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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

OBJECTOR COMLISH'S OBJECTION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

Date: TBD
Time: TBD
Courtroom: 6
Judge: Hon. Charles R. Breyer

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Objector Matthew Comlish responds in opposition to Plaintiffs' Motion for Attorneys' Fees and Costs ("Fee Motion," Dkt. 2175), filed by the Plaintiffs' Steering Committee ("class counsel").

Objector Comlish previously filed an objection ("Comlish Objection," Dkt. 1891) to the Consumer Class Action Settlement Agreement ("Settlement," Dkt. 1606), which was ratified by the Final Approval. His attorneys, the non-profit Competitive Enterprise Institute ("CEI") filed an amicus brief at the lead-counsel selection stage ("CEI Amicus," Dkt. 576). This Objection to Plaintiffs' Fee Motion incorporates the Comlish Objection and CEI Amicus by reference.

SUMMARY OF ARGUMENT

The CEI Amicus asked this Court to require competitive bidding among the dozens of qualified firms that sought lead counsel status to ensure that class recovery was maximized. This Court rejected that request, holding that it would protect the class at the back end by ensuring that its hand-selected class counsel did not receive an unreasonable windfall. Transcript of Proceedings of Jan. 21, 2016 (Dkt. 1119), at 40. Class counsel now asks this Court to break that promise by awarding it a windfall four to eight times what it would have received in a competitive bidding process. Worse, this windfall of over $130 million comes entirely at the expense of the class because of the self-dealing gimmicks of previously undisclosed clear-sailing and kicker clauses that ensure that any overage goes to Volkswagen rather than the class. There is "no apparent reason" for the reversion to benefit Volkswagen rather than the class, except that class counsel is trying impermissibly to protect their fee request from scrutiny by both the defendants and the class members. *In re Bluetooth Headset Prod. Liab. Litig.* ("*Bluetooth*"), 654 F.3d 935, 949 (9th Cir. 2011). This Court should refuse to award ***any*** attorneys' fees until the fee-reversion provision is "delete[d]" and the excess amount is guaranteed to be returned to class members, as should have happened in the first place had there been competitive bidding. *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014).

Because a competitive bidding process for a guaranteed role in risk-free litigation would have resulted in an offer by a qualified firm to perform the same services class counsel did here for lodestar without any multiplier, it is inappropriate to award class counsel any percentage of the common fund—especially since they cannot show they actually created that common fund. It is undisputed—

and boasted—that government involvement was *indispensable* to the Settlement, and no evidence supports class counsel's premise that they created a $10.033 billion common fund. Class counsel does not demonstrate responsibility for any marginal portion of the fund, but instead takes sole credit for the entire package. Based on the only publicly-available evidence, class counsel arguably *harmed* class members by surrendering valuable claims for no more (or only trivially more) relief than what was negotiated by public servants at the DOJ, EPA, CARB, and FTC. Even if class counsel could show creation of a particular constructive common fund, class recovery is only a fraction of the $10 billion claimed. Most class members must surrender property worth thousands of dollars (*i.e.* their car) to obtain relief under the settlement. Net recovery to the class is necessarily much less than $10 billion, even if an unprecedented 100% of class members participate.

Separately, Plaintiffs' agreed Fee Motion modifies and contradicts Final Approval because it demonstrates clear sailing, which was not evident in the Settlement itself. Clear sailing suggests the Settlement shortchanged the class. 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 request does not alter this fact. At the time they agreed to a Settlement "without fees," defendants necessarily estimated additional fees it would be responsible for. In other words, Volkswagen accounted for this cost in the agreement and "held back" this future anticipated expense rather than incorporate it into class recovery. Money held back in the first stage will never reach the class. Any reduction to the additional $175 million in fees that Volkswagen effectively agreed to pay to settle with the class, which amounts to $340 per class member vehicle, also will never reach the class because the settlement agreement forbids class members from collecting this portion of recovery. The two-stage structure of the Settlement, combined with clear sailing and kicker, breached counsel's fiduciary duty to the class.

Additionally, class counsel's disclosures cannot justify the $175 million Fee Motion. Counsel fails to disclose any agreement concerning attorneys' fees, although such agreements likely exist with Volkswagen (which does not oppose the motion) and among the ***120 law firms*** who seek fees in the request. Moreover, the detail about the lodestar hours is so scanty it cannot serve even as a meaningful

crosscheck on the fee award. Given the lack of evidence supporting the lodestar, the Court should require submission of detailed billing records to evaluate fees on a lodestar basis.

BACKGROUND

On October 25, 2016, the Court issued Final Approval, which approved the Amended Consumer Class Action Settlement Agreement ("Settlement," Dkt. 1685). On the same day the Court entered the United States' Amended Consent Decree ("Consent Decree," Dkt. 2103), and Permanent Injunction and Monetary Judgment to the Federal Trade Commission ("FTC Order," Dkt. 2104).

The Settlement requires Volkswagen to pay reasonable attorneys' fees and costs, but does not suggest what those fees may be. (Settlement ¶ 11.1.) On August 10, 2016, class counsel filed its "Statement on Fees," indicating its request would not exceed $332 million in fees and expenses. (Dkt. 1730 at 3.) Neither Volkswagen nor class counsel disclosed any agreements concerning fees at the fairness hearing on October 18, although counsel for Volkswagen cryptically remarked "to the extent there's been a resolution [on attorneys' fees], at least from the standpoint of Volkswagen, with respect to that, it was done last week." Fairness Hearing Transcript (Dkt. 2079), at 81:6-10. To date, no party has disclosed what this "resolution" entailed.

The Court granted Final Approval, finding "Importantly, at this juncture, there is no 'clear sailing' agreement to cause concern for collusion." Dkt. 2102 at 43 (finding inapplicable *Bluetooth*, 654 F.3d at 947, which identifies clear sailing agreements as an indication of collusive settlement).

On November 8, 2016, plaintiffs filed their Fee Motion, which seeks $175 million in attorneys' fees and costs. This motion suggested for the first time that class counsel has indeed secured a clear sailing agreement from defendants, which do not oppose the request. If class counsel's agreement with defendants is memorialized, plaintiffs have not disclosed the written agreement. Instead, the Fee Motion opaquely advises that "Volkswagen has agreed to pay this amount in addition to the $10.033 billion funding pool and does not oppose this Motion." Fee Motion (Dkt. 2175), at iv.

