No. _____

In The
Supreme Court of the United States

RONALD CLARK FLESHMAN, JR.,
Petitioner,

v.

VOLKSWAGEN, AG, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX

Elwood Earl Sanders, Jr., Esq.
Counsel of Record
8357 Curnow Drive
Mechanicsville, VA 23111
(804) 644-0477
(804) 644-3336 (Fax)
eesjresquire@netscape.net

James B. Feinman, Esq.
1003 Church Street
P. O. Box 697
Lynchburg, VA 24505
(434) 846-7603
(434) 846-0158 (Fax)
jb@jfeinman.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX TABLE OF CONTENTS

Various State Statutes:

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,	Nos. 16-17157 16-17158 16-17166 16-17168 16-17183 16-17185
JASON HILL et al., *Plaintiffs-Appellees*,	D.C. No. 3:15-md-02672-CRB
TORI PARTL; MARCIA WEESE; RUDOLF SODAMIN; GREG R. SIEWERT and SCOTT SIEWERT; RONALD CLARK FLESHMAN, JR.; DEREK R. JOHNSON, *Objectors-Appellants*,	OPINION
v.	
VOLKSWAGEN, AG; VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC, *Defendants-Appellees*,	

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, Senior District Judge, Presiding

Argued and Submitted December 7, 2017
Pasadena, California

Filed July 9, 2018

Before: A. Wallace Tashima, William A. Fletcher,
and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

SUMMARY*

Class Action / Settlement

The panel affirmed the district court's judgments certifying a class, approving a settlement, and denying Tori Patl's motion to opt out of the settlement that was entered by Volkswagen and a class of consumers after Volkswagen admitted that it had installed "defeat devices" in certain 2009-2015 model year 2.0-liter diesel cars.

The class settlement set aside ten billion dollars to fund a suite of remedies for class members. The settlement was reached before class certification. The objectors raised a variety of challenges.

The panel held that the district court did not abuse its discretion in certifying the class. The primary objection to the certification concerned whether the interests of "eligible sellers" – class members who owned vehicles with defeat devices when VW's scheme became public, but sold them before the proposed settlement was filed – were adequately represented during settlement negotiations. The panel held that the eligible sellers benefitted from being in the class alongside vehicle owners. The panel further held that there were no signs of an improper conflict of interest that denied absent class members adequate representation.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court more than discharged its duty in ensuring that the settlement was fair and adequate to the class, and affirmed the district court's approval of the settlement. The panel considered the objections to the settlement, and concluded that the district court considered the proper factors, asked the correct questions, and did not abuse its discretion in approving the settlement. Except with respect to a reversion provision, the appeals did not directly challenge the substantive fairness of the settlement, and therefore the panel held that it had no reason to comment upon it.

Under the terms of the settlement, money not paid out from the settlement pool reverted to Volkswagen, and one objector alleged that this "reversion provision" made it impossible to know the true value of the settlement to the class and provided incentive to Volkswagen to discourage participation in the settlement. The panel held that the district court adequately explained why the reversion here raised no specter of collusion. The panel further held that the incentives for class members to participate in the settlement, the complementary inducement for Volkswagen to encourage them to participate, the value of the claims, and the actual trend in class member participation all indicated that the reversion clause did not, in design or in effect, allow VW to recoup a large fraction of the funding pool.

The panel held that the district court did not abuse its discretion in denying Tori Partl's motion to opt out of the class after the deadline to do so had passed. The panel held that the district court reasonably concluded that Partl had actual notice of the correct procedure to exclude herself from

the class, she seemingly misunderstood clear directions, and such a mistake did not constitute excusable neglect or good cause.

COUNSEL

James Ben Feinman (argued), James B. Feinman & Associates, Lynchburg, Virginia, for Movant-Appellant Ronald Clark Fleshman, Jr.

Sharon Nelles (argued), William B. Monahan, and Robert J. Giuffra Jr., Sullivan & Cromwell LLP, New York, New York, for Defendants-Appellants.

N. Albert Bacharach Jr., N. Albert Bacharach Jr. P.A., Gainesville, Florida, for Objectors-Appellants Greg R. Siewert and Scott Siewert.

Bryan E. Brody, Brody & Cornwell, St. Louis, Missouri, for Objector-Appellant Tori Partl.

Brian Thomas Giles, Giles Lenox, Cincinnati, Ohio, for Objector-Appellant Derek R. Johnson.

Stephen D. Field, Stephen D. Field P.A., Hialeah, Florida, for Objector-Appellant Rudolf Sodamin.

Caroline V. Tucker, Tucker Pollard, Irvine, California, for Objector-Appellant Marcia Weese.

Kevin R. Budner, David S. Stellings, and Elizabeth J. Cabraser, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, California; Benjamin L. Bailey, Bailey Glasser

LLP, Charleston, West Virginia; Roland K. Tellis, Baron & Budd P.C., Encino, California; W. Daniel "Dee" Miles III, Beasley Allen Law Firm, Montgomery, Alabama; Lesley E. Weaver, Bleichmar Fonti & Auld LLP, Oakland, California; David Boies, Boies Schiller & Flexner LLP, Armonk, New York; J. Gerard Stranch IV, Branstetter Stranch & Jennings PLLC, Nashville, Tennessee; James E. Cecchi, Carella Byrne Cecchi Olstein Brody & Agnello P.C., Roseland, New Jersey; David Seabold Casey Jr., Casey Gerry Schenk Francavilla Blatt & Penfield LLP, San Diego, California; Frank Mario Pitre, Cotchett Pitre & McCarthy LLP, Burlingame, California; Rosemary M. Rivas, Levi & Korsinsky LLP, San Francisco, California; Adam J. Levitt, Dicello Levitt & Casey LLP, Chicago, Illinois; Steve W. Berman, Hagens Berman, Seattle, Washington; Michael D. Hausfeld, Hausfeld, Washington, D.C.; Michael Everett Heygood, Heygood Orr & Pearson, Irving, Texas; Lynn Lincoln Sarko, Keller Rorhback LLP, Seattle, Washington; Joseph F. Rice, Motley Rice LLC, Mount Pleasant, South Carolina; Paul J. Geller, Robbins Geller Rudman & Dowd LLP, Boca Raton, Florida; Roxanna Barton Conlin, Roxanne Conlin & Associates P.C., Des Moines, Iowa; Christopher A. Seeger, Seeger Weiss LLP, New York, New York; Jayne Conroy, Simmons Hanly Conroy LLP, New York, New York; Robin L. Greenwald, Weitz & Luxenberg P.C., New York, New York; Samuel Issacharoff, New York, New York; for Plaintiffs-Appellees.

OPINION

BERZON, Circuit Judge:

Striving to better, oft we mar what's well.[1]

Volkswagen duped half a million Americans into buying cars advertised as "clean diesel." They were anything but. As the lawsuits piled up, the car manufacturer hammered out a ten-billion-dollar settlement with a class of consumers, agreeing to fix or buy back the affected vehicles and providing some additional money as well. Following a thorough review, the district court blessed the agreement. Of the half million class members, a handful take issue with the settlement. We consider those appeals.

BACKGROUND

I. Litigation and settlement talks

In September 2015, Volkswagen (or VW) admitted that it had installed "defeat devices" in certain of its 2009–2015 model year 2.0-liter diesel cars. These devices—bits of software in the cars—were at the center of a massive scheme by VW to cheat on U.S. emissions tests. The clever software could detect that a car was undergoing government-mandated testing and activate emissions-control mechanisms. Those mechanisms ensured that the car emitted permissible levels of atmospheric pollutants when the test was in progress. During normal road use, however, the emission-control system was dialed down considerably. As a result, the affected cars

[1] William Shakespeare, *King Lear*, act 1, sc. 4.

usually emitted on the road between 10 and 40 times the permissible level of nitrogen oxide, a gas that reacts with other gases to create ozone and smog. This was no small-time con: over 475,000 vehicles in the United States alone contained a defeat device.[2]

The scheme became public when the Environmental Protection Agency (EPA) sent a "Notice of Violation" to Volkswagen alleging that installation of the defeat devices violated the Clean Air Act, 42 U.S.C. § 7522. The notice mentioned the possibility of a civil enforcement action by the Department of Justice.

Vehicle owners were not far behind. Within three months, hundreds of lawsuits against VW, most of them class actions, had been filed in or removed to over sixty federal district courts. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367, 1368 (J.P.M.L. Dec. 8, 2015). The complaints alleged a bevy of claims under state and federal law, including—to name just a few—breach of warranty, breach of contract, unjust enrichment, and violation of consumer protection, securities, and racketeering laws.

The Judicial Panel on Multidistrict Litigation transferred all VW defeat device-related cases to Judge Charles Breyer in the Northern District of California ("district court" or "MDL court") for "coordinated or consolidated pretrial proceedings." *Id.* at 1370. In short order the district court appointed Elizabeth Cabraser lead counsel for the putative

[2] Because some of the vehicles had several owners, and the class included some former owners of the vehicles, the eventual plaintiff class numbered approximately 490,000.

consumer class actions and chair of the Plaintiffs' Steering Committee (PSC) charged with coordinating pretrial work on behalf of the class. Around the same time, the United States' newly filed enforcement action was transferred into the MDL court.[3]

Settlement talks began early and went quickly. With the aid of a court-appointed settlement master, Robert Mueller, the parties—including the United States and the FTC—had reached agreements in principle by April 2016. Two months later—and just seven months after the cases were consolidated in the MDL court—a trio of proposed settlement agreements were filed by the private plaintiffs' class counsel, the United States, and the FTC.[4]

II. The settlement agreement

The proposed class settlement set aside ten billion dollars to fund a suite of remedies for class members. A particular class member's choices depended on whether she owned,

[3] While settlement talks were underway, a separate FTC enforcement action was also brought into the MDL court. *See FTC v. Volkswagen Grp. of Am., Inc.*, 3:16-cv-01534-CRB (N.D. Cal. March 29, 2016), ECF No. 3.

[4] The consent decree with the United States required VW to (1) buy back or fix 85% of the affected vehicles before June 2019 and (2) pay $4.7 billion to mitigate the effects of the pollution caused by its noncompliant cars and to promote zero-emissions vehicles. The consent order with the FTC largely overlapped with the terms of the class action settlement. For instance, it entered judgment in favor of the FTC in the amount of $10.033 billion, which could be satisfied by establishing a funding pool for the consumer settlement in that amount. The additional relief in the FTC consent order is not relevant to these appeals.

leased, or had previously owned, but sold, a vehicle with a defeat device:

> 1. *Owners*. Owners had the option to (1) sell the car back to VW at its pre-defeat device value (the "buyback" option) or (2) have the car fixed, provided Volkswagen could develop an EPA-approved emissions modification.[5] In addition, owners would receive "owner restitution." For owners who bought their cars before September 18, 2015 ("eligible owners"), that was a cash payment of at least $5,100, but possibly more, depending on the value of the vehicle. Owners who acquired their vehicles after that date ("eligible new owners") would receive half the eligible owner restitution described above—a cash payment of at least $2,550.
>
> 2. *Lessees*. Lessees had the option to (1) terminate their leases without penalty or (2) have the car fixed subject to development of an approved modification. In addition, lessees would receive "lessee restitution," a

[5] Volkswagen was required to have the modifications approved by the California Air Resources Board (CARB). If VW was unable to develop a government-approved modification by deadlines set out in the settlement agreement, class members would still have time to accept the buyback and would have an additional window of time to opt out of the settlement. As of July 27, 2017, the EPA and CARB had approved emissions modifications for most of the affected 2.0-liter affected vehicles. *See Volkswagen Clean Air Act Civil Settlement*, U.S. Envtl. Protection Agency, https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement (last visited June 10, 2018).

> cash payment of $1,529 plus 10% of the vehicle's value.
>
> 3. *Sellers.* "Eligible sellers"—those who sold their cars after the defeat device scheme became public but before the filing of the settlement with the court in June 2016—would receive "seller restitution" equal to one-half of full owner restitution (a cash payment of at least $2,550, but possibly more, depending on the value of the vehicle).[6]

To receive benefits, a class member submits a claim and supporting documentation; a claims processor verifies the class member's eligibility; and the class member elects a remedy, executes a release, and then obtains the benefit. The last step varies somewhat according to remedy. The deadline for submitting a claim is September 1, 2018.

The settlement figure of $10.033 billion was calculated to cover the most expensive option—the buyback—for all eligible owners, as well as the remedies selected by all non-owner class members. Any money left over in the funding pool will revert to Volkswagen after the claims period runs.[7]

---

[6] The settlement provided other benefits not pertinent to these appeals, such as loan forgiveness for class members who still owed money on their vehicles.

[7] The full amount will likely not be disbursed. Some class members have chosen the less expensive modification remedy; some have opted out of the settlement; and some will not claim the benefits available to them.

III. Settlement approval

One month after the proposed settlement was filed with it, the district court granted preliminary approval and ordered extensive notice to the class. The following schedule was set:

August 10, 2016	Additional information regarding class counsel's prospective request for attorneys' fees due.
September 16, 2016	Class members' objections to the settlement and requests for exclusion from it (*i.e.*, opt out) due.
October 18, 2016	Final fairness hearing on the settlement.

Eighteen class members appeared at the fairness hearing to voice concerns about, or objections to, the settlement. By that point—just four months after the first proposed settlement was filed and three months after preliminary approval was granted—over 63% of class members had registered for benefits under the settlement. Of the 490,000 class members, some 3,300 had opted out (although the district court noted a trend of those opt outs reversing course and later claiming benefits), and 462 had timely objected to the settlement.

One week after the fairness hearing, the district court, in a 48-page order, granted final approval of the settlement. The approval order first found that (1) the class met the threshold requirements to be certified under Rules 23(a) and 23(b)(3), and (2) notice to the class was adequate, *see* Fed. R. Civ. P.

23(c)(2). Next, it determined that the settlement was "fair, reasonable, and adequate," *see* Fed. R. Civ. P. 23(e)(2), devoting over thirty pages to an analysis of eleven separate factors going to the fairness of the settlement and to the objections of class members. The district court noted that the overwhelming early participation in the settlement and the very low numbers of opt outs and objections signaled the strength of the settlement. Assessing factors derived from *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011), the district court found that none of the settlement terms evinced collusion or militated against a finding that the settlement was fair, reasonable, and adequate.

In her motion for final approval of the settlement, class counsel stated that she would seek no more than $333 million in attorneys' fees and costs.[8] The court's order granting final approval directed her to submit a motion for fees by November 8, 2016, and set a deadline for objections to that motion for six weeks after that.

Fourteen appeals from the order approving settlement were consolidated with one related appeal. Of those, this opinion addresses six.[9]

---

[8] As it turned out, the fee request, granted by the district court, was for $175 million, little more than half the maximum that lead counsel had earlier specified. Appeals from the district court's orders on attorneys' fees were taken separately and are not addressed in this opinion.

[9] Of the fifteen appeals, five have been voluntarily dismissed. In separately filed orders, we dismiss another two for lack of standing and a third for failure to prosecute. We address a fourth on the merits in a

DISCUSSION

"Especially in the context of a case in which the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The settlement here was reached before class certification, so *Staton*'s dual direction applies.

The objectors bring a hodgepodge of challenges. One contests the district court's decision to approve certification of the class. Several others dispute the fairness of the settlement itself or the adequacy of the district court's process in approving it. And one appeals the district court's denial of her motion to opt out of the class after the deadline had passed.

The district court's decision to certify a class action and its conclusion that a class action settlement is "fair, reasonable, and adequate" are reviewed for abuse of discretion. *See id.* at 960. So is its denial of a class member's motion to exclude herself from the class out of time. *See Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994). As we explain below, the district court appropriately exercised its considerable discretion in making its determinations. We affirm.

---

separate memorandum disposition. Of the six appeals we address, two (Nos. 16-17158 and 16-17166) were jointly briefed and present the same issues.

I. Certification of the class

We begin by considering whether the class was appropriately certified. Before certifying a class, a court must ensure that it satisfies the prerequisites of Rule 23, including that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In the settlement context, a court "must pay 'undiluted, even heightened, attention' to class certification requirements." *Staton*, 327 F.3d at 952 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

The primary objection before us to the district court's certification decision concerns whether the interests of "eligible sellers"[10] in the class were adequately represented during settlement negotiations. Distilled down, objector Derek Johnson posits a conflict of interest between the eligible sellers and the vehicle owners—both the eligible owners and the "eligible new owners"[11]—in the class. As evidence of the conflict, he mainly points to the fact that eligible sellers receive only half the restitution payment accorded to eligible owners: In effect, eligible sellers "split"—figuratively—the amount provided eligible owners with the eligible new owners, who presumably purchased the

[10] As described earlier, eligible sellers are class members who owned vehicles with defeat devices on September 18, 2015, when VW's scheme to evade emissions standards became public, but sold them before the proposed settlement was filed on June 28, 2016.

[11] Those are the class members who own an affected Volkswagen but did not purchase it until after the defeat device became public knowledge.

sellers' cars with full knowledge of the vehicle's defect.[12] According to Johnson, this equivalent distribution to eligible new owners and sellers is so unfair to sellers that it demonstrates the sellers were not adequately represented by the named class representatives, only one of whom was a seller.

"The adequacy [of representation] inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. Serious conflicts of interest can impair adequate representation by the named plaintiffs, yet leave absent class members bound to the final judgment, thereby violating due process. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940)).[13]

---

[12] *See Frequently Asked Questions*, Volkswagen, https://www.vwcourtsettlement.com/en/2-0-models/ (last visited June 10, 2018) ("I sold my car after September 18, 2015. Why is my payment different from eligible owners?" "Class members who have sold their eligible vehicle between September 18, 2015 and June 28, 2016 receive the Seller Restitution because they no longer possess the vehicle to pursue a Buyback or Approved Emissions Modification. Because the Settlements also compensate the current owners of these vehicles, the eligible sellers split the Owner Restitution compensation with the current eligible owner.").

[13] The existence of a conflict does not categorically foreclose class certification. Where a conflict of interest exists within a class, however, additional due process safeguards—such as creating subclasses for groups with disparate interests and appointing separate counsel to represent the interests of each—may be required. *See Amchem*, 521 U.S. at 627; *Hanlon*, 150 F.3d at 1021.

The initial inquiry in assessing adequacy of representation, then, is whether "the named plaintiffs and their counsel have any conflicts of interest with other class members."[14] *Id.* at 1020. That general standard must be broken down for specific application; conflicts within classes come in many guises. For example, two subgroups may have differing, even adversarial, interests in the allocation of limited settlement funds. *See Amchem*, 521 U.S. at 626. Class members with higher-value claims may have interests in protecting those claims from class members with much weaker ones, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999), or from being compromised by a class representative with lesser injuries who may settle more valuable claims cheaply, *see Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003), *overruled en banc on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 564 U.S. 338 (2011). Aside from such evident structural conflicts, some proposed agreements are so unfair in their terms to one subset of class members that they cannot but be the product of inadequate representation of that subset. *See, e.g.*, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995).

Perusing the settlement before us, we see no indication of an "irreparable conflict of interest," either in the structure of the class or the terms of the settlement, that prevented the named class representatives from adequately representing sellers, or prohibited the commingling of the two in a single class. *Hanlon*, 150 F.3d at 1021.

---

[14] Adequacy "also factors in competency and conflicts of class counsel." *Amchem*, 521 U.S. at 626 n.20; *see also Hanlon*, 150 F.3d at 1021. The objection here raises no questions about that aspect of adequacy of representation.

Far from getting the short end of the stick, the eligible sellers gained enormously from being in the class with vehicle owners. The eligible owners—who comprise the vast majority of the class—were the ones with leverage enough to obtain benefits for the class. First, they had individually valuable and near-ironclad claims for rescission or restitution against VW. Second, the DOJ consent decree required VW to fix or buy back a large percentage—85%—of the affected vehicles. Failure to do so would result in immense fines. That Volkswagen thus needed to reach a deal with vehicle owners—a group including both eligible owners and eligible *new* owners—gave the class as a whole enormous collective power in bargaining.

By contrast, the eligible sellers' claims, viewed in isolation, were fairly weak. The eligible sellers no longer had the cars whose purchase allegedly caused them injury; their theory would have been that they sold their defective cars at a loss attributable to VW's installation of the defeat device (and the subsequent public revelation). But it would be difficult to prove why any eligible seller chose to sell his car or the degree to which, if any, the sale price reflected a discount for the defeat device. As one class member conceded at the fairness hearing, "[n]o one forced eligible sellers to sell their vehicles." Given the speed with which the putative classes were consolidated and settlement talks began, it is likely that many eligible sellers knew of the lawsuit, and some of the looming settlement, when they sold. The cars, moreover, were still functional and safe to drive, and the federal government made it clear from the beginning that it would not punish those driving cars with defeat devices—all of which puts a question mark over how much value the

vehicles lost as a result of the scandal.[15] So eligible sellers would face challenging, if not insurmountable, questions of causation and damages if they litigated their cases against VW.

Instead of getting nothing, eligible sellers received several thousand dollars in compensation. They quite possibly obtained it *because* they were in the same class as vehicle owners who had leverage against Volkswagen, not in spite of that inclusion. The patent upside of the settlement to eligible sellers defeats Johnson's central argument that the settlement was so unfair to sellers that it could only have been the result of inadequate representation. In that respect, this case bears no resemblance to ones in which the settlement terms are so skewed that it may be confidently inferred that some class members were not adequately represented. *See Amchem*, 521 U.S. at 627; *Molski*, 318 F.3d at 956; *In re GMC*, 55 F.3d at 801.

Further, even if the eligible sellers' claims were viable, the seller restitution, if evaluated as covering the economic losses incurred, was in an amount that generally fairly compensated for such losses. Class counsel explained at the fairness hearing that the restitution figure "in most instances"

---

[15] In a press release, the EPA told drivers: "Car owners should know that although these vehicles have emissions exceeding standards, these violations do not present a safety hazard and the cars remain legal to drive and resell." The EPA website advises that "EPA will not confiscate your vehicle or require you to stop driving." *Frequent Questions About Volkswagen Violations*, U.S. Envtl. Protection Agency, https://www.epa.gov/vw/frequent-questions-about-volkswagen-violations (last visited June 12, 2018). Most state attorneys general have also publicly disclaimed any intent to punish drivers of defeat device-equipped vehicles.

accounted for the loss realized by eligible sellers when they sold their vehicles. That Johnson and some others were not made whole by it does not render the benefit amount unreasonable,[16] much less demonstrate that it was necessarily the product of inadequate representation of the sellers. *See Molski*, 318 F.3d at 955 (representation held inadequate because "the consent decree released almost all of the absent class members' claims with little or no compensation").

Moreover, the restitution payments overall more closely resemble compensatory damages awards or penalty payments, as they are for most class members an amount of money over and above the economic value of any fix or buyback. It was therefore sensible that Volkswagen should be required to pay that "bonus" amount only once per car. The fact that eligible sellers "split" the restitution payment with eligible new owners is thus fully explicable, and does not alter our analysis, demonstrate unfairness to eligible sellers, or otherwise reveal an intra-class conflict.

