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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

MATTHEW COMLISH,

Objector.

No. 3:15-md-2672

OBJECTION TO THE 2.0-LITER TDI CONSUMER AND RESELLER DEALER CLASS ACTION SETTLEMENT

Date: October 18, 2016
Time: 8:00 a.m.
Courtroom: 6
Judge: Hon. Charles R. Breyer

MDL No. 2672

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SUMMARY OF ARGUMENT

Objector Comlish is not objecting to the adequacy of the proposed consumer relief. Instead, Comlish argues that final approval of the proposed class action settlement ("Settlement") must be denied because the Settlement fails Rule 23 notice, fairness, adequacy of representation and superiority requirements, and because of this, consumers are being unfairly shortchanged from what they could have received. Comlish does not want to delay delivery of the consumer relief, however, and Comlish shares this Court's "concern[] about vehicles being on the road which are polluting." Transcript of Hearing on Jan. 21, 2016, Dkt. 1119 at 214. Thus, to avoid further delay of the consumer relief and buyback program, the Court should enter the DOJ Consent Decree ("DOJ Order").[1]

If the Court were to enter just the DOJ Order, consumers would still receive over 99% of the $10 billion class members will receive if all three orders (the DOJ Order, FTC Stipulated Order ("FTC Order") and Settlement) are entered. That is because the DOJ Order requires buyback and lease termination *regardless* of whether the FTC Order and Settlement are ever approved. *See* Appendix A to DOJ Order, Dkt. 1605-1 at 69. The DOJ buyback obligation is satisfied by "fulfilment of [Volkswagen's] buyback obligations under the FTC Order." *Id.* And the Settlement provides no additional relief that the FTC Order provides. *See* FTC Statement Supporting the Settlement ("FTC Statement"), Dkt. 1781 at 2 (compensation under FTC Order is the same as the compensation under the Settlement). The only additional relief that the FTC Order provides that the DOJ Order does not require is the restitution payments to lessees, which total $75.7 million. *See* Appendix A to DOJ Order, Dkt. 1605-1 at 69; *see* Declaration of Edward M. Stockton ("Stockton Decl."), Dkt. 1784-1 at 53.[2]

[1] The Court should enter the DOJ Consent Decree to the extent it is lawful; though portions of the Consent Decree not relating to consumer relief exceed DOJ's authority, the Consent Decree makes those portions severable. *See* Comments of the Competitive Enterprise Institution regarding the Partial Consent Decree (noting Consent Decree's ZEV-investment provisions violate separation of powers), *available at* https://cei.org/sites/default/files/Coalition%20Comments%20on%20In%20re%20Volkswagen%20Clean%20Diesel%20Marketing%20Sales%20Prac....pdf.

[2] The Court may also make the $75.7 million lessee restitution available even if it denies Settlement approval if the Court enters the FTC Order and modifies or construes the "Effective Date" of the FTC Order.

Thus, immediate entry of the DOJ Order would still fund buyback and lease termination relief of over $9.92 billion.

The Court should not finally approve the Settlement because the class Long Form Notice ("Notice") misrepresents class members' rights and is materially misleading. The Notice states that class members "who opt out will not be eligible to receive the cash payments provided by the Class Action Settlement or to participate in the Buyback program." Notice, Dkt. 1685-3 at 18. That's simply not true. The DOJ requires the buyback program regardless of whether the Settlement is ever approved. *See* Appendix A to DOJ Order, Dkt. 1605-1 at 69. By misrepresenting to class members that they will forfeit buyback relief, the Notice wrongly threatens class members into participating in the Settlement in violation of class members' due process rights.

Further, the Notice is misleading regarding the payment of attorneys' fees. The Notice tells class members that Volkswagen is paying for attorneys' fees, which will not reduce the class members' compensation. *See* Notice, Dkt. 1685-3 at 27. As a matter of basic economics, class members *always* pay for attorneys' fees, whether directly (common fund) or indirectly (segregated fee agreement). That class counsel chose to structure a segregated fee structure here does not save the class money. It misleads class members to suggest that the payment of fees does not affect their compensation because the "defendant will not agree to class benefits so generous that when added to a reasonable attorneys' fee award for class counsel they will render the total cost of settlement unacceptable to the defendant." *Pearson v. NBTY*, Inc., 772 F.3d 778 (7th Cir. 2014).

Finally, the Notice does not disclose the fees sought and any agreements between the settling parties on fees (including clear sailing or reversion agreements), information necessary to present the

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The FTC Order indicates that the buyback and lease termination relief will become available within 5 days of the "Effective Date" of the FTC Order, which is defined as the "date the Court approves and enters [the FTC] Order, the DOJ Consent Decree, or the Class Action Settlement Agreement, whichever is *latest*." FTC Order, Dkt. 1607 at 5, 37 (emphasis added). But even if Settlement approval is denied, the FTC Order could still become effective immediately, if the parties or Court modifies or construes the FTC Order to remove reference to the Settlement from the "Effective Date" definition.

"entire settlement" to the class and necessary for this Court's Rule 23(e) fairness assessment. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) ("*Bluetooth*"). At a minimum, the settling parties must provide corrected notice of the Settlement, as well as disclosure of the fee application and any agreements between the settling parties on fees.

The Court can go farther than that and deny final approval of the Settlement. Class counsel have proved themselves inadequate representatives by breaching their fiduciary obligations in numerous ways. *First,* because the Settlement provides no additional benefit to what is available under the DOJ and FTC Orders, class members are *worse* off by participating in the Settlement because they will release their claims in exchange for relief already available to them. Class counsel have breached their fiduciary duties by negotiating a settlement that duplicates relief already available to class members and where the only real beneficiaries of the Settlement are class counsel who will reap up to $332 million in fees and expenses. *See In re Aqua Dots Products Liability Litig.*, 654 F.3d 748, 752-53 (7th Cir. 2011).

Second, class counsel breached their fiduciary obligations by structuring a segregated fee structure because it places class counsel's financial interests above the class members' interests. The segregated fee structure is "a gimmick for defeating objectors" because class members can object to the fees in the district court but lose standing to challenge the fees on appeal. *Pearson*, 772 F.3d at 786. But by trying to protect their fee award from appellate scrutiny, class counsel actually *cost* the class hundreds of millions of dollars. The two-step negotiation process structured by class counsel (negotiating class benefit first and fees second) likely cost the class members hundreds of millions of, and perhaps over a billion, dollars. In a two-step process, Volkswagen would have held back funds in the first step of negotiations because Volkswagen has to conservatively estimate what class counsel may seek in fees during the second step. Here, as class counsel themselves note, commentators were expecting a fee request of over a billion dollars.

Class members not only lose money during negotiations, but the segregated fee structure will cost class members money when fees are approved if the settling parties agree to clear sailing (where Volkswagen agrees not to challenge class counsel's request up to a certain amount) and a reversion or "kicker" agreement (where the unawarded fees revert back to Volkswagen). This would mean that $332 million is money Volkswagen would be willing to pay class members to settle, and as fiduciaries of the class, class counsel should fight to have any unawarded portion of that money return to the class, rather than defendant. *Pearson*, 772 F.3d at 786-87; *Bluetooth*, 654 F.3d at 948-49 (clear sailing and reversion agreements are warning signs of class counsel's self-dealing).

Third, class counsel breached their fiduciary duty by running up the lodestar and exaggerating the value of the Settlement to justify a future $332 million attorneys' fee request. Because class counsel is seeking fees based on percentage of recovery, class counsel is exaggerating the class benefit to justify their future excessive fee request. Class counsel claims that the benefit is $10 billion, the fund the FTC Order creates for payment of the buyback and lease termination program. As an initial matter, the FTC Order provides a money judgment against Volkswagen *in favor of the FTC*, not plaintiffs and thus class counsel is improperly taking credit for that fund. *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 165-166 (3d Cir. 2006) (class counsel should be compensated for their efforts and not benefits achieved by government agencies). But the $10 billion does not adequately reflect the benefits to class members. $10 billion is the cost of the buyback and lease termination if there is 100% participation. *See* Settlement, Dkt. 1685 at 11. While $10 billion may be the *cost to Volkswagen*, class benefits are measured on the value received by the class, not the cost to defendant. *Bluetooth*, 654 F.3d at 944. The value to class members is the difference between the buyback price and the market value of the vehicles the class members are giving up. Thus, the real value of the relief available to class members is a small fraction of the $10 billion. Further, any future fee request must be compared to the benefits *actually* realized by class members. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); *Pearson*, 772 F.3d at

781. Thus, the value of the class benefit cannot be calculated until the claims process is complete and it is determined how many class members participated in the buyback and lease termination program.

Even if class counsel will seek fees based on percentage of recovery, the Court will utilize a lodestar crosscheck to "confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *Bluetooth*, 654 F.3d at 945. This means that class counsel is incentivized to submit a large lodestar. The problem for class counsel is that when they were appointed as class counsel, Volkswagen had already been working for months with numerous government agencies and their retained dispute resolution expert Kenneth Feinberg in developing a consumer relief program. Already faced with time pressure to get these cars off the road, settlement was reached just three months after class counsel's appointment. Even with 22 firms working "around the clock" (imagine the duplication) their time could not approach the $332 million they are seeking. So to run up the lodestar, class counsel pushed off the fee application until after final approval. This schedule allows class counsel to run up the lodestar to justify an excessive fee request. Their filings to date indicate that they are engaging in wasteful practices to exaggerate their lodestar that no paying client would tolerate.

