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:

Porsche Gasoline Cases

MDL No. 2672 CRB

The Honorable Charles R. Breyer

[AMENDED PROPOSED] ORDER OF DISMISSAL WITH PREJUDICE AND JUDGMENT GRANTING FINAL APPROVAL OF CLASS SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND COSTS

Before the Court is Plaintiffs' Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Costs (the "Motion") (Dkt. 8032). The background, procedural history, and Settlement terms were summarized in the Court's Order Granting Preliminary Approval of Class Settlement and Direction of Notice Under Rule 23(e), familiarity with which is presumed. *See* Dkt. No. 7997 ("Preliminary Approval Order"). In brief, the Settlement provides at least $80 million to compensate the Class through a non-reversionary settlement fund. Individual payments range from up to $200 to $1,109 per Class Vehicle, plus an additional $250 for Sport+ Class Vehicles subject to an ongoing recall.

Following the Court's Preliminary Approval Order, notice was sent to the Class via a Court-approved notice program, which "provided direct, individual notice" to "virtually all Class members." Keogh Decl. ¶ 3. The Court has considered the Parties' briefs and accompanying submissions, the reactions of Class members, and presentations at the hearing on these matters, and the Court hereby **GRANTS** the Motion.

I. CLASS CERTIFICATION AND SETTLEMENT APPROVAL

When presented with a motion for final approval of a class action settlement, a court first evaluates whether certification of a settlement class is appropriate under Federal Rule of Civil Procedure 23(a) and (b). Rule 23(a) provides that a class action is proper only if four requirements are met: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed. R. Civ. 23(a)(1)-(4). As relevant here, settlement certification of a Rule 23(b)(3) class requires that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members" and that (2) "a class action [be] superior to any other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3).

The Court concluded that the Class and its Representatives were likely to satisfy these requirements in its Preliminary Approval Order and finds no reason to disturb its earlier conclusions. *See* Dkt. No. 7997 at 3-4. The requirements of Rule 23(a) and Rule 23(b)(3) were satisfied then and they remain so now. As such, the Court concludes that certification of the Settlement Class is appropriate.

Assuming a proposed settlement satisfies Rules 23(a) and (b), the Court must then determine whether it is fundamentally fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2). Where, as here, "the parties negotiate a settlement agreement before the class has been certified, settlement approval requires a higher standard of fairness and a more probing inquiry than may be normally required under Rule 23(e)." *Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019); *In re Apple Inc. Device Performance Litig.*, No. 21-15758, 2022 WL 4492078, at *8 (9th Cir. Sept. 28, 2022).

In preliminarily approving the Settlement, the Court applied these standards and concluded that the Settlement appeared to be "fair, reasonable, and adequate." Dkt. No. 7997 at 2. Those

conclusions stand and are bolstered by the Class's favorable reaction to Settlement. Indeed, only two Class members have objected[1] to any aspect of the Settlement or the request for attorneys' fees and costs and only ten potential Class members have submitted valid opt-out requests.[2] In contrast, at the time Plaintiffs' reply brief was filed, with more than two months left in the claim period,[3] the settlement administrator had received claims (or ECR completion data) for 109,715 (21.71%) of the eligible VINs. This is already well-above the norm and reflects the Class' positive engagement with the Settlement.[4] This additional factor further supports final approval. *See, e.g., Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming district court's approval of settlement where forty-five of 90,000 class members objected to the settlement, and 500 class members opted out); *Van Lith v. iHeartMedia + Entm't, Inc.*, No. 1:16-CV-00066-SKO, 2017 WL 4340337, at *14 (E.D. Cal. Sept. 29, 2017) ("Indeed, '[i]t is established 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 Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)); *Cruz v. Sky Chefs, Inc.*, No. C-12-02705 DMR, 2014 WL 7247065, at *5 (N.D. Cal. Dec. 19, 2014) ("A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it.").[5]

As noted, two Class members and one non-class member also submitted objections. The

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[1] One objector, Matthew Killen, submitted an objection but is not a Class Member. Mr. Killen indicates that he purchased his 2013 Porsche Boxster on June 20, 2022. While this model is among the Fuel Economy Class Vehicles, Mr. Killen purchased his vehicle well after the 96-month useful life period compensated under the Settlement. Because Mr. Killen's vehicle does not qualify for compensation, he is not a Class member. The Court nevertheless considers the substance of his objection.