In sum, the eligible sellers benefitted from being in the class alongside vehicle owners. We see no signs of an "improper conflict of interest . . . which would deny absent class members adequate representation." *Hanlon*, 150 F.3d

[16] Any settlement value based on averages will undercompensate some and overcompensate others. *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. Rev. 485, 552 (2003) ("[W]ealth transfers are endemic to damage class actions that settle for average amounts . . . ."); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999).

at 1021. There was no abuse of discretion in certifying the class.[17]

II. The settlement

We turn now to the settlement itself. Judicial review of class settlements is replete with contrasts. The district court must undertake a stringent review, "explor[ing] comprehensively all factors, and . . . giv[ing] a reasoned response to all non-frivolous objections," *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (citation and quotation marks omitted), whereas our own review of the district court's reasoning is "extremely limited"; we reverse "only upon a strong showing that the district court's decision was a clear abuse of discretion." *Hanlon*, 150 F.3d at 1026, 1027 (citation and quotation marks omitted). In another dichotomy, "we hold district courts to a high[] *procedural* standard" in their review of a settlement, *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015), but we "rarely overturn an approval of a class action consent decree on appellate review for *substantive* reasons." *Staton*, 327 F.3d at 960 (emphasis added). Our decision here reflects the interplay of these standards.

This settlement is highly unusual. Most class members' compensation—buybacks, fixes, or lease terminations *plus* some cash—is as much as, perhaps more than, they could

[17] This conclusion is not affected by this court's recent decision in *In re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018), *petition for reh'g en banc filed*, No. 15-56014 (9th Cir. Mar. 8, 2018). Unlike in that case, the district court here provided a thorough predominance analysis under Rule 23(b)(3), sufficient under *In re Hyundai*. *Cf. id.* at 702.

expect to receive in a successful suit litigated to judgment. And not just some of them: the $10.033 billion set aside would fund the most expensive remedy option for every single class member. Class members did not loiter in claiming these benefits. By the time these appeals were briefed, Volkswagen had paid out or committed to pay over $7 billion. And according to the last report from the court-appointed independent claims supervisor, by May 2018 Volkswagen had fixed or removed from the road 85.8% of all affected vehicles; paid out $7.4 billion to over 350,000 class members; and paid out or committed $8.1 billion to almost 450,000 class members. Terming the settlement a "compromise" of claims, although true of most class action settlements, is largely inapt here. The district court so noted, stating that the class members generally "are made whole" by the settlement.

Not surprisingly given the scope of the remedies afforded, most of the objections to the settlement are in some sense procedural: the district court did not sufficiently examine the settlement for signs of collusion between the defendants and class counsel; or misinterpreted what signs of collusion there were; or failed to respond specifically to an objection; or did not give class members a real shot to respond to class counsel's fee motion. In considering these objections, we keep in mind that the fundamental issue before the district court was whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

A. Review of class settlements

A proposed settlement that is "fair, adequate and free from collusion" will pass judicial muster. *Hanlon*, 150 F.3d at 1027. The inquiry is not a casual one; the uncommon risks

posed by class action settlements demand serious review by the district court. An entire jurisprudence has grown up around the need to protect class members—who often lack the ability, positioning, or incentive to monitor negotiations between class counsel and settling defendants—from the danger of a collusive settlement. *See, e.g.*, *Staton*, 327 F.3d at 959–60; *In re Bluetooth*, 654 F.3d at 946–47; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). Because of "the inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees," *Staton*, 327 F.3d at 972 n.22, we impose upon district courts "a fiduciary duty to look after the interests of . . . absent class members," *Allen*, 787 F.3d at 1223.

At the same time, there are few, if any, hard-and-fast rules about what makes a settlement "fair" or "reasonable." We have identified a lengthy but non-exhaustive list of factors that a district court may consider when weighing a proposed settlement.[18] When, as here, the settlement was negotiated before the district court certified the class, "there is an even greater potential for a breach of fiduciary duty" by class counsel, so we require the district court to undertake an additional search for "more subtle signs that class counsel have allowed pursuit of their own self-interests and that of

[18] These factors include "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026; *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 946–47.[19]

For all these factors, considerations, "subtle signs," and red flags, however, the underlying question remains this: Is the settlement fair? The factors and warning signs identified in *Hanlon*, *Staton*, *In re Bluetooth*, and other cases are useful, but in the end are just guideposts. "The relative degree of importance to be attached to any particular factor will depend upon . . . the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625. Deciding whether a settlement is fair is ultimately "an amalgam of delicate balancing, gross approximations and rough justice," *id.* (citation omitted), best left to the district judge, who has or can develop a firsthand grasp of the claims, the class, the evidence, and the course of the proceedings—the whole gestalt of the case. Accordingly, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge." *Hanlon*, 150 F.3d at 1026. "As a practical matter we will rarely overturn an approval of a class action consent decree on appellate review for substantive reasons unless the terms of the agreement contain convincing indications that the incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of the negotiations and that the district court was wrong in concluding otherwise." *Staton*, 327 F.3d at 960.

---

[19] A few such "warning signs" are attorneys' fees out of proportion to class member compensation, "clear sailing" arrangements, and agreements in which unawarded attorneys' fees revert to the defendants. *See In re Bluetooth*, 654 F.3d at 947. A "clear sailing" arrangement is one in which defendants agree not to object to class counsel's prospective motion for attorneys' fees provided the request does not exceed a certain amount. *See Allen*, 787 F.3d at 1224.

With these principles in mind, we turn to the objections.

B. The district court's examination of signs of possible collusion

The sole substantive objection before us to the terms of the settlement centers on its so-called "reversion clause." Under the settlement, money not paid out from the $10.033 billion settlement pool will revert to Volkswagen. According to one objector, the potential for reversion makes it impossible to know the true value of the settlement to the class, and creates perverse incentives for Volkswagen to discourage participation in the settlement.

A "kicker" or reversion clause directs unclaimed portions of a settlement fund, or in some cases money set aside for attorneys' fees but not awarded by the court, to be paid back to the defendant. *See In re Bluetooth*, 654 F.3d at 947; *Mirfasihi*, 356 F.3d at 783. A reversion can benefit both defendants and class counsel, and thus raise the specter of their collusion, by (1) reducing the actual amount defendants are on the hook for, especially if the individual claims are relatively low-value, or the cost of claiming benefits relatively high; and (2) giving counsel an inflated common-fund value against which to base a fee motion.[20] *See Allen*,

[20] *See also Mirfasihi*, 356 F.3d at 783 ("The part of the $2.4 million that is not claimed will revert to Fleet, and it is likely to be a large part because many people won't bother to do the paperwork necessary to obtain $10 . . . .").

Some commentators and courts disfavor reversions because they arguably undermine the deterrent effect of class actions. *See* 4 William B. Rubenstein, *Newberg on Class Actions* § 12:29 & n.5 (5th ed. 2014). That is not the basis of the objection here—as it hardly could be, with VW on

787 F.3d at 1224 & n.4. Given these possibilities, a reversion clause can be a tipoff that "class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947.

But reversion clauses can also have perfectly benign purposes and impacts, and so are not per se forbidden. Rather, to exercise its discretion appropriately, a district court must explain why the reversionary component of a settlement negotiated before certification is consistent with proper dealing by class counsel and defendants. *See id.* at 950.

The district court adequately explained why the reversion here raises no specter of collusion. First, as the district court noted, Volkswagen has every incentive to "to buy back or fix as many Eligible Vehicles as possible." Under the terms of the DOJ consent decree, if Volkswagen fails to fix or remove from the road 85% of the affected vehicles, it will be fined $85 million for each percentage point it comes up short. Second, from a class member's perspective, the benefits available are quite substantial, worth at least thousands of dollars, and in some cases more, to each class member. Given the amounts at stake, there is little chance class members will forego the benefits because of the effort of lodging a claim. Indeed, we needn't speculate as to participation. As of the date of the fairness hearing, 336,000 class members (of 490,000 total) had already registered to claim settlement benefits, and the numbers have only grown.

The incentives for class members to participate in the settlement, the complementary inducement for Volkswagen

---

the hook for billions of dollars by the time of the approval hearing on the settlement.

to encourage them to participate, the value of the claims, and the actual trend in class member participation all indicate that the reversion clause did not, in design or in effect, allow VW to recoup a large fraction of the funding pool.[21]

The district court did not abuse its discretion in determining that the reversion clause was a reasonable provision in this settlement, given the incentives to the class to claim quite substantial benefits, and was in no way a sign of collusion or unfairness. *See Allen*, 787 F.3d at 1225.[22]

C. The district court's obligation to respond to every objection

One objector finds fault in the district court's failure to respond specifically to her objection to the settlement.

"To survive appellate review, the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections." *Dennis*, 697 F.3d at 864 (citations and quotation marks omitted). That "procedural burden" on the district court helps to ensure the

---

[21] As noted in the district court's order, the $10.033 billion figure was arrived at by estimating the cost of the most expensive remedy—the buyback—for all owners in the class. Money would be left over in the funding pool if, as happened, some class members chose the less-expensive engine modification remedy and others opted out.

[22] The same objector argues that the district court abused its discretion by failing to examine the settlement for the signs of collusion laid out in *In re Bluetooth*, 654 F.3d at 947. To the contrary, the district court explicitly discussed those factors over several pages in its order. We find no error in its analysis.

substantive fairness of the settlement. *See Allen*, 787 F.3d at 1223.

Class member Marcia Weese objected to the settlement on two grounds relevant here. First, she maintained that different claims-processing procedures for class members with liens on their vehicles meant that Rule 23's "predominance requirement" was not met.[23] Second, and relatedly, she contended that the long-form notice to the class did not adequately explain the effects of a class member's vehicle lien on her eligibility for settlement benefits. The district court did not respond to either argument in its order.

As a threshold matter, even assuming Weese's arguments were "non-frivolous," *Dennis*, 697 F.3d at 864, we would be reluctant in the extreme, on the procedural ground raised, to upset a settlement—especially one of such overall benefit to the class—that otherwise evinced no signs of collusion, unfairness, or irregularity. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378–79 (9th Cir. 1993). That is all the more true here because the objector's complaint appears to be purely technical—it draws no link between the district court's supposed oversight and any substantive deficiency in the settlement. By so noting, we are not suggesting a harmless error standard for class action settlement review or otherwise disparaging the importance of procedural rigor in the review of such settlements. We merely emphasize that a reviewing court is concerned with the overall adequacy of the district

[23] Class actions certified under Rule 23(b)(3), such as this one, may be maintained only if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

court's fairness determination, not with parliamentary points of order about its process.

In any event, Weese's objections *were* frivolous, and so did not demand a response from the district court. In three sentences, she argues that additional claims-processing steps for class members with liens create individualized questions of law or fact that defeat predominance under Rule 23. But that objection is faulty on its face. The settlement does not "den[y] recovery" to, or exclude from class membership, vehicle owners with liens or loans. It just provides that, because of technical issues raised by the loan or lien as to the vehicle's title, those individuals—who still have the same legal claims, based on the same questions of law and fact, as other class members—must take additional steps to claim their benefits under the settlement. The district court properly concluded that class members—including those with liens—asserted the same injury and invoked the same basic legal theories against Volkswagen, thereby satisfying Rule 23(b)(3).

Again contrary to Weese's objection, the long-form notice to class members makes eminently clear how outstanding loans impact a class member's compensation. As the notice explains, the settlement provides *additional* compensation to class members with outstanding loans, over and above buyback value, to help them clean up title and deliver their vehicles to Volkswagen. The challenge to the notice was thus frivolous.[24]

[24] The long-form notice discusses outstanding "loans," rather than "liens" on the vehicles, but we do not think the distinction significant. A class member reading the notice would understand that she could participate in the buyback even if she did not own her vehicle outright.

Because Weese's arguments entirely lacked merit, the district court was not obligated to respond. *See Dennis*, 697 F.3d at 864.

D. The notice and timing of class counsel's motion for fees

Objections were raised with regard to both the timing and notice of class counsel's fee application.

Challenges to the notice and timing of fees under Rule 23(h) are typically framed and analyzed as challenges to the fee award, not the settlement. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010); *Allen*, 787 F.3d at 1225; *Keil v. Lopez*, 862 F.3d 685, 703 (8th Cir. 2017). Here, the district court's fee orders have been separately appealed.[25] By pressing fee-related arguments in these appeals, we understand appellants to be arguing that the district court's scheduling and notice with regard to fee objections under Rule 23(h) rendered the substantive settlement, not the fee award, unfair. *See* Fed. R. Civ. P. 23(e)(2); *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 444 (3d Cir. 2016) (considering whether fee-scheduling issues merited reversal of the order approving settlement, even though fees would be separately ruled upon and appealed). In rejecting these Rule 23(h) arguments in this appeal, we express no opinion as to the reasonableness or procedural propriety of the district court's fee award.

[25] One of the two objectors challenging fees in these appeals has also separately appealed the district court's order awarding fees to class counsel.

i. The timing of objections to class counsel's fee motion

Several objectors contend that the district court misapplied Rule 23 by setting the deadline for class members to object to the settlement before the date by which class counsel had to file a motion for fees. We disagree.

A court may award reasonable attorneys' fees in a certified class action. Fed. R. Civ. P. 23(h). Class counsel seeking a fee award must make a motion for fees under Rule 54, and notice of the motion must be "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1); *see also* Fed. R. Civ. P. 54(d)(2) (laying out the requirements for an attorney's motion for fees). Any class member "may object to the motion." Fed. R. Civ. P. 23(h)(2).

Rule 23(h) is silent as to the timing of fee motions, but the requirement that a class member be able to object by necessity imposes one. After all, a class member can't object to a nonexistent motion for fees. "The plain text of [Rule 23] requires a district court to set the deadline for objections to counsel's fee request on a date after the motion and documents supporting it have been filed." *In re Mercury*, 618 F.3d at 993 (emphasis omitted).

In *In re Mercury*, class members received notice describing the terms of the settlement and informing them that class counsel would seek 25% of the nine-figure settlement sum—almost $30 million—in fees. *Id.* at 991. The district court set a deadline for class members to object to the settlement and the "application" for attorneys' fees. *Id.* But class counsel's actual fee application was not filed until two weeks *after* that deadline. *Id.* at 990–91. We concluded

that Rule 23(h) plainly requires that class members have a chance "to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed," even if counsel specifies in its preliminary notice to the class the amount in fees it will later request. *Id.* at 993–94. Setting a schedule that denies class members a chance to object meaningfully to a fee motion by class counsel "borders on a denial of due process," *id.* at 993, and represents a failure by the district court "to fulfill its fiduciary responsibilities to the class," *id.* at 994–95; *see also Allen*, 787 F.3d at 1225–26; *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954 (9th Cir. 2015) (explaining that *In re Mercury* "rejected as insufficient Rule 23(h) notice when the motion for attorneys' fees was due after the deadline for class members to object to *the attorneys' fees motion*" (emphasis added)).

But Rule 23(h) does not require that class counsel's fee motion be filed before the deadline for class members to object to, or opt out of, the substantive *settlement*. Rather, the rule demands that class members be able to "object to *the motion*"—that is, the motion that class counsel must file to make a claim for fees under Rule 23. Fed. R. Civ. P. 23(h)(1)–(2) (emphasis added). An entirely separate provision of Rule 23 provides for class members' objections to the terms of a proposed settlement. *See* Fed. R. Civ. P. 23(e)(5). If Rule 23(h)(2) required that class members be able to object to the settlement as a whole only after class counsel's fee motion had been filed, it would say so.[26]

[26] The Third Circuit—the only circuit that has squarely decided the issue—agrees that deferring consideration of class counsel's fees until after a settlement is approved—and, consequently, until after objections to the settlement are heard and ruled upon—is no affront to Rule 23. *See In re NFL*, 821 F.3d at 445–46 (holding that "the separation of a fee award

In sum, approving a settlement before class counsel has filed a fee motion does not violate Rule 23(h). What matters is that class members have a chance to object to the fee motion when it is filed.[27]

Here, the district court gave class members six weeks to object to class counsel's completed fee motion, and several of them did so.[28] That period of time was more than enough for class members to "object to the motion." Fed. R. Civ. P. 23(h)(2). *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 954 (fifteen-day period to object to class

---

from final approval of the settlement does not violate Rule 23(h)"); *id.* at 445 (observing that "the practice of deferring consideration of a fee award is not so irregular" and collecting cases).

[27] We appreciate that the Advisory Committee Notes to Rule 23 encourage the simultaneous filing of notice of the terms of a proposed settlement and of class counsel's fee motion. *See* Fed. R. Civ. P. 23(h) advisory committee's note to 2003 amendment ("In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement . . . ."). A fee motion in some circumstances can "play[] an important role in class members' capacity to evaluate the fairness of the settlement itself." 4 Rubenstein, *supra*, § 8:22. But we cannot say that separating consideration of the settlement from consideration of class counsel's fees violates Rule 23(h). We leave for another day, and a more dubious settlement, the question of whether the inability of class members to object to a settlement after seeing a completed fee motion from class counsel could render the whole settlement unfair or unreasonable.

[28] To boot, the class had reason to know as early as August 10, 2016—more than a month before the deadline to opt out—that class counsel would seek no more than $333 million in attorneys' fees and costs. *See supra* note 8. Providing a dollar amount to class members does not by itself satisfy Rule 23(h), *see In re Mercury*, 618 F.3d at 994, but here it gave class members a ballpark estimate early on, in addition to the more-than-adequate six weeks they had to respond to the fee motion itself.

counsel's fee motion satisfied Rule 23). Because the scheduling orders did not violate Rule 23(h), they provide no basis for upsetting the settlement.

ii. Notice of class counsel's fee motion

Relatedly, two objectors argue that the district court erred by not ensuring that notice of class counsel's fee motion was "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). Because the fee motion was only posted on the settlement website, the argument goes, rather than individually mailed or emailed to class members, the notice was unreasonable and inadequate under Rule 23(h). For their part, plaintiffs-appellees respond that together, the long-form settlement notice and the district court's order granting final approval sufficiently advised class members to look for a prospective fee motion posted online.

We do not reach this objection. No matter how construed, it is a challenge to the fee award, not to the district court's order approving the settlement. Unlike the Rule 23(h) argument regarding the scheduling of class counsel's fee motion, the objectors draw no link between the notice of class counsel's fee motion—which occurred *after* the settlement was approved—and whether the *settlement* is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). If meritorious, objectors' notice argument goes to whether the district court's order awarding fees to class counsel may stand. For all we know, this court will later address this objection in the fee award appeals. But as briefed here, the objection does not point to any possible defect in the settlement order. We therefore do not pass upon the objection.

E. Remaining objections

The last objector, Ronald Clark Fleshman, Jr., asks that we overturn the district court's approval of the settlement because it unfairly exposes some class members to future liability under the Clean Air Act, and because it assertedly permits the ongoing unlawful use of unmodified Volkswagens.

We discussed these same arguments at length in our opinion affirming the district court's denial of Fleshman's attempted intervention in the United States' enforcement action. *See In re VW "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, No. 16-17060 (9th Cir. July 3, 2018). In a nutshell, Fleshman contended there, and maintains here, that under a proper reading of the Clean Air Act and its state-level implementations, it is unlawful to drive or resell an unmodified Volkswagen with a defeat device. Because the settlement allows class members to wait for an approved emissions modification—and drive their vehicles in the meantime—and because class members can decline to participate in the settlement and continue to drive their unmodified vehicles as long as they wish, the settlement permits ongoing illegal conduct. That conduct could, Fleshman maintains, expose hundreds of thousands of class members to criminal or civil liability, as well as to the possibility that their vehicles will be confiscated. At that point, Fleshman represents, the class members' claims against Volkswagen will have been released by the settlement agreement. That concatenation of risks, and the settlement notice's failure to advise class members of them, says Fleshman, renders the settlement unfair and unreasonable.

That argument did not persuade us in Fleshman's last appeal, and it does not persuade us here. Leaving to one side whether his interpretation of the Clean Air Act is correct, his central premise—that class members may be subjected to a civil or criminal sanction for driving unmodified Volkswagens—is wholly speculative. As the district court noted, the EPA and the vast majority of states have stated unequivocally that they will permit unmodified vehicles to stay on the road, and none has specifically declared them illegal to drive. Because the risks and dangers Fleshman warns about were completely improbable at the time of settlement (and remain so), the settlement notice need not have advertised them to class members, nor need the settlement have protected against them. The district court did not abuse its discretion in finding the settlement fair and reasonable over Fleshman's objections.[29]

* * * *

Again, the district court's task in reviewing a settlement is to make sure it is "not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. Our thorough consideration of the objections before us does not betoken any doubts on our part that the district court considered the proper factors, asked the correct questions, and did not abuse its discretion in approving this settlement. Except as noted—with respect to the reversion provision—these appeals did not directly challenge the

[29] Likewise, Fleshman's predictions that Volkswagen would not be able to develop an EPA-approved modification, or to buy back or fix at least 85% of the vehicles, have proven wrong.

substantive fairness of the settlement, and we therefore had no reason to comment upon it directly other than as to that provision. We do note that the settlement delivered tangible, substantial benefits to class members, seemingly the equivalent of—or superior to—those obtainable after successful litigation, and was arrived at after a momentous effort by the parties, the settlement master, and the district court. The district court more than discharged its duty in ensuring that the settlement was fair and adequate to the class. We affirm its order approving the settlement.

III. Belated opt-out

In her related appeal, Tori Partl challenges the district court's denial of her motion to opt out of the settlement class after the deadline to do so had passed. Discerning no abuse of discretion, we affirm.

A. Facts

Partl sued Volkswagen in 2013 for problems related to water leaks and "abnormal noises" in her vehicle. On August 7, 2016, Partl received an email regarding the class action settlement. The email included a link to the settlement webpage. Partl forwarded the email, along with the 32-page long-form settlement notice available at the settlement website, to her attorney. The relevant portions of the settlement notice read:

> **2. How do I claim Class Action Settlement benefits?**
>
> To claim Class Action Settlement benefits, you will need to make a claim online at

> www.VWCourtSettlement.com, or by mail or fax, as the Claims Supervisor provides.
>
> . . .
>
> **50. How do I get out of the Class Action Settlement?**
>
> If you do not want to receive benefits from the Class Action Settlement, and you want to retain the right to sue Volkswagen about the legal issues in this case, then you must take steps to remove yourself from the Class Action Settlement. You may do this by asking to be excluded—sometimes referred to as "opting out" of—the Class Action Settlement. To do so, *you must mail a letter or other written document* to the Court-Appointed claims supervisor.
>
> . . .
>
> You must *mail* your exclusion request, *postmarked* no later than September 16, 2016, to Opt Out VW Settlement, P.O. Box 57424, Washington, DC 20037 (emphasis added).