Finally, the Settlement should be denied because this class action is not a superior method for the adjudication of this dispute. The DOJ and FTC Orders provide class members with substantial relief. Indeed, the Settlement provides no additional relief but instead imposes transaction costs in the form of class counsel fees and expenses and requires a release of class members' claims. *In re Hotel Tel. Charges*, 500 F.2d 86, 91-92 (9th Cir. 1974) (holding that class action is not superior when class counsel are the primary beneficiaries).

Accordingly, Plaintiffs' Motion for Final Approval should be denied because the requirements of Rule 23 are not satisfied. If the Court does not deny approval, the Court should postpone the fairness hearing and the objection and exclusion deadline until a corrected Notice is provided to the class, plaintiffs' fee application is filed and all agreements on fees between the parties are disclosed to

the class. The Court should further require the Settlement to be structured so that unawarded fees do not revert to Volkswagen. The DOJ and FTC Orders should be entered so that the buyback and lease termination relief can be provided to consumers immediately.

PRELIMINARY STATEMENT

CCAF is a sub-unit of the IRC § 501(c)(3) non-profit Competitive Enterprise Institute ("CEI"). (CCAF, which was founded by Ted Frank in 2009, became part of CEI on October 1, 2015.) CCAF is recognized as "the leading critic of abusive class action settlements." Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12; *see also* Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 (calling CCAF's founder "the nation's most relentless warrior against class-action fee abuse"). CCAF stands for the principles that settlement fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys or third parties; and that courts scrutinizing settlements should value them based on what the class actually receives, rather than on illusory measures of relief. In CCAF's six-year history CCAF attorneys have won numerous landmark decisions in support of these principles. *E.g.*, *Pearson*, 772 F.3d 778; *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) ("*Pampers*"); *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *Bluetooth*, 654 F.3d 935.

BACKGROUND

A. EPA issues Volkswagen Notice of Violation for Defeat Device software.

On September 3, 2015, Volkswagen disclosed to the United States Environmental Protection Agency ("EPA") and the California Air Resources Board ("CARB") that Volkswagen had installed software ("Defeat Device") in Volkswagen and Audi TDI diesel vehicles that was designed to bypass emissions standards. *See* Plaintiffs' Motion for Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealer Class Action Settlement ("Final Approval Motion"), Dkt. 1784 at 4-5. On September

18, 2015, the EPA issued to Volkswagen a Notice of Violation of the Clean Air Air ("CAA") and CARB initiated an enforcement investigation. *See* Final Approval Motion, Dkt. 1784 at 5. Civil and criminal investigations ensued from state and federal authorities. *See id.*

B. Volkswagen retains Feinberg to create claims program.

On December 17, 2015, Volkswagen announced that it had engaged attorney Kenneth R. Feinberg to "develop an independent, fair and swift process for resolving these claims." *See* Volkswagen Press Release dated Dec. 17, 2015, *available at* http://media.vw.com/release/1119/ (Exh. A to Declaration of Theodore H. Frank ("Frank Decl") (attached at Exhibit 1)). Mr. Feinberg has lead the resolution and administration of some of the largest compensatory and litigation settlement programs including The September 11 Victim Compensation Fund, the BP Oil Spill in the Gulf of Mexico, the GM Ignition Switch Compensation Program, the Foreign Exchange Benchmark Rates Antitrust Litigation, the Agent Orange product liability litigation, and the closing of the Shoreham Nuclear Plant. *See* http://feinberglawoffices.com/.

Feinberg's previous claims programs boasted remarkably successful participation rates: 97% of the victims of Sept. 11 and their families accepted Feinberg's offer; 90% of victims of the BP Oil Spill accepted Feinberg's offer. *See* Arno Scheutze, *Volkswagen to offer generous compensation for U.S. customers: fund head,* Reuters (Feb. 7, 2016), *available* at http://www.reuters.com/article/us-volkswagen-emissions-idUSKCN0VG0MF (attached at Exh. B to Frank Decl.); Roland Lindner, *Wie kommt VW da heraus Herr Feinberg*, Frankfurter Allgemeine (Feb. 7, 2016) ("Lindner"), *available at* http://www.faz.net/aktuell/wirtschaft/vw-abgasskandal/staranwalt-kenneth-feinberg-im-interview-zum-vw-skandal-14055948.html (attached at Exh. C, with English translation via Google Translate). For the Volkswagen program, Feinberg sought to create an equally successful claim process where he expected an overwhelming majority to accept the settlement offer and release their claims; Feinberg's expectation arose from Volkswagen giving him full unfettered authority to set the level of compensation—a blank check. *Id.* Feinberg had set the goal of setting up a claims fund within 60-90

days of his engagement with Volkswagen, but the program was delayed because of Volkswagen's negotiations with regulators. *Id.*

With respect to Feinberg's engagement, Columbia University Law Professor John C. Coffee, Jr. said, "If I were an individual VW car owner, I would look seriously at what Feinberg offers in this case. A Ken Feinberg cash plan, or Ken Feinberg new-vehicle plan, will be better than paying lawyers for a nominal cash award and some coupons from Volkswagen." *See* Angelo Young, *Why Volkswagen Picked Ken Feinberg to Run its Fund For Emissions Cheating Claims,* International Business Times (Dec. 20, 2015), *available at* http://www.ibtimes.com/why-volkswagen-picked-ken-feinberg-run-its-fund-emissions-cheating-claims-2232908 (attached at Exh. D to Frank Decl.).

C. DOJ files Complaint seeking over $45 billion; FTC files Complaint for "billions" in injury.

The Department of Justice filed a complaint for violations of the Clean Air Act ("CAA") requesting civil penalties of over $45 billion. *See* DOJ Complaint, No. 2:16-cv-10006-LJM-MJH (E.D. Mich. Jan. 4, 2016), Dkt. 1 at 27-28; *see* William Boston, Aruna Viswanatha and Sarah Sloat, *Volkswagen Shares Fall on Fears of Bigger U.S. Penalty*, Wall Street Journal (Jan. 5, 2016) (reporting analysts' calculation of fines sought in DOJ Complaint to total over $45 billion), *available at* http://www.wsj.com/articles/volkswagen-shares-fall-on-fears-of-bigger-u-s-penalty-1452006491 (attached at Exh. E to Frank Decl.). The Federal Trade Commission also filed a complaint for violations of the FTC Act, claiming "billions of dollars in injury" and seeking "rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgment of ill-gotten monies." *See* FTC Complaint, No. 3:16-cv-01534 (N.D. Cal.), Dkt. 1 at 15, 17.

D. Class counsel seeks appointment in MDL; CCAF files amicus brief regarding competitive bidding.

The Judicial Panel on Multidistrict Litigation created this MDL on December 8, 2015, transferring all pending federal actions for pre-trial proceedings. *See* Transfer Order, Dkt. 1. On December 22, 2015, this Court ordered that any attorney that had filed an action pending in the MDL

could submit an application for a lead counsel or steering committee position by January 8, 2016, with all responses or objections to the applications by January 14, 2016. *See* Pretrial Order No. 2 (Dkt. 336). The Court received over 150 applications. *See* Dkts. 535-804.

CCAF filed a brief of *amicus curiae* on January 6, 2016, requesting that the Court employ a competitive bidding process in selection of lead counsel. *See* Brief of Amicus Curiae, Dkt. 576 at 1. As CCAF explained, use of competitive bidding would ensure a market rate to plaintiffs' attorneys, avoid awarding windfall fees out of the class' recovery, and minimize "the potential for too-cozy fee agreements, or even collusion, among the numerous plaintiffs' firms vying for their share of the pie at the expense of their putative clients." *Id.* The Court did not require competitive bidding.

While no collusion was evident and no formal agreements were disclosed by the applicants, alliances were formed and 67 firms supported the appointment of Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") as lead counsel. *See* Exhibit C to Application of Elizabeth J. Cabraser, Dkt. 782-3. On January 21, 2016, the Court appointed Ms. Cabraser as Plaintiffs' Lead Counsel and 21 lawyers (from 21 different firms) as part of the Steering Committee. *See* Pretrial Order No. 7, Dkt. 1084 at 1, 3-4. Sixteen of the firms appointed to the Steering Committee were among those who supported Ms. Cabraser's application and Ms. Cabraser in turn supported their applications.[3] *Compare* Pretrial Order No. 7, Dkt. 1084 at 3-4 *with* Exhibit C to Application of Elizabeth J. Cabraser, Dkt. 782-3; *see also* Letter from Benjamin L. Bailey, Dkt. 734-2; Letter from Steve W. Berman, Dkt. 786 at 6; Letter from David Boies, Dkt. 697 at 10; Letter from James E. Cecci, Dkt. 680 at Exhibit 2; Letter from Roxanne Barton Conlin, Dkt. 671-2; Letter from Jayne Conroy, Dkt. 718-2; Letter from Robin Greenwald, Dkt. 653 at Attachment B; Letter from Adam J. Levitt, Dkt. 678 at Exhibit B; Letter from W. Daniel "Dee" Miles III, Dkt. 684-2; Letter from Steven N. Williams, Dkt.

[3] Ms. Cabraser is not included on the list of endorsing counsel for Lynn Lincoln Sarko. *See* Letter Brief Lynn Lincoln Sarko, Dkt. 766-2.

763-1; Letter from Joseph F. Rice, Dkt. 713-2; Letter from J. Gerard Stranch, Dkt. 715-2; Letter from Roland K. Tellis, Dkt. 753 at 8; Letter from Lesley E. Weaver, Dkt. 731-2.

On February 22, 2016, consumer plaintiffs filed a Consolidated Class Action Complaint and reseller plaintiffs filed an Amended Consolidated Class Action Complaint. *See* Dkts. 1230-31. Just **two months later**, on April 21, 2016, the settling parties revealed that they had reached a settlement and this Court ordered the U.S. Government's proposed Consent Decree and plaintiffs' motion for preliminary approval be filed by June 21, 2016. *See* Minute Entry, Dkt. 1435.

