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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION This Document Relates to: ALL CONSUMER AND RESELLER ACTIONS	MDL 2672 CRB (JSC) **PLAINTIFFS' NOTICE OF MOTION, MOTION, AND MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF THE 2.0-LITER TDI CONSUMER AND RESELLER DEALER CLASS ACTION SETTLEMENT** Hearing: October 18, 2016 Time: 8:00 a.m. Courtroom: 6, 17th floor The Honorable Charles R. Breyer

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 18, 2016, at 8:00 a.m., in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Settlement Class Counsel, on behalf of the provisionally certified Settlement Class of owners and lessees of Volkswagen and Audi branded 2.0-liter TDI vehicles, as defined in the Amended Class Action Settlement Agreement and Release, will and hereby do move the Court for an Order granting final approval of the Amended Class Action Settlement Agreement and Release.

As discussed in the accompanying Memorandum and Points of Authorities, the Parties have reached an historic settlement that remediates past environmental harm, reduces future environmental harm, and, importantly, empowers consumers to make choices about the buyback or emissions modifications of their vehicles to make environmental remediation real, restore lost value to their vehicles, and provide recovery for their economic losses. Moreover, the Notice Program ordered by the Court, which included direct mail notice and an extensive media outreach, has timely commenced and is providing the best notice practicable under the circumstances. The Settlement Class Representatives and Settlement Class Counsel thus respectfully request that the Court grant its final approval, upon which the buyback program, the provision of emissions modifications as EPA/CARB approve them, and other class relief will commence.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

For six years, Volkswagen sold its Volkswagen and Audi branded TDI diesel vehicles in the U.S. with resounding success. These cars were marketed as fuel-efficient, safe, well-performing, and reliable, and in all these respects, they delivered. In one significant respect, however, they deceived. Volkswagen heavily marketed these TDI cars as “clean diesels,” when in reality, they were not. These TDI cars violated federal and state emissions rules. The use of these cars causes significant environmental damage.

When this deception was publicly disclosed on September 18, 2015, the owners and lessees were harmed too, because the market value of their cars dropped substantially. While TDI owners and lessees thought they were driving clean diesels, they were in reality unwitting agents to Volkswagen's pollution. The more TDI owners and lessees drove, the more the environment was harmed.

The mission of these Multidistrict Litigation ("MDL") proceedings, comprised of hundreds of consumer class suits, and actions by the United States Department of Justice ("DOJ") on behalf of the United States Environmental Protection Agency ("EPA"), the Federal Trade Commission ("FTC"), and the State of California by and through the California Air Resources Board ("CARB") and California's Office of the Attorney General, has been, as the Court has acknowledged and urged, two-fold: to "get[] the polluting cars fixed or off the road" as soon as possible and to compensate Volkswagen's aggrieved customers. *See, e.g.*, March 24, 2016, Status Conference Hr'g Tr. 8:20-21 (Dkt. 1384).

The proposed 2.0-Liter class action settlement (the "Settlement," "Class Action Settlement" or "Class Action Agreement"), and the related EPA/CARB and FTC agreements with Volkswagen, together accomplish these two goals—mitigating environmental damage and compensating consumers—in the speediest practicable manner, without the delays, uncertainties, and enforcement problems of protracted litigation. The Settlement accomplishes these goals in three ways, summarized here and described more fully in this brief and the Settlement Agreement:

1. Giving 2.0-liter TDI owners and lessees the option of receiving to EPA-approved emissions modifications as these become available, in combination with a restitution payment;

2. Giving 2.0-liter TDI owners the option to sell back their operable cars, regardless of their condition, to Volkswagen at September 2015 NADA Clean Trade (pre-"scandal") values, with a restitution payment on top of this frozen-in-time, vehicle-specific value. Cars recovered by Volkswagen in this "buyback" program cannot be resold, anywhere in the world, unless they are fixed to EPA standards; and

3. Pursuant to Volkswagen's agreement with the DOJ, requiring Volkswagen to pay

a total of $4.7 Billion (on top of the $10.033 billion funding pool for the Buyback and Emissions Modification program) in environmental reparations, to be administered by the EPA.

The Settlement is the largest auto-related class action settlement in U.S. history and was achieved through an historic and extraordinary collaboration among private litigants, represented by the PSC/Settlement Class Counsel, and government entities, including the DOJ, EPA, FTC, CARB, and the California Attorney General's Office, all working under conditions of urgency as directed by the Court, and facilitated by the diligence of the Court-appointed Settlement Master. The Settlement, and the related and simultaneously-negotiated FTC Consent Order and DOJ Consent Decree (together, the "Settlements") are valued at approximately $15 billion. They resolve Class Members'[1] claims pertaining to Volkswagen and Audi 2.0-liter TDI vehicles ("Eligible Vehicles") against Volkswagen,[2] and they honor consumer choice by providing owners and lessees with the options of either a "buyback" or "fix" of their vehicles, while also providing additional consumer redress in the form of substantial restitution payments. The Settlements require Volkswagen to create a $10.033 billion Funding Pool to fund the buyback and fix program, and to pay an additional $4.7 billion to environmental remediation and zero-emission technology initiatives to ensure significant ecological mitigation and future environmental protection.[3]

The speed in which the Settlement was reached is unprecedented. The Settlement was announced only nine months after news of Volkswagen's diesel scandal broke, and only five months after this Court appointed Lead Counsel and the Plaintiffs' Steering Committee ("PSC") (together, "Settlement Class Counsel"). The truncated time frame within which the Settlement was reached belies the Herculean efforts undertaken by Settlement Class Counsel and others,

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[1] Capitalized terms have the meaning ascribed to them in the Class Action Settlement.

[2] Plaintiffs' unreleased claims include those concerning 3.0-liter vehicles and all claims against Robert Bosch, LLC, Robert Bosch GmbH, and Volkmar Denner (collectively, "Bosch").

[3] In addition, a consortium of Attorneys General of at least 44 states have reached a related agreement to resolve their states' unfair and deceptive practice act claims against both Volkswagen and Porsche in exchange for (1) $1,100 for each 2.0- and 3.0-liter vehicle originally sold or leased in the participating states prior to September 18, 2015, (2) payment of $20,000,000 to the National Association of Attorneys General ("NAAG"), and (3) an injunction against future unfair and deceptive acts or practices. The Attorneys General settlement increases the total value of the Settlements to well over $15 billion.

including defense counsel, counsel representing multiple government entities, Settlement Master Mueller and his team, and the Court. Indeed, from February through June 28, 2016, weekends and weekdays were synonymous and holidays did not exist, as every day that passed without a resolution was another day that the Eligible Vehicles were spewing excessive levels of harmful pollutants into the atmosphere. The hours worked by Settlement Class Counsel (and, indeed, by counsel for all settling parties) are more typical of a multi-year complex litigation than a multi-month litigation. While these intensive settlement efforts went on around the clock, the litigation did not halt—the PSC continued its brisk pace of factual investigation, document review and analysis, and continued to build the case against settling and non-settling Defendants alike. Settlement Class Counsel have, without question, fulfilled (and will continue to fulfill) their commitment to the Court to devote their own personal time, and the time and resources of their respective firms, towards the litigation and successful resolution of this case.

All indications are that the Settlement Class appreciates the pace of the settlement as well as its benefits, and Class Members have acted swiftly to participate. As of August 24, 2016, there have been over 1.5 million visits to the official settlement website, www.VWcourtsettlement.com, where approximately 210,000 Class Members had registered for settlement benefits, a noteworthy level of participation in a program whose claims deadline does not occur until September 2018.

Settlement Class Representatives and Settlement Class Counsel respectfully request the approval of the Settlement as fair, adequate and reasonable to the Class, under the standards of Fed. R. Civ. P. 23(e) and prevailing jurisprudence.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

As alleged in the Consolidated Consumer Class Action Complaint (the "Complaint") (Dkt. 1230),[4] this multidistrict litigation arises from Volkswagen's deliberate use of a Defeat

[4] On August 16, 2016, Plaintiffs filed the Amended Consolidated Consumer Class Action Complaint, which included additional allegations in support of Plaintiffs' claims against Volkswagen pertaining to 3.0-liter vehicles, and claims against Bosch. Dkt. 1740-4. This motion addresses the operative complaint at the time of Settlement.

Device, a secretly embedded software algorithm installed in its TDI "clean diesel" vehicles that was designed to cheat emissions tests and fool regulators into approving for sale and lease hundreds of thousands of non-compliant Eligible Vehicles. The Defeat Device activates emission controls to temporarily lower emissions when the car senses that the TDI engine is being tested, and then deactivates the emission controls when the cars return to normal driving conditions. Volkswagen was able to obtain Certificates of Conformity ("COCs") from the EPA, and Executive Orders ("EOs") from CARB, only by using the Defeat Device, by misrepresenting the true levels of emissions from the Eligible Vehicles, and by concealing the use of the Defeat Device in its certification applications. With the Defeat Devices installed and the emissions controls deactivated during normal use, the Eligible Vehicles polluted at an alarming rate of up to forty times the legal limit. And yet, all the while, Volkswagen deceptively pitched itself—through an extensive, worldwide advertising campaign—as the world's foremost innovator of "clean" diesel technology to hundreds of thousands of consumers who paid a premium to purchase or lease what they believed to be "clean" diesel vehicles.

From 2009-2015, Volkswagen's Defeat Device scheme remained hidden, and the Eligible Vehicles were sold and leased at record numbers to Class Members. Even after road tests uncovered that the TDI engines were actually spewing up to forty times the allowable limits of pollutants during normal road driving, Volkswagen continued to obfuscate the truth and mislead regulators and consumers for over a year. Finally, after running out of plausible excuses for the discrepancies in the test results, Volkswagen was forced to admit its fraudulent conduct to Congress, to regulators, and to consumers who purchased and leased vehicles equipped with so-called "clean" diesel engines.

B. Procedural History

On September 3, 2015, at a meeting with the EPA and CARB, Volkswagen officials formally disclosed that Volkswagen had installed Defeat Device software in the Eligible Vehicles. On September 18, 2015, the EPA issued to Volkswagen a Notice of Violation of the Clean Air Act ("CAA") and CARB advised that it had initiated an enforcement investigation. In the months that followed, consumers filed over five hundred civil lawsuits against Volkswagen

across the United States, with over one hundred being filed in the State of California alone. The DOJ, at the request of the EPA, filed a complaint for violations of the CAA, the FTC filed a complaint for violations of the FTC Act, California and other state attorneys general announced investigations or filed lawsuits, and many other domestic and foreign government entities launched criminal and civil investigations of Volkswagen and related individuals and entities around the world.

On December 8, 2015, the Judicial Panel on Multidistrict Litigation transferred all related federal actions to the Northern District of California for coordinated pretrial proceedings before this Court. Dkt. 1. On January 19, 2016, the Court appointed former FBI Director Robert S. Mueller III as Settlement Master to attempt to facilitate a settlement between the parties. Dkt. 797. On January 21, 2016, the Court appointed Plaintiffs' Lead Counsel and the PSC. Dkt. 1084.

Since appointment, Settlement Class Counsel have worked tirelessly both to prosecute the civil cases on behalf of consumers and to work with Volkswagen, federal and state agencies, and the Settlement Master to try to negotiate resolution of some or all of the claims asserted in this litigation in a manner most favorable to Class Members. Lead Counsel created more than a dozen PSC working groups to ensure that the prosecution and settlement tracks proceeded in parallel, and that the enormous amount of work that needed to be done in a very short period of time was done in the most organized and efficient manner possible. Those working groups focused simultaneously on both litigation and settlement tasks, including: drafting complaints; serving, responding to, and reviewing voluminous discovery; analyzing economic damages (and retaining experts concerning those issues); reviewing Volkswagen's financial condition and ability to pay any settlement or judgment; assessing technical and engineering issues; coordinating with multiple federal and state governmental agencies as well as with plaintiffs in state court actions; and researching environmental issues, among others.

On February 22, 2016, Settlement Class Counsel filed a 719-page Consolidated Consumer Class Action Complaint asserting claims for fraud, breach of contract, and unjust enrichment, and for violations of The Racketeer Influenced and Corrupt Organizations Act ("RICO"), The Magnuson-Moss Warranty Act ("MMWA"), and all fifty States' consumer protection laws. Dkt.

1230. The length of, and detail in, the Complaint reflects the arduous process undertaken by Settlement Class Counsel in understanding the factual complexities of the alleged fraud, and researching and developing the various claims at issue and the remedies available to those who were harmed by Volkswagen's conduct.

Following the filing of the Complaint, Settlement Class Counsel served Volkswagen with extensive written discovery requests, including interrogatories, requests for production, and requests for admissions, and negotiated comprehensive expert, deposition, preservation, and ESI protocols. At the time of 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. That effort required the reviewing attorneys not only to understand the legal complexities of the dozens of claims Plaintiffs asserted, but also to master the difficulties and nuances involved when working with troves of documents produced in German. At the same time, Settlement Class Counsel responded to Volkswagen's discovery requests, producing documents from 174 named Plaintiffs, in addition to compiling information to complete comprehensive fact sheets, which also included document requests, for each named Plaintiff.

Under the Settlement Master's guidance and supervision, Lead Counsel and a settlement working group of the PSC engaged in arm's-length settlement negotiations with Volkswagen in an effort to resolve the consumer claims brought by Plaintiffs. At the Court's direction, the settlement negotiations began from almost the moment the Court appointed the Settlement Master, Plaintiffs' Lead Counsel, and the PSC in January 2016. Since that time, settlement discussions have occurred on both coasts of the United States, in person and telephonically, without regard to holidays, weekends, or time zones. The negotiations have been extraordinarily intense and complex, particularly considering the timeframe and number of issues and parties involved, including attorney representatives from numerous governmental entities. The result of all these meetings and negotiations is an outstanding Settlement for all consumers who purchased or leased an Eligible Vehicle.

On June 28, 2016, Plaintiffs and Settlement Class Counsel filed their Motion and

Memorandum in Support of Preliminary Approval of the Class Action Agreement and Approval of Class Notice ("Motion for Preliminary Approval"). Dkt. 1609. On July 26, 2016, the parties presented a comprehensive description of the Settlement terms, benefits and procedures at the hearing on the Motion for Preliminary Approval, and requested preliminary approval of the Amended Consumer Class Action Settlement Agreement and Release ("Settlement"). Dkt. 1685. Later that day, the Court entered its Order Granting Preliminary Approval of Settlement. Dkt. 1688. On July 29, 2016, the Court entered its Amended Order Granting Preliminary Approval of Settlement ("Preliminary Approval Order"), which corrected the Class definition such that it was consistent with the Settlement. Dkt. 1698. The Preliminary Approval Order provisionally certified the Settlement Class, preliminarily approved the Settlement, appointed Lead Counsel and the PSC as Settlement Class Counsel, appointed and designated the individuals listed on Exhibit 1 to the Motion for Preliminary Approval as Class Representatives, approved the manner and form of providing notice of the Settlement to Class Members, set a deadline for Class Members to opt-out from or object to the Settlement, and scheduled a final Fairness Hearing.

Following preliminary approval, Settlement Class Counsel diligently worked with respected class notice provider Kinsella Media, LLC ("KM") to effectuate the Notice Program ordered by the Court. The approved Long Form Notice has been directly sent by first class mail (and, for the majority of Class Members, also by e-mail) to all readily identifiable Class Members. KM further disseminated notice through an extensive print and digital media program. Finally, a Settlement Website and a toll-free telephone number were established to provide details regarding the Settlement to inquiring Class Members. Class Counsel have made themselves available to directly address questions, comments, and requests for assistance from Class Members.

On August 10, 2016, pursuant to the Court's Preliminary Approval Order, Settlement Class Counsel filed its Statement of Additional Information Regarding Prospective Request for Attorneys' Fees and Costs ("Statement"), in order to provide Class Members with sufficient information regarding Settlement Class Counsel's prospective request for attorneys' fees and costs to make an uninformed decision as to whether they should object to or opt out of the

Settlement. Dkt. 1730. The Statement papers themselves, and a plain language Executive Summary, were also made available to interested Class Members on the Court's website.

III. TERMS OF THE 2.0-LITER CLASS SETTLEMENT

A. The 2.0-Liter Settlement Class Definition

The Settlement Class consists of all persons (including individuals and entities) who, on September 18, 2015, were registered owners or lessees of, or, in the case of Non-Volkswagen Dealers, held title to or held by bill of sale dated on or before September 18, 2015, a Volkswagen or Audi 2.0-liter TDI vehicle in the United States or its territories (an "Eligible Vehicle," defined more fully in the Class Action Agreement), or who, between September 18, 2015, and the end of the Claim Period, become a registered owner of, or, in the case of Non-Volkswagen Dealers, hold title to or hold by bill of sale, an Eligible Vehicle. The following entities and individuals are excluded from the Class:

(1) Owners who acquired their Volkswagen or Audi 2.0-liter TDI vehicles after September 18, 2015, and transfer title to their vehicle before participating in the Settlement Program through a Buyback or an Approved Emissions Modification;

(2) Lessees of a Volkswagen or Audi 2.0-liter TDI vehicle that is leased from a leasing company other than VW Credit, Inc.;

(3) Owners whose Volkswagen or Audi 2.0-liter TDI vehicle (i) could not be driven under the power of its own 2.0-liter TDI engine on June 28, 2016, or (ii) had a Branded Title of Assembled, Dismantled, Flood, Junk, Rebuilt, Reconstructed, or Salvage on September 18, 2015, and was acquired from a junkyard or salvage yard after September 18, 2015;

(4) Owners who sell or otherwise transfer ownership of their Volkswagen or Audi 2.0-liter TDI vehicle between June 28, 2016, and September 16, 2016 (the "Opt-Out Deadline"), inclusive of those dates;

(5) Volkswagen's officers, directors and employees; Volkswagen's affiliates and affiliates' officers, directors and employees; their distributors and distributors' officers, directors and employees; and Volkswagen Dealers and Volkswagen Dealers' officers and directors;

(6) Judicial officers and their immediate family members and associated court staff

assigned to this case; and

(7) Persons or entities who or which timely and properly exclude themselves from the Class as provided in the Agreement.

B. Summary of Benefits to Class Members

Pursuant to the Settlement, Volkswagen will provide the following benefits to the Class Members:

(1) The creation of a Funding Pool of $10.033 billion ($10,033,000,000) from which funds will be drawn to compensate Class Members under the Buyback, Lease Termination and Restitution Payment programs, pursuant to the Class Action Settlement Program, as further detailed below;

(2) The establishment of an Approved Emissions Modification for Class Members who do not wish to participate in the Buyback or Lease Termination programs, pursuant to the Class Action Settlement Program, as further detailed below;

(3) The payment of $2.7 billion into a Trust established to support environmental programs throughout the country that will reduce NO_X in the atmosphere by an amount equal to or greater than the combined NO_X pollution caused by the cars that are the subject of the lawsuit; and

(4) The investment of $2 billion to create infrastructure for and promote public awareness of zero emission vehicles.

Class Members will be grouped into three different categories (Eligible Owners, Eligible Sellers, and Eligible Lessees) and compensated as follows:

(1) Eligible Owners will be offered the choice between (A) a Buyback and Owner Restitution, including substantial loan forgiveness if applicable, or (B) an Approved Emissions Modification and Owner Restitution.

(2) Eligible Lessees who retain an active lease of an Eligible Vehicle will be offered the choice between (A) a Lease Termination and Lessee Restitution or (B) an Approved Emissions Modification and Lessee Restitution.

(3) Eligible Lessees who return or have returned an Eligible Vehicle at the conclusion

of the lease will be offered Lessee Restitution.

(4) Eligible Lessees who obtained ownership of their previously leased Eligible Vehicle after June 28, 2016 will be offered an Approved Emissions Modification and Lessee Restitution.

(5) Eligible Sellers will be offered Seller Restitution.

(6) Owners whose Eligible Vehicles were totaled and who consequently transferred title of their vehicle to an insurance company after the Opt-Out Deadline, but before the end of the Claim Period, will be offered Owner Restitution but not a Buyback.

The Buyback and Restitution Payment programs will be based on the September 2015 (prior to the disclosure of the existence of the Defeat Device) National Automobile Dealers Association ("NADA") Clean Trade In value of the Eligible Vehicle adjusted for options and mileage ("Vehicle Value"). The Vehicle Value will be fixed as of September 2015 such that the value of Eligible Vehicles will not depreciate throughout the entire settlement claim period. The restitution amounts for owners and lessees will be same regardless of whether they choose a Buyback/Lease Termination or an Approved Emissions Modification.

The following chart summarizes Class Member options and payments:

Category	Definition	Benefit Options	Restitution Payment
Eligible Owner (bought car on or before September 18, 2015)	Registered owner of an Eligible Vehicle at the time of Buyback or Approved Emissions Modification.	(1) Buyback Vehicle Value + Restitution Payment + Loan Forgiveness if applicable OR (if approved) (2) Emissions Modification Modification to your car to reduce emissions + Restitution Payment	20% of the Vehicle Value + $2,986.73 $5,100 minimum

Category	Definition	Benefit Options	Restitution Payment
Eligible Owner (bought car after September 18, 2015)	Registered owner of an Eligible Vehicle at the time of Buyback or Approved Emissions Modification.	(1) Buyback Vehicle Value + Restitution Payment OR (if approved) (2) Emissions Modification Modification to your car to reduce emissions + Restitution Payment	10% of the Vehicle Value + $1529 + a proportional share of any restitution not claimed by Eligible Sellers $2,550 minimum
Eligible Seller	Registered owner of an Eligible Vehicle on September 18, 2015, who transferred vehicle title after September 18, 2015, but before June 28, 2016.	Restitution Payment	10% of the Vehicle Value + $ 1,493.365 $2,550 minimum
Eligible Lessee (currently leases car)	Registered lessee of an Eligible Vehicle, with a lease issued by VW Credit, Inc., at the time of Early Lease Termination or Approved Emissions Modification.	(1) Lease Termination Early termination of the lease without penalty + Restitution Payment OR (if approved) (2) Emissions Modification Modification to your car to reduce emissions + Restitution Payment	10% of the Vehicle Value (adjusted for options but not mileage) + $1529
Eligible Lessee (formerly leased car)	Registered lessee of an Eligible Vehicle, with a lease issued by VW Credit, Inc., who returned the Eligible Vehicle at the end of the lease on or after September 18, 2015, or purchased the Eligible Vehicle after June 28, 2016.	Restitution Payment	10% of the Vehicle Value (adjusted for options but not mileage) + $1,529

C. Attorneys' Fees

None of the settlement benefits for Class Members will be reduced to pay attorneys' fees or to reimburse expenses of Settlement Class Counsel. Volkswagen will pay attorneys' fees and costs separately from, and in addition to, the Settlement benefits to Class Members. Since the Court's preliminary approval of the Settlement, Settlement Class Counsel and Volkswagen have engaged in substantive discussions regarding the payment of attorneys' fees and costs; however, an agreement as to the amount of attorneys' fees and costs to be paid has not yet been reached.

As the Court noted in its Preliminary Approval Order, "Rule 23(h), which governs attorneys' fees in class actions, does not require Settlement Class Counsel to move for its fee award at the preliminary approval juncture, or even upon seeking final approval." Dkt. 1698 at 23. Accordingly, that the amount of attorneys' fees and costs is still to be determined does not affect the Court's evaluation of whether final approval of the Settlement is appropriate. *Id.* (citing *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 445 (3d Cir. 2016) ("[T]he separation of a fee award from final approval of the settlement does not violate Rule 23(h).")). Indeed, "[w]hile Class Members must be given an opportunity to object to a request for fees . . . they can be given that opportunity after final approval." Dkt. 1698 at 24.

Pursuant to the Preliminary Approval Order, on August 10, 2016, Settlement Class Counsel filed its Statement detailing the methodology it will use to determine the amount of fees and costs it will seek for the work done and expenses incurred for the common benefit of Class Members in connection with this action and the Settlement. Dkt. 1730. Specifically, Settlement Class Counsel indicated that the common benefit fee application will utilize the percentage methodology approved by the Ninth Circuit for class action settlement fee awards and seek no more than $324 million in attorneys' fees for the common benefit work performed, plus actual and reasonable out-of-pocket costs incurred, not to exceed $8.5 million, through October 18, 2016, the date of the Final Approval Hearing.[5] *Id.* at 2-3. The "capped" amount of attorneys' fees identified in the Statement 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. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002).[6]

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[5] In addition, the Statement advised Class Members that Settlement Class Counsel's fee application will include a proposed formula to reasonably and appropriately compensate counsel for the time and effort that will be spent fulfilling their obligations to Class Members in connection with the implementation of the Settlement through the close of 2018 (if the Court grants final approval). *Id.* at 3-4.

[6] Initial reactions to Settlement Class Counsel's prospective request for attorneys' fees and costs have been positive, especially given the size of the $10.33 billion funding pool commitment. *See. e.g.*, Amanda Bronstad, *VW Lawyers' Fee Request Won't Exceed $324M Despite Massive Size of Emissions Accord*, Law.com, (Aug. 11, 2016), http://www.law.com/sites/almstaff/2016/08/11/vw-lawyers-fee-request-wont-exceed-324m-

The Statement, which was made available to interested Class Members on the Court's website, provides Class Members with sufficient information as to Settlement Class Counsel's prospective request for attorneys' fees and costs to make an informed decision as to whether they should object to or opt out of the Settlement by the September 16, 2016, Objection and Opt-Out Deadline. Dkt. 1698 at 24 (citing *In re NFL Players*, 821 F.3d at 446 ("Even if the class members were missing certain information—for example, the number of hours class counsel worked and the terms of any contingency fee arrangements class counsel have with particular retired players—they still had enough information to make an informed decision about whether to object to or opt out from the settlement.")). Moreover, as stated in the notice informing Class Members of the Settlement, Class Members will have the opportunity to comment on and/or object to Settlement Class Counsel's prospective request for fees and costs before the Court rules on it. Accordingly, Rule 23(h)'s procedures and protections will apply to Settlement Class Counsel's prospective fee application such that there are no deficiencies in this regard that would preclude the Court from granting final approval of the Settlement.

IV. THE 2.0-LITER SETTLEMENT MERITS FINAL APPROVAL

A. The Class Action Settlement Process

Pursuant to Federal Rule of Civil Procedure 23(e), class actions "may be settled, voluntarily dismissed, or compromised only with the court's approval." As a matter of "express public policy," federal courts favor and encourage settlements, particularly in class actions, where the costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (same); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11:41 (4th ed. 2002) (same, collecting cases).