Although the Court required attorneys to maintain detailed billing records and submit them monthly to class counsel (Pretrial Order No. 11, Dkt. 1253), virtually none of this information appears in the Fee Motion. Instead, class members are informed that a brigade of "approximately 1,222

discrete timekeepers from approximately 120 law firms" submitted time to class counsel. Declaration of Elizabeth J. Cabraser ("Cabraser Decl.," Dkt. 2175-1), ¶ 13. Plaintiffs provide only total expenses, hours, and lodestar figures for 19 broad categories of tasks. Figures from individual firms are not provided, let alone from individual timekeepers. No dates are given for the claimed hours and expenses, let alone the billing descriptions this Court required attorneys to submit. *See id.* at 7-8.

ARGUMENT

I. Class Counsel May Not Be Awarded Fees Based Recovery It Did Not Secure

To secure Final Approval of the Settlement, class counsel was quick to point out its close cooperation with government attorneys. But now class counsel seeks full credit (and compensation) for the full value of all three agreements—claiming to have benefited class members even for the "$2.7 billion trust which will fund environmental remediation projects, and a $2 billion investment in zero-emission vehicle technology" (Fee Motion at 9), which are not part of the Settlement whatsoever, but of the DOJ Consent Decree.

The Fee Request ignores the basic premise of common fund fee awards: "*who* recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (emphasis added). It is undisputed that the DOJ, EPA, CARB, and FTC, among others, recovered a constructive common fund for the class. Requesting fees for work done by others is simply unjust enrichment. Unless and until class counsel demonstrates its marginal contribution to the buyback fund, the Court should not reward fees based on an undivided percentage of this fund.

If any portion of the fund is attributable to class counsel, this portion should further be discounted to reflect the *net* value to class members. Class members will benefit much less than $10 billion because they must surrender billions of dollars' worth of vehicles to recover this money.

A. The Court's fiduciary duty requires independent scrutiny of attorneys' fees.

The Court must discharge its "independent obligation" to monitor class counsel's fee requests as a guardian of the rights of absent class members. *Bluetooth*, 654 F.3d at 941. During the fee-setting stage of a case, the relationship between class counsel and the class "turns adversarial" necessitating

1 the Court's "jealous regard to the rights of those who are interested in the fund." *In re Mercury Interactive*
2 *Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).
3 It is important to scrutinize attorneys' fees even when they are awarded separately as part of a
4 constructive common fund, as in this case. "The court's review of the attorneys' fees component of a
5 settlement agreement is … an essential part of its role as guardian of the interests of class members.
6 To properly fulfill its … duty, the district court must not cursorily approve the attorney's fees
7 provision of a class settlement or delegate that duty to the parties." *Strong v. BellSouth Telecomms. Inc.*,
8 137 F.3d 844, 850 (5th Cir. 1998) (constructive common fund); *In re GMC Pick-Up Truck Fuel Tank*
9 *Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995) (requiring "a thorough judicial review of fee
10 applications ... in all class action settlements") (constructive common fund). "If fees are unreasonably
11 high, the likelihood is that the defendant obtained an economically beneficial concession with regard
12 to the merits provisions, in the form of lower monetary payments to class members or less injunctive
13 relief for the class than could otherwise have obtained." *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th
14 Cir. 2003). More broadly, "public confidence in the fairness of attorney compensation in class actions
15 is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 692
16 (Cal. 2016) (Liu, J., concurring).

17 **B. Attorneys' fees awarded under Rule 23 must be based on the actual marginal**
18 **benefit conferred to the class.**

19 The Fee Motion purports to justify the requested $167 million fee based on an allegedly-
20 modest percentage of the constructive common fund, which is supposed to be $10.033 billion.
21 Methodologically, relying on this figure suffers from at least two devastating errors: (1) It includes no
22 offset for the benefit that government agencies would have conferred independently, benefit for which
23 the class counsel is not the but-for cause, and (2) it incorrectly presumes that the benefit to the class
24 is the hypothetical projected cost to the defendants.
25 "The issue of the valuation of…a settlement must be examined with great care to eliminate
26 the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class,
27 by assigning a dollar number to the fund that is fictitious." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th

Cir. 2012). A "fundamental focus" in awarding fees under Rule 23(h) "is on the result *actually achieved for class members*." Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (emphasis added). Thus, "the standard (under Rule 23(e)) 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)); *accord Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) ("[I]n determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation."). This follows from a recognition that the "key consideration in determining a fee award is reasonableness in light of the benefit *actually conferred*." *In re HP Inkjet Printer Litig.*, No. 5:05-cv-3580 JF, 2011 WL 1158635, at *10 (N.D. Cal. Mar. 29, 2011) (emphasis in original).

"**[C]lass counsel's compensation must be proportioned to the <u>incremental</u> benefits they confer on the class**, not the total benefits." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) (emphasis added); *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993) (finding it within the discretion of a court awarding fees from a common fund to base its award "only on that part of the fund for which counsel was responsible"). "Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund…" *In re Prudential Ins. Co. America Sales Practices Litig.* ("*Prudential*"), 148 F.3d 283, 337 (3d Cir. 1998) (internal quotation omitted). To award fees without regard to incremental class recovery is to misalign the interests of class counsel and its clients. "[C]ourts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *In re Baby Prods. Antitrust Litig.* ("*Baby Prods.*"), 708 F.3d 163, 170 (3d Cir. 2013). The burden of proving the quantum of benefit to the class lies with the proponents of the settlement. *In re Dry Max Pampers Litig.* ("*Pampers*"), 724 F.3d 713, 719 (6th Cir. 2013).

Here, class counsel has failed to meet its burden of showing a class benefit attributable to counsel that warrants attorneys' fees anywhere close to $167 million. While the Court approved the Settlement with the view that the three settlements depended upon each other to form a global

1 settlement structure, there is virtually no evidence that class counsel provided any class benefit beyond
2 what government-negotiated consent decrees would have provided anyway. While that might have
3 sufficed at the approval stage, at the fee-setting stage, counsel must show what, if any, fraction of the
4 FTC judgment/common fund should be attributed to their efforts. Moreover, even if some fraction
5 of the fund is attributable to class counsel, the total value to class members constitutes only a fraction
6 of the $10 billion teaser.

7 **1. The only evidence of common benefit available to the Court and class**
8 **members—the settlement agreement itself—suggests virtually nil recovery over relief provided by the FTC Order.**

9 Because class counsel seeks fees based on percentage of recovery, class counsel exaggerates
10 the Settlement value to justify their excessive fee request. In the first place, the Settlement provides
11 virtually no recovery over what the Consent Decree and FTC Order provided. While the Court found
12 that "Class Members would not be entitled to any compensation for their losses" without the
13 Settlement (Final Approval at 25), the FTC Order specifically provided such compensation. *See* Dkt.
14 1607 at 19; 1781 at 1-2 (FTC Order requires payment for consumers' fair retail value, fees, and lost
15 opportunity). The FTC Order specifically provides a money judgment against Volkswagen *in favor of*
16 *the FTC* (Dkt. 1607 at 13), and class counsel improperly takes full credit for the fund.

