

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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IN RE: DELPHI CORPORATION	:	MDL No. 1725
SECURITIES, DERIVATIVE & "ERISA"	:	Master Case No. 05-md-1725
LITIGATION	:	Hon. Gerald E. Rosen
	:	
	:	This Document Relates to:
	:	<i>In re Delphi Corp. ERISA Litigation,</i>
	:	Nos. 05-CV-70882, 05-70940,
	:	05-71030, 05-71200, 05-71249,
	:	05-71291, 05-71339, 05-71396,
	:	05-71397, 05-71398, 05-71437,
	:	05-71508, 05-71620, 05-71897,
	:	05-72198
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**ERISA NAMED PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT  
MODIFICATION, FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR  
JUDGMENT MODIFICATION UNDER FED. R. CIV. P. 60**

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1. ERISA Named Plaintiffs Greg Bartell, Kimberly Chase-Orr, Neal Folck, Thomas Kessler, Donald McEvoy, and Irene Polito, through their counsel, in compliance with Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, request that the Court grant final approval of the Modification to Stipulation and Agreement of Settlement With Certain Defendants – ERISA Actions (the “Settlement Modification”) (attached to the Memorandum in Support of ERISA Named Plaintiffs’ Motion for Order Preliminarily Approving Settlement Modification, Forms and Method of Notice With Respect Thereto, and for Judgment Modification Under Fed. R. Civ. P. 60 (“Prelim. Approval Memorandum”) (Dkt. Nos. 452, 452-3; Exhibit A)).<sup>1</sup> The proposed Settlement Modification: (i) eliminates the effectiveness of Delphi’s Plan of Reorganization as a condition to the Settlement becoming final, and (ii) permits subordination of the Allowed Equity Interest to the payment in full of general unsecured creditors. For the reasons set forth in the memorandum submitted in support hereof, Lead Counsel believes that the proposed Settlement Modification is in the best interests of the Settlement Class.

Lead Counsel has satisfied the procedural requirements set by the Court for giving Class Members notice and an opportunity to object to the proposed Settlement Modification. By Order dated September 23, 2009, this Court directed that notice be provided to Class Members in the manner prescribed in the Order for Notice and Hearing (Dkt. No. 460) (amended on September 25, 2009, Dkt. No. 463). In accordance with the Order for Notice, Lead Counsel has mailed a copy of the Postcard Notice to all known class members, published the Newspaper Notice in the *USA Today* (national edition) and *The Detroit Free Press*, and posted the Website Notice on Lead Counsel’s website, [www.KellerSettlements.com](http://www.KellerSettlements.com). See Declaration of Lynn Sarko Regarding Compliance with Class Notice Requirements (“Sarko Compliance Decl.”), filed herewith.

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<sup>1</sup> Capitalized terms not otherwise defined in this Motion shall have the same meaning as ascribed to them in the Settlement Modification.

The Court provided an opportunity for Class Members to file objections and to appear at a fairness hearing, which the Court has set for November 16, 2009. The deadline for filing objections to the ERISA Settlement was November 2, 2009, and no objections were received.

2. Lead Counsel and the ERISA Named Plaintiffs request that the Court enter an Order Awarding Lead Counsel attorneys' fees of \$4,576,554.87 (20% of the Gross Settlement Fund excluding Taxes and accounting fees), to be allocated by Lead Counsel as set forth in Section IV of ERISA Named Plaintiffs' Memorandum in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Expenses ("Fee Memo") (Dkt. No. 454).

3. Lead Counsel and the ERISA Named Plaintiffs request that the Court enter an Order Reimbursing Lead Counsel \$750,000, as reserved in the Final Approval Order (Dkt No. 318), toward their costs and expenses advanced in prosecution of this litigation, to be allocated by Lead Counsel as set forth in Section IV of ERISA Named Plaintiffs' Memorandum in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Expenses ("Fee Memo") (Dkt. No. 454).

