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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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| IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION | MDL No. 2672 CRB (JSC)<br><br>The Honorable Charles R. Breyer |
| This Document Relates to:<br><br>Audi $CO_2$ Cases | **MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND DIRECTION OF NOTICE UNDER FED. R. CIV. P. 23(e)** |

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**NOTICE OF MOTION AND MOTION**

TO ALL THE PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Thursday, September 13th at 10:00 a.m. or at such other date and time as the Court may set, in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Lead Counsel and the Plaintiffs' Steering Committee, on behalf of a proposed Settlement Class of owners and lessees of certain Audi, Volkswagen, Porsche, and Bentley branded vehicles, will and hereby do move the Court for an order granting preliminary approval of the Class Action Settlement and directing notice to the Class under Fed. R. Civ. P. 23(e)(1); appointing Interim Settlement Class Counsel and Class Representatives under Fed. R. Civ. P. 23(g)(3); and scheduling a final approval hearing under Fed. R. Civ. P. 23(e)(2).

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The proposed Settlement now before the Court resolves the claims of more than 100,000 consumers who purchased or leased certain gasoline-powered Audi, Volkswagen, Porsche, and Bentley vehicles (the "Class Vehicles") that were initially labeled and marketed with overstated fuel economy (and understated carbon dioxide ("$CO_2$") emissions).[1] The Settlement provides compensation to the members of the Class for their time and expense in driving and continuing to drive Vehicles that obtain up to 1 mile per gallon ("MPG") less than was originally represented.

If all potential Class Members participate in the Settlement, the payments to the Class will total approximately $96.5 million. Individually, Class Members stand to receive lump-sum cash payments—ranging from $518.40 to $2,332.80 per Class Vehicle—correlating to their length of Vehicle possession and to their Vehicle's revised fuel economy ratings. To obtain this payment, Class Members need only submit a claim form and documents necessary to establish their eligibility. If any of the available funds are not directly claimed by Class Members, the remaining money will *not* revert to the Defendants. Instead, it will be dedicated to environmental causes, subject to Court approval, thereby ensuring the full Settlement Value inures to the benefit of the Class. Critically, none of the approximately $96.5 million available in Settlement benefits will be reduced to pay Class Counsel's attorneys' fees or expenses, or the costs of notice and claims administration.[2] Although Defendants reserve the right to contest the amount requested, any fees and costs that are awarded by the Court under Fed. R. Civ. P. 23(h) will be paid by Defendants separately, and in addition to the $96.5 million.

The proposed Settlement is an outstanding result for the Class, providing "full compensation" for the damages consumers incurred. *See* Declaration of Edward M. Stockton ("Stockton Decl.") ¶¶ 4, 23(f). Plaintiffs are proud to present this Settlement to the Court and

[1] All capitalized terms used herein have the meaning set forth in the Consumer Class Settlement Action Agreement and Release ("Settlement," "Settlement Agreement," or "Agreement"), unless otherwise indicated. The Settlement is attached as Exhibit 1 hereto.

[2] "Class Counsel" refers to proposed Interim Settlement Class Counsel and Settlement Class Counsel, as discussed below.

respectfully request approval to give notice to the Class and set the matter for final approval, under the procedure delineated by Fed. R. Civ. P. 23(e).

## II. BACKGROUND AND PROCEDURAL HISTORY

### A. Factual background: Plaintiffs alleged that Defendants inflated the fuel economy labels for the Class Vehicles.

Fuel economy is a critical factor in consumers' decisions to purchase or lease a vehicle. Given the important role it plays, vehicle manufacturers often advertise and emphasize their vehicles' fuel economy. Indeed, federal law requires that new vehicles sold or leased in the United States have a label—commonly referred to as a "Monroney" label—in their window that displays specific information about the vehicle's fuel efficiency, including the ratings for City, Highway, and Combined MPG. 49 U.S.C. § 32908, *et seq.*; 40 C.F.R. §§ 600.301–302-12. These fuel economy ratings are also communicated via the manufacturers' vehicle brochures and other consumer-facing materials, and are available for used car purchasers on www.fueleconomy.gov. As set forth in Plaintiffs' operative Amended Consolidated Consumer Class Action Complaint (the "Amended Complaint"), this case concerns specific Volkswagen, Audi, Porsche, and Bentley-branded gasoline vehicles for which the MPG represented to regulators and consumers was inflated by up to 1 MPG and will be revised accordingly.[3]

More specifically, Plaintiffs allege that a software program embedded in the Vehicles' Transmission Control Unit—the "Warm-up Program" or the "Program"—caused the fuel economy ratings for the Class Vehicles to be inflated. In each Class Vehicle, the Warm-up Program software activates when it encounters certain "entry conditions" (such as a key start) and de-activates under certain "exit conditions" (such as a steering wheel turn). *See* Amended Complaint ("Am. Compl.") ¶¶ 6-7. Thus, in effect, the Warm-up Program operates primarily during testing conditions (when the program is "active"), but not during on-road driving (when the program is "inactive"). *Id.* When the Program is active (*i.e.*, during testing), the transmission changes gears at lower engine speeds, which requires less fuel. As a result, the Class Vehicles

[3] The revised fuel economy ratings will be available on EPA's "Fuel Economy Label Updates" website, https://www.epa.gov/recalls/fuel-economy-label-updates, as well as www.fueleconomy.gov.

emitted less $CO_2$ and achieved better fuel economy in laboratory testing (the results of which were reported to the government and marketed to consumers) and worse fuel economy and higher $CO_2$ emissions when driven on the road. For all Class Vehicles, significant expert testing and discovery have confirmed a difference of at least 1 MPG between the City, Highway, and/or Combined fuel economy as represented to Class Members and as later tested with Warm-up Program de-activated.

Plaintiffs and the proposed Settlement Class operated the Class Vehicles without obtaining the reported fuel efficiency and while emitting higher $CO_2$. As a result of this discrepancy, Class Members paid for more fuel, and were inconvenienced by more frequent trips to the fuel pump, throughout the duration of their ownership or lease.

### B. Procedural background: Plaintiffs investigated their claims through a comprehensive discovery process.

On November 5, 2016, the German newspaper Bild am Sonntag ("*Bild*") reported that the California Air Resources Board had discovered a discrepancy in vehicle testing results and suspected that Audi had installed an emissions cheating device in gasoline-powered Audi models equipped with a particular 8-speed automatic transmission. The *Bild* article claimed that software in these vehicles operates to reduce $CO_2$ emissions—and, as a result increase fuel economy—only during testing cycles. In the wake of these revelations, consumers filed a number of class action lawsuits in federal courts across the country. The actions were consolidated before this Court in the pending MDL, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672 CRB (JSC). The Court had previously appointed Plaintiffs' Lead Counsel and a PSC in the MDL (Dkt. 1084), and ordered Plaintiffs to file a consolidated complaint in the new Audi $CO_2$ matters. *See* Dkt. 3217.

Following the *Bild* report, Plaintiffs and their experts conducted further investigation and technical vehicle testing to detect discrepancies in emissions and fuel economy performance between lab and normal driving conditions in the Defendants' vehicles. Thereafter, on October 12, 2017, Plaintiffs filed a 519-page Consolidated Consumer Class Action Complaint reflecting

their initial testing results as well as information learned from documents produced by the Defendants through Plaintiffs' discovery efforts. *See* Dkt. 4043-3.