[2] The settlement administrator received 27 exclusion requests, eleven of which complied with requirements set forth in the settlement and class notice. One of the eleven Class members subsequently withdrew the exclusion request and submitted a claim.

[3] At the Fairness Hearing, the Parties expressed an interest in extending the deadline from November 7, 2022, to December 7, 2022. The Court approves the deadline extension.

[4] *See* Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns, *FTC Staff Report* (Sept. 2019) at 11, 21 (finding mean and median class action claims rates of 9% and 4%, respectively).

[5] To be clear, even with this positive response, the Court does not presume the Settlement should be approved, but simply considers it as one of the relevant factors in the analysis.

Court has considered them carefully and concludes they do not meaningfully "challenge the reasonableness of [the] class action settlement." *Ebarle v. Lifelock, Inc.*, No. 15-CV-00258-HSG, 2016 WL 5076203, at *7 (N.D. Cal. Sept. 20, 2016).

One objector, Wes Lochridge, raises a handful of complaints. Dkt. 8060. First, he objects that the claim process documentation requirements are too onerous because they require owners or lessees to submit their purchase agreements or lease contracts to get paid. *Id.* at 6-7. That is not entirely accurate. Class members are invited to submit documents to establish the time periods in which they possessed their vehicles—a fact that is relevant both to class membership and to individual compensation amounts. But as the Long Form Notice and Settlement Website make clear, the specific documents that Mr. Lochridge complains about are "examples" of sufficient documentation, not requirements. *See, e.g.*, Dkt. 7071-3 at 73 (Long Form Notice). In any case, Plaintiffs demonstrated that—long before Mr. Lochridge lodged his objection—Class members had an option to submit claims without any documentation at all (subject to verification from the claims administrator). Accordingly, the Court finds that the documentation feature of the claim program is flexible and reasonable under the circumstances.

Second, Mr. Lochridge contends that many Class members, namely those with Other Class Vehicles, do not have standing because testing results do not indicate an appreciable impact on the fuel economy of their vehicles. Dkt. 8060 at 7-12. When parties settle prior to class certification and summary judgment, "general factual allegations of injury resulting from the defendant's conduct" suffice to establish standing. *In re Apple Inc. Device Performance Litig.*, No. 21-15758, 2022 WL 4492078, at *8 (9th Cir. Sept. 28, 2022) (quoting *Transunion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) and *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs easily satisfy that standard here. They detail two schemes, one of which, the "Axle Ratio fraud," involves allegations that Porsche submitted "testing results from doctored vehicles that differed in material ways from the production models." Dkt. 7969 ¶ 69. The "vehicles affected by the Axle Ratio fraud," Plaintiffs allege, "obtained worse fuel economy than represented" and "were illegal to import or sell." *Id.* ¶ 77. Critically, Plaintiffs aver that the axle ratio fraud affected a long, enumerated list of vehicles, including every single Fuel Economy *and* Other Class Vehicle. *Id.* ¶ 79. Furthermore, Plaintiffs

explain that the discovery in this case suggests that Class members with Other Class Vehicles likely did suffer economic injury—even if that injury was less clear and more difficult to calculate than the damages for Fuel Economy Class members. The Court finds that these allegations and facts establish standing at this stage in the litigation and overrules this objection.

In a related argument, Mr. Lochridge contends that there are intra-class conflicts because the claims of some Class members are stronger than the claims of other Class members. The Court finds that there are no conflicts. As with other settlements in this MDL, it is precisely because Class Counsel represents both groups of Plaintiffs that they were able to achieve such outstanding results for both groups in relation to the respective strengths of their claims. *Cf. In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 609 (9th Cir. 2018). Mr. Lochridge's authority—*Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)—is distinguishable for the reasons set forth in Plaintiffs' reply. Those cases, unlike this one, sought to recover for two different groups, including one with speculative injuries that may or may not have accrued in the future. The Court overrules this objection.[6]