The Settlement was a compromise less than the relief originally sought by plaintiffs. The Amended Consolidated Class Action Complaint included common law claims of fraud, breach of contract and unjust enrichment, state law claims of consumer protection and state warranty statutes, as well as federal RICO and Magnuson-Moss warranty claims. *See* Amended Consolidated Class Action Complaint, Dkt. 1230. Plaintiffs sought "costs, restitution, compensatory damages for economic loss and out-of-pocket costs, treble damages under Civil RICO, multiple damages under applicable states' laws, punitive and exemplary damages under applicable law, and disgorgement." *Id.* at 701. Plaintiffs' submitted the expert report of Dr. Andrew Kull in support of their Final Approval Motion. *See* Expert Report of Dr. Kull, Dkt. 1784-2. Kull concludes that "the benefits comprised of the Buyback Option will be no less advantageous than the benefits that might typically be anticipated from a successful suit for rescission and restitution." *Id.* ¶ 30. Accordingly, the consumer relief that the Settlement purports to provide does not provide full satisfaction of plaintiffs' claims, and waives claims for multiple and punitive damages.

E. DOJ and FTC submit Consent Decrees; the Class Action Settlement provides no additional marginal benefit.

On June 28, 2016, the DOJ filed a Partial Consent Decree entered between the United States, the state of California, and Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., and Volkswagen Group of America Chattanooga Operations, LLC ("Volkswagen") to settle claims relating to the 2.0-Liter TDI subject vehicles. *See* Partial Consent Decree ("DOJ Order"), Dkt. 1605-

1 at 2. Pursuant to the DOJ Order, Volkswagen is required to "remove from commerce in the United States and/or perform an Approved Emissions Modification on at least 85% of the 2.0 Liter Subject Vehicles ("Recall Rate")." *Id.* at 3. Under the DOJ Order, Volkswagen must offer buyback or lease termination to every eligible vehicle for "Retail Replacement Value," which is satisfied based on the compensation detailed in the "FTC Order and Class Action Settlement." *Id.* at 3-4; *see* Appendix A to DOJ Order ("Buyback" or "Buyback Program"), Dkt. 1605-1 at 69. Volkswagen may also offer the option of an emissions modification, if the EPA/CARB accept Volkswagen's proposal regarding the modification. DOJ Order, Dkt. 1605-1 at 4. The DOJ Order requires Volkswagen to invest $2 billion in increased use of zero emission vehicles. *Id.* Volkswagen must also contribute $2.7 billion into a "Mitigation Trust" to be used to reduce emissions where the vehicles were or will be operated. *Id.* at 5. If Volkswagen does not achieve the 85% recall rate, they must pay additional funds into the Mitigation Trust. *Id.* at 4.

The DOJ Order details the Buyback Program for eligible owners and lessees, which is to begin no more than 15 days after the DOJ Order is entered. *See id.* at 48; Appendix A to DOJ Order, Dkt. 1605-1 at 69. The Order further provides that "Settling Defendants agree and acknowledge that their obligations under this EPA/CARB Consent Decree **are independent of the FTC Order and Class Action Settlement**." *See* Appendix A to DOJ Order, Dkt. 1605-1 at 69 (emphasis added). Volkswagen may resell the vehicles after the Buyback program if Volkswagen completes an approved emissions modification on the vehicles and meets certain other conditions. *See* Appendix B to DOJ Order, Dkt. 1605-1 at 43 (Section 7.2).

On June 28, 2016, the FTC also filed a Proposed Partial Stipulated Order for Permanent Injunction and Monetary Judgment ("FTC Order") resolving claims between the FTC and Volkswagen relating to the 2.0-Liter TDI subject vehicles. *See* FTC Order, Dkt. 1607. The FTC Order works in conjunction with the DOJ Order and includes charts of specific amounts Volkswagen would pay for owner Buyback, and restitution for class members who elect emissions modifications based

on the vehicle model, year, body style, region and mileage. *See* Attachments 1A, 1C, 3A, and 3C to FTC Order, Dkts. 1607-1, 1607-3, 1607-10, 1607-12. Under the FTC Order, the Court would "enter Judgment in the amount of ten billion and thirty-three million dollars **($10,033,000,000.00) against Defendant and in favor of the FTC**." *See* FTC Order, Dkt. 1607 at 13 (emphasis added). The Effective Date of the FTC Order is the "date the Court approves and enters [the FTC] Order, the DOJ Consent Decree, or the Class Action Settlement Agreement, whichever is latest." *See id.* at 5.

Plaintiffs moved for preliminary approval of a class action settlement on June 28, 2016. *See* Motion for Settlement, Dkt. 1606. On July 26, 2016, the parties submitted an Amended Consumer Class Action Settlement and Release ("Settlement"). *See* Settlement, Dkt. 1685. The Settlement indicates that it provides consumers with a buyback, lease termination or emissions modification option, as well as additional compensation. *See* Settlement, Dkt. 1685 at 16. The Settlement, however, provides no additional relief from what the DOJ and FTC Consent Orders provide. The Settlement confirms that "the maximum $10,033,000,000 funding pool from which Class Members will be compensated [] is the **same funding pool** described in the FTC Consent Order and the DOJ Consent Decree." Settlement, Dkt. 1685 at 11 (emphasis added).[4] The $10 billion funding pool is based on "100% Buyback of all purchased Eligible Vehicles and 100% Lease Termination of all leased Eligible Vehicles." Settlement, Dkt. 1685 at 11. The FTC explained that the "proposed [class action] settlement

[4] The Settlement includes a chart of ranges for "potential payments" to class members. *See* Exhibit 6 to Settlement, Dkt. 1685-6. The Attachments to the FTC Order that set forth consumer compensation differ slightly from the "possible payment amounts" contained in Exhibit 6 to the class action Settlement. *Compare* Dkts. 1607-1 through 1607-12 *with* Dkt. 1685-6. In support of final approval, plaintiffs included the declaration of economist Edward Stockton. *See* Declaration of Edward M. Stockton ("Stockton Decl."), Dkt. 1784-1. Mr. Stockton's declaration discussed the methodology used for calculating the buyback and lease termination and restitution values provided in the Settlement. *See id.* Plaintiffs explain that the FTC "used a particular approach that reached the **same result**" as Stockton. Final Approval Motion, Dkt. 1784 at 18 n.8 (emphasis added). Because there was consumer confusion over the difference in benefits calculation between plaintiffs and the FTC Order, the FTC filed a Statement regarding the class action Settlement. *See* FTC Statement Supporting the Settlement, Dkt. 1781. The FTC explained that the "proposed settlement provides **the same generous, but appropriate, compensation to each consumer** as the FTC Order." *Id.* at. 2 (emphasis added).

provides the **same generous, but appropriate, compensation to each consumer** as the FTC Order." FTC Statement, Dkt. 1781 at 2 (emphasis added).

F. Plaintiffs file Statement on Fees.

The Settlement does not disclose the amount of fees that plaintiffs' attorneys will seek but simply states that "Volkswagen agrees to pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as the work performed by other attorneys designated by Class Counsel to perform work in connection with the Action in an amount to be negotiated by the Parties and that must be approved by the Court." *See* Settlement, Dkt. 1685 at 38. On August 10, 2016, plaintiffs filed Settlement Class Counsel's Statement of Additional Information Regarding Prospective Request for Attorneys' Fees and Costs ("Statement on Fees"). *See* Dkt. 1730. In the Statement on Fees, class counsel revealed that they would seek no more than $324 million in attorneys' fees, plus actual and reasonable out-of-pocket costs, not to exceed $8.5 million. *Id.* at 3. Class counsel states that there is no agreement on fees with Volkswagen but that "**any future agreement**" will be disclosed when class counsel files its application for fees. *Id.* (emphasis added).

G. Objector Comlish is a class member who intends to appear through counsel at the fairness hearing.

As his accompanying declaration demonstrates, Objector Matthew Comlish is a member of the settlement class. Comlish's mailing address is 320 South Talbot Court, Roswell, Georgia. *See* Declaration of Matthew Comlish ("Comlish Decl.") (attached at Exhibit 2) ¶ 2. Comlish's phone number is 301-440-0987. Comlish Decl. ¶ 2. Comlish purchased a new Volkswagen Jetta Sportwagen TDI (Diesel 2.0) from Nalley Volkswagen in Alpharetta, Georgia in April 2014, with VIN number 3VWPL7AJXEM614013. *Id.* ¶ 3. (This VIN number is included in the proposed Settlement according to the vwcourtsettlement.com website.) Comlish has remained the owner of his Volkswagen Jetta since its purchase. *Id.* ¶ 3. Comlish is thus a class member and is an "Eligible Owner" under the Settlement. *Id.* ¶ 5. Comlish received the class Notice of the Settlement in the mail. *Id.* ¶ 4. Comlish created a profile on the settlement "Online Claims Portal" at

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https://www.vwcourtsettlement.com/en/ and his profile reference number is 160826198. *Id.* ¶ 5. Comlish has reviewed the class definition under the Settlement and has not opted out. *Id.* ¶ 6.

Comlish is represented by Theodore H. Frank of the non-profit Competitive Enterprise Institute. *See* Frank Decl. ¶ 3. Comlish intends to appear at the Fairness Hearing through his counsel, Theodore H. Frank, currently scheduled for October 18, 2016, at 8:00 a.m. *See* Comlish Decl. ¶ 7. Comlish reserves the right to cross-examine any witnesses put forward in support of the Settlement. Comlish objects to any provisions of the Settlement purporting to limit appellate rights of class members or creating new burdens beyond those imposed upon appellants in Federal Rules of Appellate Procedure 7 or 8. As further described below, Comlish's Objection to the Settlement applies to the entire class. Comlish further objects to the extent that the local rules are interpreted to limit his Objection to 15 pages.

