IN THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTIRCT OF TENNESSEE
NASHVILLE DIVISION

ANTHONY LADD and NICHOLAS BRINDLE, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	**No. 3:20-CV-00626**
v.	)	
NASHVILE BOOTING, LLC	)	
	)	**Judge Eli J. Richardson**
Defendant.	)	**Magistrate Judge Alistair E. Newbern**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT AND JUDGMENT

Plaintiffs Anthony Ladd and Nicholas Brindle, on their own behalf and as appointed representatives of the Class, hereby submit this Memorandum in Support of their Unopposed Motion for Preliminary Approval of the Proposed Class Settlement and Judgment.

Plaintiffs brought this action alleging that Defendant Nashville Booting, LLC ("Defendant") negligently failed to remove booting devices from their vehicles, and the vehicles of putative class members, within one hour, as is required by Nashville Ordinance. This Court previously denied, in part, Defendant's motion to dismiss, *see* Dkts. 37-38, and granted, in part, Plaintiffs' motion for class certification. *See* Dkts. 79-80.

After protracted litigation and discovery, the Parties conducted extensive arm's-length negotiations – with the assistance of the mediator recommended by the Court – and have reached a proposed classwide Settlement and Judgment, which is attached as **Exhibit 1**. Because this proposed Settlement and Judgment satisfies the requirements of Rule 23(e)(2), and is fair, reasonable, and adequate, preliminary approval should be granted. This Court should also approve the proposed program for notifying the Class of this class action and the proposed Settlement and Judgment.

I. BACKGROUND

A. Plaintiffs' Claims.

Defendant Nashville Booting is a for-profit booting company that operates exclusively in Nashville, Tennessee. Am. Compl. ¶¶ 1, 13 (Dkt. 14); Answer to Am. Compl. ¶¶ 1, 13 (Dkt. 39). It immobilizes vehicles by placing "boots" on the vehicle's tires that only Nashville Booting technicians can remove. Def.'s Resp. to RFA ¶¶ 4-5 (Dkt. 56-1).

Nashville Ordinance § 6.81.170(E) authorizes Defendant to boot vehicles but requires removal of the boot within one hour of an unbooting request. Am. Compl. ¶ 7 (Dkt. 14). With

respect to the Plaintiffs and the Class, Defendant booted their vehicles and then failed to remove those boots within one hour of being contacted to do so. *Id.* ¶¶ 50-73.

Based on the Defendant's failure to timely unboot their vehicles within one hour, the Plaintiffs originally asserted causes of action for (1) negligent bailment, (2) negligent bailment *per se*, (3) conversion, (4) trespass to chattels, and (5) violation of 42 U.S.C. 1983. *Id.* ¶¶ 84-116 On August 3, 2021, this Court denied Defendant's motion to dismiss as to Plaintiffs' claims for negligent bailment (Count I), conversion (Count III), and trespass to chattels (Count IV). Dkt. 37-38 (but dismissed the claims for negligence *per se* (Count II) and for violation of 42 U.S.C. 1983 (Count V)).

B. This Court's Class Certification Order.

On June 17, 2022, Plaintiffs moved for class certification, Dkt. 56, which Defendant opposed, Dkt. 65. On May 11, 2023, this Court granted in part, and denied in part, Plaintiffs' motion for class certification. Dkt. 80.

Pursuant to Fed. R. Civ. P. 23(c)(1)(B), this Court certified the following Class and Claims:

> All persons who had a vehicle in their possession immobilized by Nashville Booting LLC in Nashville for longer than one hour after requesting removal of the immobilization device, from July 20, 2017 until June 17, 2022, but excluding the claims of non-named parties arising before December 1, 2018 (for whom Nashville Booting does not have any records).
>
> Plaintiffs' negligent bailment claim, conversion claim, and trespass-to-chattel claim.

Id. at 1. However, this Court declined certification as to Plaintiffs and the Class' "inconvenience damages." *Id.*

C. Defendant's Limited Assets and Liberty Mutual's Refusal to Defend.

As both Parties have previously advised this Court, Defendant has limited assets, which significantly constrains its ability to pay an appropriate amount for a classwide settlement from its own assets. *See* Hammervold Declaration, ¶ 8 (Dkt. 106); *e.g.,* Dkts. 82, 84.

Defendant's primary asset is its insurance policies with Liberty Mutual, underwritten by Ohio Security Insurance Company (collectively "Liberty Mutual"). In each of year during the class period (2017-2022), the Nashville Booting Ordinance "required [Nashville Booting] to have adequate insurance coverage. . .for the protection and welfare of the public." Nashville Ordinance § 6.81.010. Specifically, Nashville Booting was required to have liability insurance covering with "not less than a one million dollar single limit, one million dollar umbrella. . ." *Id.* § 6.81.040. Nashville Booting complied with the Ordinance in this respect, and had a General Commercial Liability insurance policy each relevant year, with a policy limit of $1,000,000 / $2,000,000 per occurrence and aggregate policy limit, respectively, and an additional $2,000,000 of aggregate coverage under an umbrella policy. For the entire class period (2017 to 2022), Nashville Booting had a total of $20,000,000 in insurance coverage limit through these policies.