The *Manual for Complex Litigation (Fourth)* (2004) describes the three-step procedure for

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despite-massive-size-of-emissions-accord/.

approval of class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of the notice of the settlement to class members, providing for, among other things, a period for potential objectors and dissenters to raise challenges to the settlement's reasonableness; and (3) a formal fairness and final settlement approval hearing. *Id.* at § 21.63. The Court completed the first step in the settlement process when it granted preliminary approval to the Settlement. Thereafter, Settlement Class Counsel completed the second step by implementing the Notice Program pursuant to the terms of the Settlement and the Court's Preliminary Approval Order. Settlement Class Representatives and Settlement Class Counsel now request that the Court take the third and final step—holding a formal fairness hearing and granting final approval of the Settlement. Settlement Class Representatives and Settlement Class Counsel further request that the Court certify the Settlement Class and enter a Final Judgment in this action.

B. The Settlement Meets the Ninth Circuit's Standards For Final Approval

Rule 23 of the Federal Rules of Civil Procedure governs a district court's analysis of the fairness of a settlement of a class action. *See* Fed. R. Civ. P. 23(e). To approve a class action settlement, the Court must determine whether the settlement is "fundamentally fair, adequate and reasonable." *In re Rambus Inc. Derivative Litig.*, No. C-06-3515–JF, 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009) (citing Fed. R. Civ. P. 23(e)); *see also Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). In granting preliminary approval of the Settlement, the Court took the first step in making this determination. *See* Dkt. 1698 at 31 ("The Court finds that the proposed Settlement is the result of intensive, non-collusive negotiations and is reasonable, fair and adequate.").

"Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only role in reviewing the substance of that settlement is to ensure that it is 'fair, adequate, and free from collusion.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 8 (2013) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). When class counsel is experienced and supports the settlement, and

the agreement was reached after arm's-length negotiations, courts should give a presumption of fairness to the settlement. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965, at *6 (N.D. Cal. June 29, 2009); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Additionally, "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

The Ninth Circuit has identified "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement" as factors for determining whether a settlement is fair, reasonable, and adequate. *See Hanlon*, 150 F.3d at 1026. "The relative degree of importance to be attached to any particular factor will depend on the unique circumstances of each case." *Officers for Justice*, 688 F.2d at 625. As discussed below, all of the relevant factors set forth by the Ninth Circuit for evaluating the fairness of a settlement at this final stage support final approval, and there can be no doubt that the Settlement was reached in a procedurally fair manner given Settlement Master Mueller's extensive involvement and active guidance and assistance. For these reasons, the Settlement merits final approval.

C. The Settlement Is Substantively Fair Because It Provides Very Significant Benefits in Exchange for The Compromise of Strong Claims

As noted in the summary of the Settlement terms above, 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. This Settlement, rare among civil litigation resolutions, will actually undo harm, as well as compensate for financial loss. The Settlement's significant benefits are provided in recognition of the strength of

Plaintiffs' case on the merits and the likelihood that Plaintiffs would have been able to certify a litigation class, maintain certification through trial, and prevail. All PSC members, a uniquely experienced group including preeminent class action litigators, consumer and environmental advocates, noted trial lawyers, and auto litigation veterans, support this Settlement, and it is highly uncertain whether the Class would be able to obtain and sustain a better outcome through continued litigation, trial, and appeal.

The PSC retained Economist Edward Stockton of The Fontana Group, Inc. to participate throughout the settlement negotiations to evaluate the economic effects on consumers of the allegedly deceptive marketing and sale of Volkswagen TDI vehicles. Mr. Stockton also aided the PSC in assessing and developing the terms of the Class Action Settlement. Mr. Stockton's Declaration is appended hereto as Exhibit A. This Declaration describes Mr. Stockton's role in working with the PSC, Volkswagen, Volkswagen's experts, regulatory personnel, and the Settlement Master throughout the negotiation of this Settlement, sets out Mr. Stockton's economic analysis and conclusions concerning the Settlement, and summarizes the extensive data on which he bases his conclusions.

Mr. Stockton's analysis demonstrates that the Settlement restores the Eligible Vehicles to pre-scandal market value, in addition to redressing environmental harms from excess emissions. The baseline for valuation of the class vehicles is the National Automotive Dealers' Association Clean Trade-In ("CTI") price as of September 2015, which predates the announcement of the scandal. This is a valuation resource relied on throughout the automotive industry, and September 2015 values are the "most proximate valuation available that relied upon pre-announcement market conditions." Stockton Declaration at 7-8. Using this valuation metric avoided price depreciation in the wake of the scandal, allowed Settlement Class Members to mitigate the effect on the vehicle's value resulting from overpayment of the TDI price premium, and allowed owners to continue to use their vehicles until the buyback transaction without suffering additional depreciation. An upward adjustment using an additional 20% of CTI, plus a fixed restitution component of nearly $3,000 per vehicle, results in consumers receiving a minimum of 112.6% of pre-scandal retail value. *Id.* at 15, 18-19. This enables Settlement Class

Members to replace their Eligible Vehicles with a comparable or better vehicle; they can sever any relationships with VW.[7] Further, the use of a mileage credit prorates the vehicle mileage used for valuation from the actual date of the buyback transaction back to September 2015, which means that consumers will receive a value for their vehicle reflecting less mileage than they have actually driven. *Id.* at 16.

For vehicles that did not yet have CTI values as of September 2015—namely, certain 2015 vehicles—the settlement bases value on "observed relationships of [CTI] value to MSRP for comparable Volkswagen vehicles." *Id.* at 17. Thus, a percentage of MSRP analogous to expected CTI value is used as a building block to ensure that owners and lessees of these vehicles, too, receive fair compensation.

Overall, in Mr. Stockton's assessment, the settlement "place[s] consumers in a position to replace their vehicles at September 2015 (pre-emissions disclosure) retail value and receive additional real economic benefits," makes "significant individual adjustments to account for certain disparate economic considerations of consumers," and "allows those consumers to purchase comparable vehicles while leaving them additional compensation for the other costs they experienced." *Id.* at 20-21.[8]

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[7] Some consumer class settlements have been criticized because they require Class Members to continue a customer relationship with the defendant, such as by buying another product from that defendant or repairing already-purchased products, in order to realize a settlement benefit. This Settlement recognizes that while many Class Members wish to keep their vehicles once they are modified to reduce emissions, others do not. The Settlement provides benefits to both groups and honors and compensates both choices, and it provides an equal payment – the owner or lessee restitution payment—to Class Members, whether they elect the buyback or emissions modification.

[8] The FTC underscores the importance of replacement value in its Statement Supporting the Settlement. It used a particular approach that reached the same result: "To be made whole, consumers must receive full compensation for their vehicles' full retail value and all other losses caused by Volkswagen's deception. Full compensation has to be sufficient for consumers to replace their vehicle. Because almost all consumers have to do so on the retail market, the FTC started its calculations with the National Association of Auto Dealers ('NADA') Clean *Retail* value for his or her vehicle before the scandal broke – 'what a person could reasonably pay for a vehicle [in good condition] at a dealer's lot.' [citations omitted] The Commission then added all other losses consumers incurred, and would incur, because of Volkswagen's deception, including the 'shoe leather' cost of shopping for a new car, sales taxes and registration, the value of the lost opportunity to drive an environmentally-friendly vehicle, and the additional amount 'Clean Diesel' consumers paid for a vehicle feature (clean emissions) that Volkswagen falsely advertised." *Federal Trade Commission's Statement Supporting the Settlement.* (Dkt. No. 1781).

Professor Andrew Kull reached a similar conclusion regarding the strength of the Settlement's remedies, viewing it through the lens of rescission. Exhibit B, Kull Declaration, at 18-20. Professor Kull served as Reporter for the American Law Institute in preparing the *Restatement Third, Restitution and Unjust Enrichment*, the authoritative nationwide restatement on these doctrines, and is thus considered the leading U.S. authority on the law of rescission, restitution and unjust enrichment. *Id.* at 2. After carefully reviewing the Complaint, the Settlement documents, and other relevant filings, and conducting research in an area of law and equity with which he is deeply familiar, Professor Kull concludes that the "benefits comprised by the Buyback Option" are at least as valuable as any that an Eligible Owner would hypothetically have been able to recover through a traditional rescissionary remedy, if successful at trial. *Id.* at 18. But this is not an apples-to-apples comparison because, as Mr. Kull observes, "[t]he benefits reasonably to be anticipated from an owner's hypothetical suit for rescission must be significantly discounted to reflect the time and expense of reaching a result by independent litigation." *Id.* at 19. In contrast, the benefits available under the Settlement "will not be reduced by attorneys' fees and other expenses that ordinarily accompany such a recovery in litigation." *Id.* at 19-20. And, of course, they will be delivered much more quickly than they would "through adversary litigation, trial, and appeal." *Id.*

The Settlement Class certainly would not have been able to secure the commencement of the buyback, emissions modification, and remediation program as swiftly as it will take place under the Settlement through adversarial litigation, judgment, and appeals, even on the expedited time schedule that the PSC sought, and the Court may have granted. Moreover, while Settlement Class Counsel believe in the strength of this case, they recognize there are always uncertainties in litigation, making resolution of claims in exchange for certain and timely provision to the Class of the significant benefits described herein an unquestionably reasonable outcome. *See Nobles*, 2009 U.S. Dist. LEXIS 59435, at *5 ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair.") (citing *Mego*, 213 F.3d at 458; *Kim v. Space Pencil, Inc.*, No. C 11-03796 LB, 2012 WL 5948951, at *15 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the

Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant.”)). Moreover, in this litigation “time is of the essence” is a reality, not a cliché. All litigation is uncertain, but here environmental harm is certain to continue, unless and until it is reduced by reaching the over-arching goal: fix the cars, or get them off the road. The Settlement addresses that goal much sooner than would trial, in an instance where sooner is palpably superior to later.

Indeed, should Settlement Class Counsel prosecute these claims against Volkswagen to conclusion, any recovery would come years in the future and at far greater expense to the environment and the Class. There is also a risk that a litigation Class would receive less or nothing at all, despite the compelling merit of its claims, not only because of the risks of litigation, but also because of the solvency risks such prolonged and expanding litigation could impose upon Volkswagen. *See, e.g.*, *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007) (affirming approval of settlement class and rejecting objections premised on prospect of plaintiffs complete victory on disputed issue because “any such victory would run the risk of being a Pyrrhic one . . . we need not embellish the point by raising the prospect of bankruptcy”).

In addition to the above, there is a risk that any class recovery obtained at trial would be reduced through offsets. Restitution remedies for automotive defects based on rescission or repurchase calculations may be subject to offset claims for the car owner’s use of the vehicle, as detailed in Mr. Kull’s Declaration. Ex. B at 10-18. For example, under California law, the Song-Beverly Consumer Warranty Act provides for an offset calculated on the basis of the mileage driven. *See* Cal. Civ. Code § 1793.2(d)(2)(C); *see also Robbins v. Hyundai Motor Am., Inc.*, No. SACV 14-00005-JLS (ANx), 2015 WL 304142 at *6 (C.D. Cal. Jan. 14, 2015); *Rupay v. Volkswagen Grp. of Am. Inc.*, No. CV 12-4478-GW FFMX, 2012 WL 10634428, at *4 (C.D. Cal. Nov. 15, 2012). State-law-required offsets could also apply to claims under the federal Magnuson Moss Warranty Act (“MMWA”), because while the MMWA effectively creates a federal cause of action to enforce state-law warranty claims, the MMWA applies state substantive law instead of creating substantively different federal warranty standards. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (“claims under the Magnuson–Moss

Act stand or fall with . . . express and implied warranty claims under state law"); *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 954 (C.D. Cal. 2012). Indeed, the MMWA itself defines the term "refund" as "refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

Further, California's Lemon Law specifically enumerates a method for calculating depreciation on vehicles in § 1793.2(d)(2)(C), while the National Traffic and Motor Vehicle Safety Act likewise notes that, following a safety recall, an available remedy to consumers is to "refund[] the purchase price, less a reasonable allowance for depreciation." 49 U.S.C. § 30120(a)(1)(A)(iii). Ultimately, any rescission or refund remedy requires that a plaintiff return the product in a comparable condition to what the plaintiff received. And because a vehicle's value depreciates significantly with use, courts require a reasonable reduction in the refund amount, to account for the depreciation and value provided to the plaintiff. *See, e.g.*, *Kruger v. Subaru of Am.*, 996 F. Supp. 451, 457 (E.D. Pa. 1998) ("Thus, because the car is unavailable and because the plaintiffs used the car for eight months, thereby depreciating its value, I conclude that the plaintiffs are not entitled to a full refund."); *Kruse v. Chevrolet Motor Div.*, Civil Action No. 96-1474, 1997 WL 408039, at *6 (E.D. Pa. July 15, 1997) ("Awarding damages equal to the full purchase price does not take into account the natural depreciation of the vehicle from normal usage."). Accordingly, the buyback calculation in the Settlement is both highly favorable to Class Members, and supported by applicable law. The settlement provides an array of provisions to compensate for the lost market value of the vehicles, and to restore their ongoing value and utility.

Avoiding years of additional litigation in exchange for the certainty of this Settlement now is also important because of the continued environmental damage being caused by the Eligible Vehicles. The Settlement will get the Eligible Vehicles off the road through a buyback or fix, reducing further environmental damage and air pollution. And the $2.7 billion allocated to NOx reduction programs effectively will reverse the environmental damage caused by the Eligible Vehicles' excess pollution.

D. The Settlement Is Procedurally Fair as the Product of Good Faith, Informed, and Arm's-Length Negotiations

Lead Counsel and the PSC settlement working group engaged in settlement discussions with Volkswagen and government representatives from the DOJ, EPA, CARB, and the FTC, under Settlement Master Mueller's guidance and supervision. Settlement Class Counsel have also analyzed huge volumes of discovery material that has provided them sufficient information to enter into a reasoned and well-informed settlement. *See, e.g.*, *Mego*, 213 F.3d at 459 (holding that "significant investigation, discovery and research" supported "district court's conclusion that the Plaintiffs had sufficient information to make an informed decision about the Settlement").

Participation of government entities in the settlement process weighs highly in favor of granting final approval. In *Marshall v. Holiday Magic, Inc.*, the Ninth Circuit observed what has become a well-established bulwark of integrity and fairness: "The participation of a government agency serves to protect the interests of the class members, particularly absentees, and approval by the agency is an important factor for the court's consideration." 550 F.2d 1173, 1178 (9th Cir. 1977) (citation omitted); accord *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 360 (E.D.N.Y. 1982) ("That a government agency participated in successful compromise negotiations and endorsed their results is a factor weighing heavily in favor of settlement approval—at least where, as here, the agency is 'committed to the protection of the public interest.'") (citation omitted). Here, this protective effect was at least quadrupled: not one, but four, major governmental agencies were involved, and multiple agencies both reflected and protected the trial—interests consumer and environmental—of the Settlement Class itself.

Evidence of a settlement negotiation process involving protracted negotiations with the assistance of a court-appointed mediator also weighs in favor of approval. *See Pha v. Yang*, No. 2:12-cv-01580-TLN-DAD, 2015 U.S. Dist. LEXIS 109074, at *13 (E.D. Cal. Aug. 17, 2015) (finding that the fact "the settlement was reached through an arms-length negotiation with the assistance of a mediator through a months-long process . . . weigh[ed] in favor of approval"); *Rosales v. El Rancho Farms*, No. 1:09-cv-00707-AWI-JLT, 2015 WL 446091, at *44 (E.D. Cal. July 21, 2015) ("Notably, the Ninth Circuit has determined the 'presence of a neutral mediator

[is] a factor weighing in favor of a finding of non-collusiveness.'") (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *15-16 (N.D. Cal. Sept. 26, 2013) (same). It is an understatement to say that the parties benefited from the assistance of Settlement Master Mueller, who played a crucial role in supervising the negotiations and in helping the parties bridge their differences.

As Mr. Stockton's Declaration makes clear, the Settlement is the result of a thorough and extensive negotiation and analytical process, in which the undersigned were armed not only with the facts of this case, and the applicable law, but extensive data on the auto industry and auto market context in which this case arose, and specific data on the class vehicles themselves. In lengthy sessions of intensive negotiation, the parties and experts evaluated highly specific data including the trim lines, specific vehicle options, mileage, finance terms, trade-in values, and expected retail replacement costs of the class vehicles, and undertook economic analyses of vehicle depreciation rates, overpayment and mitigation thereof, tax implications, vehicle search and acquisition costs, warranty refunds, anticipated vehicle use, buyback timing, and other considerations. These analyses relied on data at the VIN level—that is, specific to individual vehicles—as well as industry vehicle valuation resources.

Most settlement negotiations take place along two dimensions: plaintiff versus defendant. The negotiations culminating in the related Settlements now before this Court transpired along multiple dimensions simultaneously: federal and state government entities, and the Class approached resolution sometimes alone, and sometimes together, in various combinations and with different stances at different times, all to hammer out the best possible resolution from each party's perspective.[9] These unremitting efforts at synthesis and convergence have achieved a uniquely speedy, economically substantial, and environmentally responsible 2.0-liter settlement,

[9] *See, e.g.*, *Federal Trade Commission's Statement Supporting the Settlement* (Dkt. No. 1781), filed August 26, 2016, discussing the FTC approach to "full compensation," which, as the FTC notes, the Class Settlement achieves. The FTC started at NADA Clean Retail to assure the Settlement buyback payments would reasonably pay for comparable replacement vehicles—a goal shared by Class Plaintiffs. The Class Settlement and the FTC Order achieve the same goal through complementary perspectives.

with the Settlement Class itself as both the beneficiary of economic compensation, and the agent of environmental benefit, as the Settlements are shaped and their objectives accomplished through the buyback or emissions modification choices the Settlement Class Members make for their vehicles.

Settlement Class Counsel continue to vigorously prosecute non-settled claims against Volkswagen and other defendants in this litigation, including Volkswagen's corporate affiliate Porsche, Volkswagen's supplier Bosch, and others. This continued prosecution shows that issues in this case remain contested, and that the Settlement now being submitted for final approval resulted from vigorous, arm's-length negotiations.

Taken together, the substantive quality of the Settlement, the procedurally fair manner in which it was reached, and the economic and environmental benefits it will achieve if approved weigh in favor of granting final approval.

E. Class Member Reaction To the Settlement Has Been Overwhelmingly Favorable

The deadline for Class Member objections and opt-outs is September 16, 2016, and they will be comprehensively analyzed, reported on, and responded to, in Settlement Class Counsel's Reply Submissions, to be filed on September 30, 2016.

In the meantime, the immediate reaction of Class Members to the proposed Settlement has been overwhelmingly positive. As detailed in Section VI below, direct mail and e-mail notice has been accomplished. Over 800,000 notices were sent directly via First Class U.S. Mail to ensure reaching all approximately 475,000 Class Members. Although the Opt-Out and Objection Deadlines have not yet passed, approximately 235 consumers have requested exclusion from the Class and approximately 110 objections have been received.[10] Collectively, these numbers

[10] Two Class Members filed motions to intervene through counsel for the stated purpose of challenging certain aspects of the Settlement. On July 22, 2016, Ronald Clark Fleshman, Jr., moved to intervene to oppose final approval of the Settlement to the extent it releases claims against Volkswagen held by Virginia residents. Dkt. 1672. On August 17, 2016, the Court denied the motion finding that "Fleshman fail[ed] to show the Consumer Class Action and the Settlement practically impair[ed] his interests." Dkt. 1742 at 7. On July 29, 2016, Jolian Kangas moved to intervene in this action for the purpose of conducting discovery concerning "the process through which the settlement … was negotiated and the strength of the defenses to the core

represent less than 0.1% of the total Settlement Class. On the other hand, approximately 210,000 Class Members have already registered for the Settlement, a remarkable figure given that the Settlement has not yet been approved and no claims deadline looms. Comparison of these figures provides powerful evidence of the Settlement's fairness. *See, e.g.*, *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval of settlement with 45 objections and 500 opt-outs from class of 90,000 members, roughly 0.6%); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (finding that sixteen opt outs in class of 329 members, or 4.86%, strongly supported settlement); *Glass v. UBS Fin. Serv., Inc.*, No. C-06-4068-MMC, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007) (approving settlement with 2% opt-out rate); *Wren v. RGIS Inventory Specialists*, No. C-06-05778-JCS, 2011 WL 1230826, at *11 (N.D. Cal. Apr. 1, 2011) (holding that "'the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members'") (quoting *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)); *see also Garner v. State Farm Mut. Auto. Ins. Co.*, No. C 08 1365 CW (EMC), 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010); *Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *5 (D. Nev. Oct. 28, 2010) ("The small number of objections is an indication that the settlement is fair, adequate, and reasonable.").

Because the class action settlement procedure requires affirmative action for exclusion, provides a right of objection, but does not ask for votes of support, the case law, such as that noted above, compares a vocal minority against a silent majority as a proxy for support. Here, we have strong direct evidence of actual support: the affirmative efforts of approximately 210,000 Class Members in the last 30 days, a number increasing by the thousands daily, to register early for the substantial benefits this Settlement offers. They do not face an impending deadline—they have two more years to make choices and file claims—but the fact that so many of them have already taken steps to secure Settlement benefits just as soon as they become available (if final approval is granted) is a far stronger and more direct demonstration of positive reaction than is

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allegations" on July 29, 2016. Dkt 1697 at 2. The Court denied Mr. Kangas's Motion on August 19, 2016. Dkt. 1746.

the norm in class action approval.

V. THE COURT SHOULD CONFIRM THE CERTIFICATION OF THE 2.0-LITER SETTLEMENT CLASS

Federal Rule of Civil Procedure 23 governs the issue of class certification, whether the proposed class is a litigated class or a settlement class. However, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there will be no trial." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

Class certification is appropriate where: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Certification of a class seeking monetary compensation also requires a showing that "questions of law and fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Pursuant to the Preliminary Approval Order, the Court certified the Class defined in paragraph 2.16 of the Class Action Agreement for settlement purposes. Dkt. 1698 at 15-20. In doing so, the Court found that the Settlement Class Representatives satisfied both Rule 23(a) and (b)(3) requirements, and that Settlement Class Counsel were adequate representatives of the Class. As demonstrated below, there is no reason for the Court to depart from its previous conclusion that certification of the Class is warranted.

A. The Class Meets The Requirements Of Rule 23(a)

1. The Class Is Sufficiently Numerous

Rule 23(a)(1) is satisfied when "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is generally satisfied when the class exceeds forty members. *See, e.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). "A specific minimum number is not necessary, and [a] plaintiff need not state the exact number of

potential class members." *Richie v. Blue Shield of Cal.*, No. C-13-2693 EMC, 2014 WL 6982943, at *15 (N.D. Cal. Dec. 9, 2014). It is undisputed that 475,745 Eligible Vehicles were sold or leased in the U.S., and thus, that the Class consists of hundreds of thousands of members. The large size of the Class and the geographic dispersal of its members across the United States render joinder impracticable. *See Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006) ("Joinder of 1,000 or more co-plaintiffs is clearly impractical."). Therefore, numerosity is easily established. Moreover, the Class is defined by objective, transactional facts—the purchase or lease of an Eligible Vehicle—and there is no dispute that Class Members can easily be identified by reference to the books and records of the Volkswagen and their dealers. Accordingly, the Class is plainly ascertainable. *See Moreno v. Autozone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008) (Breyer, J.) ("A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.").

2. There Are Common Questions of Both Law and Fact

"Federal Rule of Civil Procedure 23(a)(2) conditions class certification on demonstrating that members of the proposed class share common 'questions of law or fact.'" *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014). The "commonality requirement has been 'construed permissively,' and its requirements deemed 'minimal.'" *Estrella v. Freedom Fin'l Network*, No. C 09-03156 SI, 2010 WL 2231790, at *25 (N.D. Cal. June 2, 2010) (quoting *Hanlon*, 150 F.3d at 1020). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. Assessing commonality requires courts to have "a precise understanding of the nature of the underlying claims." *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013); additional citation omitted). This allows courts to determine if the class' "claims . . . depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-*

Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). The commonality "analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2835 (2015). Indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement." *Dukes*, 564 U.S. at 369.

Here, the claims of all members of the Class derive directly from Volkswagen's fraudulent scheme to mislead federal and state regulators into approving the Eligible Vehicles for sale or lease through the use of a Defeat Device designed to bypass emission standards and mask the dangerously high levels of pollutants emitted during normal operating conditions, as well as Volkswagen's concurrent false and misleading marketing campaign that misrepresented and omitted the true nature of the Eligible Vehicles' "clean" diesel engine system. Volkswagen's common course of conduct raises common questions of law and fact, the resolution of which will generate common answers "apt to drive the resolution of the litigation" for the Class as a whole. *Dukes*, 564 U.S. at 350. And as Plaintiffs allege that their and the Class' "injuries derive from [D]efendants' alleged 'unitary course of conduct,'" they have "'identified a unifying thread that warrants class treatment.'" *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 290 (S.D.N.Y. 2012).

Courts routinely find commonality where the class' claims arise from a defendant's uniform course of conduct. *See, e.g.*, *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 488 (C.D. Cal. 2006) ("The Court finds that the class members' claims derive from a common core of salient facts, and share many common legal issues. These factual and legal issues include the questions of whether Allianz entered into the alleged conspiracy and whether its actions violated the RICO statute. The commonality requirement of Rule 23(a)(2) is met."); *Cohen v. Trump*, 303 F.R.D. 376, 382 (S.D. Cal. 2014) ("Here, Plaintiff argues his RICO claim raises common questions as to 'Trump's scheme and common course of conduct, which ensnared Plaintiff[] and the other Class Members alike.' The Court agrees."); *Spalding v. City of Oakland*, No. C11-2867 TEH, 2012 WL 994644, at *8 (N.D. Cal. Mar. 23, 2012) (commonality found

where plaintiffs "allege[] a common course of conduct that is amenable to classwide resolution"); *International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983) ("commonality requirement is satisfied where it is alleged that the defendants have acted in a uniform manner with respect to the class"); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (finding that "where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question").[11] As this Court recognized when granting preliminary approval, "[w]ithout class certification, individual Class Members would be forced to separately litigate the same issues of law and fact which arise from Volkswagen's use of the defeat device and Volkswagen's alleged common course of conduct." Dkt. 1698 at 16-17 (citing *In re Celera Corp. Sec. Litig.*, No. 5:10-CV-02604-EJD, 2014 WL 722408, at *3 (N.D. Cal. Feb. 25, 2014) (finding commonality requirement met where plaintiffs raised questions of law or fact that would be addressed by other putative class members pursuing similar claims). Accordingly, Rule 23's commonality requirement is satisfied here.