ARGUMENT

I. Final Approval of the Settlement Must Be Denied Because the Class Notice Fails to Satisfy Due Process Requirements.

Notice to class members "must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15 (1950)). The fundamental strictures of due process demand that notice to absent class members fairly apprise them of the terms of the settlement to provide them an opportunity to voice their objections. *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1440 (9th Cir.1987), *rev'd on other grounds*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) ("*Cement*"). "The absence of adequate notice injects a fatal flaw into the entire settlement process and undermines the district court's analysis of the fairness of the settlement…." *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 972 (9th Cir. 2007) ("*Veritas*"). Under Ninth Circuit law, notice will satisfy due process if it "generally describes the terms of the settlement in sufficient

detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Cement*, 817 F.2d at 1440 (quoting *Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S. Ct. 1351, 67 L. Ed. 2d 336 (1981). The Long Form Notice ("Notice") here fails to satisfy due process requirements because (1) it misrepresents class members' opt out rights by stating that class members are not entitled to the Buyback relief if they opt out of the Settlement; (2) it misleads class members regarding class members' payment of attorneys' fees; and (3) it fails to disclose the entire settlement including the attorneys' fees sought and all agreements between the settling parties regarding fees.

A. The Notice misrepresents that potential class members cannot receive Buyback relief if they opt out of the Settlement.

The Supreme Court has held that a class action "notice should describe the action and the plaintiffs' rights in it" and "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co.*, 472 U.S. at 812. The Long Form Notice ("Notice") here violates both of these requirements by misrepresenting absent class members' opt-out rights. The Notice states that potential class members "who opt out will not be eligible to receive the cash payments provided by the Class Action Settlement or to participate in the Buyback program." Notice, Dkt. 1685-3 at 18.

The DOJ Consent Decree, however, requires Volkswagen to buyback every eligible vehicle at "Retail Replacement Value." Appendix A to DOJ Consent Decree, Dkt. 1605-1 at 69. Volkswagen's obligations under the DOJ Consent Decree are *independent* of the Settlement and "if for any reason the Settling Defendants do not perform their buyback obligations under the FTC Order and Class Action Settlement, or **if the Court does not enter those agreements, Settling Defendants must still offer and provide the Buyback** as required by this Paragraph." *See id.* at 69 (emphasis added). The Buyback program is required by the DOJ for every eligible class member regardless of whether the Settlement is ever approved. By misrepresenting to class members that Buyback relief is unavailable if the class

members opt out, the Notice improperly threatens class members to remain in the Settlement and violates class members' due process rights.

While Objector Comlish has no evidence indicating whether this error was accidental or intentional, the practical effect is the same: Class members may be improperly dissuaded from opting out of the settlement, even against their best interests, as described in Section II.A. This, in turn, benefits the parties: It has the effect of increasing the size of the non-opt-out class and, thus, the number of claim releases obtained by Volkswagen and the attorneys' fees sought by class counsel.

B. The Notice misleads class members by suggesting that the class is not responsible for payment of class counsel's attorneys' fees and that class counsel's attorneys' fees do not affect class compensation.

Notice does not satisfy due process if it misleads potential class members. *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). The Notice here is misleading because it advances the fiction that class members are not responsible for payment of attorneys' fees and that the fees are unrelated to the amount of class compensation. The Notice states the following regarding class counsel attorneys' fees:

> **53. How will the lawyers be paid?**
>
> Volkswagen will pay attorneys' fees and costs in addition to the benefits it is providing to the class members in this Settlement. At a later date to be determined by the Court, Class Counsel will ask the Court for an award of attorneys' fees and reasonable costs. Class members will have an opportunity to comment on and/or object to this request at an appropriate time. The Court must approve the award of attorneys' fees and costs to be paid by Volkswagen.
>
> **Any attorneys' fees and costs awarded by the Court will be paid separately by Volkswagen and will not reduce benefits to class members.**

See Notice, Dkt. 1685-3 at 27 (emphasis in original). Plaintiffs' Statement on Fees repeats this same deception that "regardless of the amount of fees the Court decides to award Settlement Class Counsel, Class Members' settlement benefits and payments will not be reduced by one cent." Statement on Fees, Dkt. 1730 at 2. The Notice is misleading because a reasonable class member would conclude

that the class is not paying for attorneys' fees and that class counsel's attorneys' fees had no impact on the negotiation of class members' compensation. Courts and academics have rejected this idea as a matter of basic economics.

The settling parties are economic actors with rational expectations. When the parties negotiate the class benefit first, the parties know in advance that those fee negotiations are coming. While class actions may be negotiated as a common fund structure (where the parties negotiate a single pot of money from which class counsel would later seek fees) or a segregated fee structure (where the parties negotiate the class benefit first and negotiate the fees later), defendant is concerned only with the full amount necessary to settle the case. The segregated fee structure is often sold to the class as a "good deal" because defendant is "responsible" for the fees and the payment won't affect class compensation. But "[a]nyone familiar with the most rudimentary principles of economics knows that [the segregated fee structure] sounds better than it is because the money always comes out of the class, whether directly or indirectly." Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 NYU L. REV. 439, 504 (1996).

The essential idea of starting at the end of the process and working backwards toward the initial decision is called "backward induction." Backward induction is "the standard method used by economists for analyzing strategic interactions in which parties make decisions over several time periods."[5] Courts have recognized this economic reality, debunking the myth that a segregated fee agreement benefits the class. In *Pearson v. NBTY*, the Seventh Circuit was recently presented with a similar settlement structure where Judge Posner observed:

> Class counsel claim that often they negotiate for the benefits to the

[5] See Lucian Bebchuk, "A New Theory Concerning the Credibility and Success of Threats to Sue," 25 J. Legal Stud. 1 (1996). For a discussion of backward induction, see Drew Dudenberg & Jean Tirole, Game Theory, 96-99 (1991). See also David M. Kreps, A Course in Microeconomic Theory, 399-402 (1990); James M. McCarrick & Karen A. Reardon, "When the Merits Don't Matter: The Influence of Insurance on Settlements in Securities Class Actions," Andrews Corporate Officers & Directors Liability Litigation Reporter, Dec. 28, 1998.

> members of the class first, selflessly leaving for later any consideration of or negotiation for their award of attorneys' fees. That claim is not realistic. For we know that an economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel. **Caring only about his total liability, the defendant will not agree to class benefits so generous that when added to a reasonable attorneys' fee award for class counsel they will render the total cost of settlement unacceptable to the defendant.** We invited class counsel to explain how, therefore, negotiating first for class benefits could actually benefit a class, and were left without an answer. Neither can we think of a justification for a kicker clause; at the very least there should be a strong presumption of its invalidity.

772 F. 3d 778, 786-87 (7th Cir. 2014) (Posner, J.) (emphasis added); *cf Bluetooth*, 654 F.3d at 948 (separation of fee negotiations from other settlement negotiations does not demonstrate that a settlement with disproportionate fee proposal is fair).

Academic authorities describe the segregated fee structure as a "particularly dangerous legal fiction." *See* Letter to Standing Committee on Ethics and Professional Responsibility from Lester Brickman, *et al.* (Sept. 17, 2007) at 10 ("Ethics Committee Letter") (attached at Exhibit 3). When clients are directly responsible for fee payments (e.g., fees come out of common fund structure in class action settlement), clients understand that fee payments will reduce their net recovery. *Id.* But in a segregated fee structure, "defendants' total payments [a]re allowed to be artificially bifurcated into allegedly separate payments made to the plaintiffs and to their counsel—as if the size and character of the agreement's fee payments to the plaintiffs' attorneys did not negatively affect what their clients ultimately received." *Id.*

In the Ethics Committee Letter, twenty leading legal academics proposed a *per se* rule banning the segregated fee practice where it compromised the right of the class to recover the excessive fees. *Id.* at 2-3. The Letter pointed to the tobacco settlements as a real-world example of the harm class members suffer when class counsel use a segregated fee structure, quoting Former New York Attorney General Christopher Cox's testimony before the House Subcommittee on Courts and Intellectual Property:

> It is specious to argue that these $45-55 billion in [attorneys'] fees are not being diverted out of the funds available for public health and taxpayers. The tobacco industry is willing to pay a certain sum to get rid of these cases. That sum is the total cost of the payment to the plaintiffs and their lawyers. It is a matter of indifference to the industry how the sum is divided—75% for the plaintiffs and 25% for their lawyers, or vice versa. **That means that every penny paid to the plaintiff's lawyers—whether it is technically 'in the settlement or not'—is money that the industry could have paid to the states or the private plaintiffs**. Excessive attorneys' fees in this case will not be a victimless crime.

See Ethics Committee Letter at 10-11 (quoting Testimony of Honorable Chris Cox, Subcommittee on Courts and Intellectual Property, Dec. 10, 1997, *available at* http://www.afn.org/~afn54735/tob971210a.html) (emphasis added).

Thus, contrary to the misleading statements in the Notice, not only are class members paying the attorneys' fees, but the payment of class counsel's fees impacts class members' compensation. The Notice fails to adequately provide class members with an informed view of the nature of the Settlement and thereby prevents class members from evaluating the Settlement with the understanding of class members' interest in the $332 million in fees and expenses sought by class counsel and that those fees impacted class compensation.

C. By pushing the fee negotiations until after final approval, the Notice does not disclose the "entire settlement" including any agreements between the settling parties regarding payment of attorneys' fees.