Each of these requests is fully supported by the record, the Final Approval Order, and controlling Sixth Circuit authority regarding compensation of counsel in class action cases of this type and magnitude. A proposed Order Granting Lead ERISA Counsel's Motion for Award of Attorneys' Fees and Expenses was lodged with Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses (Dkt. No. 453-2).

4. ERISA Named Plaintiffs, through their counsel, request that the Court enter an Order amending the January 23, 2008, Order and Final Judgment pursuant to Fed. R. Civ. P. 60(b)(6) at the time of any final approval of the Settlement Modification. A proposed Order and Final Judgment was previously submitted as Exhibit F to the Memorandum in Support of ERISA Named Plaintiffs' Motion for Order Preliminary Approval of Settlement Modification, and corrected via errata on September 18, 2009, (Dkt. No. 456).

The grounds for granting this motion are more fully set forth in Plaintiffs' Memorandum in Support of ERISA Named Plaintiffs' Motion For Final Approval of Settlement Modification, For Award of Attorneys' Fees and Expenses, and For Judgment Modification, which is filed herewith.

WHEREFORE, ERISA Named Plaintiffs respectfully request that the Court grant final approval of the Settlement Modification, grant Lead Counsel's motion for an award of attorneys' fees and expenses, and amend the January 23, 2008, Order and Final Judgment accordingly under Fed. R. Civ. P. 60(b)(6).

Respectfully submitted this 9th day of November, 2009.

**KELLER ROHRBACK L.L.P.**

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**Liaison Counsel for Plaintiffs**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
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**MEMORANDUM IN SUPPORT OF ERISA NAMED PLAINTIFFS' MOTION  
FOR FINAL APPROVAL OF SETTLEMENT MODIFICATION, FOR AWARD OF  
ATTORNEYS' FEES AND EXPENSES, AND FOR JUDGMENT MODIFICATION  
UNDER FED. R. CIV. P. 60**

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**STATEMENT OF ISSUES PRESENTED**

1. Whether the Modification to Amended Stipulation and Agreement of Settlement With Certain Defendants – ERISA Actions dated July 10, 2009, (the “Settlement Modification”)<sup>1</sup> should be approved as fair, reasonable, adequate, and in the best interests of the Class.
2. Whether the Court should grant ERISA Lead Counsel’s Motion for Award of Attorneys’ Fees and Expenses (“Fee Motion”) (Dkt. No. 453) for:
  - a. an attorneys’ fee award of \$4,576,554.87 (20% of the Gross Settlement Fund excluding Taxes and accounting fees); and
  - b. a cost award of \$750,000 to reimburse counsel for a portion of the expenses advanced in prosecuting this action.
3. Whether the Court should modify the January 23, 2008, Order and Final Judgment under Fed. R. Civ. P. 60(b)(6).

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<sup>1</sup> The capitalized terms are defined either in this Memorandum or the Settlement Modification itself, attached as Exhibit A to the ERISA Named Plaintiffs’ Motion for Order Preliminarily Approving Settlement Modification, Forms and Method of Notice With Respect Thereto, and for Judgment Modification Under Fed. R. Civ. P. 60 (“Prelim. Approval Motion”) (Dkt. No. 451).

**STATEMENT OF  
MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT**

Pursuant to E.D. Mich. Local Rule 7.1(c)(2), Plaintiffs Greg Bartell, Kimberly Chase-Orr, Neal Folck, Thomas Kessler, Donald McEvoy, and Irene Polito (collectively, “ERISA Plaintiffs”) list the following authority as the most appropriate for the relief sought in their motion:

- *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483 (E.D. Mich. 2008);
- Order, July 22, 2009 (Dkt. No. 446) (the “Order Re Rule 60(b)(6)”); and
- Order for Notice and Hearing, September 23, 2009 (Dkt. No. 460) (the “Order for Notice”).

