Elizabeth J. Cabraser (State Bar No. 83151)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008
E-mail: *ecabraser@lchb.com*

Plaintiffs' Lead Counsel

(Plaintiffs' Steering Committee Members Listed on Signature Page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE CHRYSLER-DODGE-JEEP ECODIESEL® MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION This Document Relates to: ALL ACTIONS	Case No. 3:17-md-02777-EMC **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ATTORNEYS' FEES AND COSTS UNDER FED. R. CIV. P. 23(e), 23(h), AND PRETRIAL ORDER NOS. 3 AND 4** Hearing: May 3, 2019 Time: 10:00 a.m. Courtroom: 5, 17th Floor The Honorable Edward M. Chen

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 3, 2019 at 10:00 a.m. or at such other date and time as the Court may set, in Courtroom 5 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs' Lead Counsel, on behalf of Settlement Class Counsel and all counsel performing common benefit services under the provisions of PTO 4, will and hereby do move the Court for an order: (1) confirming the certification of the Settlement Class[1] and appointment of Settlement Class Counsel and the Settlement Class Representatives; (2) granting final approval to the Amended Consumer and Reseller Dealership Class Action Settlement Agreement and Release (Dkt. No. 508) (the "Settlement" or "Class Action Settlement"); (3) approving the award of $59 million for attorneys' fees and $7 million for expenses arising from the claims resolved by the Settlement; and (4) awarding the Settlement Class Representatives service awards of $5,000 each. This Motion is based on and supported by the Memorandum of Points and Authorities, the Declarations of Lead Counsel Elizabeth J. Cabraser, class action fee expert Brian T. Fitzpatrick, and Notice and Claims Administrator Steven Weisbrot, as well as the activities and events in these MDL proceedings to date.

[1] Here, and in the Memorandum and Points of Authorities, capitalized terms have the meaning ascribed in the Settlement unless otherwise indicated.

MEMORANDUM AND POINTS OF AUTHORITIES

INTRODUCTION

The proposed Class Action Settlement is a significant win for the Class and the environment. The Settlement, along with the interrelated and simultaneously negotiated US-CA Consent Decree (Dkt. No. 484), repairs approximately 100,000 Class Vehicles to ensure their compliance with emissions regulations, protects the repaired vehicles with a robust extended warranty, and fairly compensates Class Members with cash payments up to $3,075. *See, e.g.*, Dkt. No. 508-1 at 2. The cash compensation alone "*exceed[s]* the economic harm suffered" by the Class under Plaintiffs' damages theory "in nearly all cases." Declaration of Ted Stockton in Support of Preliminary Approval, Dkt. No. 491-3 ¶ 46 (emphasis added). If all Class Members participate, this will result in approximately $307,460,800 in compensation, plus extended warranty benefits worth an additional $239.5 million. *See* Dkt. No. 508 ¶ 4.12; Declaration of Kirk Kleckner in Support of Motion for Preliminary Approval, Dkt. No. 491-4 ¶¶ 1, 6. Separately, the Settlement also requires Defendants to pay all costs of notice and administration as well as Class Counsel's reasonable attorneys' fees and costs as approved by the Court. *See* Dkt. No. 508 ¶¶ 5.6, 8.4, 11.1. In other words, no Court-awarded attorneys' fees and costs, notice and administration costs, or other costs of effectuating the Settlement (including the emissions repairs and warranty) will be deducted from the Class Member payments described above. *Id.* The combination of these benefits makes the Class Members whole and marks an excellent result for a compromise of vigorously contested and intensively litigated claims.

The Class agrees. In preliminarily approving the Settlement, the Court noted that the "benefits to individual class members are substantial and likely to gain their attention." Dkt. No. 526 at 13. The Class Members' initial response bears this out. In the few weeks since the beginning of the notice program, more than 23,000 Class Members have already registered their interest in the Settlement by signing up on the Settlement Website. *See* Declaration of Steven Weisbrot ("Weisbrot Decl.") ¶ 21. This is a remarkable start given that the claims period will not officially open for at least two more months and will not close for nearly two years after that. *Id.* A consortium of 49 state attorneys general has also endorsed the Settlement and incorporated the

Settlement's "appropriate and reasonable" "restitution payments to consumers" into its own multistate Consent Judgment with Fiat Chrysler. *See* Dkt. No. 518 at 2.

The PSC fought hard to secure these benefits for the Class. For nearly two years, the parties engaged both in intensive, simultaneous, and parallel tracks of arm's length negotiations and "extraordinarily difficult [and] complex" litigation. *See, e.g.*, January 23, 2019, Hr'g Tr., Dkt. No. 519 at 5:19-20. For the substantial results Class Counsel achieved for the Class, and for the extensive work required to secure them, Class Counsel seek $59 million in attorneys' fees and $7 million in litigation costs. Under a conservative valuation of the constructive common fund—85% of the cash compensation (to reflect the minimum participation threshold), plus 50% of the warranty value (to account for the government's shared role in securing it), plus the separately paid notice, administration, and attorneys' fees and costs—the requested fees represent approximately 13% of the Settlement value. Calculated as a percentage of the *total* potential value of the Settlement, the fee percentage drops to 9.6%. Both percentages fall well below the Ninth Circuit's 25% benchmark as well as the mean and median percentages awarded in similarly valued "megafund" settlements. *See, e.g.*, *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (the Ninth Circuit's "benchmark" for attorneys' fees in common fund class actions is 25%); Declaration of Brian Fitzpatrick T. Fitzpatrick ("Fitzpatrick Decl.") ¶¶ 14-15, 21-26. Either percentage would be appropriate under the Ninth Circuit's factors and the particular facts of this case. *Id.* ¶¶ 21-36. This is further confirmed by a lodestar cross-check, which yields a multiplier of 1.17, less than half the average in settlements of comparable size and complexity. *Id.* ¶¶ 34-36.

Plaintiffs thus respectfully request that the Court certify the Settlement Class, grant final approval to the Settlement, and approve an aggregate award of $66 million—$59 million in fees and $7 million in costs—to be allocated by Lead Counsel among Settlement Class Counsel and additional counsel performing common benefit work for the Class under Pretrial Order Nos. 3 and 4.

BACKGROUND AND PROCEDURAL HISTORY

The Court is very familiar with this litigation. In the interest of efficiency, Plaintiffs will not repeat the entire history, much of which is detailed in Plaintiffs' preliminary approval briefing (Dkt. No. 491), the Court's preliminary settlement orders (Dkt. Nos. 526-27), and the Court's order on the first motions to dismiss (Dkt. No. 290), which are incorporated by reference herein. A few points, however, bear emphasis.

I. This Case Was Risky, Complex, and Intensively Litigated.

A lot happened in the two years between the government NOVs and the filing of the proposed Settlement. Consumer plaintiffs across the country filed over a dozen class action complaints. Dkt. No. 1. The Department of Justice commenced litigation. This MDL was formed and the PSC appointed. Dkt. Nos. 1, 173. The PSC hit the ground running and heeded the Court's direction to move with dispatch—toward both settlement and trial at once—and, in so doing, reached an excellent, principled resolution.

The PSC packed much more into these months than the timeline might suggest. Once consolidated, Class Counsel filed comprehensive Amended, First Amended, and Second Amended Consolidated Consumer Class Action Complaints that refined and developed the complex allegations in this technical, multi-party fraud case. *See* Dkt. Nos. 186, 225, 310. Each complaint spanned hundreds of pages and presented detailed claims under federal law and the laws of all 50 states. *Id.* The allegations were thorough, as were the challenges mounted against them. Both Fiat Chrysler and Bosch moved to dismiss the First Amended Complaint (Dkt. Nos. 231-32), which Class Counsel opposed in a 75-page opposition brief (Dkt. No. 249). In a 129-page order, the Court upheld Plaintiffs' nationwide RICO claim and granted leave to amend and clarify as to state common law fraud and consumer protection claims. Dkt. No. 290. Plaintiffs then filed a 438-page Second Amended Complaint, which added approximately 30 pages of detailed factual allegations (and amended many of the state law claims) based on the documents analyzed and depositions taken at that time. Dkt. No. 310. A second round of motions to dismiss followed—this one even more intense than the last. All told, the two rounds comprised 301 pages

of argument across 19 briefs, which were further developed at three lengthy hearings. *See* Dkt. Nos. 231-32, 249, 257-58, 314-15, 337, 344-45, 367, 376, 380, 382, 458-59, 465-66, 470.[2]

That's a lot of ink. But it was spilled for good reason: the issues addressed were numerous and complex. Dkt. No. 526 at 13. On RICO, for example, Defendants raised "difficult" questions (*id.*) related to causation, statutory displacement, and convergence—all of which had "pretty strong arguments on either side of the equation." October 26, 2018 Hr'g Tr., Dkt. No. 455 at 5:8-9. Had any of those challenges prevailed, Plaintiffs would have lost considerable leverage, and as the Court observed, would have faced a much more difficult landscape at class certification. *Cf. id.* at 28:17-29:2. Other significant challenges were raised relating to jurisdiction, preemption, standing, and damages. *See* Dkt. No. 526 at 13.