Partl and her lawyer spoke by phone later that day and agreed that Partl would opt out of the settlement. After their conversation, Partl returned to the settlement website and completed what she believed were all the steps needed to opt out of the settlement.

The deadline to opt out—September 16, 2016—came and went. On September 30, Partl learned at a mediation session in her state-court action that she had missed the deadline. Following that discovery, her lawyer undertook the necessary steps to be admitted pro hac vice in the MDL court so he could attempt to remedy the situation. Finally, on October 17, 2016—one month after the deadline had passed—Partl filed her belated motion to opt out of the settlement.

The district court denied her motion, noting that the long-form settlement notice "clearly provide[d]" that to opt out, class members had to *mail* in their notices of exclusion by September 16, 2016. The court held that Partl had actual notice of the correct procedure to exclude herself from the class. She seemingly misunderstood clear directions. Such a mistake does not constitute excusable neglect or good cause.

B. Discussion

A court may, in cases of "excusable neglect," extend the time in which a class member may opt out of a settlement. *See* Fed. R. Civ. P. 6(b), 60(b)(1); *Silber*, 18 F.3d at 1455. In the context of a tardy opt-out from a class action settlement, we have specifically identified as the relevant "excusable neglect" factors "the degree of compliance with the best practicable notice procedures; when notice was actually received and if not timely received, why not; what caused the delay, and whose responsibility was it; how quickly the belated opt-out request was made once notice was received; how many class members want to opt out; and whether allowing a belated opt out would affect either the settlement or finality of the judgment." *Id.*; *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395

(1993) (stating the factors for determining "excusable neglect" generally). "The scope of appellate review of the district court's disallowance of a late claim is narrow. . . . [W]e are not to substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily, and such evidence must constitute a 'clear showing' of abuse of discretion." *Silber*, 18 F.3d at 1455 (internal quotation marks omitted) (quoting *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977)).

The district court did not abuse its discretion in refusing to grant Partl's opt-out request. Properly identifying *Silber* as governing the excusable neglect inquiry in this context, the court zeroed in on the two *Silber* factors most relevant here: whether Partl received notice, and who was responsible for the delay. *See id.* Weighing them, the court concluded Partl's neglect was not excusable because (1) she had actual and timely notice of the proper method of excluding herself from the settlement; and (2) she was therefore herself squarely responsible for the failure to opt out on time. That conclusion is reasonable, supported by the record, and grounded in the relevant legal standard. *Cf. Kyle v. Campbell Soup Co.*, 28 F.3d 928, 932 (9th Cir. 1994) (attorney's two-day-late filing caused by a mistake in interpreting the court's "nonambiguous" local rules was not excusable neglect). Under the "narrow" review appropriate here, there was no abuse of discretion in denying Partl's motion to opt out late. *See id.*; *In re Gypsum Antitrust Cases*, 565 F.2d at 1128.

CONCLUSION

The district court did not abuse its discretion in certifying the class, approving the settlement, or denying Tori Partl's

motion to opt out of the settlement. Its judgments are **AFFIRMED.**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,	No. 16-17060 D.C. No. 3:15-md-02672-CRB
JASON HILL ET AL., *Plaintiffs*, and UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. VOLKSWAGEN, AG; VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC, *Defendants-Appellees*, v. RONALD CLARK FLESHMAN, JR., Proposed Intervenor, *Movant-Appellant.*	OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, Senior District Judge, Presiding

Argued and Submitted December 7, 2017
Pasadena, California

Filed July 3, 2018

Before: A. Wallace Tashima, William A. Fletcher,
and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

SUMMARY*

Intervention / Clean Air Act

The panel affirmed the district court's denial of a motion to intervene, filed by a disgruntled owner of a 2012 Volkswagen, in the federal government's Clean Air Act enforcement action against Volkswagen.

The government's suit arose from the car manufacturer's installation in some of its cars of "defeat devices" that allowed Volkswagen to cheat on emissions tests. The parties reached a final proposed consent decree, and the government filed its enforcement action with the court.

The panel held that the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604, did not grant the movant an "unconditional right" to intervene under Fed. R. Civ. P. 24(a)(1). First, the panel held that § 7604(b)(1)(B)'s diligent prosecution bar circumscribed a citizen's right to intervene in an enforcement action under that same provision. The panel further held that a citizen who retained the right to file suit on his own, despite a government enforcement action, had no statutory right to intervene in that action. Second, the panel held that the government was not suing to enforce a "standard, limitation, or order" within the meaning of the Clean Air Act, and therefore the diligent prosecution bar did not preclude movant's claims and he was free to bring his own citizen suit. Accordingly, the movant had no statutory right to intervene in the government enforcement action

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

under the Clean Air Act. Alternatively, the panel held that movant's proposed complaints-in-intervention demonstrated that he was not seeking to enforce the provisions invoked by the government, and therefore he could have filed his own suit and was not entitled to intervene in the government's action.

The panel held that movant could not intervene as of right under Fed. R. Civ. P. 24(a)(2) because he had no standing for the relief he sought.

COUNSEL

James Ben Feinman (argued), Lynchburg, Virginia, for Movant-Appellant.

Brian C. Toth (argued), Washington, D.C., for Defendants-Appellees.

Sharon Nelles (argued), New York, New York, for Defendants-Appellees.

OPINION

BERZON, Circuit Judge:

Ronald Clark Fleshman, Jr., the disgruntled owner of a 2012 Volkswagen Jetta, appeals the denial of his motion to intervene in the federal government's Clean Air Act suit against Volkswagen, AG and several of its subsidiaries (collectively Volkswagen or VW). The government's suit arose from the car manufacturer's installation in some of its cars of "defeat devices"—surreptitious pieces of software that allowed VW to cheat on emissions tests. Six months after filing suit, the parties reached a final proposed consent decree, and the government filed it with the court. Our question is whether Fleshman was entitled to intervene in the government's enforcement action. We conclude that he was not.

I

A. The Clean Air Act

The Clean Air Act "protect[s] and enhance[s] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).[1] Toward that end, the Act directs the Environmental Protection Agency (EPA) Administrator to prescribe emissions standards for new automobiles. *See* § 7521(a)(1); *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007). Each model year of a manufacturer's vehicles must carry a "certificate of

[1] All statutory citations are to the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, unless otherwise stated.

conformity" (COC) establishing those vehicles' compliance with the relevant emissions standards. § 7522(a)(1); 40 C.F.R. § 86.1848-01. The Act prohibits the installation in a new automobile of any device that bypasses or defeats the operation of emission control systems. § 7522(a)(3).

As to enforcement, the Act also grants "any person" the right to bring a civil action challenging the violation of "(A) an emission standard or limitation under this chapter or (B) an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation." § 7604(a)(1). Such a suit may not be brought, however, "if the Administrator or State has commenced and is diligently prosecuting a civil action . . . to require compliance with the standard, limitation, or order." § 7604(b)(1)(B). But "in any such action . . . any person may intervene as a matter of right." *Id.*

B. State implementation plans (SIPs)

The Clean Air Act "ma[kes] the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). Pursuant to that cooperative scheme, the EPA sets national ambient air quality standards, and the states develop state implementation plans (SIPs), subject to the approval of the EPA, to implement those standards. *See id.* at 532–33; *see also* § 7410(a).

The SIPs work toward attainment of national air quality standards primarily by regulating "stationary sources" like power plants and factories. *See Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1078–79 (D.C. Cir. 1996); *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control*

Dist., 644 F.3d 934, 938 (9th Cir. 2011). Regulation of "mobile sources" is the province of the federal government. In fact, the Act prohibits the states from setting emissions standards for new automobiles; only the EPA may do that.[2] *See Engine Mfrs. Ass'n*, 88 F.3d at 1079; § 7543(a). With that exception, the Act "preserves the right of states 'otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.'" *Engine Mfrs. Ass'n*, 88 F.3d at 1093 (quoting § 7543(d)).

II

A. Discovery of "defeat devices" & ensuing litigation

In May 2014, researchers at West Virginia University published a study showing that two of Volkswagen's 2.0-liter "light diesel" models emitted significantly higher quantities of pollutants during normal road operation than during emissions testing.[3] Following publication of the study, Volkswagen represented to the EPA and to the California Air Resources Board (CARB) that the identified discrepancies were caused by "technical issues and unexpected in-use [driving] conditions." Testing by the EPA and CARB demonstrated that Volkswagen's explanations did not account

[2] Except for California, or states that adopt emissions standards identical to California's. *See* § 7543(b)(1); *Engine Mfrs. Ass'n*, 88 F.3d at 1079–80.

[3] The study referred to the models as "Vehicle A" and "Vehicle B." The EPA and CARB identified them as the 2012 Jetta and 2013 Passat. W. Va. Univ. Ctr. for Alt. Fuels, Engines & Emissions, *In-Use Emissions Testing of Light-Duty Vehicles in the U.S.* 9 (2014), https://www.theicct.org/sites/default/files/publications/WVU_LDDV_in-use_ICCT_Report_Final_may2014.pdf.

for the disparate emissions levels. Unsatisfied, the two agencies threatened to withhold certificates of conformity for Volkswagen's 2016 model year light diesel cars, without which the company could not sell the cars in the United States.

Under that pressure Volkswagen confessed: its 2.0-liter light diesel models released between 2009 and 2015 contained a "defeat device." The device was designed so that when it sensed—and only when it sensed—the precise driving conditions of an emissions compliance test, software in the car altered engine performance so the vehicle emitted permissible levels of nitrogen oxide (NOx). Nitrogen oxide reacts with other compounds in the atmosphere to form ozone and smog. When the cars equipped with a defeat device operated under normal "in-use" road conditions, they emitted between 10 and 40 times the EPA-compliant level of NOx.

On September 18, 2015, the EPA sent a "Notice of Violation" (NOV) to Volkswagen stating that VW's installation of the defeat device on certain 2.0-liter VW diesel automobiles (the "affected vehicles") violated the Clean Air Act. Soon after, the EPA issued a press release, which contained the following message for vehicle owners:

> Car owners should know that although these vehicles have emissions exceeding standards, these violations do not present a safety hazard *and the cars remain legal to drive and resell.* Owners of cars of these models and years do not need to take any action at this time.

(emphasis added).

The VW defeat device scheme became front page news across the country. By December 2015, hundreds of private lawsuits against Volkswagen, most of them class actions, were filed in or removed to federal court. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 148 F. Supp. 3d 1367, 1368 (J.P.M.L. 2015). The Judicial Panel on Multidistrict Litigation (JPML) transferred all pending defeat device-related cases to Judge Charles Breyer in the Northern District of California (district court or MDL court) for "coordinated or consolidated pretrial proceedings." *Id.* at 1370.

The government soon joined in. On January 4, 2016, the United States filed a civil enforcement action against VW, under Section 203 of the Clean Air Act, 42 U.S.C. § 7522, in the Eastern District of Michigan. The complaint alleged four violations of the Clean Air Act:

1. **Certificates of conformity (COCs).** VW imported and sold cars not covered by a certificate of conformity, because the vehicles equipped with defeat devices did not "conform in all material respects" to the specifications described in the applications for those vehicles' certificates of conformity, in violation of Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1). Complaint at 8–9, 20–21, *United States v. Volkswagen AG*, No. 1:16-cv-10006 (E.D. Mich. Jan. 4, 2016) [hereinafter Gov't Compl.].

2. **Defeat devices.** VW manufactured and sold vehicles equipped with a "defeat device," in violation of Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B). Gov't Compl. at 9–10, 21–22; *see*

also 40 C.F.R. § 86.1803-01 (defining "defeat device").

3. **Tampering.** VW's defeat device was an "auxiliary emission control device" (AECD) that "ha[d] the effect of removing or rendering inoperative devices or elements of design" of its vehicles, in violation of Section 203(a)(3)(A) of the Act, 42 U.S.C. § 7522(a)(3)(A). Gov't Compl. at 9–11, 23–24.

4. **Reporting.** VW violated its reporting obligations under the Act by not disclosing the AECD/defeat device in its applications for COCs, in violation of Section 203(a)(2) of the Act, 42 U.S.C. § 7522(a)(2). Gov't Compl. at 11–12, 24–25.

The complaint covered both 2.0-liter and 3.0-liter diesel vehicles. The government sought (1) injunctive relief prohibiting VW from continuing to engage in the conduct alleged; (2) an order mandating appropriate steps by VW, including mitigation of NOx emissions, to remedy the violations of the Act; and (3) civil penalties for each violation of the Act. The JPML transferred the enforcement action to the MDL court on January 15, 2016.

B. The settlement process

Shortly after the government filed suit, the district court appointed Robert S. Mueller III as Settlement Master to "to facilitate settlement discussions among all parties to this multi-district litigation as soon as is feasible." The court selected lead counsel and a 22-member Plaintiffs' Steering Committee (PSC) to manage consolidated pre-trial litigation for the class. A "government coordinating counsel" was

appointed to represent the government's interests during pre-trial proceedings and settlement talks.[4]

The parties to the various cases reached an agreement in principle concerning the 2.0-liter vehicles. On June 28, 2016, the United States filed a proposed consent decree for this civil enforcement action, and the PSC filed a settlement agreement for preliminary approval in the class action. The consent decree established a program by which VW would buy back, permit the termination of leases of, or perform modifications on the emissions systems of all affected vehicles.[5] VW would also pay $2.7 billion into a "mitigation trust" to offset the increased NOx emissions caused by the affected vehicles, and pay another $2 billion to support public awareness of zero-emissions vehicles. For the buyback-lease termination-modification program, the consent decree set a participation target of 85% of the affected vehicles; for each percentage point below 85%, VW had to pay additional funds into the mitigation trust. The terms of the class action settlement largely overlapped with the terms of the consent decree between VW and the government and also with a separate consent order filed by the Federal Trade Commission. Pursuant to 28 C.F.R. § 50.7(b), notice of the partial consent decree appeared in the Federal Register on July 6, 2016, and

[4] In addition to the United States, the Federal Trade Commission (FTC), represented by separate counsel, brought claims against VW for violations of the FTC Act, 15 U.S.C. §§ 45, 53, and California sued VW for violations of state and federal law. The FTC and California actions were consolidated into the MDL proceeding. Throughout the opinion, "the government" refers to the United States unless otherwise noted.

[5] The consent decree, class action settlement, and FTC consent order covered 2.0-liter diesel vehicles. A separate settlement was reached with respect to 3.0-liter diesel vehicles.

a 30-day public comment period ensued. *See* Notice of Lodging of Proposed Partial Consent Decree Under the Clean Air Act, 81 Fed. Reg. 44,051 (July 6, 2016).

C. Fleshman's attempt to intervene

While settlement talks were well underway in the cases proceeding in California, Fleshman filed suit against VW in the Circuit Court of Campbell County, Virginia.[6] At the time Fleshman filed suit, he owned a 2012 model year light diesel Jetta.

Later, when the settlement talks were close to fruition, Fleshman moved to intervene in the class action, "to object to the proposed Consumer Class Action Settlement Agreement and Release." The district court refused to allow the intervention.

Undeterred, Fleshman moved a week later to intervene in the government's enforcement action. He argued that the consent decree "violate[d] Federal and Virginia law" because it did not require rescission of sale for all affected vehicles; instead, it permitted vehicle owners and lessees to keep their unmodified vehicles if they wished. Fleshman also alleged that Virginia's SIP prohibited the owners of affected vehicles from driving them, so the buyback should have been mandatory.

The specific SIP provision Fleshman relied upon reads in full: "No motor vehicle or engine shall be operated with the

---

[6] *See Fleshman v. Volkswagen Grp. of Am., Inc.*, No. 6:16-cv-00021-GEC (W.D. Va. May 2, 2016), ECF No. 1-1. The case was removed to federal court and then remanded back to state court. *See id.*, ECF No. 17.

motor vehicle pollution control system or device removed or otherwise rendered inoperable." 9 Va. Admin. Code § 5-40-5670(A)(3). Under Fleshman's reading, this SIP provision prohibited vehicle owners from driving unmodified affected vehicles. Fleshman maintained in his intervention motion that the EPA's statement of September 18, 2015, advising that "the [affected] cars remain[ed] legal to drive and resell" was inconsistent with the Virginia SIP. Fleshman sought intervention to "protect his interest as a Virginian[] in enforcing the laws of Virginia . . . incorporated into the Clean Air Act by way of Virginia's [SIP]."[7] He argued that the Clean Air Act's citizen-suit provision provided him with a statutory right to intervene, presumably pursuant to Federal Rule of Civil Procedure 24(a)(1).[8] Fleshman further contended that he had a protectable interest in the enforcement of Virginia's SIP not adequately protected by the parties to the litigation, presumably invoking Rule 24(a)(2).

The government observed in its opposition papers that Fleshman had not appended a complaint to his motion to intervene. In response, Fleshman attached one to his reply brief, and shortly thereafter he filed a First Amended

[7] *See Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 503 (9th Cir. 2015) ("Once approved by the EPA, a SIP becomes federal law and must be carried out by the state."). Fleshman alleged that the consent decree also violated the SIPs of more than a dozen other states and the District of Columbia.

[8] Rule 24(a) provides: "On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a).

Proposed Complaint-in-Intervention.[9] The complaint consisted largely of allegations that the EPA was not adequately prosecuting the action against VW.[10] In his prayer for relief, Fleshman sought various declarations and orders against the EPA (*e.g.*, "[f]ind and order that the EPA cannot propose and support a monetary penalty which is an incentive to violate the Clean Air Act"); none of the requested relief was directed at Volkswagen.[11]

The district court denied Fleshman's motion to intervene in this civil enforcement action. The court held that the Clean Air Act's citizen-suit provision permits intervention of right only when the intervenor seeks to enforce the same "standard, limitation, or order" as the government does in its action. Because Fleshman sought to enforce Virginia's SIP—not the same "standard, limitation, or order" as the Clean Air Act provisions underlying the government's complaint—the Act did not permit him to intervene as a matter of right.

---

[9] For simplicity, we refer to Fleshman's First Amended Proposed Complaint-in-Intervention as "the complaint" or "Fleshman Compl." except when necessary to distinguish it from the first proposed complaint-in-intervention.

[10] The two main sections of the complaint are titled "The Administrator and the EPA Have Not Diligently Prosecuted the Clean Air Act" and "The Specific Failures of the Administrator to Enforce the Clean Air Act."

[11] Fleshman did not bring his suit as a class action.

Shortly thereafter, the district court entered the proposed consent decree in the government enforcement action.[12] Fleshman appeals the denial of his motion to intervene.

III

Under Rule 24, a stranger to a lawsuit may intervene "of right" where (1) a federal statute gives the would-be intervenor an "unconditional right" to intervene in the suit, or (2) letting the lawsuit proceed without that person could imperil some cognizable interest of his. Fed. R. Civ. P. 24(a). "Rule 24(a) is construed broadly, in favor of the applicants for intervention." *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir. 1990). Fleshman argues that both subsections of Rule 24(a) entitle him to intervene. We address each subsection in turn.

A. Intervention under Rule 24(a)(1)

Fleshman first argues that he may intervene in the government's action by grace of the Clean Air Act's citizen-suit provision, § 7604. The issue is whether that provision grants him an "unconditional right" to intervene. Fed. R. Civ. P. 24(a)(1). It does not.

i. Scope of intervention under the Clean Air Act

The Clean Air Act entitles any person to sue for a violation of "an emission standard or limitation under this chapter" or "an order issued by the Administrator or a State

[12] The district court approved the class action settlement on the same day. The district court's denial of Fleshman's objections to the class action settlement are the subject of a separate appeal.

with respect to such a standard or limitation." § 7604(a)(1). A citizen's right to sue under the Act has limitations, however:

> No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> > (A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
> >
> > (B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

§ 7604(b)(1). This tripartite structure for citizen suits—a right of action, qualified by a notice requirement and a "diligent prosecution" bar, which in turn is leavened by a right to intervene—is replicated in a host of other federal

environmental statutes.[13] *See United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 977–78 (2d Cir. 1984).

Our threshold question in deciding whether Fleshman had a right to intervene in this action is whether a citizen who is not barred from bringing his own citizen suit by a diligently prosecuted government enforcement action may nonetheless intervene in that government action. After examining the parameters of § 7604(b)(1)(B)'s diligent prosecution bar, we hold that it circumscribes a citizen's right to intervene in an enforcement action under that same provision. That is, a citizen who retains the right to file suit on his own, despite a government enforcement action, has no statutory right to intervene in that action.[14]

Section 7604(b)'s two subparts work together to delimit citizen suits against alleged violators of the Act. First, before filing suit, a plaintiff must give sixty days' notice to the EPA, the relevant State, and the alleged violator. § 7604(b)(1)(A). Second, no citizen suit may be commenced if the EPA or a

---

[13] *See* Clean Water Act, 33 U.S.C. § 1365(a)–(b); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)–(b); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a)–(b); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a)–(b); *cf.* Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A)(iii) (stating a diligent prosecution bar, but without a corresponding right to intervene).

[14] This circuit has not yet considered the contours of the Act's intervention provision. *United States v. Stone Container Corp.*, 196 F.3d 1066, 1069 (9th Cir. 1999), held that § 7604(d) of the Act did not entitle the citizen plaintiffs, who had intervened in a government enforcement action under § 7604(b)(1)(B), to attorneys' fees, because such an action was not "brought pursuant to subsection (a) [the citizen-suit provision] of this section." § 7604(d). We did not discuss, however, the scope of the right to intervene under § 7604(b)(1)(B).

state is already diligently litigating an action "to require compliance with the standard, limitation, or order." § 7604(b)(1)(B). "The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation." S. Rep. No. 91-1196, at 37 (1970) (report of the Senate Committee on Public Works). "If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (discussing the citizen-suit and intervention provisions of the Clean Water Act). Taken as a whole, the statutory architecture indicates that "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.* at 60.

But not every citizen suit is verboten once the government files suit. The diligent prosecution bar prevents a citizen from suing under § 7604(a)(1) if the government is prosecuting an action "to require compliance with *the* standard, limitation, or order." § 7604(b)(1)(B) (emphasis added). "[*T*]*he* standard, limitation, or order" in (b)(1)(B) refers back to the "emission standard or limitation" or "order issued . . . with respect to such a standard or limitation" described in the citizen-suit provision, § 7604(a)(1), the violation of which any person may sue to enjoin, "[e]xcept as provided in subsection (b)." *Id.* The explicit textual cross-references between subsections (a) and (b), and the use of the definite article ("*the* standard, limitation, or order"),[15] signify

[15] "[T]he definite article 'the' particularizes the subject spoken of, suggesting that Congress meant to refer to a single object . . . ." *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1074 (9th

with precision that the diligent prosecution bar forecloses only citizen suits that seek to enforce the *same* "standard, limitation, or order" as the government enforcement action. *See Hooker Chems.*, 749 F.2d at 978.[16] A person suing to enforce a *different* "standard, limitation, or order" with regard to certain emissions from that invoked by the government in its enforcement action is not barred from doing so by § 7604(b).