After Plaintiffs filed this case, Nashville Booting made a claim on its GCL policy with Liberty Mutual. But on August 31, 2020, Liberty Mutual denied coverage.[1]

Liberty Mutual's decision to deny coverage was incorrect and appears to have been based on a misunderstanding of Plaintiffs' claims at issue in this case. Liberty Mutual claimed that Nashville Booting's liability insurance policy did not cover the Plaintiffs' claim because:

1. "[T]he loss described in the Lawsuit was not caused by an accident, but rather by the intentional booting of vehicles by Nashville Booting"; and

[1] *See* Dkt. 84-1.

2. "Since the Lawsuit alleges injury or damage expected or intended from the standpoint of Nashville Booting, there is no insurance coverage for those damages."[2]

Both claimed defenses to coverage are meritless. *See* Dkt. 82 at 1 ("Both Parties believe Liberty Mutual's denial of coverage was wrongful, particularly after this Court's order granting class certification in part."); Hammervold Decl. ¶ 9.

Liberty Mutual's first coverage defense simply *misunderstood* Plaintiffs' claims. Plaintiffs have never contended that it was wrongful for Nashville Booting to *initially* boot the Class' vehicles. *See e.g.,* MTD Resp. at 14 (Dkt. 26) (acknowledging "Nashville Booting initially had legal authority to place the boots on Plaintiffs' vehicles. . ."). Nashville Booting's intentional booting of the Class' vehicles in the first instance is not even at issue in this case and was not wrongful or actionable.

Liberty Mutual's second coverage defense ignores Plaintiffs' primary cause of action and theory of the case: that Nashville Booting was *negligent* in failing to timely remove its boots from Plaintiffs and Class' vehicles within one hour. *See* Dkt. 79 at 23-24 (discussing Plaintiffs' primary negligence claim). This negligence claim is clearly covered by Nashville Booting's CGL policy and not excluded by the intentional conduct exclusion. The fact that Plaintiffs also alleged intentional torts does not provide a defense to coverage. *See Main St. Am. Assur. Co. v. Marble Sols., LLC*, 557 F. Supp. 3d 844, 851 (6th Cir. 2021) ("If even one of the allegations is covered by the policy, the insurer has a duty to defend, irrespective of the number of allegations that may be excluded by the policy.") (*quoting Drexel Chem. Co. v. Bituminous Ins. Co.*, 933 S.W. 2d 471, 480 (Tenn. Ct. App. 1996)).

[2] Dkt. 84-1 at 9.

The fact that Nashville Booting has very limited assets, but plenty of insurance coverage that Liberty Mutual had wrongfully refused to make available for settlement purposes, complicated the Parties' ability to reach a classwide settlement because (1) Nashville Booting could not offer a sufficient settlement amount from its own assets; and (2) the Class had no reason to consider accepting a significantly discounted amount that Nashville Booting could afford to pay from its own assets because if/when the Class obtains a judgment for a much larger amount at trial, it can collect on that judgment from Nashville Booting's insurance policies. Hammervold Decl. ¶ 10; *see* Dkt. 82 at 2 (both sides "agree[d] [that] resolution of the insurance coverage issue would be helpful to facilitate meaningful negotiations among the Parties for a class wide settlement.").

Despite denying coverage, Liberty Mutual chose not to pursue a declaratory action against Nashville Booting and/or Plaintiffs, as many carriers would do. Furthermore, =Plaintiffs have not been able to independently challenge Liberty Mutual's wrongful denial of coverage because they do not have standing to do so until they obtain a judgment. *See e.g., Elvis Presley Enters. v. City of Memphis*, 2022 Tenn. App. LEXIS 108, at *37 (Tenn. Ct. App. Mar. 22, 2022) (recognizing that while "[a] claimant with a judgment against an insured can bring a direct action against the insurance company[,]" a claimant who has not yet secured a judgment does not have standing to bring a declaratory action against the insurer).

Plaintiffs attempted to obtain resolution of the insurance coverage issue by seeking to to stay the case and to work together with Defendant to pursue a declaratory action.[3] *See* Dkt. 84 at 4. However, Nashville Booting declined to do so, *see* Dkt. 85, because it considered the cost of a second legal proceeding to be prohibitive.

[3] While Plaintiffs did not have standing to *initiate* a declaratory action, they could be added as necessary parties by a party with standing. Plaintiffs could then lead the charge on litigating the issue as the real party in interest.

When the Parties agreed to mediate, Plaintiffs invited Liberty Mutual to participate in the mediation. *See* **Exhibit 2** at 4-6, 9-12. To encourage Liberty Mutual to participate, Class Counsel provided updated information on the posture of the case, as well as a detailed explanation as to why Liberty Mutual had wrongfully declined coverage. *See id.* at 9-12. However, Liberty Mutual still declined to participate. *See id.* at 3, 13.