On December 11, 2017, the Audi Defendants and Bosch Defendants filed motions to dismiss the Consolidated Complaint—totaling 58 and 41 pages, respectively. Dkts. 4545, 4546. Plaintiffs then filed an 81-page omnibus opposition on January 16, 2018 (Dkt. 4662), and both the Audi and Bosch Defendants lodged their replies in support the following month. Dkts. 4743, 4744. A hearing on those motions was scheduled for May 11, 2018, but, as detailed below, was taken off calendar by the Parties' stipulation pending the outcome of ongoing settlement discussions.

Ultimately, Plaintiffs' investigations and Defendants' own expert testing conducted after the filing of the Consolidated Complaint confirmed that the particular transmission identified in the *Bild* article (the AL 551-Q) was merely one of many transmissions Defendants programmed with the Warm-up Program software. As the testing revealed, the Warm-up Program was present in a number of transmissions used in Audi, Volkswagen, Porsche, and Bentley vehicles, and in many of those vehicles, the Program caused the Vehicles to achieve better fuel economy (and emit less $CO_2$) in the lab than on the road. Plaintiffs amended the Consolidated Complaint to account for these developments and to reflect their further knowledge of the technological background and broader scope of the misrepresented fuel economy issues gained throughout the intervening months of litigation and discovery. The result was the recently filed, 415-page Amended Consolidated Consumer Class Action Complaint. In the operative Amended Complaint, Plaintiffs bring claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"); the Magnuson-Moss Warranty Act; common law fraud by concealment; and state law consumer protection claims. The lengthy and detailed allegations related to the Warm-up Program technology in both the Amended Complaint and the earlier Consolidated Complaint reflect the arduous process undertaken by Class Counsel to analyze the multi-party fraud and complicated engine and software technologies at issue in this case, and to research, develop, and assert the various claims and the remedies available to those harmed by the conduct of Defendants and their co-conspirators.

### C. The Settlement process: The Parties engaged in a lengthy, fifteen-month negotiation process and conducted additional confirmatory discovery after the Settlement was reached.

Settlement negotiations began in April 2018 when, with a hearing on Defendants' motions to dismiss pending, the Parties agreed to commence negotiations in earnest. Dkt. 4977. Settlement discussions endured for fifteen months thereafter, ultimately resulting in the proposed Settlement now before the Court.

Throughout these negotiations, the Parties held numerous in-person sessions in locations including Germany, Washington DC, New York, and San Francisco, and continued their discussions with many telephone conferences and exchanges of information between those meetings. Declaration of Elizabeth J. Cabraser ("Cabraser Decl.") ¶ 8. The Parties ensured that many of those sessions included in-house counsel, high-level engineers, and experts to further the negotiations in an efficient and meaningful way. Meanwhile, Class Counsel continued to spend considerable time and energy gaining familiarity with the strengths and weaknesses of their claims, including through a robust and prolonged exchange of information with the Defendants. *Id.* ¶¶ 10-12. In support of both the litigation and settlement efforts, Plaintiffs' counsel retained multiple technical experts to conduct extensive testing on the Defendants' vehicles to measure and compare, among other things, their emissions and fuel economy under laboratory and on-road driving conditions. Plaintiffs worked with their experts for many months to test several vehicles under approved federal vehicle testing procedures. *Id.* Plaintiffs' experts also conducted on-road emissions testing and data collection using portable emissions measurement systems ("PEMS") on several vehicles. *Id.*

In response to regulatory inquiries and this litigation, Defendants also conducted their own extensive testing and analysis of the $CO_2$ emissions and fuel economy of their gasoline vehicles. Plaintiffs' counsel and their experts discussed the testing methodology with Defendants and their engineers at length, reviewed Defendants' testing data, and observed some of the testing in person. *Id.* Indeed, Plaintiffs and their experts traveled to Audi's testing facility in Ingolstadt, Germany, on two occasions to observe testing conducted by Defendants, and to engage in

interviews and meetings with several of the engineers responsible for testing the Class Vehicles and evaluating the results. *Id.*

The outcome of all these meetings, exchanges of information, and more than a year of negotiations is a proposed Agreement, under which the Defendants will pay approximately $96.5 million to the Class (and, if funds are unclaimed, to environmental remediation efforts), in addition to the Settlement administration costs and any attorneys' fees and costs awarded to Class Counsel by the Court. This is an exceptional result—described more fully below—that "provides full compensation to Class Members for the damages they incurred as a result of the reduced fuel economy ratings." Stockton Decl. ¶ 23(f).

## III. SUMMARY OF SETTLEMENT TERMS

The Settlement provides substantial cash compensation—with payments to Class Members of up to $518.40 to $2,332.80 per Class Vehicle through a streamlined claims process. These payments fully compensate Class Members for having driven and continuing to drive Class Vehicles that did not obtain the fuel economy represented at the time of purchase or lease.

### A. The Settlement Class definition

The Settlement Class is defined as follows: "a nationwide class, including Puerto Rico, of all persons (including individuals and entities) who own, owned, lease, or leased a Class Vehicle in the United States or its territories as of the date of the Motion for Preliminary Approval." Settlement Agreement ("SA") ¶ 2.9.[4] The Class Vehicles include 97,890 Audi, Bentley, Porsche, and Volkswagen vehicles, as defined in the proposed Settlement Agreement. *Id.* ¶ 2.15.

### B. Cash benefits to Class Members

The proposed Settlement delivers significant cash payments to any Class Member who submits a valid claim. The amount of compensation available to each Class Member is based on (1) the difference in cost for the amount of gasoline that would have been required under the

[4] Those excluded from the Class are: (a) Defendants' officers, directors and employees and participants in Volkswagen's Internal Lease Program, and/or Porsche Associate Lease Program; Defendants' affiliates and affiliates' officers, directors and employees; Defendants' distributors and distributors' officers, directors and employees; (b) Judicial officers and their immediate family members and associated court staff assigned to this case; and (c) All those otherwise in the Class who or which timely and properly exclude themselves from the Class as provided in the Class Action Agreement.

original Monroney fuel economy label and the greater amount required under the adjusted fuel economy label, and (2) a goodwill payment of an additional 15% of those damages to compensate for any inconvenience. *Id.* ¶ 4.1. The payments range from $518.40 to $2,332.80 for original owners who still own their Class Vehicles as of the date this Motion is filed. *Id.*, Ex. A. Class Members who sold, purchased used, or leased their Class Vehicles will be entitled to compensation based on the same concept described above, but prorated to account for the number of months of their ownership or possession. Critically, in all circumstances, this compensation represents 100% of the damages available to the Class under the relevant damages theory, Stockton Decl. ¶ 23(f)—a remarkable result for a compromise of contested claims that have yet to survive a motion to dismiss.

If there are any funds remaining in the Settlement Value after all valid, complete, and timely Claims are paid, subject to Court approval, the balance will be directed to environmental remediation efforts. SA ¶ 4.5. This *cy pres* distribution may include, for example, the purchase of greenhouse gas credits, environmental projects in consultation with relevant regulators, and/or other, environmentally-focused recipients, as agreed by the Parties and approved by the Court. *Id.* This ensures that all the money secured by the Settlement will inure to the benefit of the Class and the interests advanced in this litigation.

## IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL AND DECISION TO GIVE NOTICE

Federal Rule of Civil Procedure 23(e) governs a district court's analysis of the fairness of a proposed class action settlement and creates a multistep process for approval. First, a court must determine that it is likely to (i) approve the proposed settlement as fair, reasonable, and adequate, after considering the factors outlined in Rule 23(e)(2), and (ii) certify the settlement class after the final approval hearing. *See* Fed. R. Civ. P. 23(e)(1)(B); *see also* 2018 Advisory Committee Notes to Rule 23 (standard for directing notice is whether the Court "likely will be able both to approve the settlement proposal under Rule 23(e)(2) and . . . certify the class for purposes of judgment on the proposal"). Second, a court must direct notice to the proposed settlement class, describing the terms of the proposed settlement and the definition of the

proposed class, to give them an opportunity to object to or to opt out of the proposed settlement. *See* Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(e)(1), (5). Third, after a hearing, the court may grant final approval of the proposed settlement on a finding that the settlement is fair, reasonable, and adequate, and certify the settlement class. Fed. R. Civ. P. 23(e)(2). In this District, a movant's submission should also include the information called for under the District's Procedural Guidance for Class Action Settlements ("Procedural Guidance").

## V. ARGUMENT

### A. The Court will be able to certify the Class for settlement purposes upon final approval.

Certification of a settlement class is "a two-step process." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2016 WL 4010049, at *10 (N.D. Cal. July 26, 2016) (Breyer, J.) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)). First, the Court must find that the proposed settlement class satisfies Rule 23(a)'s four requirements. *Id.* (citing Fed. R. Civ. P. 23(a)). Second, the Court must find that "a class action may be maintained under either Rule 23(b)(1), (2), or (3)." *Id.* (citing *Amchem*, 521 U.S. at 613). The proposed Settlement Class here readily satisfies all Rule 23(a)(1)-(4) and (b)(3) certification requirements. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019) (en banc) (upholding district court's preliminary approval and certification of nationwide settlement class in similar fuel economy settlement).

#### 1. The Settlement Class meets the requirements of Rule 23(a).

##### a. Rule 23(a)(1): The Class is sufficiently numerous.

Rule 23(a)(1) is satisfied where, as here, "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is generally met when the class exceeds forty members. *See, e.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). It is undisputed that approximately 100,000 Class Vehicles were sold and/or leased nationwide and that the Settlement Class—which includes current and former owners and lessees of those Vehicles—includes at least 100,000 members. The size of the Settlement Class and its geographic dispersal across the United States renders joinder impracticable. *See Palmer v.*

*Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006) ("Joinder of 1,000 or more co-plaintiffs is clearly impractical."). Numerosity is satisfied.

**b. Rule 23(a)(2): The Class Claims present common questions of law and fact.**

"Federal Rule of Civil Procedure 23(a)(2) conditions class certification on demonstrating that members of the proposed class share common 'questions of law or fact.'" *Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014). Commonality "does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014). Indeed, "'[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011).[5]

Courts routinely find commonality where, as here, the class claims arise from a defendant's uniform course of conduct. *See, e.g.*, *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 17-MD-02777-EMC, 2019 WL 536661, at *6 (N.D. Cal. Feb. 11, 2019) (commonality satisfied where claims arose from the defendants' "common course of conduct" in perpetrating alleged vehicle emissions cheating scheme); *Cohen v. Trump*, 303 F.R.D. 376, 382 (S.D. Cal. 2014) ("Plaintiff argues his RICO claim raises common questions as to 'Trump's scheme and common course of conduct, which ensnared Plaintiff[] and the other Class Members alike.' The Court agrees."); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 488 (C.D. Cal. 2006) (finding common core of factual and legal issues in "the questions of whether Allianz entered into the alleged conspiracy and whether its actions violated the RICO statute").[6]

[5] Here, and throughout, internal citations are omitted unless otherwise indicated.

[6] Likewise, commonality is satisfied in cases where defendants' deployed uniform misrepresentations to deceive the public. *See Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) ("Courts routinely find commonality in false advertising cases . . . ."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501-02 (S.D. Cal. 2013) (same); *see also Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468, 478 (C.D. Cal. 2012) (whether misrepresentations "are unlawful, deceptive, unfair, or misleading to reasonable consumers are the type of questions tailored to be answered in 'the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation'") (quoting *Dukes*, 564 U.S. at 350).

Here, the Settlement Class claims are rooted in commons questions of fact relating to Defendants' development and use of the Warm-up Program and representations about the Class Vehicles' fuel economy to regulators and consumers. *See, e.g.*, Am. Compl. ¶ 96; *see also In re Hyundai*, 926 F.3d at 557 (similar common questions about misrepresented fuel economy ratings satisfied commonality requirement). These common questions will, in turn, generate common answers "apt to drive the resolution of the litigation" for the Settlement Class as a whole. *See Dukes*, 564 U.S. at 350. As the Settlement Class' "injuries derive from [D]efendants' alleged 'unitary course of conduct,'" Plaintiffs have "'identified a unifying thread that warrants class treatment.'" *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 290 (S.D.N.Y. 2012), *aff'd* 780 F.3d 70 (2d Cir. 2015). As in the *Volkswagen* diesel litigation, "[w]ithout class certification, individual Class Members would be forced to separately litigate the same issues of law and fact which arise from Volkswagen's use of the [Program] and Volkswagen's alleged common course of conduct." 2016 WL 4010049, at *10.

**c. Rule 23(a)(3): The Settlement Class Representatives' claims are typical of other Class Members' claims.**

Under Rule 23(a)(3), "'the claims or defenses of the representative parties'" must be "'typical of the claims or defenses of the class.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting Fed. R. Civ. P. 23(a)(3)). "Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Typicality "assure[s] that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 ((9th Cir. 1992)). Thus, where a plaintiff suffered a similar injury and other class members were injured by the same course of conduct, typicality is satisfied. *See Parsons*, 754 F.3d at 685; *see also Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir. 2012) ("The test of typicality is whether other members have the same or similar injury, whether the action is based

on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.").

Here, the course of conduct that injured the Settlement Class Representatives injured the other members of the proposed Settlement Class in the same way. The Settlement Class Representatives, like other Settlement Class Members, purchased or leased Class Vehicles that did not obtain the fuel economy represented to them as a result of the same Warm-up Program software active in all Class Vehicles. Like all Class Members, the Settlement Class Representatives were harmed by having to pay for more gas, and in the inconvenience of more frequent trips to the gas pump, while they used the Class Vehicles. The typicality requirements are satisfied.

**d. Rule 23(a)(4): The Settlement Class Representatives and Class Counsel have and will protect the interests of the Class.**

Rule 23(a)(4)'s adequacy requirement is met where, as here, "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy entails a two-prong inquiry: "'(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Evon*, 688 F.3d at 1031 (quoting *Hanlon*, 150 F.3d at 1020). Both prongs are readily satisfied here.

The Settlement Class Representatives have no interests antagonistic to Settlement Class Members and will continue to protect the Class' interests in overseeing the Settlement administration and through any appeals. *See Clemens v. Hair Club for Men, LLC*, No. C 15-01431 WHA, 2016 WL 1461944, at *2-3 (N.D. Cal. Apr. 14, 2016). Indeed, the Settlement Class Representatives "are entirely aligned [with the Settlement Class] in their interest in proving that [Defendants] misled them and share the common goal of obtaining redress for their injuries." *Volkswagen*, 2016 WL 4010049, at *11. The Representatives understand their duties, have agreed to consider the interests of absent Settlement Class Members, and have reviewed and uniformly endorsed the Settlement terms. *See* Cabraser Decl. ¶ 22. *See also, e.g.*, *Trosper v. Styker Corp.*, No. 13-CV-0607-LHK, 2014 WL 4145448, at *12 (N.D. Cal. Aug. 21, 2014) ("All

that is necessary is a 'rudimentary understanding of the present action and … a demonstrated willingness to assist counsel in the prosecution of the litigation.'"). The proposed Settlement Class Representatives are more than adequate.