3. The Settlement Class Representatives' Claims Are Typical of Other Class Members' Claims

"Rule 23(a)(3) requires that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Parsons v. Ryan*, 754 F.3d at 657, 685 (9th Cir. 2014) (quoting Fed. R. Civ. P. 23(a)(3)). "Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon*, 150 F.3d at 1020). "The test of typicality is 'whether other members have the same or similar injury, whether the

[11] Similarly, courts routinely find commonality in cases where uniform misrepresentations and omissions are employed to deceive the public. *See Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) ("[C]ourts routinely find commonality in false advertising cases."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501-02 (S.D. Cal. 2013) (same); *see also Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468, 478 (C.D. Cal. 2012) (whether misrepresentations "are unlawful, deceptive, unfair, or misleading to reasonable consumers are the type of questions tailored to be answered in 'the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation'") (quoting *Dukes*, 131 S.Ct. at 2551).

action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir. 2012) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Accordingly, the typicality requirement "assure[s] that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Thus, where a plaintiff suffered a similar injury and other class members were injured by the same course of conduct, typicality is satisfied. *See Parsons*, 754 F.3d at 685.

Here, the same course of conduct that injured the Settlement Class Representatives also injured other Class Members. The Settlement Class Representatives, like other Class Members, were the victims of Volkswagen's fraudulent scheme because they purchased or leased an Eligible Vehicle, each of which contained an illegal Defeat Device and produced unlawful levels of NO_X emissions. The Settlement Class Representatives, like other Class Members, would not have purchased or leased their vehicles had Volkswagen disclosed to government regulators the illegal Defeat Devices and the true nature of the Eligible Vehicles' "clean" diesel engine systems, because without Volkswagen's wrongdoing, the Eligible Vehicles would not have been approved for sale or lease in the U.S. The Settlement Class Representatives and the other Class Members will similarly benefit from the relief provided by the Settlement. Accordingly, Rule 23's typicality requirement is satisfied here.

4. The Settlement Class Representatives and Settlement Class Counsel Fairly and Adequately Protect the Interests of the Settlement Class

Finally, Rule 23(a)(4) requires "the representative parties [to] adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement is rooted in due-process concerns—'absent class members must be afforded adequate representation before entry of a judgment which binds them.'" *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (quoting *Hanlon*, 150 F.3d at 1020). Courts engage in a dual inquiry to determine adequate representation and ask: "'(1) do the named plaintiffs and their counsel have any

conflicts of interest with other Class Members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Evon*, 688 F.3d at 1031 (quoting *Hanlon*, 150 F.3d at 1020).

a. The Interests of the Settlement Class Representatives Are Directly Aligned with those of the Absent Class Members and the Settlement Class Representatives Have Diligently Pursued the Action on Their Behalf

Plaintiffs do not have any interests antagonistic to the other Class Members and will continue to vigorously protect their interests. *See Clemens v. Hair Club for Men, LLC*, No. C 15-01431 WHA, 2016 U.S. Dist. LEXIS 50573, at *6 (N.D. Cal. 2016). The Settlement Class Representatives and Class Members are entirely aligned in their interest in proving that Volkswagen misled them and share the common goal of obtaining redress for their injuries.

The Settlement Class Representatives understand their duties as class representatives, have agreed to consider the interests of absent Class Members, and have actively participated in this litigation. For example, the Settlement Class Representatives have provided their counsel with factual information pertaining to their purchase or lease of an Eligible Vehicle to assist in drafting the Complaint. Furthermore, all representative Plaintiffs were clearly advised of their obligations as class representatives and demonstrated their understanding of those obligations by completing and returning detailed verified Plaintiff Fact Sheets during discovery in this litigation. Plaintiffs also have searched for, and provided, relevant documents and information to their counsel, and have assisted in preparing discovery responses and completing comprehensive fact sheets. Moreover, Plaintiffs have regularly communicated with their counsel regarding various issues pertaining to this case, and they will continue to do so until the Settlement is approved and its administration completed. All of this together is more than sufficient to meet the adequacy requirement of Rule 23(a)(4). *See Trosper v. Styker Corp.*, No. 13-CV-0607-LHK, 2014 WL 4145448, at *43 (N.D. Cal. Aug. 21, 2014) ("All that is necessary is a rudimentary understanding of the present action and . . . a demonstrated willingness to assist counsel in the prosecution of the litigation.").

b. Settlement Class Counsel Are Adequate Representatives of the Settlement Class

Settlement Class Counsel have already demonstrated their qualifications to the Court. Lead Counsel and each member of the PSC participated in what was perhaps the most competitive application process ever in an MDL. During the application process, Settlement Class Counsel established, and the Court recognized, their qualifications, experience, and commitment to this litigation. The criteria the Court considered in appointing Settlement Class Counsel was substantially similar to the considerations set forth in Rule 23(g). *Compare* Dkt. 336 and 1084, *with Clemens*, 2016 U.S. Dist. LEXIS 50573, at *6. Settlement Class Counsel are highly qualified lawyers who have experience in successfully prosecuting high-stakes complex cases and consumer class actions. Further, Settlement Class Counsel, and their respective law firms, have already undertaken an enormous amount of work, effort and expense in this litigation and have demonstrated their willingness to devote whatever resources are necessary to see this case through to a successful and historic outcome. *See, e.g.*, May 24, 2016, Status Conference Hr'g Tr. 8:6-14 (Dkt. 1535) ("Finally, the Court must note that, while it has not and will not make a judgment on the proposed settlements until the appropriate time, it is grateful for the enormous effort of all parties, including the governmental agencies—their efforts to obtain a global resolution of the issues raised by these cases. I have been advised by the Settlement Master that all of you have devoted substantial efforts, weekends, nights, and days, and perhaps at sacrifice to your family."). Here, the Court need look no further than the significant benefits already obtained for the Class through Settlement Class Counsel's zealous and efficient prosecution of this action. *See* Dkt. 1698 at 18 ("Finally, there are no doubts regarding Class Counsel's adequacy. . . . They are qualified attorneys with extensive experience in consumer class action litigation and other complex cases. The extensive efforts undertaken thus far in this matter are indicative of Lead Plaintiffs' Counsel's and the PSC's ability to prosecute this action vigorously."). Accordingly, the Court should find that Settlement Class Counsel are adequate.

B. The Requirements of Rule 23(b)(3) Are Met

In addition to the requirements of Rule 23(a), the Court must find that the provisions of

Rule 23(b) are satisfied. The Court should certify a Rule 23(b)(3) class when: (i) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This case satisfies both the predominance and superiority requirements.

1. Common Issues of Law and Fact Predominate

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:49 at 195-96 (5th ed. 2012)). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure § 1778, at 123-24 (3d ed. 2005)). Instead, at its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). Thus, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (internal quotations and citations omitted). Accordingly, it is appropriate to certify a single nationwide class of consumers from all fifty States here.

The Rule 23(b)(3) predominance inquiry in the context of the certification of a nationwide settlement class involving various state consumer protection law claims was the subject of an extensive *en banc* decision by the Third Circuit in *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011), *cert denied sub nom.*, *Murray v. Sullivan*, 132 S. Ct. 1876 (2012). In affirming certification a nationwide settlement class, the Third Circuit's predominance inquiry was informed by "three guideposts": "first, that commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class

members; second, that variations in state law do not necessarily defeat predominance; and third, that concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class." *Sullivan*, 667 F.3d at 297. Here, like in *Sullivan*, any material variations in state law do not preclude a finding of predominance given the uniformity of Volkswagen's conduct and the resulting injuries that are common to all Class Members.

Indeed, this Court has recently adopted the rationale in *Sullivan*, foreshadowed (specifically in an auto defect class settlement context) by the Ninth Circuit in *Hanlon*, that "state law variations are largely 'irrelevant to certification of a settlement class.'" *Id.* at 304 (quoting *Sullivan*, 667 F.3d at 304) (citation omitted). *See Wakefield v. Wells Fargo & Co.*, No. C 12-05053 LB, 2014 WL 7240339, at *12-13 (N.D. Cal. Dec. 18, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2016 U.S. Dist. LEXIS 9944, at *208-09 (N.D. Cal. Jan. 6, 2016), *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 9766 (N.D. Cal. Jan. 26, 2016). Moreover, this Court has agreed that in the settlement context, the Court need not "differentiate[e] within a class based on the strength or weakness of the theories of recovery." *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 3396829, at *20 (N.D. Cal. May 26, 2015) (quoting *Sullivan*, 667 F.3d at 328); *Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 WL 988992, at *54-56 (N.D. Cal. Mar. 9, 2014) (citing *Sullivan*, 667 F.3d at 304-07).

Here, questions of law or fact common to Class Members predominate over any questions affecting only individual members. Volkswagen's uniform scheme to mislead regulators and consumers by submitting false applications for COCs and EOs, failing to disclose the existence of the illegal Defeat Devices in the Eligible Vehicles, and misrepresenting the levels of NO_X emissions of the Eligible Vehicles are central to the claims asserted in the Complaint. Indeed, the evidence necessary to establish that Volkswagen engaged in a scheme to design, manufacture, market, sell, and lease the Eligible Vehicles with Defeat Devices is common to all Class Members, as is the evidence of the false and misleading statements that Volkswagen used to mass market the Eligible Vehicles.

The Ninth Circuit favors class treatment of fraud claims stemming from a "common

course of conduct," like the scheme that is alleged by Plaintiffs here. *See In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006); *Hanlon*, 150 F.3d at 1022-1023. And, even outside of the settlement context, predominance is readily met in cases asserting RICO and consumer claims arising from a single fraudulent scheme by a defendant that injured each plaintiff. *See Amchem Prods.*, 521 U.S. at 625; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173, 1176 (9th Cir. 2010) (consumer claims based on uniform omissions are readily certifiable where the claims are "susceptible to proof by generalized evidence," even if individualized issues remain); *Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282 AHM (CTx), 2009 WL 2711956, at *22-23 (C.D. Cal. Aug. 25, 2009) ("Common issues frequently predominate in RICO actions that allege injury as a result of a single fraudulent scheme."); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1256, 1257 (11th Cir. 2004) (upholding class certification of RICO claim where "all of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs . . . [and the] "corporate policies [at issue] . . . constitute[d] the very heart of the plaintiffs' RICO claims"). Thus, Plaintiffs have satisfied the predominance requirement.

2. Class Treatment Is Superior in This Case

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

of a class action.'" *Trosper*, 2014 U.S. Dist. LEXIS 117453, at *62 (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004)).

There can be little doubt that class treatment here is superior to the litigation of hundreds or thousands of individual consumer actions. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication."). The damages sought by each class member here, while representing an important purchase to class members, are not so large as to weigh against certification of a class action. *See Smith v. Cardinal Logistics Mgmt. Corp.*, No. 07-2104 SC, 2008 WL 4156364, at *32-33 (N.D. Cal. Sept. 5, 2008) (finding that class members had a small interest in personally controlling the litigation even where the average amount of damages were $25,000-$30,000 per year of work for each class member); *see also Walker v. Life Ins. Co. of the Sw.*, No. CV 10-9198 JVS (RNBx), 2012 WL 7170602, at *49 (C.D. Cal. Nov. 9, 2012). The sheer number of separate trials that would otherwise be required also weighs in favor of certification. *Id.*; *see also* Dkt. 1698 at 19-20 ("Given that Class Members number in the hundreds of thousands, there is the potential for just as many lawsuits with the possibility of inconsistent rulings and results. Thus, classwide resolution of their claims is clearly favored over other means of adjudication, and the proposed Settlement resolves Class Members' claims at all once.").

Moreover, all private federal actions seeking relief for the Class have already been transferred to this District for consolidated MDL pretrial proceedings.[12] Dkt. 950. That the

[12] Although several class actions are pending in various state courts, the existence of these actions does not defeat a finding of superiority. *See Cartwright v. Viking Indus.*, No. 2:07-CV-02159-FCD-EFB, 2009 WL 2982887, at *44-*50 (E.D. Cal. Sept. 14, 2009) (certifying CLRA, UCL, fraudulent concealment, unjust enrichment, and warranty claims despite a concurrent state court class action that certified warranty claims for class treatment); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1069 (N.D. Cal. 2007) (recognizing that courts often certify concurrent FLSA and UCL class actions). Nor does the existence of actions filed by the DOJ or FTC preclude a finding of superiority because, among other reasons, both of those actions

Judicial Panel on Multidistrict Litigation consolidated all related consumer cases in an MDL before this Court is a clear indication that a single proceeding is preferable to a multiplicity of individual lawsuits. The government suits are here too, enabling this Court to approve and enforce all of the provisions of each of these settlements. The certification of the Settlement Class enables and completes this advantageous unified jurisdiction.

Because the class action device provides the superior means to effectively and efficiently resolve this controversy, and as the other requirements of Rule 23 are each satisfied, final approval of the Court's certification of the Settlement Class is appropriate. *See* Dkt. 1698 at 20.

VI. THE APPROVED NOTICE PROGRAM GAVE THE BEST PRACTICABLE NOTICE TO CLASS MEMBERS AND SATISFIED RULE 23 AND DUE PROCESS

In its Preliminary Approval Order, the Court held that "the Notice Plan is adequate" because "it provides the best practicable notice that is reasonably calculated to inform Class Members of this Settlement." Dkt. 1698 at 30. That Notice Program, which is currently being implemented, meets and exceeds all legal requirements. Using a range of diverse techniques designed to ensure maximally effective communication of the Settlement to all Class Members, the Notice Program included direct First Class U.S. Mail mailings to confirmed addresses of Class Members, as well as email notifications; extensive print, digital, and social media campaigns; and a comprehensive website and a toll-free telephone number. To quantify the scope and scale of the Notice Program: (a) 811,944 notice packets have been directly mailed to Class Members and dealers; (b) 79,855 email notifications have been sent to Class Members who registered with the Volkswagen or Audi Goodwill Programs, and an additional 374,025 notification emails have been sent out; (c) 125 strategically-placed print notifications in national and regional publications with circulations in the millions have been published; (d) more than 112,582,506 digital impressions have been published on dozens of relevant Internet websites and on leading social media platforms, including Facebook, Instagram, and Twitter.

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances,

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are part of the MDL and the proposed Settlement was negotiated with the participation of those government entities.

including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Publication and other notice techniques are sufficient where individual notice to the Class is impractical. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Incorporating both direct and indirect notification methods, the Notice Program here takes every reasonable step to ensure no Class Member is unaware of the Settlement. The ongoing implementation of the Notice Program is fully consistent with this Court's Preliminary Approval Order.

In conjunction with preliminary approval, the Court analyzed the content of the Long-Form Notice in light of the requirements of Rule 23(c)(2)(B), and determined that it "satisfies each element" of that Rule. Dkt. 1698 at 31. As Plaintiffs demonstrated in seeking preliminary approval of the Settlement, the Long Form Notice explains how Class Members may object to, or opt out of, the Settlement, and how Class Members may address the Court at the final approval hearing. It includes a series of questions and answers designed to explain the benefits and other details of the Settlement in clear terms in a well-organized and reader-friendly format. It also identifies by name and furnishes contact information for Lead Plaintiffs' Counsel and PSC members who can answer Class Members' questions, and indicates that additional information about the Settlement can be found on the settlement website (www.VWCourtSettlement.com) or by calling the toll-free telephone number (1-844-98-CLAIM) specifically established to provide Class Members with additional information about the Settlement and to answer any questions they may have about the Settlement.

The principal method of reaching Class Members here was individual direct mail notice. A cover letter and copy of the Long Form Notice was sent to Class Members who are readily identifiable through Volkswagen's records and/or registration data, such as Polk data. All mailings have been sent via First Class U.S. Mail, proper postage prepaid, and all addresses have been checked against the United States Postal Service's National Change of Address database prior to being sent.

The direct mail notice was supplemented by an email notice delivered to every email address provided by Class Members in connection with the Volkswagen or Audi Goodwill

Programs. This resulted in the notice administrator disseminating 453,880 email notifications of the Settlement. The Long Form Notice was mailed to 15,212 non-Volkswagen and non-Audi new car dealers, in addition to 58,167 used car dealers who may be eligible for benefits under the Settlement. Direct notice will also be mailed and/or emailed to Class Members when the EPA and CARB approve or reject Volkswagen's proposed emissions modifications for their vehicles.

The Short Form Notice also conveyed the basic structure of the Settlement and was designed to capture Class Members' attention in newspapers and periodicals with clear, concise, plain language. It has appeared as a two-color advertisement (where available) in the Sunday edition of *The New York Times* (estimated circulation of 2,579,166), the daily edition of *The Wall Street Journal* (estimated circulation of 1,321,827), the daily edition of *USA Today* (estimated circulation of 1,100,000), both the Sunday and daily editions of nineteen newspapers covering markets with 5,000 or more Eligible Vehicles, the Sunday edition of 26 newspapers covering markets with 2,000-4,999 Eligible Vehicles, the weekly editions of 31 Hispanic newspapers (translated into Spanish), and the weekly editions of 27 African American newspapers. These notices direct readers to the Settlement Website (where the Long Form Notice is available) or a toll-free telephone number for more information.

In addition to direct mailings, emails, and national and regional publication notices, a robust digital and social media campaign focused on stimulating awareness about the Settlement and encouraging Class Members' participation in the Settlement has been implemented. Targeted banner advertisements are being published on automotive websites accessed by Class Members (using IHS Automotive (Polk) data), including the National Automobile Dealers Association (www.nada.org), *Hemmings* (www.hemmings.com), and *Kelley Blue Book* (www.kbb.com). Similarly, banner ads and high-impact units (which are interactive advertisements that are larger than banner ads) have been published on websites associated with popular consumer automotive magazines, including *Automobile*, *Car & Driver*, *Motor Trend*, and *Road & Track*. Fleet owners that may be included in the Settlement have been targeted by placing banner ads on the National Association of Fleet Administrators (www.nafa.org) website, as well as other websites associated with relevant trade publications, including *Automotive Fleet*, *Automotive News*, *Auto Rental*

News, and *FLEETSolutions*. Targeted advertising on Facebook, Instagram, and Twitter, banner and video ads published on a broad and diverse range of websites through the Google Display Network, and the use of sponsored keywords/phrases on all major search engines (Google AdWords, Bing Microsoft Advertising, and their search partners), further ensure that Class Members are being notified of the Settlement as extensively, comprehensively, and assiduously as reasonably possible. To amplify the effect of these digital and social media notice techniques, an earned media program consisting of a multimedia news release distributed on PR Newswire's US1 National Circuit (reaching approximately 5,000 media outlets and 5,400 websites) was also implemented.

Each of the print, digital, and social media notices was designed to assist Class Members in obtaining full details of the Settlement by directing them to the Settlement Website and/or the toll-free telephone number. All of the relevant background information and the Settlement documents (including the Long Form Notice and the Claim Form) have been made available through both the Settlement Website and the toll-free telephone number. The interactive Settlement Website currently allows Class Members to run a vehicle look-up by VIN number to determine their eligibility to participate in the Settlement. The Settlement Website will post periodic updates as additional information becomes available, and as the claims process opens, in order to facilitate Class Members' claim submissions. A final report on the completion of the notice program, including updating of addresses for returned mail, will be submitted by Declaration from the Court–appointed notice providers are part of the September 30, 2016, reply submissions.

As discussed above, direct mail notice to Class Members remains the gold standard for adequate class-wide notice under Rule 23(b)(2)(C), Rule 23(e)(1), and principles of due process. Here, all available addresses were used, to assume delivery of notice, and many Class Members received multiple notices. Indeed, the majority of the Class Members received e-mail notice, as well as U.S. mail notice. The other forms of notice implemented in this case, including publication and email notice, ordinarily suffice even absent direct notice by mail. *See, e.g.*, *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D.

438, 449 (C.D. Cal. 2014) (approving notice by publication in *USA Today* and issuing final approval of settlement where "[t]he notice clearly apprises class members of the action and of their legal options."); *In re Netflix Priv. Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *9 (N.D. Cal. Mar. 18, 2013) (approving notice by email and publication and issuing final approval of settlement). The Notice Program being implemented in this case far surpasses the applicable legal requirements and ensures that all Class Members will receive adequate notice of the Settlement and an opportunity to object or opt out of the Settlement.

VII. CONCLUSION

For the foregoing reasons, Settlement Class Representatives and Settlement Class Counsel respectfully request that the Court confirm the certification of the Settlement Class and grant final approval to the Settlement.

Dated: August 26, 2016

Respectfully submitted,

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By: */s/ Elizabeth J. Cabraser*

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CERTIFICATE OF SERVICE

I hereby certify that, on August 26, 2016, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ *Elizabeth J. Cabraser*
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EXHIBIT A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION This Documents Relates to: ALL CONSUMER AND RESELLER ACTIONS	MDL No. 2672 CRB (JSC) **DECLARATION OF EDWARD M. STOCKTON**

INTRODUCTION

1. My name is Edward M. Stockton. I am the Vice President and Director of Economics Services of The Fontana Group, Inc. ("Fontana"), a consulting firm located at 3509 North Campbell Avenue, Tucson, Arizona 85719. I also serve on the Board of Directors of Fontana and its parent company, Mathtech, Inc. Fontana provides economic consulting

services and expert testimony regarding the retail motor vehicle industry and other industries throughout the United States and Canada.

2. My qualifications and experience are described in my C.V., which appears as **Attachment 1** to this Declaration.

3. My experience and that of Fontana are relevant to the subject matter of this action. Fontana has extensive experience analyzing many aspects of the retail automotive industry, including the economic impact on consumers from product defects and irregularities. Fontana was the primary economic expert for the consumer class in the Toyota Motor Corp. "Unintended Acceleration" matter,[1] which involved extensive analysis of class-wide economic damages on consumers who had purchased certain subject Toyota vehicles. I served in a central role in that matter, developing economic loss models and applying the settlement proceeds to class members. Fontana has also participated in other major consumer class action matters involving product defects and related marketing practices.

4. I was retained by attorneys for the Plaintiff Steering Committee ("PSC") in this case to evaluate the economic effects on consumers of the allegedly deceptive marketing and sale of certain purported clean diesel engines, or, "TDI" vehicles by Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (Collectively "Volkswagen" or "VW"). Additionally, I assisted the PSC in its efforts to assess, develop, and ultimately agree to

[1]United States District Court, Central District of California, Southern Division: Case No. 8:10ML2151 JVS (FMOx)

settlement terms for certain claims filed on behalf of consumers relating to the 2.0-liter TDI vehicles ("subject vehicles"), which are enumerated later in this declaration.

5. I have personal knowledge of the subject matter referenced in this document. If called upon I will testify to the contents of this Declaration.

Class Definition:

6. The consumer class is defined as described in the Settlement Agreement.[2] This document describes consumers and/or owners who are included in the class and those excluded from the class. This declaration should be construed to incorporate all relevant definitions set forth in the Settlement Agreement.

Scope of Work:

7. Not including time spent drafting this declaration, Fontana's billings in this matter are 572.4 hours. I have personally billed 168.8 hours. I attended multi-day sessions in Washington, D.C., consulted directly with PSC members, worked with experts for VW, met with VW, regulatory personnel from the Federal Trade Commission ("FTC"), the Department of Justice ("DOJ"), the Environmental Protection Agency ("EPA"), various personnel from states, the court-appointed mediator, Settlement Master Mueller, and outside consultants, and presented findings and analysis in meetings with all parties represented. I also participated in numerous smaller-group meetings at which parties addressed specific economic, technical, and foundational issues. While the parties worked very cooperatively to coordinate objective elements of the settlement, such as

[2] *Consumer Class Action Settlement Agreement and Release (Amended),* referencing the Section 2.16 definition of "Class" and related definitions in Sections 2.1 through 2.72.

data integrity, the analytical process, which depended upon the conforming data, was highly mutually challenging. Based on the data available to Fontana, my education, training, experience, and extensive engagement in this matter, I have adequate foundation to attest to the findings and opinions expressed in this document.

Summary of Processes, Data, and Conclusions:

8. From an economic perspective, the settlement is the product of an analytically independent, intensive, and extensive process, informed by data and analysis of far-reaching scope. The analysis relied upon data of an intensive nature of the data and reached very specific valuations for the unique characteristics of each vehicle in the class. The evaluations of vehicle characteristics were at a level of specificity beyond vehicle model, age, and trim line. These analyses extended to evaluation of specific vehicle options, mileage, finance terms, projected loan balance, trade-in value, expected retail replacement cost, and other details. The extensive nature of both the data and the analysis included a wide-range of analyses relating to consumers, such as vehicle depreciation rates, overpayment for the TDI premium, mitigation of overpayment of the TDI premium, tax implications of repurchase, vehicle search and acquisition costs, warranty refunds, anticipated vehicle use in the post-scandal period, buyback timing, and other considerations.

9. Extensive data were available to undertake these types of analyses. My colleagues and I customized analysis of these vehicle and consumer-related considerations during the course of the settlement process, and these analyses were subject to critique, review, data

validation, feedback, and discussion among multiple parties and experts involved in the settlement process.

10. These analyses relied upon data sources with detail levels and specificity at or beyond that normally employed by analysts and decision-makers in the field of retail automotive economics. These data sources included, among other sources, computer files at the Vehicle Identification Number or "VIN" level. VIN-level data were specific to individual vehicles and included information about vehicle characteristics and options. Fontana, FTC personnel, and VW's experts were able to link VIN-level information to industry vehicle valuation sources in order to derive market-based, vehicle-specific pricing information and behavior related to specific vehicles and classes of vehicles. As alluded to above, the vehicle-specific data files included information on vehicle options, mileage, trim package, location, historical trade-in and retail values, relevant tax rates, and in some cases, purchase terms, lease terms, finance terms, and loan balances. This large and detailed base of source data enabled Fontana to assess the subject matter in a manner that accounted for both the systemic diversity and individualized nature of the subject vehicles.

11. In addition to analysis presented in this declaration and the analyses described in the prior paragraphs, Fontana also performed extensive cross-checking and validation of the data sources ultimately employed. Examples include cross-checking the valuation sources ultimately used in the settlement process (described later in the declaration) against other industry sources, such as Kelley Blue Book ("KBB") values, and against specific information provided by class members about their vehicles. As described later in more

detail, a major focal point of the analysis was the relationship between trade-in prices and retail prices. Consideration of this relationship factored heavily into the settlement process.