Objector Nicholas Bugosh asserts that all Class Vehicle meets all performance and fuel economy specifications, because he believes that his Class Vehicle does. Dkt. 8055 at 2. Mr. Bugosh's belief, however, does not undermine the expert testing derived using specific drive cycles in extremely controlled laboratory conditions. In any event, objectors like Mr. Bugosh, who "appear to support no recovery for the Class, . . . are adverse to the Class." *Perkins v. Linkedin Corp.*, No. 13-CV-04303-LHK, 2016 WL 613255, at *4 (N.D. Cal. Feb. 16, 2016). This is so because "the purpose of Rule 23(e)'s final approval process is the protection of absent class members, and not the Defendants." *Ko v. Natura Pet Prod., Inc.*, No. C 09-02619 SBA, 2012 WL 3945541, at *6 (N.D. Cal. Sept. 10, 2012) ("[A]n objection based on a concern for the Defendants and an apparent non-substantive assessment of the frivolity of the action are not germane to the issue of whether the settlement is fair."). Accordingly, the Court overrules Mr. Bugosh's objection.

[6] Mr. Lochridge's final objection relates to Class Counsel's requested fee award. The Court will address this objection in Section II, *infra*.

Finally, Mr. Killen objects to the Settlement's fuel compensation formula, offering his own alterative formula, and believes that all Class members are entitled to a buyback. The Court does not follow Mr. Killen's calculations, but in any event, he fails to meaningfully engage with the compensation formula that the settling parties used, which the Court finds to be fair and reasonable. As to Mr. Killen's objection that every Class member is entitled to a buyback, this Court has approved several settlements in this MDL with no such option. *See, e.g.*, Dkt. 6634-1 (Audi CO_2 settlement), Dkt. 3220 (3.0-liter diesel settlement). The lack of a buyback option does not render this settlement unfair or inadequate. Accordingly, the Court overrules Mr. Killen's objection.

The Court further finds that the Settlement is the result of arm's-length negotiations between experienced and informed counsel representing the interests of the Parties. Based on the high degree of scrutiny required in this Circuit, and reflected here and in the preliminary approval order, the Court concludes the Settlement Agreement and the Settlement embodied therein are fundamentally fair, adequate and reasonable and hereby finally approved in all respects. The Parties are hereby directed to perform its terms.

The terms of the Settlement Agreement and of this Order and Judgment shall be forever binding on Defendants, Plaintiffs and all other Class members (regardless of whether or not any individual Class Member submits a Claim Form), as well as their respective successors and assigns.

The releases set forth in section 10 of the Settlement Agreement, together with the definitions contained in section 2 of the Settlement Agreement relating thereto, are expressly incorporated herein in all respects. The releases are effective as of the Effective Date, except as provided in paragraph 2.33 of the Settlement Agreement. Accordingly, this Court orders that:

(a) Without further action by anyone, upon the Effective Date of the settlement, Plaintiffs and each of the other Class members, on behalf of themselves, and each of their respective heirs, executors, administrators, predecessors, successors, assigns, parents, subsidiaries, affiliates, officers, directors, agents, fiduciaries, beneficiaries or legal representatives, in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged each and every Released Claim (including Unknown Claims) against any of the Released Persons,

and shall forever be barred and enjoined from commencing, instituting, prosecuting, or continuing to prosecute any or all of the Released Claims against any of the Released Persons.

(b) Without further action by anyone, upon the Effective Date of the settlement, each of the Released Persons shall be deemed to have, and by operation of this Judgment shall have, fully, finally and forever released, relinquished, and discharged Plaintiffs, Class members (except any Class member who timely and validly requests exclusion from the Class), and Lead Counsel from all claims and causes of action of every nature and description (including Unknown Claims) arising out of, relating to, or in connection with, the institution, prosecution, assertion, settlement, or resolution of the Litigation, except claims to enforce the Settlement and the terms of the Settlement Agreement and claims or defenses arising from claims by any Class member concerning a deficiency in administration of the Settlement.

Notwithstanding the paragraph above, nothing in this Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the Settlement Agreement or this Judgment.

