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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

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

MDL No. 2672 CRB (JSC)

The Honorable Charles R. Breyer

15 This Document Relates to:

16 Audi CO₂ Cases

**MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT
AND DIRECTION OF NOTICE UNDER
FED. R. CIV. P. 23(e)**

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NOTICE OF MOTION AND MOTION

TO ALL THE PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Thursday, September 13th at 10:00 a.m. or at such other date and time as the Court may set, in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Lead Counsel and the Plaintiffs' Steering Committee, on behalf of a proposed Settlement Class of owners and lessees of certain Audi, Volkswagen, Porsche, and Bentley branded vehicles, will and hereby do move the Court for an order granting preliminary approval of the Class Action Settlement and directing notice to the Class under Fed. R. Civ. P. 23(e)(1); appointing Interim Settlement Class Counsel and Class Representatives under Fed. R. Civ. P. 23(g)(3); and scheduling a final approval hearing under Fed. R. Civ. P. 23(e)(2).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The proposed Settlement now before the Court resolves the claims of more than 100,000 consumers who purchased or leased certain gasoline-powered Audi, Volkswagen, Porsche, and Bentley vehicles (the “Class Vehicles”) that were initially labeled and marketed with overstated fuel economy (and understated carbon dioxide (“CO₂”) emissions).¹ The Settlement provides compensation to the members of the Class for their time and expense in driving and continuing to drive Vehicles that obtain up to 1 mile per gallon (“MPG”) less than was originally represented.

If all potential Class Members participate in the Settlement, the payments to the Class will total approximately \$96.5 million. Individually, Class Members stand to receive lump-sum cash payments—ranging from \$518.40 to \$2,332.80 per Class Vehicle—correlating to their length of Vehicle possession and to their Vehicle’s revised fuel economy ratings. To obtain this payment, Class Members need only submit a claim form and documents necessary to establish their eligibility. If any of the available funds are not directly claimed by Class Members, the remaining money will *not* revert to the Defendants. Instead, it will be dedicated to environmental causes, subject to Court approval, thereby ensuring the full Settlement Value inures to the benefit of the Class. Critically, none of the approximately \$96.5 million available in Settlement benefits will be reduced to pay Class Counsel’s attorneys’ fees or expenses, or the costs of notice and claims administration.² Although Defendants reserve the right to contest the amount requested, any fees and costs that are awarded by the Court under Fed. R. Civ. P. 23(h) will be paid by Defendants separately, and in addition to the \$96.5 million.

The proposed Settlement is an outstanding result for the Class, providing “full compensation” for the damages consumers incurred. *See* Declaration of Edward M. Stockton (“Stockton Decl.”) ¶¶ 4, 23(f). Plaintiffs are proud to present this Settlement to the Court and

¹ All capitalized terms used herein have the meaning set forth in the Consumer Class Settlement Action Agreement and Release (“Settlement,” “Settlement Agreement,” or “Agreement”), unless otherwise indicated. The Settlement is attached as Exhibit 1 hereto.

² “Class Counsel” refers to proposed Interim Settlement Class Counsel and Settlement Class Counsel, as discussed below.

1 respectfully request approval to give notice to the Class and set the matter for final approval,
2 under the procedure delineated by Fed. R. Civ. P. 23(e).

3 **II. BACKGROUND AND PROCEDURAL HISTORY**

4 **A. Factual background: Plaintiffs alleged that Defendants inflated the fuel 5 economy labels for the Class Vehicles.**

6 Fuel economy is a critical factor in consumers' decisions to purchase or lease a vehicle.
7 Given the important role it plays, vehicle manufacturers often advertise and emphasize their
8 vehicles' fuel economy. Indeed, federal law requires that new vehicles sold or leased in the
9 United States have a label—commonly referred to as a “Monroney” label—in their window that
10 displays specific information about the vehicle's fuel efficiency, including the ratings for City,
11 Highway, and Combined MPG. 49 U.S.C. § 32908, *et seq.*; 40 C.F.R. §§ 600.301–302-12.
12 These fuel economy ratings are also communicated via the manufacturers' vehicle brochures and
13 other consumer-facing materials, and are available for used car purchasers on
14 www.fueleconomy.gov. As set forth in Plaintiffs' operative Amended Consolidated Consumer
15 Class Action Complaint (the “Amended Complaint”), this case concerns specific Volkswagen,
16 Audi, Porsche, and Bentley-branded gasoline vehicles for which the MPG represented to
17 regulators and consumers was inflated by up to 1 MPG and will be revised accordingly.³

18 More specifically, Plaintiffs allege that a software program embedded in the Vehicles'
19 Transmission Control Unit—the “Warm-up Program” or the “Program”—caused the fuel
20 economy ratings for the Class Vehicles to be inflated. In each Class Vehicle, the Warm-up
21 Program software activates when it encounters certain “entry conditions” (such as a key start) and
22 de-activates under certain “exit conditions” (such as a steering wheel turn). *See* Amended
23 Complaint (“Am. Compl.”) ¶¶ 6-7. Thus, in effect, the Warm-up Program operates primarily
24 during testing conditions (when the program is “active”), but not during on-road driving (when
25 the program is “inactive”). *Id.* When the Program is active (*i.e.*, during testing), the transmission
26 changes gears at lower engine speeds, which requires less fuel. As a result, the Class Vehicles

27 ³ The revised fuel economy ratings will be available on EPA's “Fuel Economy Label Updates”
28 website, <https://www.epa.gov/recalls/fuel-economy-label-updates>, as well as
www.fueleconomy.gov.

1 emitted less CO₂ and achieved better fuel economy in laboratory testing (the results of which
2 were reported to the government and marketed to consumers) and worse fuel economy and higher
3 CO₂ emissions when driven on the road. For all Class Vehicles, significant expert testing and
4 discovery have confirmed a difference of at least 1 MPG between the City, Highway, and/or
5 Combined fuel economy as represented to Class Members and as later tested with Warm-up
6 Program de-activated.

7 Plaintiffs and the proposed Settlement Class operated the Class Vehicles without
8 obtaining the reported fuel efficiency and while emitting higher CO₂. As a result of this
9 discrepancy, Class Members paid for more fuel, and were inconvenienced by more frequent trips
10 to the fuel pump, throughout the duration of their ownership or lease.

11 **B. Procedural background: Plaintiffs investigated their claims through a**
12 **comprehensive discovery process.**

13 On November 5, 2016, the German newspaper Bild am Sonntag (“*Bild*”) reported that the
14 California Air Resources Board had discovered a discrepancy in vehicle testing results and
15 suspected that Audi had installed an emissions cheating device in gasoline-powered Audi models
16 equipped with a particular 8-speed automatic transmission. The *Bild* article claimed that software
17 in these vehicles operates to reduce CO₂ emissions—and, as a result increase fuel economy—
18 only during testing cycles. In the wake of these revelations, consumers filed a number of class
19 action lawsuits in federal courts across the country. The actions were consolidated before this
20 Court in the pending MDL, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and*
21 *Products Liability Litigation*, MDL No. 2672 CRB (JSC). The Court had previously appointed
22 Plaintiffs’ Lead Counsel and a PSC in the MDL (Dkt. 1084), and ordered Plaintiffs to file a
23 consolidated complaint in the new Audi CO₂ matters. *See* Dkt. 3217.

24 Following the *Bild* report, Plaintiffs and their experts conducted further investigation and
25 technical vehicle testing to detect discrepancies in emissions and fuel economy performance
26 between lab and normal driving conditions in the Defendants’ vehicles. Thereafter, on October
27 12, 2017, Plaintiffs filed a 519-page Consolidated Consumer Class Action Complaint reflecting
28

1 their initial testing results as well as information learned from documents produced by the
2 Defendants through Plaintiffs' discovery efforts. *See* Dkt. 4043-3.

3 On December 11, 2017, the Audi Defendants and Bosch Defendants filed motions to
4 dismiss the Consolidated Complaint—totaling 58 and 41 pages, respectively. Dkts. 4545, 4546.
5 Plaintiffs then filed an 81-page omnibus opposition on January 16, 2018 (Dkt. 4662), and both the
6 Audi and Bosch Defendants lodged their replies in support the following month. Dkts. 4743,
7 4744. A hearing on those motions was scheduled for May 11, 2018, but, as detailed below, was
8 taken off calendar by the Parties' stipulation pending the outcome of ongoing settlement
9 discussions.