The diligent prosecution bar in turn defines the right of intervention granted by § 7604(b)(1)(B). No citizen suit for a violation of a "standard, limitation, or order" may be commenced in the face of an enforcement action "to require compliance with the [same] standard, limitation, or order, *but* in any *such* action . . . any person may intervene as a matter of right." *Id.* (emphasis added). Once again, the text and context are plain: a person may "intervene as a matter of right" in an enforcement action—"*such* action"—only if that action has barred the person from bringing his own citizen suit under § 7604(a)(1). The word "such" restricts the actions in which a person may intervene to those mentioned in the preceding clause—that is, diligently prosecuted enforcement actions that bar a citizen suit under subsection (a)(1). The connective "but" sets the grant of intervention in opposition

---

Cir. 2016) (internal quotation marks omitted) (quoting *The*, *Black's Law Dictionary* (4th ed. 1968)).

[16] In the past, we have described the bar in broad terms as "expressly preclud[ing] commencement of suits . . . when the United States has already commenced and is diligently prosecuting an action asserting the same *claims*." *Stone Container Corp.*, 196 F.3d at 1068 (emphasis added). Because the statute speaks of a "standard, limitation, or order" rather than a "claim," we avoid importing the latter term into our more specific analysis.

to the diligent prosecution bar: you can't bring your own suit, but you're allowed to intervene in this one. Lastly, "[t]he right to intervene is conferred in the same sentence that limits the rights of citizens who would otherwise bring private enforcement actions, which suggests that Congress intended to confer that right only on those particular citizens." *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 837–38 (8th Cir. 2009) (construing the scope of the Clean Water Act's analogous right of intervention).

The phrase "any person" in the intervention clause might appear to broaden the grant of intervention beyond simply those "citizens who would otherwise bring private enforcement actions," but are precluded from doing so by the government's action. *Id.* "[U]se of the word 'any' will sometimes indicate that Congress intended particular statutory text to sweep broadly." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018). But whether "any" has that import in a particular statute "necessarily depends on the statutory context." *Id.* Here, that context—and the other words of the provision—cabin "any person" to those whose suits were barred by the diligent prosecution bar.

Stone Container Corp. demonstrates how § 7604's pieces fit together. 196 F.3d at 1067. In that case, the United States filed suit against the defendant for violations of the Clean Air Act, after receiving notice under § 7604(b)(1)(A) of the private plaintiff's intent to sue. *Id.* The private plaintiff then filed its own 21-count suit against the defendant. Three of the 21 counts "mirrored" counts in the government's complaint. Those "duplicative" counts were dismissed by the plaintiff "subject to intervention in the United States enforcement action." *Id.* The plaintiff then negotiated a separate consent

decree for the remaining, non-duplicative—and non-barred—claims in its complaint. *See id.* at 1067–68.

Every circuit to consider the Clean Air Act's right of intervention—or the identically worded provisions in other environmental statutes, *see supra* note 13—has reached the same result we do. For example, the Second Circuit held, as do we, that "[i]ntervention is limited to government initiated actions that could have been brought by the individual but for the government action." *Hooker Chems.*, 749 F.2d at 978.[17] Similarly, the Third Circuit recognized that "[s]ection 7604(b) . . . does not establish a right to intervene independent from the other provisions in § 7604." *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 972–73 (3d Cir. 1982).

In short, a party may intervene as a matter of right in a Clean Air Act enforcement action only if he is barred under the Act by that enforcement action from maintaining his own suit to remedy a violation of the "standard, limitation, or order" at issue.

[17] *See also Metro. St. Louis Sewer Dist.*, 569 F.3d at 838 (holding that under the Clean Water Act, "only a citizen whose suit has been displaced by the government action is entitled to intervene"); *United States v. City of New York*, 198 F.3d 360, 364 (2d Cir. 1999) (holding that the Safe Drinking Water Act "authorizes intervention as of right by private parties in suits that could have been brought by the parties but for the fact that they are being pursued by the United States or a state").

ii. The government was not suing to enforce a "standard, limitation, or order" within the meaning of the Act

Our next question, then, is whether Fleshman aimed to enjoin violations of one of the "standard[s], limitation[s], or order[s]" underlying the government's enforcement action against Volkswagen. If so, the diligent prosecution bar precluded his action and he was entitled to intervene "as a matter of right" in the enforcement action under § 7604(b)(1)(B) and Rule 24(a)(1). If not, then he had no statutory right to intervene in the government's case.

The government brought suit to enjoin four distinct violations of Section 203 of the Clean Air Act, 42 U.S.C. § 7522. It alleged that VW violated the Act by selling vehicles not covered by certificates of conformity, equipping those vehicles with unlawful "defeat devices" and auxiliary emission control devices, and failing to report those devices in its COC applications.[18] *See supra* pages 9–10. For relief,

[18] Section 7522(a) provides: "The following acts and the causing thereof are prohibited—

> (1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity . . . .

the government sought an injunction, mitigation of excess NOx emissions, and civil penalties.

The prohibitions contained in § 7522 do not appear to be "emission standard[s] or limitation[s]" or "orders issued . . . with respect to" such standards or limitations within the meaning of § 7604(a)(1). Section 7604(f) explains that the term "emission standard or limitation," for purposes of the citizen-suit provision, covers several broad categories of regulatory requirements, including—somewhat unhelpfully—"emission standard[s]" and "emission

---

> (2)(A) for any person to fail or refuse to permit access to or copying of records or to fail to make reports or provide information required under section 7542 of this title; . . .
>
> (3)(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or
>
> (B) for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter . . . ."

limitation[s]."[19] Section 7602, which defines terms used throughout the Clean Air Act, more concretely defines "emission limitation" and "emission standard" to mean "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." § 7602(k). Neither the § 7602(k) definition nor the § 7604(f) list of categories of "emission standard[s]" and "emission limitation[s]" encompasses the generic statutory prohibitions in § 7522.

For an example of an "emission standard," consider 40 C.F.R. § 86.1811-04. That regulation establishes permissible emission levels of nitrogen oxide (NOx) for "light-duty vehicles" like the vehicles at issue in this case. *See id.* § 81.1811-04(c) ("Exhaust emissions from Tier 2 vehicles must not exceed the standards in Table S04–1 of this section at full useful life . . . ."). Unlike the statutory prohibitions in § 7522, which were enacted by Congress, the regulation is "a requirement established by . . . the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." § 7602(k).

---

[19] Examples of an "emission standard or limitation" include "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard," "a control or prohibition respecting a motor vehicle fuel or fuel additive," requirements or conditions of permits relating to other non-motor-vehicle related portions of the Clean Air Act, and—relevant later—regulatory requirements promulgated "under any applicable State implementation plan approved by the [EPA]." § 7604(f).

The United States did not sue VW for violations of 40 C.F.R. § 86.1811-04—that is, of an "emission standard or limitation" as encompassed by § 7604(a)(1)—nor for violations of any other standard or limitation promulgated under § 7521.[20] Instead, the United States sued VW for violations of statutory provisions that are not, and do not incorporate, "standard[s], limitation[s], or order[s]" within the meaning of § 7604(a)(1). The diligent prosecution bar applies only when the government is enforcing a "standard or limitation under this chapter" or an "order . . . with respect to such a standard or limitation." § 7604(a)(1). Fleshman's claims were thus not precluded by that bar, and he was free to bring his own citizen suit alleging them. And because a citizen has a statutory right to intervene in a government enforcement action under the Clean Air Act only if precluded by the diligent prosecution bar from bringing his own suit, Fleshman had no right to intervene here.

iii. Fleshman sought to enforce the Virginia SIP, not the requirements of § 7522

There is an alternative reason Fleshman had no statutory right to intervene in this action. Even if § 7522's statutory prohibitions were "standard[s], limitation[s], or order[s]" that would foreclose, through § 7604(b)(1)(B), a citizen suit, this government enforcement action would not bar Fleshman from litigating the claims in his proposed suit. Properly viewed,

[20] Section 7521 directs the EPA administrator to prescribe by regulation "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

Fleshman's claims are not predicated on any § 7522 violations.

Fleshman's first proposed complaint-in-intervention focused entirely on the EPA's inadequate enforcement of state SIPs. He sought declaratory relief to remedy the inadequacy and unlawfulness of the consent decree flowing from its inattention to state SIPs. In particular, Fleshman's first complaint—which does not refer to § 7522 at all—alleged a violation of a provision of Virginia's SIP that prohibits the operation of cars whose "pollution control system[s] or device[s]" had been "removed or otherwise rendered inoperable." 9 Va. Admin. Code § 5-40-5670(A)(3).

The government's enforcement action did not allege that VW had not complied with Virginia's (or any state's) SIP, or seek relief connected with SIP compliance. That, indeed, was Fleshman's central gripe in his original intervention complaint. Because Fleshman's original complaint alleged violations entirely distinct from those the government identified, Fleshman could have proceeded with his own citizen suit. § 7604(b)(1)(B); *see also* § 7604(f)(4) (private plaintiffs may sue to enforce a "standard, limitation, or scheduled established under . . . any applicable State implementation plan approved by the [EPA]"). He therefore had no statutory right to intervene in the government's action based on his original complaint-in-intervention.

In his amended proposed complaint-in-intervention, Fleshman emphasized somewhat different purported violations—namely, the EPA's failure to demand that all of Volkswagen's non-conforming cars be removed from the road, all sales be rescinded, and all purchase prices be

refunded, relief that he argues was mandated by the Clean Air Act. Fleshman Compl. at 11. Like the earlier complaint, however, the second one did not identify any of the subsections of § 7522 as the source of the violations alleged or the relief sought.[21] In fact, Fleshman's proposed amended complaint-in-intervention does not actually set forth *any* claims or causes of action; it contains many paragraphs of allegations followed by a request for relief.[22] If anything, Fleshman's refrain that the EPA failed to enforce the "mandatory, non-discretionary" requirements of the Clean Air Act, Fleshman Compl. at 2–8, indicates that his claims are, in reality, claims *against* the EPA under a different provision of the Act from § 7522. *See* § 7604(a)(2) ("[A]ny person may commence a civil action on his own behalf . . . against the Administrator [of the EPA] where there is alleged a failure of the Administrator to perform any act or duty under this chapter *which is not discretionary* . . . ." (emphasis added)).

---

[21] Fleshman's complaint does allude to violations of § 7522. *See* Fleshman Compl. at 2 ¶¶ 4–6, 6 ¶ 15A, 8 ¶ 15C–D, 11. But the references to § 7522 are intermingled with allegations that VW's conduct, and the consent decree itself, also violated §§ 7410, 7413, 7522(a)(4)(D), 7523, and 7541—provisions of the Act that did not underpin the government's enforcement action against VW. What is clear is that Fleshman's complaint is not founded upon violations of § 7522, notwithstanding that he mentions the section at various points in his complaint.

[22] Fleshman's blanket attempt to incorporate by reference all of the allegations in the government's complaint does not transform his suit into one alleging violations of the same "standard, limitation, or order" as the government. *See* Fleshman Compl. at 1 ¶1. The complaint incorporates the government's allegations, not its claims or causes of action. Mirroring the allegations in the government's complaint does not change the basic thrust of Fleshman's complaint.

In sum, the government's enforcement action did not bar Fleshman's suit under the diligent prosecution bar, § 7604(b)(1)(B). The statutory provisions the United States sued to enforce—§ 7522—are not "standard[s], limitation[s], or order[s]" that would preclude a citizen suit under § 7604(a)(1). Even if they were, Fleshman's proposed complaints-in-intervention demonstrate that he was not seeking to enforce the provisions of § 7522 invoked by the government. For both reasons, Fleshman could have filed his own suit against Volkswagen or the EPA to enforce Virginia's SIP. Ergo, he was not entitled to intervene in the government's action. *See* § 7604(b)(1)(B). And because the Clean Air Act did not grant Fleshman an "unconditional right to intervene," he was not entitled to do so under Rule 24(a)(1).

B. Intervention under Rule 24(a)(2)

Fleshman argues—albeit indistinctly—that he is entitled to intervene of right under Rule 24(a)(2) to protect his interest in the proper enforcement of the Clean Air Act and Virginia's SIP. Fleshman, however, lacks standing for the relief in his complaint-in-intervention that goes beyond what the United States sought in its suit, and so may not intervene of right. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).[23]

---

[23] Under Rule 24(a)(2), a court "must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." We assume, because no party has argued otherwise, that Fleshman could meet the "impairment" prong under 24(a)(2). But it is not at all clear that he could. Fleshman's ability under § 7604(a)(1) to maintain a separate

"[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Id.* The relief Fleshman seeks is completely different from that sought by the government in its action.

The United States asked the court permanently to enjoin Volkswagen's violations of § 7522, order Volkswagen to mitigate the excess NOx emissions from its vehicles, and assess civil penalties against Volkswagen for each violation of the Act. By contrast, Fleshman asked the court to:

> (1) declare that enforcement of § 7522 requires the rescission of the sale of each of the hundreds of thousands of affected vehicles;
>
> (2) declare that the EPA had no authority to "annul or repeal" the SIPs of various states, or to "impair or impede" the enforcement of SIPs, by "promoting and endorsing" an allegedly deficient and unlawful consent decree;

---

lawsuit against Volkswagen, or the EPA, to enforce the Clean Air Act would seem to defeat any argument that adjudication of the government's enforcement action without his participation will impair his interests. *See United States v. City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2002) (considering it "doubtful" that the proposed intervenors' interests would be impaired where "[t]he litigation d[id] not prevent any individual from initiating suit" to enjoin the defendants' unlawful conduct). In practice, the denial of intervention under § 7604(b)(1)(B) and Rule 24(a)(1) might effectively preclude would-be intervenors from arguing they are alternatively entitled to intervene under Rule 24(a)(2).

> (3) declare that §§ 7413 and 7541 require the EPA to notify *other* owners and lessees that it is illegal to operate their vehicles in the United States, and to notify the States of "widespread" violations of various provisions of the Clean Air Act and numerous SIPs;
>
> (4) and declare that the EPA could not "support a monetary penalty which is an incentive to violate the Clean Air Act."[24]

In short, Fleshman desires a series of declarations that the Clean Air Act requires the United States to seek a full-rescission remedy, and, conversely, prohibits it from pursuing anything short of that in a settlement with VW. For him, only the removal of all affected cars from the road will ensure that neither he nor the "many thousands of innocent owners and lessees," Fleshman Compl. at 6 ¶ 14, will later face liability for driving their allegedly SIP- and Clean Air Act-noncompliant cars.

But Fleshman lacks standing for such sweeping relief. "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted." *Or. Prescription Drug Monitoring Program v. DEA*, 860 F.3d 1228, 1233 (9th Cir. 2017) (citation omitted). For Fleshman to have standing for

[24] Although Fleshman's prayer for relief asks the court to "[f]ind and order" the relief listed above, which suggests affirmative injunctive relief, each item of specified relief seeks only a declaration that the Clean Air Act requires the EPA to do specific things, and prohibits it from doing others.

these claims for relief, he must show that the threatened harm to him—caused by the government's failure to enforce the Clean Air Act appropriately—is "certainly impending" or that "there is a substantial risk that the harm will occur," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks and citations omitted), and that only rescission of the sale of *every* affected vehicle will remedy that harm.

Assuming that Fleshman is correct that the letter of the Virginia SIP would prohibit him from driving an unmodified vehicle in the future, he has myriad ways to avoid potential liability under the SIP. *He* is aware of that risk, notwithstanding the theoretical ignorance of other owners or lessees. And he could participate in the class action settlement, by choosing to have Volkswagen either buy back his car or perform an approved emissions modification on it.[25]

Moreover, Fleshman's arguments that the EPA or any state would enforce a SIP against him for continuing to drive his car are entirely speculative. There are no plausible allegations, nor reason to believe from the record, that the EPA or any state will attempt to subject operators of unmodified Volkswagen vehicles to liability. The available evidence indicates the opposite—that "the threat of enforcement" is "chimerical," rather than "credib[le]" and

[25] Fleshman has until September 1, 2018, to file a claim for benefits under the settlement. *See Volkswagen/Audi/Porsche Diesel Emissions Settlement Program*, Volkswagen, https://www.vwcourtsettlement.com/ (last visited June 2, 2018). After briefing was completed in this appeal, the EPA and CARB approved an emissions modification program for "Generation 1" vehicles, including Fleshman's 2012 Jetta.

"substantial."[26] *Susan B. Anthony List*, 134 S. Ct. at 2342, 2345 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Fleshman's fears of enforcement thus "rest on mere conjecture about possible governmental actions." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (holding that putative injuries depending on the plaintiffs' surmise about government surveillance activities did not give rise to standing); *cf. Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010) ("[C]laims of future harm lack credibility when . . . the enforcing authority has disavowed the applicability of the challenged law to the plaintiffs.").

Further, and critically, Fleshman's potential future liability for driving his *own* car does not entitle him to seek, as he does, rescission of all the sales of the affected cars, including those belonging to hundreds of thousands of other people. His own awareness of the theoretical future enforcement problem, and the severe disjuncture between the injuries to himself he asserts and the relief he seeks, underscore that he is, primarily, asserting potential harms to third parties. *See* Fleshman Compl. at 5 ¶ 14 ("[After the settlement,] the owners and lessees [of the affected vehicles] will learn for the first time their vehicles are illegal to use, but

---

[26] *See Frequent Questions about Volkswagen Violations*, U.S. Envtl. Protection Agency, https://www.epa.gov/vw/frequent-questions-about-volkswagen-violations (last visited June 2, 2018) ("Will EPA take or confiscate my vehicle? Absolutely not. EPA will not confiscate your vehicle or require you to stop driving."); Press Release, Va. Office of the Attorney Gen., *Herring Announces Compensation for Virginia Consumers Under Settlements with Volkswagen over Emissions Fraud* (June 28, 2016), http://ag.virginia.gov/media-center/news-releases/773-june-28-2016-herring-announces-compensation-for-virginia-consumers-under-settlements-withvolkswagen-over-emissions-fraud (praising the settlements and their value to Virginians).

will have already released all claims against the defendants responsible for the illegality.").[27] Absent some exception not here applicable, Fleshman "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests" of other owners or lessees. *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1118 (9th Cir. 2015) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also Mills v. United States*, 742 F.3d 400, 407 (9th Cir. 2014) (describing when third-party standing is permitted).

In short, Fleshman has no standing for the relief he seeks that the government does not, and so may not intervene as of right under Rule 24(a)(2). *See Town of Chester*, 137 S. Ct. at 1651.

IV

The Clean Air Act did not grant Fleshman an "unconditional right" to intervene in the government's suit. Fed. R. Civ. P. 24(a)(1). The United States was not seeking to enforce any "standard, limitation, or order" as those terms are used in the Clean Air Act, and in any event, Fleshman is seeking to enforce different purported requirements of the Act. As the government's action therefore did not bar Fleshman from suing on his own, he is not entitled to intervene. § 7604(b)(1)(B). Rule 24(a)(2) is no help to Fleshman, because he lacks standing to pursue the relief in

[27] *See also* Fleshman Compl. at 6 ¶ 14 (alleging that the EPA's statements that the affected vehicles were legal to drive "set a trap for many thousands of innocent owners and lessees"); *id.* at 10 (requesting that the court order the EPA to "notify each owner and lessee of a Dirty Diesel vehicle that it is illegal to use their vehicles in the United States").

his complaint. Accordingly, the district court's judgment is **AFFIRMED.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MDL No. 2672 CRB (JSC)

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION
_____/

This Order Relates To:
ALL ACTIONS (except the securities action)
_____/

ORDER GRANTING FINAL APPROVAL OF THE 2.0-LITER TDI CONSUMER AND RESELLER DEALERSHIP CLASS ACTION SETTLEMENT

Just over one year ago, Volkswagen publicly admitted it had secretly and deliberately installed a defeat device—software designed to cheat emissions tests and deceive federal and state regulators—in nearly 500,000 Volkswagen- and Audi-branded TDI diesel vehicles sold to American consumers. Litigation quickly ensued, and hundreds of consumers' lawsuits were assigned to this Court as a multidistrict litigation ("MDL").

After five months of intensive negotiations conducted under the guidance of a Court-appointed Settlement Master, Plaintiffs and Defendants Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (collectively, "Volkswagen") reached a settlement that resolves consumer claims concerning the 2.0-liter TDI diesel vehicles. The Court

preliminarily approved the Amended Consumer Class Action Settlement Agreement ("Settlement") on July 26, 2016 (Dkt. No. 1688) and entered its Amended Order on July 29, 2016 (Dkt. No. 1698). The Settlement Class Representatives now move the Court to finally approve the Settlement. (Dkt. No. 1784.) On October 18, 2016, the Court held a fairness hearing regarding final approval, during which 18 Class Members or attorneys for Class Members addressed the Court. Having considered the parties' submissions and with the benefit of oral argument, the Court **GRANTS** final approval of the Settlement Agreement. The Settlement is fair, reasonable, and adequate.

I. BACKGROUND

A. Factual Background

Over the course of six years, Volkswagen sold nearly 500,000 Volkswagen- and Audi-branded TDI "clean diesel" vehicles, which they marketed as being environmentally friendly, fuel efficient, and high performing. Consumers were unaware, however, that Volkswagen had secretly equipped these vehicles with a defeat device that allowed Volkswagen to evade United States Environmental Protection Agency ("EPA") and California Air Resources Board ("CARB") emissions test procedures. Specifically, the defeat device produces regulation-compliant results when it senses the vehicle is undergoing testing, but operates a less effective emissions control system when the vehicle is driven under normal circumstances. It was only by using the defeat device that Volkswagen was able to

obtain Certificates of Conformity from EPA and Executive Orders from CARB for its TDI diesel engine vehicles. In reality, these vehicles emit nitrogen oxides ("NOx") at a factor of up to 40 times over the permitted limit.

B. Procedural History

On September 3, 2015, Volkswagen admitted to EPA and CARB that it had installed defeat devices on its model years 2009 through 2015 Volkswagen and Audi 2.0-liter diesel engine vehicles. The public learned of this admission on September 18, 2015, when the EPA issued a Notice of Violation ("NOV") that alleged Volkswagen's use of the defeat device violated provisions of the Clean Air Act, 42 U.S.C. § 7401 et seq. That same day, CARB sent Volkswagen a notification letter stating CARB had commenced an enforcement investigation concerning the defeat device.

Two months later, EPA issued a second NOV to Volkswagen, as well as Dr. Ing. h.c. F. Porsche AG ("Porsche AG") and Porsche Cars North America, Inc. ("PCNA"), which alleged Volkswagen had installed in its 3.0-liter diesel engine vehicles a defeat device similar to the one described in the September 18 NOV. CARB also sent a second letter concerning the same matter.