After Plaintiffs exhausted these efforts to obtain resolution of the insurance issue, or even to get Liberty Mutual to participate in settlement discussions, Plaintiffs suggested the Parties consider a settlement framework to resolve the case in a manner would allow Plaintiffs and the Class to pursue collection against Liberty Mutual, by an assignment and/or consent judgment.

Once the Parties began considering a consent judgment, Plaintiffs once again urged Liberty Mutual to participate in the mediation. *Id.* at 3. Plaintiffs also advised Liberty Mutual that by refusing to participate, it may be waiving any objection that a Class Settlement and/or Consent Judgment was too high or unreasonable. *Id.* Nevertheless, Liberty Mutual still refused to participate. *Id.* at 2.

D. The Proposed Class Settlement and Judgment.

The Parties participated in a mediation with Retired Magistrate Judge Joe Brown[4] on February 5, 2024 and then again, on February 22, 2024. After these extended negotiations, the Parties agreed in principle to the settlement terms reflected in the proposed Settlement Agreement. Ex. 1.

Under the proposed Settlement, Defendant agrees to allow a judgment to be entered against it in the total amount of $1,000,000, and for Plaintiffs' costs to be reassessed to the Defendant. Ex.

[4] Magistrate Judge Newbern recommended Judge Brown during an October 30, 2023 case management conference.

1 § I.A.1. Defendant also agrees to implement a written policy[5] to ensure no fee will be collected when it is unable to remove a boot in compliance with the time period required by the ordinance (currently 1 hour).[6] *Id.* at § I.A.3. Defendant will also pay a lump sum of $25,000, *id.* § I.A.4,[7] and will assign most[8] of its claims against Liberty Mutual, including for failure to defend in this lawsuit, to Plaintiffs and the Class. *Id.* § I.A.2. In return, Plaintiffs and the Class will agree to pursue the remaining judgment amount against Defendant's insurance policies and Liberty Mutual, and not against Defendant's other non-insurance assets. *Id.* § I.D.

E. Notice, Class Representatives' Compensation, and Attorneys' Fees and Costs.

Plaintiffs estimate that there are between 2,000 to 5,000 class members. *See* Hammervold Decl. ¶ 16; Ex. 1 at 2. Plaintiffs manually identified 100 members of the class to demonstrate that the class was sufficiently numerous (by manually cross-referencing portions of Nashville Booting's third-party call center records and Nashville Booting's EPS data). *See* Dkt. 63, Ex. A. Some other class members are also easily identifiable from a spreadsheet of complaints produced by Defendant. Ex. 1 II.A.1.ii. However, it is not feasible to identify all class members by name and contact information because the process for identifying class members requires manual cross-referencing of information from multiple sets of voluminous records. *See* Hammervold Decl. ¶¶ 11-15; Ex. 1 § II.A.1.

[5] Defendant previously claimed it had this policy, but it was not reflected in its written policy manual and there were many instances where Class members were charged unbooting fees, including Mr. Brindle. *See* Dkt. 46 at 10-11.

[6] This non-monetary benefit to the Class, and Nashville community writ large, was only obtainable through settlement because Plaintiffs did not have standing to obtain injunctive relief. *See* Dkt. 65 at 18-21, Dkt. 79 at 26 n. 19.

[7] The $25,000 lump sum payment would be allocated as follows: (1) $3,700 to reimburse Plaintiffs' litigation expenses; (2) $6,300 to pay for the cost of Class notice, and (3) $15,000 for service awards to the Class Representative Plaintiffs.

[8] The single exception is that Defendant will retain its claim to pursue recovery of the $25,000 lump sum payment it will owe pursuant to § I.A.4 of the Settlement Agreement.

As such, the Parties propose the following method of notice to the Class. First, Class Counsel will create a website, NashvilleBootingSettlement.com, which will (1) provide information about this Class Settlement and Judgment, including a summary of its material terms and class members' right to opt-out or object, (2) provide access to relevant documents concerning this Action, and (3) provide contact information for Class Counsel. Ex. 1 § II.1.i and Ex. E thereto. Second, for the individual Class members that have already been identified in Plaintiffs' List to Show Numerosity (Dkt. 63, Ex. A) or from Defendant's spreadsheet of complaints, Class Counsel will send individualized notice of the proposed Class Settlement and Judgment by text message, which will direct the Class member to the long-form notice on the Class Settlement Website.[9] Ex. 1 § II.1.ii. Third, Class Counsel will promote the Class Settlement Website by soliciting local media coverage of the class action settlement and by budgeting approximately $5,000 to promote the Class Settlement Website through targeted advertising to Nashville residents on social media. *Id.* § II.1.iii.

Under the Settlement, Plaintiffs request service awards of $8,000 for Plaintiff Anthony Ladd and $7,000 for Plaintiff Nicholas Brindle, which will be paid from the $25,000 lump sum payment by Nashville Booting. *Id.* § I.C.2.