10 Ultimately, Plaintiffs' investigations and Defendants' own expert testing conducted after
11 the filing of the Consolidated Complaint confirmed that the particular transmission identified in
12 the *Bild* article (the AL 551-Q) was merely one of many transmissions Defendants programmed
13 with the Warm-up Program software. As the testing revealed, the Warm-up Program was present
14 in a number of transmissions used in Audi, Volkswagen, Porsche, and Bentley vehicles, and in
15 many of those vehicles, the Program caused the Vehicles to achieve better fuel economy (and
16 emit less CO₂) in the lab than on the road. Plaintiffs amended the Consolidated Complaint to
17 account for these developments and to reflect their further knowledge of the technological
18 background and broader scope of the misrepresented fuel economy issues gained throughout the
19 intervening months of litigation and discovery. The result was the recently filed, 415-page
20 Amended Consolidated Consumer Class Action Complaint. In the operative Amended
21 Complaint, Plaintiffs bring claims under the Racketeer Influenced and Corrupt Organizations Act
22 ("RICO"); the Magnuson-Moss Warranty Act; common law fraud by concealment; and state law
23 consumer protection claims. The lengthy and detailed allegations related to the Warm-up
24 Program technology in both the Amended Complaint and the earlier Consolidated Complaint
25 reflect the arduous process undertaken by Class Counsel to analyze the multi-party fraud and
26 complicated engine and software technologies at issue in this case, and to research, develop, and
27 assert the various claims and the remedies available to those harmed by the conduct of
28 Defendants and their co-conspirators.

1 **C. The Settlement process: The Parties engaged in a lengthy, fifteen-month**
2 **negotiation process and conducted additional confirmatory discovery after**
3 **the Settlement was reached.**

4 Settlement negotiations began in April 2018 when, with a hearing on Defendants' motions
5 to dismiss pending, the Parties agreed to commence negotiations in earnest. Dkt. 4977.
6 Settlement discussions endured for fifteen months thereafter, ultimately resulting in the proposed
7 Settlement now before the Court.

8 Throughout these negotiations, the Parties held numerous in-person sessions in locations
9 including Germany, Washington DC, New York, and San Francisco, and continued their
10 discussions with many telephone conferences and exchanges of information between those
11 meetings. Declaration of Elizabeth J. Cabraser ("Cabraser Decl.") ¶ 8. The Parties ensured that
12 many of those sessions included in-house counsel, high-level engineers, and experts to further the
13 negotiations in an efficient and meaningful way. Meanwhile, Class Counsel continued to spend
14 considerable time and energy gaining familiarity with the strengths and weaknesses of their
15 claims, including through a robust and prolonged exchange of information with the Defendants.
16 *Id.* ¶¶ 10-12. In support of both the litigation and settlement efforts, Plaintiffs' counsel retained
17 multiple technical experts to conduct extensive testing on the Defendants' vehicles to measure
18 and compare, among other things, their emissions and fuel economy under laboratory and on-road
19 driving conditions. Plaintiffs worked with their experts for many months to test several vehicles
20 under approved federal vehicle testing procedures. *Id.* Plaintiffs' experts also conducted on-road
21 emissions testing and data collection using portable emissions measurement systems ("PEMS")
22 on several vehicles. *Id.*

23 In response to regulatory inquiries and this litigation, Defendants also conducted their own
24 extensive testing and analysis of the CO₂ emissions and fuel economy of their gasoline vehicles.
25 Plaintiffs' counsel and their experts discussed the testing methodology with Defendants and their
26 engineers at length, reviewed Defendants' testing data, and observed some of the testing in
27 person. *Id.* Indeed, Plaintiffs and their experts traveled to Audi's testing facility in Ingolstadt,
28 Germany, on two occasions to observe testing conducted by Defendants, and to engage in

1 interviews and meetings with several of the engineers responsible for testing the Class Vehicles
2 and evaluating the results. *Id.*

3 The outcome of all these meetings, exchanges of information, and more than a year of
4 negotiations is a proposed Agreement, under which the Defendants will pay approximately \$96.5
5 million to the Class (and, if funds are unclaimed, to environmental remediation efforts), in
6 addition to the Settlement administration costs and any attorneys' fees and costs awarded to Class
7 Counsel by the Court. This is an exceptional result—described more fully below—that “provides
8 full compensation to Class Members for the damages they incurred as a result of the reduced fuel
9 economy ratings.” Stockton Decl. ¶ 23(f).

10 **III. SUMMARY OF SETTLEMENT TERMS**

11 The Settlement provides substantial cash compensation—with payments to Class
12 Members of up to \$518.40 to \$2,332.80 per Class Vehicle through a streamlined claims process.
13 These payments fully compensate Class Members for having driven and continuing to drive Class
14 Vehicles that did not obtain the fuel economy represented at the time of purchase or lease.

15 **A. The Settlement Class definition**

16 The Settlement Class is defined as follows: “a nationwide class, including Puerto Rico, of
17 all persons (including individuals and entities) who own, owned, lease, or leased a Class Vehicle
18 in the United States or its territories as of the date of the Motion for Preliminary Approval.”
19 Settlement Agreement (“SA”) ¶ 2.9.⁴ The Class Vehicles include 97,890 Audi, Bentley, Porsche,
20 and Volkswagen vehicles, as defined in the proposed Settlement Agreement. *Id.* ¶ 2.15.

21 **B. Cash benefits to Class Members**

22 The proposed Settlement delivers significant cash payments to any Class Member who
23 submits a valid claim. The amount of compensation available to each Class Member is based on
24 (1) the difference in cost for the amount of gasoline that would have been required under the

25 ⁴ Those excluded from the Class are: (a) Defendants' officers, directors and employees and
26 participants in Volkswagen's Internal Lease Program, and/or Porsche Associate Lease Program;
27 Defendants' affiliates and affiliates' officers, directors and employees; Defendants' distributors
28 and distributors' officers, directors and employees; (b) Judicial officers and their immediate
family members and associated court staff assigned to this case; and (c) All those otherwise in the
Class who or which timely and properly exclude themselves from the Class as provided in the
Class Action Agreement.

1 original Monroney fuel economy label and the greater amount required under the adjusted fuel
2 economy label, and (2) a goodwill payment of an additional 15% of those damages to compensate
3 for any inconvenience. *Id.* ¶ 4.1. The payments range from \$518.40 to \$2,332.80 for original
4 owners who still own their Class Vehicles as of the date this Motion is filed. *Id.*, Ex. A. Class
5 Members who sold, purchased used, or leased their Class Vehicles will be entitled to
6 compensation based on the same concept described above, but prorated to account for the number
7 of months of their ownership or possession. Critically, in all circumstances, this compensation
8 represents 100% of the damages available to the Class under the relevant damages theory,
9 Stockton Decl. ¶ 23(f)—a remarkable result for a compromise of contested claims that have yet to
10 survive a motion to dismiss.

11 If there are any funds remaining in the Settlement Value after all valid, complete, and
12 timely Claims are paid, subject to Court approval, the balance will be directed to environmental
13 remediation efforts. SA ¶ 4.5. This *cy pres* distribution may include, for example, the purchase
14 of greenhouse gas credits, environmental projects in consultation with relevant regulators, and/or
15 other, environmentally-focused recipients, as agreed by the Parties and approved by the Court.
16 *Id.* This ensures that all the money secured by the Settlement will inure to the benefit of the Class
17 and the interests advanced in this litigation.

18 **IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL AND DECISION TO**
19 **GIVE NOTICE**

20 Federal Rule of Civil Procedure 23(e) governs a district court’s analysis of the fairness of
21 a proposed class action settlement and creates a multistep process for approval. First, a court
22 must determine that it is likely to (i) approve the proposed settlement as fair, reasonable, and
23 adequate, after considering the factors outlined in Rule 23(e)(2), and (ii) certify the settlement
24 class after the final approval hearing. *See* Fed. R. Civ. P. 23(e)(1)(B); *see also* 2018 Advisory
25 Committee Notes to Rule 23 (standard for directing notice is whether the Court “likely will be
26 able both to approve the settlement proposal under Rule 23(e)(2) and . . . certify the class for
27 purposes of judgment on the proposal”). Second, a court must direct notice to the proposed
28 settlement class, describing the terms of the proposed settlement and the definition of the

1 proposed class, to give them an opportunity to object to or to opt out of the proposed settlement.
 2 *See* Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(e)(1), (5). Third, after a hearing, the court may
 3 grant final approval of the proposed settlement on a finding that the settlement is fair, reasonable,
 4 and adequate, and certify the settlement class. Fed. R. Civ. P. 23(e)(2). In this District, a
 5 movant’s submission should also include the information called for under the District’s
 6 Procedural Guidance for Class Action Settlements (“Procedural Guidance”).

