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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL CONSUMER AND RESELLER ACTIONS

No. 3:15-md-02672-CRB

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND COSTS UNDER FED. R. CIV. P. 23(H) AND PRETRIAL ORDER NOS. 7 AND 11; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: TBD
Time: TBD
Place: Courtroom 6, 17th floor

The Honorable Charles R. Breyer

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 23(h), Pretrial Order Nos. 7 (Dkt. No. 1084) ("PTO 7") and 11 (Dkt. No. 1084) ("PTO 11"), and the Court's direction in the Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement (Dkt. No. 2102), Plaintiffs' Lead Counsel/Settlement Class Counsel, on behalf of Plaintiffs' Steering Committee/Class Counsel and all counsel performing common benefit services under the provisions of PTO 11, hereby moves the Court for an Order approving the aggregate award of $175 million for attorneys' fees and expenses arising from the claims resolved by the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement, as embodied in the Amended Consumer Class Action Settlement Agreement and Release (Dkt. No. 1685) (the "Settlement"). This Motion is based on and supported by the Memorandum of Points and Authorities, below, the Declarations of Elizabeth J. Cabraser and Brian T. Fitzpatrick, attached as Exhibits A and B hereto, and the activities and events in these MDL proceedings to date.

The Settlement secures an unprecedented $10.033 billion to compensate vehicle owners and lessees for their losses. Based on reasonable projections of claims data available so far, the vast majority of this money will end up in Class Members' pockets. Despite this historic benefit to the Class, the attorneys' fees and cost reimbursement that Class Counsel seek are quite modest when compared with awards in comparable cases. The aggregate fees and costs award requested (including reimbursable costs of $8 million) is the equivalent of less than 2% of the total monetary benefit provided to the Class, far below the benchmark in this Circuit and well below the average award in "super-mega-fund" settlements exceeding $1 billion. This award will not reduce Class benefits: pursuant to the Settlement Agreement, and as the result of post-Settlement negotiations, Volkswagen has agreed to pay this amount in addition to the $10.033 funding pool and does not oppose this Motion. The request is also justified by the lodestar cross-check, which yields a below-average multiplier that is more than warranted, given the diligent representation and exceptional results in this case. Class Counsel thus submit that the fees and costs requested are fair and reasonable and respectfully request that the Court approve them.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This fee request arises from the largest automotive settlement in history, and possibly the largest consumer class action settlement of any kind. The Settlement requires Volkswagen to establish a funding pool of up to $10.033 billion to compensate 2.0-liter TDI owners and lessees for their losses and, along with the related settlements negotiated simultaneously by the Department of Justice and the Federal Trade Commission, secures an additional $4.7 billion for environmental mitigation and zero-emission technology. Because this case presented issues not only of massive fraud, but also of real, ongoing environmental damage, the Settlement came together in record time and with unprecedented coordination between private plaintiffs and government agencies. The final result is a Settlement that remediates past environmental harm, reduces future environmental harm, and empowers consumers to make choices about the fate of their vehicles, while providing them fair compensation regardless of the choices they make.

Unsurprisingly, Class Members overwhelmingly support the Settlement. Despite the high stakes involved in this litigation, and the heightened attention paid to it, less than one percent of the Class opted out. Order Granting Final Approval, Dkt. No. 2102 at 26. In contrast, more than 75% of the Class had already registered for Settlement benefits even before the Settlement had received final approval, and almost two years before the deadline for most to register. November 3, 2016, Status Conference, Dkt. No. 2166 at 7. As the Court concluded, in granting final approval, "the high claim rate and the low opt-out and objection rates . . . strongly favors final approval" of the Settlement and is a testament to its strength. Dkt. No. 2102 at 26.

Notwithstanding the unprecedented benefits secured by the Settlement, the fees Class Counsel request are the lowest ever sought in a multi-billion dollar case, and will not be deducted from the $10.033 billion funding pool available for Class Members. They represent only 1.7% percent of the money available for defrauded owners and lessees and less than 3% of the cash payments that will end up in Class Members' pockets under even the most conservative reasonable estimates. This falls far below the 25% benchmark in this Circuit for common fund cases, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002), and far below even the

13.7% average recovery for settlements over $1 billion, Fitzpatrick Decl. ¶ 24. Moreover, while a lodestar cross-check is disfavored and unnecessary in applications like those here, *Ebarle v. Lifelock, Inc.*, No. 15-CV-00258-HSG, 2016 WL 5076203, at *11 (N.D. Cal. Sept. 20, 2016), a lodestar analysis yields an overall multiplier of only 2.63—below both the mean (3.26) and median (2.8) multipliers in "super-mega-fund" settlements like this one. Fitzpatrick Decl. ¶ 32. In the context of this historic Settlement, this result is more than justified. So, too, are the requested costs, which are reasonable and were necessary to advance the litigation and settlement expeditiously.

Plaintiffs thus respectfully request an aggregate common benefit award of $167 million in fees and $8 million in costs, to be allocated by Plaintiffs' Lead Counsel among the PSC firms and additional counsel performing work under Pretrial Order Nos. 7 and 11.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

The Court is very familiar with the history of the litigation and the terms of the Settlement. In short, it provides unprecedented value to Class Members, and it does so little more than a year after Volkswagen's fraud was revealed—a remarkably quick result for litigation of this scope and complexity.

A. The Settlement Provides Exceptional Relief for the Class.

The Settlement is comprehensive and robust. It (1) establishes a funding pool of up to $10.033 billion to compensate Class Members under the Buyback, Lease Termination and Restitution Payment programs, and (2) makes available an Approved Emissions Modification or "fix" for Class Members who do not wish to participate in the Buyback or Lease Termination programs. The related and simultaneously-negotiated DOJ Consent Decree also provides (3) the payment of $2.7 billion into a trust established to support environmental programs that will reduce NO_X by an amount equal to or greater than the combined pollution caused by the cars that are the subject of the lawsuit, and (4) the investment of $2 billion to create infrastructure for and promote public awareness of zero emission vehicles.

Under the Buyback, Lease Termination, and Restitution programs, every single Class Member is eligible for a payment ranging from several thousand dollars to more than $44,000,

calculated based on a frozen-in-time, pre-scandal value. Those who elect to sell their vehicles back to Volkswagen under the Buyback program will receive a minimum of 112.6% of the September 2015 Clean Retail value of their vehicles, even if they choose to drive their vehicles until near the end of the claims period in September 2018. Dkt. No. 1784-1 at ¶ 28. As both the Court and the FTC have observed, the Settlement "fully compensates victims of Volkswagen's unprecedented deception." Dkt. No. 2102 at 28 (citing FTC Statement Supporting Settlement, Dkt. No. 1781 at 1). And it does so in record time, a mere 13 months after the scandal broke, and nine months after Class Counsel were appointed.

B. Class Counsel Worked Around the Clock, at the Court's Direction, to Secure a Comprehensive and Expeditious Resolution.

The speed in which the Settlement was reached is unprecedented and was made possible only by the considerable efforts undertaken by Class Counsel. News of the defeat device broke on September 18, 2015, prompting hundreds of lawsuits. Three months later, the Judicial Panel on Multidistrict Litigation consolidated the actions before this Court, Dkt. No. 1, and on January 22, 2016, the Court appointed Lead Counsel and the 21-firm PSC, Dkt. No. 1084. The Court tapped an unusually large PSC for a reason: to accomplish an extraordinary amount of work at record pace.

> The Court notes it has appointed 21 attorneys to the PSC (in addition to Ms. Cabraser); the Court believes this is an appropriate number given the amount of work this litigation may entail and the need for an expeditious resolution of the matter.

Dkt. No. 1084 at ¶ 7. The Court's words proved prescient, for it took around-the-clock efforts from the entire PSC—and other attorneys from over 97 additional plaintiffs' firms that Lead Counsel enlisted, per PTO 11—to advance both the litigation and the settlement negotiations at breakneck speed to address a serious, ongoing harm and to accomplish the Court's objective of "getting the polluting cars fixed or off the road" as soon as possible. *See* March 24, 2016, Status Conference Hr'g Tr., Dkt. No. 1384 at 8:20-21.

Settlement negotiations began from almost the moment the Court appointed the Settlement Master and Class Counsel. Since that time, settlement discussions occurred on both

coasts of the United States, in person and telephonically, without regard to holidays, weekends, or time zones. The negotiations were extraordinarily intense and complex, particularly considering the timeframe and the number of issues and parties involved, including attorney representatives from numerous governmental entities.

As Settlement Master Robert S. Mueller III acknowledged in his Declaration submitted in connection with the Settlement approval briefing, the "settlement process involved at least 40 meetings and in-person conferences at various locations, including San Francisco, New York City, and Washington, DC, over a five-month period. A number of these sessions lasted many hours, both early and late, and weekends were not excluded." Dkt. No. 1977 at ¶ 5. Moreover, "the parties expended considerable time in discussing, drafting, circulating, and revising the various [Settlement] documents." *Id.* at ¶ 6.

At the same time, Class Counsel established more than a dozen working groups of PSC members and other counsel that worked tirelessly to advance the litigation swiftly, and to prepare for the possibility of a trial in the summer of 2016. Litigation working groups were charged with performing, and did in fact perform, the following tasks, among others:

a. Drafting a 719-page Consolidated Consumer Class Action Complaint asserting claims for fraud, breach of contract, and unjust enrichment, and for violations of The Racketeer Influenced and Corrupt Organizations Act ("RICO"), The Magnuson-Moss Warranty Act ("MMWA"), and all fifty states' consumer protection laws; which was filed on February 22, 2015, just one month after the appointment of Class Counsel;

b. Drafting an 83-page Consolidated Amended Reseller Class Action Complaint also asserting claims for fraud, unjust enrichment, failure to recall/retrofit, and for violations of The Racketeer Influenced and Corrupt Organizations Act ("RICO")—also filed one month after the appointment of Class Counsel;

c. Submitting and evaluating information on hundreds of plaintiffs and selecting 174 plaintiffs to serve as class representatives in the Consolidated Consumer Class Action Complaint, with additional dealership plaintiffs to serve as representatives in the Consolidated Amended Reseller Class Action Complaint;

d. Filing substantive and significant Amendments to the Class Complaints based on information gleaned from Class Counsel's investigations and analysis of the discovery;

e. Drafting and serving voluminous written discovery requests on Volkswagen, including Requests for Production, Requests for Admission and Interrogatories;

f. Responding to Volkswagen's discovery requests, including the production of documents from 174 named Plaintiffs, in addition to compiling information to complete comprehensive fact sheets, which also included document requests, for each named Plaintiff;

g. Reviewing, analyzing, and coding ***over 12 million pages*** of documents produced by Volkswagen, many of which were highly technical in nature and required German translation;

h. Drafting a motion for class certification;

i. Preparing for trial by, among other things, drafting a comprehensive trial plan and various filings pertaining to an expedited trial;

j. Negotiating comprehensive expert, deposition, preservation, confidentiality, and ESI protocols;

k. Retaining and working with technical experts to understand the complex issues pertaining to diesel engine systems and Volkswagen's use of the Defeat Device;

l. Retaining and working with economic experts to analyze damages and perform damages modeling;

m. Reviewing and analyzing Volkswagen's financial condition and ability to pay any settlement or judgment;

n. Coordinating substantive and procedural issues with multiple federal and state governmental agencies, as well as with plaintiffs in state court actions; and

o. Researching related environmental issues.