1. Consumer Actions

Consumers nationwide filed hundreds of lawsuits after Volkswagen's use of the defeat device became public, and on December 8, 2015, the Judicial Panel on Multidistrict Litigation ("JPML")

transferred 56 related actions, including numerous putative class actions, to this Court for coordinated pretrial proceedings in the above-captioned MDL. (Dkt. No. 1.) The JPML has since transferred an additional 1,101 tag-along actions to the Court. (Dkt. No. 2092.)

In January 2016, the Court appointed Elizabeth J. Cabraser of Lieff, Cabraser, Heimann & Bernstein, LLP as Lead Plaintiffs' Counsel and Chair of the Plaintiffs' Steering Committee ("PSC"), to which the Court also named 21 attorneys. (Dkt. No. 1084.) On February 22, 2016, the PSC filed its Consolidated Consumer Class Action Complaint against 13 Defendants: VWGoA; VWAG; Audi AG; Audi of America, LLC; Porsche AG; PCNA; Martin Winterkorn; Mattias Müller; Michael Horn; Rupert Stadler; Robert Bosch GmbH ("Bosch GmbH"); Robert Bosch, LLC ("Bosch LLC"); and Volkmar Denner. (Dkt. No. 1230.) The Consolidated Complaint asserted claims under (1) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c)-(d), and the Magnusson-Moss Warranty Act, 15 U.S.C. § 2301 et seq.; (2) state fraud, breach of contract, and unjust enrichment laws; and (3) all fifty States' consumer protection laws. (*Id.* ¶¶ 361-3432.) The PSC also filed a Consolidated Amended Reseller Dealership Class Action Complaint against the same 13 Defendants, which asserted RICO, fraud, failure to recall/retrofit, and unjust enrichment claims. (Dkt. No. 1231 ¶¶ 179-292.) The PSC subsequently filed an Amended Consolidated Consumer Class Action Complaint ("Amended Consumer Complaint," Dkt. No. 1804) and a Second Amended Consolidated Reseller

Dealership Class Action Complaint ("Second Amended Reseller Complaint," Dkt. No. 1805).

2. Government Actions

This MDL also includes actions brought by federal and state government entities. The United States Department of Justice ("United States") on behalf of EPA has sued VWAG, Audi AG, VWGoA; Volkswagen Group of America Chattanooga Operations, LLC ("VW Chattanooga"), Porsche AG, and PCNA for claims arising under Sections 204 and 205 of the Clean Air Act, 42 U.S.C. §§ 7523 and 7524. The Federal Trade Commission ("FTC") has also brought an action against VWGoA. The FTC brings its claims pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §53(b), and alleges violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Additionally, the State of California, on behalf of the People and CARB, has sued VWAG, VWGoA, VW Chattanooga, Audi AG, Porsche AG, and PCNA for violations of the Consumer Financial Protection Act, 12 U.S.C. § 5536, and various California state laws.

3. Settlement Negotiations

In January 2016 the Court appointed former Director of the Federal Bureau of Investigation Robert S. Mueller III as Settlement Master to oversee settlement negotiations between the parties. (Dkt. No. 973.) Settlement talks began almost immediately, and by April 2016, the parties reached agreements in principle regarding 2.0-liter diesel engine vehicles. (Dkt. No. 1439 at 4:25-6:15.) On

June 28, 2016, the United States, the PSC, and the FTC filed a Partial Consent Decree, proposed Consumer Class Action Settlement Agreement, and Partial Consent Order, respectively. (Dkt. Nos. 1605-07.) Additionally, on July 7, 2016, the State of California filed a Partial Consent Decree resolving claims brought on behalf of the People. (Dkt. No. 1642.) The PSC and the United States subsequently filed an Amended Settlement and an Amended Partial Consent Decree. (*See* Dkt. Nos. 1685, 1973-1.) Negotiations concerning the 3.0-liter diesel engine vehicles remain ongoing.

4. Approval of Settlements

The Court granted preliminary approval of the Settlement on July 26, 2016. Thereafter, the Court entered the State of California's consent decree on September 1, 2016 (Dkt. No. 1801).

In accordance with the Court's Order Granting Preliminary Approval, Plaintiffs filed a statement regarding their prospective request for attorneys' fees and costs on August 10, 2016 and a motion for final approval on August 26, 2016. (Dkt. Nos. 1730, 1784.) The Notice Administrator implemented the Court-approved Notice Program on July 28, 2016 by sending email notice to potential Class Members, and on August 10, 2016, the Notice Administrator mailed Notice of the proposed Settlement Agreement to the putative Class via first class U.S. Mail. (Dkt. No. 1978 ¶¶ 10, 12; Dkt. No. 1979 ¶¶ 8, 13.) By September 30, 2016, there were 462 timely objections and 3,298 exclusions. (Dkt. No. 1976 at 3-4; Dkt. No. 1976-2 ¶ 6.)

II. SETTLEMENT TERMS[1]

The key provisions of the Settlement are as follows. The Settlement Class is defined as

> all persons (including individuals and entities) who, on September 18, 2015, were registered owners or lessees of, or, in the case of Non-Volkswagen Dealers, held title to or held by bill of sale dated on or before September 18, 2015, a Volkswagen or Audi 2.0-liter TDI vehicle in the United States or its territories (an "Eligible Vehicle"), or who, between September 18, 2015, and the end of the Claim Period, become a registered owner of, or, in the case of Non-Volkswagen Dealers, hold title to or hold by bill of sale dated after September 18, 2015, but before the end of the Claims Period, an Eligible Vehicle in the United States or its territories.

(Dkt. No. 1685 ¶ 2.6.) Eligible Vehicles are

> Model Year 2009 through 2015 Volkswagen and Audi light-duty vehicles equipped with 2.0-liter TDI engines that (1) are covered, or purported to be covered, by the EPA Test Groups in the table [in paragraph 2.33]; (2) are, at any point during the period September 18, 2015 to June 28, 2016, registered with a state Department of Motor Vehicles or equivalent agency or owned by a

[1] A more detailed explanation of the Settlement terms can be found in the Court's Amended Order. (Dkt. No. 1698 at 4-14.)

> Non-Volkswagen Dealer in the United States or its territories that (a) holds title to the vehicle or (b) holds the vehicle by bill of sale; (3) for an Eligible Owner, are currently Operable or cease to be Operable only after the Opt-Out Deadline; and (4) have not been modified pursuant to an Approved Emissions Modification. Eligible Vehicle also excludes any Volkswagen or Audi vehicle that was never sold in the United States or its territories.

(*Id.* ¶ 2.33.)

Class Members are categorized as Eligible Owners, Eligible Lessees, or Eligible Sellers. An Eligible Owner is

> the registered owner or owners of an Eligible Vehicle on June 28, 2016, or the registered owner or owners who acquire an Eligible Vehicle after June 28, 2016, but before the end of the Claim Period, except that the owner of an Eligible Vehicle who had an active lease issued by VW Credit, Inc. as of September 18, 2015, and purchased an Eligible Vehicle previously leased by that owner after June 28, 2016 shall be an Eligible Lessee. A Non-Volkswagen Dealer who, on or after June 28, 2016, holds title to or holds by bill of sale an Eligible Vehicle in the United States or its territories shall qualify as an Eligible Owner regardless of whether that Non-Volkswagen Dealer is registered as the owner of the Eligible

> Vehicle, provided that the Non-Volkswagen Dealer otherwise meets the definition of Eligible Owner.

(*Id.* ¶ 2.30.) An Eligible Lessee is

> (1) the current lessee or lessees of an Eligible Vehicle with a lease issued by VW Credit, Inc.; (2) the former lessee or lessees of an Eligible Vehicle who had an active lease issued by VW Credit, Inc. as of September 18, 2015 and who surrendered or surrenders the leased Eligible Vehicle to Volkswagen; or (3) the owner of an Eligible Vehicle who had an active lease issued by VW Credit, Inc. as of September 18, 2015, and who acquired ownership of the previously leased Eligible Vehicle at the conclusion of the lease after June 28, 2016. For avoidance of doubt, no person shall be considered an Eligible Lessee by virtue of holding a lease issued by a lessor other than VW Credit, Inc.

(*Id.* ¶ 2.29.) An Eligible Seller is

> a person who purchased or otherwise acquired an Eligible Vehicle on or before September 18, 2015, and sold or otherwise transferred ownership of such vehicle after September 18, 2015, but before June 28, 2016. For avoidance of doubt, Eligible Seller includes any owner (1) who acquired his, her, or its Eligible Vehicle on or before September 18, 2015, (2) whose Eligible Vehicle was totaled, and (3) who consequently

> transferred title of his, her, or its vehicle to an insurance company after September 18, 2015, but before June 28, 2016.

(*Id.* ¶ 2.31.)

The Settlement gives Class Members choices as to remedies. Eligible Owners have two options: Volkswagen will pay cash ("Owner Restitution") *and* either (1) buy the Class Member's Eligible Vehicle at its pre-defeat device disclosure value ("the Buyback"), or (2) fix the Class Member's vehicle when and if EPA and CARB approve an emissions modification (a "Fix").[2] (Dkt. No. 1685 ¶¶ 4.2.1-4.2.2, 4.3.1, 4.3.3.) Eligible Lessees also have two options. They may (1) terminate their leases without penalty plus receive additional cash ("Lessee Restitution"), or (2) if a Fix is approved, have their leased car fixed plus receive Lessee Restitution. (*Id.* ¶¶ 4.2.3-4.2.4, 4.3.1, 4.3.3.) Finally, Eligible Sellers, that is, consumers who sold their Eligible Vehicle prior to the filing of the Settlement, receive cash ("Seller Restitution"). (*Id.* ¶ 2.60.) The Buyback price and Restitution amounts are based on the September 2015 National Automobile Dealers Association ("NADA") Clean Trade-In value for each Eligible Vehicle. (*Id.* ¶¶ 2.5, 2.64.) Compensation for Buybacks, Lease Terminations, and Restitution will be drawn from a $10.033 billion funding pool. (*Id.* ¶ 1.)

---

[2] The schedule for Volkswagen to submit proposed Fixes can be found in Exhibit 1 to the Settlement (Dkt. No. 1685-1 at 6-7) and the Long Form Notice (Dkt. No. 1685-3 at 19).

The Settlement further requires Volkswagen to pay reasonable attorneys' fees and costs. (*Id.* ¶ 11.1.) Class Counsel has agreed to seek no more than $324 million, plus no more than $8.5 million in actual and reasonable out-of-pocket costs, for expenses incurred through October 18, 2016. (Dkt. No. 1730 at 2-3.)

In exchange for benefits under the Settlement, Class Members agree to release all "Released Claims" against "Released Parties." The Settlement defines "Released Parties" as

> (1) Volkswagen AG, Volkswagen Group of America, Inc. (d/b/a Volkswagen of America, Inc. or Audi of America, Inc.), Volkswagen Group of America Chattanooga Operations, LLC, Audi AG, Audi of America, LLC, VW Credit, Inc., VW Credit Leasing, Ltd., VCI Loan Services, LLC, and any former, present, and future owners, shareholders, directors, officers, employees, attorneys, affiliates, parent companies, subsidiaries, predecessors, and successors of any of the foregoing (the "VW Released Entities");
> (2) any and all contractors, subcontractors, and suppliers of the VW Released Entities;
> (3) any and all persons and entities indemnified by any VW Released Entity with respect to the 2.0-liter TDI Matter;
> (4) any and all other persons and entities involved in the design, research, development, manufacture, assembly, testing, sale, leasing, repair, warranting, marketing, advertising, public relations, promotion, or distribution of any Eligible Vehicle, even if such persons are not

> specifically named in this paragraph, including without limitation all Volkswagen Dealers, as well as non-authorized dealers and sellers;
> (5) Claims Supervisor;
> (6) Notice Administrator;
> (7) lenders, creditors, financial institutions, or any other parties that financed any purchase or lease of an Eligible Vehicle; and
> (8) for each of the foregoing, their respective former, present, and future affiliates, parent companies, subsidiaries, predecessors, successors, shareholders, indemnitors, subrogees, spouses, joint ventures, general or limited partners, attorneys, assigns, principals, officers, directors, employees, members, agents, representatives, trustees, insurers, reinsurers, heirs, beneficiaries, wards, estates, executors, administrators, receivers, conservators, personal representatives, divisions, dealers, and suppliers.

(Dkt. No. 1685 ¶ 9.2.) The Settlement does not, however, release any claims against Bosch GmbH; Bosch LLC; or any of its any of its former, present, and future owners, shareholders, directors, officers, employees, attorneys, affiliates, parent companies, subsidiaries, predecessors, or successors. (*Id.*; Dkt. No. 1685-5 ¶ 6.)

In exchange for benefits under the Settlement, Class members release

> any and all claims, demands, actions, or causes of action of any kind or nature whatsoever, whether in law or in equity, known or unknown, direct, indirect or consequential, liquidated or unliquidated, past, present or future, foreseen or unforeseen, developed or undeveloped, contingent or noncontingent, suspected or unsuspected, whether or not concealed or hidden, arising from or in any way related to the 2.0-liter TDI Matter, including without limitation (1) any claims that were or could have been asserted in the Action; and (2) any claims for fines, penalties, criminal assessments, economic damages, punitive damages, exemplary damages, liens, injunctive relief, attorneys', expert, consultant, or other litigation fees or costs other than fees and costs awarded by the Court in connection with this Settlement, or any other liabilities, that were or could have been asserted in any civil, criminal, administrative, or other proceeding, including arbitration.

(Dkt. No. 1685 ¶ 9.3.)

Class Members also expressly waive and relinquish any rights they may have under California Civil Code section 1542 or similar federal or state law. (*Id.* ¶ 9.9; Dkt. No. 1685-5 ¶ 3); *see* Cal. Civ. Code § 1542 ("A general release does not extend

to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.").

III. DISCUSSION – FINAL APPROVAL OF SETTLEMENT

A. Legal Standard

The Ninth Circuit maintains "a strong judicial policy" that favors class action settlements. *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). Nevertheless, Federal Rule of Civil Procedure ("Rule") 23(e) requires courts to approve any class action settlement. Fed. R. Civ. P. 23(e). "[S]ettlement class actions present unique due process concerns for absent class members." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). As such, "the district court has a fiduciary duty to look after the interests of those absent class members." *Allen*, 787 F.3d at 1223 (collecting cases). Specifically, courts must "determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026; *see* Fed. R. Civ. P. 23(e)(2). In particular, where "the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

Approval of a settlement is a two-step process. Courts first "determine[] whether a proposed class action settlement deserves preliminary approval and

then, after notice is given to class members, whether final approval is warranted." *In re High-Tech Employee Antitrust Litig.*, 2014 WL 3917126, at *3 (N.D. Cal. Aug. 8, 2014). "At the fairness hearing, . . . after notice is given to putative class members, the court entertains any of their objections to (1) the treatment of the litigation as a class action and/or (2) the terms of the settlement." *Ontiveros v. Zamora*, 303 F.R.D. 356, 363 (E.D. Cal. 2014) (citing *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989)). After the fairness hearing, the court determines whether the parties should be allowed to settle the class action pursuant to the agreed-upon terms. *Chavez v. Lumber Liquidators, Inc.*, 2015 WL 2174168, at *3 (N.D. Cal. May 8, 2015) (citing *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004)).

B. Final Certification of the Settlement Class

1. Rule 23(a) and (b) Requirements

A class action is maintainable only if it meets the four Rule 23(a) prerequisites:

(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.

Fed. R. Civ. P. 23(a). In a settlement-only certification context, the "specifications of the Rule . . . designed to protect absentees by blocking unwarranted or overbroad class definitions . . . demand undiluted, even heightened, attention[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). "Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." (*Id.*)

In addition to the Rule 23(a) prerequisites, "parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc.*, 521 U.S. at 614. Rule 23(b)(3), relevant here, requires that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The "pertinent" matters to these findings include

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

(*Id.*)

In its Amended Order, the Court carefully considered whether Plaintiffs satisfied the Rule 23(a) and (b)(3) requirements. (*See* Dkt. No. 1698 at 15-20.) "Because the Settlement Class has not changed, the Court sees no reason to revisit the analysis of Rule 23." *G.F. v. Contra Costa Cty.*, 2015 WL 7571789, at *11 (N.D. Cal. Nov. 25, 2015) (internal quotation marks and citation omitted).

2. Rule 23(c) Requirements

"Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon*, 150 F.3d at 1025. Rule 23(c)(2)(B) requires that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "[T]he express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974).

a. *Implementation of the Notice Program*

The Court previously approved the form and content of the Long and Short Form Notices, as well as the Notice Program as set forth in the Settlement. (Dkt. No. 1698 at 28-31; *see* Dkt. Nos. 1680; Dkt. No. 1685 ¶¶ 8.1-8.8.) The Court appointed Kinsella Media LLC ("KM") as Notice Administrator to implement the Notice Program on July 27, 2016. (Dkt. No. 1698 at 32.)

Individual direct notice served as the primary means of notification. (Dkt. No. 1784 at 38.) Rust Consulting, Inc. ("Rust"), of which KM is a subsidiary, provided direct mail services. (Dkt. No. 1978 ¶¶ 7-8.) Between August 10 and 16, 2016, Rust mailed via First Class U.S. Mail a personalized cover letter and the Long Form Notice to 811,944 identified Class Members. (Dkt. No. 1784 at 37-38; Dkt. No. 1978 ¶ 10; Dkt. No. 1979 ¶ 8; *see* Dkt. Nos. 1979-1, 1979-2.) Rust obtained Class Members' addresses through Volkswagen's records and/or registration data and by purchasing a mailing list of non-Volkswagen/Audi new and used car dealers. (Dkt. No. 1784 at 38; Dkt. No. 1979 ¶¶ 5-6.) Rust checked these addresses against the United States Postal Service's National Change of Address database prior to mailing. (Dkt. No. 1784 at 38; Dkt. No. 1979 ¶ 7.) As of September 28, 2016, Rust received 732 undeliverable Notices with a forwarding address, of which 531 have been re-mailed. (Dkt. No. 1979 ¶ 9.) As of September 28, 2016, Rust received an additional 29,257 undeliverable Notices without a forwarding address. (*Id.* ¶ 10.) After running these Notices through an advance address search, such as a skip trace, to locate a more current address, Rust obtained updated addresses for 12,885 records and has re-mailed 8,767 Notices. (*Id.*) As of September 29, 2016, 16,372 mailed Notices remained undelivered. (Dkt. No. 1978 ¶ 11.) Put another way, 97.98% of mailings were delivered. (*Id.*)

To supplement the direct mail notice, Rust sent 79,772 email notifications to individuals who registered on the Settlement Website (www.VWCourtSettlement.com) and provided an

email address. (Dkt. No. 1979 ¶ 12; *see* Dkt. No. 1979-4.) Of those, 76,806 (96.28%) were delivered. (*Id.*) Rust also sent 374,025 email notifications to individuals who signed up for the Volkswagen or Audi Goodwill Programs.[3] (Dkt. No. 1784 at 37-39; Dkt. No. 1979 ¶¶ 12, 14; *see* Dkt. No. 1979-5.) Out of those 374,025 emails, 357,103 (95.48%) were delivered. (Dkt. No. 1979 ¶ 12.) In total, Rust sent 453,797 emails. (Dkt. No. 1978.) Class Members will again receive direct notice via mail or email when EPA and CARB approve or reject Volkswagen's proposed fixes. (Dkt. No. 1784 at 39.)

The Notice Program also provided for notice by publication, both in print and digital form. There have been 125 strategically-placed print notifications in national and regional publications. (Dkt. No. 1784 at 37.) Specifically, the Short Form Notice appeared as a two-color advertisement (where available) in the Sunday edition of *The New York Times*; the daily edition of *The Wall Street Journal*; the daily edition of *USA Today*; both the Sunday and daily editions of nineteen newspapers covering markets with 5,000 or more Eligible Vehicles; the Sunday edition of 26 newspapers covering markets with 2,000-4,999 Eligible Vehicles; the weekly editions of 31 Hispanic newspapers, with the Notice translated into Spanish; and the weekly editions of 27 African American newspapers. (*Id.* at 39; Dkt. No. 1978 ¶¶ 14-16; *see* Dkt. Nos. 1978-1, 1978-2.) Together, these publications have circulations in the millions. (*See* Dkt. No. 1784 at 37, 39; *see* Dkt. No. 1978-1 at 4.)

The digital and social media campaign consisted of publishing more than 112,582,506 digital

---

[3] The Volkswagen and Audi TDI Goodwill Programs are not part of the Settlement.

impressions on dozens of relevant websites and on leading social media platforms. (Dkt. No. 1784 at 37, 39-40; Dkt. No. 1978 ¶¶ 18-27.) Between July 27, 2016 and August 19, 2016, targeted banner advertisements with a bold message and graphics were published on automotive websites that Class Members visited, according to IHS Automotive data. (Dkt. No. 1784 at 39; Dkt. No. 1978 ¶¶ 18-19; *see* Dkt. No. 1978-3.) These websites included the National Automobile Dealers Association (www.nada.org), Hemmings (www.hemmings.com), Kelley Blue Book (www.kbb.com). (Dkt. No. 1784 at 39; Dkt. No. 1978 ¶ 21.) An individual who clicked on a banner advertisement was taken directly to the Settlement Website. (Dkt. No. 1978 ¶ 19.) Targeted internet advertising generated 250,724 clicks to the Settlement Website. (*Id.* ¶ 18.)

Additionally, to target individuals interested in or researching automobiles, banner advertisements and high-impact units appeared on websites associated with popular consumer automotive magazines, such as *Automobile* (www.automobilemag.com), *Car & Driver* (www.caranddriver.com), *Motor Trend* (www.motortrend.com), and *Road & Track* (www.roadandtrack.com). (Dkt. No. 1784 at 39; Dkt. No. 1978 ¶ 21.) Targeted banner advertisements on the National Association of Fleet Administrators website (www.nafa.org) and other websites associated with relevant trade publications, including *Automotive Fleet*, *Automotive News*, *Auto Rental News*, and *FLEETSolutions*, sought to reach fleet owners who may be included in the Settlement. (Dkt. No. 1784 at 40-41; Dkt. No. 1978 ¶ 22.)

The digital publications also consisted of Facebook, Instagram, and Twitter advertisements to target consumers; banner and video advertisements published on a broad and diverse range of websites through the Google Display Network; and the use of sponsored keywords/phrases on all major search engines, such as Google AdWords, Bing Microsoft Advertising, and their search partners. (Dkt. No. 1784 at 40; Dkt. No. 1978 ¶¶ 23-25.)