Similarly, as demonstrated through this litigation and this brief, Lead Counsel and many of the PSC firms have undertaken an enormous amount of work, effort, and expense in this MDL and in litigating the Audi $CO_2$ cases. They have demonstrated their willingness to devote whatever resources were necessary to reach a successful outcome throughout the nearly two years since filing the Consolidated Complaint. They, too, satisfy Rule 23(a)(4).

**2. The Settlement Class meets the requirements of Rule 23(b)(3).**

Rule 23(b)(3)'s requirements are also satisfied because (i) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

**a. Common issues of law and fact predominate.**

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* At its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). Thus, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

The Ninth Circuit favors class treatment of fraud claims stemming from a "'common course of conduct.'" *See In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006); *Hanlon*, 150 F.3d at 1022-23. Even outside of the settlement context, predominance is readily

met for RICO and consumer claims arising from the defendants' common course of conduct. *See Amchem Prods.*, 521 U.S. at 625; *Wolin*, 617 F.3d at 1173, 1176 (consumer claims based on uniform omissions certifiable where "susceptible to proof by generalized evidence," even if individualized issues remain); *Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282 AHM (CTx), 2009 WL 2711956, at *8 (C.D. Cal. Aug. 25, 2009) ("Common issues frequently predominate in RICO actions that allege injury as a result of a single fraudulent scheme."); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1256-57 (11th Cir. 2004) (affirming certification of RICO claim where "all of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs [and the] corporate policies constitute[d] . . . the very heart of the plaintiffs' RICO claims").

Here, too, questions of law and fact common to the Settlement Class Members' claims predominate over any questions affecting only individual members, because the common issues "turn on a common course of conduct by the defendant in [a] nationwide class action." *See In re Hyundai*, 926 F.3d at 559 (citing *Hanlon*, 150 F.3d at 1022–23). Indeed, "[i]n many consumer fraud cases, the crux of each consumer's claim is that a company's mass marketing efforts, common to all consumers, misrepresented the company's product—here, a vehicle's fuel efficiency." *Id.*

Similar to *Hyundai*, Defendants' common course of conduct—here, the calibration of the Warm-up Program in each Class Vehicle and the resulting overstatement of the Class Vehicles' fuel economy—are central to the claims asserted in the Amended Complaint. Common, unifying questions as to the Defendants' conduct include, for example, "(1) "[w]hether the fuel economy statements were in fact inaccurate"; and (2) "whether [the Defendants] knew that their fuel economy statements were false or misleading." *Id.* The alleged misrepresentations to the Class were (among other sources) "uniformly made via Monroney stickers." *Id.* (internal quotation marks omitted). As such, Defendants allegedly "perpetrated the same fraud in the same manner against all Class Members." *Volkswagen*, 2016 WL 4010049, at *12. Predominance is satisfied.

**b. Class treatment is superior to other available methods for the resolution of this case.**

Superiority asks "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. In other words, it "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair." *Wolin*, 617 F.3d at 1175-76. Under Rule 23(b)(3), "the Court evaluates whether a class action is a superior method of adjudicating plaintiff's claims by evaluating four factors: '(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.'" *Trosper*, 2014 WL 4145448, at *17.

Class treatment here is far superior to the litigation of more than one hundred thousand individual consumer actions. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication."). The maximum damages sought by each Settlement Class Member (ranging from a maximum of $518.40 to $2,332.80 per Class Vehicle) are small relative to the significant cost of prosecuting each one's individual claims, especially given the technical nature of the claims at issue. *See Smith v. Cardinal Logistics Mgmt. Corp.*, No. 07-2104 SC, 2008 WL 4156364, at *11 (N.D. Cal. Sept. 5, 2008) (small interest in individual litigation where damages averaged $25,000-$30,000 per year of work).

Class resolution is also superior from an efficiency and resource perspective. Indeed, "[i]f Class Members were to bring individual lawsuits against [Defendants], each Member would be required to prove the same wrongful conduct to establish liability and thus would offer the same evidence." *Volkswagen*, 2016 WL 4010049, at *12. With a class of approximately 100,000,

"there is the potential for just as many lawsuits with the possibility of inconsistent rulings and results." *Id.* "Thus, classwide resolution of their claims is clearly favored over other means of adjudication, and the proposed Settlement resolves Class Members' claims at once." *Id.* Superiority is met here, and Rule 23(e)(1)(B)(ii) is satisfied.

* * *

For all the reasons set forth above, Plaintiffs respectfully submit that the Court will—after notice is issued and Class Member input received—"likely be able to . . . certify the class for purposes of judgment on the proposal." *See* Fed. R. Civ. P. 23(e)(1)(B).

**B. The Court should appoint Lead Plaintiffs' Counsel as Interim Settlement Class Counsel under Rule 23(g)(3).**

Rule 23(g) requires this Court to appoint class counsel to represent the Settlement Class. *See* Fed. R. Civ. P. 23(g). At the outset of the MDL, as part of a competitive application process with a total of 150 submissions, the Court chose Lead Counsel and each member of the PSC due to their qualifications, experience, and commitment to the successful prosecution of this case. *See* Dkt. 1084. The criteria that the Court considered in appointing Lead Counsel and the PSC were substantially similar to the considerations set forth in Rule 23(g). *See, e.g.*, *Clemens*, 2016 WL 1461944, at *2. As noted above, Lead Counsel and many of the PSC firms have undertaken an enormous amount of work, effort, and expense in this MDL and in litigating the Audi $CO_2$ cases. *See* Cabraser Decl. ¶¶ 2-13. Plaintiffs therefore submit that Lead Counsel should be appointed as Interim Settlement Class Counsel under Rule 23(g)(3) to conduct the necessary steps in the Settlement approval process. Lead Counsel will seek appointment of PSC members as Settlement Class Counsel under 23(g)(1) in connection with final approval.

**C. The Settlement is fair, reasonable, and adequate.**

Rule 23(e)(2) identifies several criteria for the Court to use in deciding whether to grant preliminary approval of a proposed class settlement and direct notice to the proposed class. A "presumption of correctness" attaches where, as here, a "class settlement [was] reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." *See Free Range Content, Inc. v. Google, LLC*, No. 14-CV-02329-BLF, 2019 WL 1299504, at *6 (N.D.

Cal. Mar. 21, 2019). The Settlement proposed here readily satisfies the criteria for preliminary approval.

**1. Rule 23(e)(2)(A): Class Counsel and the Settlement Class Representatives have and will continue to zealously represent the Class.**

Class Counsel and the Class Representatives fought hard to protect the interests of the Class, as evidenced by the significant compensation available to the Class through the proposed Settlement. Class Counsel prosecuted this action and the fair resolution of it with vigor and dedication over the course of nearly two years. *See* Fed. R. Civ. P. 23(e)(2)(A). As detailed above, Class Counsel undertook significant efforts to uncover the facts—including retaining technical experts and conducting multiple rounds of vehicle testing—to continuously prosecute and refine the Class claims. Class Counsel also engaged in robust Rule 12 motion practice—researching, drafting, and filing an 81-page omnibus opposition brief to Defendants' motions to dismiss. *See* § II.B, *supra*.