Class certification briefing proved an equally rigorous undertaking. Plaintiffs moved to certify a nationwide class under RICO and the MMWA, as well as separate state classes under the common law fraud and consumer protection statutes of all 50 states. Dkt. No. 327. The Parties submitted 780 pages of class certification briefing (and thousands of pages of exhibits), including 18 highly technical briefs on liability and damages experts, and prepared to present their arguments in what Defendants had argued should be a multi-day class certification hearing. *See* Dkt. Nos. 327, 360, 362, 378, 385-87, 416, 418, 421, 426, 434, 436-37, 439, 447, 456, 461.

Throughout this motion practice, the Parties conducted extensive discovery, including nearly 100 depositions. After negotiating comprehensive discovery protocols, the PSC served Fiat Chrysler with 37 interrogatories, 130 document requests, and 188 requests for admission, and Bosch with 45 interrogatories, 56 document requests, and 34 requests for admission. *See* Declaration of Elizabeth J. Cabraser ("Cabraser Decl.") ¶ 5. In response, Defendants produced approximately ***5.28 million*** pages of documents, and the PSC reviewed and analyzed over 4 million of them (excluding duplicate documents from the review) through a massive, around-the-clock effort. *Id.* ¶ 6. To effectively analyze these productions, PSC attorneys were required to understand the workings of profoundly complicated emissions treatment system technology and

[2] RICO's trebling provision, it turns out, applies not just to damages, but also to briefs.

the legal complexities of multiple claims, and to master the difficulties and nuances of working with documents written in German and Italian. The massive research, review, and analysis efforts informed Plaintiffs' complaint amendments and their strategy for class certification and dispositive motion briefing; assisted Class Counsel in identifying and selecting deponents; and helped Class Counsel prepare for and conduct 31 affirmative depositions of Defendants' engineers, executives, and experts. *Id.* ¶¶ 21-23 (further detailing the multi-layer document analysis efforts and the role of that analysis in the litigation).

While the litigation pressed forward with full steam, settlement negotiations began shortly after the Court's appointment of Lead Counsel and the Settlement Master. *Id.* ¶ 12. The PSC's settlement working group engaged in complex arm's-length negotiations with Fiat Chrysler and Bosch, facilitated by the Settlement Master, in an effort to resolve the consumer claims alongside the government litigation. *Id.* ¶ 13. Throughout the process, the PSC pushed hard on two fronts: (1) to provide significant cash compensation to the class members, and (2) to offer a broad extended warranty to protect the vehicles moving forward. *Id.* In the end, Class Counsel obtained both, a remarkable result in the context of vigorously contested claims and pending dispositive motions.

II. <u>The Settlement Provides Meaningful Relief to the Class.</u>

Class Members paid a premium for EcoDiesel Vehicles that were fuel efficient, powerful, and environmentally friendly. Through this Settlement, they get them, and will be compensated in full for the economic harm incurred in purchasing and driving them before a fix was developed. First, Class Members are entitled to an emissions repair (also referred to as an Approved Emissions Modification or "AEM") which will ensure the Vehicles' compliance with emissions regulations. Second, Fiat Chrysler will provide an Extended Warranty lasting the greater of 10 years from sale or 4 years from the emissions repair that covers all the parts and systems affected by the emissions repair. The Extended Warranty alone provides $239.5 million in value to the Class. Dkt. No. 491-4 ¶¶ 1, 6. Third, Defendants will pay up to $307,460,800 in cash to the Class. Eligible Owners may receive a payment of $3,075 (or $2,460 if a former owner makes a claim on the same vehicle), and Eligible Former Owners, Lessees, and Former Lessees

all stand to receive $990. Again, these payments "*exceed* economic harm suffered" under Plaintiffs' EcoDiesel Premium damages theory "in nearly all cases." *See* Dkt. No. 491-3 ¶ 46 (emphasis added). As an added and significant benefit, none of this relief for the Class will be reduced to pay attorneys' fees or to reimburse expenses incurred by Settlement Class Counsel in prosecuting this litigation. Class Counsel's fees and costs will be paid by Defendants separately from, and in addition to, the Class benefits.[3]

The Settlement Class that is eligible for these benefits is defined in the Settlement, the Motion for Preliminary Approval, and the Court's Order Granting Preliminary Approval. *See* Dkt. Nos. 491, 508, 526. The Class includes all current owners and lessees of an Eligible Vehicle, and certain former owners and lessees as limited by relevant temporal bookmarks. *See* Dkt. No. 508 at ¶ 2.19. These exclusions are designed to limit the number of claims on a particular vehicle, and thus provide compensation sufficient to incentivize current owners and lessees to participate in the Settlement and effectuate the Settlement's goal of environmental remediation. *Id.* (defining class); Dkt. No. 507 at 2-5 (explaining rationale for exclusions); Dkt. No. 526 at 6 (same).

III. Class Members Endorse the Settlement and Are Poised to Make It a Success.

Class Members are already engaged with the Settlement and are registering their interest on the Settlement Website at an impressive rate. Following preliminary approval, the Parties worked diligently with respected class notice provider and settlement administrator Angeion Group LLC to effectuate the Court-approved Notice Program. Angeion has successfully delivered more than 130,000 notices by mail, and another 115,000 by email, using sophisticated techniques designed to evade spam filters. Weisbrot Decl. ¶¶ 6-10. Additional efforts to re-deliver the small percentage of blocked or undeliverable communications are underway. *Id.* Notice is also ongoing through an extensive print and digital media campaign featuring targeted

[3] As discussed below, the Parties have agreed that Class Counsel would seek, and the Defendants would not oppose, an aggregate award of $66 million for attorneys' fees and costs to be paid in addition to the compensation available to the Class. The Parties' discussions regarding attorneys' fees and costs were facilitated by Settlement Master Feinberg and commenced only after the Settlement terms were finalized.

internet banner advertisements, social media, and print publication in national industry magazines and newspapers. *Id.* ¶¶ 11-17.

Though early, Class Members' response to this notice program has been positive. Angeion notes that the "level of engagement for the digital and social media advertising campaigns" are high, and that the "Facebook campaign's click through rate is considerably more robust than industry averages." *Id.* ¶ 17. Furthermore, just weeks into the Notice Program, and with months to go before the claims period even begins, more than 23,000 class members have registered on the Settlement Website. *Id.* ¶ 21. This "very high engagement rate" underscores the attractiveness of the Settlement's benefits and bodes well for its implementation. *Id.*

IV. The Settlement Claims Process is Straightforward and Streamlined.

The Parties have designed a simple claims process to help ensure that the Class' strong interest in the Settlement translates to high participation. Class Members will submit their claims through a short paper claim form or through an online claims portal that will be available on the Settlement Website (www.EcoDieselSettlement.com) upon final approval. To complete a claim, Class Members need only provide their name, contact information, vehicle information, and basic supporting documentation to confirm their status as a current or former owner or lessee of an Eligible Vehicle. Once the claim is verified for completeness and eligibility, Fiat Chrysler will extend an offer to eligible Class Members. Former owners and lessees will be paid after they accept the offer. Current owners and lessees will schedule an emissions repair appointment at a dealership convenient for them, and will be paid within weeks of getting that repair. Class Counsel remain available to assist all Class Members throughout the claims process.