## I. INTRODUCTION

On January 11, 2008, the Court granted final approval to the settlement of this ERISA action in its Amended Opinion and Order Regarding Lead Plaintiffs' Motions for (1) Final Approval of Settlements, (2) Settlement Class Certification, (3) Final Approval of Plans of Allocation, and (4) Award of Attorneys' Fees; and Delphi Trust I Interim Counsel's Motion for Attorneys' Fees, Slip Op. Jan. 11, 2008 (Dkt. No. 318), ("Final Approval Order"), and subsequently entered an Order and Final Judgment on January 23, 2008 (Dkt. No. 331). As detailed in the Memorandum In Support of ERISA Named Plaintiffs' Motion for Order Preliminarily Approving Settlement Modification, Forms and Method of Notice, With Respect Thereto, and for Judgment Modification Under Fed. R. Civ. P. 60, ("Prelim. Approval Memo") (Dkt. No. 452), the Settlement provided for resolution of the claims asserted against the Settling Defendants in the ERISA Action in consideration for (a) the payment of \$22.5 million in cash insurance proceeds; and (b) an allowed equity interest (the "Allowed Equity Interest") in the Delphi Corporation Chapter 11 bankruptcy case in the face amount of \$24.5 million.

Under the Settlement Stipulation, the Allowed Equity Interest was entitled to receive the same priority and treatment under the Delphi bankruptcy Plan of Reorganization as claims of general unsecured creditors. The Effective Date of the Settlement was subject to various conditions, including the distribution of certain consideration from the Delphi bankruptcy estate, and upon substantial consummation of Delphi's Plan of Reorganization.

However, the Plan of Reorganization confirmed by the Bankruptcy Court in January 2008, was never consummated due to intervening developments in the bankruptcy case and continued deterioration in the overall economy and the automotive industry generally. In light of

these developments, following the Court's approval, Lead Counsel concluded that Delphi's ability to emerge from bankruptcy was significantly jeopardized, and that if Delphi did emerge, unsecured creditors in the bankruptcy would likely fare much worse than was anticipated when the Settlement was reached in 2007.

Given these circumstances, Lead Counsel and Delphi negotiated a modification to the Settlement to de-couple the Effective Date of the Settlement from consummation of the Delphi bankruptcy Plan of Reorganization, and executed this Settlement Modification on July 10, 2009. On September 16, 2009, Counsel moved this Court for preliminary approval of the Settlement Modification.

By Order dated September 23, 2009,<sup>2</sup> the Court approved forms and method of notice regarding the Settlement Modification to be provided to the Class, and scheduled a Fairness Hearing for November 16, 2009. As directed by the Court's September 23, 2009, Order for Notice, Lead Counsel has provided notice to 45,845 class members which informed class members of their right to object to the proposed settlement modification and potential attorneys' fee and expense awards. As of the November 2, 2009, objection deadline, Lead Counsel had received no objections to the Settlement Modification or to Lead Counsel's Fee Motion.<sup>3</sup>

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<sup>2</sup> On September 25, 2009, the Court amended the Order for Notice (Dkt. No. 463) to correct a reference to the proper Notice forms to be disseminated to the Class.

<sup>3</sup> During the objection period, Lead Counsel received one inquiry requesting information, one statement of class member participation, and one inscrutable list. *See* Declaration of Lynn Sarko Regarding Class Member Correspondence. Dkt. No. 468, Ex. A1-A3. By letter dated October 15, 2009, Lead Counsel timely responded to the inquiry lodged, and enclosed a copy of the Notice of Proposed Modification to the Settlement Agreement with Certain Defendants, as well as the names and contact information for counsel for the securities class.

The Settlement Modification is in all respects fair, adequate, reasonable and in the public interest, and, therefore, warrants final approval. Thus, pursuant to the Court's September 23, 2009, Order for Notice, the Named Plaintiffs respectfully move the Court for entry of a final order and judgment that approves the Settlement Modification, for an award of attorneys' fees and expenses as set forth in Lead Counsel's Fee Motion, and to amend the January 23, 2008, Order and Final Judgment pursuant to Fed. R. Civ. P. 60(b)(6).