Subject Vehicles:

12. The table below identifies the "Subject Vehicles" as defined in the Settlement Agreement.

Class Vehicles ("Subject Vehicles")[3]

Model	**Model Year(s)**
Volkswagen Jetta TDI	2009-2015
Volkswagen Jetta SportWagen TDI	2009-2014
Volkswagen Beetle TDI	2013-2015
Volkswagen Beetle Convertible TDI	2013-2015
Audi A3 TDI	2010-2013, 2015
Volkswagen Golf TDI	2010-2015
Volkswagen Golf SportWagen TDI	2015
Volkswagen Passat TDI	2012-2015

13. VW marketed the subject vehicles as "clean"[4] environmentally friendly diesel vehicles. Between 2009 and 2015, Volkswagen sold more new diesel light vehicles into the U.S. market than did all other manufacturers combined.[5] However, no consumer could have

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[3]https://www.vwcourtsettlement.com/en/, 8/21/2016.

[4]Clean Diesel, Volkswagen (last visited Feb. 8, 2016), previously available at, http://www.vw.com/features/clean-diesel/.

[5]*Consolidated Consumer Class Complaint:* MDL 2672 CRB (JSC), page 2.

purchased a single subject vehicle had the vehicle characteristics been known. In order to sell the subject vehicles, Volkswagen fraudulently obtained EPA Certificates of Conformity or "COCs" [6] through the use of "defeat devices" that altered engine performance during emissions testing.

Economics of Vehicle Pricing:

14. Motor vehicles are depreciating assets that lose value over time. Vehicles have initial list prices or Manufacturer Suggested Retail Prices ("MSRP"). Dealerships and consumers negotiate prices on the sales of retail vehicles, which are vehicles sold to end-using consumers. In general, retail vehicles sell for less, and possibly substantially less than MSRP. Vehicles generally experience significant immediate depreciation upon leaving the lot and entering the retail fleet. Generally, consumers participating in the buyback who also purchase replacement vehicles will acquire those replacement vehicles in a market where prices have depreciated from MSRP. Since these consumers are a) unlikely to have paid MSRP for their vehicles at the time of initial purchase and b) will be replacing vehicles that had already entered the retail (end-user) fleet, MSRP is not a meaningful reference point to assess consumer equity in terms of payments under the buyback terms of the settlement agreement.

15. In this matter, parties agreed to use National Auto Dealers Association ("NADA") Clean Trade-in or "CTI" prices as of September 2015 as the baseline for vehicle valuation. The September 2015 CTI valuations were published in August 2015 and predated the September 2015 announcement of the scandal and was the most proximate valuation

[6] Id

available that relied upon pre-announcement market conditions. Relying upon September 2015 CTI had several other benefits as well. First, it inherently avoided price depreciation that occurred in the post-scandal market. Second, it allowed customers participating in the buyback to mitigate the effect on the vehicle's value that resulted from overpayment for the TDI premium (discussed more later). Third, it allowed owners who chose to do so to continue to use their vehicles until the buyback date without the vehicle's value experiencing age-related depreciation that normally occurs in the retail vehicle market. Finally, the industry reliance on CTI values provided support for the validity of the building block used in the settlement process. Ultimately, September 2015 CTI was the tool used to restore customers to values in excess of retail replacement cost.

16. As alluded to earlier, the settlement process included cross-checking and validation of CTI values to other valuation sources. These other sources included KBB values, which are the product of a recognized and respected competitor to NADA and are very similar to CTI prices. Within NADA values, Fontana also conducted extensive analysis that related CTI values to retail values for all subject vehicles. The use of CTI was a reasonable and reliable starting point, as it provided an authoritative base value of the vehicle, from which it was possible to build an analytically-driven overall settlement payment amount.

General Economic Considerations for Consumers/Buyback Participants:

17. Plaintiffs allege that consumers who purchased subject vehicles did so under fraudulent conditions. As a consequence, consumers did not acquire the vehicles that they bargained for. As a result, consumers overpaid for the subject vehicles because the vehicles lacked

certain attributes that Volkswagen had marketed as being embodied in the vehicles and for which consumers had bargained. Furthermore, the excess emissions produced by the subject vehicles created negative utility (economic loss) for consumers who valued environmentally sound vehicle characteristics, but as a result of the emissions fraud, actually drove environmentally non-compliant vehicles. Had consumers known the subject vehicles' true characteristics, they would have either paid less for the subject vehicles or not purchased the subject vehicles at all.

18. Consumers of the subject vehicles faced three general negative economic effects. First, they overpaid at the time of purchase when acquiring the subject vehicles and also likely overpaid for ownership costs. Along with this overpayment, consumers also suffered disutility as not only did they not acquire the vehicle characteristics they bargained for, they did acquire negative value, as the result of the extreme excess vehicle emissions, uncertainty relating to the scandal and the status of vehicle ownership, and monitoring requirements associated with staying informed with respect to settlement developments. Second, consumers replacing subject vehicles likely accelerated their purchase behavior (acquisition of the next vehicle), which necessitated the incurrence of increased economic costs associated with shopping for the replacement vehicles (search and acquisition costs). Third, certain consumers replacing subject vehicles incurred residual economic costs associated with early vehicle disposal and overpayment.

Economic Considerations for Consumers/Buyback Participants: Overpayment and Disutility

19. Consumers who purchased subject vehicles paid a premium for clean diesel technology even though the clean diesel technology was not actually present in the subject vehicles. VW and the PSC estimated that the TDI premium was approximately 8% over the purchase price of models without TDI. Some of this overpayment is remedied by the use of September 2015 CTI values; the overall payment to consumers addresses the remaining overpayment at the time of purchase.

20. Under the settlement, CTI values are based upon market prices prior to the disclosure of the emissions fraud. As a result, a customer selling back his or her TDI vehicle to Volkswagen does so under a valuation established prior to the development of any market discount applied to the subject vehicles because of the emissions fraud. Since the market as of September 2015 valuations has not discounted the TDI vehicles to account for the emissions fraud, that CTI valuation treats the vehicle as if the TDI equipment performs as originally represented at the time of purchase.

21. Some effect of the original overpayment at the time of purchase still remains as of September 2015. This is because the September 2015 CTI valuations alone do not fully account for the effects of the original overpayment by the consumer that occur between the time of purchase and September 2015. In general, this amount is equal to the amount that the TDI premium depreciated between purchase and the September 2015 valuation. Parties conducted extensive individual analysis of this remaining overpayment effect and incorporated the results of that analysis in determining the overall payment amount to

consumers, which includes both the September 2015 CTI payment, and the additional payment beyond September 2015 CTI value.

22. Disutility occurs when some asset or service has the effect of creating negative benefit (cost) for its owner or user. Consumers who purchased subject vehicles unknowingly acquired disutility (negative value, not diminished value) as follows. These consumers unknowingly participated in the release of excess emissions. Once the emissions scandal became public, owners faced uncertainty regarding the disposition of their non-compliant vehicles and a cost to monitoring legal proceedings related to the scandal. As a result, subject vehicles themselves exhibited strong evidence of excess depreciation (**Attachment 2)**, and any approved fix likely would have diminished engine performance in the subject vehicles, which would reasonably be anticipated to lower resale value. As discussed earlier, the September 2015 CTI valuation avoids the effect of this disutility on the subject vehicles' pricing if the customer elects to participate in the buyback. The full payment to class members is intended to account for other disutility suffered by consumers.

Economic Considerations for Consumers/Buyback Participants: Search and Acquisition

23. Consumers participating in the buyback generally would do so in a manner that accelerates the purchase of a replacement vehicle versus what would have occurred under the consumers' normal purchase cycles. If a hypothetical consumer owned a subject vehicle for three years but would have owned the vehicle for six years but for the TDI emissions scandal, then that consumer would face increased costs associated with vehicle purchase and ownership. Assume that a hypothetical consumer expended some amount

of time and expense shopping for vehicles ("shoe leather") and also incurred direct costs associated with the vehicle purchase. If shoe leather cost were $1,000 and the direct purchase costs, such as titling and documentary fees, were $440 dollars, the assumed costs of vehicle acquisition would be $1,440. If the customer expected to own the vehicle for 6 years or 72 months, then the expected monthly cost allocated over the lifetime of ownership would be $20 per month. If participating in the buyback caused the customer to accelerate the purchase of the replacement vehicle by three years, or 36 months, then the customer would have incurred incremental acquisition costs in order to do so. Allocating costs monthly, the economic harm would be $720. Arguably, the consumer lost the entire benefit of the original search and acquisition costs and also incurred accelerated costs with respect to the purchase of the next vehicle. The settlement process included significant consideration and analysis of search and acquisition costs, and these analyses occurred at the individual vehicle level.

Economic Considerations for Consumers/Buyback Participants: Residual Effects

24. Certain consumers participating in the buyback may have or may yet experience other individual economic harm. One example is lost extended warranty coverage. Under most extended warranties, a consumer may cancel the warranty for a $50 charge or other nominal amount. Upon cancellation, customers receive a prorated refund for the remaining period of warranty coverage. In a simple example, if a customer purchases a six-year extended warranty package for $1,200, he or she will receive an extra three years of protection beyond the base factory warranty and may receive more generous coverage than the factory warranty provides. If the warranty is cancelled after three years, the

customer would pay $50 for cancellation and receive a $600 refund. However, the customer likely will have received diminished benefit from the warranty during the first three years of ownership because most coverage would come from the manufacturer warranty. Therefore the consumer overpaid for the original extended warranty by some amount. This is because the customer received less benefit from the extended warranty in the time that he or she owned the vehicle and did not receive the higher expected benefit of the warranty in the time period after the factory warranty expired. In general, a customer returning a vehicle the day that the factory warranty expires derives the least benefit from the purchase of an extended warranty, as the customer's vehicle ownership generally does not enter the warranty coverage period, but the proration of the extended warranty includes the entire duration of the factory warranty. Warranty overpayment diminishes with either shorter or longer vehicle ownership. Potential warranty-related costs received consideration and were the subject of analysis in the settlement process.

25. In addition, consumers likely incurred additional sales tax in connection with the purchases and may have paid additional insurance in accordance with artificially inflated vehicle values. In most states, the amount of sales tax that applies to a vehicle purchase is based upon the taxable basis associated with the sale. That amount is equal to the amount of the purchase reduced by the net value of any vehicle traded-in at the time of purchase. Overpayment associated with the TDI premium is likely to have increased the sales tax paid by consumers at the time of purchase. The increased vehicle value associated with the TDI premium is also likely to have increased the portion of a customer's insurance payment that relates to the vehicle's value. Parties analyzed both of

these economic effects, and consideration of these analyses factored into settlement discussions and the final overall payment amount to consumers.

Proposed Settlement and Economic Considerations

26. Compensation amounts under the Settlement Agreement use September 2015 CTI as the starting point for vehicle valuation. Recall that CTI is as of September 2015 but NADA developed and published these values prior to public awareness of the emissions scandal. NADA derived its CTI values pre-scandal, so those values do not reflect excess depreciation on the subject vehicles. Thus, these values reflect vehicles bought and sold without knowledge of the emissions fraud.

27. By using pre-scandal CTI, the settlement eliminated effects on subject vehicles' values that resulted from post-scandal excess depreciation. Therefore, it was not necessary to perform extensive econometric calculations to determine lost sales proceeds on the disposal of subject vehicles. However, the nature of CTI did necessitate that the PSC make additional consideration of the economic well-being of consumers who would participate in the buyback. Analysis of those considerations was one of the primary functions that I served in this engagement. Collectively, although CTI approximates a market-based price for certain vehicles sold under certain conditions, class members participating in the buyback do not face the same circumstances as those consumers who form the constituent data values for the CTI prices. In general, buyback participants generally would not be selling back vehicles according to their normal purchase cycles. Also, conventional trade-in customers generally face budgetary constraints that create some compulsion to sell their vehicles. For example, a trade-in may be part of the

purchase of a new vehicle. Acquiring a new vehicle may create the need to discard trade-in vehicle payment in order to take on replacement vehicle payment. A vehicle traded in may otherwise have become an excess vehicle after the acquisition of a new vehicle. These factors likely reduce the amount that consumers are willing to accept for the trade-in vehicle. Thus, it is necessary to adjust the CTI pricing to account for the economic circumstances of buyback participants.

CTI: Economic Considerations of Consumers: **Payments and Retail Values**

28. I have enclosed in **Attachment 3** calculations showing the average buyback payment that participants will receive relative to the NADA September 2015 Clean Retail values for those vehicles. The blended payment schedule for purchase vehicles are equal to a minimum of 112.6% of the subject vehicles' retail values as of September 2015. This means that the buyback formula, in general, would have enabled consumers to buy back their own vehicles in September 2015, in clean retail condition, and pay taxes and other transaction costs on those purchases. Notably, the September 2015 clean retail prices reflect conditions prior to the announcement of the emissions scandal. Therefore, these calculations assume that consumers will replace their vehicles under market conditions that do not discount the subject vehicles as a result of the emissions fraud.

Potential and Actual Additional Economic Value in the Settlement:

29. Although buyback amounts are scaled to September 2015 CTI values, it is my understanding that actual buybacks will not begin until approximately fall of 2016. This time lag offers potential economic benefit for certain consumers. Although subject vehicles exhibit evidence of excess depreciation post-scandal, many consumers continued

to derive some utility from their ownership and use of subject vehicles after September 2015. Under normal conditions, their vehicles would have depreciated by some amount during the post-September 2015 time period. Depending upon the amount that customers derive utility from owning and operating their vehicles between September 2015 and the date of their buyback, consumers might benefit by avoiding some of the depreciation that would have occurred during that time period.[7]

30. Buyback amounts will reflect a mileage credit to participants. The amount of the credit is 12,500 miles per year, prorated for each month after September 2015. By way of example, a vehicle sold back in September 2017 would receive a 25,000-mile credit based on 24 months after September 2015 at 1,041.66 miles per month. The effect of the credit will be to reduce the vehicle's mileage in its final valuation. If the example vehicle had 125,000 actual miles at the time of the buyback, it would be valued at September 2015 values based on mileage of 100,000 miles.

31. The mileage credit provides economic benefit generally to buyback participants but provides more cash benefit to consumers who experienced more diminished utility or disutility from ownership of their vehicles after the scandal broke. In a simple example, an owner who parked her subject vehicle after the scandal broke would receive a higher payment for the vehicle at the time of buyback than would a participant who continued to drive the vehicle in pre-scandal volume after September 2015.

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[7]Since vehicle values appear to have exhibited excess depreciation, consumers likely experienced below-normal utility for use of the subject vehicles during the post-September 2015 time period. Thus, most consumers would not have experienced the economic benefit of the entire amount of the normal depreciation that would have occurred during this time period.

2015 Model Year Values:

32. Certain model year 2015 vehicles did not have CTI values as of September 2015. NADA published values for those vehicles in later NADA editions. The settlement values these 2015 vehicles based on observed relationships of Clean Trade-in value to MSRP for comparable Volkswagen vehicles. This valuation was the subject of extensive analysis and discussions among the parties. Multiple independent methods led to very similar valuations. I consider the 2015 CTI estimates to be reasonable, reliable, and the product of a rigorous and analytically sound process.

Magnitude of Settlement

33. Between the buyback, the environmental-based fines, and the restitution agreed to by VW, total exposure related to the 2.0-liter portion of the emissions scandal is approximately $14.7 billion. Using publicly available sources that show MSRP and invoice (prices charged to dealerships) prices, I estimate that VW received a maximum of $12.937 billion in *gross* revenues for the subject vehicles. This is based upon ratios of invoice prices to MSRP and a 2.0% holdback (discount to invoice price paid to dealerships) amount. This figure does not account for incentives, discounts, costs of lease subvention, or other rebates that may have and likely did reduce VW's gross receipts from the sales of the subject vehicles (**Attachment 4)**. Thus, VW likely received less in gross recipts for these subject vehicles than it must pay in this settlement. In addition, VW's profit on the subject vehicles would have been much lower than its gross receipts.

Economic Consideration of Lessees versus Purchasers:

34. Payments to lessees are equal to approximately one-half of the payments (over CTI) to purchasers. Based upon differences in the economic considerations of lessees and purchasers, different compensation is appropriate. Whereas purchasers pay up-front for the entire vehicle, lessees essentially pay for the amount that vehicle's value is expected to diminish over the period of their lease. Lessees pre-negotiate the values of their vehicles that will apply at the end of the lease (residual value) and are, therefore, generally not at a financial risk of excess depreciation. Lessees generally retain their vehicles for shorter time periods than do purchasers and, as a consequence, would have had their subsequent purchases accelerated less by the scandal than did purchasers. Lessees also tend to have strict mileage limitations within their least terms and would experience less harm from overpayment than would purchasers. Finally, lessees would have experienced less uncertainty about their vehicles than would have purchasers as return conditions were pre-established prior to the scandal. These systematic differences in the economic considerations of lessees and purchasers justify a lower payment to lessees than to purchasers.

Payments: Derivations and Concepts:

35. Payments to consumers fall into three categories: (i) Payment of the September 2015 NADA Clean Trade-in ("CTI") value of the vehicle, (ii) payment above CTI for vehicle owners, and (iii) payment *based on CTI* for lessees. Categories (ii) and (iii) have two components each, "fixed" and "variable." The derivations of the amounts of the fixed and variable components of (ii) and (iii) are as follows. For (ii), the overall settlement

pool for purchase vehicles is equal to 39.588% of CTI. This amount is allocated to purchasers formulaically with a variable payment equal to 20% of CTI and a fixed payment of $2,986. For most consumers–those who purchased their vehicles prior to September 18, 2015, and who still own their vehicles at the time of the buyback–initial payment under (ii) is equal to 9/2015 CTI * 0.2 (20%) for the variable component and $2,986 for the fixed component. By way of example, a consumer selling back a vehicle with a CTI of $15,000 would receive $15,000 under (i) plus $3,000 for the variable portion of (ii) plus $2,986 for the fixed portion of (ii). The total initial payment under (ii) would be $5,986 [$3,000 + $2,986 = $5,986] for the hypothetical vehicle. See **Attachment 5** for the payment derivation for purchase and lease vehicles.

36. The initial payment under (ii) has a minimum value of at least $5,100. The fixed and variable components of (ii) take into account the funding of this minimum payment amount. An example of a vehicle when this minimum payment would apply is a hypothetical vehicle with CTI of $9,500. Under the base formula, the owner would receive an $1,900 variable payment and a $2,986 fixed payment, for a total of $4,886. In that case, compensation would rise by $214 in order to achieve the $5,100 minimum threshold.

37. A class member returning a lease vehicle receives compensation under component (iii). In general, lease vehicles are newer than purchase vehicles and have higher values. Using a vehicle with CTI of $20,000 as an example, the variable component of (iii) would be 10% or CTI, or $2,000, and the fixed component would be $1,529. Total payment under

(iii) would be $3,529 [$2,000 + $1,529 = $3,529]. Lessees who purchased their vehicles prior to June 28, 2016, are treated as vehicle owners under the Settlement Agreement.

Overall Assessment of the Settlement:

38. During this engagement, I had the opportunity to evaluate economic considerations of class members using relevant market data. PSC members did not restrict or influence my inquiry. I had the opportunity to present concerns to PSC members, Volkswagen personnel, court-appointed personnel, such as the mediator and Settlement Master, outside consultants, counsel for Volkswagen, and government entities, including the FTC, EPA, and DOJ. I had multiple opportunities to address all parties as a group.

39. The primary challenge associated with analyzing the economic considerations of the settlement was understanding the nature of CTI and using that value as a tool to place consumers in a position to replace their vehicles at September 2015 retail value and receive additional real economic benefits. The settlement successfully accomplishes that goal. Consumers participating in the buyback will receive sufficient funds to replace their vehicles with a vehicle of comparable value, valued back to September 2015 with additional cash remaining. For customers who wish to do so, they may retain their vehicles until 2018, reaping utility from use while avoiding some depreciation. Additionally, the mileage credit is a concrete economic benefit beyond the buyback amount. Collectively, based on the extensive data review and participation in the settlement efforts, it is my opinion that the settlement, by making significant individual adjustments to account for certain disparate economic considerations of consumers,

allows those consumers to purchase comparable vehicles while leaving them additional compensation for the other costs they experienced.[8]

Executed this 22nd day of August, 2016.

Edward M. Stockton

Edward M. Stockton

[8]Volkswagen and the PSC agreed to a minimum buyback payment above CTI of $5,100. A small reallocation of the base blended settlement occurred to fund this threshold. The adjustment amount was not material in the overall scope of settlement and does not affect my analytical conclusions or opinions expressed herein.

EDWARD M. STOCKTON

EDUCATION

University of Arizona, Tucson, AZ
M.S., Agriculture and Resource Economics (Applied Econometrics), 2010.
Western Michigan University, Kalamazoo, MI
B.A., Economics, 1998

POSITIONS

The Fontana Group, Inc., Tucson, Arizona
Vice President Economics Services: 2012 - present
Director of Economics Services: 2011 - 2012
Case Manager: 2005 - 2011
Senior Analyst: 2000 - 2005
Analyst: 1998 - 1999
Old Ina Corporation Tucson, AZ
Supervisor, Analyst, Manager: 1995 - 1998

RESEARCH AND CONSULTING EXPERIENCE

Mr. Stockton manages the analysis of documents, data and markets in the retail automobile industry and other industries. He has provided consultation to automobile dealers and attorneys in numerous areas including:

- Retail automobile franchising, economics and marketing
- Allocation of new vehicles during shortages
- Franchise terminations
- Franchise additions and relocations
- Analysis of manufacturer customer satisfaction measurement programs
- Customer satisfaction measurement
- Sales and profitability forecasts
- Financial analysis
- Statistical and econometric analyses
- Consumer credit
- Economic theory

REPRESENTATIVE CLIENT ASSIGNMENTS

In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation, San Fransisco, CA*, 2015-*.

Dependable Dodge, Inc. v. Fiat Chrysler Automobiles, Inc., Canoga Park, CA, 2015-.
Provided deposition testimony.

Wayzata Nissan, LLC v. Nissan North America, Inc., et al., Wayzata, MN, 2015-.
Provided pre-filed trial testimony.

Glick Nissan, Inc. v. Nissan North America, Inc., Westborough, MA, 2015-.

Northwest Hills Chrysler Jeep, LLC; Gengras Chrysler Dodge Jeep, LLC; Crowley Jeep Dodge, Inc.; Papa's Dodge, Inc. v. FCA US, LLC and Mitchell Dodge, Inc., Canton, CT, 2015-2016.

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Provided deposition and hearing testimony.

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Provided deposition testimony.

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Provided hearing testimony.

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Provided trial and deposition testimony.

CNH America, LLC n/k/a CNH Industrial America, LLC v. Quinlan's Equipment, Inc., Racine, WI, 2014-.
Provided deposition testimony.

Grayson Hyundai, LLC and Twin City Hyundai, Inc., v. Hyundai Motor America, Knoxville, TN, 2014-.
Provided deposition testimony.

TrueCar, Inc. v. Sonic Automotive, Inc., and Sonic Divisional Operations, LLC, Los Angeles, CA, 2015-.
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Provided deposition and hearing testimony.

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Provided hearing testimony.

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Provided deposition and hearing testimony.

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Provided trial testimony.

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Provided deposition testimony.

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Provided deposition and trial testimony.

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Provided deposition and hearing testimony.

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Provided deposition and trial testimony.

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Provided deposition testimony.

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Provided hearing testimony.

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Provided deposition testimony.

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Provided deposition testimony.

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Sutton Suzuki, Matteson, IL 2013.

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Provided deposition and hearing testimony.

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Randy Reed Nissan, 2012.

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Chrysler Group, LLC v. Sowell Automotive, Inc. et al., 2012-.

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Provided deposition testimony.

Dulles Motorcars, Inc. d/b/a Dulles Subaru v. Subaru of America, Leesburg, VA, 2012-.
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Bowser Cadillac, LLC v. General Motors, LLC v. Rohrich Cadillac, Inc., McMurray, PA, 2012-. Provided hearing testimony.

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First United, Inc. A California Corporation dba De La Fuente Cadillac v. General Motors, Greiner Poway, Inc. and Does 1-50, San Diego, CA, 2012.

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Provided deposition testimony and hearing testimony.

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Provided deposition testimony.

Harry W. Zanville, Esq., San Diego, CA, 2010-.

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Laura Buick-GMC, Collinsville, IL, 2011.

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Transteck, Inc. d/b/a Freightliner of Harrisburg, 2004-

Bass Sox Mercer, Tallahassee, FL, 2011-.

The Collection, Coral Gables, FL, 2011-.

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Provided hearing testimony.

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Lou Bachrodt Chevrolet Co. d/b/a Lou Bachrodt Jeep v. Chrysler Group, LLC, Rockford, IL, 2010.
Provided hearing testimony.

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Cooper and Walinski, LPA, 2009.

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Provided declaration.

Nick Alexander Imports v. BMW of North America, Beverly Hills, CA, 2008.

Monroeville Chrysler v. DaimlerChrysler Motors Company, Pittsburgh, PA, 2008.

Bowser Cadillac, LLC v. General Motors Corporation and Saab Cars USA, Inc., Pittsburgh, PA, 2008-2009.

Carlsen Subaru v. Subaru of America, Inc., San Francisco, CA, 2008.
Provided deposition and hearing testimony.

Suburban Dodge of Berwyn, Inc., and Lepetomane XXII, Inc., v. DaimlerChrysler Motors Company, LLC and DaimlerChrysler Financial Services Americas LLC, Chicago, IL, 2007-2008.
Provided deposition testimony.

Wiggin & Nourie, P.A., Manchester, NH, 2007-2008.

McCall-T LTD., a Texas limited partnership d/b/a Sterling McCall Toyota & Sterling McCall Scion, et al. v. Gulf States Toyota, Inc., McCall- T LTD., et al. v. Madison Lee Oden et al., Houston, TX, 2007-.

Volkswagen of America, Inc., and Aristocrat Volkswagen East, Inc. v. Royal Automotive, Inc., d/b/a Royal Volkswagen, Orlando, FL, 2007-.

Myers & Fuller, P.A., Tallahassee, FL, 2007-2009.

Ed Schmidt Pontiac-GMC Truck, Inc. v. DaimlerChrysler Motors Company, LLC, Perrysburg, OH, 2006-2009.

Fowler Motors, Inc. v. BMW of North America, LLC, Conway, SC, 2006-2008.

Serpa Automotive Group, Inc. v. Volkswagen of America, Inc., Visalia, CA, 2006.
Provided deposition and hearing testimony.

Serra Chevrolet, Inc. d/b/a Serra Kia v. Kia Motors America, Inc., et al., Birmingham, AL, 2006-2009.

Cardenas Enterprises, Inc., d/b/a Cardenas Toyota BMW v. Gulf States Toyota, Inc. and Toyota Motor Sales, USA, Inc., Harlingen, TX, 2006-.