ARGUMENT

I. The Settlement Class Satisfies All Requirements of Rule 23 and Should be Certified.

In its Preliminary Settlement Order, the Court carefully analyzed each of the relevant factors under Rule 23(a) and (b)(3) and concluded that "certification of a settlement class is appropriate." Dkt. No. 526 at 8-10. This remains true.

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

Rule 23(a)(1) is satisfied where, as here, "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). The Settlement Class includes more than 100,000 members dispersed across the United States. Joinder would be impracticable, and "the numerosity requirement has thus been met." Dkt. No. 526 at 9; *accord Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000) (numerosity is typically satisfied when the class exceeds 40 members); *Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006) ("Joinder of 1,000 or more co-plaintiffs is clearly impractical.").

B. Rule 23(a)(2): There are common questions of law and fact.

"Federal Rule of Civil Procedure 23(a)(2) conditions class certification on demonstrating that members of the proposed class share common 'questions of law or fact.'" *Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014). "[E]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011) (citation omitted). Here, the commonality requirement is satisfied because Plaintiffs' claims and alleged injuries all "arise from [FCA's] and Bosch's common course of conduct." Dkt. No. 526 at 9 (citation omitted).

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

Rule 23(a)(3) requires that "'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting Fed. R. Civ. P. 23(a)(3)). "Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Here, all Class Members' claims, including those of the Settlement Class Representatives, "are based on the same pattern of [FCA's] and Bosch's wrongdoing." Dkt. No. 526 at 9 (citation omitted). All Class Members "were subject to the same misconduct and suffered the same injury." *Id.* Typicality is satisfied.

D. Rule 23(a)(4): The Settlement Class Representatives and Class Counsel have and will "fairly and adequately" protect the interests of the Settlement Class.

Rule 23(a)(4)'s adequacy requirement is met where, as here, "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy entails a two-prong inquiry: "'(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Hanlon*, 150 F.3d at 1020. Both prongs are readily satisfied here. The Settlement Class Representatives "are entirely aligned [with the Settlement Class] in their interest in proving that [FCA and Bosch] misled them and share the common goal of obtaining redress for their injuries." *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, ("*Volkswagen*") No. 2672 CRB (JSC), 2016 WL 4010049, at *11 (N.D. Cal. July 29, 2016). The Settlement Class Representatives have been active participants in this litigation. They have provided documents and information, consulted with Class Counsel throughout the case, and sat for depositions. Furthermore, Class Counsel—all of whom were selected by the Court "after a vigorous and careful selection process" (Dkt. No. 526 at 10)—have undertaken an enormous amount of work, effort, and expense in this litigation to date and demonstrated their willingness to devote the considerable human and financial resources necessary to see it through to a successful outcome. "[T]he adequacy requirement has been met." Dkt. No. 526 at 10.

E. Rule 23(b)(3)—Predominance: Common issues of law and fact predominate.

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). Thus, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (citation omitted).

Before reaching the proposed Settlement, the Parties extensively briefed two motions to dismiss and a class certification motion in the litigation context. Based on that briefing and the arguments raised in the Plaintiffs' preliminary approval motion, the Court already held that "predominance is satisfied" here because: (1) the Defendants "perpetrated the same fraud in the same manner against all Class Members"; (2) the Plaintiffs alleged "a common and unifying injury . . . aris[ing] solely from" the Defendants' "use of the defeat devices"; (3) the Class is unified by a nationwide "federal RICO claim," and (4) "there are common patterns on the certain key elements among the various state laws." Dkt. No. 526 at 10-11. There is no reason to disturb this well-reasoned conclusion.

F. Rule 23(b)(3)—Superiority: Class treatment is superior to other available methods for the resolution of this case.

Superiority asks "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. In other words, it "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010). Under Rule 23(b)(3),

> the Court evaluates whether a class action is a superior method of adjudicating plaintiff's claims by evaluating four factors: "(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action."

Trosper v. Styker Corp., No. 13-CV-0607-LHK, 2014 WL 4145448, at *17 (N.D. Cal. Aug. 21, 2014) (citation omitted).

Class treatment here is far superior to the litigation of tens of thousands of individual consumer actions. *Hanlon*, 150 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication."); Dkt. No. 526 at 11 ("[C]lass action treatment is superior to other methods and will efficiently and fairly resolve the controversy."). Moreover, trial management issues are moot "because the case will not be tried,"

and, in any case, any such "trial of a class action would be manageable, at least for most if not all claims." Dkt. No. 526 at 11-12. Superiority is satisfied.

* * *

The Settlement Class meets all relevant requirements of Rule 23. Plaintiffs thus request that the Court confirm the certification of the Settlement Class and the appointment of Settlement Class Counsel and the Settlement Class Representatives.

II. The Settlement is Fair, Reasonable, and Adequate.

In preliminarily approving the Settlement, the Court carefully analyzed all factors under recently amended Rule 23(e)(2), as well as the additional considerations identified by the Ninth Circuit, and concluded that the "proposed settlement between the parties is sufficiently fair, adequate, and reasonable to warrant preliminary approval." Dkt. No. 526 at 15. Nothing has changed since then. All applicable factors weigh in favor of final approval.

A. Rule 23(e)(2)(A): The Class Representatives and Class Counsel have and continue to zealously represent the Class.

The Class Representatives and Class Counsel have zealously prosecuted this action on behalf of the Class for almost two years, and will continue to do so throughout the administration of the Settlement to secure and deliver its benefits. As detailed above, Class Counsel engaged in significant motion practice and discovery efforts to prosecute the Class claims. The Settlement Class Representatives were also actively engaged—each produced numerous documents, sat for a lengthy deposition, and regularly communicated with counsel up to and including evaluating and approving the proposed Settlement. *See* Declaration of Elizabeth J. Cabraser in Support of Motion for Preliminary Approval, Dkt. No. 491-1 ¶¶ 11-15. Each of them was consulted on the terms of the Settlement, and has expressed their support and continued willingness to protect the Class until the Settlement is approved and its administration completed. *Id.* The Class was and remains well represented.

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

As this Court already concluded, the proposed Settlement arises out of serious, informed, and non-collusive negotiations facilitated by Court-appointed Settlement Master Feinberg over the course of nearly eighteen months. *See* Dkt. No. 526 at 13. A settlement process facilitated by a court-appointed mediator weighs heavily in favor of approval. *Rosales v. El Rancho Farms*, No. 1:09-CV-00707-AWI, 2015 WL 4460635, at *16 (E.D. Cal. July 21, 2015), *report and recommendation adopted*, 2015 WL 13659310 (E.D. Cal. Oct. 2, 2015) ("[T]he 'presence of a neutral mediator [is] a factor weighing in favor of a finding of non-collusiveness.'") (citation omitted)); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *5 (N.D. Cal. Sept. 26, 2013) (same). So too does the participation of government entities in negotiations. *See Volkswagen*, No. 2672 CRB (JSC), 2016 WL 6248426, at *14 (N.D. Cal. Oct. 25, 2016) (government participation in negotiations weighed "heavily in favor" of approval), *aff'd*, 895 F.3d 597 (9th Cir. 2018); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) ("The participation of a government agency serves to protect the interests of the class members, particularly absentees, and approval by the agency is an important factor for the court's consideration.") (citation omitted). Multiple government agencies, including the Department of Justice, the Environmental Protection Agency, the California Air Resources Board, and the California Attorney General were an integral part of the multifaceted negotiations here. The Settlement is a key point of interrelated resolutions negotiated with and approved by the federal government, the State of California, and the 49-state consortium of state attorneys general. The procedurally fair manner in which this Settlement was reached weighs strongly in favor of granting final approval.

C. Rule 23(e)(2)(C): The Settlement provides significant immediate benefits in exchange for the compromise of strong claims.

The Settlement secures strong relief for the Class, as detailed throughout this brief. *See, e.g.*, Background § II, *supra*. Along with the US-CA Consent Decree, the Settlement offers (1) an emissions repair that delivers to Class Members the emissions-compliant vehicles they thought

they were buying originally, and adds to that (2) an Extended Warranty to protect against future harm, and (3) close to, if not significantly more than, full monetary compensation for the amount Class Members overpaid for their vehicles before the emissions repair became available. *See, e.g.*, Dkt. No. 491-3 ¶ 46.