7 **V. ARGUMENT**

8 **A. The Court will be able to certify the Class for settlement purposes upon final**
 9 **approval.**

10 Certification of a settlement class is “a two-step process.” *In re Volkswagen “Clean*
 11 *Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2016 WL 4010049,
 12 at *10 (N.D. Cal. July 26, 2016) (Breyer, J.) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S.
 13 591, 613 (1997)). First, the Court must find that the proposed settlement class satisfies
 14 Rule 23(a)’s four requirements. *Id.* (citing Fed. R. Civ. P. 23(a)). Second, the Court must find
 15 that “a class action may be maintained under either Rule 23(b)(1), (2), or (3).” *Id.* (citing
 16 *Amchem*, 521 U.S. at 613). The proposed Settlement Class here readily satisfies all Rule
 17 23(a)(1)-(4) and (b)(3) certification requirements. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926
 18 F.3d 539, 557 (9th Cir. 2019) (en banc) (upholding district court’s preliminary approval and
 19 certification of nationwide settlement class in similar fuel economy settlement).

20 **1. The Settlement Class meets the requirements of Rule 23(a).**

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

22 Rule 23(a)(1) is satisfied where, as here, “the class is so numerous that joinder of all class
 23 members is impracticable.” Fed. R. Civ. P. 23(a)(1). Numerosity is generally met when the class
 24 exceeds forty members. *See, e.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000).
 25 It is undisputed that approximately 100,000 Class Vehicles were sold and/or leased nationwide
 26 and that the Settlement Class—which includes current and former owners and lessees of those
 27 Vehicles—includes at least 100,000 members. The size of the Settlement Class and its
 28 geographic dispersal across the United States renders joinder impracticable. *See Palmer v.*

1 *Stassinis*, 233 F.R.D. 546, 549 (N.D. Cal. 2006) (“Joinder of 1,000 or more co-plaintiffs is
2 clearly impractical.”). Numerosity is satisfied.

3 **b. Rule 23(a)(2): The Class Claims present common questions of**
4 **law and fact.**

5 “Federal Rule of Civil Procedure 23(a)(2) conditions class certification on demonstrating
6 that members of the proposed class share common ‘questions of law or fact.’” *Stockwell v. City*
7 *& Cty. of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014). Commonality “does not turn on
8 the number of common questions, but on their relevance to the factual and legal issues at the core
9 of the purported class’ claims.” *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).
10 Indeed, “[e]ven a single question of law or fact common to the members of the class will satisfy
11 the commonality requirement.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011).⁵

12 Courts routinely find commonality where, as here, the class claims arise from a
13 defendant’s uniform course of conduct. *See, e.g., In re Chrysler-Dodge-Jeep Ecodiesel Mktg.,*
14 *Sales Practices, & Prods. Liab. Litig.*, No. 17-MD-02777-EMC, 2019 WL 536661, at *6 (N.D.
15 Cal. Feb. 11, 2019) (commonality satisfied where claims arose from the defendants’ “common
16 course of conduct” in perpetrating alleged vehicle emissions cheating scheme); *Cohen v. Trump*,
17 303 F.R.D. 376, 382 (S.D. Cal. 2014) (“Plaintiff argues his RICO claim raises common questions
18 as to ‘Trump’s scheme and common course of conduct, which ensnared Plaintiff[] and the other
19 Class Members alike.’ The Court agrees.”); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D.
20 482, 488 (C.D. Cal. 2006) (finding common core of factual and legal issues in “the questions of
21 whether Allianz entered into the alleged conspiracy and whether its actions violated the RICO
22 statute”).⁶

23
24 ⁵ Here, and throughout, internal citations are omitted unless otherwise indicated.

25 ⁶ Likewise, commonality is satisfied in cases where defendants’ deployed uniform
26 misrepresentations to deceive the public. *See Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523,
27 537 (N.D. Cal. 2012) (“Courts routinely find commonality in false advertising cases”);
28 *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*, 564 U.S. at 350).

1 Here, the Settlement Class claims are rooted in common questions of fact relating to
 2 Defendants' development and use of the Warm-up Program and representations about the Class
 3 Vehicles' fuel economy to regulators and consumers. *See, e.g.*, Am. Compl. ¶ 96; *see also In re*
 4 *Hyundai*, 926 F.3d at 557 (similar common questions about misrepresented fuel economy ratings
 5 satisfied commonality requirement). These common questions will, in turn, generate common
 6 answers "apt to drive the resolution of the litigation" for the Settlement Class as a whole. *See*
 7 *Dukes*, 564 U.S. at 350. As the Settlement Class' "injuries derive from [D]efendants' alleged
 8 'unitary course of conduct,'" Plaintiffs have "identified a unifying thread that warrants class
 9 treatment." *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 290 (S.D.N.Y. 2012), *aff'd* 780
 10 F.3d 70 (2d Cir. 2015). As in the *Volkswagen* diesel litigation, "[w]ithout class certification,
 11 individual Class Members would be forced to separately litigate the same issues of law and fact
 12 which arise from Volkswagen's use of the [Program] and Volkswagen's alleged common course
 13 of conduct." 2016 WL 4010049, at *10.

14 **c. Rule 23(a)(3): The Settlement Class Representatives' claims are**
 15 **typical of other Class Members' claims.**

16 Under Rule 23(a)(3), "the claims or defenses of the representative parties" must be
 17 "typical of the claims or defenses of the class." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir.
 18 2014) (quoting Fed. R. Civ. P. 23(a)(3)). "Like the commonality requirement, the typicality
 19 requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-
 20 extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon v. Chrysler Corp.*, 150
 21 F.3d 1011, 1020 (9th Cir. 1998)). Typicality "assure[s] that the interest of the named
 22 representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*,
 23 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508
 24 ((9th Cir. 1992)). Thus, where a plaintiff suffered a similar injury and other class members were
 25 injured by the same course of conduct, typicality is satisfied. *See Parsons*, 754 F.3d at 685; *see*
 26 *also Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir. 2012) ("The test of
 27 typicality is whether other members have the same or similar injury, whether the action is based
 28

1 on conduct which is not unique to the named plaintiffs, and whether other class members have
2 been injured by the same course of conduct.”).

3 Here, the course of conduct that injured the Settlement Class Representatives injured the
4 other members of the proposed Settlement Class in the same way. The Settlement Class
5 Representatives, like other Settlement Class Members, purchased or leased Class Vehicles that
6 did not obtain the fuel economy represented to them as a result of the same Warm-up Program
7 software active in all Class Vehicles. Like all Class Members, the Settlement Class
8 Representatives were harmed by having to pay for more gas, and in the inconvenience of more
9 frequent trips to the gas pump, while they used the Class Vehicles. The typicality requirements
10 are satisfied.

11 **d. Rule 23(a)(4): The Settlement Class Representatives and Class**
12 **Counsel have and will protect the interests of the Class.**

13 Rule 23(a)(4)’s adequacy requirement is met where, as here, “the representative parties
14 will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Adequacy
15 entails a two-prong inquiry: “(1) do the named plaintiffs and their counsel have any conflicts of
16 interest with other class members and (2) will the named plaintiffs and their counsel prosecute the
17 action vigorously on behalf of the class?” *Evon*, 688 F.3d at 1031 (quoting *Hanlon*, 150 F.3d at
18 1020). Both prongs are readily satisfied here.

19 The Settlement Class Representatives have no interests antagonistic to Settlement Class
20 Members and will continue to protect the Class’ interests in overseeing the Settlement
21 administration and through any appeals. *See Clemens v. Hair Club for Men, LLC*, No. C 15-
22 01431 WHA, 2016 WL 1461944, at *2-3 (N.D. Cal. Apr. 14, 2016). Indeed, the Settlement Class
23 Representatives “are entirely aligned [with the Settlement Class] in their interest in proving that
24 [Defendants] misled them and share the common goal of obtaining redress for their injuries.”
25 *Volkswagen*, 2016 WL 4010049, at *11. The Representatives understand their duties, have
26 agreed to consider the interests of absent Settlement Class Members, and have reviewed and
27 uniformly endorsed the Settlement terms. *See Cabraser Decl.* ¶ 22. *See also, e.g., Trospen v.*
28 *Styker Corp.*, No. 13-CV-0607-LHK, 2014 WL 4145448, at *12 (N.D. Cal. Aug. 21, 2014) (“All

1 that is necessary is a ‘rudimentary understanding of the present action and ... a demonstrated
2 willingness to assist counsel in the prosecution of the litigation.’”). The proposed Settlement
3 Class Representatives are more than adequate.

4 Similarly, as demonstrated through this litigation and this brief, Lead Counsel and many
5 of the PSC firms have undertaken an enormous amount of work, effort, and expense in this MDL
6 and in litigating the Audi CO₂ cases. They have demonstrated their willingness to devote
7 whatever resources were necessary to reach a successful outcome throughout the nearly two years
8 since filing the Consolidated Complaint. They, too, satisfy Rule 23(a)(4).

9 **2. The Settlement Class meets the requirements of Rule 23(b)(3).**

10 Rule 23(b)(3)’s requirements are also satisfied because (i) “questions of law or fact
11 common to class members predominate over any questions affecting only individual members”;
12 and (ii) a class action is “superior to other available methods for fairly and efficiently adjudicating
13 the controversy.” Fed. R. Civ. P. 23(b)(3).