Under the Settlement, Class Counsel request an attorneys' fee award of one-third of the consent judgment amount ($333,333.33) for their work in securing the judgment for the Plaintiffs and the Class in this case.[10] Ex. 1 § I.C.3. However, Class Counsel will only collect an attorneys'

[9] The proposed text message would be as follows: "This text is being sent to you by court order in Ladd v. Nashville Booting because you may be part of a preliminarily-approved class action judgment against Nashville Booting. For further information, visit www.NashvilleBootingSettlement.com. If you wish to be part of the judgment, you do not need to do anything. However, you can object or opt-out."

[10] Class Counsel would reserve the right to petition a future court for a separate attorneys' fee for work in the anticipated separate follow-on class action against Liberty Mutual. *See Id.* §§ I.C.3, n. 6, I.F*; see also* Tenn. Code Ann. § 56-7-105 (allowing award of reasonable attorneys' fees in action to against insurers for bad faith failure to pay promptly).

fee from any proceeds from the anticipated follow-on litigation against Liberty Mutual to collect on the judgment and/or to pursue the claims assigned to the Class from Nashville Booting. *Id.*[11] So, if nothing is collected from Liberty Mutual in follow-on litigation, Class Counsel will not receive any fee. Ex. 1 § I.C.3.

II. LEGAL STANDARD

The claims of "a class proposed to be certified for purposes of settlement[] may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). "Being a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement." *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 904 (S.D. Ohio 2001); *Edwards v. City of Mansfield*, No. 1:15-CV-959, 2016 U.S. Dist. LEXIS 64159, at *10 (N.D. Ohio May 16, 2016) (approving a fair and reasonable settlement agreement "promotes the public's interest in encouraging settlement of litigation").

"In the Sixth Circuit, class action settlement approval occurs in three steps. First, the district court decides whether to preliminarily approve the settlement. Second, the district court directs notice of the proposed settlement to class members. Third, the district court conducts a hearing to decide whether to grant final approval to the settlement." *In re Sonic Corp. Customer Data Sec. Breach Litig. Fin. Insts.*, No. 1:17-md-2807, 2022 U.S. Dist. LEXIS 84621, at *7 (N.D. Ohio May 10, 2022); *see also* Manual for Complex Litigation, Fourth, §21.632, at 320–21 (Fed. Jud. Ctr. 2004).

At both the preliminary and final approval stage, "[t]he fairness of the settlement must be evaluated primarily based on how it compensates class members." *Greenberg v. Procter & Gamble*

[11] Plaintiffs request that $10,000 of Defendant's lump sum payment be applied to Plaintiffs' litigation costs (which are approximately $3,700) and to the proposed class notice program, which is anticipated to cost $6,300).

Co. (In re Dry Max Pampers Litig.), 724 F.3d 713, 720 (6th Cir. 2013). In deciding whether a class action settlement is fair, reasonable and adequate under Rule 23(e), district courts should consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Robles v. Comtrak Logistics, Inc., No 15-cv-2228, 2022 U.S. Dist. LEXIS 225283, at *16-17 (W.D. Tenn. Dec. 14, 2022). "In the Sixth Circuit, courts must also consider: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery completed; (4) the likelihood of success on the merits; (5) the opinion of class counsel and representatives; (6) the reaction of absent class members; and (7) the public interest (the 'GM Factors')." *Id.* (citing *UAW v. Gen. Motors Co.*, 497 F.3d 615, 631 (6th Cir. 2007)).

The Court's assessment of these factors can be made based on information already known to the Court and then supplemented by briefs, motions and an informal presentation from the settling parties. *See* Manual for Complex Litigation, Fourth, §21.632, at 320 (Fed. Jud. Ctr. 2004).

III. ARGUMENT

The Parties' proposed Settlement and Judgement satisfies Rule 23(e)(2)'s considerations for a "fair, reasonable, and adequate settlement," and should therefore be preliminarily approved by the Court. And because the Parties' proposed notice to the Class provides the best notice practicable, and meets Rule 23(c)(2)(B)'s requirements, the Court should approve it as adequate and direct the Parties to issue the approved notice to class members.

A. The Parties' Proposed Settlement and Judgment Warrants Preliminary Approval.

Plaintiffs satisfy all four Rule 23(e)(2) factors warranting preliminary approval of the proposed Settlement and Judgment because (1) Plaintiffs and Class Counsel have adequately represented the Class; (2) the proposed Settlement and Judgment was the result of extensive, arm's-length negotiations and reached after Class Counsel engaged in over three years of discovery; (3) the relief provided to the class is adequate, taking into account the relevant factors; and (4) the proposed settlement treats all class members equally. Fed. R. Civ. P. 23(e)(2); *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 277 (6th Cir. 2016); *Brotherton*, 141 F. Supp. 2d at 904.