In seeking preliminary approval of the Settlement, plaintiffs proposed that attorneys' fees would be decided after final approval of the Settlement. *See* Plaintiffs' Motion for Preliminary Approval, Dkt. 1609 at 10-11; Long Form Notice, Dkt. 1606-3 at 25. Plaintiffs assured the court that "discussion of fees until after substantive settlement terms are agreed upon is a practice routinely approved by courts." Plaintiffs' Motion for Preliminary Approval, Dkt. 1609 at 11 (quoting *In re NFL Players Concussion Injury Litig.*, 2016 WL 1552205, at *26 (3d Cir. Apr. 18, 2016), *as amended* (May 2, 2016)). Class counsel further stated that any "future agreement" on fees between Volkswagen and class counsel would be submitted with class counsel's application for fees. *See* Statement on Fees, Dkt.

1730 at 2. This schedule contravenes the rules and practices of both the Northern District of California and the Ninth Circuit. The Nothern District of California's Procedural Guidance for Class Action Settlements states that "[r]egardless of when they are filed, requests for attorneys' fees must be noticed for the same date as the final approval hearing." *See* http://www.cand.uscourts.gov/ClassActionSettlementGuidance. In addition, plaintiffs' proposal contravenes Ninth Circuit law because without disclosure of the fees sought and any agreements on fees, the settling parties cannot disclose the "entire agreement" as required by the Ninth Circuit to fully analyze the fairness of the Settlement under Rule 23(e).

A class action notice does not comport with due process requirements if it does not disclose the terms of the settlement. *Cement*, 817 F.2d at 1440. The purpose of the notice is to allow class members to evaluate the merits and demerits of the proposed settlement. *Veritas*, 496 F.3d 962, 969 (9th Cir. 2007). At a minimum, notice must disclose the "aggregate amount of the proposed settlement." *See Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1374 (9th Cir. Ariz. 1993) (citing *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977)). In a common fund settlement like *Torrisi*, the "aggregate amount" is the fund from which the class and the attorneys will be paid. *See id.* at 1374-75. But even if the parties use a segregated fee structure (sometimes termed a "constructive common fund"), the "aggregate amount" of the settlement still includes both the class relief *and* the attorneys' fees.

As the Ninth Circuit observed, "courts have embraced the constructive common fund approach, warning that 'private agreements to structure artificially separate fee and settlement arrangements' should not enable parties to circumvent the 25% benchmark requirement on 'what is in economic reality a common fund situation.'" *Bluetooth*, 654 F.3d at 943 (quoting *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 821 (3d Cir. 1995)); *see also* Wolfman, 71 NYU L. REV. at 504 ("[T]he class action Rules should treat direct payment of fees from the defendant to the plaintiffs' lawyer as payments into the common fund."). "[I]n essence the **entire**

settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (emphasis added); *cf.* Manual for Complex Litig. § 21.75 (4th ed. 2008) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class.").

In *Bluetooth*, the Ninth Circuit held that class counsel's fees are integral in the district court's Rule 23(e) fairness determination. *See Bluetooth*, 654 F.3d at 945-46. "[W]here, as here, a settlement agreement is negotiated prior to formal class certification, consideration of the[] eight Churchill factors alone is not enough to survive appellate review." *Id.* at 946. The district court's 23(e) analysis must also consider warning signs of self-dealing including: (1) "when class counsel receive a disproportionate distribution of the settlement;" (2) "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds" and (3) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* at 947. Indeed, the Court cannot complete its Rule 23(e) fairness determination if it cannot make the necessary "comparison between the settlement's attorneys' fees award and the benefit to the class or degree of success in the litigation." *Bluetooth*, 654 F.3d at 943.

Here, plaintiffs' "Statement on Fees" indicates that they won't request more than $332 million in fees and expenses. *See* Statement on Fees, Dkt. 1730 at 3. But class members would have to search through over 1700 docket entries to find that information because it is not in the Notice and is not on the Settlement website. *See* Notice, Dkt. 1685-3; *see* https://www.vwcourtsettlement.com/en/. More important, the Notice and Statement on Fees do not disclose the settling parties' agreements as to fees. Plaintiffs state that they have "engaged in substantive discussions regarding the payment of attorneys' fees and costs" with Volkswagen, *see* Final Approval Motion, Dkt. 1784 at 12, and any "future agreement" will be disclosed when plaintiffs seek fees, *see* Statement on Fees, Dkt. 1730 at 2. Because any agreement where Volkswagen will not challenge the fee request (clear sailing) or where

any unawarded fees are returned to Volkswagen (reversion) must be considered when ruling on Rule 23(e) fairness, *Bluetooth*, 654 F.3d at 947, a motion for final approval before such agreements are disclosed is premature. Failure to disclose such agreements before final approval further violates Rule 23. *See* Fed. R. Civ. P. 23(e)(3) ("The parties seeking approval must file a statement identifying any agreement made in connection with the proposal."). The Notice fails to disclose the "entire agreement" because it does not include the fees sought and fee agreements between the parties, both of which are material facts necessary for analyzing 23(e) fairness and the disclosure of which is necessary to satisfy due process. *See also In re: Mercury Interactive Corp. Securities Litigation,* 618 F.3d 988 (9th Cir. 2010).

II. Final Approval Must Be Denied Because Class Counsel Cannot Satisfy Rule 23(g)(4) Adequacy Based on Multiple Breaches of Fiduciary Duty.

Adequate representation is a prerequisite to class certification. Fed. R. Civ. P. 23(g)(4). If class counsel "through breach of his fiduciary obligations to the class … or otherwise, demonstrates that he is not an adequate representative of the interests of the class as a whole, realism requires that certification be denied." *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002) (citing *Zucker v. Occidental Petroleum Corp*., 192 F.3d 1323, 1327-28 (9th Cir. 1999); *Sondel v. Northwest Airlines, Inc*., 56 F.3d 934, 938 (8th Cir. 1995); *Piambino v. Bailey*, 757 F.2d 1112, 1139 (11th Cir. 1985)); *see also Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917-18 (7th Cir. 2011) ("Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification."). Here, final approval must be denied because class counsel does not satisfy Fed. R. Civ. P. 23(g)(4) based on their numerous breaches of fiduciary duty including negotiating a settlement that only provides negative value to the class, structuring a segregated fee structure that cost the class significant benefits, failing to compete in appointment of class counsel and running up the lodestar to support an excessive future fee request.[6]

[6] Plaintiffs are also inadequate class representatives under Rule 23(a)(4) for the same reasons that class counsel are inadequate. *See Pearson,* 727 F.3d at 787 ("Class counsel rarely have clients to whom they are

A. Class counsel breached their fiduciary duty by negotiating a *negative* value settlement where the class receives nothing more than what is available under the DOJ/FTC Orders, but imposes high transaction costs of $332 million in attorneys' fees and expenses.

"Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement." *Bluetooth*, 654 F.3d at 946. In addition to explicit collusion, district courts must determine if "class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* at 947. If "class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class." *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000). If the "fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have [been] obtained." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

Class counsel here have breached their fiduciary duty because they negotiated a Settlement where class counsel are the only beneficiaries. The Settlement provides no additional benefits to class members that the DOJ and FTC Consent Decrees don't already provide. The DOJ Consent Order requires the Buyback and Lease Termination Program regardless of whether the Settlement is approved, *see* Appendix A to DOJ Consent Decree, Dkt. 1605-1 at 69, and the FTC Order provides the $10 billion judgment against Volkswagen in favor the FTC that funds the Buyback and Lease Termination Program, *see* FTC Consent Order, Dkt. 1607 at 13. The buyback and restitution relief discussed in the Settlement is the **same relief** provided by the DOJ and FTC orders. Settlement, Dkt. 1685 at 11; FTC Statement Supporting the Settlement, Dkt. 1781 at 2. Thus, if the DOJ and FTC

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responsive. The named plaintiffs in a class action, though supposed to be the representatives of the class, are typically chosen by class counsel….")

Orders[7] were entered right now, class members would receive everything that the Settlement could ever offer.

In *In re Aqua Dots Products Liability Litigation*, the Seventh Circuit found class certification inappropriate because plaintiffs were inadequate when they too structured a settlement for relief that was already available:

> Plaintiffs want relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class. A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests. …
>
> The principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class's lawyers enough to make them go away; effectual relief for consumers is unlikely.

654 F.3d 748, 752-53 (7th Cir. 2011); *see also Pampers*, 724 F.3d 713 (finding plaintiffs inadequate representatives where settlement provided valueless relief including refund program to which class members had already had access); *cf. In re Walgreen Co. Shareholder Litigation*, ___ F.3d ___, 2016 U.S. App. LEXIS 14684, *16 (7th Cir. Aug. 10, 2016) (Posner, J.) (finding class counsel inadequate under 23(g)(1) and (g)(4) because "[t]he only concrete interest suggested by this litigation is an interest in attorneys' fees, which of course accrue solely to class counsel and not to any class members").

Like *Aqua Dots*, the Settlement here does not provide additional benefits to the class but actually imposes **negative** value because class members are required to release their claims in exchange for nothing but transaction costs of $332 million in attorneys' fees and expenses. *See* Individual Release of Claims Exhibit 5 to Settlement, Dkt. 1685-5 (requiring notarized execution by class member); Statement on Fees, Dkt. 1730 at 3. And like *Aqua Dots*, class counsel have proven themselves

[7] As explained above, the FTC Order as proposed does not become effective until the Settlement is approved. *See* FTC Order, Dkt. 1607 at 5. The Court should exercise it discretion to amend the Effective Date of the FTC Order to permit immediate relief to class members. *See supra* at 2 n.2.

inadequate representatives.[8] Indeed, for these same reasons, the Settlement cannot satisfy Rule 23(e) fairness. Class members are better off opting out because they would receive the same relief without having to release their claims. *Allen v. Similasan Corp.*, 2016 U.S. Dist. LEXIS 105848, at * 15 (S.D. Cal. Aug. 9, 2016) (rejecting settlement where class members "would be better off opting out, since they would receive the same benefits of the injunctive relief in the Settlement Agreement but would not be giving up their right to sue").