On this last point, the Court previously observed that Plaintiffs' class certification experts calculated that the Class' conjoint-based overpayment damages were approximately $930 million, and, alternatively, that their EcoDiesel premium damages totaled approximately $472 million. *See* Dkt. No. 526 at 14 (citing Report of Colin B. Weir in Support of Plaintiffs' Motion for Class Certification, Dkt. No. 327-4 ¶¶ 60-63). However, Plaintiffs' alternative, conjoint damages model was, at that stage of the litigation, simply "demonstrative" and was to be altered if, for example, a fix became available for the Class Vehicles, as it now has. *See, e.g.*, Dkt. No. 421 at 3, 5, 13. In other words, the choice-based analysis upon which the damages model was built presumed that the vehicles sold as environmentally compliant could not become so, and was presented primarily to demonstrate the reliability of the methodology for class certification—not to provide a final calculation of damages available at trial. Similarly, the EcoDiesel premium damages presented in Mr. Weir's report calculated the overpayment over the *entire* lifespan of all the Class Vehicles, and thus did not account for an emissions repair that, once available (as it now is), would deliver to Class Members the vehicles they thought they were purchasing originally.

Nevertheless, even assuming that the combination of the emissions repair, the extended warranty, and the cash secured by the Settlement did not deliver all the benefits theoretically available at trial, they would still reflect a fair, reasonable, and adequate compromise of Plaintiffs' claims, especially considering (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of the proposed distribution plan; and (iii) the terms of the separately negotiated proposed award of attorney's fees. *See* Fed. R. Civ. P. 23(e)(2)(C). The Settlement makes specified compensation available now, not years from now. Repairs and payouts will commence upon final approval by *this* Court: they will not be delayed or held hostage by appeal. Payments that are soon, certain, and substantial merit approval as fair, adequate, and reasonable.

1. Plaintiffs' claims were strong, but significant risk remained and, absent a settlement, any potential relief was years away.

Plaintiffs believed in the strength of their case and were prepared to take it all the way to trial. But, as detailed above, there were many hurdles ahead. *See, e.g.*, Background § II, *supra*. From the beginning of the litigation to the end, Defendants conceded nothing. According to Defendants' motions to dismiss and class certification briefing, the Court lacked jurisdiction, the Plaintiffs had no standing, their state law claims were preempted, their RICO claims were statutorily displaced (and otherwise flawed), all their claims were overwhelmed by individual issues, and their factual allegations could not be proved.[4] As the Court observed, many of these issues were "difficult" and even "[d]amages were potentially problematic in light of Defendants' position that there was an easy repair for the vehicles at issue," Dkt. No. 526 at 13-14—a position that was vindicated once the regulators approved the AEM. Plaintiffs prevailed on some of these issues, but the second motion to dismiss and the class certification motion remained pending, and a summary judgment motion was forthcoming. Assuming their claims survived to trial, moreover, Plaintiffs would still have to prove an intricate and technical multi-party fraud, among many other things. And if Plaintiffs prevailed at trial, they would have to re-litigate virtually all of these issues in the inevitable appeals.

To put it plainly, Plaintiffs had no guarantee that they would make it to trial, win at trial, and win on appeal. Even if they did, relief for the Class was likely years away—meaning that the environmental harm posed by the excess emissions would continue unabated for the foreseeable future. The Settlement eliminates this risk, cuts through the delay, and provides immediate and significant benefits. This factor strongly favors final approval. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the

[4] A further consideration is the involvement of foreign defendants, including FCA N.V. (Netherlands), Bosch GmbH (Germany), and VM Motori S.p.A. (Italy). Plaintiffs' allegations against these companies implicate, at least in part, actions taken in Europe. Additional risks thus arise should Plaintiffs have to prove the propriety of the Court's personal jurisdiction over these entities, or that U.S. law extends to reach their extraterritorial conduct.

Settlement is fair.") (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)); *Kim v. Space Pencil, Inc.*, No. C 11-03796 LB, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant."); *Volkswagen*, 2016 WL 6248426, at *12; Fed. R. Civ. P. 23(e)(2)(C)(i).

2. The claim process is straightforward and convenient.

The Settlement framework provides an emissions repair, a robust extended warranty, and substantial monetary compensation through a straightforward claims process designed to be as convenient as possible. *See* Background § IV, *supra*; *see also* Dkt. No. 508-4. Class Members have and will receive information about the Settlement benefits through the Court-approved Notice Program. To obtain those benefits, Class Members will submit a simple Claim Form and receive an offer once their eligibility is verified. Former owners and lessees will get paid after accepting the offer, and current owners and lessees will get paid after scheduling and receiving an emissions repair at a dealership convenient to them. The Settlement's method for processing claims and distributing relief is fair and reasonable. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

3. Class Counsel's requested attorneys' fees and costs are reasonable and will not reduce the benefits available to the Class.

Class Counsel's fee request is detailed below, but in this context it is worth highlighting that any Court-awarded attorneys' fees or costs will be paid separately by Defendants and will not be deducted from the compensation available to the Class. These fees and costs were separately negotiated only after the Settlement terms were agreed upon, a practice routinely approved by courts as in the Class' best interest. *See Volkswagen*, 2016 WL 6248426, at *23. Plaintiffs' success in persuading Defendants to pay fees and costs separately has significant monetary value to the Class Members, who otherwise could have such fees and costs deducted from their recoveries. The "terms of . . . [the] proposed award of attorneys' fees" are fair and reasonable. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii).

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

The proposed Settlement fairly and reasonably allocates benefits among Eligible Owners, Lessees, Former Owners, and Former Lessees. *See* Dkt. No. 526 a 14 ("[T]the settlement reasonably differentiates among class members."). All Class Members are eligible for compensation that accords with their EcoDiesel premium damages, and current owners are provided extra incentive to "to bring their vehicles in for repair" (*id.*)—a necessary feature to accomplish the Settlement's objective of repairing the Class Vehicles and mitigating future pollution. This factor, too, counsels in favor of granting final approval.

E. The Settlement satisfies the Ninth Circuit's approval factors.

The Ninth Circuit has identified a number of additional factors for courts to consider when evaluating the fairness, reasonableness, and adequacy of a class action settlement. Those factors include: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement. *In re Bluetooth*, 654 F.3d at 946. Many of these—*e.g.*, the strength of plaintiffs' case, the risk and duration of further litigation, and the amount offered—overlap with the Rule 23(e)(2)(C) factors and are addressed above. The remainder favor final approval as well.

1. The Parties settled only after significant discovery and motion practice.

Class Counsel "carefully investigated the claims before reaching a resolution" through dozens of affirmative depositions, voluminous written discovery, and analysis of millions of pages of documents. They also tested those claims through significant motion practice. Class Counsel were therefore well-positioned to evaluate the strengths and weaknesses of the case and to negotiate a fair and reasonable Settlement. *See Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. 2014). They have done so.

2. Class Counsel unanimously endorse the Settlement.

In considering whether to grant final approval, courts are entitled to give "considerable weight" to the opinions of experienced class counsel who are familiar with the litigation. *Id.* (citing *Hanlon*, 150 F.3d at 1026); *see also Volkswagen*, 2016 WL 6248426, at *14 ("Courts afford 'great weight to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'") (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)). The ten-firm PSC here represents a deep bench of experienced class action litigators who uniformly conclude that the Settlement provides an excellent outcome in the face of the uncertainties in continued litigation.

3. The presence of government participants favors final approval.

As detailed above, the private Plaintiffs litigated and resolved this case alongside the Department of Justice and the California Attorney General. They were also in regular contact with a consortium of the attorneys general of the remaining 49 states, who endorsed the Settlement and incorporated its "appropriate and reasonable" "restitution payments to consumers" into their own Consent Judgment with Fiat Chrysler. *See* Dkt. No. 518 at 2. The involvement of these government participants, all of whom support the Settlement, "weighs heavily in favor of final approval." *Volkswagen*, 2016 WL 6248426, at *14.