17 In fact, the Consent Decree and FTC Order provide essentially identical relief to all class
18 members as the Settlement. The declaration of plaintiffs' expert economist Edward M. Stockton
19 discussed the methodology used for calculating the buyback and lease termination and restitution
20 values provided in the Settlement. Stockton Decl., Dkt. 1784-1. Plaintiffs represented that the FTC
21 "used a particular approach that reached the **same result**" as Stockton. Final Approval Motion (Dkt.
22 1784), at 18 n.8 (emphasis added). The FTC agreed that the "proposed settlement provides **the same**
23 **generous, but appropriate, compensation to each consumer** as the FTC Order." FTC Statement
24 Supporting the Settlement, Dkt. 1781 at. 2 (emphasis added). In terms of compensation, the
25 Settlement provided no value over the FTC Order, so the $10 billion maximum fund cannot be basis
26 for class counsel's percent-of-fund award. Class counsel should be compensated for their efforts and
27 not benefits achieved by government agencies. *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 165-166

1 (3d Cir. 2006).
2 Class counsel asserted that they were "indispensable to the result" (Dkt. 1976 at 21), and the
3 Court found that the Settlement must be considered together with the Consent Decree and FTC
4 Order (Dkt. 2102 at 25), but this does not suggest class counsel provided any particular marginal
5 benefit to class members. Class counsel argues that the extensive involvement of government agencies
6 should not cause the common fund to be "discounted" (Fee Motion at 10), but this is inconsistent
7 with the Court's responsibility to conduct an independent evaluation of the Fee Request. According
8 to class counsel, if government agencies had already agreed to a $10 billion fund, private counsel could
9 claim a percentage of the entire fund even if it only provided a peppercorn of additional relief.
10 To the extent that class counsel insists it provided some marginal benefit beyond what
11 government agencies would have achieved, class counsel must provide evidence establishing that
12 purported benefit to the class. It is inappropriate to base a "fee calculation on 'the entire value of the
13 settlement, including any portion which would have been provided to the class'" anyway. *Prudential*,
14 148 F.3d at 336. To be eligible for fees, class counsel must be a "material factor" in the creation of
15 benefits; that is, it had to have been "more than an initial impetus behind the creation of the benefit."
16 *Id.* at 337. *Accord* American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.13 Illustration 2
17 (2010). Otherwise, it would "undermine the equitable principles which underline the concept of the
18 common fund, and would create an incentive for plaintiffs' attorneys to minimize the costs of failure
19 … by freeriding on the monitoring efforts of others." *Prudential*, 148 F.3d at 337. *See also In re Cendant*
20 *Corp. Prides Litig.*, 243 F.3d 722, 741 (3d Cir. 2001) ("[Defendant's] liability and consequent
21 collectability had been conceded at the outset of the PRIDES controversy, and that fact should have
22 been given major consideration by the District Court when setting Kirby's attorneys' fees."). Only the
23 *marginal* benefit to class members should be considered.
24 If there is any marginal benefit attributable to class counsel, it is likely small; government
25 agencies are perfectly competent to require product buybacks without the help of private counsel. For
26 example, the National Highway Traffic Safety Commission entered a consent order with FCA US,
27 LLC ("Fiat Chrysler") requiring it to buy back vehicles that it could not adequately repair at "a

premium of 10% above the Purchase Price," which was reported to affect as many as 200,000 vehicles.[1] Similarly, a recent EPA consent decree requires Harley-Davidson to buy back 340,000 devices for "at a minimum, Defendants' full sales price to the dealer, and all shipping and handling costs."[2] Notably, the terms of these consent decrees are more generous to consumers than the Settlement, which bases compensation on the *used book value* of the vehicles rather than purchase price.

The circumstances in this case resemble those of the Fiat Chrysler and Harley-Davidson consent decrees, which demonstrates the error of crediting class counsel with the entire buyback fund. In each of these cases, without the involvement of a private class proceeding, agencies impelled buybacks, which were necessary to bring vehicles into compliance with applicable law. And the only way to effectuate a buyback is to pay *at least* replacement value—otherwise consumers would not be willing to surrender their defective parts or vehicles. Thus, once a buyback became inevitable (when Volkswagen and regulators were unable to bring the 2.0-liter vehicles into compliance with a recall), the general scheme of the FTC Order became inevitable with or without involvement of class counsel. Here, government would have required buyback, and thus government would require billions to be spent on a buyback program anyway. If class counsel seeks to be paid based on a percentage of the fund—even a small percentage—it must submit evidence showing what fraction of the fund they are actually responsible for. Such evidence is needed when the contributions of counsel to a global settlement, if any, cannot be ascertained from the record. Other courts have appropriately demanded such proof. *E.g., In re HQ Sustainable Mar. Indus.*, No. C11-0910-RSL, 2013 U.S. Dist. LEXIS 87103, at *7-*8 (W.D. Wash. June 20, 2013).

Given this record, with no evidence suggesting whether class counsel added a princely sum or a peppercorn to the common fund, class counsel cannot take credit for all of the Settlement's value.

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[1] *See* Paul Einstein, *Fiat Chrysler Buy-Back, Recall: Here's What You Need to Know*, NBC News (Jul. 20, 2015); FCA US, LLC Consent Order (July 26, 2015), available at http://www.safercar.gov/rs/chrysler/pdfs/FCA_Consent_Order.pdf.

[2] *See* Consent Decree, *United States v. Harley-Davidson, Inc.*, No. 1:16-cv-01687, Dkt. 2-1 (D.D.C. Aug. 18, 2016), available at https://www.epa.gov/enforcement/consent-decree-harley-davidson.

2. Even if the FTC judgment is credited to class counsel, actual class recovery is substantially less than $10 billion.

Even if some portion of relief provided by the FTC Order is attributed to class counsel, the $10 billion maximum vastly overstates actual recovery. Class counsel rationalizes its fee request based on a theoretical $10.033 billion recovery for the class, implicitly asserting that, but for the work of class counsel, the class would have received less or even nothing from Volkswagen. This is wrong.

First, the maximum settlement fund represents a hypothetical and unprecedented 100% claim rate where each and every eligible class member sells back their vehicle, where no vehicle is totaled prior to buyback, and where no vehicle has excess mileage. Volkswagen will certainly pay less than $10 billion, so will retain some fraction. As the Court noted, "it is reasonable to expect that not all of the $10.033 billion will be needed." Final Approval (Dkt. 2102) at 36. The settling parties have no incentive to buy back or modify more than 85% of the vehicles, which is the percentage required by the Consent Decree for Volkswagen to avoid paying additional penalties.