**II. THE SETTLEMENT MODIFICATION TERMS**

Named Plaintiffs previously set forth the events leading to the proposed settlement modification and the principal terms of the Settlement Modification in the Prelim. Approval Memo at 1-2. In summary, the Settlement Modification alters the existing Settlement as follows:

First, substantial consummation of Delphi's Plan of Reorganization is eliminated as a condition to the Effective Date of the Settlement. Rather, the Settlement would become effective upon the Court's and the Bankruptcy Court's approvals of the Settlement Modification (and the corresponding modification to the Securities settlement) becoming Final.

Second, the Class's Allowed Equity Interest would no longer be entitled to the same treatment as unsecured claims in the Delphi bankruptcy, unless unsecured claims receive full payment plus interest.

**III. THE SETTLEMENT MODIFICATION SHOULD BE APPROVED**

As set forth in the Prelim. Approval Memo at 2-6, Lead Counsel believes that the Settlement Modification is in the best interests of the Settlement Class. The de-coupling of the Effective Date of the Settlement from substantial consummation of Delphi's Plan of

Reorganization eliminates significant uncertainty and the potential for delay with respect to the Settlement's effectiveness and ultimate distribution to the Class.

Under the new Delphi Plan of Reorganization confirmed by the Bankruptcy Court in July 2009, the Settlement Class (with equivalent treatment to that of general unsecured creditors) would have received little if anything with respect to the Allowed Equity Interest. Moreover, there is a substantial risk that the Bankruptcy Court would have declined to approve non-subordinated treatment of the Allowed Equity Interest (particularly in the face of opposition from the Official Committee of Unsecured Creditors), which would then have jeopardized the entire Settlement.

**A. The Settlement Modification Satisfies Each Element of the Sixth Circuit's Test for Fairness in Class Action Settlements.**

Lead Counsel briefed these issues previously in its Prelim. Approval Memo at 3-6 and thus addresses them again here only briefly.

The Sixth Circuit has identified eight factors that District Courts may examine when deciding whether to approve a class action settlement:

- (a) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement;
- (b) the risks, expense, and delay of further litigation;
- (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs;
- (d) the amount of discovery completed and the character of the evidence uncovered;
- (e) whether the settlement is fair to the unnamed class members;
- (f) objections raised by class members;
- (g) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and
- (h) whether the settlement is consistent with the public interest.

*In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008)

(citing *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (further

citations omitted)). All of these factors are ascertainable at this time, and should inform this Court's analysis of the proposed Settlement Modification.

In its Final Approval Order approving the initial settlement in this case, this Court noted that "each of the Sixth Circuit's factors weighs in favor of approval of both [the ERISA and Securities] Settlements." *Id.* The Settlement Modification does not change this analysis; rather, it makes the Settlement more appealing than it was in the first instance through removal of a significant contingency – substantial consummation of Delphi's Plan of Reorganization.

The first factor, "likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement," still supports approval of the settlement. *Id.* As mentioned above, the Class gains a substantial benefit from the Settlement Modification that it did not have in the original settlement: its recovery no longer depends on Delphi successfully emerging from bankruptcy.

The second factor also weighs in favor of the Settlement Modification. Indeed, "the risks, expense, and delay of further litigation," *id.*, are more imminent now than they were when the Court approved the original settlement. Because the Settlement Modification allows the parties to avoid this "risk[, expense, and delay," *id.*, it weighs in favor of approval of the Settlement Modification.

The third and fourth factors — "the judgment of experienced counsel ... [and] the amount of discovery completed and the character of the evidence uncovered," *id.* suggest now, as they did in the initial settlement, that this Court should approve the Settlement Modification. In light of the developments surrounding Delphi's bankruptcy and deteriorating financial condition, the finding that counsel have "made informed judgments regarding the Settlements," *Delphi*, 248

F.R.D. at 498, is still valid and the third and fourth factors favor approval of the Settlement Modification.