4. Though early, the Class' initial response has been positive.

The Class is already showing their support for the Settlement. Indeed, only weeks into the Notice Program, and with several months before the claims period officially opens, more than 23,000 Class Members have already registered on the Settlement Website. Weisbrot Decl. ¶ 21. In contrast, no Class Member has yet objected to the Settlement and only one has sought to be excluded. *Id.* Once the Notice Program concludes and the relevant deadlines have passed, Class Counsel will provide a full accounting of all the information outlined in the District's Procedural Guidance. For now, however, this factor strongly supports final approval, and Class Counsel have every reason to believe it will stay that way.

* * *

The Settlement is fair, reasonable, and adequate, and merits final approval.

III. Class Counsel's Requested Fee is Fair, Reasonable, and Appropriate.

"[L]awyer[s] who recover[] a common fund . . . [are] entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In 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)).

When a settlement establishes a common fund or calculable monetary benefit for a class, it is both appropriate and preferred to award attorneys' fees based on a percentage of the monetary benefit obtained. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); Fitzpatrick Decl. ¶¶ 11-13. This is true even in a "claims made or class reversion" settlement, and in such cases, "it is appropriate to award class fund attorneys' fees based on the gross settlement fund" available to the class. *See, e.g.*, *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *12 (E.D. Cal. Sept. 2, 2011) (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997)).[5] For the purpose of appraising a fee percentage, moreover, the constructive common fund also includes the ascertainable value of non-monetary relief[6] (here, the Extended Warranty) and, if paid separately by the defendants (as here), the cost of notice and settlement administration,[7] and attorneys' fees.[8]

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[5] *See also, e.g.*, *Rainbow Bus. Sols. v. MBF Leasing LLC*, No. 10-CV-01993-CW, 2017 WL 6017844, at *2 n.1 (N.D. Cal. Dec. 5, 2017) ("Fairness of the fee should be determined by the amount made available to the class, not the amount actually paid in claims."); *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936-LB, 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015) ("Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available to class members rather than the actual amount that is ultimately claimed."); *Ellsworth v. U.S. Bank, N.A.*, No. 3:12-CV-02506-LB, 2015 WL 12952698, at *4 (N.D. Cal. Sept. 24, 2015) (same); *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, No. 06-02069 SBA, 2011 WL 31266, at *5 n.5 (N.D. Cal. Jan. 5, 2011) ("With respect to the amount of the fund created, 'attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims against the fund so that money remains in it that otherwise would be returned to the defendants.'") (citation omitted).

[6] *See, e.g.*, *Rainbow Bus.*, 2017 WL 6017844, at *1 (The fund from which a fee percentage is calculated includes "the total benefit made available to the settlement class, including costs, fees, and injunctive relief."); *Miller*, 2015 WL 758094, at *5 ("When determining the value of a settlement, courts consider both the monetary and nonmonetary benefits that the settlement confers."); *Pokorny v. Quixtar, Inc.*, No. C 07–0201 SC, 2013 WL 3790896, *1 (N.D. Cal. July 18, 2013) ("The court may properly consider the value of injunctive relief obtained as a result of

Applying these principles to this case, the constructive common fund established by the Settlement includes: (1) the cash compensation available to the Class ($307.5 million, Dkt. No. 508 ¶ 4.12); (2) the consumer value of the Extended Warranty ($239.5 million, Dkt. No. 491-4 at 1, 5);[9] (3) the separately paid attorneys' fees and costs ($66 million, if awarded by the Court); and (4) the separately paid cost of notice and settlement administration ($1.5 million, Dkt. No. 491-2 ¶ 53). Together, these benefits total approximately $615 million. Class Counsel's requested fees represent 9.6% of this fund. This falls far below this Circuit's 25% benchmark, as well as the mean and median percentages awarded in comparable "megafund" settlements. Fitzpatrick Decl. ¶¶ 23-26 (discussing empirical analyses showing a mean and median awarded percentages 17.8% and 19.5%); *see also In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-MD-2541-CW, 2017 WL 6040065, at *2 (N.D. Cal. Dec. 6, 2017) (citing Theodore Eisenberg, Geoffrey Miller, and Roy Germano, *Attorneys' Fees in Class Actions 2009-2013*, 92 N.Y.U. L. Rev. 937, 947 (2017) ("Eisenberg-Miller 2017") (Empirical analysis shows that "21% was the midpoint for fees where the recovery exceeded $100 million.").

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settlement in determining the appropriate fee."); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EDJ, 2013 WL 1120801, at *7 (N.D. Cal. Mar. 18, 2013) (settlement value "includes the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief").

[7] *See, e.g.*, *Weeks v. Kellogg Co.*, No. CV 09-08102 MMM RZX, 2013 WL 6531177, at *29 (C.D. Cal. Nov. 23, 2013) (It is "proper to include [the cost of notice and settlement administration] in the value of the class action settlement" where plaintiffs "successfully negotiated a provision that required defendants to bear" those costs and "thus ensured that more money would be available to pay claimants."); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2018 WL 3960068, at *8-9 (N.D. Cal. Aug. 17, 2018) ("These costs 'of providing notice to the class can reasonably be considered a benefit to the class' in this case. The same is true of the other administrative costs (such as processing claim forms and operating a call center to answer Settlement Class Members' questions) that contribute to 'distribut[ing] [the] settlement award in a meaningful and significant way.'").

[8] *See, e.g.*, *Rainbow Bus.*, 2017 WL 6017844, at *1 (holding that the common fund includes costs and fees, if paid separately); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 283 (3d Cir. 2009) (approving a fee award based on a total settlement value that included, *inter alia,* attorneys' fees to be paid independent of the common fund).

[9] Although Fiat Chrysler estimates that the Extended Warranty will cost it approximately $105 million (Dkt. No. 508 ¶ 4.12), "the standard is not how much money a company spends on purported benefits, but the value of those benefits to the class." *In re Anthem*, 2018 WL 3960068, at *8.

Notwithstanding the above, in a different case, this Court has expressed concern that the Circuit's practice of "using the full fund theoretically available as a basis for evaluating the reasonableness of a negotiated fee award," may, under some circumstances, "divorce the class counsel's incentives from the best interests of the class." *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 937 (9th Cir. 2014) (Chen, J. dissenting), *vacated after settlement*, 772 F.3d 608 (9th Cir. 2014). Those circumstances are not present here. As the Court already observed, there is "a strong incentive to ensure that there is a high participation/claims rate," given that Fiat Chrysler faces "penalties of more than $6,000 per vehicle" if it fails to achieve "85% participation" in the Settlement. Dkt. No. 526 at 6-7, 13. This feature, in combination with the "substantial" and attention-grabbing benefits available to the Class, alleviates any concerns about the fairness of evaluating Class Counsel's fee request based on the full value of the Settlement fund. *See id.*; *see also* Dkt. No. 519 at 30 ("[T]he incentives are structured such that we do have parallel incentives now on everybody's part to maximize the cars to get fixed. There is no perverse incentive."); Fitzpatrick Decl. ¶¶ 16-17.

Nevertheless, even if the Court were inclined to discount the value of the constructive common fund, the resulting percentage would remain reasonable and appropriate under the facts of this case. If, for example, the Court reduced the cash component to only 85% of the cash available to the Class (to reflect the minimum participation threshold) and cut the warranty value by 50% (to account for the government's shared role in securing it), Class Counsel's fee request would rise to only 13% of the Settlement value. Take out the warranty altogether, and the fee percentage is still 17.7%. In other words, even under the most conservative valuations of the Settlement, Class Counsel's requested fee percentage remains well below or (at worst) in line with the average awards in comparable cases. Fitzpatrick Decl. ¶¶ 23-26.

The reasonableness of Class Counsel's request is further confirmed by the traditional factors analyzed in this Circuit. These factors include: (1) the results achieved by class counsel; (2) the complexity of the case and skill required; (3) the risks of litigation; (4) the benefits to the class beyond the immediate generation of a cash fund; (5) the market rate of customary fees for similar cases; (6) the contingent nature of the representation and financial burden carried by

counsel; and (7) a lodestar cross-check. *See, e.g.*, *Volkswagen*, No. 2672 CRB (JSC), 2017 WL 1047834, at *1 (N.D. Cal. Mar. 17, 2017) (citing *Vizcaino*, 290 F.3d at 1048-52); *see also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); Fitzpatrick Decl. ¶ 14 (listing factors). Each of these factors supports Class Counsel's request in this case.