1. Class Representatives and Counsel Have Adequately Represented the Class.

Plaintiffs and Class Counsel filed this case nearly four years ago, Dkt. 1 (July 20, 2020), and have vigorously represented and prosecuted the Class' claims during the pendency of this lawsuit. For instance, Plaintiffs opposed, and mostly prevailed against, Defendant's motion to dismiss,[12] the Parties engaged in extensive discovery (and successfully resolved most of their disputes without requiring court intervention),[13] and Plaintiffs and Class Counsel certified a class over Defendant's opposition.[14] Class Counsel, Kotchen & Low LLP, has considerable experience

[12] *See* Dkt. 19-20, 26, 37-38.

[13] *See e.g.,* Dkt. 46, 47, 48, 53, 82.

[14] *See* Dkt. 56, 65, 74, 78-79.

with class actions,[15] and in granting class certification, this Court found that Plaintiffs and their Counsel would adequately represent the Class. *See* Dkt. 79 at 15, 32.

2. The Proposed Settlement Was Negotiated at Arm's-Length After Significant Discovery.

There is a strong initial presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. *Bowman v. Art Van Furniture, Inc.*, No. 17-11630, 2018 U.S. Dist. LEXIS 207674, at *11 (E.D. Mich. Dec. 10, 2018) ("There is a presumption by courts of the absence of fraud or collusion in class action settlements 'unless there is evidence to the contrary.'") (quotation omitted); *see also* Newberg on Class Actions §11.41 at 11-88 (3d ed. 1992).

As described above, the Settlement and Judgment is the result of lengthy and complex arm's-length negotiations between the Parties, which took place after over three years of discovery. Hammervold Decl. ¶ 5; *see Bowman*, 2018 U.S. Dist. LEXIS 207674, at *12 (granting preliminary approval where "Plaintiff's counsel engaged in an investigation into Defendant and its alleged telemarketing calls, and the parties exchanged some preliminary factual details, followed by information regarding the potential class size."). These negotiations occurred over an extended period and the Parties were only able to reach an agreement with the help of Retired Magistrate Judge Joe Brown, who was recommended by the Court, and with whom the Parties spent two

[15] *See, e.g.*, *Buchanan v. Tata Consultancy Servs., Ltd.*, No.15-cv-01696, 2017 WL 6611653, at *1 (N.D. Cal. Dec. 27, 2017) (appointing K&L as class counsel for terminations class); *Heath v. Google Inc.*, 215 F. Supp. 3d 844, 855 (N.D. Cal. 2016) (granting Plaintiffs' motion for conditional certification and K&L's appointment as collective action counsel); *In re Delta/AirTran Baggage Fee Antitrust Litig.,* 317 F.R.D. 675, 693, 700 (N.D. Ga. 2016) (certifying class of between 28 and 57 million members and appointing K&L as class counsel); *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090, 2016 WL 4697338, at *15 (D. Minn. Sept. 7, 2016) (appointing K&L as class counsel); Order at 50, 69 (Dkt. 384), *Palmer v. Cognizant Tech. Sols. Corp.*, No. 2:17-cv-0648-DMG-PLA (C.D. Cal. Oct. 27, 2022) (certifying bench terminations class of approximately 2,200-2,300 members and appointing K&L as class counsel). Defendant conceded that Plaintiffs' Counsel would adequately represent the class, if certified. Dkt. 65 at 15.

separate days in mediation. *See id.*; *Bowman*, 2018 U.S. Dist. LEXIS 207674, *11 ("The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.") (quotation omitted)

Counsel for both sides are experienced and thoroughly familiar with the factual and legal issues presented. *See* Hammervold Decl. ¶¶ 4-6. "It is well settled that, in approving a class action settlement, a court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs." *Amos v. PPG Indus.,* No. 2:05-cv-70, 2015 U.S. Dist. LEXIS 106944, at * (S.D. Ohio Aug. 13, 2015) (quotation omitted); *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983); *Flinn v. FMC Corp*., 528 F.2d 1169, 1173 (4th Cir. 1975); *Whitlock v. FSL Mgmt., LLC*, 2015 U.S. Dist. LEXIS 170516, *19-20 (W.D. Ky. Dec. 21, 2015); *Bowling v. Pfizer, Inc.,* 143 F.R.D. 141, 151 (S.D. Ohio Aug. 19, 1992) ("an initial presumption of fairness exists if the settlement is recommended by class counsel after arms-length bargaining."). Additionally, the structure of the proposed Class Settlement and Judgment *itself* belies any possible collusion, as Class Counsel will only earn any fee if it is successful, and to the degree to which it is successful, in collecting on the consent judgment against Liberty Mutual. Ex. 1 § I.C.3.

3. The Relief Provided to the Class by the Settlement and Judgment is Fair, Reasonable, and Adequate.

Rule 23(e)(2)(C) requires that "the relief provided for the class is adequate, taking into account: ([a]) the costs, risks, and delay of trial and appeal; . . . ([b]) the terms of any proposed award of attorney's fees, including timing of payment; and ([c]) any agreement required to be

identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C).[16] The proposed Settlement and Judgment satisfies this adequacy requirement and represents a strong outcome for the Class.

a. The Settlement Will Provide Adequate Relief for the Class and Avoid Significant Expense, Risk, and Delay.