Like the Settlement previously approved by this Court, the Settlement Modification was the product of arm's-length negotiations and so satisfies the fifth and seventh factors as well.<sup>4</sup> When it became clear that Delphi might not be able to consummate the Plan of Reorganization, Lead Counsel began a series of protracted negotiations with Bankruptcy counsel, and eventually, Lead Counsel and Delphi reached an agreement that delivers monetary value for the class, while detaching the Settlement from the effective date of Delphi's Plan of Reorganization.

Finally, the Settlement Modification is in the public interest, and satisfies the eighth and final element of the Sixth Circuit's analysis for class action settlements. As this Court recognized when it approved the initial settlement, this litigation comprises two intertwined public interests: "encouraging settlement of complex class action litigation . . . [and] assist[ing] Delphi and its employees and shareholders in concluding its bankruptcy proceeding and returning to a more solid financial condition . . ." *Id.* at 501-02.

Therefore, because the Settlement Modification follows in the footsteps of the original settlement and satisfies each element of the Sixth Circuit test, this Court should grant final approval to the Settlement Modification.

#### **IV. COMPLIANCE WITH NOTICE REQUIREMENTS**

As required by Fed. R. Civ. P. 23, the requirements of due process, and the Order for Notice (Dkt. No. 460), the Class received proper and adequate notice of the Settlement Modification. Pursuant to the Order for Notice, the Postcard Notice was timely mailed to the last

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<sup>4</sup> Factor six, objections raised by class members, is moot as no objections were received.

known address of class members, as provided by the Company, and published on the website maintained by Lead Counsel as designated in the Notice. Likewise, the approved Newspaper Notice was published in *The Detroit Free Press* and the *USA Today* (national edition). See Declaration of Lynn Sarko Regarding Compliance with Class Notice Requirements (“Sarko Compliance Decl.”).

**V. LEAD COUNSEL’S MOTION FOR ATTORNEYS’ FEES AND EXPENSES SHOULD BE GRANTED**

In the Final Approval Order, the Court ordered creation of a reserve of 20% of the Gross ERISA Settlement Fund for a potential award of attorneys’ fees to ERISA Lead Counsel. Final Approval Order at 52. The Court also ordered creation of a reserve of \$750,000 to cover the costs and expenses of ERISA Lead Counsel. Pursuant to the Final Approval Order, these reserves were to be set aside “pending resolution of all claims in the ERISA action and the filing by ERISA Lead Counsel of a formal application for fees and expenses.” *Id.*

In light of the successful results achieved in this hard-fought class action, and as recognized in the Final Approval Order, Plaintiffs respectfully request that:

- Lead Counsel be awarded attorneys’ fees of \$4,576,554.87 (20% of the Gross Settlement Fund, excluding Taxes and accounting fees), to be allocated by Lead Counsel as set forth in Section IV of the Fee Motion; and
- Lead Counsel be reimbursed \$750,000 from the reserve toward their costs and expenses advanced in prosecuting this litigation, to be allocated by Lead Counsel as set forth in Section IV of the Fee Motion.

Named Plaintiffs previously set forth in the Memorandum in Support of Lead Counsel’s Motion For Award of Attorneys’ Fees and Expenses, (Dkt. No. 454), (“Fee Memo”) and

Declaration of Lynn Sarko (Dkt. No. 455), (“Sarko Fee Decl.”) a detailed summary of the litigation, the Settlement Modification, and the relevant case law. Rather than repeat that summary, Plaintiffs will briefly review the highlights for the Court.

**A. Lead Counsel Are Entitled to a Reasonable Percentage of the Common Fund.**

It is well established that “a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) (“[C]ourts in the Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases.”).

Because the courts in the Sixth Circuit have expressed a preference for the “percentage-of-the-fund” method in common fund cases, and because the Court has previously reserved funds based on a percentage of the gross recovery, Lead Counsel requests a fee based on this method.