The Settlement Class Representatives are also actively engaged. Each worked with counsel to review and evaluate the terms of the proposed Settlement Agreement and has endorsed its terms. Each Representative has also expressed their continued willingness to protect the Class until the Settlement is approved and its administration completed. Cabraser Decl. ¶ 22.

**2. Rule 23(e)(2)(B): The Settlement is the product of good faith, informed, and arm's-length negotiations.**

After the motion to dismiss hearing was taken off-calendar in April 2018 (Dkt. 4977), the Parties began to undertake serious, informed, and arm's-length negotiations—including multiple negotiation sessions in Germany, New York, San Francisco, and Washington DC. *Id.* ¶ 8. After fifteen months, these detailed, evidence-based discussions culminated in in the proposed Settlement now before the Court. *See* Fed. R. Civ. P. 23(e)(2)(B).

With negotiations ongoing, and as described above (§ II.C), Class Counsel independently retained technical experts to conduct testing on the Class Vehicles in on-road and laboratory settings, resulting in comprehensive data and analysis of the Vehicles' emissions and fuel economy in both settings, while Defendants conducted an extensive testing and review process in

response to regulatory inquiries and this litigation. The Parties agreed to share information about their independent processes and results to facilitate informed negotiations. In addition, the Parties also engaged in extensive document and information exchanges, including the production and review of millions of pages of documents in this MDL. *Id.* ¶ 3; SA ¶ 6.1. After the Agreement was reached, the Parties conducted several more months of confirmatory discovery. The confirmatory discovery process included, among other things, an additional round of vehicle testing conducted in Germany with experts from all Parties; detailed interviews of several key witnesses including high-level managers and engineers; and the production of more than ten thousand pages of documents, including technical presentations and data provided to the regulators in a parallel investigation. Cabraser Decl. ¶ 12.

Where extensive information has been exchanged, "[a] court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement's value is based upon such adequate information." William B. Rubenstein, et al., 4 Newberg on Class Actions § 13:49 (5th ed. 2012) ("*Newberg*"); *cf. In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 320 (N.D. Cal. 2018) (concluding that the "extent of discovery" and factual investigation undertaken by the parties gave them "a good sense of the strength and weaknesses of their respective cases in order to 'make an informed decision about settlement") (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)).

Here, too, the significant exchange of documents and information supports the parties' ability to make a well-supported decision on settlement. Notably, discovery supporting a settlement need not have been formally produced and can include documents and information learned in related proceedings. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239–40, 1241 (9th Cir. 1998) (noting that formal discovery is not required for settlement approval and that "[i]n particular, the district court and plaintiffs may rely on discovery developed in prior or related proceedings"); *Wahl v. Yahoo! Inc.*, No. 17-CV-02745-BLF, 2018 WL 6002323, at *4 (N.D. Cal. Nov. 15, 2018) (granting final approval of class settlement although "little formal discovery" was conducted, noting relevant inquiry was whether parties had "sufficient information to evaluate the case's strengths and weaknesses."). Here, Defendants have produced

thousands of pages of documents directly responsive to Plaintiffs' claims in the Audi $CO_2$ matters, and millions of pages of relevant documents in the "Clean Diesel" MDL—all of which informed Plaintiffs' understanding of the strengths and weaknesses of their claims. Cabraser Decl. ¶¶ 3, 12.

A meaningful exchange of documents and information also evidences that the litigation was adversarial, and therefore serves as "an indirect indicator that a settlement is not collusive but arms-length." 4 *Newberg* § 13:49; *see also In re Anthem*, 327 F.R.D. at 320 ("Extensive discovery is also indicative of a lack of collusion. . . ."); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2019 WL 2077847, at *1 (N.D. Cal. May 10, 2019) ("Lead Counsel vigorously litigated this action during motion practice and discovery, and the record supports the continuation of that effort during settlement negotiations."). Here, Plaintiffs sought, reviewed, and analyzed a significant production of the Defendants' documents, data, and other information, and conducted on-the-ground investigations through expert interviews and site visits to Defendant AUDI AG's testing facility in Ingolstadt, Germany, among other things. Cabraser Decl. ¶¶ 3-4, 10-12.

The Parties' confirmatory discovery efforts further support the reasonableness of the settlement. Engaging in confirmatory discovery, as the Parties have here, adds even more legitimacy to the negotiation process. *See In re Nissan Radiator/Transmission Cooler Litig.*, No. 10 CV 7493(VB), 2013 WL 4080946, *5 (S.D. N.Y. May 30, 2013) (finding discovery sufficient to warrant approval because "plaintiffs conducted an investigation prior to commencing the action, retained experts, and engaged in confirmatory discovery in support of the proposed settlement").

It is also worth noting that the methodology and outcomes of the Parties' testing were independently assessed by the EPA, who has reviewed the fuel economy calculations underpinning the Settlement's compensation formula. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2016 WL 6248426 at *14 (N.D. Cal. Oct. 25, 2016), *aff'd sub nom. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597 (9th Cir. 2018) (government participation in

negotiations weighed "heavily in favor" of approval); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) ("The participation of a government agency serves to protect the interests of the class members, particularly absentees, and approval by the agency is an important factor for the court's consideration."). The revised fuel economy values will also be updated on the official government website, www.fueleconomy.gov.

But perhaps most importantly of all, the result of the negotiations speaks for itself. Where, as here, the Class stands to recover their damages *in full*, there is little room for argument that counsel failed to protect the interests of the Class or otherwise engaged in collusive behavior. *See* Cabraser Decl. ¶ 13; *see also In re Volkswagen*, 2019 WL 2077847, at *1 (granting final settlement approval where "Lead Counsel ha[d] . . . a successful track record of representing [plaintiffs] in cases of this kind . . . [and] attest[ed] that both sides engaged in a series of intensive, arm's-length negotiations" and there was "no reason to doubt the veracity of Lead Counsel's representations").

**3. Rule 23(e)(2)(C): The Settlement provides substantial compensation in exchange for the compromise of strong claims.**

The Settlement provides substantial relief for the Class, especially considering (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of the proposed distribution plan; and (iii) the fair terms of the requested award of attorney's fees. *See* Fed. R. Civ. P. 23(e)(2)(C).

As noted above, the Settlement secures up to approximately $96.5 million for cash payments designed to Class Members for having driven and continuing to drive vehicles for which the actual, on-road fuel economy is up to 1 MPG less than was originally represented, and separately requires Defendants to pay reasonable Settlement administration costs and attorneys' fees and costs that would otherwise be deducted from the Class' recovery. The amount of compensation available to each Class Member is based on (1) the difference in cost for the amount of gasoline that would have been required under the original Monroney fuel economy label and the greater amount required under the adjusted fuel economy label, and (2) a goodwill payment of an additional 15% of those damages to compensate for any inconvenience. In making this calculation, the compensation formula—which is detailed in the declaration of expert

economist Ted Stockton (Stockton Decl. ¶¶ 9-23) and in the Long Form Notice (Declaration of Cameron Azari ("Azari Decl."), Attachment 3)—relies on a number of negotiated parameters—including the average miles per year, the expected duration of ownership, and fuel cost—each of which is favorable to the Class.