A. Class Counsel obtained substantial benefits for the Class.

The benefit Class Counsel secured for the Class is the single most important factor in evaluating the reasonableness of a requested fee. *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 here.

As the Court already concluded, "the benefits available to class members are substantial, and likely to gain their attention." Dkt. No. 526 at 13; *see also* Dkt. No. 519 at 33 ("The compensation to the class is considerable. It is substantial."). That is true. The Settlement provides immediate and meaningful relief to the Class, including cash payments up to $3,075, an emissions repair, a valuable Extended Warranty, and a guarantee that none of these benefits will be reduced by Class Counsel's attorneys' fees and costs. Economist Ted Stockton concluded that the cash compensation alone "*exceed[s]* economic harm suffered based on the economic overpayment model" advanced by Plaintiffs "in nearly all cases." Dkt. No. 491-3 ¶ 46 (emphasis added). It is "highly unusual" for a class action settlement to recover what is, by some measures, close to if not all of what the class could recover at trial. *See Volkswagen*, 895 F.3d 597, 610 (9th Cir. 2018). That this Settlement achieves such relief through the compromise of strongly contested claims is a remarkable result and strongly supports the requested fees.

B. The Settlement resulted from Class Counsel's zealous representation in complex and risky litigation.

This was a complex case, both factually and legally. *See, e.g.*, Dkt. No. 519 at 5:19-20 (MR. FEINBERG: . . . As Your Honor has pointed out, this has been an extraordinarily difficult, complex litigation."). The subject matter was highly technical. The claims implicated multiple defendants (foreign and domestic) in a multi-part conspiracy lasting many years. The litigation required an enormous amount of discovery, including millions of pages of documents and nearly

100 depositions. And the complicated legal issues spawned hundreds of pages of contested briefing and expert battles.

It was a risky case, too. As the Court observed, "[d]ifficult issues were raised . . . on Plaintiffs' RICO claim," "the standing issue was far from clear," "class certification was not guaranteed, particularly given the number of state law claims being brought," and "[d]amages were potentially problematic." Dkt. No. 526 at 13-14. These are but a few of the hurdles that Plaintiffs faced both at the outset of the litigation and at its resolution.

That Class Counsel achieved such substantial relief in the face of this complexity and risk speaks to their skill, effort, and dedication to the Class.

This conclusion is not undermined by the presence of the government plaintiffs. In fact, in many ways, their presence made both the litigation and the settlement efforts more complex. *See* Dkt. No. 519 at 5:2-8 (recognizing complexity of global resolution given the US-CA consent decree, consumer Settlement, and collateral proceedings from State Attorneys General). And, though the government shared the litigation burden (at least in the case against the FCA defendants), this simply is not a situation 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) *and In re VISA Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 523-24 (E.D.N.Y. 2003) *with In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 101 (D.D.C. 2002). Indeed, the consumer litigation here pre-dates the government litigation, and the two have moved forward collaboratively, in tandem, since consolidation. Like plaintiffs' counsel in *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 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." 142 F.R.D. 588, 597 (S.D.N.Y. 1992). Instead, Class Counsel did much of the work "on their own," and working hand-in-hand with the government, "made the kill." *Id.*

Notwithstanding the above, skeptics may argue that this case was destined for success and presented little risk in light of the substantial relief secured in *Volkswagen*. But *Volkswagen* was, in many ways, *sui generis*. As Judge Breyer observed in that case, "Volkswagen *admit[ted]* to installing and failing to disclose the defeat devices in its TDI diesel engine vehicles,"

Volkswagen, 2016 WL 6248426, at *10, and later pleaded guilty to criminal charges related to that offence. Defendants made no such admission here and instead mounted a staunch defense over two years of intensive litigation. Moreover, any suggestion that diesel emissions cases are simple or easy is quickly dispelled by a glance at similar lawsuits. In the wake of *Volkswagen*, at least six other diesel emissions cases have been filed across the country. *See, e.g.*, *Counts v. General Motors LLC*, No. 1:16-cv-12541 (E.D. Mich.); *Bledsoe et al. v. FCA USA LLC et al.*, No. 2:16-cv-14024 (E.D. Mich.); *In re: Mercedes-Benz Emissions Litigation*, 2:16-cv-00881 (D.N.J.); *Fenner v. General Motors LLC*, No. 2:17-cv-11661 (E.D. Mich.); *Gamboa v. Ford Motor Co.*, No. 2:18-cv-10106 (E.D. Mich.); *Rickman v. BMW of North America LLC*, No. 2:18-cv-04363 (D.N.J.). Not one of them has been resolved, and some face dismissal.

Class Counsel's skilled advocacy in resolving a complex and risky case strongly supports their fee request. *See, e.g.*, *Hanlon*, 150 F.3d at 1029 (The "complexity and novelty of issues" can justify upward departure from benchmark); *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1450–51 (N.D. Cal. 1994) (same); Fitzpatrick Decl. ¶¶ 27-28.

C. The Settlement provides significant non-monetary relief in addition to the cash compensation.

As described above, the Settlement secures an array of benefits. Chief among them is the emissions repair that finally delivers to Class Members the emissions-compliant vehicles they thought they were buying in the first place. These repairs will mitigate future environmental harm from excess emissions, while "provid[ing] the added benefit of minimizing the potential waste" of removing the cars from the roads altogether. *See Volkswagen*, No. 2672 CRB (JSC), 2017 WL 3175924, at *3 (N.D. Cal. July 21, 2017). This significant (but unquantifiable) non-monetary relief supports Class Counsel's request. *Id.*

So does the substantial Extended Warranty. As explained above, the value of the Extended Warranty to the Class can be, and has been, reliably calculated "within a reasonable degree of professional certainty" by economist Kirk Kleckner, whose valuations have been accepted and relied upon in a number of large automotive class actions. *See* Dkt. No. 491-4 at 1-5 (outlining his methodology); *see also, e.g.*, *In re Volkswagen & Audi Warranty Extension Litig.*,

89 F. Supp. 3d 155, 169 (D. Mass. 2015) (accepting Kleckner's warranty valuations); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 810ML02151JVSFMOX, 2013 WL 12327929, at *9 n.10 (C.D. Cal. July 24, 2013) (finding Kleckner's warranty valuation to be "both reliable and relevant"); *In re: Takata Airbags Products Liability Litigation*, Case No. 15-MD-2599 (S.D. Fla.), Dkt. No. 2162 (order granting motion for final approval of BMW settlement, supported by Dkt. No. 2033-2, declaration of Kirk Kleckner on warranty valuation), Dkt. No. 2385 (order granting motion for final approval of Honda and Nissan settlements, supported by Dkt. No. 2256-4, declaration of Kirk Kleckner on warranty valuation); Dkt. No. 3121 (order denying motion to exclude testimony of Kirk Kleckner on warranty valuation). Thus, for fee-setting purposes, the warranty value is most properly considered as part of the fund secured by the Settlement. *Staton*, 327 F.3d at 974 (When "accurately ascertained," the value of "injunctive relief" is included "as part of the value of a common fund for purpose of applying the percentage method of determining fees."). If the Court were inclined not to consider it in the Settlement valuation, however, this significant non-monetary relief would—at a minimum—strongly support a fee award of 17.7% of the remaining fund. *Cf. Pan v. Qualcomm Inc.*, No. 16-CV-01885-JLS-DHB, 2017 WL 3252212, at *12 (S.D. Cal. July 31, 2017) (concluding that "substantial" non-monetary relief *that could not be accurately valued* supported fee award of nearly 30%).

D. Class Counsel's requested fee percentage falls well below the benchmark and compares favorably to awards in similarly valued settlements.