North Avenue Auto, Inc., d/b/a Grand Honda v. American Honda Motor Co., Inc. a California Corporation, Chicago, IL, 2006-2009.

Saleen, Inc., Irvine, CA, 2006-.

Golden Ears Chrysler Dodge Jeep, Maple Ridge, BC, 2006-2007.

Action Nissan, Inc. v. Nissan North America, Inc., Nyack, NY, 2005-2007.

Harbor Truck Sales and Services, Inc. d/b/a Baltimore Freightliner v. DaimlerChrysler Motors Company, LLC, Baltimore, MD, 2005-2007.

PH Automotive Holding Corporation, d/b/a Pacific Honda, Cush Automotive Group, d/b/a Cush Honda San Diego, Tipton Enterprises, Inc., d/b/a Tipton Honda, Ball Automotive Group, d/b/a Ball Honda v. American Honda Motor Co., Inc., San Diego, CA, 2005-2007.

Rusing & Lopez, Tucson, AZ, 2005.

Sonic Automotive, Inc. v. Rene R. Isip, Jr.; RRIJR Auto Group, Ltd., d/b/a Rene Isip Toyota of Lewisville, and John Eagle, Lewisville, TX, 2005.

Competitive Engineering, Inc. v. Honeywell International, Inc., Tucson, AZ, 2005.

Century Motors Corporation v. DaimlerChrysler Motors Company, LLC., St. Louis, MO, 2005.

Lone Star Truck Group, Albuquerque, NM, 2005-2006.

Thomas Bus Gulf Coast, Inc., Houston, TX, 2005.

Stoops Freightliner, Indianapolis, IN, 2005-2006.

Cameron, Worley, Forham, P.C., Nashville, TN, 2004-2005.

Transteck, Inc. d/b/a Freightliner of Harrisburg v. DaimlerChrysler Vans, LLC, Harrisburg, PA, 2004.

Around The Clock Freightliner Group, Inc., Oklahoma City, OK, 2004-2006.

Alamo Freightliner, San Antonio, TX, 2004-2005.

GKG Motors, Inc. d/b/a Suzuki of San Antonio v. Cantwell Fielder, Ltd. d/b/a Quality Suzuki and American Suzuki Motor Corporation, San Antonio, TX, 2004-2007.

Maple Shade Motor Corporation v. Kia Motors America, Inc., Turnersville, NJ, 2004-2006.

Star Houston, Inc. d/b/a Star Motor Cars, Inc. v. Mercedes-Benz-USA, LLC, Austin, TX, 2004-2006.

Perez Investments, Inc. d/b/a Rick Perez Autonet v. DaimlerChrysler Financial, L.L.C. d/b/a Chrysler Financial, L.L.C.; DaimlerChrysler Motors Corporation, Austin, TX, 2004.

Mazda Motors of America v. Maple Shade Motor Corporation, d/b/a Maple Shade Mazda et al., Maple Shade, NJ, 2004.

Wickstrom Chevrolet-Pontiac-Buick-GMC. v. General Motors Corporation, Chevrolet Division, Austin, TX, 2004.

Sea Coast Chevrolet - Oldsmobile, Inc. Belmar, NJ, 2004.

Steve Taub, Inc. d/b/a Taub Audi v. Audi Of America, Inc., Santa Monica, CA, 2003.

Toledo Mack Sales and Service, Inc. v. Mack Truck, Inc., Columbus, OH, 2003.

Cooper & Elliot, Columbus, OH, 2003.

Bayshore Ford Truck Sales, Inc., et al. v. Ford Motor Company, New Castle, DE, 2003-.

Maritime Ventures, LLC; Maritime Motors, Inc. v. City of Norwalk; Norwalk Redevelopment Agency, Norwalk, CT, 2003.

Cox Nuclear Pharmacy, Inc.and Accuscan, LLC v. CTI Molecular Imaging, Inc., Mobile, AL, 2002-.

Mazda Motor of America, Inc. v. David J. Phillips Buick-Pontiac, Inc., Orange County, CA, 2002- 2003.

Kimnach Ford, Norfolk, VA, 2002-.

Brown & Brown Chevrolet v. General Motors, Phoenix, AZ, 2002.

New Country Toyota, Durango, CO, 2002-2003.

ALCO Cadillac-Pontiac Sales, Inc. v. General Motors Corp. et al, Englewood Cliffs, NJ, 2001-2003.

Al Serra Chevrolet, Inc. v. General Motors Corp., Flint, MI, 2001.

Bayou Ford Truck Sales, Inc. d/b/a Bayou City Ford-Sterling v. Sterling Truck Corp., Houston, TX, 2001-2002.

Fred Lavery Company et al. v. Nissan North America, Inc., et al., Birmingham, MI, 2000-2002.

Tamaroff Buick and Sunshine Automotive, Inc. v. American Honda, Detroit, MI, 2000-2006.

Applegate Chevrolet, Inc. v. General Motors Corporation Flint, MI, 2000-2001.

Anchorage Chrysler Center, Inc. v. DaimlerChrysler Motors Corporation, Anchorage, AK, 2000-2003.

Ford Motor Company v. Pollock Motor Co., Inc. f/k/a Pollock Ford Co., Inc., v. Ford Motor Credit, Gadsden, AL, 1999-2001.

Suzuki Motor Corporation Japan v. Consumers Union of United States, Inc., Orange County, CA, 1999.

Arata Motor Sales v. American Honda Motor Co., et al., Burlingame, CA, 1999.

Star Motor Cars v. Mercedes-Benz of North America, Inc., Houston, TX, 1999.

Dispatch Management Services Corp., in Aero Special Delivery, Inc. v. United States of America, San Francisco, CA, 1999-2003 (est).

Arnold Lincoln Mercury v. Ford Motor Co., Detroit, MI, 1999-2000.

Landmark Chevrolet Corporation v. General Motors Corporation et al, Houston, TX, 1998-2002.

Ford Dealers of Greater Toronto, Toronto, ONT, Canada 1998-2003.

Volkswagen of America, Inc., et al. v. Pompano Imports, Inc., d.b.a. Vista Motor Company, Pompano Beach, FL, 1998-1999.

PUBLICATIONS

"Understanding Sales Performance Measurements: How Average Became the New Minimum," Dealer Law Review, Issue 14.3, Winter 2014, pp. 1-2.

White Paper: Customer Satisfaction Measurement, co-authored with Dr. Ernest H. Manuel, Jr., 2012.

White Paper: Generalized Retail Sales Effectiveness [restricted distribution], co-authored with Dr. Ernest H. Manuel, Jr., 2012.

Time Inspection Study Report of the Brotherhood of Maintenance of Way Employee Division/IBT (BMWED), Submitted to The Committee on Transportation and Infrastructure of the House of Representatives and The Committee on Commerce, Science, and Transportation of the Senate, 2011.

White Paper: Customer Satisfaction, co-authored with Dr. Ernest H. Manuel, Jr., 2010.

White Paper: Sales Effectiveness (RSI and MSR): Flaws in Manufacturers' Measurement of Dealers' Sales Performance, co-authored with Dr. Ernest H. Manuel, Jr., 2010.

OTHER

Trends in Franchise Economics and a Theory of Dealer Investment, presented to CPA group, Oklahoma City, OK, 2014.

"sales expectations vs Sales Expectations," presentation to AutoCPA Group, 2013.

Testimony before the Texas House of Representatives on behalf of the Texas Automobile Dealers Association regarding public policy issue related to franchise law, April 9, 2013.

"Navigating the Post-Slump Environment," presentation to Chief Financial Officers Group, Palm Springs, CA, April 2012.

"How Dealers Can Protect Themselves" presentation to AutoCPA Group, 2011.

Minnesota Auto Dealers, issues related to General Motors and Chrysler bankruptcies and dealer arbitrations, 2010.

Arizona Electric Power Cooperative, hourly load forecasting using econometric estimation, 2006.

Cases in which Mr. Stockton gave deposition, hearing or trial testimony during the past four years

Dependable Dodge, Inc. v. Fiat Chrysler Automobiles, Inc., (State of California New Motor Vehicle Board).
Provided deposition testimony 7/2016.

Wayzata Nissan, LLC v.Nissan North America, Inc., et al., (State of Minnesota District Court, Fourth Judicial District, Hennepin County).
Provided pre-filed trial testimony 7/2016.

Grossinger Autoplex, Inc. v. General Motors, LLC, (Office of the Secretary of State of Illinois before the Motor Vehicle Review Board).
Provided deposition testimony 1/2016 and hearing testimony 3/2016.

Mathew Enterprise, Inc. v. Chrysler Group LLC, (U.S. District Court Northern District of California).
Provided deposition testimony 12/2015 and 3/2016.

CNH America, LLC n/k/a CNH Industrial America, LLC v. Quinlan's Equipment, Inc., (State of Wisconsin Circuit Court Racine County).
Provided deposition testimony 1/2016.

Navistar v. New Baltimore Garage, Inc. (Commonwealth of Virginia Department of Motor Vehicles).
Provided hearing testimony 10/2015.

Bates Nissan, Inc., v. Nissan North America Inc., (State Office of Administrative Heaurings,
Provided deposition testimony 7/2015 and hearing testimony 9/2015.

TrueCar, Inc. v. Sonic Automotive, Inc., and Sonic Divisional Operations, LLC (United States District Court for the Central District of California).
Provided deposition testimony 5/2015.

Mathew Enterprise, Inc., a California Corporation, and Mathew Zaheri, an individual vs. Chrysler Group, LLC, a Delaware Liability Company; Chrysler Group Realty Company, LLC, a Delaware Limited Liability Company, and DOES 1-40 (Superior Court of the State of California, County of Santa Clara).
Provided trial testimony 3/2015.

Grayson Hyundai, LLC and Twin City Hyundai, Inc., vs. Hyundai Motor America (Tennessee Motor Vehicle Commission).
Provided deposition testimony 3/2015.

Recovery Racing, LLC d/b/a Maserati of Fort Lauderdale vs.Maserati North America, Inc., and Rick Case Weston, LLC, d/b/a Rick Case Maserati (State of Florida Division of Administrative Hearings).
Provided hearing testimony 10/2014.

Beck Chevrolet v. General Motors, LLC., (State of New York, Department of Motor Vehicles, Division of Safety and Business Hearings).
Provided trial testimony 10/2014.

Sweeten Truck Center, L.C., v. Volvo Trucks North America, a Division of Volvo Group North America, LLC, (Before the Texas Department of Motor Vehicles Motor Vehicle Division).
Provided deposition testimony 8/2014 and hearing testimony 9/2014.

BSAG Inc., and Bob Stallings Nissan of Baytown, Inc. v. Baytown Nissan, Inc., Burklein Family Limited Partnership, Nissan North America, Inc., and Frederick W. Burklein (In the District Court of Harris County, Texas 127th Judicial District).
Provided deposition testimony 7/2014.

General Motors, LLC, v. Leep Chev, LLC, d/b/a Lujack's Chevrolet (In the Iowa District Court In and For Scott County).
Provided deposition testimony 7/2014.

Century Motors Corporation v Chrysler Group, LLC et al. (In the Eleventh Judicial Circuit, State of Missouri, Circuit Judge Division).
Provided deposition testimony 3/2014 and trial testimony 4/2014.

Mega RV Corp. v Mike Thompson Recreational Vehicles (Superior Court of the State of California County of Los Angeles).
Provided deposition testimony 1/2014.

Santa Cruz Nissan, Inc., dba Santa Cruz Nissan v. Nissan North America, Inc., (California New Motor Vehicle Board).
Provided deposition testimony 12/2013 and hearing testimony 1/2014 and 2/2014.

Forrester Lincoln Mercury, Inc. v Ford Motor Company (Unites States District Court for the Middle District of Pennsylvania - transferred to private arbitration, Philadelphia, PA).
Provided hearing testimony 11/2013.

*Star Houston, Inc., d/b/a Star Motor Cars v. Mercedes Benz USA, LLC (*State Office of Administrative Hearings).
Provided deposition testimony 10/2012 and 9/2013. Provided hearing testimony 10/2013.

Majid Slim v Henry Khachaturian aka Hank Torian, Torian Holdings, Fremont Automobile Dealership, LLC., and Does 1-20 (Superior Court of the State of California in and for the County of Alameda.
Provided deposition testimony 10/2013 and trial testimony 11/2013.

GMAC v Lloyd Belt, Lloyd Belt GM Center, Inc., and Lloyd Belt Chrysler, Inc. (Circuit Court for Miller County, MO).
Provided deposition testimony 9/2013.

Bob Wade Autoworld v Ford Motor Company (Virginia Mediation).
Provided hearing testimony 8/2013.

Van Wie Chevrolet, Inc. d/b/a Evans Chevrolet v General Motors LLC and Sharon Chevrolet, Inc. (Supreme Court of the State of New York, County of Onondaga).
Provided deposition testimony 8/2013.

Midcon Compression L.L.C. v Loving County Appraisal District (In the District Court Loving County, Texas, 143rd Judicial District).
Provided deposition testimony 6/2013.

Aldon, Inc. dba Carson Toyota/Scion, Cabe Brothers dba Cabe Toyota/Scion, Apaulo, Inc. dba Norwalk Toyota/Scion, and DWWSB, Inc. dba South Bay Toyota/Scion v. Toyota Motor Sales, U.S.A., Inc. (State of California New Motor Board).
Provided deposition 4/2013 and hearing testimony 6/2013.

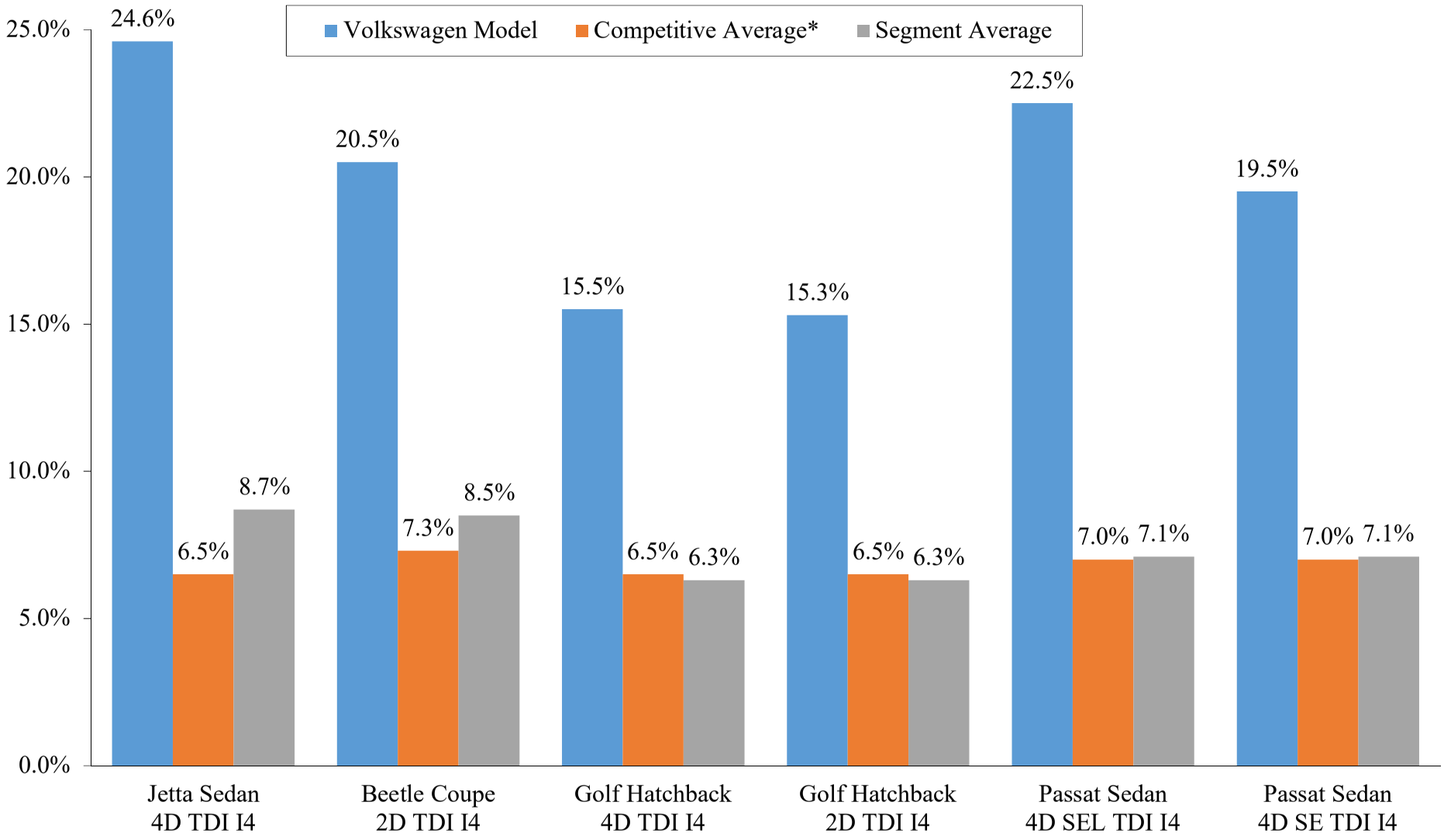
Texas House of Representatives regarding public policy issue related to franchise law,
Provided hearing testimony, 4/2013.

Morrie's European Car Sales, Inc. dba Morrie's Cadillac-Saab v. General Motors, LLC (American Arbitration Association).
Provided deposition testimony 11/2012.

Bowser Cadillac, LLC v. General Motors, LLC, v Rohrich Cadillac, Inc. (Commonwealth of Pennsylvania, Department of State, State Board of Vehicle Manufacturers, Dealers and Salespersons).
Provided hearing testimony 9/2012.

Dulles Motorcars, Inc. d/b/a Dulles Subaru v. Subaru of America, Leesburg, VA (Virginia in the Department of Motor Vehicles).
Provided hearing testimony 8/2012.

NADA Clean Trade Depreciation Rates
Model Year 2013 Volkswagen TDI Models, Competitive Average*, and Segment Average
9/2015 to 4/2016



* Competitive Average includes any Honda, Mazda, and Toyota/Scion vehicles.

SOURCE: The Fontana Group, Inc.
DATA: NADA Price Data Files (Magnetic Media), 9/2015, and 4/2016.

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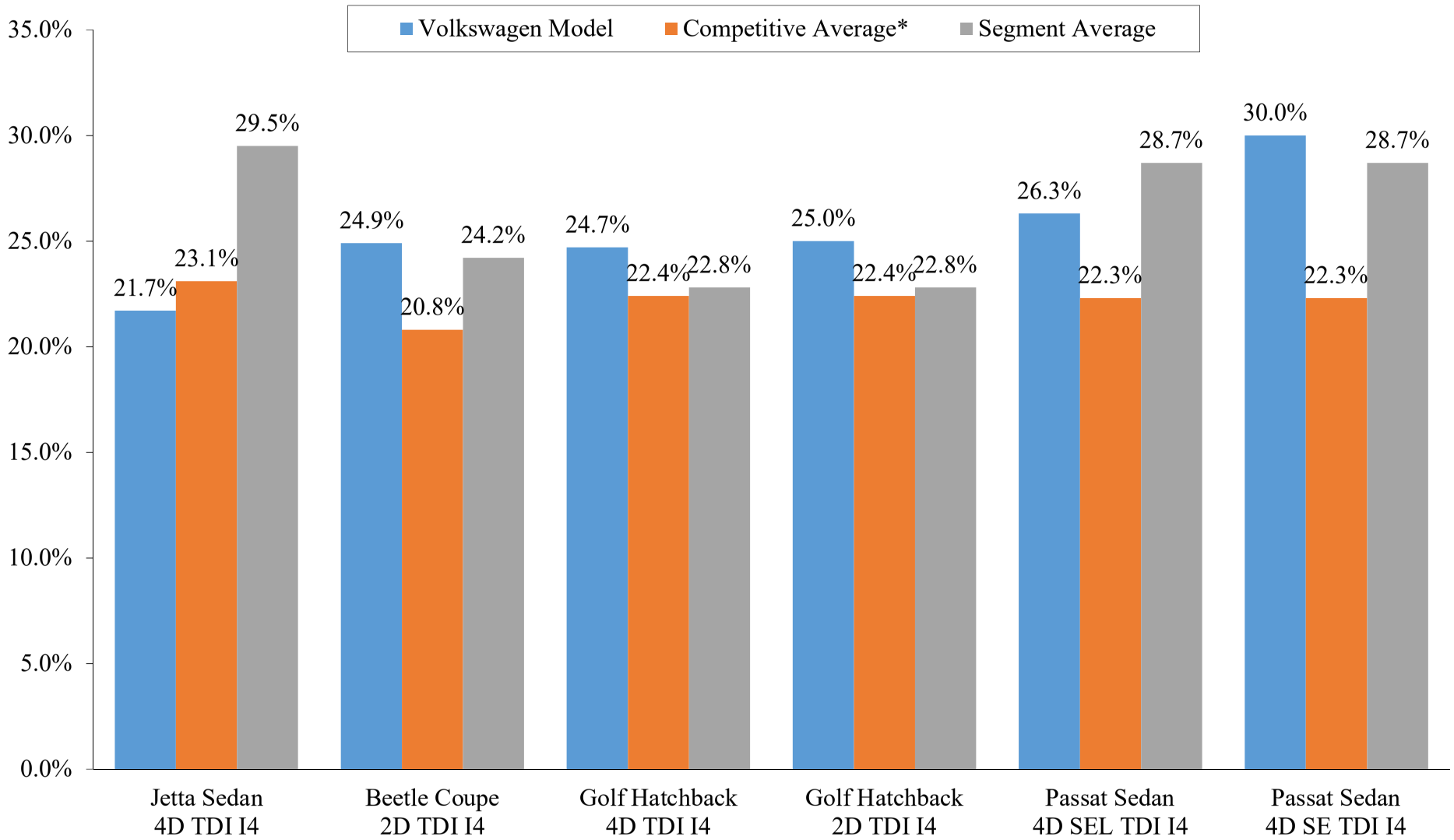
NADA Clean Trade Depreciation Rates
Model Year 2013 Volkswagen TDI Models, Competitive Average*, and Segment Average
9/2013 / 10/2013 / 11/2013 to 9/2015

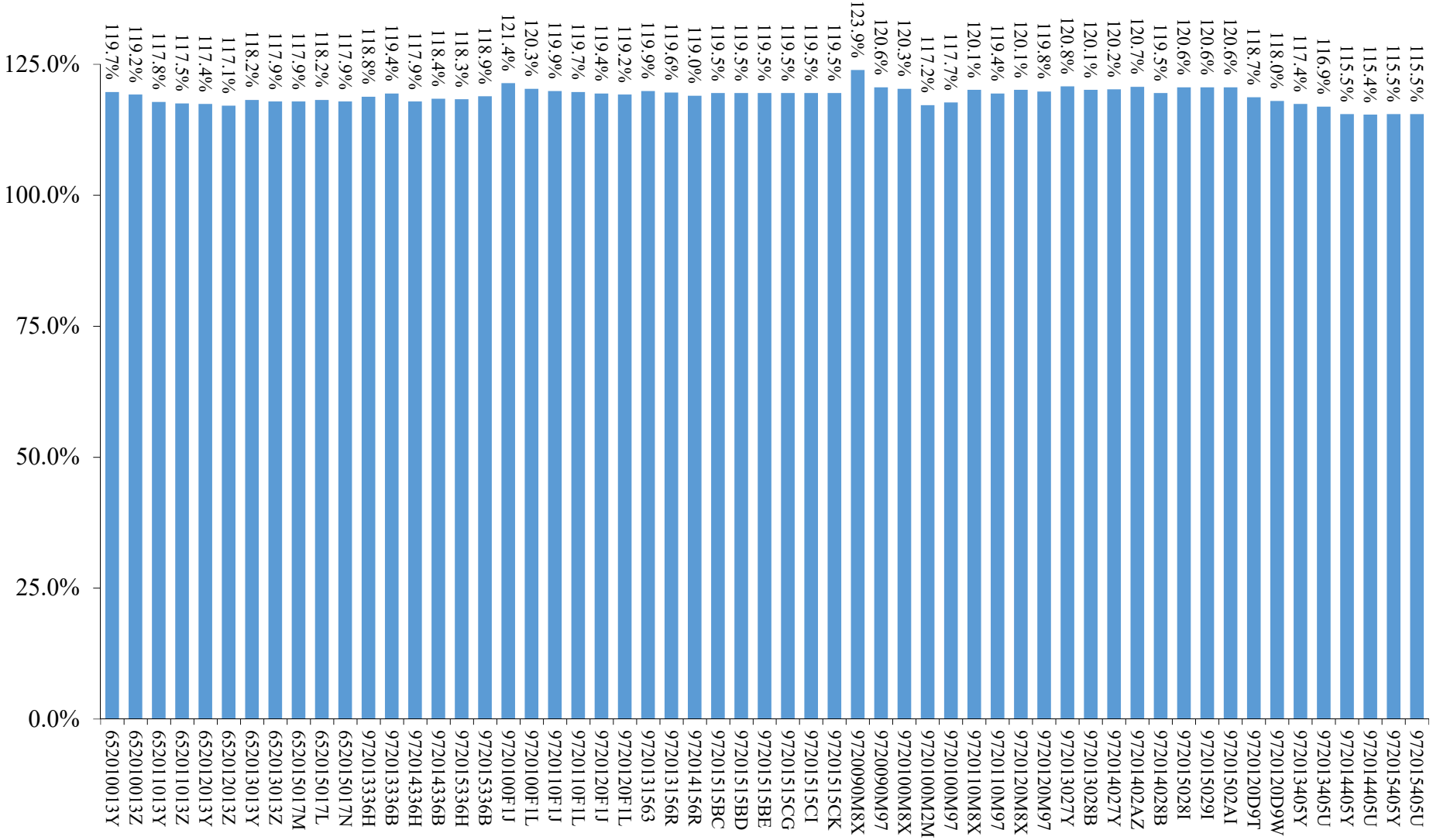


* Competitive Average includes any Honda, Mazda, and Toyota/Scion vehicles.

SOURCE: The Fontana Group, Inc.
DATA: NADA Price Data Files (Magnetic Media), 9/2013, 10/2013, 11/2013, and 9/2015.

F:\VWBE:DEPR.XLSX:CD1:22:TKHIHO

Estimated Minimum Payment* as a Percent of Clean Retail
9/2015



* Estimated payment = Greater of Clean Trade-In + 20% of Clean Trade-In + $2,986.73 or Clean Trade-In + $5,100.

SOURCE: The Fontana Group, Inc.
DATA: NADA Data Files (Magnetic Media), 9/2015.