Specifically, the Settlement formula calculates the extra gallons attributable to the reduced fuel economy based on the assumption that each Class Vehicle has been and will continue to be driven an average of 1,250 miles per month (or 15,000 miles per year). Stockton Decl. ¶¶ 16-19. Furthermore, the Settlement compensates Class Members for 96 months' worth of extra gasoline (combined with the monthly estimate of 1,250 miles, this means the Vehicles are compensated for 120,000 miles of extra fuel costs). *Id.* ¶ 21. This compares favorably to the number of months compensated in two recent class action settlements related to MPG reductions. *See Ellis v. Gen. Motors, LLC*, No. 2:16-cv-11747-GCS-APP, Dkt. 34-2 at 12 (E.D. Mich. July 14, 2017); *In re Hyundai*, 926 F.3d at 554. Finally, the compensation formula uses an estimated fuel cost of $3.54 per gallon, and applies a 15% goodwill premium to account for any inconvenience to Class Members. Stockton Decl. ¶¶ 20, 22.

Taken both individually and together, these inputs make clear that the Settlement provides Class Members with full compensation for their damages. *Id.* ¶ 23. This is an exceptional result for the compromise of contested claims that have not yet survived a motion to dismiss.

**a. The Settlement mitigates the risks, expenses, and delays the Class would bear with continued litigation.**

The Settlement benefits (described above) are even more impressive given the inherent uncertainties of continued litigation and the inevitable delay that would accompany it. Even if the Settlement secured something less than actual damages, compromise of potential recovery in exchange for certain and timely provision of the benefits under the Settlement is an unquestionably reasonable outcome. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965 at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair."); *Kim v. Space Pencil, Inc.*, No. C 11-03796 LB, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28,

2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant.").

This case, like those cited above, is not without risk. Defendants moved to dismiss the Consolidated Complaint, and there is little doubt they would raise similar arguments against the now-operative Amended Complaint should the litigation proceed. The motions to dismiss are not yet decided, and the outcome of those motions was far from certain.

As to the RICO claim, for example, Judge Chen recently remarked in the FCA EcoDiesel proceedings that, "to the extent [the RICO claim] is predicated on fraud on the EPA . . . [it] raises some tough questions, questions that I think are not very clear in the case law." *See In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig.*, No. 17-md-02777, Dkt. 455 at 4:3-9 (N.D. Cal. Oct. 26, 2018). And while many courts (including this one, and Judge Chen in the first round of briefing in *FCA EcoDiesel*) have upheld well-pled RICO allegations in automotive litigation (in what, Plaintiffs respectfully submit, is the better-reasoned view), Judge McNulty in the District of New Jersey recently dismissed a RICO claim on behalf of a putative class alleging an emissions cheating scheme against BMW. *Rickman v. BMW of N. Am.*, No. CV 18-4363, 2019 WL 2710068, at *12 (D.N.J. June 27, 2019).

Success on Plaintiffs' state-law claims is likewise not guaranteed. Indeed, similar state-law claims have been dismissed in several recent automotive cases. *See, e.g., In re Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig.*, 295 F. Supp. 3d 927, 1027 (N.D. Cal. 2018) (dismissing plaintiffs' common law fraud claims, and various other state-law claims for lack of privity and failure to obtain approval of state attorneys general); *Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572, 594 (E.D. Mich. 2017) (similar). Plaintiffs would likely face these same challenges, and others, here.

Finally, while Plaintiffs have not moved to certify a litigation class, that process would be expensive, lengthy, and, again, uncertain. Avoiding years of additional, risky litigation in exchange for the immediate and significant cash payments is a principled compromise that works to the clear benefit of the Class.

**b. Class Members will obtain relief through a straightforward claims process.**

The Parties were specific and intentional in their efforts to ensure that the claims process will be straightforward and efficient. To receive compensation, Class Members need only submit a claim form online or by mail with sufficient supporting documentation to establish the dates during which they owned or leased their Class Vehicles (*e.g.*, purchase agreement, sale documentation, and/or proof of current registration). No further action is required. Class Members who have submitted a complete and valid claim will be sent a check for compensation within thirty days of the settlement Effective Date, or of receipt of their completed claim. SA ¶ 5.1. The effort required and safeguards incorporated in this process are proportional to the compensation available, and necessary and appropriate to preserve the integrity of the Claims Program.

**c. Counsel will seek reasonable attorneys' fees and costs separate from the payments to the Class.**

The Settlement Value will not be reduced to pay any Court-awarded attorneys' fees or costs to Class Counsel, which Defendants will pay in addition to the cash available for payments directly to Class members. Plaintiffs' success in negotiating for fees and expenses to be paid in addition to the Class recovery has significant monetary value to the Class, which otherwise would have had to pay such fees and costs out of the Settlement recovery. The amount of the reasonable attorneys' fees and expenses to be paid to Class Counsel was not the subject of negotiation prior to signing the Settlement—only after executing the Settlement Agreement did the Parties commence discussion of the potential fees and expenses. Waiting until after the Settlement terms are finalized before discussing fees is a settlement best-practice that puts the interests of the Class first and is routinely approved by courts in this District. *See, e.g.*, *In re Volkswagen*, 2016 WL 6248426, at *23.

**4. Rule 23(e)(2)(D): The Proposed Settlement treats all Class Members equitably relative to one another.**

The proposed Settlement fairly and reasonably allocates payments among the Class Members pursuant to a straightforward formula tied to the duration of possession of the Class Vehicle and the original and amended mileage ratings for each particular Class Vehicle make and

model. The formula for calculating the maximum compensation for each Class Vehicle is described above (*see* § V.C.3) and further explained in the Stockton Declaration (Stockton Decl. ¶¶ 9-23) and the Long Form Notice (Azari Decl., Attachment 3).

Class Members who are the original owners of their Vehicles and continued to own them as of the date this Motion is filed will receive the maximum compensation for that Vehicle. All other Class Members will receive compensation under the same formula, but prorated to account for the months that they owned or leased their Class Vehicles. Specifically, Class Members who held active leases as of the date this Motion is filed are eligible for compensation for all months in the full duration of their lease (even if the lease extends beyond the date of this Motion). Class Members who purchased their Vehicles used, but owned them as of the date this Motion is filed, will be entitled to compensation for the months they have owned their Class Vehicles, as well as any remaining months up to a total of 96 months after their Class Vehicles were first sold.

This system of calculating payment values in monthly increments, and based on the degree of impact in a particular Class Vehicle make, model, and year, uses transparent and objective criteria to determine Class Member payments. These reasonable parameters ensure that the Settlement treats Class Members equitably relative to one another. *See* Fed. R. Civ. P. 23(e)(2)(D); *see also In re Hyundai & Kia Fuel Econ. Litig.*, No. MDL 13-2424-GW(FFMx), 2014 WL 12603199 at *2 (C.D. Cal. Aug. 21, 2014) (granting preliminary approval of similar settlement, where payment amounts for each make and model ranged from $240 to $1,420 and were "correlated to the amount of the fuel economy misstatements" and thus "differences between the recovery amounts stem[med] mostly from differences in the damages suffered . . . rather than any improper favoring of one group of Class Members over another.").

**5. The Proposed Settlement merits approval under this District's Procedural Guidance.**

This District recently updated its Procedural Guidance for Class Action Settlements. The Guidance provisions relevant to this Agreement are addressed below. All of them favor approval of the proposed Settlement.