The proposed Settlement and Judgment represents a victory for the Class that was not assured at trial. When this Court certified the Class, it indicated that it was going to "hold" the Class to its specific theory of liability, which was that Defendant "utilizes a business model and staffing policies that has caused injuries in a manner that amounts to negligence." Dkt. 79 at 21, n. 16. The Court noted that accordingly, the Class would need to prove at trial that "Defendant's business practice and policies were the cause of the delays" of the Class' injuries, rather than other individualized factors outside the Defendant's control, such as traffic, weather, ongoing events, and wrecks. *Id.* at 20, 23. While Plaintiffs produced evidence supporting Defendant's liability, *see* Ps' Mot. Class Cert. Dkt. 56, trials are inherently risky, and it is not a given that a jury would agree with the Class on liability. Indeed, Defendant filed a motion for summary judgment challenging the sufficiency of the Plaintiffs' proof on this issue. Dkt. 94-96.[17]

The consent judgment also provides a strong recovery compared to the range of damages that the jury could award the Class at trial. In its class certification order, this Court limited the Class' potential damages only to their "economic damages" for the loss of use of their vehicles, and precluded the Class from pursuing non-economic damages based on "inconvenience." Dkt. 79

[16] The proposed Settlement Agreement does not address the method for notice, approval, and/or distribution of any future proceeds that may be obtained for the Class through the follow-on litigation against Liberty Mutual, but these issues do not need to be addressed at this time. The Class has not yet obtained any money from Liberty Mutual, and will only be able to do so through a follow-on class action lawsuit against Liberty Mutual, in which the class will have to seek separate class certification. If and when the Class is successful against Liberty Mutual in a follow-on lawsuit to collect on the consent judgment and Defendant's assigned claims, the court in that case will have to approve any settlement with Liberty Mutual, or any distribution of money collected pursuant to a judgment against Liberty Mutual.

[17] That motion was not resolved and will hopefully become moot due to the Parties' proposed settlement.

at 26-29. The estimated class size of 2,000 to 5,000 class members, and as such, the $1,000,000 judgment amount would provide for a recovery between $200 to $500 per class member. This is a reasonable per-class member settlement amount for an injury limited to the economic value of the loss of use of a vehicle for several hours.

Further, had the Parties not reached a settlement, both the Parties and the Court would be subject to significant costs and delay associated with trial, along with any appeals. *Robles*, 2022 U.S. Dist. LEXIS 225283, at *23-24 (finding "the relief provided for the class . . . adequate" where "continuing to litigate [would] impose[] additional costs . . . including . . . expert witness fees, trial preparation fees, and travel expenses, as well as considerable additional attorney time"). Accordingly, taking these factors into account, the settlement is adequate.

b. *The Terms and Structure of the Settlement and Proposed Attorneys' Fees are Fair and Reasonable.*

The structure of the Settlement and Judgment is adequate and fair to the Class, even though the Class (and Class Counsel) will not receive any monetary payment unless or until a follow-on class action case is also successful against Liberty Mutual. Hammervold Decl. ¶ 6. Since Defendant has limited assets beyond its insurance policies with Liberty Mutual, and Liberty Mutual has declined to defend Nashville Booting or otherwise participate in settlement discussions, the Class was never going to be able to recover anything meaningful without obtaining a judgment and prevailing in follow-on litigation against Liberty Mutual. *Id.* ¶¶ 7-10. The Settlement and Judgment structure is the only realistic framework that allowed the Class to settle, without accepting a massive discount on their recovery based on Defendant's limited ability to pay from its own assets. *Id.* The Settlement and Judgment allows for the Class to proceed to that next phase, without the cost and uncertainty of a class action trial. *Id.*

Similar settlements have been approved in other class action cases, particularly where, as here, the defendant does not have significant assets and the insurance carrier has wrongfully declined coverage. *See e.g.*, *Olsen v. Siddiqi*, 520 S.W.3d 1, 5-6, 17 (Mo. App. 2017) (affirming summary judgment in favor of class in subsequent garnishment action against insurer to collect on $6M consent judgment and assignment by insured defendant in underlying class action); *Aks v. Southgate Trust Co.*, No. 92-2193, 1994 U.S. Dist. LEXIS 5761, at *3-5, 38 (D. Kan. Mar. 31, 1994) (ordering insurer to pay $2M portion of judgment, where insured defendant had agreed to a consent judgment and assignment to settle an underlying class action after the insurer wrongly denied coverage). A similar Settlement and Judgment structure is often used by bankruptcy trustees and courts when a class action is asserted against a defendant in bankruptcy and the insurance policy is the primary asset. *See e.g., Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Capital)*, 610 B.R. 725, 731, 747 (Bankr. S.D.N.Y. 2019) (granting plaintiff class' motion for partial summary judgment on coverage issue against insurer after insured defendant had entered into consent judgment and assignment with plaintiff class in underlying class action in bankruptcy); *Hrobuchak v. Fed. Ins. Co*., No. 3:10-0481, 2013 U.S. Dist. LEXIS 74160, at *22-26 (M.D. Pa. May 24, 2013) (affirming plaintiff class' standing to pursue direct action against insurer to collect on judgment and assignment of rights as part of it insured's bankruptcy liquidation plan).