F:\VWBE:ESPAY%CL.XLSX:CE%C:22:TEHMHO

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Estimated Sales to Dealerships by VIC
Volkswagen & Audi 2.0L TDI Vehicles

VIC	Line Make	Model	Model Year	Series	Body Style	Estimated Sales
652010013Y	AUDI	A3	2010	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	$4,899,241
652010013Z	AUDI	A3	2010	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	$65,316,727
652011013Y	AUDI	A3	2011	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	$38,986,341
652011013Z	AUDI	A3	2011	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	$82,832,252
652012013Y	AUDI	A3	2012	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	$48,744,961
652012013Z	AUDI	A3	2012	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	$75,098,372
652013013Y	AUDI	A3	2013	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	$11,835,223
652013013Z	AUDI	A3	2013	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	$48,732,682
652015017M	AUDI	A3	2015	A3-4 Cyl. Turbo	Sed 4D TDI Premium Plus 2WD I4 Turbo	$44,948,199
652015017L	AUDI	A3	2015	A3-4 Cyl. Turbo	Sedan 4D TDI Premium 2WD I4 Turbo	$40,030,633
652015017N	AUDI	A3	2015	A3-4 Cyl. Turbo	Sedan 4D TDI Prestige 2WD I4 Turbo	$8,816,632
972013336H	VOLKSWAGEN	Beetle	2013	Beetle	Convertible 2D TDI I4	$76,672,264
972013336B	VOLKSWAGEN	Beetle	2013	Beetle	Coupe 2D TDI I4	$96,291,285
972014336H	VOLKSWAGEN	Beetle	2014	Beetle	Convertible 2D TDI I4	$56,442,105
972014336B	VOLKSWAGEN	Beetle	2014	Beetle	Coupe 2D TDI I4	$58,251,571
972015336H	VOLKSWAGEN	Beetle	2015	Beetle	Convertible 2D TDI I4	$18,042,786
972015336B	VOLKSWAGEN	Beetle	2015	Beetle	Coupe 2D TDI I4	$13,366,293
9720100F1J	VOLKSWAGEN	Golf	2010	Golf-4 Cyl.	Hatchback 2D TDI	$43,029,898
9720100F1L	VOLKSWAGEN	Golf	2010	Golf-4 Cyl.	Hatchback 4D TDI	$62,254,082
9720110F1J	VOLKSWAGEN	Golf	2011	Golf-4 Cyl.	Hatchback 2D TDI	$73,090,983
9720110F1L	VOLKSWAGEN	Golf	2011	Golf-4 Cyl.	Hatchback 4D TDI	$151,188,417
9720120F1J	VOLKSWAGEN	Golf	2012	Golf-4 Cyl.	Hatchback 2D TDI	$67,732,783
9720120F1L	VOLKSWAGEN	Golf	2012	Golf-4 Cyl.	Hatchback 4D TDI	$220,283,303
9720131563	VOLKSWAGEN	Golf	2013	Golf	Hatchback 2D TDI I4	$29,897,214
972013156R	VOLKSWAGEN	Golf	2013	Golf	Hatchback 4D TDI I4	$195,640,301
972014156R	VOLKSWAGEN	Golf	2014	Golf	Hatchback 4D TDI I4	$83,946,178
97201515BC	VOLKSWAGEN	Golf	2015	Golf	Hatchback 4D TDI S I4 Turbo	$265,900,042
97201515CI	VOLKSWAGEN	Golf	2015	Golf	Wagon 4D TDI SE I4 T-Diesel	$244,361,245
9720090M8X	VOLKSWAGEN	Jetta	2009	Jetta-4 Cyl.	Sedan 4D TDI	$634,101,823
9720090M97	VOLKSWAGEN	Jetta	2009	Jetta-4 Cyl.	Wagon 4D TDI	$257,762,368
9720100M8X	VOLKSWAGEN	Jetta	2010	Jetta-4 Cyl.	Sedan 4D TDI	$716,830,611
9720100M2M	VOLKSWAGEN	Jetta	2010	Jetta-4 Cyl.	Sedan 4D TDI Cup Street Edition	$31,020,226
9720100M97	VOLKSWAGEN	Jetta	2010	Jetta-4 Cyl.	Wagon 4D TDI	$561,883,895

Estimated Sales to Dealerships by VIC
Volkswagen & Audi 2.0L TDI Vehicles

VIC	Line Make	Model	Model Year	Series	Body Style	Estimated Sales
9720110M8X	VOLKSWAGEN	Jetta	2011	Jetta-4 Cyl.	Sedan 4D TDI	$513,077,540
9720110M97	VOLKSWAGEN	Jetta	2011	Jetta-4 Cyl.	Wagon 4D TDI	$550,444,703
9720120M8X	VOLKSWAGEN	Jetta	2012	Jetta-4 Cyl.	Sedan 4D TDI	$792,622,344
9720120M97	VOLKSWAGEN	Jetta	2012	Jetta-4 Cyl.	Wagon 4D TDI	$512,805,363
972013027Y	VOLKSWAGEN	Jetta	2013	Jetta	Sedan 4D TDI I4	$749,238,343
972013028B	VOLKSWAGEN	Jetta	2013	Jetta	Wagon 4D TDI I4	$548,992,663
972014027Y	VOLKSWAGEN	Jetta	2014	Jetta	Sedan 4D TDI I4	$587,884,146
972014028B	VOLKSWAGEN	Jetta	2014	Jetta	Wagon 4D TDI I4	$560,900,799
972015028I	VOLKSWAGEN	Jetta	2015	Jetta	Sedan 4D S TDI I4	$358,923,356
9720120D9T	VOLKSWAGEN	Passat	2012	Passat-4 Cyl. Turbo	Sedan 4D SE TDI	$297,957,665
9720120D9W	VOLKSWAGEN	Passat	2012	Passat-4 Cyl. Turbo	Sedan 4D SEL TDI	$239,729,377
972013405Y	VOLKSWAGEN	Passat	2013	Passat	Sedan 4D SE TDI I4	$649,508,193
972013405U	VOLKSWAGEN	Passat	2013	Passat	Sedan 4D SEL TDI I4	$530,293,155
972014405Y	VOLKSWAGEN	Passat	2014	Passat	Sedan 4D SE TDI I4	$517,071,837
972014405U	VOLKSWAGEN	Passat	2014	Passat	Sedan 4D SEL TDI I4	$480,421,111
972015405Y	VOLKSWAGEN	Passat	2015	Passat	Sedan 4D SE TDI I4	$340,922,399
972015405U	VOLKSWAGEN	Passat	2015	Passat	Sedan 4D SEL TDI I4	$278,289,880
					Sum:	$12,937,313,809

NOTE: Excludes six un-matched vehicles.

SOURCE: The Fontana Group, Inc.
DATA: NADA Data Files (Magnetic Media), 9/2015.
US News Internet Site, 7/11/2016.
Volkswagen 2.0L Subject Vehicle Data File (Magnetic Media), 11/2007 - 11/2015.
Edmunds Internet Site, 7/8/2016.
FVWBE: DPROFITS.XLSX:SPS:22:TDITHO

Average Invoice as a Percent of MSRP by VIC
Volkswagen & Audi 2.0L TDI Vehicles

VIC	Line Make	Model	Model Year	Series	Body Style	Average Invoice % MSRP*
652010013Y	AUDI	A3	2010	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	92.998%
652010013Z	AUDI	A3	2010	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	92.998%
652011013Y	AUDI	A3	2011	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	93.005%
652011013Z	AUDI	A3	2011	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	93.005%
652012013Y	AUDI	A3	2012	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	93.002%
652012013Z	AUDI	A3	2012	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	93.002%
652013013Y	AUDI	A3	2013	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium	93.002%
652013013Z	AUDI	A3	2013	A3-4 Cyl. Turbo	Hatchback 4D TDI Premium Plus	93.002%
652015017M	AUDI	A3	2015	A3-4 Cyl. Turbo	Sed 4D TDI Premium Plus 2WD I4 Turbo	93.000%
652015017L	AUDI	A3	2015	A3-4 Cyl. Turbo	Sedan 4D TDI Premium 2WD I4 Turbo	93.000%
652015017N	AUDI	A3	2015	A3-4 Cyl. Turbo	Sedan 4D TDI Prestige 2WD I4 Turbo	93.000%
972013336H	VOLKSWAGEN	Beetle	2013	Beetle	Convertible 2D TDI I4	95.999%
972013336B	VOLKSWAGEN	Beetle	2013	Beetle	Coupe 2D TDI I4	95.999%
972014336H	VOLKSWAGEN	Beetle	2014	Beetle	Convertible 2D TDI I4	95.999%
972014336B	VOLKSWAGEN	Beetle	2014	Beetle	Coupe 2D TDI I4	95.999%
972015336H	VOLKSWAGEN	Beetle	2015	Beetle	Convertible 2D TDI I4	96.000%
972015336B	VOLKSWAGEN	Beetle	2015	Beetle	Coupe 2D TDI I4	96.000%
9720100F1J	VOLKSWAGEN	Golf	2010	Golf-4 Cyl.	Hatchback 2D TDI	95.446%
9720100F1L	VOLKSWAGEN	Golf	2010	Golf-4 Cyl.	Hatchback 4D TDI	95.427%
9720110F1J	VOLKSWAGEN	Golf	2011	Golf-4 Cyl.	Hatchback 2D TDI	96.004%
9720110F1L	VOLKSWAGEN	Golf	2011	Golf-4 Cyl.	Hatchback 4D TDI	96.002%
9720120F1J	VOLKSWAGEN	Golf	2012	Golf-4 Cyl.	Hatchback 2D TDI	96.000%
9720120F1L	VOLKSWAGEN	Golf	2012	Golf-4 Cyl.	Hatchback 4D TDI	95.999%
9720131563	VOLKSWAGEN	Golf	2013	Golf	Hatchback 2D TDI I4	96.000%
972013156R	VOLKSWAGEN	Golf	2013	Golf	Hatchback 4D TDI I4	96.001%
972014156R	VOLKSWAGEN	Golf	2014	Golf	Hatchback 4D TDI I4	96.000%
97201515BC	VOLKSWAGEN	Golf	2015	Golf	Hatchback 4D TDI S I4 Turbo	95.999%
97201515BD	VOLKSWAGEN	Golf	2015	Golf	Hatchback 4D TDI SE I4 Turbo	95.999%
97201515BE	VOLKSWAGEN	Golf	2015	Golf	Hatchback 4D TDI SEL I4 Turbo	95.999%
97201515CG	VOLKSWAGEN	Golf	2015	Golf	Wagon 4D TDI S I4 T-Diesel	95.999%
97201515CI	VOLKSWAGEN	Golf	2015	Golf	Wagon 4D TDI SE I4 T-Diesel	95.999%
97201515CK	VOLKSWAGEN	Golf	2015	Golf	Wagon 4D TDI SEL I4 T-Diesel	95.999%
9720090M8X	VOLKSWAGEN	Jetta	2009	Jetta-4 Cyl.	Sedan 4D TDI	94.446%

Average Invoice as a Percent of MSRP by VIC
Volkswagen & Audi 2.0L TDI Vehicles

VIC	Line Make	Model	Model Year	Series	Body Style	Average Invoice % MSRP*
9720090M97	VOLKSWAGEN	Jetta	2009	Jetta-4 Cyl.	Wagon 4D TDI	94.397%
9720100M8X	VOLKSWAGEN	Jetta	2010	Jetta-4 Cyl.	Sedan 4D TDI	94.426%
9720100M2M	VOLKSWAGEN	Jetta	2010	Jetta-4 Cyl.	Sedan 4D TDI Cup Street Edition	94.365%
9720100M97	VOLKSWAGEN	Jetta	2010	Jetta-4 Cyl.	Wagon 4D TDI	94.372%
9720110M8X	VOLKSWAGEN	Jetta	2011	Jetta-4 Cyl.	Sedan 4D TDI	95.999%
9720110M97	VOLKSWAGEN	Jetta	2011	Jetta-4 Cyl.	Wagon 4D TDI	95.999%
9720120M8X	VOLKSWAGEN	Jetta	2012	Jetta-4 Cyl.	Sedan 4D TDI	96.001%
9720120M97	VOLKSWAGEN	Jetta	2012	Jetta-4 Cyl.	Wagon 4D TDI	95.998%
972013027Y	VOLKSWAGEN	Jetta	2013	Jetta	Sedan 4D TDI I4	96.001%
972013028B	VOLKSWAGEN	Jetta	2013	Jetta	Wagon 4D TDI I4	95.999%
972014027Y	VOLKSWAGEN	Jetta	2014	Jetta	Sedan 4D TDI I4	96.001%
97201402AZ	VOLKSWAGEN	Jetta	2014	Jetta	Sedan 4D TDI Value I4 Turbo	95.999%
972014028B	VOLKSWAGEN	Jetta	2014	Jetta	Wagon 4D TDI I4	96.000%
972015028I	VOLKSWAGEN	Jetta	2015	Jetta	Sedan 4D S TDI I4	95.998%
972015029I	VOLKSWAGEN	Jetta	2015	Jetta	Sedan 4D SE TDI I4	96.002%
97201502AI	VOLKSWAGEN	Jetta	2015	Jetta	Sedan 4D SEL TDI I4	95.998%
9720120D9T	VOLKSWAGEN	Passat	2012	Passat-4 Cyl. Turbo	Sedan 4D SE TDI	95.901%
9720120D9W	VOLKSWAGEN	Passat	2012	Passat-4 Cyl. Turbo	Sedan 4D SEL TDI	95.903%
972013405Y	VOLKSWAGEN	Passat	2013	Passat	Sedan 4D SE TDI I4	95.901%
972013405U	VOLKSWAGEN	Passat	2013	Passat	Sedan 4D SEL TDI I4	95.895%
972014405Y	VOLKSWAGEN	Passat	2014	Passat	Sedan 4D SE TDI I4	95.902%
972014405U	VOLKSWAGEN	Passat	2014	Passat	Sedan 4D SEL TDI I4	95.901%
972015405Y	VOLKSWAGEN	Passat	2015	Passat	Sedan 4D SE TDI I4	95.901%
972015405U	VOLKSWAGEN	Passat	2015	Passat	Sedan 4D SEL TDI I4	95.900%

* Values are shown rounded, but are unrounded in their application.

SOURCE: The Fontana Group, Inc.
DATA: NADA Data Files (Magnetic Media), 9/2015.
US News Internet Site, 7/11/2016.
Volkswagen 2.0L Subject Vehicle Data File (Magnetic Media), 11/2007 - 11/2015.
F\VWBE: DPROFITS.XLSX:SAIM:22:TDITHO

Back-up for Invoice and MSRP Data
for Comparison and Averages

Model Year	Make	Invoice Model	NADA Model	Invoice Trim	NADA Body Style	Invoice	MSRP	Invoice/ MSRP
2010	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium	Hatchback 4D TDI Premium	$27,853	$29,950	0.92998
2010	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium Plus	Hatchback 4D TDI Premium Plus	$27,853	$29,950	0.92998
2011	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium	Hatchback 4D TDI Premium	$28,134	$30,250	0.93005
2011	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium Plus	Hatchback 4D TDI Premium Plus	$28,134	$30,250	0.93005
2012	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium	Hatchback 4D TDI Premium	$28,133	$30,250	0.93002
2012	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium Plus	Hatchback 4D TDI Premium Plus	$28,133	$30,250	0.93002
2013	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium	Hatchback 4D TDI Premium	$28,133	$30,250	0.93002
2013	Audi	A3	A3	4dr HB S tronic FrontTrak 2.0 TDI Premium Plus	Hatchback 4D TDI Premium Plus	$28,133	$30,250	0.93002
2015	Audi	A3	A3	4dr Sdn FWD 2.0 TDI Premium	Sedan 4D TDI Premium 2WD I4 Turbo	$30,318	$32,600	0.93
2015	Audi	A3	A3	4dr Sdn FWD 2.0 TDI Premium Plus	Sed 4D TDI Premium Plus 2WD I4 Turl	$30,318	$32,600	0.93
2015	Audi	A3	A3	4dr Sdn FWD 2.0 TDI Prestige	Sedan 4D TDI Prestige 2WD I4 Turbo	$30,318	$32,600	0.93
2013	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI	Coupe 2D TDI I4	$22,555	$23,495	0.95999
2013	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI	Coupe 2D TDI I4	$23,611	$24,595	0.95999
2013	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI w/Sun	Coupe 2D TDI I4	$24,187	$25,195	0.95999
2013	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI w/Sun	Coupe 2D TDI I4	$25,243	$26,295	0.95999
2013	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI w/Sun/Sound/Nav	Coupe 2D TDI I4	$25,483	$26,545	0.95999
2013	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI w/Sun/Sound/Nav	Coupe 2D TDI I4	$26,539	$27,645	0.95999
2013	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI	Convertible 2D TDI I4	$27,835	$28,995	0.95999
2013	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI w/Sound/Nav	Convertible 2D TDI I4	$28,027	$29,195	0.95999
2013	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI w/Sound/Nav	Convertible 2D TDI I4	$29,083	$30,295	0.95999
2013	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI	Convertible 2D TDI I4	$26,779	$27,895	0.95999
2014	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI	Coupe 2D TDI I4	$23,611	$24,595	0.95999
2014	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI	Coupe 2D TDI I4	$24,667	$25,695	0.95999
2014	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI w/Sun/Sound/Nav	Coupe 2D TDI I4	$26,395	$27,495	0.95999
2014	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI w/Sun/Sound/Nav	Coupe 2D TDI I4	$27,451	$28,595	0.95999
2014	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI	Convertible 2D TDI I4	$27,739	$28,895	0.95999
2014	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI	Convertible 2D TDI I4	$28,795	$29,995	0.95999
2014	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI w/Sound/Nav	Convertible 2D TDI I4	$28,891	$30,095	0.95999
2014	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI w/Sound/Nav	Convertible 2D TDI I4	$29,947	$31,195	0.95999
2015	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI *Ltd Avail*	Coupe 2D TDI I4	$23,803	$24,795	0.95999
2015	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI	Coupe 2D TDI I4	$24,317	$25,330	0.96001
2015	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI *Ltd Avail*	Coupe 2D TDI I4	$24,859	$25,895	0.95999
2015	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI	Coupe 2D TDI I4	$25,372	$26,430	0.95997
2015	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI w/Sun/Sound/Nav *Ltd A	Coupe 2D TDI I4	$26,602	$27,710	0.96001
2015	Volkswagen	Beetle	Beetle	Coupe 2dr Man 2.0L TDI w/Sun/Sound/Nav	Coupe 2D TDI I4	$27,384	$28,525	0.96
2015	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI w/Sun/Sound/Nav *Ltd A	Coupe 2D TDI I4	$27,657	$28,810	0.95998
2015	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI *Ltd Avail*	Convertible 2D TDI I4	$27,931	$29,095	0.95999
2015	Volkswagen	Beetle	Beetle	Coupe 2dr DSG 2.0L TDI w/Sun/Sound/Nav	Coupe 2D TDI I4	$28,441	$29,625	0.96003

Back-up for Invoice and MSRP Data for Comparison and Averages

Model Year	Make	Invoice Model	NADA Model	Invoice Trim	NADA Body Style	Invoice	MSRP	Invoice/ MSRP
2015	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI	Convertible 2D TDI I4	$28,488	$29,675	0.96
2015	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI *Ltd Avail*	Convertible 2D TDI I4	$28,987	$30,195	0.95999
2015	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI w/Sound/Nav *Ltd A	Convertible 2D TDI I4	$29,083	$30,295	0.95999
2015	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI	Convertible 2D TDI I4	$29,544	$30,775	0.96
2015	Volkswagen	Beetle	Beetle	Convertible 2dr Man 2.0L TDI w/Sound/Nav	Convertible 2D TDI I4	$29,881	$31,125	0.96003
2015	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI w/Sound/Nav *Ltd A	Convertible 2D TDI I4	$30,139	$31,395	0.95999
2015	Volkswagen	Beetle	Beetle	Convertible 2dr DSG 2.0L TDI w/Sound/Nav	Convertible 2D TDI I4	$30,937	$32,225	0.96003
2012	Volkswagen	Passat	Passat	4dr Sdn 2.0L Manual TDI SE	Sedan 4D SE TDI	$24,929	$25,995	0.95899
2012	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SE w/Sunroof	Sedan 4D SE TDI	$26,752	$27,895	0.95902
2012	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SE w/Sunroof & Nav	Sedan 4D SE TDI	$28,286	$29,495	0.95901
2012	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SEL Premium	Sedan 4D SEL TDI	$30,876	$32,195	0.95903
2013	Volkswagen	Passat	Passat	4dr Sdn 2.0L Manual TDI SE	Sedan 4D SE TDI I4	$25,150	$26,225	0.95901
2013	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SE w/Sunroof	Sedan 4D SE TDI I4	$27,068	$28,225	0.95901
2013	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SE w/Sunroof & Nav	Sedan 4D SE TDI I4	$28,660	$29,885	0.95901
2013	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SEL Premium	Sedan 4D SEL TDI I4	$31,564	$32,915	0.95895
2014	Volkswagen	Passat	Passat	4dr Sdn 2.0L Manual TDI SE	Sedan 4D SE TDI I4	$25,582	$26,675	0.95903
2014	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SE w/Sunroof	Sedan 4D SE TDI I4	$27,500	$28,675	0.95902
2014	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SE w/Sunroof & Nav	Sedan 4D SE TDI I4	$29,130	$30,375	0.95901
2014	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SEL Premium	Sedan 4D SEL TDI I4	$32,026	$33,395	0.95901
2015	Volkswagen	Passat	Passat	4dr Sdn 2.0L Manual TDI SE	Sedan 4D SE TDI I4	$25,985	$27,095	0.95903
2015	Volkswagen	Passat	Passat	4dr Sdn 2.0L TDI DSG SE w/Sunroof	Sedan 4D SE TDI I4	$27,931	$29,125	0.959
2015	Volkswagen	Passat	Passat	4dr Sdn 2.0L DSG TDI SE w/Sunroof & Nav	Sedan 4D SE TDI I4	$29,585	$30,850	0.959
2015	Volkswagen	Passat	Passat	4dr Sdn 2.0L TDI DSG SEL Premium	Sedan 4D SEL TDI I4	$32,534	$33,925	0.959
2009	Volkswagen	Jetta	Jetta	4dr Man TDI	Sedan 4D TDI	$21,004	$22,270	0.94315
2009	Volkswagen	Jetta	Jetta	4dr Man TDI Loyal *Ltd Avail*	Sedan 4D TDI	$21,164	$22,440	0.94314
2009	Volkswagen	Jetta	Jetta	4dr DSG TDI	Sedan 4D TDI	$22,103	$23,370	0.94579
2009	Volkswagen	Jetta	Jetta	4dr DSG TDI Loyal *Ltd Avail*	Sedan 4D TDI	$22,263	$23,540	0.94575
2010	Volkswagen	Jetta	Jetta	4dr Manual TDI	Sedan 4D TDI	$21,528	$22,830	0.94297
2010	Volkswagen	Jetta	Jetta	4dr DSG TDI	Sedan 4D TDI	$22,627	$23,930	0.94555
2010	Volkswagen	Jetta	Jetta	4dr Manual TDI Cup	Sedan 4D TDI Cup Street Edition	$23,552	$24,990	0.94246
2010	Volkswagen	Jetta	Jetta	4dr DSG TDI Cup	Sedan 4D TDI Cup Street Edition	$24,651	$26,090	0.94484
2011	Volkswagen	Jetta	Jetta	4dr Manual TDI LE	Sedan 4D TDI	$21,211	$22,095	0.95999
2011	Volkswagen	Jetta	Jetta	4dr Manual TDI	Sedan 4D TDI	$22,075	$22,995	0.95999
2011	Volkswagen	Jetta	Jetta	4dr DSG TDI LE	Sedan 4D TDI	$22,267	$23,195	0.95999
2011	Volkswagen	Jetta	Jetta	4dr DSG TDI	Sedan 4D TDI	$23,131	$24,095	0.95999
2011	Volkswagen	Jetta	Jetta	4dr Manual TDI w/Nav	Sedan 4D TDI	$23,227	$24,195	0.95999
2011	Volkswagen	Jetta	Jetta	4dr DSG TDI w/Nav	Sedan 4D TDI	$24,283	$25,295	0.95999
2012	Volkswagen	Jetta	Jetta	4dr Manual TDI	Sedan 4D TDI	$21,864	$22,775	0.96