Only Class members filing valid and timely Claim Forms shall be entitled to participate in the Settlement and receive a distribution from the Settlement Fund for Fuel Economy Class Vehicles and Other Class Vehicles. Class members with Sport+ Class Vehicles shall be entitled to participate in the Settlement and receive a distribution from the Settlement Fund upon timely completion of an Emissions Compliant Repair ("ECR") for their Class Vehicle and without filing a Claim Form. All Class members shall, as of the Effective Date, be bound by the releases set forth herein whether or not they submit a valid and timely Claim Form.

II. THE REQUESTED ATTORNEYS' FEES AND COSTS

Class Counsel requests an award of $24 million in attorneys' fees and $710,733.89 in costs (for a total of $24,710,733.89) for work undertaken in prosecuting the claims resolved by the Settlement. This amount is to be paid from the Settlement Fund. *See* Dkt. No. 7971-1 ¶ 12.1.

Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "Attorneys' fees provisions included in proposed class action agreements are, like every other aspect of such agreements, subject to the determination

whether the settlement is 'fundamentally fair, adequate and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) (citation omitted). Thus, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

When, as here, a settlement establishes a calculable monetary benefit for a class, a court has discretion to award attorneys' fees based on a percentage of the monetary benefit obtained, or by using the lodestar method. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 1047834, at *1 (N.D. Cal. Mar. 17, 2017); *see also Staton*, 327 F.3d at 967. The $80 million (and up to $85 million) available to the class is non-reversionary, eliminating incentive to discourage Class members' participation in the Settlement and ensuring that the full value is put towards the interests of the Class in this litigation. Class Counsel's requested fee represents 30% of the minimum settlement value and 28.2% of the settlement's total potential monetary value. This modest upward departure from the 25% benchmark is more than justified under the facts of case, particularly given the exceptional results obtained for the Class. *See, e.g.*, *Hernandez v. Dutton Ranch Corp.*, No. 19-CV-00817-EMC, 2021 WL 5053476, at *6 (N.D. Cal. Sept. 10, 2021) (collecting cases and finding that"[d]istrict courts within this circuit . . . routinely award attorneys' fees that are one-third of the total settlement fund . . . [s]uch awards are routinely upheld by the Ninth Circuit"); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) (settlement recovering 36% of available damages was "exceptional result" justifying fee award of 33.33%) (collecting additional cases); *Andrews, et al. v. Plains All Am. Pipeline L.P., et al.*, No. CV154113PSGJEMX, 2022 WL 4453864, at *2 (C.D. Cal. Sept. 20, 2022) (settlement recovering between 25% and 65% of potential compensatory damages justified awarding 32% of $230 million common fund) (collecting additional cases).

Mr. Lochridge's final objection is that the Court should award no more than the 25% benchmark because, he believes, the settlement does not offer complete recovery for Fuel Economy Class members like him. Dkt. 8060 at 12-13. But courts commonly "justif[y] upward departures from the 25% benchmark" with "[f]ar lesser results (with 20% recovery of damages or less)." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-MD-2541-CW,

2017 WL 6040065, at *2 (N.D. Cal. Dec. 6, 2017), *aff'd*, 768 F. App'x 651 (9th Cir. 2019) (noting that "fee awards exceed[] the [25%] benchmark" in "*most* common fund cases"). Here, this settlement provides full compensation (or close to it) to Fuel Economy Class members because its inflation-adjusted estimate for the cost of premium gasoline is generous, and awards Fuel Economy Class members 15% on top of that recovery. The factual basis for Mr. Lochridge's objection is incorrect, and the objection is overruled.[7]

A lodestar cross-check also confirms the reasonableness of the award sought. Both the hours worked and the rates billed (a blended average rate of $439.76 per hour) are customary and reasonable. *See, e.g.*, *Volkswagen*, 2017 WL 1047834, at *5 (approving blended average hourly billing rate of $529 per hour in this MDL). The total lodestar yields a multiplier of 1.96 for work done as of filing of the final approval motion and 1.86 including a reasonable estimate of anticipated future work to implement and protect the Settlement. Either multiplier is well within the range of reason and supported by the facts of this case. *See, e.g.*, *Volkswagen*, 2017 WL 1047834, at *5 (approving multiplier of 2.63 in this MDL); *In re Volkswagen*, No. 2672 CRB (JSC), 2017 WL 2178787, at *3 (N.D. Cal. May 17, 2017) (approving multiplier of 2.32 in this MDL); *In re Volkswagen*, No. 2672 CRB (JSC), 2017 WL 3175924, at *4 (N.D. Cal. July 21, 2017) (approving multiplier of 2.02 in this MDL); Theodore Eisenberg, Geoffrey Miller, & Roy Germano, *Attorneys' Fees in Class Actions 2009-2013*, 92 N.Y.U. L. Rev. 937, 967 (2017) (finding that the average multiplier in cases valued over $67.5 million was 2.72).