With the Settlement and Judgment, the Class will have a strong probability of a meaningful recovery from Defendant's only significant asset: its insurance policies with Liberty Mutual. The follow-on litigation against Liberty Mutual is likely to be successful because the structure of the Settlement and Judgment is permissible under Tennessee law,[18] and Liberty Mutual's denial of

[18] *See Littleton v. TIS Ins. Servs.,* 2015 Tenn. App. LEXIS 56, at *8-11 (Tenn. Ct. App. Feb. 3, 2015) (where plaintiff entered into a consent judgment with defendant, and assignment of defendant's claim against insurer, but covenanted

coverage was wrongful.[19] *See supra* at pp. 3-4. If and when the Class is successful in the follow-on litigation against Liberty Mutual, the Class could recover *more* than the full remaining balance owed on the consent judgment because they may also be able recover: (1) pre- and post-judgment interest;[20] (2) the 25% statutory penalty under the Tenn. Code Ann. § 56-7-105(a); (3) reasonable attorneys' fees per Tenn. Code Ann. § 56-7-105(b); (4) punitive damages;[21] and (5) Nashville Booting's costs of defending against this lawsuit, less its $25,000 lump sum payment (which it did not assign to the Class).

Defendant's $25,000 lump sum payment and its proposed allocation towards litigation costs ($3,700 incurred by Class Counsel and $6,300 for class notice) and incentive awards for the Class Representatives are also reasonable. This lump sum payment toward the Settlement and Judgment is substantial given Defendant's limited assets. In addition, it is well-established that the reimbursement of litigation costs should be prioritized over any other distribution. Allocating the remainder of the lump sum payment to the class representatives' incentive awards is also appropriate because the Plaintiffs were actively involved in this litigation over the past 3+ years, including by aiding in the drafting of the complaint, reviewing briefing, responding to discovery requests and sitting for depositions, and they played a key role in obtaining the Settlement and Judgment. As such, the Class Representatives deserve to be compensated for their service. *See*

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not to execute the judgment against the defendant's own assets, plaintiff was entitled to recover uncollected balance of the judgment against the insurer).

[19] The structure of the attorneys' fee requested by Class Counsel reflects their high confidence that the follow-on litigation against Liberty Mutual will be successful, as Class Counsel will only earn a fee if that litigation is successful. *See* Ex. 1 § I.C.3.

[20] *See York v. Vulcan Materials Co.,* 63 S.W.3d 384, 390 (Tenn. Ct. App. 2001) (affirming trial court's award of pre-judgment interest in judgment against insurer for failure to indemnify).

[21] Tennessee courts have repeatedly held that the 25% statutory penalty of Tenn. Code Ann. § 56-7-105(a) does not prohibit recover of bad faith or common law punitive damages. *See e.g., Lindenberg v. Jackson Nat'l Life Ins. Co.,* 2014 U.S. Dist. LEXIS 184081 (WD Tenn. 2014) ("The Court finds that punitive damages are available in addition to the remedies for bad faith set out in § 105").

Hammervold Declaration; *Enterprise Energy Corp. v. Columbia Gas Transmission Corp*., 137 F.R.D. 240, 250-251 (S.D. Ohio 1991) (holding that class representatives are entitled to service awards based on actions taken to protect interests of the class, the benefit to the Class, as well as the time and effort spent in the litigation and awarding $50,000 incentive award for each of six class representatives). Any alternative distribution of the remainder of the lump sum payment after costs would require the Class to incur significant settlement administration costs, which would likely eat up a sizable portion of the available funds.

Further, the proposed attorneys' fee award is also reasonable, considering the result (and its value) that Class Counsel's representation has created for Plaintiffs and the Class. "[I]n a common fund case such as this, a reasonable fee is normally a percentage of the Class recovery." *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05-cv-00187, No. 2:07-CV-208, 2007 U.S. Dist. LEXIS 2392, at *3 (M.D.N.C. Jan. 10, 2007); *see also In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 U.S. Dist. LEXIS 70167, at *14 (E.D. Tenn. May 17, 2013) ("The percentage-of-the-fund method . . . clearly appears to have become the preferred method in common fund cases"); *Boeing Co. v. VanGemert*, 444 U.S. 472, 478 (1980). While the Sixth Circuit has permitted fee awards ranging up to 50 percent,[22] "fee awards in class actions average around one third of recovery." *In re Se. Milk*, 2013 U.S. Dist. LEXIS 70167, at *16 (citations omitted and collecting cases). In addition, a one-third fee to Class Counsel is similarly provided for in the Class Counsel's retainer agreements with the Class Representatives. Hammervold Decl., ¶ 17.