Back-up for Invoice and MSRP Data
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Model Year	Make	Invoice Model	NADA Model	Invoice Trim	NADA Body Style	Invoice	MSRP	Invoice/ MSRP
2012	Volkswagen	Jetta	Jetta	4dr DSG TDI	Sedan 4D TDI	$22,921	$23,875	0.96004
2012	Volkswagen	Jetta	Jetta	4dr Manual TDI w/Premium	Sedan 4D TDI	$23,247	$24,215	0.96002
2012	Volkswagen	Jetta	Jetta	4dr DSG TDI w/Premium	Sedan 4D TDI	$24,303	$25,315	0.96002
2012	Volkswagen	Jetta	Jetta	4dr Manual TDI w/Premium & Nav	Sedan 4D TDI	$24,331	$25,345	0.95999
2012	Volkswagen	Jetta	Jetta	4dr DSG TDI w/Premium & Nav	Sedan 4D TDI	$25,387	$26,445	0.95999
2013	Volkswagen	Jetta	Jetta	4dr Man TDI *Ltd Avail*	Sedan 4D TDI I4	$22,071	$22,990	0.96003
2013	Volkswagen	Jetta	Jetta	4dr DSG TDI *Ltd Avail*	Sedan 4D TDI I4	$23,127	$24,090	0.96002
2013	Volkswagen	Jetta	Jetta	4dr Man TDI w/Premium *Ltd Avail*	Sedan 4D TDI I4	$23,452	$24,430	0.95997
2013	Volkswagen	Jetta	Jetta	4dr DSG TDI w/Premium *Ltd Avail*	Sedan 4D TDI I4	$24,508	$25,530	0.95997
2013	Volkswagen	Jetta	Jetta	4dr Man TDI w/Premium/Nav *Ltd Avail*	Sedan 4D TDI I4	$24,855	$25,890	0.96002
2013	Volkswagen	Jetta	Jetta	4dr DSG TDI w/Premium/Nav *Ltd Avail*	Sedan 4D TDI I4	$25,911	$26,990	0.96002
2014	Volkswagen	Jetta	Jetta	4dr Man TDI Value Edition	Sedan 4D TDI Value I4 Turbo	$20,443	$21,295	0.95999
2014	Volkswagen	Jetta	Jetta	4dr DSG TDI Value Edition	Sedan 4D TDI Value I4 Turbo	$21,499	$22,395	0.95999
2014	Volkswagen	Jetta	Jetta	4dr Man TDI	Sedan 4D TDI I4	$22,681	$23,625	0.96004
2014	Volkswagen	Jetta	Jetta	4dr DSG TDI	Sedan 4D TDI I4	$23,737	$24,725	0.96004
2014	Volkswagen	Jetta	Jetta	4dr Man TDI w/Premium	Sedan 4D TDI I4	$24,283	$25,295	0.95999
2014	Volkswagen	Jetta	Jetta	4dr DSG TDI w/Premium	Sedan 4D TDI I4	$25,339	$26,395	0.95999
2014	Volkswagen	Jetta	Jetta	4dr Man TDI w/Premium/Nav	Sedan 4D TDI I4	$25,723	$26,795	0.95999
2014	Volkswagen	Jetta	Jetta	4dr DSG TDI w/Premium/Nav	Sedan 4D TDI I4	$26,779	$27,895	0.95999
2015	Volkswagen	Jetta	Jetta	4dr Man 2.0L TDI S	Sedan 4D S TDI I4	$20,774	$21,640	0.95998
2015	Volkswagen	Jetta	Jetta	4dr DSG 2.0L TDI S	Sedan 4D S TDI I4	$21,830	$22,740	0.95998
2015	Volkswagen	Jetta	Jetta	4dr Man 2.0L TDI SE w/Connectivity	Sedan 4D SE TDI I4	$23,113	$24,075	0.96004
2015	Volkswagen	Jetta	Jetta	4dr DSG 2.0L TDI SE w/Connectivity	Sedan 4D SE TDI I4	$24,168	$25,175	0.96
2015	Volkswagen	Jetta	Jetta	4dr Man 2.0L TDI SEL	Sedan 4D SEL TDI I4	$25,353	$26,410	0.95998
2015	Volkswagen	Jetta	Jetta	4dr DSG 2.0L TDI SEL	Sedan 4D SEL TDI I4	$26,409	$27,510	0.95998
2009	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI	Wagon 4D TDI	$22,503	$23,870	0.94273
2009	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI	Wagon 4D TDI	$23,602	$24,970	0.94521
2010	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI	Wagon 4D TDI	$23,200	$24,615	0.94251
2010	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI	Wagon 4D TDI	$24,299	$25,715	0.94493
2011	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI	Wagon 4D TDI	$23,995	$24,995	0.95999
2011	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI	Wagon 4D TDI	$25,051	$26,095	0.95999
2012	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI	Wagon 4D TDI	$24,517	$25,540	0.95995
2012	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI	Wagon 4D TDI	$25,574	$26,640	0.95998
2012	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI w/Sunroof	Wagon 4D TDI	$26,198	$27,290	0.95999
2012	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI w/Sunroof & Nav	Wagon 4D TDI	$26,994	$28,120	0.95996
2012	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI w/Sunroof	Wagon 4D TDI	$27,255	$28,390	0.96002
2012	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI w/Sunroof & Nav	Wagon 4D TDI	$28,051	$29,220	0.95999
2013	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI	Wagon 4D TDI I4	$24,763	$25,795	0.95999

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Model Year	Make	Invoice Model	NADA Model	Invoice Trim	NADA Body Style	Invoice	MSRP	Invoice/ MSRP
2013	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI	Wagon 4D TDI I4	$25,819	$26,895	0.95999
2013	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI w/Sunroof	Wagon 4D TDI I4	$26,491	$27,595	0.95999
2013	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI w/Sunroof & Nav	Wagon 4D TDI I4	$27,259	$28,395	0.95999
2013	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI w/Sunroof	Wagon 4D TDI I4	$27,547	$28,695	0.95999
2013	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI w/Sunroof & Nav	Wagon 4D TDI I4	$28,315	$29,495	0.95999
2014	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI	Wagon 4D TDI I4	$25,503	$26,565	0.96002
2014	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI	Wagon 4D TDI I4	$26,558	$27,665	0.95999
2014	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI w/Sunroof	Wagon 4D TDI I4	$27,230	$28,365	0.95999
2014	Volkswagen	Jetta Wagon	Jetta	4dr Manual TDI w/Sunroof & Nav	Wagon 4D TDI I4	$27,998	$29,165	0.95999
2014	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI w/Sunroof	Wagon 4D TDI I4	$28,287	$29,465	0.96002
2014	Volkswagen	Jetta Wagon	Jetta	4dr DSG TDI w/Sunroof & Nav	Wagon 4D TDI I4	$29,054	$30,265	0.95999
2010	Volkswagen	Golf	Golf	2dr HB Man TDI	Hatchback 2D TDI	$21,122	$22,155	0.95337
2010	Volkswagen	Golf	Golf	4dr HB Man TDI	Hatchback 4D TDI	$21,695	$22,760	0.95321
2010	Volkswagen	Golf	Golf	2dr HB DSG TDI	Hatchback 2D TDI	$22,221	$23,255	0.95554
2010	Volkswagen	Golf	Golf	4dr HB DSG TDI	Hatchback 4D TDI	$22,794	$23,860	0.95532
2011	Volkswagen	Golf	Golf	2dr HB Man TDI	Hatchback 2D TDI	$22,297	$23,225	0.96004
2011	Volkswagen	Golf	Golf	4dr HB Man TDI	Hatchback 4D TDI	$22,930	$23,885	0.96002
2011	Volkswagen	Golf	Golf	2dr HB DSG TDI	Hatchback 2D TDI	$23,353	$24,325	0.96004
2011	Volkswagen	Golf	Golf	4dr HB DSG TDI	Hatchback 4D TDI	$23,986	$24,985	0.96002
2012	Volkswagen	Golf	Golf	2dr HB Man TDI	Hatchback 2D TDI	$23,266	$24,235	0.96002
2012	Volkswagen	Golf	Golf	4dr HB Man TDI	Hatchback 4D TDI	$23,937	$24,935	0.95998
2012	Volkswagen	Golf	Golf	2dr HB DSG TDI	Hatchback 2D TDI	$24,322	$25,335	0.96002
2012	Volkswagen	Golf	Golf	2dr HB Man TDI w/Sunroof & Nav	Hatchback 2D TDI	$24,917	$25,955	0.96001
2012	Volkswagen	Golf	Golf	4dr HB DSG TDI	Hatchback 4D TDI	$24,993	$26,035	0.95998
2012	Volkswagen	Golf	Golf	4dr HB Man TDI w/Sunroof & Nav	Hatchback 4D TDI	$25,589	$26,655	0.96001
2012	Volkswagen	Golf	Golf	2dr HB DSG TDI w/Sunroof & Nav	Hatchback 2D TDI	$25,973	$27,055	0.96001
2012	Volkswagen	Golf	Golf	2dr HB Man TDI w/Tech Pkg	Hatchback 2D TDI	$26,534	$27,640	0.95999
2012	Volkswagen	Golf	Golf	4dr HB DSG TDI w/Sunroof & Nav	Hatchback 4D TDI	$26,645	$27,755	0.96001
2012	Volkswagen	Golf	Golf	4dr HB Man TDI w/Tech Pkg	Hatchback 4D TDI	$27,206	$28,340	0.95999
2012	Volkswagen	Golf	Golf	2dr HB DSG TDI w/Tech Pkg	Hatchback 2D TDI	$27,590	$28,740	0.95999
2012	Volkswagen	Golf	Golf	4dr HB DSG TDI w/Tech Pkg	Hatchback 4D TDI	$28,262	$29,440	0.95999
2013	Volkswagen	Golf	Golf	2dr HB Man TDI *Ltd Avail*	Hatchback 2D TDI I4	$23,266	$24,235	0.96002
2013	Volkswagen	Golf	Golf	4dr HB Man TDI	Hatchback 4D TDI I4	$24,192	$25,200	0.96
2013	Volkswagen	Golf	Golf	2dr HB DSG TDI *Ltd Avail*	Hatchback 2D TDI I4	$24,322	$25,335	0.96002
2013	Volkswagen	Golf	Golf	2dr HB Man TDI w/Sunroof & Nav *Ltd Avail*	Hatchback 2D TDI I4	$24,917	$25,955	0.96001
2013	Volkswagen	Golf	Golf	4dr HB DSG TDI	Hatchback 4D TDI I4	$25,248	$26,300	0.96
2013	Volkswagen	Golf	Golf	4dr HB Man TDI w/Sunroof & Nav	Hatchback 4D TDI I4	$25,819	$26,895	0.95999
2013	Volkswagen	Golf	Golf	2dr HB DSG TDI w/Sunroof & Nav *Ltd Avail*	Hatchback 2D TDI I4	$25,973	$27,055	0.96001

Back-up for Invoice and MSRP Data
for Comparison and Averages

Model Year	Make	Invoice Model	NADA Model	Invoice Trim	NADA Body Style	Invoice	MSRP	Invoice/ MSRP
2013	Volkswagen	Golf	Golf	2dr HB Man TDI w/Tech Pkg *Ltd Avail*	Hatchback 2D TDI I4	$26,534	$27,640	0.95999
2013	Volkswagen	Golf	Golf	4dr HB DSG TDI w/Sunroof & Nav	Hatchback 4D TDI I4	$26,875	$27,995	0.95999
2013	Volkswagen	Golf	Golf	4dr HB Man TDI w/Tech Pkg *Ltd Avail*	Hatchback 4D TDI I4	$27,481	$28,625	0.96003
2013	Volkswagen	Golf	Golf	2dr HB DSG TDI w/Tech Pkg *Ltd Avail*	Hatchback 2D TDI I4	$27,590	$28,740	0.95999
2013	Volkswagen	Golf	Golf	4dr HB DSG TDI w/Tech Pkg	Hatchback 4D TDI I4	$28,537	$29,725	0.96003
2014	Volkswagen	Golf	Golf	4dr HB Man TDI	Hatchback 4D TDI I4	$24,192	$25,200	0.96
2014	Volkswagen	Golf	Golf	4dr HB DSG TDI	Hatchback 4D TDI I4	$25,248	$26,300	0.96
2014	Volkswagen	Golf	Golf	4dr HB Man TDI w/Sunroof & Nav	Hatchback 4D TDI I4	$25,819	$26,895	0.95999
2014	Volkswagen	Golf	Golf	4dr HB DSG TDI w/Sunroof & Nav	Hatchback 4D TDI I4	$26,875	$27,995	0.95999
2015	Volkswagen	Golf	Golf	4dr HB Man TDI S	Hatchback 4D TDI S I4 Turbo	$21,451	$22,345	0.95999
2015	Volkswagen	Golf	Golf	4dr HB DSG TDI S	Hatchback 4D TDI S I4 Turbo	$22,507	$23,445	0.95999
2015	Volkswagen	Golf	Golf	4dr HB Man TDI SE	Hatchback 4D TDI SE I4 Turbo	$24,859	$25,895	0.95999
2015	Volkswagen	Golf	Golf	4dr HB DSG TDI SE	Hatchback 4D TDI SE I4 Turbo	$25,915	$26,995	0.95999
2015	Volkswagen	Golf	Golf	4dr HB Man TDI SEL	Hatchback 4D TDI SEL I4 Turbo	$27,259	$28,395	0.95999
2015	Volkswagen	Golf	Golf	4dr HB DSG TDI SEL	Hatchback 4D TDI SEL I4 Turbo	$28,315	$29,495	0.95999
2015	Volkswagen	Golf Wagon	Golf	4dr Man TDI S	Wagon 4D TDI S I4 T-Diesel	$23,611	$24,595	0.95999
2015	Volkswagen	Golf Wagon	Golf	4dr DSG TDI S	Wagon 4D TDI S I4 T-Diesel	$24,667	$25,695	0.95999
2015	Volkswagen	Golf Wagon	Golf	4dr Man TDI SE	Wagon 4D TDI SE I4 T-Diesel	$26,875	$27,995	0.95999
2015	Volkswagen	Golf Wagon	Golf	4dr DSG TDI SE	Wagon 4D TDI SE I4 T-Diesel	$27,931	$29,095	0.95999
2015	Volkswagen	Golf Wagon	Golf	4dr Man TDI SEL	Wagon 4D TDI SEL I4 T-Diesel	$29,131	$30,345	0.95999
2015	Volkswagen	Golf Wagon	Golf	4dr DSG TDI SEL	Wagon 4D TDI SEL I4 T-Diesel	$30,187	$31,445	0.95999

Restitution Calculation

	Allocation at 100% Buyback
Maximum Settlement Amount	**$ 10,033,000,000**
Underwater Loan Pool	$ (42,670,723)
Leases - Remaining Lease Depreciation	$ (26,000,000)
Specified Reserves	$ (68,670,723)
Allocation Amount	$ 9,964,329,277
Additional Allocation Amount for Option Changes	$ 7,371,093
Purchased - CT Sept 2015 plus options and mileage	$ 7,089,446,039
Restitution - Total Available	**$ 2,882,254,331**
Restitution - Purchased Vehicles	$ 2,806,602,260
Restitution - Leased Vehicles	$ 75,652,071
Restitution - Total Allocated	**$ 2,882,254,331**
Amount Remaining for Allocation	**$ -**
Restitution - Purchased Vehicles / Purchased - CT Sept 2015 plus options and mileage	**39.588%**

Purchased Vehicles - NADA Clean Trade - September 2015	$ 6,972,338,687
Options Adjustment	$ 168,245,400
Mileage Adjustment	$ (51,138,048)
Purchased Vehicles - Total Value Base (100% Adjusted Clean Trade)	**$ 7,089,446,039**

Lease Vehicles - Total Value Base (100% Adjusted Clean Trade)	**$ 425,919,164**

Restitution Calculation

	Allocation at 100% Buyback		
	Current Calculation	Original Calculation	Difference
Purchased Vehicles - NADA Clean Trade - September 2015	$ 6,972,338,687	$ 6,972,338,687	$ -
Options Adjustment	$ 168,245,400	$ 155,967,000	$ 12,278,400
Mileage Adjustment	$ (51,138,048)	$ (51,138,048)	$ -
Purchased Vehicles - Total Value Base (100% Adjusted Clean Trade)	**$ 7,089,446,039**	**$ 7,077,167,639**	**$ 12,278,400**
Lease Vehicles - Total Value Base (100% Adjusted Clean Trade)	**$ 425,919,164**	**$ 425,838,114**	**$ 81,050**
Total	**$ 7,515,365,203**	**$ 7,503,005,753**	**$ 12,359,450**

Restitution Calculation

Total Funding Pool	$	10,033,000,000			
Specified Reserves					
Loans	$	(42,670,723)			
Leases - Remaining Lease Depreciation	$	(26,000,000)			
subtotal: Specified Reserves	**$**	**(68,670,723)**			
Adjustment to Address Option Changes					
Increase in Retail Vehicle Options - NADA Clean Trade Sept 2015	$	12,278,400			
20% Adjustment for Variable Portion of Premium	$	2,455,680			
Allocation Amount	$	8,105			
Total Additional Amount to Address Option Changes	$	14,742,185			
50% of Additional Amount	**$**	**7,371,093**			
Allocation Amount (Pool less Specified Reserves)	$	9,971,700,370			
Vehicle Valuation					
Purchased Vehicles - NADA Clean Trade Sept 2015	$	6,972,338,687			
Options	$	168,245,400			
Mileage Adjustment	$	(51,138,048)			
Purchased Vehicle - NADA Clean Trade Sept 2015 plus options and mileage	$	7,089,446,039			
Available for Restitution (Pool less Specified Reserves and Vehicle Valuation)	**$**	**2,882,254,331**			
			Vehicle Count		Average
Sales - CT Sept 2015 plus options and mileage	$	7,089,446,039	454,123	$	15,611
Variable Percentage		20.0%	Per Vehicle*		
Purchased Variable Amount	$	1,417,889,208	$ 3,122		
Purchased Fixed Amount**	$	1,388,713,052	$ 3,058		
Purchased Subtotal	**$**	**2,806,602,260**	**$ 6,180**		**39.588%**
			Vehicle Count		Average
Leases - CT Sept 2015 plus options	$	425,919,164	21,622	$	19,698
Variable Percentage		10.0%	Per Vehicle*		
Leases Variable Amount = 50% Purchased %	$	42,591,916	$ 1,970		
Leases Fixed Amount = 50% Purchased $	$	33,060,155	$ 1,529		
Lease Subtotal	**$**	**75,652,071**	**$ 3,499**		**17.762%**
Total Restitutions	**$**	**2,882,254,331**			

* Figures in these charts reflect averages. Individual vehicles/VINs will receive a higher or lower Restitution amount depending on the specific circumstances of that vehicle in applying the settlement provisions.

** Purchased Fixed Amount reflects an average amount and where an adjustment to bring the vehicle to the minimum $5,100 Restitution is required they may receive more. In cases where the Restitution is in excess of $5,100, the fixed portion of the Restitution will be $2,986 per vehicle. This reflects a redistribution of $72 per vehicle from vehicles with total Restitutions of greater than $5,100 to vehicles with total Restitutions less than $5,100.

Purchased Fixed Amount before redistribution	$	3,058
Purchased Fixed Amount after redistribution	$	2,986
Purchased Fixed Amount redistributed	$	72
Vehicles with Fixed Amounts redistributed to bring vehicles to minimum $5,100		377,857
Total Purchased Amount redistributed	**$**	**26,782,875**

FRE 408 Confidential Settlement Communications
Subject to US/CA/VW/FTC Confidentiality Agreement

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION This Document Relates to: ALL CONSUMER AND RESELLER ACTIONS	MDL 2672 CRB (JSC) **EXPERT REPORT OF ANDREW KULL** Hearing: October 18, 2016 Time: 8:00 a.m. Courtroom: 6, 17th floor The Honorable Charles R. Breyer

EXPERT REPORT OF ANDREW KULL

1. By Order filed July 26, 2016, this Court gave preliminary approval to the proposed Amended Consumer Class Action Settlement and Release filed the same day (the "Settlement"). (Terms used in this Report have the meanings assigned to them in the Settlement documents.) I have been retained by Class Counsel to provide an expert opinion describing one relevant legal perspective from which the fairness, reasonableness, and adequacy of the Settlement might be assessed. Specifically, I have been asked to compare the relief offered to an Eligible Owner under the Settlement with the relief that might be obtained, outside the Settlement, by means of a suit for rescission and restitution under general principles of law and equity.

2. The Settlement offers Eligible Owners a basic choice of remedies. By electing the Approved Emissions Modification Option, they can have their vehicles brought into compliance at Volkswagen's expense, if and when a "fix" becomes available. By electing the Buyback Option, they can return their vehicles to Volkswagen, receiving in exchange a partial refund of the original purchase price. With either option, Eligible Owners receive additional monetary compensation—called "Owner Restitution," but functionally an award of damages. The Modification Option resembles, in structure, the relief that an owner might obtain by an action for breach of warranty. The Buyback Option resembles, in structure, the relief that might be obtained by a successful suit for rescission and restitution. The latter comparison is the subject of the present Report.

3. I make the following representations on the basis of my own knowledge and opinions. If called as a witness, I could and would competently testify to the matters stated herein.

Background and Qualifications

4. I currently hold the position of Distinguished Senior Lecturer at the University of Texas School of Law. The courses I have taught most often include Contracts, Property, Restitution (or Remedies), and Commercial Law.

5. During the last four years, I have not testified as an expert at trial. My deposition as an expert was taken in *Chickasaw Nation v. United States Department of the Interior*, Civ. 05-1524-W (W.D. Okla.).

6. By agreement with counsel, I am being paid $600 per hour for my study and testimony in this case.

7. Further information on my background and professional qualifications, with a list of all relevant professional publications, is set forth in my current *curriculum vitae*, attached to this Report as Exhibit A.

8. My particular qualification for offering the opinions described herein is my knowledge of the law of restitution and its associated equitable remedies. "Rescission and restitution"—the full name of the remedy by which an Eligible Owner might seek to unwind the purchase of a defective vehicle—is at the core of legal remedies that are "restitutionary" in function, because its essence is to reverse the challenged transaction: to direct each party to restore whatever it received from the other. Rescission in these circumstances is equitable relief, and its availability is subject to well-established equitable limitations. By traditional standards it is an extraordinary remedy, available—subject to the discretion of the court—when unwinding the bargain instead of enforcing it will achieve an outcome that is equitable to both parties.

9. Restitution in general, and its equitable components in particular, are important topics that have largely disappeared from the law school curriculum, becoming unfamiliar to many American lawyers. I have been teaching and writing about the law of restitution and unjust enrichment for more than 20 years. From 1997 to 2010, I served as Reporter for the American Law Institute in preparing the *Restatement Third, Restitution and Unjust Enrichment* (published 2011). Although the preparation of any Restatement involves extensive consultation with various ALI bodies, my position as Reporter made me, in reality, the sole author of this two-volume work. Work on this project was my principal scholarly occupation for approximately 15 years. In consequence of this involvement, I acquired a reputation as the leading U.S. authority on the law of restitution and unjust enrichment.

Materials Relied On

10. In preparing this Report, I have reviewed selected pleadings and other documents in this case, including (i) the Consolidated Consumer Class Action Complaint (filed February 22, 2016); (ii) transcripts of status conferences and of the hearing on preliminary settlement approval; (iii) the Class Action Settlement Agreement; and (iv) the Amended Order Granting Preliminary Approval of Settlement (filed July 29, 2016). I have read a sampling of the extensive news coverage of the Volkswagen emissions scandal and its consequences, including the pending litigation and its prospects of settlement. I have investigated and reviewed the legal authorities specifically cited in this Report (such as cases, *Restatements*, and treatises), as well as further legal materials of the same kind and to the same effect as those cited herein.

11. In stating the following opinions I am relying on my knowledge of general principles of common law and equity as they relate to rescission and restitution, and on certain provisions of Article 2 of the Uniform Commercial Code. Except as specifically mentioned I have not considered remedies that might be available to Eligible Owners under federal or state consumer-protection statutes, and I express no opinion with respect to such remedies.

Summary of Opinion

12. An Eligible Owner who chose to pursue an independent suit for rescission and restitution would probably be allowed to do so, because the threshold requirements that limit access to the remedy would—in the context of the "clean diesel" litigation—be liberally interpreted in favor of the owner. Even if the likelihood is small that rescission would ultimately be denied, the need to address these preliminary legal obstacles must be taken into account in assessing the expected recovery from this hypothetical litigation. In contrast, all such issues are effectively waived by the terms of the Settlement.

13. An Eligible Owner who elects the Buyback Option will obtain relief that is analogous, in function and structure, to the outcome of a successful suit for rescission and restitution. It is possible to identify standard legal and factual issues that would necessarily be addressed in a suit for rescission, and to compare the treatment of the same issues under the terms

of the Buyback. Assuming that an independent suit for rescission against Volkswagen would ultimately be allowed to proceed, two central issues would remain to be litigated:

a. The amount of the refund to which the rescinding buyer is entitled; in other words, the proper accounting between Volkswagen and the buyer for depreciation (or use value) when a used vehicle is returned in place of a new one.

b. The amount of "incidental" or "collateral" damages to be awarded to the rescinding buyer, over and above the partial refund of the purchase price.

On each of these central issues, the resolution offered by the Buyback Option appears to be at least as favorable to a typical owner as the outcome likely to be reached under standard rules governing rescission and restitution. In some respects, to be noted, the Buyback Option is more favorable to the Owner than rescission by ordinary legal rules. I conclude that the benefits of the Buyback Option will be no less advantageous than the benefits that might typically be anticipated from an independent suit for rescission and restitution.

Basic Objectives of Rescission and Restitution

14. The remedy of rescission and restitution ("rescission" for short) permits a qualified plaintiff to unwind an objectionable transaction instead of enforcing it, restoring both parties as nearly as possible to the positions they occupied before the transaction took place—the "status quo ante." Reversing a transaction instead of remediating it has typically been regarded as an exceptional and disruptive remedy, and one that is potentially prejudicial to the defendant. For this reason it is subject to a number of requirements that would not apply to an action for damages for breach of warranty:

a. The transaction sought to be reversed must be *fundamentally defective*, such that justice is better served by allowing the injured party to escape from the transaction altogether—instead of being restricted to compensation for the deficiencies of the defendant's performance. A purchase induced by the seller's fraud meets this requirement.

b. The consequences of rescission and restitution to the defendant are potentially harsh, and their severity may increase dramatically with the passage of time. For this reason, it is standard doctrine that a party who wishes to avoid the contract (instead of enforcing

it) cannot have it both ways. Upon discovery of grounds for avoidance, the rescinding party (i) must give prompt notice of the intention to rescind and (ii) cannot thereafter act inconsistently with that choice. For example, if the underlying transaction involves a fraudulent sale of goods, a buyer may lose the right of rescission by the continued use of the goods with knowledge of the fraud.

15. Because the object of rescission and restitution is to restore *both* parties to the status quo ante, the transaction must be one that it is still possible to reverse. If the case is one in which it is impossible to unscramble the egg, the plaintiff's remedy is damages, not rescission—no matter how culpable the defendant may be. In theory, rescission requires that each party restore to the other whatever was received in the challenged transaction, in specie or in value. Because an exact mutual restoration is usually impossible, a court must decide whether it will permit rescission to proceed on the basis of an imperfect restitution plus money adjustments. As summarized by the *Restatement*:

> A perfect rescission would restore both parties to the status quo ante by specific restitution of property previously transferred, leaving no unjust enrichment, no loss to either party (apart from the defendant's loss of bargain), and no need for the court to place a value on benefits conferred. Rescission becomes complicated when courts must decide how far to depart from this ideal version to accommodate a claimant who is unable to restore in specie the benefits received from the defendant; and when the consequence of rescission, seen in retrospect, is a noncontractual transaction in which one party's temporary possession and subsequent restoration of the other's property may give rise to unjust enrichment and reliance loss on either side.

Restatement Third, Restitution and Unjust Enrichment § 54, Comment *b*.