More importantly, the gross total paid through the FTC judgment vastly overstates recovery. Unlike typical class actions settlements, **most class members are required to surrender vehicles worth thousands of dollars in order to achieve any recovery**.[3] Any buyback program (the centerpiece of the Settlement) is by definition an exchange of cash for property. The *net* benefit to the class members is thus the difference between the two, not simply the amount of cash received. Neither class counsel nor its retained expert acknowledge this simple fact, even though it's absolutely crucial to valuing the settlement, much less comparing it to other "megafund" settlements where class members simply receive a check without needing to surrender valuable property.

Class benefits are measured on the *net value* received by the class, not the cost to defendant. *Bluetooth*, 654 F.3d at 944. Recovery to class members is their net payment—that is, the amount they receive for surrendering their vehicle *minus* the replacement value of the vehicles the class members

[3] Hypothetically, class members could receive a payment without surrendering their vehicle under the modification option, but this possibility is entirely speculative. Neither CARB nor the EPA have an active proposal from Volkswagen to modify the 2.0-liter TDI vehicles. If such plan is later submitted, there is no guarantee it will be approved; CARB rejected a California-specific recall in January. Even if all class members received payments for modifications, Volkswagen would pay only about $2 billion under the Settlement.

1 are giving up *including* replacement costs, taxes, and fees. Thus, the net value of relief available to class
2 members is a fraction of the maximum $10 billion cost to Volkswagen. For example, plaintiffs' expert
3 Edward Stockton found that the Settlement payments are a minimum of 112.6% of the fair value on
4 September 2015 (Stockton Decl., Dkt. No. 1784-1 at ¶ 28), which does not account for taxes,
5 registration, and other transaction costs of buying a new vehicle. Thus, when subtracting the fair
6 market value of the car that class members are required to tender, and considering replacement fees
7 and taxes, recovery to class members constitutes more like 12.6% of the settlement fund, $1.26 billion,
8 which works out to approximately $2500 per class member vehicle.

9 Considering the *net* value of the buyback fund, the fee request is on the upper bound of the
10 amount typical for megafund cases like this one—approximately 12% of net recovery. *See* Fitzpatrick
11 Decl. (Dkt. 2175-2) at 5-7 (showing that attorneys' fees exceeded 12% in only 6 of 33 megafund
12 settlements examined by plaintiffs' expert). The percentage of attorneys' fees attributable to class
13 counsel is higher still because class counsel is not wholly responsible for the Settlement. For example,
14 if class counsel could show that it created third of net recovery (about $420 million), the $167 million
15 fee request constitutes 28.4% of the constructive common fund.

16 Only by grossly inflating the benefits to class members—by focusing on gross payments
17 instead of *net* payments—can class counsel argue that their fee is relatively small or reasonable.

18 The Fee Motion must be compared to the "economic reality" of *net* benefits *actually* realized
19 by class members. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); *Bluetooth*, 654 F.3d at 944;
20 *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). Thus, the net value of the Settlement cannot
21 be calculated until the claims process is complete and parties disclose net payments to class members,
22 but it is clear already that plaintiffs' $175 million request is exorbitant, even if class counsel could
23 credit itself for creating the entire buyback fund, which it cannot.

24 **II. The Fee Motion Unfairly Provides Preferential Treatment to Class Counsel**

25 Even if class counsel could demonstrate its responsibility for creating some portion of the
26 constructive common fund, the Fee Motion is unfair and unreasonable because it earmarks recovery
27 for class counsel without benefit to class members. "Such inequities in treatment make a settlement

unfair," for neither class counsel nor the named representatives are entitled to disregard their "fiduciary responsibilities" and enrich themselves while leaving the class behind. *Pampers*, 724 F.3d at 718-21; *see also Bluetooth*, 654 F.3d at 947.

A. Plaintiffs' fee request amounts to hundreds of dollars per class member, and ought to be disgorged to the class.

The Fee Motion not only constitutes a significant percentage of *net* recovery. While class counsel seeks to cast its Fee Motion as a modest request, in absolute *and* relative terms $175 million is significant. Nearly half a million vehicles are covered by the Settlement, and the Fee Motion represents approximately $340 per class member vehicle.

Even a relatively "small" deduction from the fee request would provide value to an individual class member. If the Court declined to award even a fraction of the Fee Motion, the sum could easily be administered to class members in the form of supplemental *pro rata* payments sent after the claims deadline. For example, if the Court were to award $165 million of the $175 million that Volkswagen *agrees to pay*, this modest fee deduction equals $20 per class member.

While class counsel has breached its fiduciary responsibly by artificially barring class members from enjoying any portion of the Fee Motion, the Court must independently act as a fiduciary to the class. The Court should order the disgorgement of any unreasonable fee for the benefit of the class. Such disgorgement is necessary to remedy class counsel's self-dealing.[4] When class counsel breaches its fiduciary duties to absent class members, the "court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received)." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012); *see also* Restatement (Third) of the Law Governing Lawyers § 37.

Given parties' evident clear-sailing agreement and the strong presumption against reversion, Comlish requests that the Court disgorge any unawarded portion of the $175 million request for the

[4] The fact that Volkswagen does not oppose class counsel's $175 million Fee Motion gives rise to an inference that an undisclosed "clear-sailing" agreement was reached and undisclosed. Class counsel's attendant professional responsibilities include a duty to refrain from secret side settlements with the defendant, especially any side agreements related to attorneys' fees. *In re Hager*, 812 A.2d 904 (D.C. 2002); *In re Ungar*, 25 So. 3d 101, 103 (La. 2009); *Fla. Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011); *accord* Fed. R. Civ. P. 23(e)(3).

benefit of client class members, instead of simply benefitting the defendants. Fee disgorgement owing to a breach of counsel's fiduciary duties is an equitable rule "founded both on principle and pragmatics." *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999). As a matter of principle, the attorney "is not entitled to be paid when he has not provided the loyalty bargained for and promised." *Id.* at 237-38. As a matter of pragmatics, "the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not." *Id.* at 238. Even where the clients suffer no monetary harm from the breach, the fee should be disgorged to deter future misconduct; it is not a "windfall" for the clients to receive that disgorgement. *Id.* at 240.

B. The reversionary fee request demonstrates impermissible self-dealing by class counsel.

Class counsel have breached their fiduciary duties by effectively negotiating a subsequent settlement that provides no benefit to class members, and the only real beneficiaries of this new settlement are class counsel who will reap up to $175 million in fees and expenses. *See 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).

The Fee Motion, which effectively includes clear sailing and kicker, raises red flags from *Bluetooth*, which suggests a breach in fiduciary duty. The Fee Motion also implies the class has been shortchanged because Volkswagen would have rationally accounted for the future fee request when negotiating the Settlement. Had class counsel not agreed to a fee request with reversion to defendants, the Fee Motion could have resulted in hundreds of additional dollars for each class member.