Advancing all of these tasks simultaneously was, to say the least, a serious undertaking, as the Court acknowledged:

> The Court must note that . . . it is grateful for the enormous efforts of all parties . . . to obtain a global resolution . . . . I have been advised by the Settlement Master that all of you have devoted substantial efforts, weekends, nights, and days, and perhaps at sacrifice to your family. . . . And I just want you to know that this Court is extremely grateful for those efforts. And I think they have borne fruit.

May 24, 2016, Status Conference Hr'g Tr., Dkt. No.1535 at 8:8-18.

After the Settlement was filed, and through the present day, moreover, Class Counsel have devoted substantial resources to implementing the Settlement. Class Counsel have communicated extensively with thousands of class members, providing them with information and advice about the Settlement. Indeed, to date, Class Counsel have logged over 20,000 such communications—including communications by telephone, by correspondence, and by email. Cabraser Decl. ¶ 3. Class Counsel and others authorized by Lead Counsel under PTO 11 will continue to devote significant resources to this litigation through at least September 2018, to ensure that Class Members have the resources and assistance they need to take advantage of the extraordinary benefits secured through the Settlement.

III. ARGUMENT

A. Class Counsel's Fee Request Is Fair, Reasonable, and Appropriate.

In deciding whether a requested fee amount is appropriate, the Court's role is to determine whether such amount is "fundamentally 'fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)). Where a settlement establishes a common fund or calculable monetary benefit for the class members, it is both appropriate and preferred to award attorneys' fees based on a percentage of the monetary benefit obtained. *See Vizcaino*, 290 F.3d at 1047; Fitzpatrick Decl. ¶¶ 9-11. Where, as here, a settlement arguably does not create a "common fund" *per se*, but instead involves a claims process, "the Ninth Circuit may analyze the case as a 'constructive common fund' for fee-setting purposes." *Nwabueze v. AT & T Inc.*, No. C 09-01529 SI, 2013 WL 6199596, at *11 (N.D. Cal. Nov. 27, 2013) (quoting *In re Bluetooth Headset Prods. Liabl. Litig.*, 654 F.3d 935, 941-943 (9th Cir. 2011)).

"To calculate appropriate attorneys' fees under the constructive common fund method, the Court should look to the maximum settlement amount that could be claimed." *Nwabueze*, 2013 WL 6199596, at *11. Courts have long looked to the entire value of the benefit made available to class members, even in cases where it is unlikely all or most of that benefit would be claimed. *Lopez v. Youngblood*, No. CV–F–07–0474 DLB, 2011 WL 10483569, at *12 (E.D. Cal. Sept. 1, 2011); *accord Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-81 (1980); *Williams v.*

MGM-Pathe Commc'ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997); *see also* Fitzpatrick Decl. ¶ 14. The constructive common fund benefits therefore include all amounts paid by the defendant including, for example, the cost of notice, settlement administration, and attorneys' fees. *Staton*, 327 F.3d at 974-75; *Lopez*, 2011 WL 10483569, at *31; *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011). The benchmark award of attorneys' fees in common fund or constructive common fund cases is 25%, *Bluetooth*, 654 F.3d at 942, and the average percentage awarded in billion-dollar settlements is 13.7%, Fitzpatrick Decl. ¶ 24.

Here, the $175 million aggregate award of fees and costs that Class Counsel request, and that Volkswagen has agreed to pay, is an extremely small portion of the total monetary benefit in this case. The Settlement's monetary benefit indisputably includes the $10.033 billion available to fund the Buyback, Lease Termination, and Restitution programs. Class Counsel's fees represent *only 1.7%* of that figure. The total Class benefit is even larger than that, however. While Class Counsel do not rely on such a calculus, the constructive common fund fairly includes the very significant monies Volkswagen has paid and will pay to develop and provide the emission modifications free of charge to Class Members who choose it, to execute the notice plan; to staff an intricate settlement support team; and to administer a complex program to buy back hundreds of thousands of vehicles across the nation (and in some instances across the world) over a two year period. Volkswagen need not divulge the cost of these programs, but suffice it to say, it's a lot. In this case, however, the quantifiable monetary benefit of $10.033 billion is more than sufficient to justify Class Counsel's request and is all that Class Counsel rely on for the calculations in this Motion.

It is true that Volkswagen is likely to retain some small part of the $10.033 billion funding pool. As noted above, however, many courts have concluded that any potential "reversion" is irrelevant to the calculation of the monetary fund. Regardless, Class Counsel's requested fees are a small percentage even of the cash that Volkswagen will actually put in Class Members' pockets under any reasonable estimate. Less than 1% of the Class opted out, and some of those who did have already opted back in. Dkt. No. 2102 at 26. It is not unreasonable, therefore, to project that approximately 95% of the Class will receive Settlement benefits, especially since over 75% of the

Class has *already registered*, almost two years before the deadline most Class Members. Dkt. No. 2166 at 7. The current registration statistics indicate that approximately 78% of Class Members are choosing the Buyback option. Cabraser Decl. ¶ 3. If 95% of the Class participates (95% owners and 95% lessees) and 75% of the owners sell their vehicles back, then, using the average buyback and restitution figures, Volkswagen's cash payments to Class Members will total $8,049,105,094.66. Class Counsel's fees reflect less than 2.1% percent of that amount. Even under the most conservative, and less likely, projection—85% participation, 50% buyback—the fee request amounts to less than 3% of the consumer cash payments.

This miniscule percentage is fair, appropriate, and reasonable under the circumstances. In fact, it is far lower than the typical attorneys' fees awarded even in super-mega-fund settlements. In his accompanying Declaration, class action expert Professor Brian Fitzpatrick notes that the mean and median awards in common fund and constructive common fund cases in this Circuit are 23.9% and 25% respectively, and, nationwide, the mean and median percentages awarded in settlements exceeding $1 billion are 13.7% and 9.5%, respectively. Fitzpatrick Decl. ¶¶ 22-24. No matter how you slice it, Class Counsel's request is only a small fraction of the amount that would be permissible under controlling case law.

Although 25% is the presumptive benchmark, courts in the Ninth Circuit frequently reference five additional factors in evaluating the reasonableness of a requested fee. Those are: (1) the result achieved; (2) the skill required and the quality of the work of plaintiffs' counsel; (3) the customary fees for similar cases; and (4) the contingent nature of the fee and financial burden carried by counsel; and (5) the risks inherent in the litigation. *Vizcaino*, 290 F.3d at 1048-50; Fitzpatrick Decl. ¶ 12. Courts also occasionally engage in a streamlined lodestar "cross-check" analysis. *Vizcaino*, 290 F.3d at 1048-50; Fitzpatrick Decl. ¶ 12. Each of these factors supports Class Counsel's request.

1. <u>Class Counsel Obtained Exceptional Results for the Class.</u>

The benefit obtained for the class is the single most important factor. *In re Bluetooth*, 654 F.3d at 942; *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). It weighs heavily in favor of approving Class Counsel's fees.

As detailed at length above, in the Settlement approval briefing, and in the Court's Order approving the Settlement, from an aggregate standpoint, the Settlement is extraordinary—maybe even unprecedented. The $10.033 billion that Volkswagen has committed to make available for Class Members represents "the largest payout by an automaker to consumers in U.S. history." Jacob Bogage, *Volkswagen Agrees to Pay Consumers Biggest Auto Settlement in History*, WASH. POST (June 27, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/06/27/volkswagen-agrees-to-pay-consumers-biggest-auto-settlement-in-history/. It may also be the largest consumer class action settlement in history. *See* Fitzpatrick Decl. ¶ 6.

But perhaps more important than the aggregate statistics is the meaningful relief the Settlement provides to each and every individual Class Member—relief that allows defrauded owners and lessees to recoup their losses, and then some, on what may be one of the largest purchases of their lifetimes. The Settlement gives Class Members the option to receive an emissions modification (if approved by the EPA) to bring their vehicles in compliance with governmental regulations and receive a significant cash payment; to terminate their leases without penalty and receive a significant cash payment; or to sell back their vehicles for an amount that is pegged to the vehicles' pre-scandal "clean" valuation, regardless of the condition of vehicles. As Professor Andrew Kull observed, Class Members likely do well if not better under the Settlement than they would if they tried their cases to verdict under a theory of rescission. Dkt. No. 1784-2 at 2, 19-20. This is especially true given the remarkable speed in which the benefits become available under the Settlement.

Even this does not capture the full value of the Settlement, however. Many Class Members were outraged that they had been made unwitting agents of excessive pollution. They, and all other Class Members, benefit greatly from the creation of a $2.7 billion trust which will fund environmental remediation projects, and a $2 billion investment in zero-emission vehicle technology. While these features are papered in the DOJ Consent Decree, the Court rightfully acknowledged that "[i]t's all part and parcel of an overall settlement." Fairness Hr'g Tr., Dkt. No. 2079 at 53:14-15.