Further, class counsel cannot justify the $332 million high transaction costs by claiming credit for the government's work. Class counsel argues that "the parties to this class action" achieved the resolution which provides the "$10 billion in cash." Statement on Fees, Dkt. 1730 at 2. Class counsel is claiming credit where credit is not due. The $10 billion relief comes from the FTC Order which provides a money judgment against Volkswagen **in favor of the FTC**, not plaintiffs. *See* FTC Consent Order, Dkt. 1607 at 13. Even the FTC's Statement minimizes class counsel's contribution, as it was the FTC that "'pulled the laboring oar in constructing the proposed settlement.'" *Id.* at 2 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)).

"Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). Class counsel should be compensated for "the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations." *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 165-166 (3d Cir. 2006) (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 336-37 (3d Cir. 1998)); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993) (affirming district court's fee award reduction where counsel's efforts "piggybacked" on success of earlier case); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 43 (2000) ("Lawyers who file coattail class actions should nearly always earn lower fees than they

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would have earned had they achieved the same result without the benefit of prior government litigation."). Class counsel came to the table months after the government had been negotiating with Volkswagen and its retained expert Feinberg. That they didn't achieve anything is demonstrated by the lack of additional benefit from the Settlement. That they will seek $332 million in fees and expenses for these efforts demonstrates a breach of fiduciary duty.

In sum, class counsel breached their fiduciary duty by negotiating a Settlement that makes class members *worse* off because class members are releasing their claims in exchange for nothing that is not already available under the DOJ and FTC Orders and imposes transactional costs of $332 million in fees and expenses.

B. Class counsel breached fiduciary duty by negotiating a segregated fee structure that cost the class hundreds of millions of dollars.

"A fundamental premise of the American legal system is that lawyers must be undividedly loyal to their clients' interests, even above their own." Ethics Committee Letter at 6 (citing Herbert Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS, § 15.03 (3d ed. 1992) ("[A]ttorneys . . . seeking to represent the class assume fiduciary responsibilities to the class . . .")). Ethics rules limit the circumstances in which third parties can compensate attorneys because "if lawyers are compensated by parties other than their clients, they are, at a minimum, placed at grave risk of becoming fiduciaries of their clients *in name only*." Ethics Committee Letter at 7 (emphasis in original); *see also Zucker*, 192 F.3d at 1327 ("[T]he lawyer might 'by accepting or bargaining for any compensation from the other side, even if fully disclosed to his client, put himself in a position which will interfere with his wholehearted duty to his client.'"). Where plaintiffs' counsel and defendants are negotiating fees separate from recovery, "[l]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Bluetooth*, 654 F.3 at 847 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)); *Lobatz*, 222 F.3d at 1147 ("If … class counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class."). "It is the duty of attorneys under fiduciary

principles, the law of agency, and the rules of ethics to achieve the best possible results for their clients." *See* Ethics Committee Letter at 10-11. By structuring a segregated fee structure, class counsel sacrificed the best possible results (hundreds of millions in class compensation) and the class's interests in three ways.

First, the segregated fee structure likely cost the class hundreds of millions in class compensation. A segregated fee structure leads to less compensation for the class based on settling parties' backward induction in the negotiation process. A defendant entering settlement negotiations will have a reservation price which is less than the expected total cost of trial. For example, if trial will cost a defendant $101, defendant would enter the negotiation with a total reservation price of $100. In a one-step negotiation, defendant may negotiate up to the $100 reservation price and the defendant is indifferent as to the percentage of that fund that is allocated to the class or class attorneys' fees. If defendant enters a two-step negotiation, however, defendant must estimate the number of attorneys' fees that will be negotiated in the second step. Defendant is incentivized to *overestimate* attorneys' fees in a two-step process, however, because any underestimation could lead to the defendant exceeding his total reservation price. Thus, even if a defendant estimates a $20 attorneys fee, defendant will not pay $75 during initial negotiation because an underestimation of attorneys' fees could lead to the total value of litigation exceeding the $100 total reservation price. The defendant would instead pay a lower amount, such as $70, in the initial class negotiations and leave extra space for the second-step negotiations to ensure that defendant does not exceed the $100 total reservation price. If defendant and class counsel agree on $30, defendant will have avoided exceeding its total reservation price and if defendant and class counsel agree on $25, then defendant will enjoy a savings of $5. But whatever the result of the second-step negotiations, the class will receive less than if negotiations had occurred in a single step.

In other words, if class counsel had not engaged in a segregated fee structure here, the class benefit would likely have been hundreds of millions of dollars higher. Volkswagen and class counsel

did "not discuss[] the amount of fees and costs to be paid prior to agreement on the terms of this Class Action Agreement." *See* Settlement, Dkt. 1606 at Section 11.1. Volkswagen had no way of knowing what class counsel would actually request, but had to assume a very large amount. Class counsel later reported that they would seek no more than $324 million in fees and $8.5 million in expenses, *see* Statement on Fees, Dkt. 1730 at 3, which amount "represents an amount far below the 25% benchmark established by the Ninth Circuit, which, if adopted by the Court here, would yield a fee award of **more than $3.5 billion**." Final Approval Motion, Dkt. 1784 at 13 (emphasis added). Because Volkswagen did not know the amount of fees class counsel would seek, Volkswagen had an incentive to conservatively estimate that class counsel would be seeking $1 to $3.5 billion dollars based on the Ninth Circuit's 25% benchmark and Ninth Circuit precedent. Because Volkswagen was incentivized to hold back those billions of dollars during the first step of negotiations, the class would have lost hundreds of millions in compensation in compromise of the claims or the additional amount that defendant had reserved for negotiating fees.

Second, class counsel also breached their fiduciary duty by structuring a segregated fee structure because of the potential reversion to Volkswagen if the Court awards less than $324 million. If the settling parties agree to $324 million in fees, but the Court awards less than the $324 million, the unawarded fees would revert back to Volkswagen. Courts have repeatedly held that the reversion to defendant is part of a constructive common fund and reflects money that a defendant *would* have been willing to pay class members to settle, whether it was negotiated separately or not. *Pearson*, 772 F.3d at 786-87; *Redman v. RadioShack Corp.,* 768 F.3d 622, 637 (7th Cir. 2014); *Bluetooth*, 654 F.3d at 948-49; *Johnston*, 83 F.3d at 245-46; *see also* Lester Brickman, LAWYER BARONS 522-25 (2011) (reversionary kicker should be considered *per se* unethical). If the defendant is willing to pay $324 million, then class counsel—as fiduciaries for the class—should have structured the settlement to capture the unawarded fees for their clients rather than returning to Volkswagen. Their failure to do so is a breach of fiduciary duty.

Third, class counsel breached their fiduciary duty by structuring the segregated fee structure because it improperly insulates their fee on appeal. The reversion or kicker agreement is described as "a gimmick for defeating objectors." *Pearson*, 772 F.3d at 786. "If the class cannot benefit from the reduction in the award of attorneys' fees, then the objector, as a member of the class, would not have standing to object, for he would have no stake in the outcome of the dispute." *Id.* at 786; *cf. Stetson v. Grissom*, 821 F.3d 1157, 1164 (9th Cir. 2016) (noting that objector generally does not have standing to appeal fee award in class action if objector did not participate in settlement because "reduction in class-counsel fees will not benefit him"). In a common fund setting, a court could correct an excessive fee request by "increase[ing] the share of the settlement received by the class, at the expense of class counsel." *Pearson*, 772 F.3d at 786 (quoting *Redman*, 768 F.3d at 632). But "[t]his route is barred unless the judge invalidates the kicker clause." *Pearson*, 772 F.3d at 786. While an objector here has the right under Rule 23(h) to object in the district court to class counsel's attorneys' fee request, an objector would have no standing to challenge only the fee request on appeal. *See Stetson*, 821 F.3d at 1163. As fiduciaries, class counsel is required to place their clients' interests above their own. Class counsel breached their fiduciary duty by placing their interests above class members with a segregated fee structure that insulates their fee request from correction on appeal.

C. Class counsel breached their fiduciary duty by failing to compete for class counsel appointment and running up the lodestar to the detriment of the class.

Class counsel also breached their fiduciary obligation by placing their financial interests above class members when seeking appointment as class counsel. "[A] fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client." Ethics Committee Letter at 27 (quoting *In re Swartz*, 686 P.2d 1236, at 1243 (Ariz. 1984)). "An attorney is only entitled to fees which are fair and just and which adequately compensate him for his services." Ethics Committee Letter at 28 (quoting *Missouri ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W. 2d 832, at 835 (Mo. App. 1996)). "[N]egotiating a settlement that elevates a

lawyer's financial interests over that of the class is a breach of the lawyer's fiduciary obligation to the client not to elevate the lawyer's financial interests over that of the client and is unethical as well, no matter how much money is at stake for the lawyer." Lester Brickman, LAWYER BARONS 524 (2011). CCAF filed a brief of *amicus curiae* with this Court requesting that counsel engage in competitive bidding for selection of lead counsel to ensure a market rate to plaintiffs' attorneys and avoid a windfall fees out of the class's recovery. *See* Brief of Amicus Curiae, Dkt. 576 at 1. The Court did not require competitive bidding. Instead, the parties collaborated rather than competed for lead counsel. By failing to compete, the lawyers placed their financial interests above the class's and deprived the class of the savings the class would have realized from a competitive process.