**B. The 20 Percent Fee Requested by Lead Counsel is Within the Range Considered Reasonable and Fair in the Sixth Circuit.**

Lead Counsel’s request for 20% of the Gross ERISA Settlement Fund for attorneys’ fees is well within the range of percentage fee awards generally approved by district courts in the Sixth Circuit. Fee Memo at 7-8. Lead Counsel faced substantial risks in this complex litigation, and pursued all potential avenues to secure a favorable outcome in the face of a vigorous defense that created numerous legal obstacles. These efforts yielded an excellent recovery for the Class.

**C. The Requested 20 Percent Fee Award is Fair and Reasonable under the Sixth Circuit *Bowling* Factors**

As detailed in the Fee Memo at 8-17, the Sixth Circuit evaluates the reasonableness of a requested attorney fee award by reviewing six factors: (1) the value of the benefit rendered to the

plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996); *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

Each of these factors supports the fee award here. First, through Lead Counsel's efforts the Class members who suffered losses in their retirement accounts will receive a cash recovery of \$22.5 million. Second, Lead Counsel devoted more than 8,700 attorney and professional hours to the prosecution of this case, and advanced expenses of \$870,474.45 over four years of litigation, and fee awards of 28.5% and 25% of settlement values in similar cases were recently adjudged reasonable in view of the same Lead Counsel's value of services on an hourly basis. Third, Lead Counsel accepted this matter on a wholly contingent basis and has received no compensation to date. Fourth, Lead Counsel through its diligent work has conferred a valuable benefit on Class members that would not otherwise have been obtained. Fifth, ERISA class actions are inherently complex, and the law on this issue is in a state of flux. Finally, Lead Counsel are highly experienced in complex ERISA and class actions matters such as this one. In sum, review of each of the *Bowling* factors supports the award to Lead Counsel of the requested fee award of 20% of the settlement value.

**D. Lead Counsel Should Be Awarded The \$750,000 Reserve For Reimbursement Of Expenses.**

It is well established in the Sixth Circuit that "[e]xpense awards are customary when litigants have created a common settlement fund for the benefit of a class." *In re F&M Distributions, Inc. Sec Litig.*, No. 95-71778, 1999 U.S. Dist. LEXIS 11090, at \*20 (E.D. Mich. June 29, 1999).

“Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with . . . experts and consultants, travel and other litigation-related expenses.” *In re Cardizem*, 218 F.R.D. at 535; *see also* Sarko Fee Decl. at ¶ 18.

Here, Lead Counsel and those firms which performed work approved by Lead Counsel have advanced or incurred \$870,474.45 in expenses to date. A breakdown of these unreimbursed expenses is contained in the Sarko Fee Decl. at ¶¶ 82-83. In light of the complex nature of this litigation, which required significant travel, computerized legal research, retention of highly qualified expert witnesses, and several mediation sessions with a capable and respected mediator, the expenses incurred were both reasonable and reasonably related to the interests of the Named Plaintiffs and the Class.

**E. Allocation Of Attorneys’ Fee Award And Expenses By Lead Counsel.**

With the Court’s approval, Lead Counsel intends to allocate fees and expense awards to Lead Counsel, Liaison Counsel and the other Plaintiffs’ Counsel who performed work at the direction of Lead Counsel, taking into consideration each firm’s contribution to the prosecution of this matter, as set forth in the Sarko Fee Decl. at ¶¶ 76-78.

In short, the fee request, as well as the request for reimbursement of expenses, is supported by the record and controlling Sixth Circuit authority regarding compensation for attorneys’ fees and reimbursement of expenses, and accordingly, the requests should be granted.

**VI. IF THE COURT GRANTS FINAL APPROVAL TO THE SETTLEMENT MODIFICATION, THE COURT SHOULD ALSO AMEND THE JUDGMENT UNDER FED. R. CIV. P. 60.**

On January 23, 2008, the Court entered an Order and Final Judgment in this matter as to the Settling Defendants. In light of the Settlement Modification, Named Plaintiffs now move this Court to concurrently amend that judgment pursuant to Fed. R. Civ. P. 60(b)(6) as the Court so indicated in its Order Re Rule 60(b)(6), July 22, 2009, (Dkt. No. 446). Federal Rule of Civil Procedure 60(b)(6) gives a court broad discretion to vacate or amend a judgment for any reason that justifies relief.