As detailed above, Class Counsel's request reflects only 9.6% of the full value of the constructive common fund. This is the appropriate valuation, especially given the incentive structures created by this particular settlement. *See Boeing*, 444 U.S. at 479-81; *Williams*, 129 F.3d 1027 (9th Cir. 1997). Even under the most conservative approaches, however, the percentage would rise to only 13% (reducing the compensation by 15% and the warranty by 50%) or, at most, 17.7% (removing the warranty altogether). All of these percentages fall well below the 25% benchmark as well as the mean and median percentages awarded across the country and

in this Circuit—which, depending on the study, range from 23.9% to 29%. Fitzpatrick Decl. ¶¶ 23-26 (discussing several empirical studies calculating mean and median percentages).

Still, as this Court observed, percentage awards in "megafund" settlements like this one skew lower. Dkt. No. 526 at 14-15; *Alexander v. FedEx Ground Package Sys., Inc.*, No. 05-CV-00038-EMC, 2016 WL 3351017, at *2 (N.D. Cal. June 15, 2016). But even among megafund settlements, Class Counsel's request is perfectly ordinary and reasonable. Indeed, Professor Fitzpatrick's empirical analysis reveals that the mean and median awards in settlements between $250 and $500 million are 17.8% and 19.5%, respectively—both of which exceed even the most conservative calculation of the percentage requested here. Fitzpatrick Decl. ¶ 23.

It is true, as Judge Koh recently observed, that Professor Fitzpatrick's database included only 8 settlements over two years. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *13 (N.D. Cal. Sept. 2, 2015). For this reason, Judge Koh was more persuaded by a study that included more data points (68) over a longer time (1993 to 2008) and concluded that the mean and median in settlements exceeding $175.5 million were 12% and 10.2%, respectively. *Id.* (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248, 265 (2010) ("Eisenberg-Miller 2010")). But, as Professor Fitzpatrick notes, the Eisenberg-Miller 2010 study included settlements in the billions of dollars and, because those settlements yielded by far the lowest percentages, the mean and median that resulted are not tailored to, and likely not reflective of, settlements comparable to this one. Fitzpatrick Decl. ¶ 24.

Furthermore, new data have emerged since *In re High Tech* that confirm Professor Fitzpatrick's initial conclusions for similarly-valued settlements. Specifically, Professor William Rubenstein has reported that his database includes an additional 11 settlements over a six-year period valued between $300 and $600 million. *Id.* ¶ 26. The mean and median percentages awarded in that group were 17.6% and 17.9%—results that were "almost completely synchronous" with Professor Fitzpatrick's study. *Id.* Furthermore, Eisenberg & Miller published an updated analysis of 458 cases, 45 of which fell into the highest tranche (above $67.5 million). *See* Eisenberg-Miller 2017, 92 N.Y.U. L. Rev. at 940, 948. The average percentage awarded in

those cases was 22.3%, and, as Judge Wilken observed, "21% was the midpoint for fees where the recovery exceeded $100 million." *In re NCAA*, 2017 WL 6040065, at *2 (citing Eisenberg-Miller 2017, 92 N.Y.U. L. Rev. at 947, and awarding class counsel 20% of $208.7 million recovery).

Thus, no matter how you slice it, Class Counsel's requested fees are significantly below or (at worst) in line with the average awards in similarly-valued megafund settlements. This factor, too, supports Class Counsel's request.

E. Class Counsel carried considerable financial burden in prosecuting this complex litigation.

It is an established practice to reward attorneys who assume representation on a contingent basis to compensate them for the risk that they might be paid nothing at all. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). Such a practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney. *Id.* Class Counsel devoted tens of thousands of hours and advanced whatever expenses were necessary to see this case through to a successful outcome, all with no guarantee of reimbursement. Cabraser Decl. ¶¶ 3, 17, 28. In so doing, Class Counsel turned down opportunities to work on other cases to devote the appropriate amount of time, resources, and energy necessary to responsibly handle this complex case.

The demands of the case were high. Class Counsel made the accelerated pace and parallel settlement and litigation tracks each an important priority. The Court directed it, and the case deserved it. This factor further supports Class Counsel's request.

F. A lodestar cross-check confirms the requested fees are reasonable.

Courts in this Circuit sometimes employ a "streamlined" lodestar analysis to "cross-check" the reasonableness of a requested award. *See, e.g.*, *Vizcaino*, 290 F.3d at 1050 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."); Dkt. No. 526 (endorsing the cross-check for megafund cases). As explained below and in the accompanying Cabraser

Declaration,[10] the cross-check reveals that, under the circumstances of this case, Class Counsel worked a reasonable number of hours billed at reasonable rates. The resulting lodestar yields a modest multiplier of 1.36 for work performed to date and 1.17 including time anticipated for the on-the-ground work necessary to implement, oversee, and protect this Settlement over the next two-plus years. Either multiplier is well below the average in comparable cases and justified by the significant results achieved. Fitzpatrick Decl. ¶¶ 34-35.

1. Class Counsel expended a reasonable number of hours advancing this complex and hard-fought litigation.

As summarized above, this case was intensively litigated from its inception. *See, e.g.*, Background § I, *supra*; Cabraser Decl. ¶¶ 3-11. To effectively prosecute this case, Class Counsel engaged in extensive discovery that included hundreds of discovery requests (many of which were disputed and litigated), nearly 100 depositions, and the strategic review and analysis of more than 4 million pages of documents. *Id.* They also engaged in complex and extremely robust briefing on several dispositive motions and class certification. *Id.* At the same time, they were simultaneously preparing for trial and participating in complex, multi-party settlement

[10] The Cabraser Declaration includes, among other information: (1) the total common benefit hours billed, lodestar incurred, and blended average billing rate for each of the 19 category codes identified in PTO 4; (2) the total common benefit hours billed, lodestar incurred, and blended average billing rate for each of the ten non-PSC participating counsel firms, along with a description of the work performed by those firms; (3) the total common benefit hours billed, lodestar incurred, range of billing rates, and blended average billing rates for each category of timekeeper (Partner, Associate, Non-Partner-Track Attorney, and other professional); and (4) a list of all attorney timekeepers' law schools and graduation years, timekeeper designation, and rates billed. This detailed declaration comports with the Court's directives in PTO 4 and this District's Procedural Guidance for Class Action Settlements. *See Procedural Guidance*, Attorneys' Fees ("Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed."); *see also Volkswagen*, 2017 WL 1047834, at *5, n.5 (finding that class counsel had complied with similar pretrial order and overruling objection that more lodestar information was necessary in similar fee application because "it is well established that '[t]he 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.'") (quoting *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015). Class Counsel are nevertheless prepared to submit detailed copies of the tens of thousands of individual time entries, should the Court wish to engage in a line-by-line review.

negotiations. *Id.* The Settlement that resulted from this work provides substantial relief to the Class.

In furtherance of these common benefit efforts, among many others, Class Counsel worked 95,951.4 hours. Based on the work required in defending and implementing other automotive class settlements, Class Counsel estimates that approximately 15,000 more hours will be necessary for the on-the-ground efforts to finalize, implement, and protect the Settlement over the next two-plus years. This will include, for example, work required to (1) obtain final approval of the Settlement; (2) protect the Settlement on appeal (if any appeals are lodged); and (3) oversee and help implement the Settlement over the two-year Settlement Benefit Period, which will include, among other things, (a) responding to inquiries from many of the more than 100,000 class members, and (b) participating in the detailed, claim-by-claim review process for the Claims Review Committee. *See* Cabraser Decl. ¶ 18.

This is a lot of time but, as noted above, a lot was (and remains to be) accomplished. Moreover, Professor Rubenstein's database reveals that the average number of hours worked in cases settling in the $300 million to $600 million range is 137,906. Fitzpatrick Decl. ¶ 34. Thus, even including the time projected for the next few years, Class Counsel's hours are below average, and justified under the facts of this case.