In a competitive market, a firm proposing to a sophisticated client a rate that would result in an above-market return would find itself underbid by competitors willing to accept a smaller above-market return, until all above-market rents were bid away. Thus, for defense lawyers, competition will bid down defense lawyers' fees to lodestar, that is, billable hours times market rate of services per hour. For plaintiffs' counsel, however, the contingency adds risk that effects the market rate, as explained by Judge Posner in *Steinlauf v. Continental Illinois Corp.*:

> Suppose a lawyer can get all the work he wants at $200 an hour regardless of the outcome of the case, and he is asked to handle on a contingent basis a case that he estimates he has only a 50 percent chance of winning. Then if (as under the lodestar method) he is still to be paid on an hourly basis, he will charge (if risk neutral) $400 an hour for his work on the case in order that his expected fee will be $200, his normal billing rate. If the fee award is to simulate market compensation, therefore, the lawyer in this example is entitled to a risk multiplier of 2 (2 × $200 = $400).

962 F.2d 566, 569 (7th Cir. 1992). Thus, if competitive bidding was used by plaintiffs' attorneys, one firm would request a contingent percentage of recovery that would produce an *ex ante* expectation greater than lodestar and another firm has the incentive to underbid that firm by offering a lower contingent percentage of recovery that still produces an expectation of lodestar or greater. With

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enough competition, one would expect the contingent-fee rate to be bid down to the expected risk-adjusted lodestar.

But in this unique case, the risk of not recovering lodestar was minute. Class counsel entered this action where Volkswagen effectively admitted liability, had already engaged an alternative dispute resolution expert who had *carte blanche* authority to pay class members, and where government agencies were leading investigations that sought over $50 billion in damages. This Court recognized that this case would not present significant hurdles for proving liability because "[i]t is obviously not a who-done-it type of case. It is more of a case of how do we fix what was done." *See* Transcript of Proceedings of Hearing dated Jan. 21, 2016, Dkt. 1119 at 30. If class counsel had engaged in competitive bidding, the limited risk would have driven class counsel's compensation down to lodestar.

Rather than competing during appointment of counsel, the law firms collaborated and created alliances. 67 firms supported the appointment of Elizabeth J. Cabraser as lead counsel including 16 firms that were appointed to the Steering Committee; Ms. Cabraser in turn supported their applications. *See supra* at 9. The fact that such a large number of firms collaborated instead of competing is a typical sign of anti-competitive behavior that reflect an expectation of receiving rates well above market and opportunity costs—in other contexts and perhaps even this one, it might be called price fixing in violation of the antitrust laws.

This anti-competitive behavior is typical of the scheming in the MDL setting where the same players show up again and again. "On the plaintiffs' side, repeat players (attorneys who held more than one leadership position within our dataset) held 767 out of 1,221 available leadership roles, or 62.8 percent." Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Paper No. 2016-04 at 21, 73 (Table A3) (Feb. 2016) ("Burch"), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724637 (forthcoming 102 CORNELL LAW REVIEW ___ (2017)) (reporting that Lieff Cabraser was in top 5 of

firms with most MDL leadership appearances). "[T]he relevant plaintiffs' bar is small, lead lawyers can influence and sometimes directly control one another attorneys' fees, lawyers must often rely on each other to form funding coalitions, and, as explained below, being dubbed 'uncooperative' may render defectors ineligible for future leadership roles." *Id.* at 13. "Critics likewise note that, as veterans, leaders have developed an arsenal of strategies to corral, convince, and coerce other lawyers to come together for proposes of organizing and settling cases en masse." Burch at 4 (citations omitted)*; see, e.g.,* Transcript of Proceedings of Jan. 21, 2016, Dkt. 1119 at 102 (applicant Miles describing previous case where applicants Berman and Cabraser "corralled all of the co-leads").

Rather than competing, the MDL repeat players engage in backscratching to the detriment of the class:

> Lawyers' finances may be intertwined with each other not only through settlement provisions that condition the deal (and attorneys' fees) on achieving a certain plaintiff participation rate, but also through formal joint venture agreements and **informal promises to distribute common-benefit work and leadership positions to allies**. Longstanding principal-agent research suggests that agents' financial self-interest may color their advice to clients. Just as they do in the class action and criminal context, **repeat players face systemic temptations to be more loyal to each other or even to defendants, than to their own clients**.

Burch at 63.

This Court found competitive bidding unnecessary because the Court would determine whether the final fee was reasonable and the Court would be thorough in its review of time records and expenses. *See* Transcript of Proceedings of Jan. 21, 2016, Dkt. 1119 at 40. But the Court's subsequent review of time records of 22 firms does not prevent the running up of lodestar of those firms.[9] And class counsel have every incentive to run up the lodestar. Given the involvement of the numerous government agencies already engaged in negotiating consumer relief, the assignment of a

[9] The Court appointed 22 individuals, but advised class counsel to "draw upon their firms and co-counsel to assist them with their duties." *See* Pretrial Order No. 7, Dkt. 1084 at 4.

1 settlement master and the great time pressure to resolve the action quickly, the remaining work for
2 class counsel would be short lived; in fact, the action settled just **three months** after appointment of
3 class counsel. Class counsel knows that they need a substantial lodestar to justify a large fee request
4 because even if they seek fees based on percentage of recovery, the Court will utilize a lodestar
5 crosscheck to "confirm that a percentage of recovery amount does not award counsel an exorbitant
6 hourly rate." *Bluetooth*, 654 F.3d at 945.

7 Indeed, class counsel's own Statement of Fees demonstrates that they have improperly inflated
8 their lodestar. *First,* class counsel has indicated that they will submit a fee application some time in the
9 future with no explanation as to why such application must be delayed. Delaying the fee application
10 until after final approval permits class counsel to submit a greater lodestar than if they had submitted
11 their application prior to final approval. *Cf. In re Citigroup Inc. Sec. Litig.,* 965 F. Supp. 2d 369, 392
12 (S.D.N.Y. 2013) (discounting $7.5 million of lodestar for time spent after the parties reached an
13 agreement in principle); *see also In re AOL Time Warner, Inc. Securities & "ERISA" Litigation*, No. 02 Civ.
14 5575 (SWK), 2006 U.S. Dist. LEXIS 78101, at *73 (S.D.N.Y. Sept. 28, 2006) (R&R of Special Master),
15 adopted, 2006 U.S. Dist. LEXIS 77926 (S.D.N.Y. Oct. 25, 2006) (reducing lodestar by 5,000 associate
16 hours for document review performed after signing a memorandum of understanding and before
17 execution of settlement agreement).

18 *Second*, class counsel have indicated that lawyers or paralegals are spending 30-60 minutes with
19 individual class members answering questions regarding the Settlement. *See* Statement of Fees, Dkt.
20 1730 at 3. There is no reason an attorney needs to spend 60 minutes discussing the Settlement with
21 class members at $500/hour when such discussions could be handled by a $30/hour trained claims
22 administrator or other temporary contract employee. Class counsel's inefficient use of resources
23 reflects an inflation of lodestar to justify their future request of $332 million in fees and expenses.

24 Competitive bidding would have limited relief to a true lodestar. Instead, without competitive
25 bidding and with the certainty of a large settlement, class counsel is incentivized to accumulate the
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greatest (inflated) lodestar possible for their individual firms as well as their co-counsel. By inflating their lodestar, class counsel have elevated their financial interests above that of their clients in violation of their fiduciary obligations.

D. Class counsel disguises its selfish Settlement by artificially inflating the Settlement value.

In determining whether proposed class counsel is adequate, "the Court may consider the honesty and integrity of the putative class counsels, as they will stand in a fiduciary relationship with the class." *Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 160 (S.D.N.Y. 2010); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("[B]ecause class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole."). In assessing Rule 23(e) fairness, the Court must determine the value of "the benefit to the class." *Bluetooth*, 654 F.3d at 943. Class counsel breached its fiduciary duty by misrepresenting the value of the benefit to the class.

Class counsel states that they will seek fees utilizing a percentage of recovery based on the "$10.033 billion Funding Pool commitment obtained by the Settlement." *See* Statement of Fees, Dkt. 1730 at 3. As an initial matter, this is misleading because the Settlement does not provide $10 billion; it is the FTC Order, not the Settlement, that will enter judgment of $10 billion against Volkswagen and in favor of the FTC. *See supra* Section II.A. Further, class counsel is misrepresenting the value of the relief to the consumers because $10 billion grossly overstates the value of what the class will actually receive.

First, the $10 billion is the amount of the Buyback, Lease Termination and Restitution relief if there is 100% Buyback of purchased vehicles and 100% Lease Termination of leased vehicles." Settlement, Dkt. 1685 at 11. But this is the amount it will cost *Volkswagen* to provide the relief, which is not the same as the value to the class. (Indeed, $10 billion is not even the *actual* cost to Volkswagen because they may later sell the vehicles after the Buyback which will offset that cost. *See* Appendix B

to DOJ Consent Decree, Dkt. 1605-1 at 43.) The cost to the defendant is not the benefit to the class. "[T]he standard [under Rule 23] is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)). Here, the class members are giving up something of value in exchange for the relief. For example, imagine a class member receiving a buyback of $15,000 plus restitution of $5,986. *See* Stockton Decl. Dkt. 1784-1 ¶ 35. That class member is not receiving $20,986 in relief. Her vehicle still has value and thus, to receive the relief she is giving up that value. Thus, the value to the class member is the $20,986 *less* the market value of her vehicle that she is giving up. The value she is receiving is closer to $5,000 than to $20,000. Thus, the gross relief available is likely closer to $2 to $3 billion rather than $10 billion.