14 **a. Common issues of law and fact predominate.**

15 “The predominance inquiry ‘asks whether the common, aggregation-enabling, issues in
16 the case are more prevalent or important than the non-common, aggregation-defeating, individual
17 issues.’” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). “When ‘one or more
18 of the central issues in the action are common to the class and can be said to predominate, the
19 action may be considered proper under Rule 23(b)(3) even though other important matters will
20 have to be tried separately, such as damages or some affirmative defenses peculiar to some
21 individual class members.’” *Id.* At its core, “[p]redominance is a question of efficiency.”
22 *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). Thus, “[w]hen common
23 questions present a significant aspect of the case and they can be resolved for all members of the
24 class in a single adjudication, there is clear justification for handling the dispute on a
25 representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022.

26 The Ninth Circuit favors class treatment of fraud claims stemming from a “‘common
27 course of conduct.’” *See In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006);
28 *Hanlon*, 150 F.3d at 1022-23. Even outside of the settlement context, predominance is readily

1 met for RICO and consumer claims arising from the defendants’ common course of conduct. *See*
2 *Amchem Prods.*, 521 U.S. at 625; *Wolin*, 617 F.3d at 1173, 1176 (consumer claims based on
3 uniform omissions certifiable where “susceptible to proof by generalized evidence,” even if
4 individualized issues remain); *Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282 AHM
5 (CTx), 2009 WL 2711956, at *8 (C.D. Cal. Aug. 25, 2009) (“Common issues frequently
6 predominate in RICO actions that allege injury as a result of a single fraudulent scheme.”); *see*
7 *also Klay v. Humana, Inc.*, 382 F.3d 1241, 1256-57 (11th Cir. 2004) (affirming certification of
8 RICO claim where “all of the defendants operate nationwide and allegedly conspired to underpay
9 doctors across the nation, so the numerous factual issues relating to the conspiracy are common to
10 all plaintiffs [and the] corporate policies constitute[d] . . . the very heart of the plaintiffs’ RICO
11 claims”).

12 Here, too, questions of law and fact common to the Settlement Class Members’ claims
13 predominate over any questions affecting only individual members, because the common issues
14 “turn on a common course of conduct by the defendant in [a] nationwide class action.” *See In re*
15 *Hyundai*, 926 F.3d at 559 (citing *Hanlon*, 150 F.3d at 1022–23). Indeed, “[i]n many consumer
16 fraud cases, the crux of each consumer’s claim is that a company’s mass marketing efforts,
17 common to all consumers, misrepresented the company’s product—here, a vehicle’s fuel
18 efficiency.” *Id.*

19 Similar to *Hyundai*, Defendants’ common course of conduct—here, the calibration of the
20 Warm-up Program in each Class Vehicle and the resulting overstatement of the Class Vehicles’
21 fuel economy—are central to the claims asserted in the Amended Complaint. Common, unifying
22 questions as to the Defendants’ conduct include, for example, “(1) “[w]hether the fuel economy
23 statements were in fact inaccurate”; and (2) “whether [the Defendants] knew that their fuel
24 economy statements were false or misleading.” *Id.* The alleged misrepresentations to the Class
25 were (among other sources) “uniformly made via Monroney stickers.” *Id.* (internal quotation
26 marks omitted). As such, Defendants allegedly “perpetrated the same fraud in the same manner
27 against all Class Members.” *Volkswagen*, 2016 WL 4010049, at *12. Predominance is satisfied.
28

1 **b. Class treatment is superior to other available methods for the**
2 **resolution of this case.**

3 Superiority asks “whether the objectives of the particular class action procedure will be
4 achieved in the particular case.” *Hanlon*, 150 F.3d at 1023. In other words, it “requires the court
5 to determine whether maintenance of this litigation as a class action is efficient and whether it is
6 fair.” *Wolin*, 617 F.3d at 1175-76. Under Rule 23(b)(3), “the Court evaluates whether a class
7 action is a superior method of adjudicating plaintiff’s claims by evaluating four factors: ‘(1) the
8 interest of each class member in individually controlling the prosecution or defense of separate
9 actions; (2) the extent and nature of any litigation concerning the controversy already commenced
10 by or against the class; (3) the desirability of concentrating the litigation of the claims in the
11 particular forum; and (4) the difficulties likely to be encountered in the management of a class
12 action.’” *Trosper*, 2014 WL 4145448, at *17.

13 Class treatment here is far superior to the litigation of more than one hundred thousand
14 individual consumer actions. “From either a judicial or litigant viewpoint, there is no advantage
15 in individual members controlling the prosecution of separate actions. There would be less
16 litigation or settlement leverage, significantly reduced resources and no greater prospect for
17 recovery.” *Hanlon*, 150 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 (“Forcing individual
18 vehicle owners to litigate their cases, particularly where common issues predominate for the
19 proposed class, is an inferior method of adjudication.”). The maximum damages sought by each
20 Settlement Class Member (ranging from a maximum of \$518.40 to \$2,332.80 per Class Vehicle)
21 are small relative to the significant cost of prosecuting each one’s individual claims, especially
22 given the technical nature of the claims at issue. *See Smith v. Cardinal Logistics Mgmt. Corp.*,
23 No. 07-2104 SC, 2008 WL 4156364, at *11 (N.D. Cal. Sept. 5, 2008) (small interest in individual
24 litigation where damages averaged \$25,000-\$30,000 per year of work).

25 Class resolution is also superior from an efficiency and resource perspective. Indeed, “[i]f
26 Class Members were to bring individual lawsuits against [Defendants], each Member would be
27 required to prove the same wrongful conduct to establish liability and thus would offer the same
28 evidence.” *Volkswagen*, 2016 WL 4010049, at *12. With a class of approximately 100,000,

1 “there is the potential for just as many lawsuits with the possibility of inconsistent rulings and
2 results.” *Id.* “Thus, classwide resolution of their claims is clearly favored over other means of
3 adjudication, and the proposed Settlement resolves Class Members’ claims at once.” *Id.*
4 Superiority is met here, and Rule 23(e)(1)(B)(ii) is satisfied.

5 * * *

6 For all the reasons set forth above, Plaintiffs respectfully submit that the Court will—after
7 notice is issued and Class Member input received—“likely be able to . . . certify the class for
8 purposes of judgment on the proposal.” *See* Fed. R. Civ. P. 23(e)(1)(B).

9 **B. The Court should appoint Lead Plaintiffs’ Counsel as Interim Settlement**
10 **Class Counsel under Rule 23(g)(3).**

11 Rule 23(g) requires this Court to appoint class counsel to represent the Settlement Class.
12 *See* Fed. R. Civ. P. 23(g). At the outset of the MDL, as part of a competitive application process
13 with a total of 150 submissions, the Court chose Lead Counsel and each member of the PSC due
14 to their qualifications, experience, and commitment to the successful prosecution of this case. *See*
15 Dkt. 1084. The criteria that the Court considered in appointing Lead Counsel and the PSC were
16 substantially similar to the considerations set forth in Rule 23(g). *See, e.g., Clemens*, 2016 WL
17 1461944, at *2. As noted above, Lead Counsel and many of the PSC firms have undertaken an
18 enormous amount of work, effort, and expense in this MDL and in litigating the Audi CO₂ cases.
19 *See* Cabraser Decl. ¶¶ 2-13. Plaintiffs therefore submit that Lead Counsel should be appointed as
20 Interim Settlement Class Counsel under Rule 23(g)(3) to conduct the necessary steps in the
21 Settlement approval process. Lead Counsel will seek appointment of PSC members as Settlement
22 Class Counsel under 23(g)(1) in connection with final approval.

23 **C. The Settlement is fair, reasonable, and adequate.**

24 Rule 23(e)(2) identifies several criteria for the Court to use in deciding whether to grant
25 preliminary approval of a proposed class settlement and direct notice to the proposed class. A
26 “presumption of correctness” attaches where, as here, a “class settlement [was] reached in arm’s-
27 length negotiations between experienced capable counsel after meaningful discovery.” *See Free*
28 *Range Content, Inc. v. Google, LLC*, No. 14-CV-02329-BLF, 2019 WL 1299504, at *6 (N.D.