**a. Preliminary Approval Guidance (1)(a) & (c): There are no meaningful differences between the litigation and Settlement Classes, and the released claims are consistent with those asserted in the Complaint.**

Where a litigation class has not been certified, the Guidance instructs a party to explain differences between the settlement class and claims to be released compared to the class and claims in the operative complaint. *See* Procedural Guidance, Preliminary Approval (1)(a), (1)(c) . Here, the proposed Settlement Class is essentially identical to the class in the Amended Complaint. Am. Compl. ¶ 258. The Settlement Class closes the class period, with a backstop as of the date of filing for Preliminary Approval, and treats Class Members equitably according to the duration of their possession of the Class Vehicle. This minor refinement in the definition of the Settlement Class is appropriate to facilitate a principled and equitable Settlement, and reflects the fact that those who purchase or lease a Class Vehicle after the filing of this motion will—both through this litigation and through the disclosures that are to be amended on www.fueleconomy.gov—do so with full notice of the Vehicles' true fuel economy. Moreover, those relatively few people who may have been class members under the proposed definition in the operative Amended Complaint but who are not members of the proposed Settlement Class are not releasing their claims.[7]

Finally, the claims released in the Settlement are limited to those arising out of the "Transmissions/Fuel Economy Matter," SA ¶ 10.3, which covers the issues relating to the Warm-up Program, the marketing of fuel economy related to Warm-up Program, and the "the subject matter of the Action," *id.* ¶ 2.40. Thus, the claims at issue in the operative Amended Complaint and those released in the Settlement are substantially the same, if not identical.

[7] As discussed above, the definition of the proposed class was amended in the operative Amended Complaint to cover only those who own, owned, lease, or leased one of the vehicles that was demonstrated through exhaustive testing and regulatory confirmation to have an appreciable fuel economy difference attributable to Warm Up Program that resulted in modified fuel economy labeling. Am. Compl. ¶¶ 4-12, 68-75. Those who would have been members of the previously-defined proposed Class in the now-superseded Consumer Class Action Complaint, but who are not members of the Settlement Class, are not releasing their claims through this Settlement.

**b. Preliminary Approval Guidance (1)(e): The Settlement Recovery mirrors that available if Plaintiffs had prevailed in litigation on the merits.**

The Guidance instructs a party to address the "anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise." *See* Procedural Guidance, Preliminary Approval (1)(e). These considerations are addressed in Section V.C.3, above. To recap, Class members stand to receive "*full* compensation" for the damages associated with driving Class Vehicles that did not obtain the advertised fuel economy. Stockton Decl. ¶ 23 (emphasis added). In other words, the Settlement secures 100% of actual damages, and as an added benefit, Defendants will pay all administrative costs of the Settlement and any attorneys' fees and costs awarded to Class Counsel in addition to the cash available to pay Class members directly.

It is true that if Plaintiffs had fully prevailed on their RICO claim, they may have received treble damages. 18 U.S.C. § 1964(c). But success on the RICO claim (or the others, for that matter) was by no means guaranteed, as explained above. And, as general matter, "courts do not traditionally factor treble damages into the calculus for determining a reasonable settlement value." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009). In sum, the Settlement secures compensation that meets or significantly exceeds virtually all Class Members' actual damages in compromise for contested and uncertain claims that, if litigated to their conclusion, would not have resolved for several more years.

**c. Preliminary Approval Guidance (1)(f): The Settlement's Allocation plan is fair and equitable.**

The Procedural Guidance requires an explanation of the proposed allocation for the settlement fund. As explained above, the amount of compensation to each Class Member correlates with the months they possessed the Class Vehicle—either through lease or ownership. *See* § III.B, *supra*. The differences equitably apportion recovery corresponding to Plaintiffs' theory of injury and the harms endured by each Class Member.

**d. Preliminary Approval Guidance (1)(g): A substantial number of Class Members are expected to participate through a streamlined claims program.**

The Settlement, the Notice Plan, and the claims process are all designed to maximize class member participation. The claim form is intended to be simple and the documents required are intended to cover only that which is necessary to establish eligibility. The amount of compensation available to Class Members, on the other hand, is considerable— ranging from $518.40 to $2,332.80 per Class Vehicle. Furthermore, Defendants have no motivation to minimize participation because the maximum Settlement Value is fixed at the outset and non-reversionary, and any unclaimed monies will be put toward environmental remediation efforts in the interests of the Class, subject to the Court's approval. Given all of the above, the Parties anticipate a high rate of participation.

**e. Preliminary Approval Guidance (1)(h) & (8): Unclaimed Settlement funds will be distributed to environmental remediation efforts and will not revert to Defendants.**

As discussed above, unclaimed Settlement funds (if any) that are not paid directly to Class Members will not revert to Defendants. SA ¶ 4.5. Instead, they will be directed toward "environmental remediation efforts"—agreed to by the Parties and approved by the Court—that are consistent with "(1) the objectives of the underlying statute(s) and (2) the interests of the silent class members." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011). This Settlement provision ensures that all parties are properly motivated to compensate as many Class Members as possible and that all the Settlement funds will benefit the Class. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 672820, at *3 (N.D. Cal. Feb. 16, 2017) (granting preliminary approval of Bosch "Clean Diesel" settlement, including provision that remaining funds not distributed to the class would be "distributed through *cy pres* payments according to a distribution plan and schedule filed by Class Counsel and approved by the Court"). The Parties' selection of *cy pres* recipients (if any) will be announced on the Settlement Website—as explained in the Long Form Notice. *See* Azari Decl., Attachment 3 at Q10.

**f. Preliminary Approval Guidance (2): The Parties selected an experienced notice and claims administrator after a competitive bidding process.**

The Parties solicited proposals from three well-known and experienced notice and settlement administration vendors. Cabraser Decl. ¶ 19. After multiple rounds of detailed bids, the Parties selected Epiq to serve as the Settlement Claims and Notice Administrator. Lead Counsel has worked with Epiq as the settlement claims and/or notice provider in six cases over the last two years, but has also worked with numerous other providers over this time period. *Id.* ¶ 21. Epiq estimates that the cost of implementing the Notice Plan and administering the Settlement will be approximately $500,000, which is reasonable in the context of a settlement of this scope and value. As discussed above, Defendants will pay these costs over and above the cash compensation to Class Members and Class Counsel's attorneys' fees and costs. *See* SA ¶ 5.3.

**g. Preliminary Approval Guidance (3)-(5): The proposed Notice Plan comports with Rule 23, Due Process, and this District's Procedural Guidance.**

As detailed below (§ V.D) and in the accompanying Azari Declaration, the notice program comports with the best-practices outlined in the Procedural Guidance. *See* Preliminary Approval Guidance (3). It also explains Class Members' rights to opt-out of or object to the Settlement, and provides clear instructions for how and when to exercise those rights. *See* Preliminary Approval Guidance (4)-(5).

**h. Preliminary Approval Guidance (6): Proposed Settlement Class Counsel will seek reasonable attorneys' fees and costs, which Defendant's will pay in addition to the money available to directly compensate the Class.**

Class Counsel will move the Court for an award of reasonable attorneys' fees and costs, in an amount to be negotiated or litigated and then approved by the Court. Class Counsel's fees and expenses will not reduce Class Members' recovery in any way. *See* § V.C.3.c, *supra*.

Specifically, Class Counsel intend to seek reimbursement of up to $2,130,392.04 in out-of-pocket costs reasonably expended to prosecute and resolve this case. Cabraser Decl. ¶ 26. Class Counsel also intend to seek up to $23,869,607.97 in attorneys' fees for work performed and

expenses incurred in furtherance of this litigation pursuant to Pretrial Orders 7 and 11.[8] *Id.* ¶ 28. This fee request will represent less than 20% of the total settlement value, which includes (1) the non-reversionary cash component of the Settlement ($96,543,645) and the separately-paid (2) class notice and settlement administration costs (approximately $500,000) and (3) attorneys' fees and costs ($26,000,000). *See, e.g.*, *Rainbow Bus. Sols. v. MBF Leasing LLC*, No. 10-CV-01993-CW, 2017 WL 6017844, at *1 (N.D. Cal. Dec. 5, 2017) (The fund from which a fee percentage is calculated includes "the total benefit made available to the settlement class, including costs, fees, and injunctive relief."). This percentage falls well below the 25% benchmark in this Circuit as well as the mean and median awards in similarly-sized settlements. *See, e.g.*, Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 832, 839 Table 11 (2010) (finding a mean and median of 23.7% and 24.3% in settlements valued between $72.5 to $100 million); 5 *Newberg* § 15:81, Graph 2 (similar conclusion). Class Counsel's lodestar—which remains subject to further review and auditing that could reduce the amount—is approximately $8,157,663.70, which would yield a multiplier of 2.93. Cabraser Decl. ¶ 25.

Class Counsel will provide additional information and rationale for their request in the fee application and in the class notice, so that Class Members will have the opportunity to comment on or object to the requested fees prior to the final approval hearing.

**i. Preliminary Approval Guidance (7): Plaintiffs will not seek incentive awards for the Settlement Class Representatives.**

The Settlement Class Representatives will be entitled to the same compensation, calculated under the same formula, as all other Settlement Class Members, and will not seek incentive awards.

[8] Pursuant to ¶ 12.1 of the Settlement Agreement, the Parties continue to attempt to negotiate the amount of attorneys' fees and expenses to be paid by Defendants. SA ¶ 12.1. If the Parties reach agreement, Plaintiffs "will submit the negotiated amount to the Court for approval." *Id.* If they do not reach agreement, the Parties "will litigate the fee issue(s), and each Party will present its respective position to the Court for determination." *Id.*

**j. Preliminary Approval Guidance (9): The Parties have proposed a reasonable schedule for the Settlement Approval Process that provides Class Members sufficient time to exercise their rights.**

The last step in the settlement approval process is the fairness hearing, at which the Court may hear any evidence and argument necessary to evaluate the Settlement and the application for attorneys' fees and costs. The Parties propose a detailed schedule for final approval and implementation in the attached Proposed Order and incorporate it by reference herein.

**k. Preliminary Approval Guidance (10): The Settlement complies with the Class Action Fairness Act ("CAFA").**

Pursuant to the Settlement Agreement, Defendants will serve notices in accordance with the requirements of 28 U.S.C. § 1715(b) within ten days of the filing of this motion. The Settlement fully complies with all of CAFA's substantive requirements because it does not provide for a recovery of coupons (28 U.S.C. § 1712), does not result in a net loss to any Class Member (28 U.S.C. § 1713), and does not provide for payment of greater sums to some Class Members solely on the basis of geographic proximity to the Court (28 U.S.C. § 1714).

**l. Preliminary Approval Guidance (11): Information about past distributions in comparable class settlements.**

Pursuant to the Guidance, Plaintiffs provide an "easy-to-read" chart detailing certain information about three comparable settlements in the attached Cabraser Declaration. Cabraser Decl., Attachment 1. The three settlements compared are the three "Clean Diesel" settlements that were previously negotiated by Class Counsel in this MDL, namely—the 2.0-liter settlement (Dkt. 1685), the 3.0-liter settlement (Dkt. 2891), and the Bosch settlement (Dkt. 2918). As the chart shows, those three settlements have delivered more than $10 billion in compensation to the classes, and each settlement has already reached or is on pace to reach participation rates of over 90%. Cabraser Decl., Attachment 1.

The Settlement now before the Court will utilize a similar notice and outreach program, provides substantial compensation, and utilizes a simplified administration that involves only a single step for Class Members. Class Counsel are therefore able to predict with some confidence that much of the money available to Class Members will be paid out in this case as well. And

notably, to the extent money remains after the Class is paid, it too will be directed towards efforts that benefit the interests of the Class and the causes advanced in this litigation.

**D. The Proposed Notice Plan provides the best practicable notice.**

Rule 23(e)(1) requires that before a proposed settlement may be approved, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and come forward and be heard.'" *Churchill Vill., L.L.C., v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). For a Rule 23(b)(3) Settlement class, the Court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The proposed Notice Plan meets these standards. The Parties created this proposed program—including both the content and the distribution plan—with Epiq, an experienced firm specializing in notice in complex class litigation. The program includes a Short and Long Form Notice, and a comprehensive Settlement Website, that are clear and complete, and that meet all the requirements of Rule 23 and the Procedural Guidance.

The Long Form Notice is designed to explain Class Members' rights and obligations under the Settlement in clear terms and in a well-organized and reader-friendly format, and follows the Ninth Circuit's *en banc* guidance in *In re Hyundai*. 926 F.3d at 567 ("[S]ettlement notices must 'present information about a proposed settlement neutrally, simply, and understandably.'"); *see also* Azari Decl., Attachment 3. It includes an overview of the litigation; an explanation of the Settlement benefits; contact information for Class Counsel; the address for a comprehensive Settlement Website that will house links to the notice, motions for approval, attorneys' fees, and other important documents; instructions on how to access the case docket; and detailed instructions on how to participate in, object to, or opt out of the Settlement. *Id.*

There are also two forms of Short Form Notice: a Postcard Notice and an Email Notice. *Id.*, Attachments 2, 4. The Postcard Notice is in eye-catching "postcard" form conveying the basic structure of the Settlement and designed to capture Class Members' attention with concise, plain language. The Email notice is similarly structured and provides all basic information about the Settlement and Class Members' rights thereunder. Both forms of Short Form Notice direct readers to the Settlement Website (where the Long Form Notice is available) for more information.

The principal method of reaching Class Members will be through individual direct mail notice, consisting of postcard notices by U.S. first class mail to all readily identifiable Class Members. *Id.* ¶¶ 14-19. Direct mail notice will be coupled with individual notice by email (designed specifically to avoid spam filters), a robust paid-media campaign including digital banner advertisements and sponsored search listings, a toll-free telephone number, and a Settlement Website. *Id.* ¶¶ 20-29. Based on his considerable experience, Mr. Azari anticipates that the Notice Plan will "successfully deliver notice to more than 95% of the Settlement Class." *Id.* ¶ 11. This Notice Plan satisfies due process and Rule 23, and comports with all accepted standards and this District's Procedural Guidance.

## VI. CONCLUSION

Plaintiffs respectfully request that the Court: (1) determine under Rule 23(e)(1) that it is likely to approve the Settlement and certify the Settlement Class; (2) direct notice to the Class through the proposed notice program; (3) appoint Lead Plaintiffs' Counsel as Interim Settlement Class Counsel to conduct the necessary steps in the Settlement approval process; and (4) schedule the final approval hearing under Rule 23(e)(2).

Dated: August 30, 2019

Respectfully submitted,

*/s/ Elizabeth J. Cabraser*

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*Plaintiffs' Steering Committee*

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 30, 2019, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ *Elizabeth J. Cabraser*
Elizabeth J. Cabraser