1. The agreed Fee Motion constitutes a fee agreement with both clear sailing and kicker, which *Bluetooth* identifies as red flags.

The Court previously found that there was no clear sailing agreement evident at that time, Final Approval (Dkt. 2102), at 43, but the assented Fee Motion now demonstrates agreement between the settling parties. Class counsel does not disclose whether a *written* agreement was reached, but Volkswagen will not oppose payment of $175 million (clear sailing), and any reduction of this amount

1 will remain with Volkswagen rather than revert to the class (kicker).[5]

2 Class counsel secured assent to its Fee Motion solely for its own benefit, and the reversionary
3 nature of the fees are an indicator of self-dealing and harm to the class. **No reasonable class member**
4 **would forfeit money that Volkswagen *agrees to pay***, yet the Fee Motion does precisely this. *See*
5 *Bluetooth*, 654 F.3d at 947-49 (clear sailing and reversion agreements are warning signs of class counsel's
6 self-dealing at the expense of class members' interests); *Pearson*, 772 F.3d at 786-87 (fee reversion has
7 "strong presumption" of "invalidity"); *Eubank*, 753 F.3d at 723 (fee reversion is "questionable
8 provision" which should have been "delete[d]"); *In re General Motors Corp. Engine Interchange Litigation*,
9 594 F.2d 1106, 1131 (7th Cir. 1979) (fee segregation is "questionable provision").

10 In effect, the $175 million request constitutes part of the lump sum Volkswagen would pay
11 class members and counsel to settle the underlying claims. As fiduciaries of the class, counsel should
12 fight for any unawarded portion of that money to return to the class rather than defendants. Class
13 counsel's failure to do so means that the $175 million request, which defendants agree not to oppose,
14 functionally includes a "kicker" provision that ensures any reduction in the fee request reverts to
15 Volkswagen rather than the class. The settlement agreement effectuates this by stipulating that fees
16 will be considered separate and apart from class relief. This is the third red flag pinpointed by *Bluetooth*:
17 when the "parties arrange for fees not awarded to revert to defendants rather than be added to the
18 class fund." *Bluetooth*, 654 F.3d at 947. This "kicker arrangement reverting unpaid attorneys' fees to
19 the defendant rather than to the class amplifies the danger" that is "already suggested by a clear sailing
20 provision." *Id.* at 949. "The clear sailing provision reveals the defendant's willingness to pay, but the
21 kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees."
22 *Id.* Incredibly, even though potential class recovery is left on the table, class counsel claims that the
23 segregated fee structure gimmick "benefits the class." Plaintiffs' Reply Memo. in Support of Final
24 Approval (Dkt. 1976), at 27.

25

26 [5] The Court should inquire into the existence of a written fee agreement between class counsel and
Volkswagen. Objector Comlish reserves his right to submit additional briefing if any such agreement is
27 disclosed.

2. Class counsel structured the segregated fee request to prevent review.

In a typical common-fund settlement, the district court may, at its discretion, reduce the fees requested by plaintiffs' counsel—and when it does so, the class will benefit from the surplus. A constructive common fund with "separate" fees is an inferior settlement structure for one principal reason: the segregation of funds means that the Court cannot remedy allocation issues by reducing fee awards or named-representative payments. *See Bluetooth*, 654 F.3d at 949; *Pearson*, 772 F.3d at 786; Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809, 1839 (2000) (such a fee arrangement is "a strategic effort to insulate a fee award from attack"); Lester Brickman, LAWYER BARONS 522-25 (2011) (same; further arguing that reversionary kicker should be considered per se unethical). Combining segregated fees with clear sailing "by its very nature deprives the court of the advantages of the adversary process." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). Clear sailing "suggests, strongly," that its associated fee request should go "under the microscope of judicial scrutiny." *Id.* at 525. The clear-sailing clause enables lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Id.* at 524; *accord Bluetooth*, 654 F.3d at 947.

The segregated fee structure also acts as "a gimmick for defeating objectors" because class members may lose standing to challenge the fees on appeal. *Pearson*, 772 F.3d at 786.

Here, class counsel put its own fees ahead of the interests of the class by securing agreement from Volkswagen to insulate those fees from challenge.

3. The Fee Motion could have been negotiated on behalf of the class, but class counsel declined to do so.

Class counsel attempts to excuse the suspect terms of its *de facto* clear sailing agreement by invoking the fiction that a two-stage negotiation means fees cannot diminish class recovery. At the urging of class counsel, the Settlement, notice to class, and the Court itself incorrectly asserted that fees will not and cannot reduce recovery. As a matter of economics, this is false. Rational parties estimate the *total* costs of an agreement before it is executed, and mediated class action settlements are no exception. 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*, 772 F.3d at 786.

Class counsel says that their request cannot diminish class recovery, but in fact counsel has preemptively alienated the class from common fund benefits Volkswagen would willingly pay.

By negotiating agreement for the Fee Motion (effectively clear sailing and kicker), class counsel breached its duty to its putative clients, the class members. Counsel breaches its fiduciary obligation when it agrees to a fee arrangement to the detriment of the class. *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000) ("[C]lass counsel agreed to accept excessive fees and costs to the detriment of class plaintiffs, then class counsel breached their fiduciary duty to the class."). Class counsel breached their fiduciary obligation by failing to demand a settlement structure or fee agreement that would return any reversion to the class.

Class counsel could have easily worked on behalf of the class in reaching their fee agreement with defendants. For example, Volkswagen might have agreed to establish a $175 million fund for payment of attorneys' fees and costs, such that any money not awarded would be paid the class *pro rata*. In this way, class members would have been the "foremost beneficiaries" of the Settlement. *Baby Prods.*, 708 F.3d at 179. However, neither party had any incentive to make such an agreement. Volkswagen would not agree to pay any additional sum certain to *class members* because claims against it have already been released.[6]

As for class counsel, its interests now diametrically oppose class interests. Should class counsel have agreed to award class members from residual attorneys' fees, it would expose the Fee Motion to more vigorous objections because class members would stand to benefit from any fee reduction. Such an arrangement would also provide objectors with clear-cut standing to appeal any fee award. From the perspective of class counsel, it was better to earmark clear sailing for themselves and no one else.

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[6] The Settlement obligated Volkswagen to pay "reasonable attorneys' fees," but left the term unclear. Defendants evidently assented to the $175 million Fee Motion by estimating the costs and risks of a contested fee award. The Fee Motion is essentially a private agreement between defendants and class counsel, where the parties rationally avoided costs litigating the fee issue. Unfortunately, due to the clear sailing agreement, the Court cannot evaluate the Fee Motion with input from Volkswagen, which is the party most likely to know to what extent fees were reasonably incurred.