1 Cal. Mar. 21, 2019). The Settlement proposed here readily satisfies the criteria for preliminary
2 approval.

3 **1. Rule 23(e)(2)(A): Class Counsel and the Settlement Class**
4 **Representatives have and will continue to zealously represent the**
5 **Class.**

6 Class Counsel and the Class Representatives fought hard to protect the interests of the
7 Class, as evidenced by the significant compensation available to the Class through the proposed
8 Settlement. Class Counsel prosecuted this action and the fair resolution of it with vigor and
9 dedication over the course of nearly two years. *See* Fed. R. Civ. P. 23(e)(2)(A). As detailed
10 above, Class Counsel undertook significant efforts to uncover the facts—including retaining
11 technical experts and conducting multiple rounds of vehicle testing—to continuously prosecute
12 and refine the Class claims. Class Counsel also engaged in robust Rule 12 motion practice—
13 researching, drafting, and filing an 81-page omnibus opposition brief to Defendants’ motions to
14 dismiss. *See* § II.B, *supra*.

15 The Settlement Class Representatives are also actively engaged. Each worked with
16 counsel to review and evaluate the terms of the proposed Settlement Agreement and has endorsed
17 its terms. Each Representative has also expressed their continued willingness to protect the Class
18 until the Settlement is approved and its administration completed. Cabraser Decl. ¶ 22.

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

21 After the motion to dismiss hearing was taken off-calendar in April 2018 (Dkt. 4977), the
22 Parties began to undertake serious, informed, and arm’s-length negotiations—including multiple
23 negotiation sessions in Germany, New York, San Francisco, and Washington DC. *Id.* ¶ 8. After
24 fifteen months, these detailed, evidence-based discussions culminated in in the proposed
25 Settlement now before the Court. *See* Fed. R. Civ. P. 23(e)(2)(B).

26 With negotiations ongoing, and as described above (§ II.C), Class Counsel independently
27 retained technical experts to conduct testing on the Class Vehicles in on-road and laboratory
28 settings, resulting in comprehensive data and analysis of the Vehicles’ emissions and fuel
economy in both settings, while Defendants conducted an extensive testing and review process in

1 response to regulatory inquiries and this litigation. The Parties agreed to share information about
2 their independent processes and results to facilitate informed negotiations. In addition, the Parties
3 also engaged in extensive document and information exchanges, including the production and
4 review of millions of pages of documents in this MDL. *Id.* ¶ 3; SA ¶ 6.1. After the Agreement
5 was reached, the Parties conducted several more months of confirmatory discovery. The
6 confirmatory discovery process included, among other things, an additional round of vehicle
7 testing conducted in Germany with experts from all Parties; detailed interviews of several key
8 witnesses including high-level managers and engineers; and the production of more than ten
9 thousand pages of documents, including technical presentations and data provided to the
10 regulators in a parallel investigation. Cabraser Decl. ¶ 12.

11 Where extensive information has been exchanged, “[a] court may assume that the parties
12 have a good understanding of the strengths and weaknesses of their respective cases and hence
13 that the settlement’s value is based upon such adequate information.” William B. Rubenstein, et
14 al., 4 *Newberg on Class Actions* § 13:49 (5th ed. 2012) (“*Newberg*”); *cf. In re Anthem, Inc. Data*
15 *Breach Litig.*, 327 F.R.D. 299, 320 (N.D. Cal. 2018) (concluding that the “extent of discovery”
16 and factual investigation undertaken by the parties gave them “a good sense of the strength and
17 weaknesses of their respective cases in order to ‘make an informed decision about settlement’”
18 (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)).

19 Here, too, the significant exchange of documents and information supports the parties’
20 ability to make a well-supported decision on settlement. Notably, discovery supporting a
21 settlement need not have been formally produced and can include documents and information
22 learned in related proceedings. *See Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239–40,
23 1241 (9th Cir. 1998) (noting that formal discovery is not required for settlement approval and that
24 “[i]n particular, the district court and plaintiffs may rely on discovery developed in prior or
25 related proceedings”); *Wahl v. Yahoo! Inc.*, No. 17-CV-02745-BLF, 2018 WL 6002323, at *4
26 (N.D. Cal. Nov. 15, 2018) (granting final approval of class settlement although “little formal
27 discovery” was conducted, noting relevant inquiry was whether parties had “sufficient
28 information to evaluate the case’s strengths and weaknesses.”). Here, Defendants have produced

1 thousands of pages of documents directly responsive to Plaintiffs’ claims in the Audi CO₂
2 matters, and millions of pages of relevant documents in the “Clean Diesel” MDL—all of which
3 informed Plaintiffs’ understanding of the strengths and weaknesses of their claims. Cabraser
4 Decl. ¶¶ 3, 12.

5 A meaningful exchange of documents and information also evidences that the litigation
6 was adversarial, and therefore serves as “an indirect indicator that a settlement is not collusive but
7 arms-length.” 4 *Newberg* § 13:49; see also *In re Anthem*, 327 F.R.D. at 320 (“Extensive
8 discovery is also indicative of a lack of collusion. . . .”); *In re Volkswagen “Clean Diesel” Mktg.,*
9 *Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2019 WL 2077847, at *1
10 (N.D. Cal. May 10, 2019) (“Lead Counsel vigorously litigated this action during motion practice
11 and discovery, and the record supports the continuation of that effort during settlement
12 negotiations.”). Here, Plaintiffs sought, reviewed, and analyzed a significant production of the
13 Defendants’ documents, data, and other information, and conducted on-the-ground investigations
14 through expert interviews and site visits to Defendant AUDI AG’s testing facility in Ingolstadt,
15 Germany, among other things. Cabraser Decl. ¶¶ 3-4, 10-12.

16 The Parties’ confirmatory discovery efforts further support the reasonableness of the
17 settlement. Engaging in confirmatory discovery, as the Parties have here, adds even more
18 legitimacy to the negotiation process. See *In re Nissan Radiator/Transmission Cooler Litig.*, No.
19 10 CV 7493(VB), 2013 WL 4080946, *5 (S.D. N.Y. May 30, 2013) (finding discovery sufficient
20 to warrant approval because “plaintiffs conducted an investigation prior to commencing the
21 action, retained experts, and engaged in confirmatory discovery in support of the proposed
22 settlement”).

23 It is also worth noting that the methodology and outcomes of the Parties’ testing were
24 independently assessed by the EPA, who has reviewed the fuel economy calculations
25 underpinning the Settlement’s compensation formula. See *In re Volkswagen “Clean Diesel”*
26 *Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2016 WL 6248426 at
27 *14 (N.D. Cal. Oct. 25, 2016), *aff’d sub nom. In re Volkswagen “Clean Diesel” Mktg., Sales*
28 *Practices, & Prods. Liab. Litig.*, 895 F.3d 597 (9th Cir. 2018) (government participation in

1 negotiations weighed “heavily in favor” of approval); *Marshall v. Holiday Magic, Inc.*, 550 F.2d
2 1173, 1178 (9th Cir. 1977) (“The participation of a government agency serves to protect the
3 interests of the class members, particularly absentees, and approval by the agency is an important
4 factor for the court’s consideration.”). The revised fuel economy values will also be updated on
5 the official government website, www.fueleconomy.gov.

6 But perhaps most importantly of all, the result of the negotiations speaks for itself.
7 Where, as here, the Class stands to recover their damages *in full*, there is little room for argument
8 that counsel failed to protect the interests of the Class or otherwise engaged in collusive behavior.
9 *See* Cabraser Decl. ¶ 13; *see also In re Volkswagen*, 2019 WL 2077847, at *1 (granting final
10 settlement approval where “Lead Counsel ha[d] . . . a successful track record of representing
11 [plaintiffs] in cases of this kind . . . [and] attest[ed] that both sides engaged in a series of
12 intensive, arm’s-length negotiations” and there was “no reason to doubt the veracity of Lead
13 Counsel’s representations”).

14 **3. Rule 23(e)(2)(C): The Settlement provides substantial compensation in**
15 **exchange for the compromise of strong claims.**

16 The Settlement provides substantial relief for the Class, especially considering (i) the
17 costs, risks, and delay of trial and appeal; (ii) the effectiveness of the proposed distribution plan;
18 and (iii) the fair terms of the requested award of attorney’s fees. *See* Fed. R. Civ. P. 23(e)(2)(C).

19 As noted above, the Settlement secures up to approximately \$96.5 million for cash
20 payments designed to Class Members for having driven and continuing to drive vehicles for
21 which the actual, on-road fuel economy is up to 1 MPG less than was originally represented, and
22 separately requires Defendants to pay reasonable Settlement administration costs and attorneys’
23 fees and costs that would otherwise be deducted from the Class’ recovery. The amount of
24 compensation available to each Class Member is based on (1) the difference in cost for the
25 amount of gasoline that would have been required under the original Monroney fuel economy
26 label and the greater amount required under the adjusted fuel economy label, and (2) a goodwill
27 payment of an additional 15% of those damages to compensate for any inconvenience. In making
28 this calculation, the compensation formula—which is detailed in the declaration of expert

1 economist Ted Stockton (Stockton Decl. ¶¶ 9-23) and in the Long Form Notice (Declaration of
2 Cameron Azari (“Azari Decl.”), Attachment 3)—relies on a number of negotiated parameters—
3 including the average miles per year, the expected duration of ownership, and fuel cost—each of
4 which is favorable to the Class.