There was also significant media coverage of the Settlement. Between June 28, 2016 and July 25, 2016, there were approximately 11,780 pieces from U.S. media outlets. (Dkt. No. 1978 ¶ 28(a).) Between July 26, 2016 and September 16, 2016, an additional 5,630 news pieces were generated. (*Id.*) Approximately 72.3% of the total coverage came from online and print news sources, 18.1% from television news, and 9.4% from blogs. (*Id.*) On July 29, 2016, an earned media program consisting of a "campaign hero microsite," or a multimedia news release, was distributed on PR Newswire's US1 National Circuit, which reaches approximately 5,000 media outlets and 5,400 websites. (Dkt. No. 1784 at 40; Dkt. No. 1978 ¶ 28(b).)

Finally, the Short and Long Form Notices direct Class Members to the Settlement Website and a toll-free telephone number (1-844-98-CLAIM). (Dkt. No. 1784 at 40; Dkt. No. 1978 ¶ 32; *see* Dkt. Nos. 1685-2, 1685-3.) Both the Website and the telephone number allow Class Members to, among other things, obtain additional information and access the Settlement documents. As of September 29, 2016, there had been 105,420 calls to the toll-free number. (Dkt. No. 1978 ¶ 32.) The Settlement Website has also received 885,290 unique visits. (Dkt. No. 1976 at 3.)

b. *CAFA Compliance*

The Class Action Fairness Act ("CAFA") provides that "each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement[.]" 28 U.S.C. § 1715(b). Volkswagen mailed notice of the proposed Settlement and Release to the United States Attorney General and all 50 States' Attorneys General on July 5, 2016. (Dkt. No. 1783 ¶ 2; *see* Dkt. No. 1783-1.)

c. *Adequacy of Notice*

The Court is satisfied that the extensive Notice Program was reasonably calculated to notify Class Members of the proposed Settlement. The Notice "apprise[d] interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Indeed, the Notice Administrator reports the Notice Program reached more than 90% of potential Class Members. (Dkt. No. 1978 ¶ 35.)

Objector Autoport, LLC ("Autoport") states it did not receive actual notice and asserts that "presumably hundreds if not thousands of other dealers nationwide who are likewise unaware of their rights under the settlement[.]" (Dkt. No. 1879 at 3-4.) But due process does not require that class members receive actual notice, only that notice "be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of

the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (quoting *Mullane*, 339 U.S. at 314). Moreover, Autoport's timely-filed objection indicates it was aware of the Settlement, and its claim that "hundreds if not thousands of other dealers" did not receive notice is unsupported speculation. The Court therefore overrules Autoport's objection regarding notice.

*****

The Settlement Class satisfies Rules 23(a) and 23(b)(3), and Notice satisfies Rule 23(c). Accordingly, the Court grants final class certification.

C. Fairness, Adequacy, and Reasonableness

Courts may approve a class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts assessing the fairness of a settlement generally weigh

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant;

> and (8) the reaction of the class members of the proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004).

But where, as here, the parties negotiate a settlement before a class has been certified, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Pre-class certification settlements "must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *In re Bluetooth Prods. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (citing *Hanlon*, 150 F.3d at 1026). This heightened scrutiny "ensure[s] that class representatives and their counsel do not secure a disproportionate benefit 'at the expense of the unnamed plaintiffs who class counsel had a duty to represent.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1027). As such, courts must evaluate the settlement for evidence of collusion. (*Id.*)

Because "[c]ollusion may not always be evident on the face of a settlement, . . . courts therefore must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947. Signs of subtle collusion include, but are not limited to,

> (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded,
> (2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries "the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class"; and
> (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund[.]

Id. (internal quotations and citations omitted).

1. The *Churchill* Factors

a. *Strength of Plaintiffs' Case*

The first *Churchill* factor does not favor settlement. "Approval of a class settlement is appropriate when plaintiffs must overcome significant barriers to make their case." *G.F.*, 2015 WL 7571789, at *8 (citing *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010)). But courts need not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice*

v. Civil Serv. Comm'n of City & Cty. of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982).

Plaintiffs concede they have a strong case. (*See* Dkt. No. 2079 at 19:4.) Liability is not an issue: Volkswagen admits to installing and failing to disclose the defeat device in its TDI diesel engine vehicles, which it marketed as environmentally friendly. Thus, only the amount of recovery is in dispute. Plaintiffs submit the declaration of Andrew Kull, Distinguished Senior Lecturer at the University of Texas and former Reporter for the American Law Institute, regarding the strength of the Settlement's remedies. (Dkt. No. 1784-2 ¶¶ 4, 9.) Mr. Kull notes that "[a]n Eligible Owner who chose to pursue an independent suit for rescission and restitution would probably be allowed to do so, because the threshold requirements that limit access to the remedy would—in the context of the "clean diesel" litigation—be liberally interpreted in favor of the owner." (*Id.* ¶ 12; *see id.* ¶ 16 ("[T]he facts underlying the 'clean diesel' litigation make it probable that courts would interpret these rules [regarding rescission] liberally in favor of an Eligible Owner seeking rescission and restitution against Volkswagen."). But recovery of damages is less certain given that "[t]he direct harm caused by the TDI engines' nonconformity was not to the vehicle owner—who obtained a vehicle that performed as expected—but to the public at large. Something could be allowed on account of the owner's frustration and inconvenience, but recovery on this basis might be only modest." (*Id.* ¶ 28(b); *see id.* ¶ 29(a).) That said, Mr. Kull concedes that "[e]nhanced or exemplary damages might be available in some cases." (*Id.* ¶ 28(c).)

In their Amended Consumer Complaint and Second Amended Reseller Complaint, Plaintiffs seek rescission, restitution, and compensatory damages. (Dkt. No. 1804 ¶¶ E-F; Dkt. No. 1805 at 110-11.) Plaintiffs have a high probability of successfully obtaining their sought-after remedies. Thus, this factor does not favor final approval.

b. *Risk, Expense, Complexity, and Likely Duration of Further Litigation*

But Plaintiffs' strong claims are balanced by the risk, expense, and complexity of their case, as well as the likely duration of further litigation. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000), as amended (June 19, 2000). Settlement is favored in cases that are complex, expensive, and lengthy to try. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). This factor supports final approval.

Plaintiffs assert that "should Settlement Class Counsel prosecute these claims against Volkswagen to conclusion, any recovery would come years in the future and at far greater expense to the environment and the Class." (Dkt. No. 1784 at 20.) Plaintiffs also emphasize that prolonged litigation risks further environmental damage caused by the Eligible Vehicles. (Dkt. No. 1784 at 21; *see* Dkt. No. 2079 at 19:6-9.) Settlement, however, will remove the Eligible Vehicles from roads and thus reduce additional environmental damage and air pollution. (Dkt. No. 1784 at 21.)

There are also potential monetary risks associated with litigation. Despite their strong claims, Class Counsel "recognize there are always

uncertainties in litigation[.]" (*Id.* at 19.) It is possible that "a litigation Class would receive less or nothing at all, despite the compelling merit of its claims, not only because of the risks of litigation, but also because of the solvency risks such prolonged and expanding litigation could impose upon Volkswagen." (*Id.* at 20.)

First, any class recovery obtained at trial could be reduced through offsets. Several state laws account for offsets based on the owner's use of the vehicle. *See e.g.,* Cal. Civ. Code § 1793.2(d)(2)(C) ("When restitution is made . . . , the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity."); Md. Code Ann. Com. Law § 14-1502(c)(1)(ii)(2) (requiring manufacturer to "[a]ccept return of the motor vehicle from the consumer and refund to the consumer the full purchase price . . . less: 1. A reasonable allowance for the consumer's use of the vehicle not to exceed 15 percent of the purchase price; and 2. A reasonable allowance for damage not attributable to normal wear . . . ."); Mass. Gen. Laws Ann. ch. 90, § 7N 1/2 ("In instances in which a vehicle is sold and subsequently returned, the manufacturer shall refund the full contract price of the vehicle . . . , less . . . a reasonable allowance for use . . . ."); Wash. Rev. Code Ann. § 19.118.041(1)(a) ("Compensation for a reasonable offset for use shall be paid by the consumer to the manufacturer in the event that the consumer accepts a replacement motor vehicle.").

Second, Mr. Kull opines that if an Eligible Owner were to litigate his or her claims, Volkswagen could reasonably be expected to defend against the action. (Dkt. No. 1784-2 ¶ 18.) Mr. Kull sets forth a number of threshold issues regarding rescission that Volkswagen could contest, including fraudulent inducement, notice, and continued use. (*Id.* ¶¶ 18(a)-(f).) But "[e]ven with a favorable resolution of these issues, the consequence would be to increase the cost and delay the outcome of independent litigation—thereby depressing the expected recovery of an owner's suit for rescission." (*Id.* ¶ 18(f).) Moreover, monetary "compensation obtained through an independent lawsuit will necessarily be reduced by the amount of associated legal expenses, resulting in a significant reduction in an owner's expected recovery from independent litigation." (*Id.* ¶ 28(d).)

Given the risks of prolonged litigation, the immediate settlement of this matter is far preferable. As the Court stated at the outset, the priority was to get the polluting cars off the road as soon as possible. (*See* Dkt. No. 365 at 5:7-6:6.) The Settlement does that. It requires Volkswagen to make the funds to compensate Class Members available within ten days of the Court's final approval order (Dkt. No. 1685 ¶ 10.1), and the Buyback program will begin immediately upon final approval of the Settlement and entry of the United States' Consent Decree (Dkt. No. 1685-3 at 3). For those Class Members who elect a Fix, the Consent Decree sets forth a schedule for Volkswagen to submit proposed Fixes; the last deadline for Volkswagen's final submittal is October 30, 2017. (*See* App'x B ¶ 4.2, Dkt. No. 1973-1.) And, if no Fix is approved, Class Members may instead participate in

a Buyback. The Settlement thus ensures Class Members that a remedy—whether a Buyback or a Fix—is available immediately or, at the latest, 2018. (*See* Dkt. No. 1685 ¶ 4.3.1; Dkt. No. 1784 at 5.)

While Plaintiffs might ultimately prevail on their claims, the Settlement provides benefits much sooner than if litigation were to continue. Moreover, litigation would cause additional environmental damage that the Settlement otherwise reduces. The second *Churchill* factor therefore supports final approval.

c. *Risk of Maintaining Class Action Status throughout Trial*

The potential difficulties in obtaining and maintaining class certification weighs in favor in final approval. Plaintiffs represent they would have successfully certified a litigation class and maintained certification through trial. (Dkt. No. 1784 at 17.) There does not appear to be any issue with maintaining class certification at this point. That said, if the parties had not settled, Volkswagen could have opposed Plaintiffs' motion for class certification and, even if the Court certified the class, there is a risk the Court could later de-certify it. As such, this factor favors settlement.

d. *Amount Offered in Settlement*

The amount offered in the Settlement favors final approval. This factor is considered "the most important variable in assessing a class settlement is the amount of relief obtained for the class." *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp.

3d 993, 1001 (N.D. Cal. 2015), *reconsideration denied*, 2015 WL 4735521 (N.D. Cal. Aug. 10, 2015). "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), as amended (June 19, 2000) (internal quotation marks omitted). Thus, courts evaluating the amount offered in settlement for fairness must consider the settlement as a "complete package taken as a whole, rather than the individual component parts[.]" *Officers for Justice*, 688 F.2d at 628.

The Settlement adequately and fairly compensates Class Members. The Settlement requires Volkswagen to establish a Funding Pool in the amount of $10.033 billion. (Dkt. No. 1685 ¶ 2.42.) This amount presumes 100% Buyback of all purchased Eligible Vehicles and 100% Lease Termination of all leased Eligible Vehicles. (*Id.*)

The amount of cash a Class Member receives depends on the value of his or her Eligible Vehicle. The Settlement uses the NADA Clean Trade-In ("CTI") price as of September 2015 as a baseline for the Vehicle Value, which determines the price at which Volkswagen will purchase the Eligible Vehicle in a Buyback. (Dkt. No. 1685 ¶¶ 2.5, 4.2.1.) Edward M. Stockton, Vice President and Director of Economics Services of The Fontana Group, Inc., explains that the September 2015 CTI baseline benefits Class Members, as it (1) "inherently avoid[s] price depreciation that occurred in the post-scandal market;" (2) "allow[s] customers participating in the buyback to mitigate the effect on the vehicle's value that resulted from overpayment for the TDI

premium;" and (3) "allow[s] owners . . . to continue to use their vehicles until the buyback date without the vehicle's value experiencing age-related depreciation that normally occurs in the retail vehicle market." (Dkt. No. 1784-1 ¶ 15.) The Vehicle Value is further customized by taking into account OEM-installed options and mileage. (Dkt. No. 1685-1 ¶ 12.)

Restitution, which Class Members receive in addition to either a Buyback or Lease Termination or a Fix, provides additional monetary compensation. Eligible Owners are entitled to a Restitution Payment of $5,100 or 20% of the vehicle value plus $2,986.73, whichever is greater. (*Id.* ¶ 5(a).) Thus, not only do Eligible Owners participating in a Buyback receive monetary compensation that allows them to replace their vehicles at a September 2015 retail value, but they also receive an additional cash payment for other costs. Mr. Stockton calculates this combination of payments is equal to a minimum of 112.6% of the Eligible Vehicles retail values as of September 2015. (Dkt. No. 1784-1 ¶ 28.)

The Settlement also guarantees Eligible Lessees a Restitution Payment comprised of 10% of the Vehicle Value plus $1,529. (Dkt. No. 1685-1 ¶ 9.) While this formula means Restitution for Eligible Lessees is less than Restitution for Eligible Owners, compensation for Eligible Lessees is still fair and adequate. Mr. Stockton notes that the Lessees and Owners have different economic considerations which justify a lesser monetary payment. (Dkt. No. 1784-1 ¶ 34.) Specifically,

> [w]hereas purchasers pay up-front for the entire vehicle, lessees essentially pay for the

> amount that vehicle's value is expected to diminish over the period of their lease. Lessees pre-negotiate the values of their vehicles that will apply at the end of the lease (residual value) and are, therefore, generally not at a financial risk of excess depreciation. Lessees generally retain their vehicles for shorter time periods than do purchasers and, as a consequence, would have had their subsequent purchases accelerated less by the scandal than did purchasers. Lessees also tend to have strict mileage limitations within their least terms and would experience less harm from overpayment than would purchasers. Finally, lessees would have experienced less uncertainty about their vehicles than would have purchasers as return conditions were pre-established prior to the scandal.

(*Id.*) Thus, it is not unreasonable that Eligible Lessees should receive a smaller payment than Eligible Owners.

In sum, the Settlement provides recovery for the losses Class Members suffered as a result of Volkswagen's use and subsequent disclosure of the defeat device. By giving them the September 2015 value of their vehicle, it not only provides sufficient compensation to place Class Members in the same position they were in pre-disclosure but also gives them additional compensation. As such, the Settlement offers Class Members relief that is fair and adequate. This factor therefore favors final approval.

e. *Extent of Discovery Completed and the Stage of the Proceedings*

"In the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp.*, 213 F.3d at 459 (9th Cir. 2000) (brackets, citation, and internal quotation marks omitted). Instead, courts look for indications "the parties carefully investigated the claims before reaching a resolution." *Ontiveros*, 303 F.R.D. at 371.

The extent of discovery completed and the stage of the proceeding weighs in favor of approving the Settlement. The parties reached this Settlement at an early phase of the litigation; the parties have not engaged in any dispositive motion practice. But a swift resolution does not mean the parties were unprepared to engage in settlement negotiations. To the contrary, Class Counsel and Volkswagen engaged in significant discovery such that each party was fully informed to participate in settlement discussions.

Prior to filing the Complaint, "Class Counsel served Volkswagen with extensive written discovery requests, including interrogatories, requests for production, and requests for admissions[.]" (Dkt. No. 1784 at 7.) In response, Volkswagen produced over 12 million pages of documents; Class Counsel has reviewed and analyzed approximately 70% of them. (*Id.*) Additionally, Class Counsel "analyz[ed] economic damages (and retain[ed] experts concerning those issues); review[ed] Volkswagen's financial condition and ability to pay any settlement

or judgment; assess[ed] technical and engineering issues; . . . and research[ed] environmental issues, among others." (*Id.* at 6.) Volkswagen also propounded discovery requests on Class Counsel, who in turn "produc[ed] documents from 174 named Plaintiffs, in addition to compiling information to complete comprehensive fact sheets, which also included document requests, for each named Plaintiff." (*Id.*)

Thus, Class Counsel's careful investigation of their claims before they filed their Complaint and their extensive review of discovery materials indicates they had sufficient information to make an informed decision about the Settlement. As such, this factor favors approving the Settlement.

f. *Experience and Views of Counsel*

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation. *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Courts afford "great weight to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 528 (internal quotation marks omitted).

Class Counsel believe it is "highly uncertain whether the Class would be able to obtain and sustain a better outcome through continued litigation, trial, and appeal." (Dkt. No. 1784 at 17.) As the Court previously noted, Class Counsel "are qualified attorneys with extensive experience in consumer class action litigation and other complex cases" who the Court selected after a competitive

application process. (Dkt. No. 1698 at 18.) In light of Class Counsel's considerable experience and their belief that the Settlement provides more than adequate benefits to Class Members, this factor favors final approval.

g. *Presence of Government Participant*

This factor weighs heavily in favor of final approval. Volkswagen provided notice to all 50 State Attorneys General and the U.S. Attorney in accordance with CAFA. "Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010) (citing Fed. R. Civ. P. 23(e)(2)). No state or federal official objected. To the contrary, 44 State Attorneys General support the Settlement. (Dkt. No. 1784 at 3 n.3; Dkt. No. 2079 at 26:10-13.) Indeed, in a letter to Kentucky residents, the Attorney General for the State of Kentucky stated that his office had "evaluated the options for Kentucky consumers under the national class action settlement, to make certain they would be adequate – they are." (Dkt. No. 1976-3 at 1.)

Moreover, although no government entity is a direct party to the Settlement, Class Counsel negotiated the Settlement alongside the United States, FTC, and CARB. For over five months, the Settlement Master "communicated on a continuous

basis with the representatives of the MDL parties – originally Volkswagen, the Department of Justice, the Environmental Protection Agency and the California Air Resources Board, and the PSC; subsequently, upon the filing of its Complaint, the Federal Trade Commission; and ultimately the California Attorney General." (Dkt. No. 1977 ¶ 4.) As a result, the agreements—the Consumer and Reseller Dealership Class Action Settlement, the United States' Consent Decree, the FTC's Consent Order, and the State of California's Consent Decree—are inextricably tied to one another. Indeed, the Settlement Master explains that "[t]his settlement process was iterative and had multiple moving parts and shifting dynamics because it had to address the needs and interests of consumers and state and federal government entities." (*Id.* ¶ 7.) To that end, the FTC "strongly supports" the Settlement, noting it "provides the same generous, but appropriate compensation to each consumer as the FTC Order" and "is clearly in the public interest." (Dkt. No. 1781 at 1-2.) Accordingly, the Court finds this factor strongly favors settlement.

Objector Jolian Kangas challenges the Settlement Master's competence on two grounds. The Court finds no merit in either argument. First, Kangas asserts that the Settlement Master "has maintained a profitable relationship with Volkswagen." (Dkt. No. 1826 at 3.) This allegation is unfounded. The Settlement Master disclosed any potential conflicts prior to his appointment. (*See* Dkt. No. 797-1.) The Court was therefore fully aware of these possible issues and was satisfied they would not influence the Settlement Master's ability to guide settlement negotiations. Specifically, the

Settlement Master noted WilmerHale had or was currently representing Volkswagen in matters unrelated to the defeat device. (*Id.*) He stated, however, that he and other WilmerHale staff working on his team would be walled off from any other Volkswagen-related matters, and that the attorneys involved in the other matters would likewise be walled off from his work as Settlement Master. (Dkt. No. 797-1 at 1.) Kangas presents no evidence beyond his bare assertion that the Settlement Master did not abide by his representation or otherwise allowed WilmerHale's unrelated dealings with Volkswagen to influence his work in this MDL. Indeed, that Class Members are adequately compensated under the Settlement suggests the Settlement Master did not supervise settlement negotiations to the detriment of Class Members. The Court therefore finds this contention meritless.

Second, Kangas accuses the Court of appointing the Settlement Master through "cronyism." (Dkt. No. 1826 at 3.) Again, this allegation is specious. The Court appointed the Settlement Master due to his extensive experience dealing with government entities and private individuals, experience accumulated during his tenure as the former Director of the FBI and as the U.S. Attorney for the Northern District of California, as well as his years in private practice. (Dkt. No. 797 at 2.) This made the Settlement Master uniquely qualified to handle settlement negotiations in this MDL, which involved several state and federal government entities, foreign parties, and private individuals. That the Court was familiar with the Settlement Master's resume is not "cronyism;" it is these very

qualifications that warranted the Settlement Master's appointment.

Finally, the Court notes that parties had an opportunity to respond to its intent to appoint the Settlement Master to his current role. (Dkt. No. 797 at 2.) No party—including Kangas—objected to his appointment. Accordingly, the Court overrules Kangas' objection concerning the Settlement Master.

Yet another objector, Matthew Comlish, seems to believe the participation of government entities detracts from the Settlement. Comlish alleges the Settlement provides a "negative value" to Class Members because "it provides no additional benefits to class members that the United States and FTC Consent Decrees don't already provide." (Dkt. No. 1891 at 23.) He further contends "the Settlement . . . actually imposes **negative** value because class members are required to release their claims in exchange for nothing but transaction costs of $332 million in attorneys' fees and expenses." (*Id.* at 23-24 (emphasis in the original).) These objections are without merit.

Comlish erroneously claims the Settlement offers nothing more than what is required by the United States' Partial Consent Decree and the FTC's Partial Consent Order. Simply put, none of the agreements can be viewed in a vacuum and none can function without the others. As the Settlement Master explains,

> [t]his settlement was iterative and had multiple moving parts and shifting dynamics because it had to address the needs and interests of consumers and federal government entities. The parties had

> overlapping claims and authority; multiple parties sought economic, injunctive, and environmental relief; *no single party could, as a jurisdictional or practical matter obtain and enforce all the relief sought*; and the parties had different priorities and perspectives.