1 Yet a fiduciary may *not* engage in precisely this sort of self-interested behavior.

4. The two-stage segregated fee request likely *cost* class members hundreds of million, if not billions, of dollars.

By attempting to insulate their fee request from appeal, class counsel likely *cost* the class dearly. *See* Comlish Objection (Dkt 1891) at 26-29. The two-step negotiation process used by class counsel (negotiating class benefit first and fees second) cannot magically eliminate tradeoffs between attorneys' fees and class recovery.

Of course class members are paying the attorneys' fees—whether the process proceeds in one step, two steps, or a hundred steps. When faced with a potential liability, defendants must decide whether to settle the case or proceed to trial. Defendants will settle if the *total* estimated costs of settlement are less than the estimated costs (and risked judgment) of going to trial. Defendants will fight if not. In a two-step process, Volkswagen (like any rational party) will estimate the total costs of settlement in the first step—including the deferred fee award. As a rational defendant, Volkswagen effectively "holds back" funds in the first step of negotiations due to the expected fee request in the second step. That is, VW knew what it was willing to pay total to resolve the claims, and factored in the *anticipated costs* of administration and attorneys' fees, among other things, before striking a deal.

The settling parties insist that fees were not discussed (e.g. Settlement, Dkt. 1606 at § 11.1), but that's precisely part of the problem. Volkswagen had no way of knowing what class counsel would actually request, but had to assume a very large amount in view of "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. Because Volkswagen did not know the amount of fees class counsel would seek, Volkswagen would reasonably estimate that class counsel would seek $500 million or $3.5 billion dollars. Volkswagen therefore would have factored this amount into the first step of negotiations, and "held back" additional recovery for the class. In other words, a rational negotiator such as Volkswagen would agree to offer *less in the first stage* of negotiation in expectation of receiving a large demand for fees. As it turns out, the Fee Motion was low enough that Volkswagen agreed not to contest fees even though the billing is rife with questionable charges judging even from

1 the sketchy billing summary provided by class counsel. *See* Section II.C, immediately below.

2 By structuring a two-stage negotiation where attorneys' fees receive clear sailing, the parties
3 have reduced class recovery, made appellate review of the fee request more difficult, have artificially
4 deprived the class of money Volkswagen agrees to pay, and have deprived this court from the input
5 of Volkswagen—the party best positioned to scrutinize the Fee Motion. All of these effects are
6 contrary to class interests, and class counsel should not be rewarded for these tactics.

7 **C. Class counsel breached its fiduciary duty by failing to control costs.**

8 To fatten its lodestar, class counsel engaged in prolific waste that no paying client would
9 tolerate. The class cares about minimizing expenses, *e.g, In re Wells Fargo Sec. Litig*, 157 F.R.D. 467, 471
10 (N.D. Cal. 1994), yet counsel is incentivized to submit a large lodestar figure to inflate at least the
11 lodestar crosscheck, and so it appears to have here. The Fee Motion includes surprisingly scant billing
12 detail, but several examples of apparent waste are evident on the record.

13 *First,* class counsel failed to submit any substantive information about billing before its Fee
14 Motion, submitted after Final Approval and over 100 days after the Settlement Agreement was
15 executed. Delaying the fee application until after final approval permits class counsel to submit a
16 greater lodestar than if they had submitted their application prior to final approval. Class counsel has
17 compounded this problem by declining to file any document showing *when* the claimed 99,000 hours
18 of billing were performed. On the present record, the Court cannot evaluate the Fee Motion for
19 unnecessary churn. *Cf. In re Citigroup Inc. Sec. Litig.,* 965 F. Supp. 2d 369, 392 (S.D.N.Y. 2013)
20 (discounting $7.5 million of lodestar for time spent after the parties reached an agreement in principle);
21 *see also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02 Civ. 5575 (SWK), 2006 U.S. Dist.
22 LEXIS 78101, at *73 (S.D.N.Y. Sept. 28, 2006) (R&R of Special Master), adopted, 2006 U.S. Dist.
23 LEXIS 77926 (S.D.N.Y. Oct. 25, 2006) (reducing lodestar by 5,000 associate hours for document
24 review performed after signing a MOU and before execution of settlement agreement).

25 *Second*, without explanation, class counsel seeks fees for an astonishing 1,222 billers from
26 "approximately 120 law firms," although this Court appointed just ***22 attorneys*** to act as steering
27 committee counsel. The Court ordered that only "Participating Counsel" may be considered for

common benefit compensation, which "shall be defined as Lead Counsel and members of the Plaintiffs' Steering Committee (along with members and staff of their respective firms), any other counsel authorized by Lead Counsel to perform work that may be considered for common benefit compensation, and/or counsel who have been specifically approved by this Court as Participating Counsel prior to incurring any such cost or expense." Order No. 11 (Dkt. 1253), at 1-2. The Court has not specifically authorized *any* additional counsel, and class counsel does not explain how authorizing about 98 additional law firms is possibly consistent with avoiding wasteful and duplicative billing. Because class counsel does not even identify the billers, let alone the amount of hours each billed and the dates they worked, it is impossible to ascertain potential duplication and overstaffing.[7]

Third, class counsel conducted aimless and overly costly document review. At the time of the settlement "Volkswagen had produced over 12 million pages of documents, and Settlement Class Counsel had reviewed and analyzed approximately 70% of them through a massive, around-the-clock effort." Final Approval Motion (Dkt. 1784), at 13. In the first place, a document-by-document review is unnecessary and no private client would pay for such indiscriminate review except in special cases such as handwritten documents that cannot be keyword searched and filtered. Such review is doubly unjustified in a case with admitted liability, where only damages are at issue. The Fee Motion and supporting papers do not suggest whether the undirected document review occurred before or *after* April 21, 2016, when the parties had agreed in principle to buy back all of the vehicles, including compensation. At this point in the case, only the compensation scheme needed to be ironed out, so undirected document review was pure churn for the sake of inflating attorneys' fees. According to the Cabraser Declaration, the document review consumed 27,863.5 hours, for a lodestar of $11.56 million,

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[7] Rule 23(g) requires the district court to select the best applicant among those seeking to be class counsel. Fed. R. Civ. Proc. 23(g). Is not uncommon for counsel to agree who will be lead class counsel "in exchange for commitments to share the legal work and fees." Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.272 (2004). "To guard against overstaffing and unnecessary fees, **the court should order the attorneys to produce for court examination any agreements they have made relating to fees or costs**." *Id.* (emphasis added). Class counsel has not disclosed how those other 98 firms will be compensated from any fee award, which is another reason the Fee Motion is objectionable. See Section III.A.

or 22% of the lodestar value requested for hours billed to date.[8] Dkt. 2175-1 at 7. Therefore, class counsel claims a $414.95/hour blended rate for document review, which is a rate no firm or client would reasonably pay even for foreign-language review (let alone the $1091/hour rate suggested by the lodestar multiplier). In commercial litigation, document review is performed by contract attorneys in the first instance, which allows review projects to quickly and economically scare. Contract attorneys cost perhaps $30 an hour, and their work is generally supervised by junior associates or experienced vender attorneys, yielding a blended rate less than a quarter of what plaintiffs claim in the Fee Motion. Commercially unreasonable rates cannot be credited for lodestar purposes. The Court should deduct hours spent on unnecessary tasks. *See Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011).