Second, even if the total relief available to the class is $2 to $3 billion, that assumes a 100% participation rate. The class benefit must be valued on what the class *actually* receives. In *Allen v. Bedolla*, the Ninth Circuit evaluated a settlement that provided for clear-sailing, segregated fee award of $1.125 million while a sub-8% claims rate meant that the class would receive at most $373,675. 787 F.3d 1218, 1224 n.4 (9th Cir. 2015). The Ninth Circuit held that even though the $1.125 million was only 25% of the *gross fund* established by the settlement, "when examined in terms of 'economic reality,' the award exceeds the maximum possible amount of class recovery by a factor of three." *Id.* at 1224 (footnote and citations omitted); *see also Pearson*, 772 F.3d at 781 (holding that class benefit is the amount actually realized by the class); *Redman*, 768 F.3d at 630 (same). Thus, the value of the class benefit cannot be calculated until the claims process is complete.

Third, the $4.7 billion in environmental remediation and zero-emission technology initiatives is not a class benefit. In describing the benefits of the Settlement, plaintiffs argue that "the Settlement compensates Class Members for the loss in market value of the Eligible Vehicles and for Volkswagen's misrepresentations about the environmental characteristics of the Eligible Vehicles, provides for the buyback and potential refit of the Eligible Vehicles to make them compliant with applicable

environmental regulations, and **results in the creation of a substantial fund for mitigation of the environmental harms caused by excess emissions from the Eligible Vehicles**." Final Approval Motion, Dkt. 1784 at 16 (emphasis added).

The Settlement does not create the $4.7 billion relief. Indeed, the Settlement recognizes that such relief is required under the DOJ Order: "In addition, under the related DOJ Consent Decree, Volkswagen will pay $2.7 billion to fully remediate any environmental effects of excess NOx emissions, and will invest an additional $2.0 billion to create infrastructure for and promote public awareness of zero emission vehicles ("ZEVs")." Settlement, Dkt. 1685 at 3. More important, the $4.7 billion environmental relief is *cy pres* relief that should not be considered in valuing the class benefit. *See Pearson,* 772 F.3d at 784 (holding that *cy pres* should not be counted as a settlement benefit).

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In sum, class counsel have negotiated this Settlement against the interests of unnamed class members, and thus have fallen short of the undivided loyalties counsel must have toward unnamed class members under Rule 23(g)(4). *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 968 (9th Cir. 2009) ("The responsibility of class counsel to absent class members…does not permit even the appearance of divided loyalties of counsel.") (internal quotation omitted). Accordingly, the Court should deny final approval.

III. Final Approval Must Be Denied Because the Settlement Cannot Satisfy Superiority.

Rule 23(b)(3) requires a showing that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Superiority it not satisfied here.

First, superiority is not satisfied because the attorneys are the primary beneficiaries of the Settlement. As explained above, the Settlement provides no additional benefit to class members that they would not receive under the DOJ and FTC Orders. *See* Section II.A. Because the Settlement offers no additional benefit, the only beneficiaries of the Settlement are plaintiffs' attorneys, who are

seeking hundreds of millions of dollars in fees. The Ninth Circuit has held that "[w]henever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute." *In re Hotel Tel. Charges*, 500 F.2d 86, 91-92 (9th Cir. 1974). As in *Hotel Tel. Charges*, because class counsel are the only beneficiaries of the class action here, the Settlement is not a superior method for resolving the dispute.

Second, superiority is not satisfied because the DOJ and FTC Orders provide class members with the same "generous compensation" that the Settlement purports to provide but without requiring class members to release all claims. The superiority inquiry asks what is the best method of adjudication from the perspective of absent putative class members. Accordingly, "the court must 'assess the advantages of alternative procedures for handling the total controversy.'" *Kamm v. California City Development Co.*, 509 F.2d 205, 211-212 (9th Cir. Cal. 1975) (quoting Advisory Committee Note to Amended 23). In *Kamm,* the Ninth Circuit elucidated the standards for the superiority inquiry. There, the Ninth Circuit affirmed the district court's finding that a class action was not superior because "proceedings had already [been] brought by the California officials in state court," and observed several other factors in support of a finding that a class action was not superior:

> (1) A class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level. (2) The class action would involve 59,000 buyers in separate transactions over a 14 year period, with part of the buyers desiring to retain their land. (3) **Significant relief had been realized in the state action through (a) restitution to many members of the class**; (b) Western Cities' agreement to establish a program to settle future disputes; 14 (c) **a permanent injunction**; and (d) a letter of credit in the amount of approximately $5,000,000 to guarantee funds for off-site improvements. (4) **The state court retained continuing jurisdiction**. (5) **No member of the class is barred from initiating a suit on his own behalf**. (6) Although the class action aspects of the case have been dismissed, appellants' action is still viable. (7) Defending a class action would prove costly to the defendants and duplicate in part the work expended over a considerable period of time in the state action.

509 F.2d at 212 (emphasis added). The bolded factors above are also present here.

Applying the *Kamm* factors, district courts have denied class certification on superiority grounds where class members already receive significant relief from settlements with government agencies. In *Imber-Gluck v. Google Inc.*, No. 5:14-cv-01070-RMW, 2015 U.S. Dist. LEXIS 44839, at *8 (N.D. Cal. Apr. 3, 2015), for example, the Court held that the superiority requirement was not met where an FTC settlement provided "significant relief" sought in the proposed class action and did not bar individual actions by class members, while the class action would impose transaction costs and be largely duplicative. *Cf. Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014) ("No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars."); *Saunders v. Trattoria*, No. CV 07-1060, 2007 U.S. Dist. LEXIS 97193 (C.D. Cal. Oct. 23, 2007) (class action not superior where underlying law "provided individuals the ability to bring their own actions").[10] So, too, here. The DOJ and FTC Orders provide class members with substantial relief, while the Settlement provides no additional relief but instead imposes transaction costs in the form of class counsel fees and expenses, as well as a release of claims. This begs the question: How does the Settlement possibly represent a superior method of adjudication?

That class counsel would impose $332 million transactional costs on the class is particularly egregious given that a generous consumer relief program was already in the works before they were even appointed as class counsel. A month before this Court appointed lead counsel, Volkswagen had engaged Kenneth R. Feinberg to develop and administer a claims program. *See* Volkswagen Press Release. Having administered some of the most successful complex litigation claims programs,

[10] In that same vein, as in *Allson v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), "the most compelling rationale for finding superiority in a class action-the existence of a negative value suit-is missing in this case." *Id.* at 420. "A negative value suit is one in which class members' claims would be uneconomical to litigate." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 n.l (5th Cir. 2004) (internal quotation omitted). The damages claims of this lawsuit are astronomical and provide ample incentive for class members to proceed on an individual basis.

Feinberg intended to begin a claims program within 60-90 days from his December 17th engagement that would provide generous compensation for consumers to yield the same 90% plus participation his previous programs boasted. *See* Lindner *supra* at 7. Thus, before class counsel had even filed the Complaint in the MDL, Mr. Feinberg was ready to launch a consumer relief program, delayed only by Volkswagen waiting for U.S. regulators' approval to fix the vehicles. *See id.*

Beyond the requirement of benefit in addition that obtained through government efforts, the superiority "determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. Cal. 1998); *see also Kamm*, 509 F.2d at 211-212. Mr. Feinberg was paid between $850,000 to $1.25 million per month for approximately two years to administer the $20 billion BP Oil Spill fund—and the BP fund was a far more complex undertaking where claimants had individualized damages for lost business, rather than a single set of economic damages that could be formulaically applied based on the value of the automobile. For Feinberg to spend $324 million, that run rate would last between 22 and 32 years.

Feinberg's engagement compared to class counsel's potential fees demonstrates that the Settlement cannot satisfy superiority requirements because a class resolution here is not "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3); *see Saunders*, 2007 U.S. Dist. LEXIS 97193, at *3 (class action must be "superior—not just as good as—other available methods of handling the controversy" (internal quotations omitted)). Despite having the burden to do so, Plaintiffs have not shown that this class action is superior to the DOJ and FTC investigations, either alone or in combination with, a claims process administered by Mr. Feinberg that was likely to result in overwhelming acceptance by putative class members at a significantly lower cost.

CONCLUSION

For the forgoing reasons, consumer Plaintiffs' Motion for Final Approval should be denied, the DOJ Consent Decree and the FTC Stipulated Order should be entered and the FTC

Stipulated Order should be modified or construed to become effective immediately. If the Court does not deny approval of the Settlement, the Court should postpone the fairness hearing and the objection and exclusion deadline until a corrected Notice is provided to the class, plaintiffs' fee application is filed and all agreements on fees between the parties are disclosed to the class.

Dated: September 16, 2016

Respectfully submitted,

/s/ Theodore H. Frank

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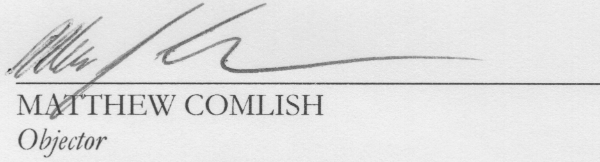
I, Matthew Comlish, personally attest that I have discussed the foregoing Objection with my counsel and I have fully reviewed and endorse the Objection.

DATED: Sept 16, 2016



MATTHEW COMLISH
Objector

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CERTIFICATE OF SERVICE

I hereby certify that, on September 16, 2016, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system. Additionally I caused to be served via first class mail a copy of this Objection and accompanying exhibits upon the following:

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I also caused to be served via overnight courier a copy of this Objection and accompanying exhibits upon the following:

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/s/Theodore H. Frank

Theodore H. Frank