(Dkt. No. 1977 ¶ 7 (emphasis added).) For instance, while the Partial Consent Decree sets forth a Recall Rate that requires Volkswagen to buy back or fix 85% of the Eligible Vehicles by June 2019 (*see* App'x A ¶¶ 6.1, 6.3, Dkt. No. 1973-1), the Settlement requires Volkswagen to pay Class Members monetary compensation (*see* Dkt. No. 1685 ¶¶ 4.2.1-4.2.2, 4.2.3). Thus, if the Partial Consent Decree were to operate without the Settlement, the cars would be removed from the roads, but Class Members would not be entitled to any compensation for their losses. Undoubtedly, Class Members would have little incentive to give back or fix their cars if they received nothing in return. On the other hand, if the Settlement were to stand alone, Class Members could receive a Buyback or Fix and Restitution, but Volkswagen would have little motivation buy back or fix as many cars as possible. The Partial Consent Decree's penalties for failing to meet the Recall Rate ensure Volkswagen will attempt to buy back or fix as many Eligible Vehicles as possible. Thus, the Settlement does not fail to provide additional benefits as Comlish argues—far from it. In fact, the Settlement provides the benefits necessary to encourage Class Members to ensure the polluting vehicles are removed from the road, but these benefits can only be successful with the

implementation of the Partial Consent Decree and the Partial Consent Order. Accordingly, the Court overrules Comlish's objection.

h. *Reactions of Class Members*

There are approximately 490,000 Class Members.[4] (Dkt. No. 1976 at 6.) Their interest in the Settlement has been high, as evidenced by the fact that "Class Counsel attorneys and staff have responded by phone, email, and correspondence to over 16,000 inquiries from more than 8,000 Class members; the Settlement call center has received approximately 105,420 calls; and the Settlement website has received 885,290 unique visits since its launch." (Dkt. No. 1976; *see* Dkt. No. 1976-2 ¶ 4.) At the hearing, Plaintiffs represented that the number of calls to the settlement call center had increased to more than 130,000, and the number of unique visits to the Settlement website had increased to more than 1 million, or approximately 7,000 visits per day. (Dkt. No. 2079 at 16:23-17:1.)

As of September 29, 2016, a total of 311,209 Class Members (63.5%) from all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam had registered for benefits under the Settlement. (*Id.* at 3, 26.) At the hearing, Plaintiffs stated that as of October 13, 2016, the number of registrations increased to 336,612. (Dkt. No. 2079 at 16:12-14.) This includes 11,199 current Lessees; 1,715 former Lessees; and 18,045 Eligible Sellers. (*Id.* at 16:14-16.) In contrast, only 3,298

[4] Although there are 475,745 Eligible Vehicles, some of them have had multiple owners. This accounts for the higher number of Class Members than Eligible Vehicles.

Class Members (approximately 0.7%) have opted out. (Dkt. No. 1976 at 3.) Notably, the number of opt outs continues to decrease as Class Members revoke their request for exclusion. (Dkt. No. 2079 at 17:4-5.) A list of Class Members who have opted out of the Settlement can be found in Exhibit 1 to this Order. An additional 462 Class Members (approximately 0.09%) have timely objected. (Dkt. No. 1976 at 3.)

Given the high claim rate and the low opt-out and objection rates, this factor strongly favors final approval. *See Churchill Vill.*, 361 F.3d at 577 (finding no abuse of discretion where district court, among other things, reviewed list of 500 opt-outs in a class of 90,000 class members); *Cruz v. Sky Chefs, Inc.*, 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."); *Chun-Hoon*, 716 F. Supp. 2d at 852 (granting final approval of settlement where 16 out of 329 class members (4.86%) requested exclusion). That more than half of Class Members have filed a claim also supports final approval. *See In re TracFone*, 112 F. Supp. 3d 993 at 1006 (approving class action settlement with claim rate of approximately 25-30%); *Moore v. Verizon Commc'ns Inc.*, 2013 WL 4610764, at *8 (N.D. Cal. Aug. 28, 2013) (approving class action settlement with 3% claim rate). While this figure is remarkable in and of itself, it is particularly impressive given that Class Members have until 2018 to submit a claim. (*See* Dkt. No. 1685 ¶ 2.11.) Nonetheless, the Court recognizes that not all—albeit a small percentage—of Class Members are not entirely satisfied with the Settlement. "[I]t is the nature of a settlement, as a highly negotiated compromise . . .

that it may be unavoidable that some class members will always be happier with a given result than others." *Allen*, 787 F.3d at 1223 (internal quotation marks omitted). The Court has addressed some of those objections above; it addresses the remaining ones here.

i. Objections to Vehicle Valuation

o *2015 NADA CTI Vehicle Valuation*

The most common objection was to the use of the NADA CTI valuation rather than, for instance, the NADA Clean Retail. (*See* Dkt. No. 1976-2 at 5.) Plaintiffs argue "[t]he best industry valuation for large numbers of vehicles is NADA Clean Trade-In, which provides a fair and reasonable reference point for vehicle valuation." (Dkt. No. 1976 at 11.) They emphasize that other valuation methods, such as MSRP minus depreciation and Kelley Blue Book ("KBB"), require more individualized calculations and determinations as to vehicle conditions. (*Id.* (footnote omitted).) Using the NADA CTI value thus benefits Class Members, as it does not reduce benefits if their vehicles are in less than clean condition.

Some Class Members argue the Settlement should rely on the NADA Clean Retail valuation, rather than CTI. By focusing on the NADA CTI valuation alone, these objections neglect to take into account that the cash payment consists of not just the Buyback price but also a Restitution Payment. This combination results in a payment that "is significantly *more* than the Clean Retail value." (Dkt. No. 1976-1 ¶ 40 (emphasis in original); *see* Dkt. No. 1784-1 ¶ 28 ("The blended payment schedule for

purchase vehicles are equal to a minimum of *112.6%* of the subject vehicles' retail values as of September 2015." (emphasis added).) Also, by relying on the September 2015 value, the Settlement allocates the diminution in value caused by the defeat device to Volkswagen and ensures Class Members do not bear the burden of the disclosure.

The FTC agrees that the Settlement's compensation "fully compensates victims of Volkswagen's unprecedented deception." (Dkt. No. 1781 at 1.) Noting that "[f]ull compensation has to be sufficient for consumers to replace their vehicle[,]" the FTC began the calculations for its Partial Consent Order with the NADA Clean Retail value, then factored in the additional losses, "including the 'shoe leather cost of shopping for a new car, sales taxes and registration, the value of the lost opportunity to drive an environmentally-friendly vehicle, and the additional amount 'Clean Diesel' consumers paid for a vehicle feature (clean emissions) that Volkswagen falsely advertised." (*Id.* at 1-2.) In the end, "[t]he proposed private settlement provides the same generous, but appropriate, compensation to each consumer as the FTC Order." (*Id.* at 2.)

In sum, although the Settlement begins with NADA CTI value, the addition of the Restitution Payment ensures Class Members are made whole. As such, the compensation based on the NADA CTI value fairly and adequately compensates Class Members.

o *Recovery of Full Purchase Price*

Eighty-nine Class Members object to their inability to obtain a full refund of the purchase price of their vehicles. The Court is not persuaded by these objections. Again, the Buyback price plus the Restitution Payment place Class Members in a position where they can purchase a vehicle comparable to the one they believed they had in September 2015, before the disclosure of the defeat device.

Class Members could only be entitled to a full refund of purchase price if they returned their vehicles in the same condition they received it. Such a scenario is virtually inconceivable as it is highly unlikely Class Members never used their vehicles after purchasing them. Indeed, many Class Members received a great deal of use out of their vehicles over the years. Under such circumstances, courts have been unwilling to award plaintiffs the full purchase price as either restitution or damages. *See Brady v. Mercedes-Benz USA, Inc.*, 243 F. Supp. 2d 1004, 1008 (N.D. Cal. 2002) ("[T]he restitution awardable under [California Civil Code] § 1793.2(d)(2)(B) must be reduced by the amount directly attributable to use (as measured by miles driven) by the consumer prior to the first repair (or attempted repair) of the problem as pro-rated against a base of 120,000 miles."); *Kruse v. Chevrolet Motor Div.*, 1997 WL 408039, at *2 (E.D. Pa. July 17, 1997) ("[I]mplicit in the concept of a refund of the purchase price is the condition that the purchaser return the consumer good at issue. [ ] [P]laintiff accepted and used the car for approximately one and one-half years, thereby diminishing the value of the car. Awarding damages

equal to the full purchase price does not take into account the natural depreciation of the vehicle from normal usage." (internal citations omitted)). And, as the Court previously noted, state laws generally award consumers the cost of the vehicle less an amount for reasonable use.

Additionally, Professor Klonoff opines that requiring Volkswagen "to pay the full purchase, regardless of the age of the vehicle, would increase the cost of the settlement multifold. The possibility of bankruptcy under such a scenario cannot be ignored." (*Id.* ¶ 32 (footnote omitted).) Bankruptcy would present "a huge impediment to prompt, efficient, and fair payments to injured claimants." (*Id.* (footnote omitted).) Weighing this possibility against the immediate and guaranteed benefits provided by the Settlement, settlement is clearly favored.

Some Class Members will inevitably wish they could recover more. But "the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (internal quotation marks and citation omitted). The Settlement provides cash benefits that are consistent with the recovery provided by state and federal laws and are reasonable under the circumstances.[5]

---

[5] Even if recovery of the full purchase price were possible, calculating those amounts on a classwide basis could present challenges. For instance, Manufacturer Suggested Retail Prices ("MSRP") would be an unreliable measure of purchase price. Mr. Stockton notes that "[d]ealerships and consumers negotiate prices on the sales of retail vehicles, which are vehicles sold to end-using consumers. In general, retail vehicles sell for less, and possibly substantially less than MSRP." (Dkt. No. 1784-1 ¶

o *Mileage Adjustments*

Many Class Members objected to the use of mileage adjustments. Specifically, Class Members oppose the downward adjustment in the Vehicle Value for high mileage, i.e., mileage that exceeds the allowed 12,500 miles per year. They contend the Eligible Vehicles were designed to drive long distances and were promoted for their excellent gas mileage. (Dkt. No. 1976 at 10.) Relying on this representation, Class members drove their vehicles long distances. (*Id.*)

Class Members who frequently drove their vehicles undeniably got more use out of them, and, quite simply, mileage affects a vehicle's value. A vehicle with high mileage is worth less than a vehicle with low mileage. Indeed, this notion is reflected in federal and state laws, which allow a reduction in a consumer's recovery based on his or her use of the vehicle. *See, e.g.*, 15 U.S.C. § 2301(12) ("The term 'refund' means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission)."); Ala. Code § 8-20A-2(b)(4) ("There shall be offset against any monetary recovery of the consumer a reasonable allowance for the consumer's use of the vehicle."); Alaska Stat. § 45.45.305 ("[T]he manufacturer or distributor shall . . ., at the owner's option, . . . refund the full purchase price to the owner less a reasonable allowance for the use of the motor vehicle from the time it was delivered to the original owner."); Cal. Civ. Code § 1793.2(d)(2)(C)

14.) Thus, even if Class Members could recover the full purchase price, MSRP would not accurately reflect that amount.

("When restitution is made . . . , the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor[.]"); Va. Code. Ann. § 59.1-207.13 ("The subtraction of a reasonable allowance for use shall apply to either a replacement or refund of the motor vehicle."). The Settlement is consistent with this practice. Notably, the Settlement also increases compensation for Class Members who drove less than 12,500 miles per year and thus incurred less depreciation.

Moreover, the 12,500 mile allowance was a negotiated term that is consistent with, if not more generous than, accepted car valuations. (*See* Dkt. No. 1976 at 10 ("12,500 miles of driving per year for each vehicle—an allowance that was negotiated—is more generous than the average driver's estimated annual mileage of approximately 12,000 miles." (footnote omitted).) Plaintiffs submit the Declaration of Professor Robert Klonoff, who reviewed the objections relating to the adequacy of the class relief. (*See* Dkt. No. 1976-1 ¶¶ 10, 14.) Professor Klonoff explains that "the 12,500 figure is in line with various accepted car valuations" and points out that "[m]ost calculations offered by Carmax, Kelley Blue Book, Edmunds, and others are based on 11,500 to 13,000 annual miles." (*Id.* ¶ 46.) Indeed, the 12,500 mileage allowance set forth in the Settlement falls on the higher end of that range.

At the hearing and in its written objection, Objector Wheels, Inc. ("Wheels") argued the Settlement should value Eligible Vehicles based on their September 2015 mileage in cases where Class

Members can produce accurate records of such mileage. (Dkt. No. 1882 at 5; Dkt. No. 2079 at 31:18:24.) But with close to 500,000 Eligible Vehicles, it would take a substantial amount of time to individually review records of each Vehicle's mileage; this would inevitably impede Class Members' ability to quickly receive their benefits. In light of the ongoing environmental harms caused by these Vehicles, the need to efficiently process their repurchase is paramount.

Thus, the Court finds the mileage adjustment is appropriate.

o *Reimbursement for Sales Tax and Other Fees*

Class Members have also objected that the Settlement does not provide reimbursement for sales taxes and other fees, including licensing, DMV fees, smog certificates, and title costs. Their frustration lies in the notion that they will pay sales tax and other official fees twice: once for the Eligible Vehicle and again for the replacement.

Mr. Klonoff notes that "the blue book value of a car does not depend on how much the owner paid for sales taxes and other fees." (Dkt. No. 1976-1 ¶ 64.) Such costs are not part of a seller's consideration, and "the fact that such payments were made does not increase the attractiveness of a vehicle from a buyer's perspective." (*Id.*) A vehicle's value is independent of the sales tax and fees that the owner paid. Put another way, a buyer will not pay more for a vehicle simply because of the taxes and fees.

Moreover, as noted earlier, the Settlement awards Class Members 112.6% of their Eligible Vehicles' September 2015 value. This allows Class

Members to replace their Eligible Vehicles with an equivalent make and model and still have enough remaining cash to pay the sales tax and other fees on that new purchase. True, as Mr. Klonoff points out, some lemon laws cover sales taxes and other official fees. (*Id.* ¶ 62 (citing N.J. Stat. Ann. 56:12-21(a)–(b); Wis. Stat. Ann. § 218.015(2)(b).) But the Settlement is not unfair even if it does not separately compensate these expenses. Importantly, the Settlement provides Class Members sufficient compensation to purchase an equivalent replacement vehicle at no additional expense.

At the hearing, Class Member Mark Dietrich objected to his inability to recover registration expenses. (Dkt. No. 2079 at 35:14-21.) Dietrich had renewed his vehicle's registration just ten days ago, which also required a smog test. (*Id.* at 35:14-17.) But, as Plaintiffs noted, although state governments have not been willing to refund registration fees, Class Members can choose to drive their vehicles until the registration expires and then complete the Buyback before they have to renew the registration again. (*Id.* at 71:15-21.)

Accordingly, the Court finds the Settlement is not unfair because it does not separately reimburse Class Members for the taxes and other fees paid on their Eligible Vehicles.

o *Reimbursement for Extended Warranties and Service Contracts*

Many Class Members purchased extended warranties or service contracts on their Eligible Vehicles. Some of them seek reimbursement of the

entire costs of those warranties and object on this basis.

Mr. Stockton explains that "[u]nder most extended warranties, a consumer may cancel the warranty for a $50 charge or other nominal amount. Upon cancellation, customers receive a prorated refund for the remaining period of warranty coverage." (Dkt. No. 1784-1 ¶ 24.) The same applies to service contracts. (Dkt. No. 1976-1 ¶ 52.) Thus, should Class Members wish to cancel their extended warranties or service contracts, they would only be responsible for the cancellation fee. The Restitution Payment covers this expense. Class Members therefore will not be penalized for cancelling their extended warranties or service contracts.

o *Reimbursement for Other Expenses*

Other Class Members seek reimbursement for factory-installed options. The Court overrules objections on this ground. The Settlement provides that Vehicle Value shall be adjusted for Original Equipment Manufacturer ("OEM")-installed options. (Dkt. No. 1685-1 ¶¶ 4, 12.) As such, the Settlement fairly compensates Class Members for OEM-installed features on their Eligible Vehicles.

Yet other Class Members seek compensation for non-OEM features, in other words, aftermarket add-ons such as window tinting, security systems, hitches, stereo systems, and car mats. True, the Settlement only provides reimbursement for OEM-installed options and not aftermarket add-ons. To offer compensation for aftermarket add-ons complicates the claims process and risks delaying Class Members' payments. First, Mr. Klonoff notes

that the very question of what constitutes an add-on can be problematic. (Dkt. No. 1976-1 ¶ 57 ("[W]hat would be the scope of the covered additions? For instance, would a high-powered stereo system, easily removable but nonetheless purchased for use in that vehicle, be covered? What about seat covers that presumably could be used on another car and sold separately on eBay? Just defining 'add-on' would be difficult.").) Second, even assuming a workable definition of an "add-on," the value of each one would have to be determined on a case-by-case basis. Whereas Vehicle Value can be determined by a straightforward formula—i.e., mileage and OEM-installed options—there is no similarly objective way to calculate the value of each aftermarket add-on, particularly given the wide range of add-ons Class Members may have installed on their vehicles. Further, aftermarket add-ons do not necessarily increase a vehicle's value; according to Mr. Klonoff, "some add-ons may actually be *undesirable* to most consumers" and thus decrease the value of the vehicle. (*Id.* ¶ 58 (emphasis in the original).) Given the size of the Class, an individual review of each aftermarket add-on would require substantial time and resources. This in turn would significantly delay relief to Class Members. The Settlement presumes all Vehicles are in the same good condition; the same approach is necessary here to ensure the efficient distribution of benefits. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 155 (E.D.N.Y. 2000) (noting steps to be taken to ensure fair and efficient claims process).

o *Compensation for Eligible Sellers*

Some Eligible Sellers object to the amount of Seller Restitution to which they are entitled, asserting that it is less than what Eligible Owners receive. Seller Restitution is calculated as 10% of the Vehicle Value plus $1,493; however, the Settlement guarantees Eligible Sellers a $2,550 minimum in Restitution. (Dkt. No. 1685-3 at 8.) The Court finds this fairly and adequately compensates Eligible Sellers. If a Class Member has already sold his or her vehicle to a third party, he or she has already received some compensation for that Eligible Vehicle. But because a post-September 2015 sale price would reflect a diminution in value caused by Volkswagen's disclosure, Seller Restitution accounts for the difference between the pre- and post-disclosure values. The Settlement thus makes most Eligible Sellers whole.

o *Loan Forgiveness*

Some objectors take issue with the amount of loan forgiveness; specifically, some Class Members dislike the additional payment of up to 30% of the combined Buyback plus Restitution Payments ("Buyback Package") for those who owe more on their vehicle than the Buyback Package provides. Plaintiffs explain that

> [o]ne of the Settlement's many goals was to make Class members whole. If that were the only objective, then Class members should be treated identically regardless of whether they financed a portion of their purchase or

> paid all cash. But another important objective of the Settlement was to get the polluting cars off the road. Forgiving the loans (up to a certain point) helps advance both goals by ensuring that no Class member (or at least, very few) would be required to pay additional money to Volkswagen to free themselves of the polluting Vehicles. It therefore incentivizes more of those Class members to participate in the Settlement and to sell their polluting vehicles back to Volkswagen.

(Dkt. No. 1976 at 15-16.)

The loan forgiveness does not render the Settlement unfair. Although loan forgiveness provides additional benefits to some Class Members, it does not entitle them to more cash than Class Members who own their vehicles outright. Rather, the additional compensation is paid directly to the lender. (Dkt. No. 1685-1 ¶ 14.) This ensures Class Members can sell back their vehicles without continuing to be responsible for an outstanding balance on a car they no longer own; at the very least, if loan forgiveness does not cover the entire balance, it reduces the amount owed on the loan and thus the Class Member's obligations. The Settlement therefore obtains the same benefit for all Class Members regardless of whether they financed their vehicle or not, i.e., it allows Class Members to return their vehicles and relieves or reduces their financial obligations associated with ownership. Ultimately, loan forgiveness is simply a supplementary benefit to those who need it; it does not reduce the benefits

of other Class Members. And while some Class Members eligible for loan forgiveness may want an additional payment on top of the loan forgiveness, they have not shown that the additional 30% is so insufficient so as to render the Settlement unfair. The Court therefore overrules objections based on loan forgiveness.

o *Lessee Compensation*

Seventeen Eligible Lessees have objected to various parts of the Settlement. First, some protest the amount of compensation available to them. In addition to a Lease Termination or a Fix, Eligible Lessees are entitled to Lessee Restitution. Although Lessee Restitution is less than Owner Restitution (*see* Dkt. No. 1685 ¶¶ 4.2.2, 4.2.4), as discussed above, this reflects the fact that owners and lessees have different economic relationships with their vehicles. Owners, for instance, must bear the diminution in value caused by Volkswagen's disclosure of the defeat device, but Lessees can simply return the vehicle to the lessor without bearing the brunt of the loss. Moreover, the Settlement treats Eligible Lessees and Eligible Owners equally—they both have the option to return their vehicles to Volkswagen, or they may instead obtain a Fix and retain possession of their vehicles. In either situation, both Eligible Lessees and Eligible Owners are entitled to Restitution that takes into account their respective losses.

Second, some Eligible Lessees have objected to the Settlement due to the structure of their lease contracts, specifically, the contractual charges on mileage overages. (Dkt. No. 1976 at 15.) But as

Plaintiffs point out, "[a]ny charges related to mileage overages stem from the Class member's initial lease contract and would be owed whether or not the vehicles met relevant emissions limits." (*Id.*) Additionally, there is no downward adjustment to Lessee Restitution based on mileage. Put another way, even if an Eligible Lessee exceeds the allowed mileage as provided for in his or her lease contract, the amount of Lessee Restitution remains unaffected.

Third, other Eligible Lessees object that the Settlement treats them as Lessees notwithstanding their intention to purchase their leased vehicles at the end of their lease. (Dkt. No. 1976 at 15.) That they *intended* to become an owner does not negate the fact they are not now owners. Lessees—even those who intended to purchase their vehicles—simply have not suffered the same harm as those Class Members who have already purchased their vehicles.

ii. Objections to Reversion

Some Class Members object that unused Funds will revert to Volkswagen. (*See* Dkt. No. 1976 at 32.) Plaintiffs explained at the hearing that the $10.33 billion Funding Pool is not a fixed-fund settlement but rather a commitment for the maximum amount of compensation Volkswagen agrees to pay Class Members. (Dkt. No. 2079 at 69:21-22.) Put another way, "[i]f every consumer comes in for the settlement and chooses a buyback, every penny of that gets spent[.]" (*Id.* at 70:3-4.) But the Settlement is designed to allow Class Members to choose their remedy. It is possible that not all Class Members will select a Buyback or a Lease Termination; some

may choose a Fix. (*See id.* at 70:9-13 ("If there is a delay in emissions modification, more of them will choose the buyback. More of the money will be spent. If people like the emissions modification and they choose to wait and drive their cars, then less of that money will be spent.").) Because those Class Members will receive less cash, it is reasonable to expect that not all of the $10.033 billion will be needed. Moreover, as noted above, Volkswagen has strong financial incentives to compensate as many Class Members as possible. Any money it could save by not compensating Class Members would be lost in the form of penalties for failing to achieve the Recall Rate.

iii. Objections Regarding the Class Definition

o *Individuals Excluded from the Class Definition*

Some individuals have objected to the Settlement's failure to include vehicles sold and leases terminated prior to the defeat device's disclosure. The Class Definition requires Class Members to have owned or leased their Eligible Vehicles on September 18, 2015. (*See* Dkt. No. 1685 ¶ 2.16.) Thus, these individuals are not Class Members, and the Court need not consider their objections. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) ("[N]onclass members have no standing to object to the settlement of a class action.").

o *Eligible Sellers*

Objector Wheels argues the June 28, 2016 Eligible Seller cut-off date is arbitrary and unfair. (Dkt. No. 1882 at 1-2.) To be an Eligible Seller, a person must have "purchased or otherwise acquired an Eligible Vehicle on or before September 18, 2015, and sold or otherwise transferred ownership of such vehicle after September 18, 2015, but before June 28, 2016." (Dkt. No. 1685 ¶ 2.31.) The June 28, 2016 cut-off is not unfair. On that day, Eligible Sellers knew they would be beneficiaries of the Settlement only if they held onto their Eligible Vehicles. Thus, those who sold their Eligible Vehicles after the proposed Settlement did so knowing they would be ineligible for benefits.