Fourth, class counsel represented that lawyers or paralegals spent 30-60 minutes with individual class members answering questions regarding the Settlement. *See* Statement of Fees (Dkt. 1730), at 3. There is no reason an attorney needs to spend 60 minutes discussing the Settlement with class members at $500/hour when such discussions could be handled by a $30/hour trained claims administrator or other temporary contract employees.

At best, class counsel's inefficient use of resources reflects an indifferent inflation of lodestar to justify their future fee request. At worst, class counsel hired contract attorneys to pointlessly churn so that a 3000% markup on this time could be requested. On the present record it is impossible to quantify the amount of waste. The Fee Motion does not even identify the astonishing 120 law firms and 1,222 timekeepers with billing in this matter, let alone provide sufficient information to determine reasonable fees. That said, waste is clearly evident and should not be rewarded.[9]

[8] Class counsel also requests fees for work they hypothesize will be performed in the future: 21,287.4 hours with a lodestar of $11 million precisely. To the extent that counsel is awarded for future hours, compensation ought to be deferred so that the reasonableness of these hours can be ascertained. Courts routinely reject the inclusion of future hours. *E.g.*, *7-Eleven, Inc. v. Etwa Enter.*, 2013 U.S. Dist. LEXIS 83961, at *14 (D. Md. Jun. 12, 2013); *St. Hilaire v. Indus. Roofing Co.*, 346 F. Supp. 2d 212, 215 (D. Me. 2004).

[9] As previously discussed, competitive bidding would have reduced fees and increased class recovery. *See* Comlish Objection (Dkt. 1891), at 29-33. The Court found competitive bidding unnecessary because 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.

1 **D. A lodestar multiplier is inappropriate when there is no risk of nonpayment and defendant already admitted liability.**

2 Given that class counsel cannot demonstrate its creation of any particular portion of the
3 constructive common fund, a lodestar allocation may be the Court's only alternative. *See Wininger v. SI*
4 *Mgmt. L.P.*, 301 F.3d 1115, 1124 (9th Cir. 2002) (abuse of discretion to use percentage of fund method
5 where counsel was only responsible for part of fund); *see also Principles of the Law of Aggregate Litigation* §
6 3.13 (2010) ("the percentage method may not be feasible when the value of the common fund is
7 difficult to assess. … In those circumstances, the court should use the lodestar method."). Under a
8 lodestar award or even upon crosscheck, it is inappropriate to reward a lavish lodestar multiplier in a
9 case with admitted liability and minimal risk.

10 Class counsel argues its $167 million fee request represents a "modest" 2.63 lodestar multiplier.
11 Fee Motion, Dkt. 2175 at 18. In the first place, the lodestar includes hypothetical future work and is
12 inflated with churn, as previously discussed. Putting aside these problems, class counsel seeks an
13 overall multiplied blended rate of nearly $1400/hour, even though none of the factors favoring a
14 multiplier exist in this case. Such a multiplier is exorbitant. *In re Indymac Mortgage-Backed Secs. Litig.*, 94
15 F. Supp. 3d 517, 524 (S.D.N.Y. 2015) ("a blended hourly rate for all attorneys and other time-keeping
16 staff of $810.71 . . . strikes the Court as quite excessive"); *In re Gilat Satellite Networks, Ltd.*, No. 02-cv-
17 1510 (CPS), 2007 WL 2743675, at *18 (E.D.N.Y. Sept. 18, 2007) (an effective hourly rate of $602 for
18 all personnel was "significant" if not quite excessive).

19 Any multiplier over 1 is inappropriate here. The Supreme Court has established a "strong
20 presumption that the lodestar is sufficient" without an enhancement multiplier. *Perdue v. Kenny A.*, 559
21 U.S. 542, 546 (2010). A lodestar enhancement is justified only in "rare and exceptional" circumstances
22 where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been
23 adequate to attract competent counsel." *Id.* at 554; *accord Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527,
24 532 (8th Cir. 1999) (noting that only in "rare" and "exceptional" cases, "counsel may be entitled to a
25 multiplier to reward them for taking on risk and high-quality work"). "[T]he burden of proving that
26 an enhancement is necessary must be borne by the fee applicant." *Id. Kenny A*'s limitation on
27 enhancements was made in the context of interpreting 42 U.S.C. § 1988's language of "reasonable"

fee awards, but it applies equally to "reasonable" fee awards in class actions made under Fed. R. Civ. P. 23(h). *See e.g.*, *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J. concurring/dissenting) (referring to *Kenny A* as an "analogous statutory fee-shifting case."); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496, 500 (6th Cir. 2011).

There was no shortage of competent counsel offering to work on this matter. The Court received a total of 150 applications, including 46 who applied for lead counsel. And why wouldn't counsel apply? The case was remarkably low risk, involving a defendant with **$31 billion cash on hand**,[10] which had admitted liability and was vigorously negotiating settlement with government agencies before class counsel was even appointed. *See In re Agent Orange Product Liability Litig.*, 818 F.2d 226, 236 (2d Cir. 1987) ("as the chance of…settlement increases, the justification for using a risk multiplier decreases."); *In re Johnson & Johnson Derivative Litig.*, No. 11-2511(FLW), 2013 U.S. Dist. LEXIS 167066, at *36 (D.N.J. Nov. 25, 2013) ("Nor is an enhancement necessary to compensate counsel for the contingent nature of this case. … that conclusion is bolstered by the number of attorneys seeking to be first in the door in filing lawsuit on behalf of shareholders, and the intense level of competition litigating who would become lead counsel. … from counsel's perspective, this was a 'promising' case, holding the prospect of a large fee recovery from solvent defendants."); *Rodriguez v. Barrita, Inc.*, 53 F. Supp. 3d 1268, 1287 (N.D. Cal. 2014) ("no fee enhancement is warranted here, where the skill of counsel, the difficulty and novelty of the underlying legal issues, and the contingent nature of the fee award are already baked into the unadorned lodestar.").

In short, any multiplier greater than one would be improper.