5 Specifically, the Settlement formula calculates the extra gallons attributable to the reduced
6 fuel economy based on the assumption that each Class Vehicle has been and will continue to be
7 driven an average of 1,250 miles per month (or 15,000 miles per year). Stockton Decl. ¶¶ 16-
8 19. Furthermore, the Settlement compensates Class Members for 96 months’ worth of extra
9 gasoline (combined with the monthly estimate of 1,250 miles, this means the Vehicles are
10 compensated for 120,000 miles of extra fuel costs). *Id.* ¶ 21. This compares favorably to the
11 number of months compensated in two recent class action settlements related to MPG reductions.
12 *See Ellis v. Gen. Motors, LLC*, No. 2:16-cv-11747-GCS-APP, Dkt. 34-2 at 12 (E.D. Mich. July
13 14, 2017); *In re Hyundai*, 926 F.3d at 554. Finally, the compensation formula uses an estimated
14 fuel cost of \$3.54 per gallon, and applies a 15% goodwill premium to account for any
15 inconvenience to Class Members. Stockton Decl. ¶¶ 20, 22.

16 Taken both individually and together, these inputs make clear that the Settlement provides
17 Class Members with full compensation for their damages. *Id.* ¶ 23. This is an exceptional result
18 for the compromise of contested claims that have not yet survived a motion to dismiss.

19 **a. The Settlement mitigates the risks, expenses, and delays the**
20 **Class would bear with continued litigation.**

21 The Settlement benefits (described above) are even more impressive given the inherent
22 uncertainties of continued litigation and the inevitable delay that would accompany it. Even if the
23 Settlement secured something less than actual damages, compromise of potential recovery in
24 exchange for certain and timely provision of the benefits under the Settlement is an
25 unquestionably reasonable outcome. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL
26 1854965 at *2 (N.D. Cal. June 29, 2009) (“The risks and certainty of recovery in continued
27 litigation are factors for the Court to balance in determining whether the Settlement is fair.”);
28 *Kim v. Space Pencil, Inc.*, No. C 11-03796 LB, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28,

1 2012) (“The substantial and immediate relief provided to the Class under the Settlement weighs
2 heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and
3 appeal, as well as the financial wherewithal of the defendant.”).

4 This case, like those cited above, is not without risk. Defendants moved to dismiss the
5 Consolidated Complaint, and there is little doubt they would raise similar arguments against the
6 now-operative Amended Complaint should the litigation proceed. The motions to dismiss are not
7 yet decided, and the outcome of those motions was far from certain.

8 As to the RICO claim, for example, Judge Chen recently remarked in the FCA EcoDiesel
9 proceedings that, “to the extent [the RICO claim] is predicated on fraud on the EPA . . . [it] raises
10 some tough questions, questions that I think are not very clear in the case law.” *See In re*
11 *Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig.*, No. 17-md-02777,
12 Dkt. 455 at 4:3-9 (N.D. Cal. Oct. 26, 2018). And while many courts (including this one, and
13 Judge Chen in the first round of briefing in *FCA EcoDiesel*) have upheld well-pled RICO
14 allegations in automotive litigation (in what, Plaintiffs respectfully submit, is the better-reasoned
15 view), Judge McNulty in the District of New Jersey recently dismissed a RICO claim on behalf of
16 a putative class alleging an emissions cheating scheme against BMW. *Rickman v. BMW of N.*
17 *Am.*, No. CV 18-4363, 2019 WL 2710068, at *12 (D.N.J. June 27, 2019).

18 Success on Plaintiffs’ state-law claims is likewise not guaranteed. Indeed, similar state-
19 law claims have been dismissed in several recent automotive cases. *See, e.g., In re Chrysler-*
20 *Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig.*, 295 F. Supp. 3d 927, 1027
21 (N.D. Cal. 2018) (dismissing plaintiffs’ common law fraud claims, and various other state-law
22 claims for lack of privity and failure to obtain approval of state attorneys general); *Counts v. Gen.*
23 *Motors, LLC*, 237 F. Supp. 3d 572, 594 (E.D. Mich. 2017) (similar). Plaintiffs would likely face
24 these same challenges, and others, here.

25 Finally, while Plaintiffs have not moved to certify a litigation class, that process would be
26 expensive, lengthy, and, again, uncertain. Avoiding years of additional, risky litigation in
27 exchange for the immediate and significant cash payments is a principled compromise that works
28 to the clear benefit of the Class.

1 **b. Class Members will obtain relief through a straightforward**
 2 **claims process.**

3 The Parties were specific and intentional in their efforts to ensure that the claims process
 4 will be straightforward and efficient. To receive compensation, Class Members need only submit a
 5 claim form online or by mail with sufficient supporting documentation to establish the dates during
 6 which they owned or leased their Class Vehicles (*e.g.*, purchase agreement, sale documentation,
 7 and/or proof of current registration). No further action is required. Class Members who have
 8 submitted a complete and valid claim will be sent a check for compensation within thirty days of
 9 the settlement Effective Date, or of receipt of their completed claim. SA ¶ 5.1. The effort required
 10 and safeguards incorporated in this process are proportional to the compensation available, and
 11 necessary and appropriate to preserve the integrity of the Claims Program.

12 **c. Counsel will seek reasonable attorneys' fees and costs separate**
 13 **from the payments to the Class.**

14 The Settlement Value will not be reduced to pay any Court-awarded attorneys' fees or
 15 costs to Class Counsel, which Defendants will pay in addition to the cash available for payments
 16 directly to Class members. Plaintiffs' success in negotiating for fees and expenses to be paid in
 17 addition to the Class recovery has significant monetary value to the Class, which otherwise would
 18 have had to pay such fees and costs out of the Settlement recovery. The amount of the reasonable
 19 attorneys' fees and expenses to be paid to Class Counsel was not the subject of negotiation prior
 20 to signing the Settlement—only after executing the Settlement Agreement did the Parties
 21 commence discussion of the potential fees and expenses. Waiting until after the Settlement terms
 22 are finalized before discussing fees is a settlement best-practice that puts the interests of the Class
 23 first and is routinely approved by courts in this District. *See, e.g., In re Volkswagen*, 2016 WL
 24 6248426, at *23.

25 **4. Rule 23(e)(2)(D): The Proposed Settlement treats all Class Members**
 26 **equitably relative to one another.**

27 The proposed Settlement fairly and reasonably allocates payments among the Class
 28 Members pursuant to a straightforward formula tied to the duration of possession of the Class
 Vehicle and the original and amended mileage ratings for each particular Class Vehicle make and

1 model. The formula for calculating the maximum compensation for each Class Vehicle is
2 described above (*see* § V.C.3) and further explained in the Stockton Declaration (Stockton Decl.
3 ¶¶ 9-23) and the Long Form Notice (Azari Decl., Attachment 3).

4 Class Members who are the original owners of their Vehicles and continued to own them
5 as of the date this Motion is filed will receive the maximum compensation for that Vehicle. All
6 other Class Members will receive compensation under the same formula, but prorated to account
7 for the months that they owned or leased their Class Vehicles. Specifically, Class Members who
8 held active leases as of the date this Motion is filed are eligible for compensation for all months in
9 the full duration of their lease (even if the lease extends beyond the date of this Motion). Class
10 Members who purchased their Vehicles used, but owned them as of the date this Motion is filed,
11 will be entitled to compensation for the months they have owned their Class Vehicles, as well as
12 any remaining months up to a total of 96 months after their Class Vehicles were first sold.

13 This system of calculating payment values in monthly increments, and based on the
14 degree of impact in a particular Class Vehicle make, model, and year, uses transparent and
15 objective criteria to determine Class Member payments. These reasonable parameters ensure that
16 the Settlement treats Class Members equitably relative to one another. *See* Fed. R. Civ. P.
17 23(e)(2)(D); *see also In re Hyundai & Kia Fuel Econ. Litig.*, No. MDL 13-2424-GW(FFMx),
18 2014 WL 12603199 at *2 (C.D. Cal. Aug. 21, 2014) (granting preliminary approval of similar
19 settlement, where payment amounts for each make and model ranged from \$240 to \$1,420 and
20 were “correlated to the amount of the fuel economy misstatements” and thus “differences
21 between the recovery amounts stem[med] mostly from differences in the damages suffered . . .
22 rather than any improper favoring of one group of Class Members over another.”).

23 **5. The Proposed Settlement merits approval under this District’s**
24 **Procedural Guidance.**

25 This District recently updated its Procedural Guidance for Class Action Settlements. The
26 Guidance provisions relevant to this Agreement are addressed below. All of them favor approval
27 of the proposed Settlement.
28

1 **a. Preliminary Approval Guidance (1)(a) & (c): There are no**
 2 **meaningful differences between the litigation and Settlement**
 3 **Classes, and the released claims are consistent with those**
 4 **asserted in the Complaint.**

5 Where a litigation class has not been certified, the Guidance instructs a party to explain
 6 differences between the settlement class and claims to be released compared to the class and
 7 claims in the operative complaint. *See* Procedural Guidance, Preliminary Approval (1)(a), (1)(c) .
 8 Here, the proposed Settlement Class is essentially identical to the class in the Amended
 9 Complaint. Am. Compl. ¶ 258. The Settlement Class closes the class period, with a backstop as
 10 of the date of filing for Preliminary Approval, and treats Class Members equitably according to
 11 the duration of their possession of the Class Vehicle. This minor refinement in the definition of
 12 the Settlement Class is appropriate to facilitate a principled and equitable Settlement, and reflects
 13 the fact that those who purchase or lease a Class Vehicle after the filing of this motion will—both
 14 through this litigation and through the disclosures that are to be amended on
 15 www.fueleconomy.gov—do so with full notice of the Vehicles’ true fuel economy. Moreover,
 16 those relatively few people who may have been class members under the proposed definition in
 17 the operative Amended Complaint but who are not members of the proposed Settlement Class are
 18 not releasing their claims.⁷

19 Finally, the claims released in the Settlement are limited to those arising out of the
 20 “Transmissions/Fuel Economy Matter,” SA ¶ 10.3, which covers the issues relating to the Warm-
 21 up Program, the marketing of fuel economy related to Warm-up Program, and the “the subject
 22 matter of the Action,” *id.* ¶ 2.40. Thus, the claims at issue in the operative Amended Complaint
 23 and those released in the Settlement are substantially the same, if not identical.

24
 25 ⁷ As discussed above, the definition of the proposed class was amended in the operative Amended
 26 Complaint to cover only those who own, owned, lease, or leased one of the vehicles that was
 27 demonstrated through exhaustive testing and regulatory confirmation to have an appreciable fuel
 28 economy difference attributable to Warm Up Program that resulted in modified fuel economy
 labeling. Am. Compl. ¶¶ 4-12, 68-75. Those who would have been members of the previously-
 defined proposed Class in the now-superseded Consumer Class Action Complaint, but who are
 not members of the Settlement Class, are not releasing their claims through this Settlement.

1 **b. Preliminary Approval Guidance (1)(e): The Settlement**
 2 **Recovery mirrors that available if Plaintiffs had prevailed in**
 3 **litigation on the merits.**

4 The Guidance instructs a party to address the “anticipated class recovery under the
 5 settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims,
 6 and an explanation of the factors bearing on the amount of the compromise.” *See* Procedural
 7 Guidance, Preliminary Approval (1)(e). These considerations are addressed in Section V.C.3,
 8 above. To recap, Class members stand to receive “*full* compensation” for the damages associated
 9 with driving Class Vehicles that did not obtain the advertised fuel economy. Stockton Decl. ¶ 23
 10 (emphasis added). In other words, the Settlement secures 100% of actual damages, and as an
 11 added benefit, Defendants will pay all administrative costs of the Settlement and any attorneys’
 12 fees and costs awarded to Class Counsel in addition to the cash available to pay Class members
 13 directly.

14 It is true that if Plaintiffs had fully prevailed on their RICO claim, they may have received
 15 treble damages. 18 U.S.C. § 1964(c). But success on the RICO claim (or the others, for that
 16 matter) was by no means guaranteed, as explained above. And, as general matter, “courts do not
 17 traditionally factor treble damages into the calculus for determining a reasonable settlement
 18 value.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009). In sum, the Settlement
 19 secures compensation that meets or significantly exceeds virtually all Class Members’ actual
 20 damages in compromise for contested and uncertain claims that, if litigated to their conclusion,
 21 would not have resolved for several more years.

22 **c. Preliminary Approval Guidance (1)(f): The Settlement’s**
 23 **Allocation plan is fair and equitable.**

24 The Procedural Guidance requires an explanation of the proposed allocation for the
 25 settlement fund. As explained above, the amount of compensation to each Class Member
 26 correlates with the months they possessed the Class Vehicle—either through lease or ownership.
 27 *See* § III.B, *supra*. The differences equitably apportion recovery corresponding to Plaintiffs’
 28 theory of injury and the harms endured by each Class Member.

1 **d. Preliminary Approval Guidance (1)(g): A substantial number**
 2 **of Class Members are expected to participate through a**
 streamlined claims program.

3 The Settlement, the Notice Plan, and the claims process are all designed to maximize class
 4 member participation. The claim form is intended to be simple and the documents required are
 5 intended to cover only that which is necessary to establish eligibility. The amount of
 6 compensation available to Class Members, on the other hand, is considerable— ranging from
 7 \$518.40 to \$2,332.80 per Class Vehicle. Furthermore, Defendants have no motivation to
 8 minimize participation because the maximum Settlement Value is fixed at the outset and non-
 9 reversionary, and any unclaimed monies will be put toward environmental remediation efforts in
 10 the interests of the Class, subject to the Court’s approval. Given all of the above, the Parties
 11 anticipate a high rate of participation.

12 **e. Preliminary Approval Guidance (1)(h) & (8): Unclaimed**
 13 **Settlement funds will be distributed to environmental**
 remediation efforts and will not revert to Defendants.

14 As discussed above, unclaimed Settlement funds (if any) that are not paid directly to Class
 15 Members will not revert to Defendants. SA ¶ 4.5. Instead, they will be directed toward
 16 “environmental remediation efforts”—agreed to by the Parties and approved by the Court—that
 17 are consistent with “(1) the objectives of the underlying statute(s) and (2) the interests of the
 18 silent class members.” *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011). This
 19 Settlement provision ensures that all parties are properly motivated to compensate as many Class
 20 Members as possible and that all the Settlement funds will benefit the Class. *In re Volkswagen*
 21 *"Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL
 22 672820, at *3 (N.D. Cal. Feb. 16, 2017) (granting preliminary approval of Bosch “Clean Diesel”
 23 settlement, including provision that remaining funds not distributed to the class would be
 24 “distributed through *cy pres* payments according to a distribution plan and schedule filed by Class
 25 Counsel and approved by the Court”). The Parties’ selection of *cy pres* recipients (if any) will be
 26 announced on the Settlement Website—as explained in the Long Form Notice. *See Azari Decl.*,
 27 Attachment 3 at Q10.
 28

1 **f. Preliminary Approval Guidance (2): The Parties selected an**
 2 **experienced notice and claims administrator after a competitive**
 bidding process.

3 The Parties solicited proposals from three well-known and experienced notice and
 4 settlement administration vendors. Cabraser Decl. ¶ 19. After multiple rounds of detailed bids,
 5 the Parties selected Epiq to serve as the Settlement Claims and Notice Administrator. Lead
 6 Counsel has worked with Epiq as the settlement claims and/or notice provider in six cases over
 7 the last two years, but has also worked with numerous other providers over this time period. *Id.* ¶
 8 21. Epiq estimates that the cost of implementing the Notice Plan and administering the
 9 Settlement will be approximately \$500,000, which is reasonable in the context of a settlement of
 10 this scope and value. As discussed above, Defendants will pay these costs over and above the
 11 cash compensation to Class Members and Class Counsel's attorneys' fees and costs. *See SA*
 12 ¶ 5.3.

13 **g. Preliminary Approval Guidance (3)-(5): The proposed Notice**
 14 **Plan comports with Rule 23, Due Process, and this District's**
 Procedural Guidance.

15 As detailed below (§ V.D) and in the accompanying Azari Declaration, the notice program
 16 comports with the best-practices outlined in the Procedural Guidance. *See Preliminary Approval*
 17 *Guidance (3)*. It also explains Class Members' rights to opt-out of or object to the Settlement,
 18 and provides clear instructions for how and when to exercise those rights. *See Preliminary*
 19 *Approval Guidance (4)-(5)*.

20 **h. Preliminary Approval Guidance (6): Proposed Settlement Class**
 21 **Counsel will seek reasonable attorneys' fees and costs, which**
 Defendant's will pay in addition to the money available to
 directly compensate the Class.

22 Class Counsel will move the Court for an award of reasonable attorneys' fees and costs,
 23 in an amount to be negotiated or litigated and then approved by the Court. Class Counsel's fees
 24 and expenses will not reduce Class Members' recovery in any way. *See § V.C.3.c, supra*.

25 Specifically, Class Counsel intend to seek reimbursement of up to \$2,130,392.04 in out-
 26 of-pocket costs reasonably expended to prosecute and resolve this case. Cabraser Decl. ¶ 26.
 27 Class Counsel also intend to seek up to \$23,869,607.97 in attorneys' fees for work performed and
 28

1 expenses incurred in furtherance of this litigation pursuant to Pretrial Orders 7 and 11.⁸ *Id.* ¶ 28.
 2 This fee request will represent less than 20% of the total settlement value, which includes (1) the
 3 non-reversionary cash component of the Settlement (\$96,543,645) and the separately-paid (2)
 4 class notice and settlement administration costs (approximately \$500,000) and (3) attorneys’ fees
 5 and costs (\$26,000,000). *See, e.g., Rainbow Bus. Sols. v. MBF Leasing LLC*, No. 10-CV-01993-
 6 CW, 2017 WL 6017844, at *1 (N.D. Cal. Dec. 5, 2017) (The fund from which a fee percentage is
 7 calculated includes “the total benefit made available to the settlement class, including costs, fees,
 8 and injunctive relief.”). This percentage falls well below the 25% benchmark in this Circuit as
 9 well as the mean and median awards in similarly-sized settlements. *See, e.g., Brian Fitzpatrick,*
 10 *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud.
 11 832, 839 Table 11 (2010) (finding a mean and median of 23.7% and 24.3% in settlements valued
 12 between \$72.5 to \$100 million); 5 *Newberg* § 15:81, Graph 2 (similar conclusion). Class
 13 Counsel’s lodestar—which remains subject to further review and auditing that could reduce the
 14 amount—is approximately \$8,157,663.70, which would yield a multiplier of 2.93. Cabraser Decl.
 15 ¶ 25.

16 Class Counsel will provide additional information and rationale for their request in the fee
 17 application and in the class notice, so that Class Members will have the opportunity to comment
 18 on or object to the requested fees prior to the final approval hearing.

19 **i. Preliminary Approval Guidance (7): Plaintiffs will not seek**
 20 **incentive awards for the Settlement Class Representatives.**

21 The Settlement Class Representatives will be entitled to the same compensation,
 22 calculated under the same formula, as all other Settlement Class Members, and will not seek
 23 incentive awards.

24
 25
 26 ⁸ Pursuant to ¶ 12.1 of the Settlement Agreement, the Parties continue to attempt to negotiate the
 27 amount of attorneys’ fees and expenses to be paid by Defendants. SA ¶ 12.1. If the Parties reach
 28 agreement, Plaintiffs “will submit the negotiated amount to the Court for approval.” *Id.* If they do
 not reach agreement, the Parties “will litigate the fee issue(s), and each Party will present its
 respective position to the Court for determination.” *Id.*

1 **j. Preliminary Approval Guidance (9): The Parties have proposed**
 2 **a reasonable schedule for the Settlement Approval Process that**
 provides Class Members sufficient time to exercise their rights.

3 The last step in the settlement approval process is the fairness hearing, at which the Court
 4 may hear any evidence and argument necessary to evaluate the Settlement and the application for
 5 attorneys’ fees and costs. The Parties propose a detailed schedule for final approval and
 6 implementation in the attached Proposed Order and incorporate it by reference herein.

7 **k. Preliminary Approval Guidance (10): The Settlement complies**
 8 **with the Class Action Fairness Act (“CAFA”).**

9 Pursuant to the Settlement Agreement, Defendants will serve notices in accordance with
 10 the requirements of 28 U.S.C. § 1715(b) within ten days of the filing of this motion. The
 11 Settlement fully complies with all of CAFA’s substantive requirements because it does not
 12 provide for a recovery of coupons (28 U.S.C. § 1712), does not result in a net loss to any Class
 13 Member (28 U.S.C. § 1713), and does not provide for payment of greater sums to some Class
 14 Members solely on the basis of geographic proximity to the Court (28 U.S.C. § 1714).

15 **l. Preliminary Approval Guidance (11): Information about past**
 16 **distributions in comparable class settlements.**

17 Pursuant to the Guidance, Plaintiffs provide an “easy-to-read” chart detailing certain
 18 information about three comparable settlements in the attached Cabraser Declaration. Cabraser
 19 Decl., Attachment 1. The three settlements compared are the three “Clean Diesel” settlements
 20 that were previously negotiated by Class Counsel in this MDL, namely—the 2.0-liter settlement
 21 (Dkt. 1685), the 3.0-liter settlement (Dkt. 2891), and the Bosch settlement (Dkt. 2918). As the
 22 chart shows, those three settlements have delivered more than \$10 billion in compensation to the
 23 classes, and each settlement has already reached or is on pace to reach participation rates of over
 24 90%. Cabraser Decl., Attachment 1.

25 The Settlement now before the Court will utilize a similar notice and outreach program,
 26 provides substantial compensation, and utilizes a simplified administration that involves only a
 27 single step for Class Members. Class Counsel are therefore able to predict with some confidence
 28 that much of the money available to Class Members will be paid out in this case as well. And

1 notably, to the extent money remains after the Class is paid, it too will be directed towards efforts
2 that benefit the interests of the Class and the causes advanced in this litigation.

3 **D. The Proposed Notice Plan provides the best practicable notice.**

4 Rule 23(e)(1) requires that before a proposed settlement may be approved, the Court
5 “must direct notice in a reasonable manner to all class members who would be bound by the
6 proposal.” “Notice is satisfactory if it ‘generally describes the terms of the settlement in sufficient
7 detail to alert those with adverse viewpoints to investigate and come forward and be heard.’”
8 *Churchill Vill., L.L.C., v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). For a Rule 23(b)(3)
9 Settlement class, the Court must “direct to class members the best notice that is practicable under
10 the circumstances, including individual notice to all members who can be identified through
11 reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). The best practicable notice is that which is
12 “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency
13 of the action and afford them an opportunity to present their objections.” *Mullane v. Cent.*
14 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

15 The proposed Notice Plan meets these standards. The Parties created this proposed
16 program—including both the content and the distribution plan—with Epiq, an experienced firm
17 specializing in notice in complex class litigation. The program includes a Short and Long Form
18 Notice, and a comprehensive Settlement Website, that are clear and complete, and that meet all
19 the requirements of Rule 23 and the Procedural Guidance.

20 The Long Form Notice is designed to explain Class Members’ rights and obligations
21 under the Settlement in clear terms and in a well-organized and reader-friendly format, and
22 follows the Ninth Circuit’s *en banc* guidance in *In re Hyundai*. 926 F.3d at 567 (“[S]ettlement
23 notices must ‘present information about a proposed settlement neutrally, simply, and
24 understandably.’”); *see also* Azari Decl., Attachment 3. It includes an overview of the litigation;
25 an explanation of the Settlement benefits; contact information for Class Counsel; the address for a
26 comprehensive Settlement Website that will house links to the notice, motions for approval,
27 attorneys’ fees, and other important documents; instructions on how to access the case docket;
28 and detailed instructions on how to participate in, object to, or opt out of the Settlement. *Id.*

1 There are also two forms of Short Form Notice: a Postcard Notice and an Email Notice.
2 *Id.*, Attachments 2, 4. The Postcard Notice is in eye-catching “postcard” form conveying the
3 basic structure of the Settlement and designed to capture Class Members’ attention with concise,
4 plain language. The Email notice is similarly structured and provides all basic information about
5 the Settlement and Class Members’ rights thereunder. Both forms of Short Form Notice direct
6 readers to the Settlement Website (where the Long Form Notice is available) for more
7 information.

8 The principal method of reaching Class Members will be through individual direct mail
9 notice, consisting of postcard notices by U.S. first class mail to all readily identifiable Class
10 Members. *Id.* ¶¶ 14-19. Direct mail notice will be coupled with individual notice by email
11 (designed specifically to avoid spam filters), a robust paid-media campaign including digital
12 banner advertisements and sponsored search listings, a toll-free telephone number, and a
13 Settlement Website. *Id.* ¶¶ 20-29. Based on his considerable experience, Mr. Azari anticipates
14 that the Notice Plan will “successfully deliver notice to more than 95% of the Settlement Class.”
15 *Id.* ¶ 11. This Notice Plan satisfies due process and Rule 23, and comports with all accepted
16 standards and this District’s Procedural Guidance.

17 **VI. CONCLUSION**

18 Plaintiffs respectfully request that the Court: (1) determine under Rule 23(e)(1) that it is
19 likely to approve the Settlement and certify the Settlement Class; (2) direct notice to the Class
20 through the proposed notice program; (3) appoint Lead Plaintiffs’ Counsel as Interim Settlement
21 Class Counsel to conduct the necessary steps in the Settlement approval process; and (4) schedule
22 the final approval hearing under Rule 23(e)(2).
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28

1 Dated: August 30, 2019

Respectfully submitted,

2 /s/ Elizabeth J. Cabraser

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CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2019, service of this document was accomplished pursuant to the Court’s electronic filing procedures by filing this document through the ECF system.

/s/ Elizabeth J. Cabraser
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