2. Class Counsel billed reasonable rates for those hours.

The blended average billing rate for the work described above is approximately $453 per hour. Cabraser Decl. ¶ 17.[11] This rate is reasonable and, if anything, on the low side given the skill, experience, and reputation of Class Counsel—all of whom were appointed through a competitive leadership application process. *See, e.g.*, *Volkswagen*, No. 2672 CRB (JSC), Dkt. No. 3396-2 (Rubenstein Declaration) ¶ 29 (N.D. Cal. June 30, 2017) (noting that the average blended rate of 40 class action settlements approved in this District in 2016 and 2017 was

[11] Although PTO 4 authorizes Class Counsel to "seek an award of fees based on their hourly rate at the time a settlement or judgment is reached to account for the delay in payment," to be conservative, the billing rates used for this application are the historical, "then-present" rates recorded in the monthly time reports submitted to Lead Counsel since 2017. *See* Dkt. No. 181 at 8.

$528.11 per hour); *Volkswagen*, 2017 WL 1047834, at *5 (approving blended average billing rate of $529 per hour in analogous litigation).

3. Class Counsel's performance and the results achieved justify a reasonable lodestar multiplier.

The Ninth Circuit *requires* an upward multiplier when certain risk factors are present and authorizes a multiplier for certain "reasonableness" factors, including the quality of representation, the complexity of the issues presented, and most importantly, the benefit obtained for the class. *See, e.g.*, *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *In re Bluetooth*, 654 F.3d at 942). As this Court recently observed, a typical multiplier in megafund cases is "3 or less." *Alexander*, 2016 WL 3351017, at *3. The data bear this out. The Eisenberg-Miller 2017 study, for example, found that the average multiplier in cases valued over $67.5 million (the highest decile in that study) was 2.72. Eisenberg-Miller 2017 at 967. Other studies are in accord, and some report even higher averages. *See, e.g.*, Fitzpatrick Decl. ¶ 35 (noting that Professor Rubenstein found an average multiplier of 2.75 in his database of class actions in the $300 to $600 million range); *id.* (reporting that Fitzpatrick's empirical study found an average multiplier of 3.37 for settlements between $250 million and $500 million).

Thus, Class Counsel's requested multiplier—1.17 with anticipated future time and 1.36 without—is, at worst, half the average multiplier awarded in comparably valued cases. This result is more than justified by the complexity and results of this case.

IV. <u>Class Counsel's Expenses are Reasonable and Appropriate.</u>

"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). This includes expenses that are reasonable, necessary, directly related to the litigation, and normally charged to a fee-paying client. *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).

Here, Class Counsel seek $7,000,000 in litigation expenses, which includes $6,041,614.94 already expended by Lead Counsel, all PSC firms, and numerous other firms designated by lead counsel to advance the common benefit pursuant to the terms of PTO 4. Cabraser Decl. ¶¶ 28-30 (breaking out the costs across the 19 Court-approved categories). It also includes approximately $958,000 that Class Counsel are responsibly reserving to cover the anticipated costs associated with the on-the-ground administration and implementation efforts over the next several years. *Id.* Seven million dollars is a lot of money, but, at 1.1% to 2.1% of the constructive common fund (depending on how the fund is valued), it is in line with (or less than) than the average costs awarded in class action settlements. Fitzpatrick Decl. ¶ 37 (citing studies finding that the average costs ranged from 2.7% to 3.9% of settlement value).

More importantly, these costs are commensurate with the stakes, complexity, and intensity of this particular litigation. They include, for example, approximately $2.3 million to employ technical experts on emissions system functionality, testing processes, software programming and code analysis as well as several litigation experts—including four who were presented with the class certification briefing—on topics ranging from marketing to classwide damages methodologies. *See* Cabraser Decl. ¶¶ 28-31. They also include, among other costs detailed in the Cabraser Declaration, approximately $1.3 million to satisfy Class Counsel's joint obligations to cover the fees and costs Court-appointed Settlement Master, *see* Dkt. No. 184 ¶ 7; and $734,954.14 for the eDiscovery services and document processing platform, necessary for processing, maintaining, and analyzing the millions of pages of documents produced in this case.

No doubt, this case was expensive to prosecute. But, as other courts have recognized, "Class Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent." *Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014). This is true, and Class Counsel expended only that which they believed was necessary to advance the interests of the Class. The requested costs are reasonable and should be reimbursed.

V. The Settlement Class Representatives Have Earned, and Public Policy Supports, the Requested Service Awards.

Class Counsel request service awards of $5,000 for each of the 60 proposed Settlement Class Representatives (*see* Dkt. No. 491-6), which, if awarded, will be paid in addition to the benefits available to the Class. Dkt. No. 508 ¶ 15.2. This Court has already observed that $5,000 is the "presumptive incentive award in this District" and concluded that this request is "reasonable" here. Dkt. No. 526 at 15. This conclusion is well supported. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (affirming awards of $5,000); *In re Mego*, 213 F.3d at 463 (same); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *11 (N.D. Cal. Aug. 3, 2016) ("An incentive award of $5,000 is presumptively reasonable. . . ."); *In re NCAA*, 2017 WL 6040065, at *11 (awarding $20,000 where, as here, "the class representatives spent a significant amount of time assisting in the litigation of this case, in preparing for and having their depositions taken, in searching for and producing documents that spanned many years, and in conferring with counsel throughout the litigation"). The Settlement Class Representatives worked hard to protect the interests of the Class by, among other things, responding to written discovery requests; searching for and producing documents; preparing for, traveling to, and sitting for lengthy depositions; and regularly communicating with counsel to stay abreast of and monitor the developments in this litigation. *See* Dkt. No. 491-1 ¶¶ 11-15. They have earned the modest service awards requested.

CONCLUSION

For the foregoing reasons, Settlement Class Representatives and Settlement Class Counsel respectfully request that the Court confirm the certification of the Settlement Class and appointment of Settlement Class Counsel and Class Representatives; grant final approval to the Settlement; award $59 million in attorneys' fees and $7 million in costs to be allocated by Lead Counsel among the PSC firms and additional counsel performing work under Pretrial Order Nos. 3 and 4; and approve service awards of $5,000 to each Settlement Class Representative.

Dated: March 11, 2019

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Elizabeth J. Cabraser*
Elizabeth J. Cabraser

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: 415.956.1000
Facsimile: 415.956.1008
E-mail: *ecabraser@lchb.com*

Plaintiffs' Lead Counsel and Chair of the Plaintiffs' Steering Committee

Roland K. Tellis
BARON & BUDD, P.C.
15910 Ventura Boulevard, Suite 1600
Encino, CA 91436
Telephone: 818.839.2320
Facsimile: 818.986.9698
E-mail: *rtellis@baronbudd.com*

W. Daniel ("Dee") Miles, III
BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES P.C.
218 Commerce Street
Montgomery, AL 36104
Telephone: 800.898.2034
Facsimile: 334.954.7555
E-mail: *dee.miles@beasleyallen.com*

Lesley E. Weaver
BLEICHMAR FONTI & AULD, LLP
555 12th Street, Suite 1600
Oakland, CA 94607
Telephone: 415.445.4003
Facsimile: 415.445.4020
E-mail: *lweaver@bfalaw.com*

David S. Casey, Jr.
CASEY GERRY SCHENK FRANCAVILLA BLATT & PENFIELD LLP
110 Laurel Street
San Diego, CA 92101-1486
Telephone: 619.238.1811
Facsimile: 619.544.9232
E-mail: *dcasey@cglaw.com*

Steve W. Berman
HAGENS BERMAN
1918 8th Avenue, Suite 3300
Seattle, WA 98101
Telephone: 206.623.7292
Facsimile: 206.623.0594
E-mail: *steve@hbsslaw.com*

Lynn Lincoln Sarko
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: 206.623.1900
Facsimile: 206.623.3384
E-mail: *lsarko@kellerrohrback.com*

Joseph F. Rice
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Telephone: 843.216.9000
Facsimile: 843.216.9450
E-mail: *jrice@motleyrice.com*

Rachel L. Jensen
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 98101
Telephone: 619.231.1058
Facsimile: 619.231.7423
E-mail: *rachelj@rgrdlaw.com*

Stacey P. Slaughter
ROBINS KAPLAN LLP
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
Telephone: 612.349.8500
Facsimile: 612.339.4181
E-mail: *sslaughter@robinskaplan.com*

Plaintiffs' Steering Committee

CERTIFICATE OF SERVICE

I hereby certify that, on March 11, 2019, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

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