Fed. R. Civ. P. 60(b) states, in pertinent part: “On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief.” It is well settled law that Rule 60 provides courts with authority “adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” *Liljeberg v. Health Servs. Acquisition Corp.* 486 U.S. 847, 864 (1988), (quoting *Klapprott v. U.S.*, 335 U.S. 601, 614-615 (1949)).

Two preconditions must be met for Rule 60(b)(6) to apply: First, the grounds for relief set forth in Rules 60(b)(1)-(5) must not be applicable, and second, the motion must be filed within a reasonable time from the date of entry of the judgment at issue. *See Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). Where changed circumstances warrant vacating or modifying a judgment, a court can apply Rule 60(b)(6) to accomplish justice, particularly where the changed circumstances were beyond the movant’s control. *See Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580-81 (6th Cir. 1985) (holding that a post-judgment change in the law warranted Rule 60(b)(6) relief).

The present situation is tailor-made for the Court's amendment of its January 23, 2008, Order and Final Judgment pursuant to Rule 60(b)(6). The first precondition is easily met as the parties are not seeking to amend the Judgment for any of the reasons set forth in Rule 60(b)(1-5), which provide for relief in cases of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a judgment that is void; or (5) a judgment that has been satisfied, released, or discharged. *See* Fed. R. Civ. P. 60(b)(1)-(5). Second, this motion is brought within a reasonable time after entry of the Judgment. There is no specific time within which a Rule 60(b)(6) motion must be brought. *See* Fed. R. Civ. P. 60(c)(1). Instead, the timeliness of a Rule 60(b)(6) motion depends on the facts of circumstances of each case, including the circumstances compelling equitable relief. *Olle*, 910 F.2d at 365. Here, the events giving rise to this motion unfolded over an almost two year period of time during which the delay in the consummation of the Delphi bankruptcy Plan of Reorganization and the deteriorating economy rendered the effectiveness of the Settlement unlikely, if not impossible.

More importantly, Rule 60(b)(6) relief is appropriate here because the effectiveness of the Settlement has not occurred due to changed circumstances that were not contemplated by the Settling Parties when they entered into the Stipulation and First Settlement Modification. These changed circumstances include, among others, uncertainty regarding the Bankruptcy Effective Date, deterioration of the economy, and the auto industry in particular, and contraction of the credit markets, which have together prevented the Class and the Released Parties from receiving the benefit of what they bargained for. As set forth in *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 470 (6th Cir. 2007), these circumstances rise to the level of the extraordinary

and exceptional circumstances resulting in manifest injustice, as required for Rule 60(b)(6) amendment of an earlier judgment. Accordingly, as suggested in the Court's Order Re Rule 60(b)(6), dated July 22, 2009, Named Plaintiffs now request that the Court amend the earlier Judgment to properly reflect the Settlement Modification.

**VII. CONCLUSION**

Lead Counsel respectfully submits that the Settlement Modification should be approved, that Lead Counsel should be awarded attorneys' fees and expenses as set forth in the Fee Motion, and that the Court's January 23, 2008, Order and Final Judgment be amended pursuant to Fed. R. Civ. P. 60(b)(6). Accordingly, Named Plaintiffs' Motion For Final Approval of Settlement Modification, For Award of Attorneys' Fees and Expenses And For Judgment Modification Under Fed. R. Civ. P. 60 should be granted.

Respectfully submitted this 9th day of November, 2009.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 9, 2009, I electronically filed ERISA Named Plaintiffs' Motion for Final Approval of Settlement Modification, for Award of Attorneys' Fees and Expenses and for Judgment Modification Under Fed. R. Civ. P. 60 and Memorandum in Support with the Clerk of the Court using the ECF system, which will send notification of such filing to:

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