[22] *Walls v. JPMorgan Chase Bank, N.A.*, No. 3:11-cv-673, 2016 U.S. Dist. LEXIS 142325, at *15-16 (W.D. Ky. Oct. 14, 2016).

4. The Proposed Settlement Treats Class Members Equitably Relative to Each Other.

The proposed Settlement treats all class members equitably relative to each other because each class member would be a beneficiary of the proposed Consent Judgment and each class member would have the same opportunity to make a claim or collect a payment if the follow-on litigation against Liberty Mutual is successful.

B. The Parties' Proposed Notice Program Should be Approved.

Once the court has determined that it will likely be able to approve the proposed settlement, it must "direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Neither due process nor Federal Rule of Civil Procedure 23(e) require that each Class Member receive notice, only that the class notice be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *see Chaefer v. Tannian (In re Cherry)*, 164 F.R.D. 630, 637 (E.D. Mich. 1996) ("[I]n a Rule 23(b)(2) class action in which monetary damages are requested and a consent judgment is entered, absent class members may constitutionally be bound without actual receipt of notice of the pendency of the action or its settlement, as long as notice is reasonably calculated, under all the circumstances, to apprise absent class members of the pendency of the action and its settlement.").

As outlined above, Class Members who have already been identified through reasonable effort will receive a text message directing them to the Class Settlement Website, which will fully apprise Class Members of the existence of this lawsuit, the proposed Settlement and Judgment, the Court's preliminary approval order, and information necessary to make informed decisions about their rights. This information includes: (i) the terms of the Settlement and Judgment; (ii) the

proposed service awards for the Class Representatives (iii) the attorneys' fees and expenses that will be sought by Class Counsel; (iv) the procedure and timing for objecting to the Settlement and Judgment, and the right of the Parties to seek limited discovery from objectors; (v) the date and place of the final fairness hearing; and (vi) the full settlement documents, as well as key pleadings from the case.

Because it would be time and cost prohibitive to identify and provide individual notice all other Class Members, the Parties propose process that unidentified class members be notified of the Settlement and Judgment by publication. This method of notice is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see Treviso v. Nat'l Football Museum, Inc.,* No. 2:07-CV 208, 2022 U.S. Dist. LEXIS 243007, at *4, 7 (N.D. Ohio Aug. 29, 2022) (approving class notice where a portion of class members who could not be reasonably identified were notified by customized publication, including targeted social media ads and finding this notice plan "easily satisfies the best practicable notice as required by Rule 23," despite defendant's objection). Here, the Parties' plan for notice is appropriate based on the circumstances because it is the most cost-effective way to reach a large swath of people, including Class Members, in the Nashville community. While notice by publication was traditionally reserved for paid notices on the back page of a printed newspaper, many Class Members are likely to see the Class Settlement Website if it is promoted on social media. Additionally, Class Counsel will solicit organic media coverage of the Settlement and Judgment and Class Settlement Website at no cost to the Class. *See* Ex. 1 § II.A.iii; *see also Treviso,* 2022 U.S. Dist. LEXIS 243007, at *4 (noting that notice was particularly effective because it resulted in organic media coverage). The local

media will likely report on the Class Settlement, considering its previous interest in the case when it was filed, as well as at other various phases of the case.[23]

In accordance with Fed. R. Civ. P. 23(c)(2), the Class Settlement Website advises Class Members of their right to opt-out of, or object to, the proposed Class Settlement and Judgment. Ex. 1 at Ex. E (p. 2).

The Class Settlement Website also encourages any class members who find the website but did not receive a text message directing them there, to provide their contact information to Class Counsel, so that they will receive direct notice when it comes time to provide such notice of a class settlement or judgment in the follow-on litigation against Liberty Mutual. Ex. 1 at Ex. E thereto.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement and Judgment, approve the Parties' proposed notice plan to class members, and set a date for a fairness hearing for final approval of the settlement.

[23] *See e.g.,* WSMV 4 Nashville, "Class Action Filed Against Booting Company, July 24, 2020, available at: https://www.youtube.com/watch?app=desktop&v=-SmFWynNLsc;[23] Fox 17, "Class action lawsuit targets Nashville company booting cars parked downtown," July 24, 2020, available at: https://fox17.com/news/local/class-action-lawsuit-targets-nashville-company-booting-cars-parked-downtown; Tennessean, "Nashville Car Booting Predatory Practice Frustrates City Legal Oversight," February 29, 2024, *available at:* https://www.tennessean.com/story/news/local/2024/02/29/nashville-car-booting-predatory-practice-frustrations-city-legal-oversight/72437340007/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 21, 2024, a true and correct copy of the foregoing filing was served through the ECF electronic filing system upon the following counsel of record for the Defendant.

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