16. These traditional requirements of the rescission remedy must be understood and interpreted against its equitable backdrop. Rescission is governed in every respect by equitable principles, and the circumstances of a challenged transaction (including the relative positions of the parties) are all-important in determining how the requirements and procedures of the remedy will be applied in a particular case. As a practical matter, the facts underlying the "clean diesel" litigation make it probable that courts would interpret these rules liberally in favor of an Eligible

Owner seeking rescission and restitution against Volkswagen. As summarized by the *Restatement*:

> (3) Rescission is limited to cases in which counter-restitution by the claimant will restore the defendant to the status quo ante, unless
>
> (a) the defendant is fairly compensated for any deficiencies in the restoration made by the claimant, or
>
> (b) the fault of the defendant or the assignment of risks in the underlying transaction makes it equitable that the defendant bear any uncompensated loss.
>
> (4) Rescission is appropriate when the interests of justice are served by allowing the claimant to reverse the challenged transaction instead of enforcing it. As a general rule:
>
> (a) If the claimant seeks to reverse a transfer induced by fraud or other conscious wrongdoing, the limitation described in subsection (3) is liberally construed in favor of the claimant.

Restatement Third, Restitution and Unjust Enrichment § 54.

Threshold Requirements of Rescission

17. On a realistic view—consistent with the *Restatement's* broad generalizations, quoted immediately above—it appears highly unlikely that a court would deny rescission and restitution to an Eligible Owner on the ground either (i) that the owner had waited too long after learning of the TDI emissions scandal to give notice or to commence an action for rescission, or (ii) that the reversal of the transaction (with money adjustment) would fail to restore Volkswagen to the status quo ante. Further threshold requirements could be problematic in some cases: (iii) an owner who could not establish that Volkswagen's misrepresentations had induced his purchase of the vehicle would not normally be entitled to rescind for fraud, and (iv) an owner's continued use of the vehicle with notice of the fraud might be held to preclude a subsequent rescission, at least in some jurisdictions. I do not attempt in this Report to gauge the likelihood that a remedy by rescission and restitution would in fact be available to a given owner. On the contrary, I assume for purposes of comparison that an owner's suit for rescission would *not* be barred by the threshold requirements of the rescission remedy. The reason to consider the existence of these requirements nonetheless—even while making the practical assumption that they could ultimately

be satisfied—is that their presence would add to the costs (and thereby reduce the expected recovery) of a hypothetical suit for rescission and restitution.

18. There is a mass of decisional law, reinforced at key points by UCC Article 2, supporting the contention that the availability of rescission to a defrauded buyer is limited in important respects. Denial of rescission does not mean denial of all legal recourse, but it means that the plaintiff is remitted to an action for damages—typically for breach of warranty. The tendency of recent decisions is to lower the barriers to rescission, particularly in consumer cases, and where particular prejudice to the seller cannot be shown. The issues would have to be litigated nevertheless. In considering a hypothetical claim for rescission by an Eligible Owner, it is reasonable to assume that Volkswagen would defend the suit. The first line of defense to a suit for rescission is to contend that the threshold requirements of rescission have not been met. In the Settlement, by contrast, all such defenses have effectively been waived. The threshold issues include:

a. Fraudulent Inducement. A buyer who seeks to rescind for a seller's fraudulent misrepresentation must show that the misrepresentation induced the sale. *See* Restatement Second, Contracts § 164, Comment *c* ("No legal effect flows from . . . a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it"). At common law, an Eligible Owner who did not know (or did not care) about the TDI engine's supposedly "green" attributes at the time of purchase would have a claim for breach of warranty but not for rescission. The Settlement Agreement eliminates this issue by presuming, in effect, that *every* Eligible Owner was induced to purchase by Volkswagen's misrepresentations about the "green" features of the TDI diesel engine.

b. Notice. Countless authorities can be cited for the requirement that a party wishing to rescind must notify the defendant promptly after learning of the grounds for rescission. *See, e.g.*, Restatement Second, Contracts § 381(2) ("The power of a party to avoid a contract for misrepresentation . . . is lost if after he knows of a fraudulent misrepresentation . . . he does not within a reasonable time manifest to the other party his intention to avoid it"). Where the rescinding party is a buyer of goods, the same rule is carried forward by UCC § 2-608(2)

("Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in the condition of the goods which is not caused by their own defects").

c. There are substantial reasons to doubt that an owner's suit for rescission against Volkswagen would be hindered by a finding that notice was untimely. What constitutes a "reasonable time" depends on the circumstances. By the rule of the *Restatement* just quoted, relevant circumstances include both "the extent to which the ground for avoidance was the result of any fault by either party," and "the extent to which the other party's conduct contributed to the delay." Restatement Second, Contracts § 381(3). In the present context, the filing and pendency of hundreds of class actions against Volkswagen, many of them pleading theories of rescission (or "revocation of acceptance"), gave actual notice to Volkswagen that owners who found the Settlement unacceptable would in many cases seek to rescind their purchases; an owner might persuasively argue that the election to opt out of the Settlement gave Volkswagen timely notice of an intention to rescind. Moreover, an owner might reasonably argue that Volkswagen's participation in highly publicized settlement negotiations amounted to "conduct contribut[ing] to the delay," inasmuch as Eligible Owners could not be expected to decide whether to accept the terms of the Settlement before learning what they were.

d. Continued use. A buyer who demands rescission for the seller's fraud is taking the position that the contract of sale is invalid: the consequence (on the buyer's theory) is that the property in question belongs once again to the seller. Because the continued use of the seller's property by the buyer is inconsistent with the idea that there is no valid contract between them, the traditional rule is that such continued use constitutes an "affirmance" or "ratification" of the challenged contract, precluding any subsequent resort to rescission. *See, e.g.*, Restatement Second, Contracts § 380(2) ("The power of a party to avoid a contract for . . . misrepresentation is lost if . . . after he knows of the misrepresentation if it is fraudulent, he . . . acts with respect to anything that he has received in a manner inconsistent with disaffirmance"). Here again, the traditional rule of common law and equity is carried forward by the Uniform Commercial Code, though it is necessary to string together several UCC sections to extract the sense—which courts

have found ways to ignore in consumer cases. *See* § 2-608(3) (buyer who revokes acceptance "has the same rights and duties with regard to the goods involved as if he had rejected them"); § 2-602(2)(a) ("after rejection any exercise of ownership by the buyer . . . is wrongful as against the seller"); § 2-606(1)(c) ("Acceptance of goods occurs when the buyer . . . does any act inconsistent with the seller's ownership"). Application of the traditional rule on affirmance would preclude rescission by any owner who made substantial use of an Eligible Vehicle after learning of the emissions fraud. An illustration to the original *Restatement of Contracts* conveys the flavor of the older rule in the context of the fraudulent sale of an automobile:

> 2. A fraudulently induces B to buy in New York an automobile for which B pays $500 and promises to pay $2000 more. Before discovering the fraud B drives the machine to Chicago where he becomes aware of the facts. He immediately writes A that he has stored the machine in Chicago for A, and informs A that the transaction is avoided and demands return of the $500 which has been already paid. A is under no duty to return the money unless the machine is returned to him in New York.

Restatement of Contracts § 480, Comment *c*, Illustration 2 (1932).

e. Modern courts are disinclined to impose this burden on a consumer buyer, particularly when the buyer's freedom of action is as obviously constrained as in the case of a motor home or a vehicle needed for daily use. *See, e.g.*, Ex parte Stem, 571 So. 2d 1112 (Ala. 1990) (defrauded buyer of automobile not required to return or store the car pending trial of the suit; without it, he would have been unable to transport his daughter to school or else obliged to purchase another vehicle). Partial displacement of common law and equity by UCC article 2—where "rescission" was renamed "revocation of acceptance"—has led to some reframing of the question but not to uniform answers. Courts in many states have replaced the traditional doctrine of "affirmance" with a test of "reasonable use." The starting citation for this proposition is a well-known California decision:

> [C]ourts around the country are in general agreement that reasonable continued use of motorized vehicles does not, as a matter of law, prevent the buyer from asserting rescission (or its U. Com. Code equivalent, revocation of acceptance). This consensus is based upon the judicial recognition of practical realities—purchasers of unsatisfactory vehicles may be compelled to continue using them due to the financial burden to securing alternative

> means of transport for a substantial period of time. The seller remains protected through a recoupment right of setoff for the buyer's use of the good beyond the time of revoking acceptance.

Ibrahim v. Ford Motor Co., 214 Cal. App. 3d 878, 897-98 (1989) (numerous citations omitted). Although the tendency of the decisions is clearly in favor of allowing rescission notwithstanding continued use, particularly in suits by consumer buyers of vehicles and motor homes, the underlying question remains unsettled. *See, e.g.*, *Small v. Savannah International Motors, Inc.*, 619 S.E.2d 738 (Ga. Ct. App. 2005) (buyers' continued use of vehicle and continued loan payments were inconsistent with attempted revocation of acceptance, thereby barring resort to the remedy); *Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract*, 41 A.L.R.2d 1173 (1955); *Use of goods by buyer as constituting acceptance under UCC § 2-606(1)(c)*, 67 A.L.R.3d 363 (1975). The most comprehensive academic treatment of the question—while strongly favoring the adoption of a rule of "reasonable use"—concluded that uniformity could only be achieved by explicit amendment of article 2. John R. Bates, *Continued Use of Goods After Rejection or Revocation of Acceptance: The UCC Rule Revealed, Reviewed, and Revised*, 25 Rutgers L.J. 1 (1993).

f. As in the case of the traditional notice requirement, my conclusion about the issue of "continued use" in the present context is not that any owner's hypothetical suit for rescission would likely be barred. It is that both the applicable legal rule in a particular jurisdiction, and the appropriate characterization of an owner's continued use of an Eligible Vehicle in a particular case, would be matters potentially contested in the defense of a suit for rescission. Even with a favorable resolution of these issues, the consequence would be to increase the cost and delay the outcome of independent litigation—thereby depressing the expected recovery of an owner's suit for rescission. By the terms of the Settlement Agreement, by contrast, all inquiry into these matters is implicitly waived.

Mutual Restoration and Accounting

19. When the threshold requirements are satisfied and rescission is available, the function of the remedy is to return *both* parties as nearly as possible to the status quo ante by a

process of mutual restoration and accounting. The *Restatement* describes the overall process in general terms:

> (2) Rescission requires a mutual restoration and accounting in which each party
>
> (a) restores property received from the other, to the extent such restoration is feasible,
>
> (b) accounts for additional benefits obtained at the expense of the other as a result of the transaction and its subsequent avoidance, as necessary to prevent unjust enrichment, and
>
> (c) compensates the other for loss from related expenditure as justice may require.

Restatement Third, Restitution and Unjust Enrichment § 54(2). If a court allows an Eligible Owner to rescind the purchase of an Eligible Vehicle, this "mutual restoration" will mean, initially, the surrender of the vehicle in exchange for a refund; but the refund normally to be expected under these circumstances would only be partial. Restoring a used vehicle in exchange for the original purchase price would not return the parties to the positions they occupied at the time of the initial bargain. Accordingly, the principal concern of the "accounting" that accompanies "mutual restoration" will be a downward adjustment of the original purchase price to reflect the fact that the owner is returning a used vehicle in place of a new one. This downward adjustment functions simultaneously as a measure of the benefit derived by the buyer from interim use and of the loss to the seller from interim depreciation. An analogous "restoration and accounting" is incorporated in those provisions of the Settlement Agreement by which an Eligible Owner who surrenders an Eligible Vehicle for Buyback receives in return its Vehicle Value, reflecting its approximate market value (as a used car) as of August 2015. (Additional compensation payable in connection with a Buyback, designated "Owner Restitution," corresponds more closely to the award of "collateral damages" that might be made in conjunction with rescission. For this reason, Owner Restitution is discussed separately in ¶¶ 25-28 of this Report.)

20. Where rescission is sought by a defrauded buyer, the need to return the property to the seller and to account for its interim depreciation—alternatively conceived, for the value of its

interim use—constitutes the most prominent feature of any discussion of the remedy. *See, e.g.*, Restatement Second, Contracts § 384 (rescinding party must return "any interest in property that he has received in exchange in substantially as good condition as when it was received by him," except where "justice requires that compensation be accepted in its place and the payment of such compensation can be assured"); id., Comment a ("[t]he fact that [the rescinding party] has benefited from possession of [property received from the other party] does not preclude restitution since he can compensate the other party in money for this benefit"); 5 Corbin, *Law of Contracts* § 1114, at 608 (2d ed. 1964) ("all courts are in agreement that restitution by the defendant will not be enforced unless the plaintiff returns in some way what was received as a part performance by the defendant"); 3 Dobbs, *Law of Remedies* § 9.3(3), at 584-85 (2d ed. 1993) ("plaintiff who seeks to rescind for misrepresentation, like the plaintiff who seeks rescission on other grounds, will be required ultimately to restore what he received in the transaction").

21. Cases in which a rescinding buyer seeks to restore depreciated property draw some readily understandable distinctions between the different causes of a loss in value. Depreciation resulting from the property's inherent defects, or from conditions that the seller has fraudulently misrepresented, is plainly for the account of the seller. *See, e.g.*, UCC § 2-608 (allowing revocation of acceptance "before any substantial change in the condition of the goods which is not caused by their own defects"); Dobbs, supra, at 588 ("where the property received by the plaintiff is damaged, destroyed or depreciated by forces or conditions as to which the defendant made a fraudulent misrepresentation, restoration of the property in its devalued condition should satisfy the plaintiff's obligation"). Conversely, depreciation resulting from the plaintiff's fault—if it does not preclude rescission altogether—is obviously for the account of the plaintiff. *See* 1 Palmer, Law of Restitution § 3.12, at 308 (1978) ("a party will not be permitted to obtain restitution by returning property which was damaged through his own fault, even though the other was guilty of fraud"). Applied to the present context, if an Eligible Owner is allowed to rescind the purchase of an Eligible Vehicle, the difference between the present value of the surrendered vehicle and the value it would have (other things being equal) if Volkswagen's representations had been accurate is a loss properly borne by Volkswagen. By contrast, a loss in value

attributable to the fault of the owner—for example, if the vehicle has been damaged in a collision and not repaired—would plainly be charged to the owner.

22. Between these extremes lies the loss in value attributable to owner's interim use of the vehicle: the ordinary depreciation in market value that would have occurred if Volkswagen had made no misrepresentation about emissions, and if the vehicle had incurred no more than ordinary wear and tear. On general principles of restitution and unjust enrichment there is little doubt that this element of depreciation will be charged to the owner, because it corresponds (however roughly) to the benefit derived by the owner from the transaction being rescinded. *See, e.g.*, Restatement of Restitution § 66, Comment d (1937) ("If the subject matter has been utilized, ordinarily the one seeking restitution is obliged to account for its use"); Dobbs, supra, at 591 ("plaintiff must restore all benefits fairly traceable to the transaction he now wants to avoid"); Palmer, supra, at 303 ("the true basis of the requirement [that a party who obtains restitution must return or otherwise account for benefits received] is to prevent the unjust enrichment of the plaintiff, who is himself seeking restitution based on the defendant's unjust enrichment"). Simply put, a remedy that allowed an owner the free use of an automobile for an extended period of time would grant a windfall to the owner while imposing a forfeiture on Volkswagen—outcomes that traditional principles of equity seek to avoid. A court might acknowledge that such an outcome was punitive, taking the view that Volkswagen's conduct was culpable and that Volkswagen deserves to be punished. But punishment is not the accepted function of rescission and restitution.

23. To recapitulate: If an Eligible Owner is permitted to rescind the purchase of an Eligible Vehicle, the uncontroversial starting point of the remedy will be the restoration of a used vehicle in exchange for a refund of some portion of the original purchase price. The first predictable controversy, and the initial focus of any such litigation, will address the net amount of the refund. The question in equitable terms is how to allocate, between the rescinding owner and Volkswagen, the difference between the value of the vehicle when new and the current value of the vehicle being returned. This difference in price can be seen as a measure of depreciation, or as a measure of use value to the buyer, or both at once: the concepts are not logically distinct.

24. The aspect of the Settlement Agreement that corresponds to these questions of valuation and allocation is its definition of Vehicle Value. Certain observable features of the Vehicle Value calculation are relevant to the comparison:

a. Vehicle Value is based on prevailing used car prices as of August 2015. By taking market value as the basis of Vehicle Value, the Settlement Agreement allocates to the Eligible Owner the whole of the loss in value attributable to the ordinary use of the vehicle from the date of purchase to August 2015. This is what ordinary principles of rescission and restitution would indicate as appropriate, at least as a starting point, given the equitable ideal of restoring *both* parties to the status quo ante. A rescinding buyer who could return a car virtually unused could reasonably claim a full refund of the price. A buyer who returns a used car in place of a new one is expected to make up the difference by a money adjustment.

b. By contrast, the court in a given jurisdiction might be guided by provisions of local consumer-protection law directing that the refund of the purchase price to a rescinding buyer be reduced by "a reasonable allowance" or "a reasonable offset" to reflect interim use or depreciation. Examples of statutory language to this effect are quoted in the Court's Amended Order Granting Preliminary Approval of Settlement (filed 7/29/16), at 27. Interpreting such language in a hypothetical suit against Volkswagen, a court might decide that a "reasonable allowance" for depreciation was something less than actual depreciation as measured by market value. Punitive objectives are inconsistent with general principles of equity, but a court that wished to impose punishment could obviously achieve this end by minimizing the extent of the "reasonable allowance" to which VW was entitled.

c. Because Vehicle Value is based on used car values as of August 2015, or a month before the Volkswagen emissions fraud became public knowledge, the Settlement Agreement allocates to Volkswagen, in principle at least, that portion of overall vehicle depreciation attributable to Volkswagen's misrepresentation. This is the result that standard rescission doctrine requires.

d. Moreover, Vehicle Value is fixed as of August 2015, without further downward adjustment for either (a) continued use after that date not exceeding 1000 miles per

month or (b) damage to the vehicle not rendering it inoperable. Because an Eligible Owner might elect the Buyback Option as late as September 1, 2018, this feature of the Buyback is noticeably more favorable to the owner than ordinary rescission doctrine would require. By the usual rules allocating loss from depreciation, the amount of refund to a rescinding buyer would be based on the value of the vehicle on the date restitution was actually tendered. Damage to the vehicle—assuming it did not preclude rescission entirely—would likewise be charged to the owner in the accounting that accompanies rescission.

Damages in Conjunction with Rescission

25. The second focus of a suit for rescission would be the amount of damages to which the rescinding owner is additionally entitled. "Damages" in this context refers to compensation distinct from and in addition to the mutual restoration and accounting (in effect, the partial refund to the buyer) just described. Modern law allows the recovery of certain elements of damages in conjunction with rescission. The Buyback Option includes an analogous damages component designated "Owner Restitution" (increased in some cases by the payment of Loan Forgiveness). The essential point for purposes of this discussion is to acknowledge that the recovery of appropriate damages should indeed be available to an owner in a suit for rescission, though only to the extent that the award serves to restore the owner to the precontractual status quo.

26. Rescission means unwinding and reversing the challenged transaction, while an action for damages is a way of affirming and enforcing it—by demanding that the seller render the promised performance or make good its deficiencies. Older law saw these approaches as fundamentally incompatible. The more modern, liberal approach recognizes that the immediate objective of rescission—namely, the restoration of a qualified plaintiff to the status quo ante—cannot be achieved if the plaintiff is not compensated for what are variously called "collateral" or "out-of-pocket" damages, or "incidental or reliance loss." For example, an Eligible Owner who suffers inconvenience and incurs expense in replacing an Eligible Vehicle would not be made whole (in the context of rescission, restored to his precontractual position) unless such losses can be compensated. Modern law permits the compensation of such loss in conjunction with rescission and restitution. This does not mean that all claims for damages are compatible with the

remedy of rescission. Most obviously, an owner who successfully rescinds would not be allowed to recover full expectation damages as well, because this would involve the avoidance and enforcement of the contract at the same time.

27. The contemporary approach is described in the following terms by the recent *Restatement*:

> *i. Incidental or reliance loss.* Rescission of the parties' exchange may leave the claimant with losses from related expenditures (as distinct from payment of the price) made in reliance on the transaction that is being set aside. Compensation of such loss by an award of damages is a remedy different in kind from rescission and restitution, but the remedies are not necessarily inconsistent when the claimant's basic entitlement is to be restored to the status quo ante. Damages measured by the claimant's expenditure can be included in the accounting that accompanies rescission, in order to do complete justice in a single proceeding.
>
> Recovery of what are commonly called ''incidental damages'' may thus be allowed in connection with rescission, consistent with the remedial objective of restoring the claimant to the precontractual position. See Illustration 27.

. . .

Illustrations:

> 27. Relying on Seller's misleading description, Buyer pays $5000 for a boat lying in 100 feet of water. After spending $500 to raise the boat and finding that it is worthless, Buyer obtains rescission of the transaction based on Seller's fraud. In addition to recovering the $5000 paid, Buyer can recover the $500 spent in raising the boat.

Restatement Third, Restitution and Unjust Enrichment § 54, Comment *i* & Illustration 27.

Though differently expressed, UCC § 2-721 is ultimately to the same effect:

> Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

See also UCC § 2-608, Official Comment 1 ("Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him")[1].

[1] Reform of this aspect of the old "election of remedies" doctrine is epitomized by the New York

28. Several comparisons can be drawn between the assessment of collateral damages that might be expected in an owner's suit for rescission and the damage calculation that is implicit in Owner Restitution:

a. The theory of rescission is that restitution of the car to the seller, and restitution of the price to the buyer (adjusted for interim use and depreciation), leaves both parties as nearly as possible back where they started. "Collateral" damages are available to the extent the buyer can point to residual, uncompensated injury from the transaction that has been set aside. Out-of-pocket or "reliance" expenditures, such as the cost of investigating a product's defects, would be a standard example. One arguable source of collateral damages in the present case is the excess (if any) of a rescinding owner's outstanding Loan Obligation over Vehicle Value. Within the limits set forth in the Loan Forgiveness provisions of the Settlement Agreement, the amount of Owner Restitution is effectively increased to compensate for this element of collateral damages. Because a causal relation between Volkswagen's fraud and the amount of the Loan Obligation might in many cases be hard to establish, Loan Forgiveness represents a component of collateral damages that might not be recoverable under ordinary restitution principles.

b. The direct harm caused by the TDI engines' nonconformity was not to the vehicle owner—who obtained a vehicle that performed as expected—but to the public at large. Something could be allowed on account of the owner's frustration and inconvenience, but recovery on this basis might be only modest. Seen against this background, the amount of Owner

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statute, an early and influential product of that state's Law Revision Commission:

> *(e) Claim for damages and rescission*. A claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction, shall not be deemed inconsistent with a claim for rescission or based upon rescission. In an action for rescission or based upon rescission the aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, conferred by him as a result of the transaction, and damages to which he is entitled because of such fraud or misrepresentation; but such complete relief shall not include duplication of items of recovery.

N.Y. C.P.L.R. § 3002(e) (originally enacted 1941).

Restitution available with the Buyback Option—possibly increased to the extent of Loan Forgiveness—appears relatively generous.

c. On the other hand, the damage award in a hypothetical lawsuit might be fixed without regard to the restrictive notion of "collateral" damages that is implicit in the theory of rescission. Enhanced or exemplary damages might be available in some cases.

d. The aggregate monetary compensation payable under the Buyback Option (the sum of Vehicle Value and Owner Restitution) will be paid to the Eligible Owner net of fees to Class Counsel, which are being paid separately by Volkswagen. By contrast, compensation obtained through an independent lawsuit will necessarily be reduced by the amount of associated legal expenses, resulting in a significant reduction in an owner's expected recovery from independent litigation.

Conclusion

29. The Buyback Option under the Settlement Agreement closely resembles, in its component elements, the relief that an Eligible Owner would obtain from a successful suit for rescission and restitution. Available points of comparison may be recapitulated as follows:

a. It is reasonable to assume that an owner's suit for rescission would be allowed to proceed, notwithstanding the traditional threshold requirements of the remedy, if only because the context is the consumer purchase of a motor vehicle. But the threshold requirements rest on an extensive body of law, and they would predictably be invoked by any defendant opposing rescission. The existence of these defenses would make litigation of the hypothetical suit more time-consuming and expensive. By contrast, the Buyback Option concedes (in effect) the entitlement of each Eligible Owner to a remedy that is functionally equivalent to rescission and restitution.

b. By the rules that normally govern the remedy of rescission and restitution, a purchaser who returns a used car in place of a new one would not be entitled to a full refund of the original purchase price.

c. The calculation of Vehicle Value parallels the central element of the mutual accounting that would be part of a judicial rescission: namely, the allocation between

buyer and seller of the difference in value between the vehicle as purchased and the vehicle being returned. It is certainly possible that a court sympathetic to the owner (or seeking to punish Volkswagen) might allocate to Volkswagen a greater share of the loss from ordinary depreciation—thereby restoring to the owner a larger proportion of the original purchase price. On the other hand, two provisions of the Vehicle Value calculation are distinctly more favorable to the owner than ordinary rules of rescission would direct: (i) Vehicle Value is fixed as of August 2015, without further downward adjustment for continued use thereafter, and (ii) Vehicle Value is established without deduction for damage to the vehicle for which the buyer would normally be accountable to the seller, so long as the vehicle is still operable. On balance, Vehicle Value makes a reasonable approximation of the portion of the original purchase price (as distinct from an award of damages) that a typical owner might reasonably expect to recover by a judicial rescission, in a court following general principles of law and equity.

d. Owner Restitution payable under the Buyback Option corresponds to an award of "collateral" damages, available under modern law in conjunction with rescission. In this context, the additional allowance for Loan Forgiveness may be understood as compensation for one particular element of collateral damages—a damage claim that the award in a judicial rescission case might not acknowledge. In part because of the Loan Forgiveness feature, and because direct damages attributable to the ownership of an Eligible Vehicle might be difficult to prove, the amounts offered as Owner Restitution appear generous.

e. The benefits reasonably to be anticipated from an owner's hypothetical suit for rescission must be significantly discounted to reflect the time and expense of reaching a result by independent litigation. By contrast, Vehicle Value and Owner Restitution will be payable promptly and net of deductions.

30. I conclude that the benefits comprised by the Buyback Option will be no less advantageous than the benefits that might typically be anticipated from a successful suit for rescission and restitution. Moreover, these benefits will be delivered more quickly by the Settlement than they typically would be delivered through adversary litigation, trial, and appeal, and they will not be reduced by attorneys' fees and other expenses that ordinarily accompany

such a recovery in litigation. Furthermore—as compared with an owner's successful independent suit—Buyback better serves the public interest by getting Eligible Vehicles off the road more quickly. This last consideration might be irrelevant to an individual owner's decision to accept a Buyback. But it serves one of the principal goals identified in the Class Action Settlement Agreement, and it presumably bears on the Court's decision to approve the Settlement. Both comparisons support the preliminary conclusion of the Court that the proposed Settlement is reasonable, fair, and adequate (Amended Order Granting Preliminary Approval of Settlement (filed 7/29/16), at 31), and confirmation of that conclusion at final approval.

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