, related to the Fee Petition. Plaintiff's counsel responded to and filed motions in opposition to such discovery and in support of the Fee Petition.

78. Plaintiff's counsel opposed multiple motions to stay and an "Emergency Motion for a Continuance" filed by KMA in an attempt to have courts in other jurisdictions pre-empt or settle the claims covered by the Pennsylvania verdict.

79. This Court conducted a discovery hearing on September 12, 2005, in which it quashed some of KMA's discovery requests and denied its motion to stay and emergency motion for a continuance.

83. KMA embarked on a "reverse auction" settlement strategy in which it had attempted to pick-off and release the claims of the Pennsylvania class through litigation pending in other fora. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (describing "reverse auction" tactic).

84. To protect the interests of the Pennsylvania class, Plaintiff's counsel traveled to California and Florida to attend mandatory mediation and attempted a settlement hearing in

federal court, in which the Pennsylvania claims would potentially have been released for inadequate coupon consideration.

85. Plaintiff's counsel were successful in protecting the Pennsylvania class. *See, e.g.*, *Smith v. Sprint Commc'ns Corp.*, 387 F.3d 612 (7th Cir. 2004) (rejecting proposed nationwide class action settlement that would preempt and release more advanced state class actions); *Naposki v. First Nat'l Bank of Atlanta*, 2005 WL 1285716 (N.Y. App. Div. 2d May 31, 2005) (awarding $5,000 in sanctions against defense counsel for failing to advise appellate court of competing class action and settlement in California).

86. Nonetheless, this Court directed that Plaintiff's counsel delete all such travel and related time expenses related to the California mediation, as it was not clearly connected to the Pennsylvania verdict. Plaintiff's counsel deducted these lodestar and expenses.

87. Plaintiff's counsel examined and summarized the time records provided by KMA's defense counsel, and compared them to the time records supporting Plaintiff's Fee Petition.

88. On September 13, 2005, Plaintiff submitted a Supplemental Petition for an Award of Attorney Fees, accompanied with the Supplemental Affidavits of Plaintiff's counsel and the Affidavit of Robert Hrouda, summarizing the information and data reflected in the incomplete time records provided by KMA.

89. The Hrouda Affidavit observed that KMA's outside counsel had actually expended over 7,100 hours on the litigation as of May 27, 2005 and that the class action specialist at DLA Piper Rudnick (KMA's trial counsel) with experience most comparable to that of Plaintiff's counsel, David Clarke, Jr., had billed KMA at rates ranging from $560-$595 per hour, which were higher than those Plaintiff's counsel set forth in the Fee Petition.

90. The Supplemental Petition of Plaintiff's counsel reflected an updated lodestar of $3,371,296 and updated expenses of $274,153 and therefore requested a fee award of $4,635,532, reflecting a result and quality enhancer of 1.375.

91. The Court conducted an evidentiary hearing on the Fee Petition on September 13, 2005.

92. At the hearing, Plaintiff's counsel offered as exhibits (1) the Fee Petition and supporting Affidavits; (2) the Reply Brief in Support of the Fee Petition, which attached the affidavits of five prominent Philadelphia attorneys as to the applicable market rates for plaintiff class action counsel; (3) the Supplemental Fee Petition and supporting Affidavits; (4-6) the detailed time records of Plaintiff's counsel; and (7) the Affidavit of Robert Hrouda.

93. In opposition, KMA exclusively relied on argument and the testimony of John Marquess of Legal Cost Control, a reputed "fee auditor".

94. Mr. Marquess has no qualifications to perform legal fee audit services in connection with any class action litigation or to render any reliable or trustworthy opinion with respect to the efforts devoted by Plaintiff's counsel on the litigation.

95. In the matter of *In re Worldwide Direct, Inc. (Debtors)*, 316 B.R. 637, 642-644 (D. Del. Bankr., Oct. 29, 2004) the court found Mr. Marquess's testimony "less than helpful" and that his report "cannot be considered an expert report done in accordance with generally accepted methodologies".

96. Mr. Marquess has admitted that there "is no such thing as generally accepted legal auditing principles."

97. He has admitted that he confines his review solely to a review of the time records.

98. He did not review the hearing transcripts in this case.

99. He did not read the deposition transcripts.

100. He did not review briefs or pleadings; or read the opinions issued in the case.

101. He did not conduct any survey of other counsel handling plaintiff class actions in Pennsylvania.

102. He relied on an undisclosed, proprietary data base for his opinions.

103. On cross-examination, Mr. Marquess admitted that what he criticized as "block billing" in the time records of Plaintiff's counsel was also prevalent throughout the time records of KMA's defense counsel, DLA Piper.

104. Mr. Marquess criticized hundreds of hours recorded by Plaintiff's counsel during the trial dates of May 17 through May 26 because the description did not meet his idiosyncratic standards.

105. He admitted that the entries for the same period in the records of KMA's counsel also reflected the "block-billing" and the same description.

106. The Court finds that the testimony and report of Mr. Marquess was not credible, reliable, accurate or helpful.

107. He criticized the number of hours recorded by attorney Michael Donovan on the day of the charging conference, contending they were excessive. But when asked whether he knew that the Court had instructed counsel to work that night to negotiate and prepare agreed-upon instructions, he admitted he did not know what had happened at trial to explain the entry.

108. He said, and his "report" repeated, that 35 hours recorded by "S. Yee" of the Donovan Searles law firm were non-compensable because they showed an over-billing for one day's worth of work.

109. However, the 35 hours reflected a week's worth of work for a law clerk of Korean descent who assisted counsel in preparing for and examining the last-minute engineering witness produced by KMC, Mr. Sohn, and in assisting at the Class Certification Hearing.

110. Plaintiff's counsel explained in a letter to the Court that all of the hours billed by Ms. Yee during the week of the hearing had been recorded accidentally at the end of the week when she had submitted her time sheet.

111. Ms. Yee's presence at the two days of Mr. Sohn's deposition was reflected on the deposition transcript, which was admitted as an Exhibit at the Class Certification Hearing.

112. Mr. Marquess testified under oath that the elected chancellor of the bar of Philadelphia, Mr. Feldman, a trial lawyer of 35 years experience should be compensated at a rate of $235 per hour which is the same rate he assigned to attorney James Francis, who was admitted to the bar in 1996. Mr. Marquess knew that the rate assigned for Mr. Feldman, chancellor-elect of the bar of Philadelpia was $125 per hour lower than the $360 hourly rate KMA had paid for the work of junior associate Keith Smith at trial. The Court finds that opinion unsound, baseless and reflective of the lack of credibility or substantive value of the "expert's" entire testimony.

113. Mr. Marquess met the lax legal standard to offer opinions on fee-billing practices because he is paid to find deficiencies in attorney billings.

114. Mr Marquess offered the absurd opinion that plaintiff's counsel should not receive compensation for any time spent at trial.

115. "The Court: Your criticism is that it's not explained what anybody was doing at trial and it seemed from your review that there were up to 11 people at trial at any given time. Is that it?

THE WITNESS: Yes.

THE COURT:	Does this represent 100 percent of the billing for trial or some lesser percent?
THE WITNESS:	It's 100 percent of the billing for trial.
THE COURT:	So you're saying this Court should award no fee for attendance at trial because it's inadequately documented; is that it?
THE WITNESS:	I would say until the firm adequately documented why all these people were there, it should not be reimbursed.

Mr. Marquess admitted he had no basis for this testimony:

> "**Q:** You don't know one way or another whether we [Plaintiff's counsel] actually expended the time that we claimed, do you?
> **A:** That's correct."

The witness testimony is rejected. It lacks any semblance of reasonable analysis is biased and factually baseless.

116. By Order dated January 11, 2006 and entered January 23, 2006, the Court granted Plaintiff's Petition for an Award of Attorney Fees and awarded "reasonable attorney fees based on actual time expended of $4,125,000, and reasonably incurred costs and expenses of $267,513."

117. The Court reduced the amount awarded from that reflected in the Supplemental Petition based on the fact that the post-trial time was not all devoted to matters exclusively connected to the present case and was otherwise expended on fee petition matters for which Plaintiff's counsel may subsequently petition in the event the Court's order is affirmed in whole or in part.

118. On October 24, 2007, the Superior Court affirmed the judgment of this Court on the Merits.

119. Section 2310(d)(2) of the Magnuson-Moss Warranty Act ("MMWA") provides: "If a plaintiff finally prevails in any action brought under paragraph (1) of this subsection, he

may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate." 15 U.S.C. § 2310(d)(2).

120. This provision directly applies to and controls the present Petition because the Jury returned a verdict in favor of Plaintiff and the Class arising under the MMWA. *See, e.g., Signora v. Liberty Travel Inc.,* 886 A.2d 284, 293 (Pa. Super. 2005); *Krebs v. United Refining Co.,* 893 A.2d 776, 790-791 (Pa. Super. 2006) (requiring the trial court consider statutory purposes).

121. Plaintiff is the "prevailing party" in this class action, and her fee petition was timely filed.

122. The Fee Petition and award were timely. *See Miller Electric Co. v. DeWeese*, 589 Pa. 167, 907 A.2d 1051 (2006), holding that an attorney's fee petition is "ancillary to the underlying action" and therefore, not disposed of by the entry of judgment. 907 A.2d at 1057. Under Pa. R. App. P. 1701(b), the Trial Court retains jurisdiction to decide the "ancillary" attorney fee issue after a merits appeal. *See Rosen v. Rosen*, 520 Pa. 19, 549 A.2d 561 (1988) (attorneys fees and costs are collateral or ancillary to the merits and do not divest the trial court of jurisdiction after an appeal has been filed pursuant to Rule 1701); *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988) ("the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable'").

123. The lodestar that results from multiplying the total number of hours reasonably expended by a reasonable rate is presumptively valid. *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa. Super. Ct. 2005), *alloc. denied*, 919 A.2d 958 (Pa. 2007); *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir. 1996).

124. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.... In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *Corbett v. National Products Co.*, Civ. Action No. 94-2652, 1995 U.S. Dist. LEXIS 6425 (E.D. Pa. May 9, 1995).

125. In addressing statutory fee-shifting, the U.S. Supreme Court has ruled that where work in another forum "was both useful and of a type ordinarily necessary to advance the . . . litigation," it should be included in the fee award. *Webb v. Board of Education*, 471 U.S. 234, 243 (1985).

126. A court may not lower a statutory fee to achieve proportionality with the size of the verdict. *Logan v. Marks*, 704 A.2d 671, 673-74 (Pa. Super. 1997) (citing *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1042 (3d Cir. 1996)); *Signora v. Liberty Travel, Inc.*, 886 A.2d at 293.

127. As prevailing party at trial, Plaintiff bears the initial burden of presenting affidavits or other evidence supporting the base or lodestar fee of counsel, and the reasonableness of their request for an enhancement.

128. Once the fee petitioner comes forward with evidence supporting her petition, the law imposes a burden on the fee objector to present cognizable objections. *Township of South*

Whitehall v. Karoly, 891 A.2d 780 (Pa. Cmwlth. 2006) ("Once the prevailing party has established the relatedness of the claims it is the opposing party's burden to establish a basis for segregating the hours spent on the successful and unsuccessful claims."); *Clarke v. Whitney*, 3 F. Supp.2d 631, 633-634 (E.D. Pa. 1988) (after the petitioner comes forward, the opposing party "has the burden of providing a sufficient basis to contest the reasonableness of the fees").

129. A party opposing a fee for time spent on unsuccessful claims must show not only that the claim was unsuccessful, but also that the claims "were 'distinct in all respects from' the claims on which the party did succeed." *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990); *Clarke*, 3 F.Supp.2d at 634.

130. The party challenging the lodestar bears the heavy burden of proving that the lodestar should be reduced. *Rode v. Dellarciprete*, 892 F.2d at 1183; (*Gaffney v. City of Allentown*, No. 97-4455, 1998 U.S. Dist. LEXIS 242 at *12 (E.D. Pa. Jan. 7, 1998). *See also Rosenfeld Foundation Trust*, O.C. No. 1664 IV of 2002, 2006 WL 3040020, at *36-37 (Ct. of Common Pleas, Orphans' Court Div., July 31, 2006) (fee opponent failed to satisfy her burden of proof).

131. Defendant has failed to carry its burden on its fee objections, and its proposed "percentage reduction" based solely on proportionality is not reasonable, not necessary, and not appropriate in this specific case.

132. Class Counsel have met their burden of presenting affidavits or other evidence supporting their lodestar and the reasonableness of their request for an enhancement.

133. Class Counsel expended thousands of hours in time and effort to bring about the successful result for the Class.

134. A large proportion of those hours were required because of the size of the Class, quantity of relevant records and the nature of the defense litigation tactics.

135. "[T]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

136. The result of that calculation is called the base or lodestar fee. That lodestar is presumed to yield a reasonable fee. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

137. The lodestar analysis is generally considered the appropriate method of determining attorneys' fees in statutory fee cases.

138. The shifting of fees serves the public policy of encouraging private enforcement of the substantive rights created by Congress. Manual for Complex Litigation, Third § 24.13 (2000). This is particularly true in plaintiff cases, where the likely aggregate recoveries are often smaller or limited by statute, making such cases unsuitable for contingent-fee or common fund representation.

139. As of June 3, 2005, the combined lodestar here for the three firms serving as Class Counsel, was $3,046,296, reflecting lawyer and paralegal time of over 8,294.3 hours.

140. Expenses and costs incurred at that point totaled $263,051.99.

141. The number of hours expended by Class Counsel is roughly equivalent to those expended by defendant in defending the claims, taking into account the fact that Plaintiff had the burden of proof and that KMA possessed virtually all of the evidence and materials necessary for Plaintiff to prove the class claims.

142. All of the class claims were inextricably intertwined.

143. The facts and evidence required to prove the breach of express warranty and MMWA claims were the same as those required to establish the implied warranty and UTPCPL claim.

144. Class Counsels' efforts would have been required and the same amount of work expended even had Plaintiff not pursued an implied warranty claim and a UTPCPL claim.

145. The actual time and rates devoted to the case are comparable to those required to defend the case, and because the same work was required for all of the claims, the adjusted fees awarded by this Court are reasonable and are compensable within the meaning of the MMWA.

146. The hourly rates for the firm Donovan Searles, LLC are reasonable and well within the range of hourly rates for attorneys with a class action practice.

147. The rates are consistent with all other firms concentrating in complex class action litigation.

148. The rates are commensurate with the level of the Donovan Searles attorneys' experience and qualifications in the area of complex plaintiff protection litigation, as set forth in the Donovan Searles firm biography and the Summary of Experience.

149. The Donovan Searles firm primarily handles class action cases and the rates requested here are similar to the rates the firm has been awarded in other cases it has handled.

150. The rates are also reasonable in light of the prevailing community billing rate charged by attorneys in similar practices.

151. The hourly rates for the firm of Francis & Mailman are within the range of what is reasonable and appropriate in this market.

152. The hourly rates for the attorneys in the firm are the same as the regular current rates charged for their services in their standard non-class matters, including both contingent and non-contingent matters.

153. There has not been any alteration or deviation from the firm's hourly rates to account for the added complexity or increased risk factor of this action.

154. The attorneys of the Francis & Mailman firm concentrate their practice in the area of plaintiff protection and plaintiff litigation.

155. The hourly rates for the Francis & Mailman attorneys are within the range charged by attorneys with comparable experience levels for plaintiff class action litigation of a similar nature.

156. The hourly rates for the Feldman Sheppard firm are within the range of what is reasonable and appropriate for experienced trial lawyers.

157. The hourly rates for the attorneys in the firm are the same as the regular current rates charged for their services in their standard non-class matters, including both contingent and non-contingent matters.

158. There has not been any alteration or deviation from the firm's hourly rates to account for the added complexity or increased risk factor of this action.

159. The attorneys of Feldman Sheppard specialize in trial practice.

160. The hourly rates for the Feldman Sheppard attorneys are within the range charged by attorneys with comparable experience levels for trial practice of a similar nature.

161. Summary spreadsheets identify the attorney performing the work, the category of the work, the amount of time spent on each category, and the hourly rate charged for the tasks.

162. These spreadsheets were supported by detailed time records specifying the dates and descriptions of the specific tasks performed by each attorney and law firm employee.

163. The summary spreadsheets readily meet the specificity required of a party seeking attorneys' fees. *See Rode*, 892 F.2d at 1190 (specificity required to extent necessary to determine if the hours claimed are unreasonable for the work performed).

164. Affidavits submitted by Class Counsel set forth the basis for the division of labor among the three firms and their efforts to litigate the case in an efficient manner.

165. The fees petitioned for by Plaintiff satisfy the factors set forth in Rule 1716 of the Pennsylvania Rules of Civil Procedure.

166. Class Counsel expended thousands of hours in time and effort to bring about the successful result for the Class.

167. A large proportion of those hours were required because of KMA's litigation tactics.

168. KMA removed the case to federal court and opposed Plaintiff's effort to have the matter remanded to this Court. However, their position changed 360 degrees after certification by the federal district court.

169. KMA then petitioned for an interlocutory appeal.

170. Thus, all of the federal court work incurred by Plaintiff's counsel was mandated by KMA's litigation tactics.

171. Similarly, KMA attempted to appeal to the Superior Court after this Court certified a class similar to the class certified by the federal district court.

172. KMA hid behind the corporate relationship of its foreign corporate parent to delay discovery and selectively disclose facts, information, photographs and videotape.

173. The quality of services rendered by Plaintiff's counsel support the fee petition.

174. Counsel provided quality trial and class certification legal services.

175. The hourly rates of Plaintiff's counsel were roughly equivalent to the hourly rates charged by the class action experts at KMA's outside counsel

176. The Court also finds Plaintiff's hourly rates to be reasonable.

177. The legal marketplace in 2005 fully justified the hourly rates charged by Plaintiff's counsel, confirmed by the $560-$595 hourly rates charged by KMA's own class action counsel. (KMA witness agreeing that defense counsel who billed at $595 per hour had been practicing for 5 years fewer than Alan Feldman).

178. The 2005 Survey of Hourly Rates published by the National Law Journal confirmed the reasonableness of Plaintiff's rates.

179. The award of a multiplier is well within the Court's discretion. *Signora v. Liberty Travel, Inc.*, 886 A.2d at 293-294 (Pa. Super. 2005).

180. The multiplier requested by Class Counsel in this action (1.375) is well within the range of fees awarded by courts in this jurisdiction. *Milkman v. American Travellers Life Ins. Co.*, 61 Pa. D. & C. 4th 502, at 566 (Phila. C.P. Mar. 28, 2002) ("courts have often found a multiplier of three or higher to be reasonable in a class action setting"); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (approving multiplier "in the range of 4.5 to 8.5" (awarding 6.96)).

181. Considering the Class award of $5,640,000, awarded fees of $4,125,000 and expenses of $267,513, the Class has obtained an aggregate common benefit of over $10 million. A fee award of 40% of that common benefit is well within the range of reasonableness for class action litigation taken to verdict through trial and judgment, and is supported by prevailing case

law. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (fee awards range from 19% to 45%); *Blackman v. O'Brien Envtl. Energy, Inc.*, No. Civ. A. 94-5686, 1999 U.S. Dist. LEXIS 7160 (E.D. Pa. May 12, 1999) (awarding 35% from $875,000 settlement fund); *In re Warner Comm.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1984) ("Traditionally, courts in this circuit and elsewhere have awarded fees in the 20 percent - 50 percent range in class actions"); *Milkman v. American Travellers Life Ins. Co.*, 61 Pa. D. & C. 4th 502, at 567 (Comm. Pl. Mar. 28, 2002).

182. A court may also analyze a fee request under the percentage of recovery approach. *See, e.g., Court Awarded Attorneys Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985). The percentage method is intended to mirror the private marketplace for negotiated contingent fee arrangements. *See Kirchoff v. Flynn*, 786 F.2d. 320, 324 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee is the 'market rate.'"). In non-class litigation, 33⅓% to 40% contingency fees are typical.

183. Justices Brennan and Marshall observed in *Blum v. Stenson*, 465 U.S. 886 (1984): "In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Id.* at 904 n.19; *see also Phemister v. Harcourt Brace Jovanovich, Inc.*, 1984-2 Trade Cas. (CCH) ¶66,234, at 66,995 (N.D. Ill. 1984) ("The percentages agreed on [in non-class action damage lawsuits] vary, with one-third (1/3) being particularly common.").

184. In *Signora*, 886 A.2d at 293, the Superior Court observed that fees may be enhanced to account for "contingent risk," and "in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement."

185. A trial court should properly consider the class action character, the contingency nature of any recovery and the conduct of the defense in adjusting a statutory fee award.

186. In *Signora*, the Superior Court approved the award of a 1.5 multiplier in a fee-shifting class action and expressly rejected the contention that a fee enhancement should not be applied in statutory fee cases.

187. The Court observed that fees may be enhanced not only to account for "contingent risk," but also "in light of the degree of success, the potential public benefit achieved, and the potential inadequacy of the private fee arrangement." *See also Croft*, 557 A.2d at 439 (listing similar factors in MMWA case).

188. The results achieved and benefits conferred on the Pennsylvania class members are substantial. The jury's affirmative verdict on the Magnuson-Moss Act claim means that the aggregate class award will not be reduced by attorney fees or costs.

189. The true benefit obtained by Plaintiff's counsel for the Class must also include the amount of the fees and expenses awarded against KMA.

190. The magnitude, complexity and uniqueness of the litigation are additional factors buttressing the fee award.

191. The motions *in limine*, motions to compel, and appellate issues touch on international law, the law of corporate designees, the intricacies of class certification, the inter-relationship of a foreign corporate parent and its wholly-owned domestic subsidiary, the admissibility of documents and images from a foreign, untested source, and the reasonableness of attorney fees.

192. As one of the very few plaintiff class actions to be tried to verdict in the past five (5) years, it cannot be disputed that this case was complex and unique.

193. The receipt of any fee by Plaintiff's counsel was totally contingent on the success of the case. Counsel would have received nothing had there been a defense verdict. More significantly, they would have had to write-off not just thousands of billable hours but also tens of thousands of dollars in out-of-pocket expenses.

194. Plaintiff's counsel are entitled to an award of a reasonable fee based on the common fund obtained, which includes the fee in this case, since the MMWA is a fee-shifting statute.

195. A significant consideration supporting the enhancement in this case is that the relatively low amount of damages recoverable under plaintiff protection statutes such as the MMWA do not make such cases attractive to most attorneys with a contingent fee practice. *See Skelton v. General Motors Corp.*, 860 F.2d 250, 256-257 (7th Cir. 1988) ("the fee-shifting provision [of the Magnuson-Moss Act] does not prevent the court from awarding risk multipliers."). Further, car manufacturers and distributors are generally represented by well-financed and extremely competent counsel.

196. Where an attorney accepts representation of a plaintiff in such a highly specialized field of law, despite the uncertainty and the required investment of time and expenses, the award of compensation should reflect the potential inadequacies of the private fee market. *See, e.g., Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (noting "that without an adjustment for risk, the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market'" (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731-33 (1987))).

197. Enhancing fee recovery deters MMWA violations by discouraging companies from unfairly under-pricing their competitors by over-promising but under-delivering in their

transactions with plaintiffs. *See* 15 U.S.C. § 2301 (legislative findings and purposes of MMWA); H.R. Rep. No. 93-1107, 2d Sess. 1974, reprinted in 1974 U.S.C.C.A.N. 7702, 7709 ("It is difficult for a company to conform to high standards and practices if it has competitors who continue to reap greater profits by pursuing less honorable tactics").

198. Attorney fees are an important economic consideration encouraging all automobile warrantors to comply with the statute and to engage in early resolution of meritorious disputes.

199. In this case, the value created for the Class, combining the cash award with the requested fees and expenses, is over $10 million. Under the general percentage of recovery approach, therefore, a reasonable fee after a merits trial would equate to about (40%), which fully supports the $4,125,000 fee awarded by this Court.

200. The MMWA permits recovery of expert witness fees, deposition costs, copying fees, and many other expenses that might not otherwise be recoverable under local or court rules limiting case "costs." *See, e.g.*, *Wirtz*, 355 F. Supp. 2d at 1207-13 (finding itemized expenses, including computer research and expert expenses compensable but disallowing some (such as travel and copying) on grounds of inadequate documentation); *Holmes v. LG Marion Corp.*, 258 Va. 473, 481-482, 521 S.E.2d 528 (1999)(observing that MMWA provides for recovery of expenses beyond those typically considered "court costs"); *Universal Motors, Inc. v. Waldcock*, 719 P.2d 254, 260 (Alaska 1986) (MMWA authorizes recovery of expenses beyond those otherwise considered as "court costs"); *Lavene v. Volkswagen of America*, 702 N.W.2d 652 (Mich. App. 2005) (same).

201. The Superior Court in *Krebs* reasoned that an award of reasonable expenses was necessary to promote the purposes of the fee-shifting statutes, observing that a trial court's

failure to award "out-of-pocket expenses" is "contrary to the General Assembly's inclusion of a fee-shifting provision in the [statute]." *Krebs*, 893 A.2d at793.

202. The Affidavits of Class Counsel show that costs as set forth therein were incurred in the prosecution of this case.

203. The bulk of those costs were for expert fees, class notice costs, trial, deposition and hearing transcription expenses, copying costs, including appeal briefing expenses, legal research services, telephone calls and document copying charges for discovery documents, pleadings, briefs, and exhibits, and trial exhibit expenses.

204. All of the costs were advanced by Plaintiff's counsel and were necessarily incurred. Plaintiff is awarded the adjusted costs in full.

BY THE COURT

11/14/07
DATE

MARK I. BERSTEIN, J.