In sum, both the percentage of the fund and the lodestar multiplier are reasonable in light of the substantial benefits obtained for the Class and the risks and complexities of this litigation. Moreover, as noted above, only one Class member, Mr. Lochridge, has objected to Class Counsel's fee request.

Class Counsel's request for $24 million in attorneys' fees and $710,733.89 in costs (for a

[7] Mr. Lochridge also argues that Class Counsel should identify and excise its lodestar relating to Other Class Vehicles. He asserts that Class members with these vehicles do not have standing so the time that Class Counsel spend on Other Class Vehicles was "misdirected." Dkt. 8060 at 13. But as this Court has already found, all Class members have standing. Accordingly, the time spent litigating and settling this case inures to the benefit of all Class members. This objection is also overruled.

total of $24,710,733.89) is hereby **GRANTED**.

Finally, Plaintiffs request a service award of $250 to be paid to the Settlement Class Representatives in addition to compensation available to them through the claims program. This is reasonable under the facts of this case, and supported by the time and efforts the Class Representatives dedicated to participating in this litigation. The request for service awards for each of the settlement class representatives is therefore **GRANTED**.

III. CONCLUSION

Accordingly, the Court hereby orders, adjudges, finds, and decrees as follows:

1. The Court hereby **CERTIFIES** the Settlement Class and **GRANTS** the Motion for Final Approval of the Settlement. The Court fully and finally approves the Settlement in the form contemplated by the Settlement Agreement (Dkt. No. 7971-1) and finds its terms to be fair, reasonable and adequate within the meaning of Fed. R. Civ. P. 23. The Court directs the consummation of the Settlement pursuant to the terms and conditions of the Settlement Agreement.

2. The Court **DISMISSES** the Action and all claims contained therein, as well as all of the Released Claims, with prejudice as to the Parties, including the Class. The Parties are to bear their own costs, except as otherwise provided in the Settlement Agreement.

3. Only those persons who timely submit valid requests to opt out of the Settlement Class are not bound by this Order and are not entitled to any recovery from the Settlement.

4. The Court **CONFIRMS** the appointment of Lead Plaintiffs' Counsel as Settlement Class Counsel.

5. The Court **CONFIRMS** the appointment of the Settlement Class Representatives listed as Plaintiffs in the Amended Consolidated Consumer Class Action Complaint.

6. The Court **CONFIRMS** the appointment of JND as Claims and Notice Administrator.

7. The Court **GRANTS** Class Counsel's request for attorneys' fees and costs, and **AWARDS** Class Counsel $24,710,733.89 in attorneys' fees and costs, to be allocated by Lead Counsel among the PSC firms that performed common benefit work in the Porsche Gasoline Cases pursuant to the terms of Pretrial Order No. 11.

8. The Court **AWARDS** the Settlement Class Representatives service awards of $250 each, to be paid in addition to the compensation available the Settlement Class Representatives through the settlement claims program.

9. The Court hereby discharges and releases the Released Claims as to the Released Parties, as those terms are used and defined in the Settlement Agreement.

10. The Court hereby permanently bars and enjoins the institution and prosecution by Class Plaintiffs and any Class Member of any other action against the Released Parties in any court or other forum asserting any of the Released Claims, as those terms are used and defined in the Settlement Agreement.

11. The Court further reserves and retains exclusive and continuing jurisdiction over the Settlement concerning the administration and enforcement of the Settlement Agreement and to effectuate its terms. Dkt. No. 7971-1 at ¶ 10.15.

IT IS SO ORDERED.

DATED: _____

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THE HONORABLE CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE