**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**
**Miami Division**

**S.D. Fla. Case No. 1:17-cv-23033-SCOLA**

**LILA WILSON, MATTHEW MARTINO, THOMAS WILSON, TERESA GARELLA, MARY BLUE, RYAN BROWN, BRIAN MAYTUM, LEIGH GLASBAND, NICK PANOPOULOS, CARISSA MACCHIONE, SYDNEE JOHNSON, JORGE CRUZ, DEBBIE GRAY, LORNE SPELREM, and ISMAEL ORRANTIA, on behalf of themselves and all others similarly situated,**

**Plaintiffs**

**v.**

**VOLKSWAGEN GROUP OF AMERICA, INC. and VOLKSWAGEN, AG,**

**Defendants.**
_____/

# PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF VOLKSWAGEN CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF CLASS NOTICE AND INCORPORATED MEMORANDUM OF LAW

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Plaintiffs respectfully move, under Rule 23 of the Federal Rules of Civil Procedure, for preliminary approval of the proposed Settlement with Volkswagen Group of America, Inc. and Volkswagen AG, preliminary certification of the Class defined in the Settlement, preliminary appointment of Settlement Class Counsel and the Settlement Administrator, and approval of the proposed notice to the Class.[1]

## INTRODUCTION

This litigation began nearly two years ago, when Plaintiff car owners and lessees sued Volkswagen Group of America, Inc. and Volkswagen AG (collectively "Volkswagen" or "Defendants") for economic damages arising from allegedly defective suspension systems in Plaintiffs' vehicles. Plaintiffs alleged that this common defect existed in model year 2009 through 2017 Volkswagen CC vehicles and was concealed from purchasers and lessees. Specifically, Plaintiffs alleged, the defective suspension systems do not allow technicians to adjust the vehicles' front camber or rear camber sufficiently when they inevitably deviate from Volkswagen's alignment specifications. It is claimed that this unfixable camber misalignment in turn causes improper and accelerated tire wear, which can present serious safety risks to vehicle occupants. Volkswagen has denied the existence of any defect in the suspension system of its model year 2009 through 2017 CC vehicles and has litigated this action vigorously, contesting the merits of Plaintiffs' claims.

Now, after extensive negotiations, in good faith and at arm's length, by counsel experienced in consumer class action matters, and with the benefit of significant discovery, Volkswagen has agreed to the proposed Settlement of this vigorously contested case that

[1] The Settlement Agreement is attached hereto as Exhibit A. Capitalized terms not defined herein shall have the same definitions and meanings ascribed to them in the Settlement.

provides substantial benefits to the Class. The estimated value of the Settlement, according to the valuation expert retained by Plaintiffs, is approximately $57.3 million.

The primary features of the Settlement include:

- Future Tire Rotation Certificates: Volkswagen will issue a certificate of eligibility to Settlement Class Members of up to two (2) free tire rotations for their Settlement Class Vehicle to be performed at recommended tire rotation intervals by authorized Volkswagen dealers, until the Settlement Class Vehicle reaches an original odometer mileage of one hundred ten thousand (110,000) miles. These certificates automatically transfer and remain with the Settlement Class Vehicle upon its sale.

- Pro Rata Out-of-Pocket Claims Process: Settlement Class Members may submit claims for pro rata reimbursement of past expenses incurred for both Qualifying Tire Replacements and Qualifying Tire Rotations. These claims will be reviewed and managed by the Claims Administrator.

    - Past Qualifying Tire Replacements: Settlement Class Members may submit claims for pro rata reimbursement of out-of-pocket expenses for Qualifying Tire Wear Replacements paid for prior to the Effective Date of the Settlement. Specifically, Settlement Class Members may submit claims for Qualifying Tire Wear Replacements performed within 35,000 miles since the date of installation of a tire with the Relevant Tire Specifications on the Settlement Class Vehicle, at a pro rata amount to be calculated based on the following formula: (1- (tire mileage/35,000)) x (cost of replacement tire). That amount is limited to a maximum of $209.00 for each qualifying 235/45R17 replacement tire and $254.00 for each qualifying 235/40R18 replacement tire.

    - Past Qualifying Tire Rotations: Class Members may also submit claims for pro rata reimbursement of out-of-pocket expenses for Qualifying Tire Rotations paid for prior to the Effective Date of the Settlement. Specifically, Settlement Class Members may submit claims for Qualifying Tire Rotations performed within 9,000 miles after either the date of the last rotation of the same tire(s), or if the tire(s) had not been previously rotated, the date of installation of said tire(s), at a pro rata amount to be calculated based on the following formula: (1-(tire mileage/9,000)) x (cost of tire rotation). That amount is limited to $56.00 for each qualifying tire rotation.

The proposed Settlement is fair, reasonable, and adequate. Indeed, it is an outstanding result for the Settlement Class. It will provide cash recovery to eligible Settlement Class

Members for past out-of-pocket expenses and increase tire longevity by providing free tire rotations, which also will encourage Settlement Class Members to bring their vehicles to dealerships for scheduled tire rotations. The Class described in the Settlement, moreover, satisfies all the requirements of Rule 23 for settlement purposes. And the proposed notice to Class Members is designed to communicate the Settlement to the Class and far exceeds all applicable requirements of law, including Rule 23 and constitutional due process.

Accordingly, Plaintiffs seek preliminary approval of the Settlement, preliminary certification of the Class defined in the Settlement, preliminary appointment of Settlement Class Counsel and the Settlement Administrator, and approval of the proposed notice to the Class. A proposed Preliminary Approval Order for the Settlement is attached as an exhibit to this motion.

## BACKGROUND AND PROCEDURAL HISTORY

### A. Factual Background.

As the Court is generally familiar with the facts giving rise to Plaintiffs' claims and Volkswagen's defenses, Plaintiffs will focus the following summary on the facts pertinent to this motion.

In 2017, Plaintiffs sued Volkswagen on behalf of themselves and all others similarly situated. Plaintiffs, who owned or leased model year 2009 through 2017 CC vehicles manufactured or distributed by Volkswagen, alleged that their vehicles were equipped with a defective suspension system. The suspension system in their vehicles, Plaintiffs alleged, share a common, uniform defect: the system's components fail to allow technicians to sufficiently adjust the vehicle's front camber and rear camber when they deviate from Volkswagen's alignment specifications. Plaintiffs alleged that as a result of the CC's misaligned cambers, its tires experience improper and accelerated wear.

Plaintiffs alleged that they suffered economic damages as a result of purchasing defective suspension systems and vehicles that were inaccurately represented to be defect-free. In addition, Plaintiffs claimed to have suffered damages in the form of out-of-pocket expenses, including the cost of otherwise premature tire rotations and replacements.

Defendants deny these claims and maintain that there was and is no defect in the Settlement Class Vehicles' suspension system, nor is there any improper issue with the vehicles' tire rotation schedules, that caused or contributed to the types of tire conditions alleged by Plaintiffs. Defendants maintain that these vehicles (including their suspension system and tires) were properly designed, manufactured and distributed, were reasonably safe, and functioned and performed in a superior manner. Defendants also maintain that no warranties (express or implied) were breached, nor were any consumer statutes or other statutes violated in any way.

**B. Procedural History.**

On August 10, 2017, Plaintiffs[2] filed a class action complaint in the U.S. District Court for the Southern District of Florida, *Wilson, et al. v. Volkswagen Group of America Inc. et al.*, 1:17-cv-23033 (S.D. Fla.), asserting economic loss claims against Volkswagen Group of America and Volkswagen AG for the allegedly defective suspension system contained in model year 2009 through 2017 Volkswagen CC vehicles.[3] (ECF No. 1.) On October 12, 2017, Volkswagen Group of America filed a motion to dismiss. (ECF No. 18.)

[2] Lila Wilson, Matthew Marino, Thomas Wilson, Teresa Garella, Mary Blue, Ryan Brown, Brian Maytum, Leigh Glasband, and Nick Panopoulous were the named plaintiffs in that complaint.

[3] On August 14, 2017, a second putative action containing the same allegations was filed against Defendants by many of the same plaintiffs in the U.S. District Court for the District of New Jersey, *Martino et al. v. Volkswagen Group of America Inc. et al.*, 1:17-cv-06035 (D.N.J.) ("*Martino*"). *Martino* was subsequently transferred to this Court for all further proceedings. The *Martino* case, which has remained dormant by virtue of this case, is included in this proposed Settlement.

On November 20, 2017, Plaintiffs filed a First Amended Class Action Complaint.[4] (ECF No. 26.) On November 21, 2017, the Court entered an order finding Volkswagen Group of America's motion to dismiss moot upon the filing of Plaintiffs' First Amended Class Action Complaint. (ECF No. 27.)

On January 12, 2018, Volkswagen Group of America filed a motion to dismiss Plaintiffs' First Amended Class Action Complaint. (ECF No. 34.) In its motion, Volkswagen Group of America zealously argued that twenty-one of Plaintiffs' twenty-nine claims should be dismissed for a variety of reasons, including failure to meet the heightened pleading standard required for fraud claims, failure to plead Volkswagen's knowledge of the defect, and expiration of various statutes of limitation. *Id.* Plaintiffs filed an opposition to Volkswagen Group of America's motion to dismiss on February 26, 2018 (ECF No. 41), and Volkswagen Group of America filed its reply to Plaintiffs' opposition on March 30, 2018 (ECF No. 48). On April 3, 2018, Volkswagen AG filed its own motion to dismiss, incorporating the arguments raised by Volkswagen Group of America and asserting additional arguments for dismissal. (ECF No. 49.) Plaintiffs filed an opposition to Volkswagen AG's motion on April 27, 2018 (ECF No. 52), and Volkswagen AG filed its reply on May 4, 2018 (ECF No. 53).

On September 26, 2018, this Court entered an order granting in part and denying in part Volkswagen Group of America's motion to dismiss. (ECF No. 78.) Specifically, the Court granted Volkswagen of America's motion to dismiss certain Plaintiffs' Magnuson-Moss Warranty Act claims and certain state warranty, fraud, and statutory claims. The Court dismissed these claims with prejudice. *Id.* at 24–25. Plaintiffs filed a motion for partial reconsideration of the Court's order with respect to certain claims and alternatively sought leave to amend their

[4] The First Amended Class Action Complaint added Carissa Macchione, Sydnee Johnson, Jorge Cruz, Debbie Gray, Lorne Spelrem, and Ismael Orrantia as plaintiffs.

complaint. (ECF No. 87.) The Court denied Plaintiffs' motion for reconsideration entirely on November 30, 2018. (ECF No. 90.) The Court, however, also denied Volkswagen AG's motion to dismiss on November 30, 2018. (ECF No.89.) On October 24, 2018, both Defendants filed their respective answers and affirmative defenses. (ECF Nos. 84 and 85.) Defendants asserted no less than forty-five (45) affirmative defenses. *Id.*

Significant discovery has taken place in this case. Over the past two years, Defendants have produced a substantial volume of documents through discovery. Plaintiffs' counsel have dedicated teams of attorneys to the laborious work of reviewing these documents, many of which are in German, requiring expensive and time-consuming translation, at significant expense—which Plaintiffs have borne. Plaintiffs also have retained and worked extensively with multiple experts—including the preparation of initial expert reports—on liability and damages issues in an effort to prepare the case for trial.

**C. Settlement Negotiations.**

Hard-fought preliminary settlement discussions began in November of 2018, between Plaintiffs' counsel and Volkswagen's counsel. During these preliminary discussions as well as subsequent negotiations, the Parties discussed their relative views of the law, facts, and potential relief for the proposed Class and exchanged a series of counterproposals for key conceptual aspects of a potential settlement. This included an in-person mediation session before Francis L. Carter, Esq. After numerous subsequent phone conferences, the Parties ultimately reached an agreement in principle in June of 2019. On June 27, 2019, as the Parties negotiated and drafted the terms of the written Settlement, the Parties informed the Court that "they were nearing a proposed class settlement to resolve the claims asserted in this action." (ECF No. 101.) The Court ordered the Parties to file a motion for preliminary approval of the settlement and

certification of the Settlement Class no later than July 26, 2019. (ECF No. 102.) The Parties continued to draft and negotiate the precise terms of the Settlement Agreement and related documents for several weeks, finalized their agreement, and signed the Settlement Agreement on July 26, 2019. At all times, negotiations were adversarial, non-collusive, and at arm's length.

## TERMS OF THE SETTLEMENT

The terms of the Settlement are detailed in the Agreement, attached hereto as Exhibit A. The following is a summary of the material terms of the Settlement.

### A. The Settlement Class.

The Class is an opt-out class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The Settlement Class is defined as:

> All persons and entities who, as of the Notice Date, purchased or leased a Settlement Class Vehicle, as defined in Section I (V) of this Agreement, in the United States of America and Puerto Rico.
>
> Excluded from the Settlement Class are (a) anyone claiming solely personal injury, property damage (other than to the vehicle itself) and/or subrogation; (b) all Judges who have presided over the Wilson Action and Martino Action and their spouses; (c) all current employees, officers, directors, agents and representatives of Defendants, and their family members; (d) any affiliate, parent or subsidiary of Defendants and any entity in which Defendants have a controlling interest; (e) any used car dealer or person/entity engaged in the business of selling used cars; (f) anyone who purchased a Settlement Class Vehicle for the purpose of commercial resale; (g) anyone who purchased a Settlement Class Vehicle with salvaged title and/or any insurance company who acquired a Settlement Class Vehicle as a result of a total loss; (h) any insurer of a Settlement Class Vehicle; (i) issuers of extended vehicle warranties and service contracts; (j) any Settlement Class Member who, prior to the date of this Agreement, settled with and released Defendants or any Released Parties from any Released Claims; and (k) any Settlement Class Member that files a timely and proper Request for Exclusion from the Settlement Class.

Exhibit A (§ I.T).

"Settlement Cass Vehicles" are defined as model year 2009 through 2017 Volkswagen CC vehicles imported and distributed by Defendant Volkswagen Group of America, Inc. for sale or lease in the United States and Puerto Rico. *See* Exhibit A (§ I.U).

Based on Volkswagen's sales information, Plaintiffs estimate that there are at least 120,000 potential members of the Settlement Class.

**B. Future Tire Rotation Certificates.**

Pursuant to the Settlement, Volkswagen will issue a certificate of eligibility for current owners and lessees of the Settlement Class Vehicles awarding up to two (2) free tire rotations at an authorized Volkswagen dealer for each Settlement Class Vehicle, upon the Effective Date of the Settlement, until the vehicle reaches an original odometer mileage of 110,000 miles. This benefit will be automatically transferred and will remain with the Settlement Class Vehicle upon the sale of the vehicle, to the extent the two (2) free tire rotation limit has not already been reached. The certificate of eligibility allows the tire rotations to be performed at recommended tire rotation intervals at authorized Volkswagen dealers. These certificates of eligibility are valid until the Settlement Class Vehicle reaches an original odometer mileage of 110,000 miles. *See* Exhibit A (§ II.A.). This is not only an economic benefit for Class Members, but it also encourages Class Members to rotate their tires at recommended intervals to maximize performance.

**C. Out-of-Pocket Pro Rata Reimbursement for Past Qualifying Tire Wear Replacements Claims Process.**

Another critical feature of the Settlement is an Out-of-Pocket Pro Rata Reimbursement Claims Process for past purchases of replacement tires exhibiting Qualifying Tire Wear on Settlement Class Vehicles. Under the Settlement, Volkswagen will provide pro rata reimbursement for past out-of-pocket tire replacement expenses incurred and paid for by eligible Class Members prior to the Effective Date and within 35,000 miles of use of the replaced tire. Specifically, Class Members that purchased an OE Continental ContiProContact Tire or a replacement tire having the Relevant Tire Specifications on a Settlement Class Vehicle at a Volkswagen dealership or independent service center due to Qualifying Wire Tear will be entitled to receive a pro rata reimbursement of certain out-of-pocket expenses paid for the tire replacement, in an amount to be calculated based on the following formula: (1- (tire mileage/35,000)) x (cost of replacement tire). Class Members are entitled to recover up to $209.00 for each qualifying 235/45R17 replacement tire and $254.00 for each qualifying 235/40R18 replacement tire. *See* Exhibit A (§ II.B.). This Tire Replacement Claims Process permits Class Members to recover at least some of the expenses they incurred in replacing their tires on their Settlement Class Vehicles that exhibited Qualifying Tire Wear.

The Tire Replacement Claim Form, moreover, is straightforward, simple, and not burdensome. *See*, *e.g.*, Exhibit A at Ex. 1. It will be provided to Class Members via the Settlement website and will also be physically mailed to Class Members along with the Class Notice Form. The Settlement Claim Administrator, Epiq Global, will oversee the Claims Process, including the eligibility of claims for reimbursement. Claims Forms post-marked no

later than 150 days after the Notice Date[5] will be reviewed by the Claim Administrator for reimbursement. In addition to properly completing the Claims Form, Class Members must only provide Proof of Tire Replacement Expense(s), Proof of Adherence to the Vehicle's Maintenance Schedule,[6] and, *inter alia,* an affirmation that the Class Member has not been previously reimbursed for the expenses for which reimbursement is sought on the Claims Form. If any claim is denied by the Claim Administrator for being deficient, the Claim Administrator is required to provide the Class Member with a description of the deficient supporting information and an opportunity to cure such deficiency.

For each approved reimbursement claim, the Claim Administrator, on behalf of Defendants, shall mail to the Settlement Class Member, at the address listed on the Claims Form, a reimbursement check, which will be sent out no later than 75 days after the date of receipt of the Claim or within 75 days of the Effective Date, whichever is later. Exhibit A (§ III.B.). There is no limit on the amount of money that Volkswagen is required to pay to for valid claims submitted under this provision of the Settlement.

**D. Out-of-Pocket Pro Rata Reimbursement for Past Qualifying Tire Rotations Claims Process.**

In addition to providing a claims process for pro rata reimbursement of Qualifying Tire Wear replacements, the Settlement also provides for pro rata reimbursement of past Qualified

[5] In addition, if the Effective Date of the Settlement occurs on a date that is more than 150 days from the Notice Date, and during the period of time between the end of the 150-day claim period and the Effective Date, the Settlement Class Member incurs an out-of-pocket expense that is covered for pro rata reimbursement under the Settlement, the Class Member may submit a claim to the Claim Administrator either online, or by mail post-marked, no later than thirty (30) days after the Effective Date.

[6] If a Class Member is unable to obtain maintenance of documents and records despite having undertaken a good faith effort to obtain them, the Settlement Class Member may submit a Declaration under penalty of perjury detailing what efforts were made to obtain the records and attesting to adherence to the vehicle maintenance schedule. *See* Exhibit A (§ I.M.)

Tire Rotation expenses. Under the Settlement, Volkswagen will provide pro rata reimbursement for certain past out-of-pocket tire rotation expenses that were incurred and paid for prior to the Effective Date of the Settlement and within 9,000 miles of tire usage from the last, most recent tire rotation. Specifically, Class Members may apply for pro rata reimbursement of tire rotations performed within 9,000 miles after either the date of the last rotation of the same tires, or, if the tire(s) had not previously been rotated, the date of installation of said tire(s) on the Settlement Class Vehicle. The Settlement Class Member is entitled to a pro rata reimbursement of certain out-of-pocket expenses paid for the rotation in an amount calculated based on the following formula: (1 – (tire mileage/9,000)) x (cost of tire rotation). Class Members may receive up to $56.00 for each qualifying tire rotation. *See* Exhibit A (§ II.C.). This confers a substantial benefit to Class Members that can recover at least some of the expenses incurred on past tire rotations.

The Tire Rotation Claim Form, moreover, is straightforward, simple, and not burdensome. *See*, *e.g.*, Exhibit A at Ex. 1. It will be provided to Class Members via the Settlement website and will also be physically mailed to Class Members along with the Class Notice.

The Settlement Claim Administrator, Epiq Global, will oversee the Out-of-Pocket Claims Process, including the eligibility of claims for reimbursement. Claims Forms post-marked no later than 150 days after the Notice Date[7] will be reviewed by the Claim Administrator for reimbursement. In addition to properly completing the Claims Form, Class Members must only provide Proof of Tire Rotation Expense(s), and an affirmation that the Class Member has not been previously reimbursed for the expenses for which reimbursement is sought on the Claims Form. If any claim is denied by the Claim Administrator for being deficient, the Claim

[7] See also footnote 5, *supra*.

Administrator is required to provide the Class Member with a description of the deficient supporting information and an opportunity to cure such deficiency.

For each approved reimbursement claim, the Claim Administrator, on behalf of Defendants, shall mail to the Settlement Class Member, at the address listed on the Claims Form, a reimbursement check, which will be sent out no later than 75 days after the date of receipt of the Claim or within 75 days of the Effective Date, whichever is later. Exhibit A (§ III.B.). Once again, there is no limit on the amount of money that Volkswagen must pay with respect to valid claims submitted under this provision of the Settlement.

**E. Release.**

Upon entry of final judgment, Class Members agree to give a release to the "Released Parties," defined essentially as Volkswagen and all related entities, persons and suppliers of the subject tires of, *inter alia*, all claims "which in any way relate to the suspension system and related components of, tire rotation and maintenance recommendations, instructions and warnings concerning, and/or excessive, uneven and/or premature wear of original or replacement tires of, Settlement Class Vehicles," and all claims that were or could have been asserted in the Actions. Exhibit A (§ I.Q.). There are two important exceptions carved from the releases: The Settlement explicitly provides that its Release "expressly exempts claims for personal injuries and property damage (other than damage to the Settlement Class Vehicles and/or their original or replacement tires)." *Id.*

**F. Settlement Class Notice Plan.**

The Settlement contains a straightforward Notice Plan designed to satisfy all applicable laws, including Rule 23 and constitutional due process. The Claim Administrator will be responsible for executing the Settlement Class Notice Plan. The Claim Administrator will, within

100 days after entry of the Preliminary Approval Order, cause individual Class Notice, substantially in the form attached to the Settlement as Exhibit 5, together with the Claim Forms, attached as Exhibit 1 to the Settlement, to be mailed by first class U.S. mail to the current or last known addresses of all reasonably identifiable Settlement Class Members. The Claim Administrator must also re-mail any Direct Mailed Notices returned by the U.S. Postal Service with a forwarding address, and, for returned mail without a forwarding address, research better addresses and promptly re-mail copies of the applicable notice to any better addresses.

The Class Notice will advise Class Members of the general terms of the Settlement, including information on Class membership, the relief to be provided, and what claims are to be released; notify Class Members of their right to opt out of or object to the Settlement; and disclose the amount of attorney's fees and expenses that Settlement Class Counsel may seek, as well as individual service awards to the Class Representatives.

The Claim Administrator will also create and maintain a Settlement website containing pertinent information regarding the Settlement, including:

1. Instructions on when and how to submit a Claim for reimbursement either by mail or online submission;

2. Instructions on how to contact the Claim Administrator, Defendants' Counsel, and Class Counsel for assistance;

3. A means by which a current owner or lessee of a Settlement Class Vehicle may download or otherwise request a copy of the vehicle's certificate of eligibility for free future tire rotations covered under this Settlement;

4. A copy of the Claim Form, Class Notice and this Settlement Agreement; and

5. Any other relevant information agreed upon by counsel for the Parties.

Exhibit A (§ IV.B.6.). The details of the proposal for implementing the Notice Plan are set forth in the Declaration of Cameron R. Azari, Esq., of Epiq Systems, Inc., the proposed Claim Administrator. *See* Exhibit B. Defendants shall be responsible for the costs of the Settlement

Notice Plan.

To comply with the Class Action Fairness Act, the Claim Administrator shall also send to each appropriate State and Federal official the materials specified in 28 U.S.C. § 1715 and otherwise comply with its terms. The identities of such officials and the content of the materials shall be mutually agreeable to the Parties, through their respective counsel.

**G. Settlement Claim Administration.**

The Claim Administrator is charged with administering all aspects of the Settlement. The Parties agree that Epiq Global shall serve as the Claim Administrator. The Claim Administrator's responsibilities will include (1) sending out direct mail notice of the Settlement, (2) creating and maintaining the Settlement website, and (3) overseeing and administering the Claims Process for both pro rata qualifying tire replacement reimbursement claims and pro rata qualifying tire rotation reimbursement claims, a function which requires the exercise of discretion to determine the reasonableness and eligibility of Class Members' claims for out-of-pocket expenses and to deny any fraudulent claims. Defendants shall be responsible for the costs of the Claim Administrator. *See* Exhibit A (§ III.A-B.)

**K. Attorney's Fees and Incentive Awards for Class Representatives.**

Class Counsel, Podhurst Orseck, P.A., Kreher & Trapani LLP, and Pogust Millrood LLC, did not reach an agreement with Volkswagen on attorney's fees and expenses until after agreeing to the principal terms set forth in the Settlement Agreement. The Settlement Agreement provides that Settlement Class Counsel agree to limit their request to the Court for attorney's fees and expenses to a collective combined amount of no more than $7.7 million.[8] Likewise,

[8] This percentage is in keeping with prevailing law and practice in this Circuit. *See*, *e.g.*, *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999); *In re Checking Account Overdraft*

Volkswagen agrees not to oppose such a request. Attorney's fees and expenses awarded to Settlement Class Counsel for work done on behalf of the Class will be paid by Volkswagen.

The Parties agreed that the Court's resolution of the issue of attorney's fees and expenses shall have no bearing on the Settlement Agreement. In particular, an Order solely relating to attorney's fees or expenses shall not operate to terminate or cancel the Settlement Agreement or affect or delay its Effective Date.

Finally, it is agreed that Plaintiffs' counsel may petition the Court for service awards of up to $2,500 per Settlement Class Representative[9] in order to compensate them for their efforts on behalf of the Class.

## MEMORANDUM OF LAW

### A. The Legal Standard for Preliminary Approval.

Rule 23(e) requires judicial approval for the compromise of claims brought on a class basis. "Although class action settlements require court approval, such approval is committed to the sound discretion of the district court." *In re U.S. Oil and Gas Litig*., 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as . . . the realization that compromise is the essence of settlement." *Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See*, *e.g*., *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466

*Litig.*, 830 F. Supp. 2d 1330, 1365-66 (S.D. Fla. 2011); *Almanazar v. Select Portfolio Servicing, Inc.*, No. 14-cv-22586-FAM, 2016 WL 1169198, at *4 (S.D. Fla. Mar. 25, 2016).

[9] Specifically, Lila Wilson, Matthew Martino, Thomas Wilson, Teresa Garella, Mary Blue, Brian Maytum, Leigh Glasbland, Nick Ponopoulous, Carissa Macchione, Sydnee Johnson, Debbie Gray, Lorne Spelrem, and Ismael Orrantia are entitled to service awards.

(S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) (citing cases).

The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness." 4 NEWBERG § 11.26; *Almanazar*, 2015 WL 10857401, at *1. "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co*., No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). "Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness." *Almanazar*, 2015 WL 10857401, at *1; *see* MANUAL FOR COMPLEX LITIGATION, Third, § 30.42 (West 1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

When determining whether a settlement is ultimately fair, adequate and reasonable, recently amended Rule 23(e)(2) instructs courts to consider whether: (1) "the class representatives and class counsel have adequately represented the class; [(2)] the proposal was negotiated at arm's length; [(3)] the relief provided for the class is adequate[;] and [(4)] the proposal treats Class Members equitably relative to each other." Fed. R. Civ. P. 23(e)(2); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019). Additionally, courts in this circuit have looked to: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible

recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986; *see*, *e.g.*, *Smith*, 2010 WL 2401149, at *2. All of these factors support preliminary approval of the settlement.

**B. The Settlement Satisfies the Criteria for Preliminary Approval.**

Each of the relevant Rule 23(e)(2) factors weighs in favor of Preliminary Approval of the Settlement. First, Class Representatives and Class Counsel have adequately represented the Class. Fed. R. Civ. P. 23(e)(2)(A). Second, the Settlement was reached in the absence of collusion and is the product of good-faith, informed, and arm's-length negotiations by competent counsel of a vigorously contested case. Fed. R. Civ. P. 23(e)(2)(B). Third, the relief obtained by the Settlement is more than adequate, considering the costs, risks, and delay associated with trial as well as appeal, the relief provided to the Class, and the service awards provided to Class Representatives and attorney's fees sought. Fed. R. Civ. P. 23(e)(2)(C).[10] Fourth, the Settlement treats all Class Members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). In sum, a preliminary review of the factors related to the fairness, adequacy, and reasonableness of the Settlement demonstrates that the Settlement fits well within the range of fairness, adequacy and reasonableness, such that Preliminary Approval is appropriate.

**1. Class Representatives and Class Counsel Have Adequately Represented the Class.**

Plaintiffs' interests are similarly aligned and coextensive with those of absent Class Members. Plaintiffs were subjected to the same conduct by Volkswagen and suffered the same

[10] There are no agreements by the Parties that are not reflected in the Settlement. *See* Fed. R. Civ. P. 23(e)(2)(c)(iv).

injuries as absent Class Members. More importantly, absent Class Members will equally benefit from the relief provided by the Settlement. Class Counsel has also adequately represented the Class in this litigation and Settlement. Plaintiffs are represented by qualified and competent counsel with extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Indeed, Class Counsel devoted substantial time and resources to the vigorous litigation of the Action from its inception through the date of the Settlement.

Moreover, in evaluating Class Representatives' and Class Counsel's adequacy, courts consider whether Class Counsel and Plaintiffs "had an adequate information base" before negotiating and entering into the settlement. *See* Rule 23(e)(2)(A) advisory committee's note to 2018 amendment. Indeed, courts consider the stage of proceedings at which settlement is achieved "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma v. Am. Express Co*., 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005). Plaintiffs settled the Action with the benefit of extensive document discovery, their own deposition testimony and the deposition testimony of a key third-party witness, as well as extensive discussions with experts and consultants. As noted, review of those documents and consultation with experts positioned Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and prospects for success at class certification, summary judgment, and trial. *Id*.

Furthermore, Class Counsel have a thorough understanding of the practical and legal issues they would continue to face litigating these claims against Volkswagen. In this case, Plaintiffs face a number of serious challenges, including class certification and summary judgment. The Settlement, with its substantial benefits to the Class, is an outstanding result

given the complexity of the Action and the significant barriers that stand between the present juncture and final judgment including the sufficiency and ability to prove the claims; contested issues of liability, causation and damages; *Daubert* challenges to damage experts' methodologies; class certification; interlocutory Rule 23(f) appeal of class certification; motions for summary judgment; motions in limine; trial; and post-trial appeals.

**2. The Settlement is the Product of Good-Faith, Informed, and Arm's-Length Negotiations.**

Rule 23(e)(2)(B) requires courts to consider whether "the proposal was negotiated at arm's length." And courts have noted that class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton*, 559 F.2d at 1330; *see also Lipuma*, 406 F. Supp. at 1318-19 (S.D. Fla. 2005) (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arm's-length negotiations by experienced Class Counsel").

The Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this case. The Parties engaged in extensive, adversarial negotiations for several months, engaged the services of an experienced mediator, and exchanged countless proposals while the litigation continued on a parallel track. These negotiations were conducted in the absence of collusion.

Furthermore, counsel for each party is particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Counsel zealously represented their clients' interests through protracted litigation before this Court for approximately two years.

In negotiating this Settlement in particular, Class Counsel had the benefit of years of experience and a familiarity with the facts of this Action as well as with other cases involving similar claims. Class Counsel conducted a thorough investigation and analysis of Plaintiffs' claims and Volkswagen's defenses and engaged in formal discovery with Volkswagen and third parties. Class Counsel's review of that discovery enabled them to gain an understanding of the evidence related to central questions in the case and prepared counsel for well-informed settlement negotiations. *See Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *11 (S.D. Fla. Jan. 31, 2008) (finding that "Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation" where counsel conducted two 30(b)(6) depositions and obtained "thousands" of pages of documentary discovery).

**3. The Relief Provided to Class Members is Adequate.**

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiffs maintain that the claims asserted are meritorious, that any motion for class certification would prove successful, and that Plaintiffs would prevail if this matter proceeded to trial. Volkswagen, however, maintains that Plaintiffs' claims are unfounded and cannot be litigated as a class action. Volkswagen denies any potential liability and has shown a willingness to litigate Plaintiffs' claims vigorously. The Parties have concluded that the benefits of settlement in this case outweigh the risks attendant to continued litigation, which include, but are not limited to, the time and expenses associated with proceeding to trial, the time and expenses associated with appellate review, and the countless uncertainties of litigation, particularly in the context of a large and complex litigation. Indeed, Rule 23(e)(2)(C)(i) instructs courts to consider whether the

costs, risks, and delay of trial and appeal militate toward a finding that the Settlement provides adequate relief to the class. When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.*

Courts have determined that settlements may be reasonable even where Plaintiffs recover only part of their actual losses. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"). "The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable." *Lipuma*, 406 F. Supp. 2d at 1323.

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The value of the Settlement, estimated by Plaintiffs' valuation expert to be at least $57.3 million, is significant by any measure. The relief afforded through the Settlement, moreover, directly addresses the issues of liability and damages alleged in the case. It compensates Class Members for the qualifying enumerate tire-related expenses they previously incurred, and provides current owner/lessee Class Members with two future free tire rotations per each Settlement Class Vehicle, subject to certain mileage limits, which addresses the tire wear that Class Vehicles may suffer in the future. Considering the substantial benefits that the Settlement provides to Class Members, the Settlement is fair and represents a reasonable recovery for the Class in light of Volkswagen's defenses and the challenging and unpredictable path of litigation Plaintiffs would have faced absent a settlement.

**(a) The Costs and Risks of Trial.**

While Plaintiffs and Settlement Class Counsel are confident in the strength of their case, they are also pragmatic in their awareness of the various defenses available to Volkswagen, as well as the risks inherent to litigation. Volkswagen claims and maintains that its model year 2009 through 2017 CC vehicles are not defective and have defect-free suspension systems. Moreover, Volkswagen argues that it had no knowledge of any alleged suspension system defect or problem, that the vehicles' tires do not wear improperly and/or prematurely as claimed by Plaintiffs, and that no warranties (express or implied) were breached or statutes or laws violated in connection with the vehicles and their tires. Volkswagen also challenges the legal merit of Plaintiffs' claims and Plaintiffs' damages theories. Based on the discovery that has been conducted to date, Plaintiffs believe that they could prevail in a litigated class certification battle. Yet Volkswagen would assert numerous defenses to liability and damages, and arguments against certification of all or parts of the Class, presenting risks. Furthermore, even if Plaintiffs

were successful, Volkswagen would inevitably seek interlocutory review of class certification rulings via Rule 23(f) in the Court of Appeals, additionally delaying the progress towards trial.

The success of Plaintiffs' claims in future litigation turns on these and other uncertainties that are guaranteed to arise in the context of motions for summary judgment and at trial. Protracted litigation carries inherent risks that would necessarily have delayed and endangered Class Members' monetary recovery. Even if Plaintiffs prevailed at trial against Volkswagen, any recovery could be delayed for years by an appeal. *See Lipuma*, 406 F. Supp. 2d at 1322 (reasoning that the likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

This Settlement provides substantial, immediate relief to Class Members without further delay. Settlement will provide benefits to the Class Members far sooner than a litigated outcome, and some of those benefits are ones which Volkswagen could not have been compelled to deliver solely through litigation. Moreover, the traditional means for handling claims like those at issue here would unduly tax the court system, require a massive expenditure of public and private resources, and ultimately be impracticable. The Settlement is the best vehicle for Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Ongoing litigation would involve substantial, expensive fact and expert discovery, lengthy additional pretrial proceedings in this Court as well as appellate courts, and, ultimately, a lengthy trial and inevitable appeal. Absent the Settlement, the Action would likely continue for two or three more years, at a minimum. Under the circumstances, Plaintiffs and Class Counsel appropriately determined that the Settlement reached with Volkswagen outweighs the risks of continued litigation.

**(b) The Effectiveness of the Distribution of the Settlement Benefits.**

The Settlement provides for an effective and adequate means to distribute the settlement benefits, including the certificates of eligibility and pro rata reimbursement of certain enumerated past out-of-pocket expenses incurred for Qualifying Tire Wear Replacement and Qualifying Tire Rotation Claims. Upon the Effective Date of the Settlement, each present owner or lessee of a Settlement Class Vehicle will be issued a certificate of eligibility for two (2) free tire rotations per Settlement Class Vehicle. The certificate will be made available for download on the Settlement website or, if a Class Member so requests, will be made available by the Claim Administrator. The certificate can then be easily redeemed at an authorized Volkswagen dealer of the Class Member's choosing until the vehicle reaches an original odometer mileage of 110,000 miles. *See* Exhibit A (§ II.A.)

Pro rata reimbursements for qualifying tire replacements and tire rotations under the Settlement claims process are also easily redeemable by Class Members and are not subject to any class-wide monetary cap. Class Members will receive Claim Forms along with their mailed Class Notice. The forms will also be available on the Settlement website. To submit a claim for either tire rotation reimbursement or tire replacement reimbursement, Class Members need only fill out the appropriate form and include the requested documentation and information, as described above. *Id.* (§§ II.B–C.) Checks for approved reimbursement claims will be sent out by the Claim Administrator no later than 75 days after the receipt of the Claim or the Effective date, whichever is later. *Id.* (§ III.B.). If any Claim is preliminarily found to be deficient, the Claim Administrator will inform the Class Member of the deficiency and provide a 45-day opportunity to cure or provide any missing information/documentation.

**(c) Settlement Class Representative Service Awards and Attorney's Fees.**

The Settlement provides for a service award of $2,500 per Settlement Class Representative. This award is reasonable and commensurate with service awards typically approved in similar consumer class actions.

Similarly, the parties agreement that Class Counsel will seek and accept no more than $7.7 million in combined attorneys' fees and expenses, to which Volkswagen will not object, is fair, adequate, and consistent with prevailing law in the Eleventh Circuit and this District.[11]

**(d) The Settlement Represents the Full Agreement of the Parties.**

There is no other agreement between the parties that is required to be identified by Rules 23(e)(3) or any agreement made in connection with the Settlement that is not part of the Settlement. The Court can, therefore, determine the fairness and adequacy of the Parties' proposal for settlement by looking solely to the Settlement.

**4. The Settlement Treats Class Members Equitably Relative to Each Other.**

The Settlement treats all Class Members equitably. Rule 23(e)(2)(D) considers "whether the apportionment of relief among Class Members take[s] appropriate account of differences among their claims," *see* Rule 23(e)(2)(D) advisory committee's note to 2018 amendment, which the Settlement does. The amount each Class Member will receive is based on the Class Member's out-of-pocket expenses actually incurred.

[11] This percentage is in keeping with prevailing law and practice in this Circuit. *See*, *e.g.*, *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774–75 (11th Cir. 1991); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1365–66 (S.D. Fla. 2011); *Almanazar v. Select Portfolio Servicing, Inc.*, No. 14-cv-22586-FAM, 2016 WL 1169198, at *4 (S.D. Fla. Mar. 25, 2016).

### C. Preliminary Certification of the Settlement Class Is Appropriate.

For settlement purposes, Plaintiffs respectfully request that the Court certify the Settlement Class defined above and in the Agreement. "A class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *Borcea v. Carnival Corp*., 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks omitted). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Preliminary certification of a nationwide class for settlement purposes permits notice of the proposed Settlement to the class, which in turn informs Class Members of the existence and terms of the proposed Settlement, of their right to be heard on its fairness, of their right to opt out, and of the date, time, and place of the fairness hearing. *See* MANUAL FOR COMPL. LITIG., §§ 21.632, 21.633. For purposes of this Settlement only, Volkswagen does not oppose class certification. For the reasons set forth below, certification of the Settlement Class is appropriate under Rules 23(a) and (b)(3).

Certification under Rule 23(a) requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Under Rule 23(b)(3), certification is appropriate if the questions of law or fact common to the members of the class predominate over individual issues of law or fact and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The numerosity requirement of Rule 23(a) is satisfied because the Settlement Class consists of approximately 120,000 people throughout the United States, and joinder of all such persons is impracticable. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (finding numerosity satisfied where plaintiffs identified at least 31 Class Members "from a wide geographical area").

"[C]ommonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative Class Members." *Williams v. Mohawk Indus., Inc*., 568 F.3d 1350, 1355 (11th Cir. 2009) (internal quotation marks omitted); *see also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001) (same). Here, the commonality requirement is satisfied because there are many questions of law and fact common to the Settlement Class that center on Volkswagen's alleged conduct in manufacturing and selling vehicles that, Plaintiffs claim, were equipped with a defective suspension system while representing that its Settlement Class Vehicles were defect free and safe, as alleged in the operative First Amended Complaint. *See In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 674 (S.D. Fla. 2011).

For similar reasons, Plaintiffs' claims are reasonably coextensive with those of the absent Class Members, such that the Rule 23(a)(3) typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (finding typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (finding that named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the Class Members"). Plaintiffs are typical of absent Class Members because they were subjected to the same alleged conduct by Volkswagen, claim to have suffered from the same injuries, and, to the extent they qualify, will equally benefit from the relief provided by the Settlement.

Plaintiffs also satisfy the adequacy of representation requirement. Adequacy under Rule 23(a)(4) relates to (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. *Fabricant*, 202 F.R.D. at 314. The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Emp. Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiffs' interests are coextensive with, and not antagonistic to, the interests of the Class, because Plaintiffs and absent Class Members have an equally significant interest in the relief offered by the Settlement, and the interests of the two groups do not diverge. Further, Plaintiffs are represented by qualified and competent counsel with extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Class Counsel have devoted substantial time and resources to vigorous litigation of the Action from inception through the date of the Settlement.

The predominance requirement of Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every Class Member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each Class Member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks omitted). Plaintiffs satisfy the predominance requirement because liability questions common to all Class Members substantially outweigh any possible issues that are individual to each Class Member, particularly for settlement purposes in which the court is not concerned with intractable manageability and trial issues. The salient evidence necessary to establish Plaintiffs' claims is common to both the

Class Representatives and all members of the Settlement Class—they would all seek to prove their claims that Volkswagen's vehicles have a common defect and that Volkswagen's conduct was wrongful. And the evidentiary presentation changes little if there are 100 Class Members or 6,000,000: in either instance, Plaintiffs would present the same evidence of Volkswagen's marketing and promised warranties, and the same evidence of the subject vehicles' alleged defects. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) ("[I]f common issues truly predominate over individualized issues in a lawsuit, then 'the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.'") (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 322 (5th Cir. 1978)).

Furthermore, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). For these reasons, the Court should certify the Class defined in the Settlement.

### D. The Court Should Approve the Proposed Notice Plan Because It Conforms to Rule 23(e)(1) And Is Constitutionally Sound.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all Class Members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPL. LITIG., § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and give them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a Class Member and be bound by the final

judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co*., 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* MANUAL FOR COMPL. LITIG., § 21.312 (listing relevant information).

The proposed Notice Plan satisfies all of these criteria. As recited in the Settlement and above, the Notice Plan will inform Class Members of the substantive terms of the Settlement, will advise Class Members of their options for opting-out or objecting to the Settlement, and will direct them where to obtain additional information about the Settlement. Moreover, the Notice Plan is being implemented by one of the most respected Notice experts in the country, Cameron Azari of Epiq Systems, Inc.

In his declaration, attached as Exhibit B to this motion, Mr. Azari provides detailed information about the scope of the Notice Program. As Mr. Azari states, the program is "the best notice practicable under the circumstances of this case." Exhibit B, ¶ 10. The program features direct mail to each Class Member, the best possible form of notice. (*Id.*, ¶¶ 13-17.) The notice is estimated to reach "over 90% to 95%" of the Class. (*Id.*, ¶ 21.) Such a program is designed to exceed the requirements of constitutional due process. (*Id.*) Importantly, the notice will also be available in Spanish to target and reach the Spanish-speaking audience.

Therefore, the Court should approve the Notice Program and the form and content of the Notice appended as Exhibit 5 of the Settlement Agreement.

**E. The Court Should Schedule a Fairness Hearing.**

The last step in the Settlement approval process is a Fairness Hearing, at which the Court will hear all evidence and argument necessary to make its final evaluation of the Settlement. Proponents of the Settlement may explain the terms and conditions of the Settlement and offer argument in support of final approval. The Court will determine at or after the Fairness Hearing

whether the Settlement should be approved; whether to certify the Settlement Class; whether to appoint Class Counsel and the Settlement Class Representatives; whether to appoint the Claim Administrator; whether to enter a final order and judgment under Rule 23(e); and whether to approve Class Counsel's application for attorneys' fees and reimbursement of costs and expenses and the request for Service Awards for the Class Representatives.

Plaintiffs request that the Court schedule the Fairness Hearing for a full day during the week of December 2, 2019, if that is convenient for the Court. Plaintiffs will file their motion for final approval of the Settlement, and Class Counsel will file their Fee Application and request for Service Awards for Class Representatives, in advance of the Fairness Hearing and by the deadline set by the Court.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order that:

1. Grants preliminary approval to the Settlement;

2. Preliminarily certifies the proposed Class defined in the Settlement pursuant to Rule 23(b)(3) and (e), for settlement purposes only, and appoints the following as Settlement Class Representatives for the Volkswagen Class: Lila Wilson, Matthew Martino, Thomas Wilson, Teresa Garella, Mary Blue, Brian Maytum, Leigh Glasbland, Nick Panopoulos, Carissa Macchione, Sydnee Johnson, Debbie Gray, Lorne Spelrem, and Ismael Orrantia.

3. Approves (a) the Notice Plan set forth in the Settlement, and (b) the form and content of the Notice as set forth in the form attached to the Settlement as Exhibit 5 thereto;

4. Approves and orders the opt-out and objection procedures set forth in the Settlement;

5. Stays the Plaintiffs' claims asserted in this action against Volkswagen;

6. Appoints as Class Counsel the law firms listed in the Settlement Agreement (*e.g.*, Exhibit A, § I.F.);

7. Schedules a Fairness Hearing during the week of December 2, 2019, subject to the Court's availability and convenience; and

8. Addresses the other related matters pertinent to the preliminary approval of the Settlement.

Dated: July 26, 2019

Respectfully submitted,

**PODHURST ORSECK, P.A.**

*/s/ Peter Prieto*
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***Counsel for Plaintiffs***

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed via CM/ECF and served on all counsel of record via electronic notices generated by CM/ECF on July 26, 2019.

By: */s/ Peter Prieto*
Peter Prieto