The unassailable fact that the Settlement resulted from an historic collaboration with

government entities does not diminish the benefits Class Counsel obtained for the Class. As Director Mueller explained, "no single party could, as a jurisdictional or practical matter, obtain and enforce all the relief sought." Dkt. No. 1977 at ¶ 7. The Class Settlement provides the mechanism through which the relief is administered, and critically, provides Volkswagen the releases that were essential to any resolution. This simply is not a case where the plaintiffs piggybacked on the efforts of government counsel. *Compare In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998) ("The role of Class Counsel was critical, not only in achieving the significant recovery, but in framing the issues which became the subject of the later [government action].") *and In re VISA Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 523-24 (E.D.N.Y. 2003) (noting that the case was "very risky" and that "government piggybacked on Class Counsel's efforts") *with In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 101 (D.D.C. 2002) (reducing fees where "class plaintiffs filed their suit after a predecessor litigant—in this case, the FTC—had already expended substantial effort to establish the liability of the defendants" and "[the] case simply did not require the same heavy lifting"). In fact, the consumer litigation here pre-dates government litigation, and the two have moved forward collaboratively, in tandem, since the actions were consolidated. Like plaintiffs' counsel in *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992), Class Counsel cannot "be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill." Instead, Class Counsel did much of the work "on their own," and with the assistance of government agencies, "made the kill." *Id.*

Such collaboration speaks to competence and diligence of Class Counsel and to their interest in achieving as much for the Class as possible as fast as possible. It does not, therefore, follow that the constructive common fund should be discounted. *See, e.g.*, *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1006 (N.D. Cal. 2015); *Ebarle*, 2016 WL 5076203, at *9-11; *In re Reebok Easytone Litig.*, No. 4:10-CV-11977-FDS, Dkt. No. 74 (D. Mass. Jan. 19, 2012). But even if any such discounting were appropriate, it is more than covered by the "dramatic" downward "departure from the benchmark" and from the super-mega-fund average reflected in Class Counsel's application. Fitzpatrick Decl. ¶ 27.

Finally, the overwhelmingly positive response from Class Members further validates the Settlement's merit. As detailed in the Settlement approval briefing, this is an exceptionally engaged Class, and the Settlement received an extraordinary amount of attention, from the media and from Class Members themselves—which required a commensurate level of responsiveness and engagement from Class Counsel. Nevertheless, and notwithstanding the efforts of some attorneys to collect opt-outs, less than 1% of the Class excluded itself, and less than 0.1% objected to the terms of the Settlement. Dkt. No. 2102 at 26. In contrast, before the Settlement had even received approval, upwards of 63% of the Class had already registered for Settlement benefits—almost two years before the deadline to do so for all but Eligible Sellers. *Id.* As of November 3, 2016, more than 75% of the Class had registered. Dkt. No. 2166 at 7. This juxtaposition, underscored by the many communications Class Counsel received from Class Members expressing their support and appreciation for the Settlement, further demonstrates the value of the relief obtained.

Viewing all of these features together, it is clear that the strength of the settlement benefits—the most important factor in the reasonableness evaluation—strongly supports Class Counsel's requested fees.

2. Class Counsel's Skill and Work Product Have Been Exemplary.

This was (and remains) a complex case requiring the skills of a "group of diverse" and "highly competent counsel," as the Court has recognized. Feb. 25, 2016, Status Conference Hr'g Tr., Dkt. No. 1270 at 5:8-12. The Court selected Class Counsel out of a group of approximately 150 applying attorneys and concluded that Class Counsel "are qualified attorneys with extensive experience in consumer class action litigation and other complex cases." Dkt. No. 1688 at 18. Even opposing counsel dubbed Class Counsel an "all-star cast of . . . some of the best plaintiffs' lawyers in America." Dkt. No. 2079 at 27:8-9. As the Court noted in the Order granting preliminary approval of the Settlement, "[t]he extensive efforts undertaken thus far in this matter," including the myriad of litigation and settlement related-duties outlined herein, "are indicative of Lead Plaintiffs' Counsel's and the PSC's ability to prosecute this action vigorously." Dkt. No. 1688 at 16. The skill and diligence demonstrated by Class Counsel in this litigation,

therefore, support their requested fees. As the Court predicted in PTO 7, a PSC of this size and experience was required by the demands of the Settlement, and Lead Counsel took advantage of the authority granted in PTO 7 to enlist and authorize nearly 100 additional firms to perform the necessary common benefit work, which was then tracked pursuant to the protocol set forth in PTO 11. Cabraser Decl. ¶ 7.

3. Customary Fees in Similar Cases Greatly Exceed Those Requested Here.

Comparing the requested fees to awards in similar cases spotlights the reasonableness of the application. As explained herein, and detailed in the Declaration of Professor Fitzpatrick, the fees requested are well below the benchmark in this Circuit, well below the mean and median awards in super-mega-fund cases, and, if granted, would likely mark the "lowest" percentage "ever recorded in a billion-dollar class action case." Fitzpatrick Decl. ¶ 14. This factor strongly supports the reasonableness of Class Counsel's request.

4. The Litigation Was Complex, and Class Counsel Carried Considerable Financial Burden and Risk.

The Court's orders appointing the PSC and providing a protocol for common benefit work and expenses establish that this matter is purely contingent with all fees and expenses subject to approval by the Court. Dkt. Nos. 1084, 1254. All PSC members were required to regularly contribute to the litigation fund (they have advanced millions of dollars in common benefit assessments to date) and devoted thousands of hours to this litigation without any guarantee that they would be reimbursed for their time and efforts. Cabraser Decl. ¶ 6. And, while Plaintiffs' case was strong, the demands of the case were high, and Settlement was far from a foregone conclusion. This factor, too, supports Class Counsel's request. Class Counsel made the breakneck speed of this case their priority, the Court directed it, and the case deserved it.

5. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fees.

The lodestar method of evaluating attorneys' fees is not favored. There are many reasons for this, including the fact that the lodestar method is onerous to calculate and can create tension

between the interests of class counsel and the interests of the class. Fitzpatrick Decl. ¶¶ 9-11, 32 (collecting and analyzing cases). While some courts nevertheless employ a "streamlined" lodestar analysis to "cross-check" the reasonableness of a requested award, such a cross-check is not necessary, especially where, as here, the percentage requested falls so far below the benchmark. *Ebarle*, 2016 WL 5076203, at *11 ("The Court declines to conduct a lodestar cross-check in this case, given that under the percentage-of-the-fund method the fee request was significantly below the 25% benchmark."); *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D. Cal. 2008) ("A lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point."); *Aichele v. City of L.A.*, No. CV-12-10863-DMG, 2015 WL 5286028, at *6 (C.D. Cal. Sept. 9, 2015) (same). Although unnecessary, a lodestar cross-check would result in only a modest multiplier of 2.63 and therefore supports Class Counsel's request.

In this case, in PTOs 7 and 11, the Court established a protocol for identifying, categorizing, and recording common benefit time. Class Counsel have followed those directions, as described in the declaration of Elizabeth J. Cabraser, and collected and reviewed common benefit time submissions from all 21 PSC firms and many others that were designated by Lead Counsel to perform common benefit work. Cabraser Decl. ¶¶ 11-12. The hours worked and rates billed are summarized in the Declaration of Elizabeth Cabraser.[1] *Id.* at ¶¶ 14-17. In short, the total number of hours worked to advance the common benefit is 120,111.3. *Id.* at ¶ 14. The aggregate lodestar is $63,526,785.70. *Id.* The average billing rate is approximately $529 per hour. *Id.* at ¶ 17.

The rates billed (customary rates, as PTO 11 directed) are reasonable. Hourly rates should be guided by the prevailing market rates for similar work performed by attorneys of comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Hajro v. U.S.*

[1] Providing more than hours worked and billing rates is unnecessary, given the Court's Orders and the limited nature of the lodestar cross-check. *See Winterrowd v. Am.Gen.Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009) (quoting *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (Cal. Ct. Appl. 1986) ("Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.")); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . [courts] may rely on summaries submitted by the attorneys and need not review actual billing records." (citation omitted) (internal quotation marks omitted)).

Citizenship & Immigration Servs., 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012). Even in 2013, rates in the San Francisco area could exceed $1,000 per hour. *See* 2013 National Law Journal Billing Survey. Courts in this district have therefore approved rates comparable to those claimed here. *See, e.g.*, *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015). A blended rate of $529 is not unreasonable under the circumstances of this case, Fitzpatrick Decl. ¶ 32, especially given the skill, experience, and reputation of Class Counsel—who were selected by the Court, after written submissions and oral presentations, from a pool of over 150 applicants and who were directed by the Court to devote their personal attention to this case, Dkt. No. 1084 at ¶ 5.

The time expended was also necessary. As explained above, the Court and the Class expected counsel to prosecute this case aggressively and on many fronts. Doing so required extraordinary dedication and time commitment. These efforts were necessary to achieve this historic settlement.

Finally, the facts of this case, and the law in this Circuit, support a reasonable lodestar multiplier. Indeed, courts frequently adjust lodestar figures upward to reflect a number of "reasonableness factors," including the quality of representation and the benefit obtained for the class. *In re Bluetooth*, 654 F.3d at 941-42. Those factors are discussed at length above, and both factors justify the "modest" multiplier of 2.63 requested here. Fitzpatrick Decl. ¶ 32. This is particularly true given that, as Professor Fitzpatrick notes, "as the settlement size increases, the lodestar class counsel receives typically increases as well." *Id*. Thus, the mean and median multipliers in settlements greater than or equal to $1 billion are 3.26 and 2.8 respectively. *Id.* Class Counsel's requested multiplier falls below both and is well supported by the extraordinary result achieved for the Class.

B. Class Counsel's Expenses are Reasonable and Appropriate.

"Class counsel are entitled to reimbursement of reasonable out-of-pocket expenses." *Wakefield v. Wells Fargo & Co.*, No. 3:13-cv-05053 LB, 2015 WL 3430240, at *6 (N.D. Cal. May 28, 2015); *see also Staton*, 327 F.3d at 974; Fed. R. Civ. P. 23(h). Expenses that are

reasonable, necessary, directly related to the litigation, and normally charged to a fee-paying client are recoverable. *See, e.g.*, *Willner v. Manpower Inc.*, No. 11-cv-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015); *Buccellato v. AT&T Operations, Inc.*, No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011).

As with the common benefit time, PTO 11 outlines the Court-approved procedure for identifying, categorizing, recording, and reviewing expenses. Class Counsel complied with that Order. Cabraser Decl. ¶¶ 11. The total amount of reimbursable expenses pursuant to PTO 11 equals $8 million. *Id.* at ¶ 18. That covers $7,192,794.28 in relevant costs already expended to advance the common benefit by Lead Counsel, all 21-PSC firms, and numerous other firms designated by lead counsel to perform common benefit work. *Id.* Examples of such expenses include hiring numerous experts to strengthen Plaintiffs' litigation and settlement positions; establishing and maintaining a sophisticated document review platform and support team to facilitate the review and analysis of millions of pages of documents; and advancing half of the costs of the Court-appointed Settlement Master, among many other things. Each expenditure falls into one of the 19 categories sanctioned by the Court. The reimbursable expenses also include $807,205.72 in anticipated future costs associated with implementing the Settlement for more than 470,000 Class Members over the next 26 months. *Id.* at ¶ 19. The total costs expended and projected are well within the customary range of costs associated with litigation of this scope and recoveries of this magnitude. Fitzpatrick Decl. ¶ 34. In fact, as with the fees, the costs for which Class Counsel seek reimbursement fall below both the median and mean costs awarded in super-mega-fund cases. *Id.* The costs are therefore reasonable and should be reimbursed.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant Class Counsel's Motion and award $175 million in attorneys' fees and costs related to the 2.0-Liter TDI Settlement, which Volkswagen has agreed to pay in addition to the $10.033 billion available for the Class.

Dated: November 8, 2016

Respectfully submitted,

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By: */s/ Elizabeth J. Cabraser*

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On the Brief

CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2016, 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*
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EXHIBIT A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL CONSUMER AND RESELLER ACTIONS

MDL 2672 CRB (JSC)

DECLARATION OF ELIZABETH J. CABRASER IN SUPPORT PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS UNDER FED. R. CIV. P. 23(H) AND PRETRIAL ORDER NOS. 7 AND 11

The Honorable Charles R. Breyer

I, ELIZABETH J. CABRASER, declare:

1. I am an attorney admitted to the Bars of the State of California and the Northern District of California. I am counsel of record for Plaintiffs in these proceedings, and serve, pursuant to Pretrial Order No. 7: Order Appointing Plaintiffs' Lead Counsel, Plaintiffs' Steering Committee, and Government Coordinating Counsel (Dkt. No. 1084) ("PTO 7") as Lead Plaintiffs' Counsel.

2. I also serve, pursuant to this Court's Orders Granting Preliminary and Final Approval of Settlement (Dkt. Nos. 1688, 2102), as Lead Settlement Class Counsel for the 2.0-liter TDI Consumer and Reseller Settlement Class.

3. The Volkswagen "Clean Diesel" claims were predominantly asserted in the form of class action complaints. Within weeks of the revelations regarding Defendants' use of "defeat devices" in diesel vehicles, hundreds of class action complaints had been filed in or removed to federal courts. These cases were coordinated and centralized by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407 and assigned to Hon. Charles R. Breyer by Transfer Order dated December 8, 2015 (Dkt. No. 1). To date, more than 1,200 actions, most styled as class actions, have become a part of these MDL proceedings. They have been managed, pleaded, prosecuted, discovered, and, as to the 2.0-liter claims against the Volkswagen Defendants, certified and settled as a Rule 23 class action, with the PSC tasked with filing consolidated class action complaints, conducting common discovery, and appointed to serve as Class Counsel for the 2.0-liter Settlement. Pursuant to this authority, Settlement Class Counsel negotiated the Amended Consumer Class Action Settlement Agreement and Release (Dkt. No. 1685) (the "Settlement"), which the Court approved on October 25, 2016. Volkswagen has reported that, by November 3, 2016, over 75% of the Class had already registered for Settlement benefits, November 3, 2016, Status Conference, Hr'g Tr., Dkt. No. 2166 at 7, approximately 78% of whom have initially selected the buyback option. Thus far, Class Counsel have logged over 20,000 communications with Class Members—including communications by telephone, by correspondence, and by email—responding to questions and requests for information.

4. In PTO 7, the Court appointed counsel to lead these MDL proceedings and set forth their responsibilities. From 150 leadership applications received, the Court appointed 21 attorneys to the PSC, and the undersigned as Plaintiffs' Lead Counsel, noting that "this is an appropriate number given the amount of work this litigation may entail and the need for an expeditious resolution of this matter." Dkt. No. 1084 at ¶ 7. The Court also vested Plaintiffs' Lead Counsel with "the authority to retain the services of any attorney not part of the PSC to perform any common benefit work, provided the attorney so consents and is bound by the PSC's compensation structure." *Id*. at ¶ 2.

5. In Pretrial Order No. 11: Protocol for Common Benefit Work and Expenses ("PTO 11") (Dkt. No. 1254), the Court defined" Compensable Common Benefit Work and Common Expenses" and set forth the Court-ordered "Protocols for Submission of Time and Expenses" and for reimbursement of common benefit work.

6. To date, all PSC members have participated actively in funding the prosecution of the Class claims, by performing work on a priority basis as assigned and authorized by the undersigned, by incurring the necessary and appropriate out-of-pocket travel and administrative costs to do so, and additionally by contributing millions of dollars in assessments to a common benefit fund. This fund has been used to retain experts (including liability, technical, and procedural experts) to fund the massive document analysis and expedited trial preparation effort, and to pay one half of the services of the Court-appointed Settlement Master and his team, pursuant to Pretrial Order No. 6: Appointment of Robert S. Mueller III as Settlement Master (Dkt. No. 973 at ¶ 4).

7. An ongoing effort has been made to include and involve interested counsel in the common benefit work of the MDL, to an extent practicable and commensurate with the Court's directive for dispatch in the prosecution and resolution of the "clean diesel" claims. To date, in addition to the PSC, attorneys from nearly 100 firms have been requested and authorized by the undersigned to perform work under PTO 7 and have submitted records under PTO 11. For example, prior to the filing of the Consolidated Consumer Class Action Complaint (Dkt. No. 1230), the undersigned requested all firms who had submitted leadership applications and other

interested firms to submit information on plaintiffs interested in serving as proposed class representatives. Information on over nearly 600 plaintiffs was submitted by dozens of firms. All of these firms were asked to submit their time for this effort under PTO 11.

8. Section 11.1 of the operative Amended Consumer Class Action Settlement Agreement and Release (Dkt. No. 1685) provides that Volkswagen shall pay the reasonable attorneys' fees and costs for work performed by Class Counsel related to the prosecution and resolution of the 2.0-liter claims, as well as such work performed by other attorneys designated by Class Counsel, in an amount to be negotiated by the parties and approved by the Court. There were no attorneys' fee negotiations until after the Settlement was signed and submitted to the Court. After preliminary approval was granted and after Class Counsel filed their Statement describing the maximum fees to be sought (Dkt No. 1730), negotiations directed by the Court and assisted by a mediator yielded a total fees and costs amount ($175 million) that Volkswagen agreed not to oppose and to pay if awarded. These fees and costs are the subject of the instant Motion.

9. The work of these MDL proceedings, and of the 2.0-liter Settlement, is unfinished. The Settlement must be administered, implemented, defended and enforced until its benefits have been delivered to all successful claimants. The fee request includes an amount reserved to compensate PSC and additional firms who are authorized by the undersigned under PTOs 7 and 11 to perform this prospective and necessary work.

10. In the Order Granting Preliminary Approval of Settlement (Dkt. No. 1688), the Court set forth the procedure for requesting an award of fees, as well as the requirements of for such a request. Settlement Class Counsel complied with that Order by filing a Statement of Additional Information Regarding Prospective Request for Attorneys' Fees and Costs (Dkt. No. 1730) and, now that the Settlement has received Final Approval and the Parties have negotiated an agreed-upon fee/cost aggregate, by filing the instant Motion.[1]

[1] Although the Court's Orders, including PTO 11, establish the required contents for this fee request, the Motion also complies with N.D. Cal. Civil Local Rule 54-5 by reporting on the quantum and categories of work performed pursuant to PTO 11—the specific protocol on time and costs adopted by the Court for these MDL proceedings.

11. Pursuant to the procedures outlined in PTO 11, attorneys and staff working at my direction and under my supervision collected and reviewed submissions of common benefit time and reimbursable costs and expenses submitted by the PSC and other law firms from whom I and other PSC members requested common benefit work per PTO 11. The database maintaining the submissions has been meticulously maintained and updated weekly.

12. Only time and expenses that inured to the common benefit of the 2.0-liter TDI Consumer and Reseller Dealership Class and that advanced the claims resolved in the Amended Consumer Class Action Settlement Agreement and Release (Dkt. No. 1685) (the "Settlement") have been included in the time presented, and the costs submitted, in Plaintiffs' Motion For Attorneys' Fees And Costs Under Fed. R. Civ. P. 23(h) and Pretrial Order Nos. 7 and 11. This excludes, to the extent reasonably possible, time and expenses directed towards prosecution or resolution of the claims based on 3.0-liter vehicles and against the Bosch defendants.

13. The final common benefit time submission includes approximately 1,222 discrete timekeepers from approximately 120 law firms.

14. The total number of common benefit hours associated with the prosecution and resolution of the 2.0-liter TDI claims against the Volkswagen Defendants is approximately 120,024.3. This results in a combined lodestar of $63,526,785.70. That includes the hours already worked and associated lodestar broken down by the Court-approved categories outlined in PTO 11,[2] as shown in Table 1 below. The total fees requested—$167 million—represent a 2.63 multiplier of the $63,526,785.70 in combined lodestar.

[2] These task codes are: 1. Lead Counsel Calls/Meetings; 2. PSC Calls/Meetings; 3. Lead Counsel/PSC Duties; 4. Administrative; 5. MDL Status Conf.; 6. Court Appearance; 7. Research; 8. Discovery; 9. Doc. Review; 10. Litigation Strategy & Analysis; 11. Dep. Prep/Take/Defend; 12. Pleadings/Briefs/pre-trial Motions/Legal; 13. Science; 14. Experts/Consultants; 15. Settlement; 16. Trial Prep/Bellwether; 17. Trial; 18. Appeal; 19. Miscellaneous.

Table 1

Category Breakdown		
PTO 11 Category	**Total Hours**	**Total Lodestar**
1	1166.2	$917,371.80
2	1123.1	$926,576.30
3	5931.2	$2,869,955.80
4	5876.4	$1,954,507.10
5	1017.7	$770,835.10
6	957.5	$748,683.90
7	6605.1	$3,272,767.10
8	5627.8	$3,427,403.20
9	27863.5	$11,561,954.04
10	6297.8	$4,357,836.60
11	100.3	$70,734.00
12	10170.3	$6,011,442.70
13	56.4	$46,534.80
14	1521.5	$1,034,260.20
15	22635.6	$13,148,802.26
16	435.5	$368,663.50
17	36.6	$31,246.50
18	-	-
19	1314.4	$1,007,210.80
Reserved	21287.4	$11,000,000.00
Total	**120024.3**	**$63,526,785.70**

15. As shown above, the total also includes 21,287.4 hours of reserved time ($11 million in reserved lodestar) to cover the work necessary to (1) guide the hundreds of thousands of Class Members through the remaining 26 months of the Settlement Claims Period; (2) assist in the implementation and supervision of the Settlement, including by participating in the Claims Review Committee, as outlined in the Final Approval Order (Dkt. No. 2102 at 46); and (3) defend and protect the Settlement on appeal, among other things. This sum will be held in reserve and used to compensate the PSC members and other firms to be authorized by Plaintiffs' Lead Counsel to perform these necessary and appropriate steps to assure the delivery of Settlement benefits to the Class.

16. The projection was calculated in four steps. First, the average hours and lodestar associated with Settlement implementation from the months of July, August, and September,

2016, was determined. That average was 3,239.1 hours and $1,673,782.57 in lodestar per month for only Settlement-related time. Second, the monthly average was multiplied by the number of months (26) remaining between November 2016 (no November time was included in any of the hours or lodestar submitted) and the end of the Claims Period in December 2018. That resulted in a total of 84,217.5 hours and a lodestar of $43,518,346.73 projected over the remaining life of the Settlement. Third, those projected totals were *reduced by 75%*, resulting in a final, conservative projected future Settlement-administration lodestar of $10,879,586.68 (21,054.4 hours). Finally, the number was rounded to $11 million (21,287.4 hours).

17. The range of hourly rates varied considerably given the diversity of lawyers and law firms tasked to perform common benefit work and includes some of the most qualified and experienced lawyers in the country who the Court appointed to the PSC. The hourly billing rates ranged from $275 to $1600 for partners; from $150 to $790 for associates; and from $80 to $490 for paralegals. These are the customary billing rates of the submitting lawyers and paralegals, reflecting their experience and the economies of their law practices. My customary hourly rate, for example, awarded by federal courts in this District and elsewhere is $1,000 per hour. The average hourly billing rate for all common benefit work performed and projected per PTO 11 is $529.

18. The aggregate common benefit costs and expenses total is $8 million. This total includes the costs already expended, which are broken down by Court-approved category in PTO 11[3] in Table 2 below, and which equals $7,192,794.28.

[3] The cost categories are: 1. Assessment Fees; 2. Federal Express / Local Courier, etc.; 3. Postage Charges; 4. Facsimile Charges; 5. Long Distance; 6. In-House Photocopying; 7. Outside Photocopying; 8. Hotels; 9. Meals; 10. Mileage; 11. Air Travel; 12. Deposition Costs; 13. Lexis/Westlaw; 14. Court Fees; 15. Witness / Expert Fees; 16. Investigation Fees / Service Fees; 17. Transcripts; 18. Ground Transportation (i.e. Rental, Taxis, etc.); and 19. Miscellaneous

Table 2

Category Breakdown	
PTO 11 Category	**Common Benefit Costs**
1	$4,787,500.00
2	$10,187.85
3	$5,087.46
4	$73.15
5	$13,074.11
6	$71,594.73
7	$15,296.37
8	$269,200.38
9	$96,659.90
10	$6,341.23
11	$518,734.07
12	$101.20
13	$129,101.93
14	$584,242.96
15	$277,791.68
16	$157,927.02
17	$2,266.06
18	$91,924.23
19	$155,689.95
Reserved	$807,205.72
Total	**$8,000,000.00**

19. As shown above, the total requested costs per PTO 11 also include $807,205.72 in projected costs, which Settlement Class Counsel is responsibly reserving to cover expenses associated with the on-the-ground enforcement and assistance efforts this Settlement will take, as hundreds of thousands of class members across the country go to Volkswagen dealerships for buybacks or emissions modifications, and all other costs associated with the implementation and defense of the Settlement.

20. Plaintiffs thus seek an aggregate common benefit award of $167 million in fees and $8 million in costs, to be allocated by Plaintiffs' Lead Counsel among the PSC firms and additional counsel performing work under PTOs 7 and 11.

I declare under penalty of perjury that the forgoing is true and correct. Executed in Miami, Florida, this 8th day of November 2016.

/s/ Elizabeth J. Cabraser
Elizabeth J. Cabraser

EXHIBIT B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL CONSUMER AND RESELLER ACTIONS

MDL 2672 CRB (JSC)

DECLARATION OF BRIAN T. FITZPATRICK IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS UNDER FED. R. CIV. P. 23(H) AND PRETRIAL ORDER NOS. 7 AND 11

The Honorable Charles R. Breyer

Background and qualifications

1. I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research at Vanderbilt and New York University have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the University of Arizona Law Review, and the NYU Journal of Law & Business. My work has been cited by numerous courts, scholars, and popular media outlets, such as the New York Times, USA Today, and the Wall Street Journal. I am also frequently invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, and 2016, and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See*

id. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 169 from the Ninth Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts.[1]

4. I have been asked by class counsel to opine on whether the attorneys' fees and expenses they have requested here are reasonable. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel; I have attached a list of these documents in Exhibit 2. As I explain, based on my study of settlements across the country and in the Ninth Circuit in particular, I believe the requests here are within the range of reason.

Case background

5. In September of 2015, it became known that Volkswagen had deceived the public and federal and state governments for many years by installing a so-called "defeat device" (so

[1] *See*, *e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at *17 (S.D.N.Y. Apr. 24, 2016) (same); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litigation*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F.Supp.3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F.Supp.2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Federal National Mortgage Association Securities, Derivative, and "ERISA" Litigation*, 4 F.Supp.3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Products Liability Litigation*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litigation*, 953 F.Supp.2d 82, 98-99 (D.D.C. 2013) (same); *In re Southeastern Milk Antitrust Litigation*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

named because it was designed to defeat emissions-testing machines) in its 2.0- and 3.0-liter diesel automobiles. Shortly thereafter, the federal government, the State of California, and hundreds of private plaintiffs filed civil lawsuits against Volkswagen AG, its affiliated companies, and other defendants for fraud and environmental harms. These lawsuits were transferred to this court pursuant to the Multidistrict Litigation statute, and, after nearly a year of intense negotiations and pretrial litigation, the governments and the private plaintiffs have now reached settlements with Volkswagen AG and its affiliated entities with respect to the 2.0-liter vehicles; litigation is ongoing against other defendants and with respect to the 3.0-liter vehicles.

6. The settlement between the private plaintiffs and Volkswagen was reached on behalf of a class of current owners and lessees and many former owners and lessees of Volkswagen 2.0-liter diesel vehicles. The Court preliminarily approved it on July 29 and gave it final approval on October 25. The Court's orders and class counsel's filings describe the terms of the settlement in great detail and I will not repeat them here except as necessary. But I will note that the settlement calls for class members to each receive *thousands* of dollars, *see* Ex. 6 to Settlement Agreement, and, when environmental remediation is included, Volkswagen could pay out *more than $15 billion total* (exactly how much depends on how many class members take advantage of the settlement). This is worth mentioning because this settlement could very well become the largest class action settlement in American history. In Table 1, below, I list all class action settlements in the United States over $1 billion of which I am aware; the only settlements with a realistic chance to top this one are the economic, business, medical, and property loss settlements with BP (estimated at $13 billion) and the securities fraud Enron settlement ($7 billion). Regardless, the Volkswagen 2.0-liter settlement appears to be the largest settlement of consumer claims in U.S. history.

7. Volkswagen has agreed to pay class counsel $175 million in attorney's fees and expenses on top of the relief called for in the settlement. Class counsel's expenses have come to approximately $8 million leaving as much as $167 million for fees. Class counsel have now asked the court to award them these amounts for their work in bringing about the settlement. As I explain below, the fee request reflects only 1.1% to 7.8% of the settlement depending on how

conservative the court wishes to be in valuing the settlement. In my opinion, any of these percentages would be well within the range of reasonableness. Moreover, as I explain, the expense request is below the typical award in settlements of this size.

Table 1: All common fund or constructive common fund class action settlements greater than or equal to $1 billion

Case	Settlement Amount	Fee Method	Lodestar Multiplier	Fee Percentage	Expenses
BP Gulf Oil Spill (2012)[2]	$13 billion	Percent	2.3	4.3%	$44.8 million
Enron Securities Fraud (2008)[3]	$7.2 billion	Percent	5.2	9.52%	$39+ million
Diet Drugs Products Liability (2008)[4]	$6.4 billion	Percent	2.6+	6.75%	$24.2 million
WorldCom Securities (2005)[5]	$6.1 billion	Percent	4.0	5.5%	$10.7 million
Payment Card Interchange Fees Antitrust (2014)[6]	$5.7 billion	Percent	3.4	9.56%	$27 million
Visa Antitrust (2003)[7]	$3.4 billion	Percent	3.5	6.5%	$18.7 million
Tyco Securities (2007)[8]	$3.3 billion	Percent	2.7	14.5%	$28.9 million
Cendant Securities (2003)[9]	$3.2 billion	Percent	Not calculated	1.73%	$14.6 million
AOL Securities (2006)[10]	$2.65 billion	Percent	3.7	5.9%	$3.4 million
Bank of America Securities (2013)[11]	$2.4 billion	Not specified	Not calculated	6.5%	$8 million
Toshiba Diskette (2000)[12]	$2.1 billion (total) $1 billion (cash)	Both	Not calculated	7.1% (total) 15% (cash)	$3 million

[2] *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2016 WL 6215974 (E.D.La. Oct. 25, 2016)

[3] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008).

[4] *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 553 F. Supp. 2d 442 (E.D. Pa. 2008).

[5] *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005).

[6] *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014).

[7] *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003).

[8] *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249 (D.N.H. 2007).

[9] *In re Cendant Corp. Litig.*, 243 F. Supp. 2d 166 (D.N.J. 2003).

[10] *In re AOL Time Warner, Inc. Sec.*, 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006).

[11] *In re Bank of America Corp. Sec., Derivative, and ERISA Litig.*, No. 09-md-2058 (S.D.N.Y., Apr. 8, 2013).

[12] *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000).

Case	Settlement Amount	Fee Method	Lodestar Multiplier	Fee Percentage	Expenses
Toyota Unintended Acceleration (2013)[13]	$1.6 billion (est. total) $757 million (cash)	Percent	2.9	12.3% (total) 26.4% (cash)	$27 million
Credit Default Swaps Antitrust (2016)[14]	$1.87 billion	Percent	6.2	13.6%	$10.2 million
Prudential Insurance (2000)[15]	$1.8 billion	Percent	2.1	7.5%	$5+ million
Black Farmers Discrimination (2013)[16]	$1.2 billion	Percent	<2.0	7.4%	$28+ million
Tobacco Antitrust (2003)[17]	$1.2 billion	Lodestar	4.5	5.9%	$4.5 million
TFT-LCD Antitrust (2013)[18]	$1.1 billion	Percent	≈2.5	28.5%	$8.7 million
Nortel Securities I (2006)[19]	$1.1 billion	Percent	2.1	3%	$3.7 million
Nortel Securities II (2006)[20]	$1.1 billion	Percent	Not calculated	8%	$3 million
Royal Ahold Securities (2006)[21]	$1.1 billion	Percent	2.6	12%	$3.3 million
Allapattah Contract (2006)[22]	$1.1 billion	Percent	Not calculated	31.33%	$4.1 million
Nasdaq Antitrust (1998)[23]	$1 billion	Percent	4.0	14%	$4.4 million
Sulzer Hip (2003)[24]	$1 billion	Both	2.4	4.8%	$3.7 million
N = 23			Low = <2.0 High = 6.2 Avg = 3.26 Med = 2.80	Low = 1.73% High = 31.33% Avg = 9.83% (total) 10.79% (cash)	

[13] *In re Toyota Motor. Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.*, No. 10-ml-2151 (C.D. Cal., June 17, 2013).

[14] *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016).

[15] *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 106 F. Supp. 2d 721, 736 (D.N.J. 2000).

[16] *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82 (D.D.C. 2013) (incurred rather than awarded expenses).

[17] *DeLoach v. Phillip Morris Cos.*, 2003 WL 23094907 (M.D.N.C. Dec. 19, 2003).

[18] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013).

[19] *In re Nortel Networks Corp. Sec. Litig.*, No. 01-cv-1855 (S.D.N.Y., Jan. 29, 2007).

[20] *In re Nortel Networks Corp. Sec. Litig.*, No. 04-cv-2115 (S.D.N.Y., Dec. 26, 2006).

[21] *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383 (D. Md. 2006).

[22] *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006); *Allapattah Servs., Inc. v. Exxon Corp.*, No. 91-cv-986 (S.D.Fla. Apr. 16, 2007).

[23] *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998).

[24] *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 939 (N.D. Ohio 2003).

Case	Settlement Amount	Fee Method	Lodestar Multiplier	Fee Percentage	Expenses
				Med = 7.40% (total) 7.50% (cash)	

Assessment of the reasonableness of the request for attorneys' fees

8. The $10.033 cash commitment secured by the settlement is a "common fund" for purposes of fee analysis because the attorneys' efforts have created a settlement fund for the benefit of all class members. Although Volkswagen agreed to pay class counsel's fees separately and on top of its payments to class members, because this is a class action, the court still must approve the fees as reasonable. *See* Fed. R. Civ. P. 23(h). When a fee-shifting statute is inapplicable in such cases (as it is here), courts usually evaluate the fees as if they were to come from the common fund instead of separately from the defendant. That is, courts in such cases create a so-called "hypothetical" or "constructive" common fund by adding together 1) the fees the defendant agreed to pay separately and 2) the value of the fund created for the benefit of the class. The court then evaluates whether it would be reasonable to "award" the fees from this "fund" in the same way it would fees in any common fund class action. *See, e.g.*, *In re Heartland Payment Sys., Inc. Customer Data Security Breach Litig.*, 851 F. Supp. 2d 1040, 1072 (S.D. Tex. 2012) (Rosenthal, J.).

9. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.* Over time, however, the lodestar approach fell out of favor in common fund class actions. It did so largely for two reasons. First, courts came to dislike the lodestar method because it was difficult to calculate the lodestar; courts had to review voluminous time records and the like. Second—and more importantly—courts came to dislike the lodestar method

because it did not align the interests of class counsel with the interests of the class; class counsel's recovery did not depend on how much the class recovered, but, rather, on how many hours could be spent on the case. *See id.* at 2051-52. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is predominantly injunctive in nature (and the value of the injunction cannot be reliably calculated). *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of settlements).

10. The more popular method of calculating attorneys' fees today is known as the "percentage" method. Under this approach, courts select a percentage that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage approach became popular precisely because it corrected the deficiencies of the lodestar method: it is less cumbersome to calculate, and, more importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052. Indeed, the percentage method is virtually always used in large common fund cases like this one. I show this again in Table 1, above; column three shows the method used by the court to award fees in each case.

11. In the Ninth Circuit, district courts have the discretion to use either the lodestar method or the percentage method in common fund cases. *See In re Washington Public Power Supply Sys. Securities Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994) ("[D]istrict court has discretion to use either method in common fund cases."). In light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage method, it is my opinion that courts should generally use the percentage method in common fund cases whenever the value of the settlement can be reliably calculated. Only where the value of the settlement cannot be reliably calculated is it my opinion that courts should use the lodestar method; in these circumstances, the lodestar method is the only feasible choice. In this case, I believe the settlement can be reliably valued and therefore the percentage method should be used.

12. Under the percentage method, courts must 1) calculate the value of the settlement and then 2) select a percentage of that value to award to class counsel. When calculating the value of the settlement, courts usually include any cash compensation to class members, cash the defendant must pay to third parties, non-cash relief that can be reliably valued, attorneys' fees and expenses, and administrative costs paid by the defendant. *See, e.g.*, *In re Heartland Payment*, 851 F. Supp. 2d at 1080. When selecting the percentage, courts in the Ninth Circuit use 25% as the "'bench mark' percentage for the fee award," which "can then be adjusted upward or downward to account for any unusual circumstances involved in the case." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). *See also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (stating that the 25% benchmark percentage "should be adjusted . . . when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). In various cases, the Ninth Circuit has identified at least eight different factors that district courts can examine in deciding whether to increase or decrease an award from the benchmark:

(1) the results achieved by class counsel, *see Six Mexican Workers*, 904 F.2d at 1311; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002);

(2) the length the case has transpired, *see Six Mexican Workers*, 904 F.2d at 1311; *Vizcaino*, 290 F.3d at 1050;

(3) the complexity of the case, *see Six Mexican Workers*, 904 F.2d at 1311; *In re Pacific Enters. Securities Litig.*, 47 F.3d 373, 379 (9th Cir. 1995);

(4) the risks the case involved, *see In re Pacific Enters. Securities Litig.*, 47 F.3d at 379; *Vizcaino*, 290 F.3d at 1048-49;

(5) the percentages awarded in other class action cases, *see Vizcaino*, 290 F.3d at 1050;

(6) any non-monetary benefits obtained by class counsel, *see In re Pacific Enters. Securities Litig.*, 47 F.3d at 379; *Vizcaino*, 290 F.3d at 1049; *Staton v. Boeing*, 327 F.3d 938, 946 (9th Cir. 2003).

(7) the percentages in standard contingency-fee agreements in similar individual cases, *see Vizcaino*, 290 F.3d at 1049; and

(8) class counsel's lodestar, *see id.* at 1050-51.

13. As I explain below, under even the most conservative assumptions, the fee request here is but a small fraction of the Ninth Circuit's 25% benchmark. In my opinion, this fraction is easily justified in light of the Ninth Circuit's factors.

Valuation of the settlement

14. As I noted above, the face value of this settlement is over $15 billion, including $10.033 billion in compensation to the class, $4.7 billion in environmental remediation, the $175 million in fees and expenses (if approved by the court), millions more in notice and administrative expenses to run the claims process (which Volkswagen has also agreed to pay), and the very significant (albeit unknown) funds Volkswagen has expended and will expend to develop and implement the emissions modifications and to execute the buyback of hundreds of thousands of vehicles. Under Supreme Court precedent, the Court is permitted to base class counsel's fee percentage on this face value—even if not all of it is ultimately paid out by Volkswagen. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-81(1980). If the court chooses to do this, class counsel's fee request would amount to only 1.1% of the total value of the settlement (excluding the unknown funds paid for notice and settlement administration) and only 1.7% of the value of the cash compensation available to the class. According to Table 1, either percentage would make the fee request here the lowest one ever recorded in a billon-dollar class action case.

15. Many scholars do not favor the Supreme Court's face-value approach and believe that attorney's fees should be based only on monies actually paid by defendants, not on monies that might be paid. This is in order to incentivize class action lawyers to generate actual compensation and deterrence rather than theoretical compensation and deterrence. *See* Principles of the Law of Aggregate Litigation, §§ 3.13, cmt. a & 3.13(b) (American Law Institute, 2010).

16. Here, we do not yet know exactly how much Volkswagen will pay out under the settlement; we will not know that for certain for two more years because class members have until then to submit claims and to elect among their remedies. Although the court could wait to award fees until we know the exact amount Volkswagen will pay, *see id.*, in my opinion that is not necessary because we already know that, whatever the total comes to, it will be *billions* of

dollars and that even the *most conservative estimate* of these billions is *more than sufficient* to justify class counsel's fee request.

17. We know this because more than 370,000 class members (more than 75% of the class) have *already* submitted claims to the settlement administrator. *See* Status Conference Hr'g Tr. at 7:16. In my opinion, there is little doubt that there will be many more claims submitted before the two-year period closes.

18. If we assume 95% of class members eventually submit claims and that 75% of them choose the buyback option and 25% choose the repair option—a quite realistic scenario in my opinion given the lucrative payments available to class members (and buy-back payments in particular) as well as the class members' selection rate so far—Volkswagen will end up paying some $8 billion in cash compensation to the class on top of the $175 million to class counsel in fees and expenses (if approved by the court). This means that even if we completely ignore all other sums Volkswagen will pay under the settlement—including the $4.7 billion in environmental remediation and settlement administration expenses (items, as I noted, that are normally included in the hypothetical common fund valuation)—class counsel's fee request is only 2.1% of the hypothetical common fund. If we add these items back into the settlement, the fee request is only 1.3%.

19. But the fee percentage requested here is quite modest even if we make more conservative assumptions. For example, suppose only 85% of class members file claims (it is unlikely the participation rate will fall below this number because the governments' consent decree with Volkswagen requires this level of participation or penalties are imposed) and the split is a less costly 50% buyback and 50% repair; Volkswagen still ends up paying $5.6 billion on top of fees and expenses, and class counsel's fee request would then still be only 2.9% of the hypothetical common fund if the environmental remediation is ignored and 1.6% if it is not ignored.

20. Or consider even the most conservative (and wildly unrealistic) estimate possible: even if not a single additional class member files a claim and all of those who have filed claims elect to repair their cars rather than sell their cars back—this is wildly unrealistic in part because

no fix may ever be found and because the buyback is so much more lucrative—Volkswagen would end up paying $2 billion to class members in addition to the $175 million to class counsel. This would still make class counsel's fee request here only 7.8% if environmental remediation is ignored and only 2.4% if it is not.

21. In my opinion, it is not important to choose among these valuations of the settlement. No matter which one is used—the Supreme Court's $15 billion face value; the $10.033 billion Funding Pool face value; realistic estimates of $5.6 billion or $8 billion in cash to the class (and with or without the $4.7 billion in environmental remediation); or my wildly unrealistic underestimate of $2 billion in cash to the class (again, with or without the environmental remediation)—class counsel's fee request is but a small fraction of the Ninth Circuit's benchmark: it ranges from 1.1% to 7.8% of the settlement. In my opinion, any of these percentages would be justified by the Ninth Circuit's factors.

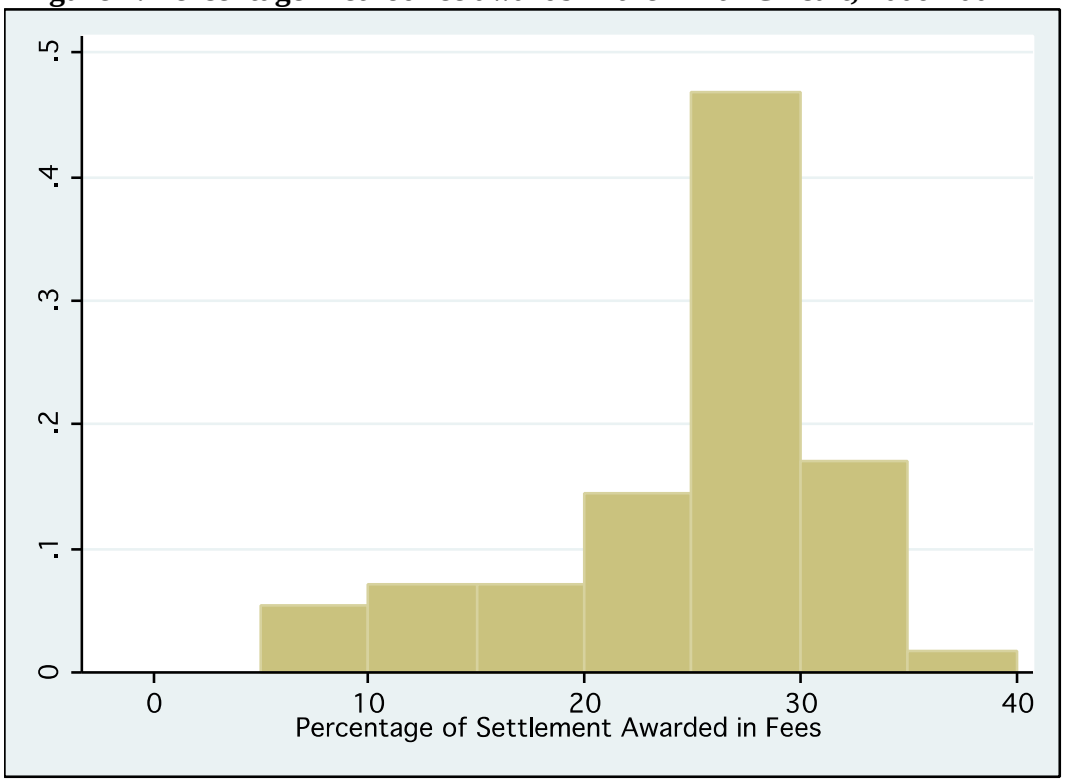
Selecting the percentage

22. Consider first the factor that looks at how this request measures up against others: (5) the percentages awarded in other class action cases. According to my empirical study, the most common fee percentages awarded in class actions using the percentage method were 25%, 30%, and 33%, with the mean and median at 25%. *See* Fitzpatrick, *Empirical Study*, *supra*, at 833, 838 (Figure 6). The numbers for the 111 settlements in the Ninth Circuit where the percentage method was used were quite similar: the most common percentages were also 25%, 30%, and 33%, with the vast majority of awards also between 25% and 35%, and a mean of 23.9% and median of 25%. My numbers agree with the other large-scale academic study of class action fee awards. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) (finding mean and median of 24% and 25% nationwide, and 25% in Ninth Circuit).[25] Needless to say, all of these numbers greatly exceed the fee requested here no matter which valuation of the settlement is used.

[25] The fee-percentage numbers in the Eisenberg-Miller study are often slightly lower than in my study because their methodology led them to oversample larger settlements. *See* Fitzpatrick, *Empirical Study, supra*, at 829.

23. Indeed, in order to see more clearly where the fee request here falls among other awards, I graphed the distribution of the Ninth Circuit's percentage awards from my study in Figure 1. The figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). Thus, for example, nearly half of all settlements (i.e., nearly .5 of all settlements) had fee awards that fell between 25% (inclusive) and 30%. As the Figure shows, class counsel's fee request would, if granted, be one of the lowest—if not the lowest—awarded in this Circuit.

Figure 1: Percentage-method fee awards in the Ninth Circuit, 2006-2007



24. It should be noted that the nationwide data in my empirical study (again, consistent with the Eisenberg-Miller study) showed that settlement size had a statistically significant but inverse relationship with the fee percentages awarded—*i.e.*, that federal courts awarded lower percentages in cases where settlements were larger. *See* Fitzpatrick, *Empirical Study*, *supra*, at 838, 842-44. For example, there were nine settlements in my dataset for $1 billion or more, and the mean and median fee percentages in these cases were 13.7% and 9.5%, respectively. *See id.* at 839. Many courts and commentators, including me, do not endorse this bigger-settlement-

smaller-fee approach because it creates bad incentives for class counsel.[26] Nonetheless, even if it is followed here, class counsel's fee request—no matter which valuation of the settlement is used—is *still* below the mean and median in my study for *even billion dollar settlements*. My study is not aberrational: as the fifth column of Table 1, above, shows, the fee requested here is *below* (or right at, if one uses the most conservative and wildly unrealistic assumptions) the average and median percentages *among all known billion dollar settlements in American history*. As such, this factor supports the fee request here.

25. Consider next the factors that assess how the relief in this settlement stacks up against the obstacles class counsel faced: (1) the results achieved by class counsel, (3) the complexity of the case, and (4) the risks the case involved. According to Professor Kull, the relief offered the class here is at least as good as what the class could have recovered if it had prevailed at trial. *See* Ex. B to Motion for Final Approval ¶13.b. Likewise, the FTC has said the relief here will make class members whole. *See* Settlement Hr'g Tr. at 94:22. Although, again, we do not know for certain how many class members will eventually participate in the settlement, we do know that at least 75% of the class will do so because, as I noted, that is how many have already filed claims with the settlement administrator. It is extraordinarily uncommon for a class to recover 75% of its possible damages in a settlement.[27]

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[26] *See, e.g.*, *In re Cendant Corp. Litigation*, 264 F.3d 201, 284 n. 55 (3d Cir. 2001) ("Th[e] position [that the percentage of a recovery devoted to attorneys fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply." (alteration in original)); *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D.Fla. 2006) (awarding fees of 31.33% of $1.075 billion because "[w]hile some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method . . . . . By not rewarding class counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for class counsel to settle too early for too little"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (awarding 30% of $410 million and quoting *Allapattah*); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10ML-02151-JVS, at 17 n.16 (C.D. Cal., Jun. 17, 2013) ("The Court also agrees with . . . other courts, e.g., *Allapattah*, which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class."). Consider the following example: if courts award class counsel 30% of settlements if they are under $100 million, but only 20% of settlements if they are over $100 million, then rational class counsel will prefer to settle cases for $90 million (*i.e.*, a $27 million fee award) than $125 million (*i.e.*, a $25 million fee award). Such incentives are obviously perverse.

[27] The best studies of class member recoveries come from securities fraud cases. *See, e.g., Recent Trends*

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26. At the same time, it must be acknowledged that the plaintiffs here had many advantages that plaintiffs do not normally enjoy in class litigation. Most significantly, Volkswagen had arguably conceded several elements of liability in this case; the risks and complexities class counsel faced here centered on the measure of damages and whether Volkswagen would deplete its assets before the class could collect any judgment it obtained. I defer to Professor Kull's judgment that the recovery here is justified by these risks. *See* Ex. B to Motion for Final Approval ¶¶ 29-30. Even so, I think the court could reasonably conclude that this case was less contentious than most class actions.

27. In addition, it must be noted that class counsel had the assistance of the federal and California governments in prosecuting this case. Although many class action cases benefit from government enforcement efforts, it is not common for the government and the private bar to jointly litigate and jointly negotiate a settlement. There is no doubt—as the federal government itself has acknowledged—that class counsel contributed significantly to the achievement of the generous relief provided in this settlement. *See* Settlement Hr'g Tr. at 83:11-13, 22-25 and 93:24-25. But there is also no doubt that the governments, too, played a significant role. It is impossible for me to say who was responsible for what, but in my opinion, it does not matter. Even if the court wishes to depart downward from the 25% benchmark because this case was relatively agreeable or because the government was partially responsible for the settlement, class counsel's fee request here is already a (dramatic) departure from the benchmark. As such, I think these factors, too, are consistent with the fee request here.

28. Consider next factor (2): the length this case has transpired. This case has not lasted as long as most class action cases. According to my empirical study, the average and median times in which settlements were reached in class actions were around three years. *See* Fitzpatrick, *Empirical Study, supra*, at 820. This is, admittedly, another reason why the court might wish to depart downward from the benchmark. Again, however, class counsel's request

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in Securities Class Action Litigation: 2014 Full-Year Review, available at http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf at 9, 33 (finding that the median securities fraud class action between 1996 and 2015 settled for between 1.3% and 7.0% of a measure of investor losses, depending on the year).

has already incorporated this consideration by departing significantly from the benchmark. On the other hand, there was great pressure on the parties—including pressure brought to bear by the court—to come to an agreement as quickly as possible in order to remove the offending vehicles from the road to prevent even more environmental damage. The parties undertook herculean efforts to reach the settlement as quickly as they did and they should hardly be punished for packing more activity into one year of litigation than many litigants do in several years. Indeed, as Class Counsel has informed me, the parties have already reviewed *millions* of pages of documents (nearly 12 million as of the date of the fee petition)—over 10% of which were in German—despite the short time they have had to engage in discovery.

29. In my opinion, the length-the-case-has-transpired factor is more a proxy for class counsel's performance than a measure of class counsel's performance itself; it is a proxy for whether class counsel have dug far enough into the case to know what the case is worth and to provide the court with information about what the case is worth so it can evaluate whether the recovery here is warranted by the risks and complexities of the case. As I explained above, the recovery here is very successful compared to most class actions even in light of the advantages the class enjoyed here. As such, I do not believe this factor is reason to reduce class counsel's fee award even further below the benchmark than class counsel have already requested.

30. Consider next factor (6) any non-monetary benefits. As I noted above, the settlement calls for $4.7 billion in environmental remediation. If the court does not include this amount in the denominator of class counsel's fee percentage, then it would be reasonable to *increase* the fee percentage the court was otherwise inclined to award. Moreover, the $10.033 billion in possible cash compensation to the class does not include the monies Volkswagen will have to pay to fix the vehicles of class members who elect that option (assuming a fix is eventually found). This, too, is reason to depart upward with respect to class counsel's fee percentage.

31. Consider next factor (7): the percentages in standard contingency-fee agreements in similar individual cases. It is well known that standard contingency-fee percentages in individual litigation are *at least* 33%, much greater than the percentage requested here. *See, e.g.*,

Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries" (emphasis omitted)); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that "[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases"). Unsurprisingly, Class Counsel have informed me that many of the class representatives here entered into retainer contracts agreeing to pay their lawyers at least 33%. I normally do not put much stock in individual retainer agreements because the small-stakes nature of typical class claims are very different than those in individual cases; retainer agreements signed by class representatives are usually not credible because class representatives have so little at stake they are indifferent as to what fraction their lawyers might take from them. In this case, however, class members had real money at stake: as the settlement terms show, many of them had *tens of thousands of dollars* at stake. *See* Ex. 6 to Settlement Agreement. As such, the retainer agreements signed by the class members have more credibility as real market transactions. For this reason, they provide another basis to depart upward with respect to class counsel's fee percentage. I do not mean to suggest, of course, that the fee award in a class action should necessarily be the same as the fee in an individual case; class actions often deliver economies of scale and lower transaction costs and their fee awards should reflect that. But comparing the 33% fee agreed to in these retainer agreements with the fee request here as a percentage of the settlement (1.1% to 7.8% (*supra* ¶ 21)) is consistent with substantial economies of scale and accompanying savings to class members. (Plaintiffs will not have to pay class counsel fees under any of these underlying contingency agreements because class counsel negotiated a settlement in which Volkswagen pays the fees.)

32. Consider finally factor (8): class counsel's lodestar. Although, in my opinion, it does more harm than good to consider class counsel's lodestar when awarding fees under the percent method,[28] if the court does consider it, the court should know that there is nothing unusual

[28] The so-called "lodestar crosscheck" reintroduces the very same undesirable consequences of the lodestar

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about the multiplier that would result from class counsel's request here. Class counsel have reported a lodestar of approximately $63.5 million (including $11.0 million in anticipated time to shepherd home the settlement over the next two years), *see* Declaration of Elizabeth J. Cabraser in Support of Plaintiffs' Notice of Motion and Motion for Attorneys' Fees and Costs Under Fed. R. Civ. P. 23(h) and Pretrial Order Nos. 7 and 11, which would result in a lodestar multiplier of approximately 2.63 if the court grants their fee request. This works out to an approximated blended hourly rate of $529 per hour which in my experience is not unreasonable. In my empirical study, the mean and median lodestar multipliers in cases using the percentage method with the lodestar crosscheck were 1.65 and 1.34, respectively. *See* Fitzpatrick, *Empirical Study, supra*, at 834. These numbers are also consistent with the Eisenberg-Miller study. *See* Eisenberg & Miller, *supra*, at 273 (finding mean multiplier of 1.81). The multiplier that would result here would be higher than the typical case, but this is not the typical case. The relationship between settlement size and lodestar multipliers is the opposite of that between settlement size and fee percentages: as the settlement size increases, the lodestar multiplier class counsel receives typically increases as well. *See id.* at 274 ("As the recovery decile increases, the multiplier also tends to increase, with the multiplier in the highest recovery decile more than triple that of the multiplier in the lowest recovery decile."). As this is one of the largest class action settlements in American history—if not *the* largest—it would not be unexpected that the lodestar multiplier here

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method that the percentage method was designed to correct in the first place. In particular, if class counsel believe that courts will cap the percentage awarded at some multiple of their lodestar, then they will have precisely the same incentives they would if courts used the lodestar method alone: to be inefficient, perform unnecessary projects, delay results, and overbill and overstaff work in order to run up their lodestar. *See Vizcaino v. Microsoft Corp.*, 290 F.3d at 1050 n. 5 ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee . . . ."). The lodestar crosscheck also caps the amount of compensation class counsel can receive from a settlement, thereby misaligning their incentives from those of class members, and blunting their incentive to achieve the largest possible award for the class. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2065-66. Consider the following example. Suppose a class action lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 25% fee if it exceeded twice his lodestar, then he would be rationally indifferent between settling the case for $8 million and $80 million (or any number higher than $8 million). Although I am not suggesting that class counsel here would have been tempted in this way—these are some of the finest class action lawyers in America—the decisions courts make today set the expectations for class action lawyers tomorrow, and it is bad public policy to create the expectation that the lodestar crosscheck will cap class counsel's fees under the percentage method.

would be greater than in the average case. When compared to other large cases, however, the multiplier here is below both the average and the median. This can be seen from column four of Table 1, which shows an average multiplier in billion dollar cases (if the courts calculated them) of 3.26 and a median of 2.80. Indeed, that class counsel's lodestar multiplier is so modest despite the relatively short duration of this litigation is confirmation that class action has been especially busy throughout this time.

33. For all these reasons, I believe the fee award requested here is well within the range of reasonable awards.

Assessment of the reasonableness of the request for expenses

34. Class counsel have requested approximately $8 million in expenses in connection with this settlement. Although I have not reviewed each dollar of these expenses in any detail, comparison to the other billon-dollar settlements in Table 1 shows little reason to worry that the expenses here are unreasonable. In the final column of that table, I listed the expenses that the courts approved in those cases (except for one case where the attorneys sought a lump sum award to cover fees and expenses but the court nonetheless noted how much had been incurred in expenses). As the table shows, the vast majority of the class action lawyers handling billion-dollar cases asked to be reimbursed for much more in expenses—in some cases, much, much more—than class counsel are requesting here. Indeed, although I do not list it in the table, the average expenses approved in these billion-dollar cases was $14.3 million and the median was $8.7 million—both above what is sought here. Moreover, although we do not yet know exactly how much Volkswagen will eventually pay out pursuant to this settlement, under any realistic scenario, it is *very* likely that the expenses requested here will be a *lower percentage* of the total value of the settlement than in *any* other billion-dollar class action. Of course, it is true that this case has not transpired as long as many of these other cases; thus, I would not have expected class counsel to have incurred more expenses than in the typical billion-dollar case (even with the accelerated litigation schedule class counsel pursued here). But the request here is below the typical. In other words, from all outward appearances, class counsel have been responsible with their expenses.

35. My compensation in this matter has been $695 per hour plus expenses.

Dated: November 8, 2016

Brian T. Fitzpatrick

EXHIBIT 1

BRIAN T. FITZPATRICK

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Professor*, 2012 to present
- *FedEx Research Professor*, 2014-2015; *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Federal Courts, Complex Litigation, Comparative Class Actions
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press, forthcoming 2018)

ACADEMIC ARTICLES

A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology, 69 VAND. L. REV. 991 (2016)

The Hidden Question in Fisher, 10 NYU J. L. & LIBERTY 168 (2016)

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The End of Class Actions?, 57 ARIZ. L. REV. 161 (2015)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 VA. L. REV. 839 (2012)

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An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043 (2010)

Originalism and Summary Judgment, 71 OHIO ST. L.J. 919 (2010)

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

Election by Appointment: The Tennessee Plan Reconsidered, 75 TENN. L. REV. 473 (2008)

Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 MICH. J. RACE & LAW 277 (2007)

BOOK CHAPTERS

Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

Is the Future of Affirmative Action Race Neutral? in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

ACADEMIC PRESENTATIONS

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability, Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered*, Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Empirical Legal Studies
Reviewer, Oxford University Press
Reviewer, Supreme Court Economic Review
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights
Board of Directors, Tennessee Stonewall Bar Association
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia

COMMUNITY ACTIVITIES

Board of Directors, Nashville Ballet; Nashville Talking Library for the Blind, 2008-2009

EXHIBIT 2

Documents Reviewed:

- Consumer Class Action Settlement Agreement and Release ("Settlement Agreement") (document 1606, filed 6/28/16) and exhibits thereto
- Plaintiffs' Notice of Motion, Motion, and Memorandum in Support of Preliminary Approval of the Class Action Agreement and Approval of Class Notice (document 1609, filed 6/28/16)
- Amended Order Granting Preliminary Approval of Settlement (document 1698, filed 7/29/16)
- Federal Trade Commission's Statement Supporting the Settlement ("FTC Statement") (document 1781, filed 8/26/16)
- Plaintiffs' Notice of Motion, Motion, and Memorandum in Support of Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealer Class Action Settlement ("Motion for Final Approval") (document 1784, filed 8/26/16) and exhibits thereto
- Plaintiffs' Reply Memorandum in Support of Motion for Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealer Class Action Settlement (document 1976, filed 9/30/16)
- October 18, 2016, Settlement Hearing Transcript ("Settlement Hr'g Tr.")
- Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement (document 2102, filed 10/25/16)
- November 3, 2016, Status Conference Hearing Transcript ("Status Conference Hr'g Tr.")
- Declaration of Elizabeth J. Cabraser in Support Plaintiffs' Notice of Motion and Motion for Attorneys' Fees and Costs Under Fed. R. Civ. P. 23(H) and Pretrial Order Nos. 7 and 11 (filed herewith)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL CONSUMER AND RESELLER ACTIONS

No. 3:15-md-02672-CRB

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS UNDER FED. R. CIV. P. 23(H) AND PRETRIAL ORDER NOS. 7 AND 11

The Honorable Charles R. Breyer

Before the Court is Plaintiffs' Motion for Attorneys' Fees and Costs Under Fed. R. Civ. P. 23(h) and Pretrial Order Nos. 7 and 11 (the "Motion"). The Motion is **GRANTED** for the reasons stated therein, and the Court awards $167 million in fees and $8 million in costs in connection with the 2.0-liter TDI Settlement, to be paid by Volkswagen, and to be allocated by Plaintiffs' Lead Counsel among the PSC firms and additional counsel performing work under Pretrial Order Nos. 7 and 11.

IT IS SO ORDERED.

Dated:

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CHARLES R. BREYER
United States District Judge