III. The Fee Motion is Deficient

In support of the Fee Motion, class counsel filed only 48 pages of argument and precious few billing details. On this record, the Court cannot exercise an independent review. *In re Wash. Pub. Power Supply Sys Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994). "The party seeking fees has the burden of submitting sufficient information to justify the requested fees and taxable costs." MANUAL FOR

[10] John Rosevear, *How Many Billions Will Volkswagen Have to Pay?*, MOTLEY FOOL (Sep. 29, 2015).

1 COMPLEX LITIGATION (Fourth) § 21.724, at 338. Class counsel has not carried this burden. The Fee
2 Request is deficient in several different ways. As discussed in Section I.B, class counsel provides no
3 evidence it should be credited with creating any portion of the buyback fund. Further, class counsel
4 fails to disclose whether it has entered any agreements with Volkswagen or among counsel concerning
5 fees. Finally, the comically inadequate lodestar information cannot support even a lodestar crosscheck

6 **A. Rule 23(h) requires class counsel to disclose agreements regarding how the**
7 **fee award will be allocated among class counsel and the other 98 law firms who submitted lodestar time.**

8 Rule 23(h) authorizes the Court to award "reasonable" attorneys' fees only when notice of the
9 fee request is "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h), (h)(1); *Redman*,
10 768 F.3d at 637-38. "Because members of the class have an interest in the arrangements for payment
11 of class counsel whether that payment comes from the class fund or is made directly by another party,
12 notice is required in all instances." Notes of Advisory Committee on 2003 Amendments to Rule 23.
13 "Active judicial involvement in measuring fee awards is singularly important to the proper operation
14 of the class-action process." *Id.* Rule 23(e)(3) requires that "The parties seeking approval must file a
15 statement identifying any agreement made in connection with the proposal." It is not sufficient that
16 class members are able to make "generalized arguments about the size of the total fee"; the notice
17 must enable them to determine which attorneys seek what fees for what work. *Mercury Interactive*, 618
18 F.3d at 994. The fee request in this case lacks basic information; it fails to provide even the bare bones
19 of who seeks what, instead providing for a lump sum for the "approximately 120 law firms" to be
20 distributed by class counsel. *See* Cabraser Decl. (Dkt. 2175-1). This extra-judicial award undermines
21 Rule 23(h)'s policy of "ensur[ing] that the district court, acting as a fiduciary for the class, is presented
22 with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee."
23 *Mercury Interactive*, 618 F.3d at 994.

24 "In a class action settlement, the district court has an independent duty under Federal Rule of
25 Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided
26 up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d 220,
27 227 (5th Cir. 2008). The district court "must not … delegate that duty to the parties." *Id.* at 228

(internal quotation omitted). The appellants in *High Sulfur*, lawyers dissatisfied with their share, complained that the district court had sealed the fee-allocation list, such that they could not compare their fee awards to those of other attorneys. The Fifth Circuit agreed: "One cannot compare apples to oranges without knowing what the oranges are." *Id.* at 232. *See generally id.* at 234-35; *cf. In re "Agent Orange" Prods. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987) (noting that allowing counsel to divide award among themselves "overlooks the district court's role as protector of class interests under Rule 23(e) and its role of assuring reasonableness in awarding of fees in equitable fund cases").

The non-public *High Sulfur* fee agreement is comparatively inoffensive to the mass of undisclosed agreements here. In *High Sulfur*, at least the district-court judge had the fee committee's recommendation available. Here, the allocation is made in an out-of-court backroom agreement among class counsel without any judicial involvement. It is impossible to reconcile this with the *High Sulfur* requirement that fee awards be allocated openly by the court, nor can the Fee Motion be squared with Rule 23(e)(3)'s requirement that counsel disclose related agreements. The Court rightly observed that it "has the task of ensuring that the fees charged are reasonable." Transcript of Proceedings of Jan. 21, 2016 (Dkt. 1119), at 40. This cannot be done if class counsel's distribution of fees to "approximately 120 law firms" remains a black box.

Class counsel must disclose any agreement regarding allocation and agreement to fees in this action before any fee request should be approved. *See also* Section II.B.1.

B. The lodestar information is inadequate even as a cross-check.

Class counsel provides no lodestar information other than high-level general descriptions in a 9-page declaration that lacks even minimal information about attorney identities, hours billed, attorney and staff billing rates, and steps that were taken to avoid duplication and unnecessary churn among the twenty-two steering committee firms involved in the litigation (let alone the "approximately 1,222 discrete timekeepers from approximately 120 law firms"). *See* Dkt. 2175-2 ¶ 13.

This is entirely inadequate for any lodestar calculation, even if only a crosscheck. *Postier v. Louisiana-Pacific Corp.*, No. 09-cv-03290, 2014 WL 1031406, at *3, 2014 U.S. Dist. LEXIS 33611, at *8 (N.D. Cal. Mar. 13, 2014); Procedural Guidance for Class Action Settlements, *available at*

http://cand.uscourts.gov/ClassActionSettlementGuidance ("All requests for approval of attorneys' fees awards must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund."). And absence of billing records means class members were "handicapped in objecting." *Redman*, 768 F.3d at 638.

Adequate lodestar information is not optional when percentage-of-fund fees are sought; it remains necessary for the court to independently evaluate the reasonableness of a fee request. "In the absence of any analysis and evidence regarding the lodestar method, the Court is precluded from exercising its discretion over which method to employ." *Steinfeld v. Discover Fin. Servs.*, No. C 12-01118 JSW, 2013 U.S. Dist. LEXIS 91429, at *5 (N.D. Cal. June 27, 2013); *see also Bluetooth*, 654 F.3d at 942-43; *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013) (lodestar would "serve[] little purpose as a cross-check if it is accepted at face value"); *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 305 (E.D.N.Y. 2015) (failure to submit timesheets "provides a basis to deny the fee application in its entirety"); *Ahdoot v. Babolat VS N. Am.*, No. 13-02823 GAF, 2014 U.S. Dist. LEXIS 124115, at *3 (C.D. Cal. Sept. 4, 2014).

Because class counsel has not provided sufficient information to even permit a lodestar crosscheck, the requested fee may not be approved on *either* a percentage-or-fund or lodestar basis.

CONCLUSION

The Court should deny the Fee Motion in its entirety at least until the kicker is deleted and class counsel provides adequate documentation of (1) benefits attributable to the work of class counsel, (2) agreements concerning attorneys' fees, and (3) customary lodestar information including at least timekeepers, their billing rates, their hours, and the months their hours were billed. Any percentage-of-fund fee award must be based on net benefits to class members of the portion of the common fund attributable to class counsel. To the extent a fee award is based on lodestar, no multiplier above 1 should be awarded. The Court should defer awarding fees for future work until it is actually performed and found to be reasonable.

Dated: December 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 20, 2016, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ Anna St. John

Anna St. John