The Settlement further requires Eligible Sellers to identify themselves within 45 days of the Court's preliminary approval order. (*Id.* ¶ 2.32.) Although Objector Autoport contends this deadline is also arbitrary, the Court disagrees. First, Autoport's assertion that "[t]his opt-in deadline does not apply to consumers, only dealers" is simply not true. (*See* Dkt. No. 1879 at 2.) The Settlement required dealers and consumers alike to identify themselves as Eligible Sellers by September 16, 2016. Moreover, this deadline had a purpose. The Settlement designates certain funds for Seller Restitution; the unclaimed portion of that is distributed to Eligible Owners who purchased their cars after September 18, 2015. (Dkt. No. 1685 ¶ 2.42; Dkt. No. 1685-1 ¶ 5(b).) Thus, in to accurately calculate the amount of Owner Restitution for those who purchased after the fraud disclosure, the parties must first know which

Eligible Sellers will seek Restitution. The Eligible Seller deadline is therefore appropriate.

iv. Objections to Attorneys' Fees

o *Class Counsel's Fee Request*

A number of Class Members take issue with the timing and structure of Class Counsel's prospective fee request. Although Class Counsel still has not moved for attorneys' fees and costs, this does not warrant denying final approval. Indeed, Rule 23(h) does not require Class Counsel to seek attorneys' fees at the final approval stage. *See* Fed. R. Civ. P 23(h); *In re Nat'l Football League Players Concussion Injury Litig.* ("*In re NFL Players*"), 821 F.3d 410 (3d Cir. 2016) ("[T]he separation of a fee award from final approval of the settlement does not violate Rule 23(h)."); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 910 F. Supp. 2d 891, 918 n.16 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (granting final approval where "parties had no discussions regarding fees other than the PSC's making clear that it would eventually file a request for attorneys' fees."). Nor are Class Members in the dark about Class Counsel's prospective fee request. In accordance with the Court's Order (Dkt. No. 1689 at 23-24), Class Counsel submitted a Statement detailing their forthcoming request for attorneys' fees and costs (Dkt. No. 1730). Specifically, "Class Counsel's common benefit fee application will seek no more than $324 million in attorneys' fees, plus actual and reasonable out-of-pocket costs, not to exceed $8.5 million." (*Id.* at 3.) Class Counsel will

also propose a formula, "such as the equivalent of a small percentage of payments made to Class Members," to cover costs they continue to incur for addressing Class Members' ongoing requests for information and questions about the Settlement. (*Id.* at 3-4.)

Class Members therefore had sufficient information as to Class Counsel's prospective request prior to the Opt-Out Deadline. *See In re NFL Players*, 821 F.3d at 446 ("Even if the class members were missing certain information—for example, the number of hours class counsel worked and the terms of any contingency fee arrangements class counsel have with particular retired players—they still had enough information to make an informed decision about whether to object to or opt out from the settlement."). As of August 10, 2016—more than a month before the Opt-Out Deadline—Class Members knew the maximum amount of attorneys' fees and costs Class Counsel intended to request and also knew Class Counsel would seek ongoing costs to be calculated by a Court-approved formula. Class Members could thus evaluate the prospective fee request and make an informed decision as to whether to remain in the Class.

Importantly, Class Counsels' attorneys' fees will not diminish the benefits awarded to Class Members under the Settlement. (Dkt. No. 1685 ¶ 4.4.5 ("To the extent Volkswagen elects or is ordered to pay private attorneys' fees or costs, Volkswagen will not receive credit for such payments against obligations to Class Members under this Class Action Agreement and the Final Approval Order.").) And, in any event, the Court must approve any fee request as reasonable. *See In re Bluetooth*, 654 F.3d at 941 ("[C]ourts have

an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount."). Class Members will also be notified of Class Counsel's fee request, once it is filed. *See* Fed. R. Civ. P. 23(h)(1) ("Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner."). Thereafter, Class Members will have an opportunity to object to the motion. *See* Fed. R. Civ. P. 23(h)(2). As the Court stated at the Fairness Hearing, the fees to be sought by Class Counsel did not have any relationship to the monies Volkswagen was willing to devote to compensate the Class. (Dkt. No. 2079 at 54:19-55:3).

o *Class Members' Personal Attorneys' Fees*

Some objectors argue the Settlement is unfair because it does not compensate Class Members for fees for their private attorneys, in other words, those attorneys not appointed to the PSC. The Settlement is silent as to Volkswagen's obligations to pay the fees and costs for attorneys other than Class Counsel or attorneys Class Counsel designated to perform work in connection with this litigation. (*See* Dkt. No. 1685.) However, the Settlement is not unfair simply because it does not require Volkswagen to pay the private attorneys' fees of those Class Members who chose to retain an attorney.

v. Objections Based on Public Policy

A number of objectors raise concerns about public policy. For instance, some Class Members argue Volkswagen will profit from the Settlement.

Mr. Stockton estimates that Volkswagen received at most $12.937 billion in gross revenues for the Eligible Vehicles. (Dkt. No. 1784-1 ¶ 33.) Incentives, discounts, and other rebates likely reduce this figure. (*Id.*) In comparison, Volkswagen's liability under the Settlement is $10.033 billion. At first glance, $10.033 billion is less than the estimated revenues Volkswagen received. However, the United States' Partial Consent Decree, which imposes fines and requires Volkswagen to pay for environmental remediation, increases Volkswagen's liability to $14.7 billion. That figure could also increase in the event Volkswagen fails to buy back or fix 85% of Eligible Vehicles. Thus, Volkswagen will not profit under the terms of the Settlement.

vi. Objections Regarding Environmental Concerns

Other objectors take issue with the Settlement's ability to address environmental concerns. As an initial matter, the United States on behalf of the EPA can more effectively address environmental concerns than Class Counsel who represent consumers. The United States' Consent Decree does just that. Under that agreement, Volkswagen agrees to pay $2 billion over ten years to promote the use of zero emissions vehicles ("ZEV") and $2.7 billion over three years to reduce the excess NOx emissions attributed to the Eligible Vehicles. (*See* App'x C-D, Dkt. No. 1973-1.) These efforts address the environmental damage caused by Eligible Vehicles.

Objector Ronald Clark Fleshman, Jr. argues the Settlement improperly allows Class Members to continue driving their Eligible Vehicles in violation

of federal and state laws.[6] (Dkt. No. 1893 at 10-11.) Fleshman has previously raised, and the Court rejected, this concern. (*See* Dkt. No. 1760 at 5, 8; Dkt. No. 1991 at 7-8.) No federal or state authority has declared the Eligible Vehicles illegal to drive. As Plaintiffs note, EPA has explicitly stated it will not confiscate Eligible Vehicles, and "[t]he 44 states participating in the Attorneys General statement have also agreed to allow Class vehicles to stay on the road pending participation in the Class Action Settlement." (Dkt. No. 1976 at 31.)

vii. Objections to Release

Several Class Members object to the Release. (*See* Dkt. No. 1685-5.) In particular, Objectors Kangas and Scott Siewert raise two concerns. First, Kangas and Siewert argue Class Members cannot "be bound to a class-wide compulsory release if the underl[ying] agreement is voided." (Dkt. No. 1826 at 12; Dkt. No. 1877 at 6.) Class Members execute an Individual Release only upon acceptance of an offer. (Dkt. No. 1685 ¶ 2.57; Dkt. No. 1685-4 ¶ 4(b).) If a Class Member receives benefits under the Settlement before the Settlement is reversed on appeal, an Individual Release is appropriate consideration. The Court therefore does not find the Individual Release is unfair.

Second, Kangas and Siewert object to the release of "concealed or hidden" claims. (Dkt. No. 1826 at 13-14; Dkt. No. 1877 at 7-8.) Class action settlement agreements commonly release concealed or hidden

---

[6] Many of Fleshman's objections concern the United States' Partial Consent Decree, not the Settlement. (*See* Dkt. No. 1893.) The Court does not address those objections here.

claims. *See In re Zynga Inc. Sec. Litig.*, 2015 WL 6471171, at *4 (N.D. Cal. Oct. 27, 2015); *Wakefield v. Wells Fargo & Co.*, 2014 WL 7240339, at *7 (N.D. Cal. Dec. 18, 2014); *Torchia v. W.W. Grainger, Inc.*, 2014 WL 3966292, at *3 (E.D. Cal. Aug. 13, 2014). Moreover, the Release is limited to claims related to the "2.0-liter TDI Matter," which the Settlement defines as

> (1) the installation or presence of any Defeat Device or other auxiliary emission control device in any Eligible Vehicle; (2) the design, manufacture, assembly, testing, or development of any Defeat Device or other auxiliary emission control device used or for use in an Eligible Vehicle; (3) the marketing or advertisement of any Eligible Vehicle as green, environmentally friendly, and/or compliant with state or federal emissions standards; (4) the actual or alleged noncompliance of any Eligible Vehicle with state or federal emissions standards; and/or (5) the subject matter of the Action, as well as any related events or allegations, with respect to Eligible Vehicles.

Dkt. No. 1685 ¶¶ 2.1, 9.3; *see Taylor v. W. Marine Prod., Inc.*, 2015 WL 307236, at *1 (N.D. Cal. Jan. 20, 2015) (preliminarily approving settlement that "released . . . only . . . claims relating to underpayment of daily overtime pay" whether such claims were "concealed or not concealed or hidden"). To that end, the Release expressly does not include claims of personal injury or wrongful death. (Dkt.

No. 1685 ¶ 9.3; Dkt. No. 1685-5 ¶ 1.) Thus, Class Members who wish to litigate such claims may do so.

viii. Objections Regarding Other Motions

Objectors Maria Barrera, Shawn Blanton, Travis Bourland, Steven Bracht, Pablo Cortez, Jonathan Evans, Evangelina/Leonel Falcon, Luis Guarjardo, Eliseo Hernandez, Allison Kaminski, David King, Sean Luchnick, Maria C. Martinez-Diaz, Duncan Moskowitz, Paul Munro, Brian Planto, Angela Purvis, Ronnie Robledo, Ray A. Robeldo, Ray A. Sarabia, Storm Taliaferrow, and Terry Woodford (collectively, "Barrera Objectors") argue Class Counsel have "actively worked against the interest[s] of non-representative class members" because Class Counsel have allegedly urged the Court not to consider pending motions to remand until after the Opt Out Deadline. (Dkt. No. 1863-3 at 8-9.) The Barrera Objectors fail to explain why delaying ruling on these motions adversely affects Class Members. Moreover, if Class Members seeking to remand their case wished to litigate their claims in state court, they simply had to exclude themselves from the Settlement.

The Barrera Objectors further raise the Court's denial of Class Member Jolian Kangas' motion to intervene to conduct discovery. (*Id.* at 7, 10; *see* Dkt. No. 1746.) Specifically, they take issue with Class Counsel's opposition to Kangas' motion. (Dkt. No. 1863-3 at 10.) They contend this is a sign that "Class Counsel have actively worked against any interest but its own by forcing its proposed settlement to become a *fait accompli* among class members." (*Id.*)

The Barrera Objectors do not explain why opposing the motion was contrary to Class Members' interests. The Court denied Kangas' motion because he failed to show that his interests were impaired and to present evidence of collusion. (*See* Dkt. 1746 at 3-6.) Given the size of the Class and the scale of the discovery produced, it would delay Class compensation and the removal of polluting cars from roads. It would also waste resources if Class Counsel allowed any Class Member to conduct discovery into the settlement negotiations, particularly when the Class Member did not provide a basis to do so. Their opposition was thus proper and not adverse to the Class.

2. The Bluetooth Factors

Although the *Churchill* factors favor settlement, consideration of those factors alone is insufficient. *See In re Bluetooth*, 654 F.3d at 946. Where, as here, the parties reach a settlement prior to class certification, courts must examine the settlement with "an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." (*Id.* (citations omitted).) "Collusion may not always be evident on the face of a settlement, and courts therefore must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." (*Id.* at 947.) Signs of subtle collusion include

> (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded;
> (2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and
> (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.

(*Id.* (internal quotations marks and citations omitted).)

Despite the presence of one *Bluetooth* factor, the Court finds no evidence of collusion. The *Bluetooth* court made clear that these factors are not dispositive but merely "warning signs" or "indicia of possible implicit collusion." (*Id.*) Even if all three signs are present, courts may still find that a settlement is reasonable. *See id.* at 50 (noting that the district court may find the settlement reasonable notwithstanding the presence of all three *Bluetooth* factors).

The first *Bluetooth* factor asks whether Class Counsel receive a disproportionate distribution of the Settlement or whether Counsel are amply rewarded while the Class receives no monetary distribution. (*Id.* at 947.) This factor is not implicated. First, the Settlement does not entitle Class Counsel to any portion of the Settlement

funds; the $10.033 billion Funding Pool is designated solely for Class Members. Second, the Settlement provides for monetary benefits for all Class Members, namely, the price of a Buyback and/or Restitution. Thus, there is no question Counsel is rewarded while the Class receives no monetary award. Further, even if Class Counsel were to receive the maximum they stated they would seek (an unlikely outcome), that amount—$324 million—is less than four percent of the Settlement. As such, this factor does not suggest collusion.

The second *Bluetooth* factor considers whether the parties negotiated a "clear sailing" agreement for the payment of attorneys' fees separate from the class funds. (*Id.* at 947.) The Settlement provides that Volkswagen will pay attorneys' fees separate from, and in addition to, the compensation provided to Class Members. (Dkt. No. 1685 ¶ 11.1.) As noted above, Class Counsel will not seek more than $324 million in attorneys' fees and $8.5 million in costs. (Dkt. No. 1730 at 3.) Importantly, at this juncture, there is no "clear sailing" agreement to cause concern for collusion. Although Class Counsel has agreed not to seek more than a total of $332.5 million in attorneys' fees and costs, plus future costs to be determined by a formula, Volkswagen has not agreed not to contest such a request. Moreover, that dialogues for attorneys' fees began after the parties filed the Settlement suggests Class Counsel did not accept an excessive fee in exchange for an unfair settlement or otherwise allow their fees to interfere with their negotiations for Class Members' benefits. As such, this factor is not indicative of collusion.

The third *Bluetooth* factor, which considers whether the settlement provides for funds not

awarded to revert to defendants, is to some extent present. The Settlement provides that upon either the conclusion of the Claim Period or the termination or invalidation of the Settlement, any unused funds shall revert to Volkswagen. (Dkt. No. 1685 ¶¶ 10.3-10.4.) While reversionary provisions can sometimes be problematic, that is not the case here. The proposed Partial Consent Decree requires Volkswagen to buyback or fix 85% of the Eligible Vehicles by June 30, 2019. (Dkt. No. 1973-1 ¶ 3; App'x A ¶¶ 6.1 & 6.3, *id.*) Failure to do so results in additional monetary penalties for Volkswagen. (Dkt. No. 1973-1 ¶ 3; App'x A ¶¶ 6.1 & 6.3, *id.*) And, as the Court previously discussed, Volkswagen appears to have the infrastructure and manpower to fulfill its obligations under the Settlement. (*See* Dkt. No. 1698 at 25-26.) Thus, although the Settlement provides that any unused funds will revert to Volkswagen, the Court is satisfied that it is not evidence of collusion.

In sum, although one of the three *Bluetooth* factors is present, the Court finds the Settlement is not the result of, or was influenced by, collusion.

*****

In light of the foregoing analysis, the Court finds final approval is appropriate. The number of objections is small, and their substance does not call into doubt the Settlement's fairness. The *Churchill* factors support final approval, and the *Bluetooth* factors do not suggest collusion. Thus, even under heightened scrutiny, the Court concludes the Settlement is fair, adequate, and reasonable.

IV. DISCUSSION – CLAIMS REVIEW COMMITTEE

The Settlement creates a Claims Review Committee ("CRC") to review appeals of contested claims deemed ineligible. (Dkt. No. 1685 ¶ 5.3.) The CRC is a three-member committee comprised of one PSC representative, one Volkswagen representative, and one Court-appointed "neutral." (*Id.*) Class Counsel and Volkswagen nominate David S. Stellings and Sharon L. Nelles, respectively, to serve on the CRC. The Court now appoints the Honorable Fern M. Smith (ret.) to serve as the third and neutral member.

V. DISCUSSION – ALL WRITS ACT

The All Writs Act authorizes district courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, [ ] and encompasses even those who have not taken any affirmative action to hinder justice." *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977) (internal citations omitted). However, the authority granted by the All Writs Act, though broad, is not unlimited. *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1098 (9th Cir. 2008). Indeed, the Anti-Injunction Act limits the district court's ability to enjoin state proceedings

"except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. "Although comity requires federal courts to exercise extreme caution in interfering with state litigation, federal courts have the power to do so when their jurisdiction is threatened." *Hanlon*, 150 F.3d at 1025; *see Keith v. Volpe*, 118 F.3d 1386, 1390 (9th Cir. 1997) ("[T]he All Writs Act, 28 U.S.C. § 1651, empowers the federal courts to enjoin state proceedings that interfere, derogate, or conflict with federal judgments, orders, or settlements.").

A stay of all state court actions relating to Released Claims, that is, the claims of Class Members who have not properly opted out, is necessary to preserve the Court's jurisdiction. First, Class Members have been given an opportunity to opt out of the Settlement. *See Jacobs v. CSAA Inter-Ins.*, 2009 WL 1201996, at *2 (N.D. Cal. May 1, 2009) ("A district court may enjoin named and absent members who have been given the opportunity to opt out of a class from prosecuting separate class actions in state court." (citing *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 204 (3d Cir. 1993)). Second, a state court's disposition of claims similar to or overlapping the Released Claims would implicate the same legal and evidentiary issues; thus, such action would threaten the Court's jurisdiction and hinder its ability to decide the case. *See Jacobs*, 2009 WL 1201996, at *3 ("A preliminary injunction is appropriate to preserve jurisdiction because there is a sufficient overlap of claims between the federal and state class actions, such that the same legal and evidentiary issues will be implicated in each case."); *In re Jamster Mktg. Litig.*,

2008 WL 4482307, at *6 (S.D. Cal. Sept. 29, 2008) ("Any litigant may be enjoined from proceeding with a state court action where it is 'necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide the case.'" (quoting *In re Diet Drugs Prod. Liab. Litig.*, 282 F.3d 220, 234 (3d Cir. 2002)). Accordingly, the Court enjoins Class Members who have not opted out from participating in any state court litigation relating to the Released Claims. This injunction, however, does not prevent Class Members from dismissing or staying his or her Released Claims.

VI. CONCLUSION

For the foregoing reasons, the Court **ORDERS** the following:

1. Plaintiffs' Motion for Final Approval of the Settlement is **GRANTED**. The Settlement in its current form is fair, adequate, and reasonable and is in the best interest of Class Members. Benefits under the Settlement shall immediately be made available to Class Members.

2. The Court **CONFIRMS** the appointment of Lead Plaintiffs' Counsel and the PSC listed in Pretrial Order No. 7 (Dkt. No. 1084) as Settlement Class Counsel.

3. The Court **CONFIRMS** the appointment of the Settlement Class Representatives listed in Exhibit 1 to the Plaintiffs' Motion for Preliminary Approval of the Settlement and Approval of Class Notice (Dkt. No 1609-1).

4. The Court **CONFIRMS** the appointment of Ankura Consulting Group, LLC as Claims Supervisor. The Claims Supervisor, including its subcontractors, and the directors, officers, employees, agents, counsel, affiliates and advisors, shall not be liable for their good-faith compliance with their duties and responsibilities as Claims Supervisor under the Settlement, this Order, all prior orders, the Partial Consent Decree, or any further Settlement-related orders or decrees, except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

5. The Court **APPOINTS** Citibank Private Bank to serve as the Escrow Agent.

6. The Court **CONFIRMS** the appointment of David S. Stellings and Sharon L. Nelles to the Claims Review Committee and **APPOINTS** and the Hon. Fern M. Smith to serve as the CRC's neutral member on the Court's behalf.

7. The Court **DISMISSES WITH PREJUDICE** the following without costs to any party:

> a. The claims pertaining to Eligible Vehicles, as between the Settlement Class and all its Members who have not timely and properly excluded themselves, on the one hand, and any Released Party or Parties. However, costs shall be awarded as specified in this Final Order and Judgment and in the Settlement, such as the motion for an award of attorneys' fees and costs, as contemplated by the settling Parties in Section 11 of the Settlement, which may be filed at the appropriate time to be determined by the

Court, and posted on the official Settlement website, www.VWCourtSettlement.com.
b. All related lawsuits pending in the MDL centralized in this Court by the Judicial Panel on Multidistrict Litigation on December 8, 2015 ("MDL"), *see In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367 (J.P.M.L. 2015), asserting claims pertaining to Eligible Vehicles, as between a Settlement Class Member who is not an opt-out or otherwise excluded, and any Released Party or Parties.
c. All related lawsuits pending in this MDL containing only claims between a Settlement Class Member who is not an opt-out or otherwise excluded, and against any Released Party or Parties, and pertaining to Eligible Vehicles.

8. Claims related to the 3.0-liter TDI diesel engine vehicles are **NOT DISMISSED.**

9. Class Members who have not properly opted out and any person purportedly acting on behalf of any Class Member(s) are **ENJOINED** from commencing, filing, initiating, instituting, pursuing, maintaining, enforcing or prosecuting, either directly or indirectly, any Released Claims in any judicial, administrative, regulatory, arbitral or other proceeding, in any jurisdiction or forum, against any of the Released Parties. Nothing herein shall prevent any Class Member, or any person actually or purportedly acting on behalf of any Class Member(s), from taking any actions to dismiss his, her or its Released Claims.

10. Only those persons and entities who timely submitted valid requests to opt out of the Settlement Class are not bound by this Order, and any such excluded persons and entities are not entitled to any recovery from the Settlement. A list of those persons can be found in Exhibit 1 to this Order.

11. Persons and entities that are determined by the Claims Administrator or the Court to be excluded from the Class, because his/her/its vehicle is not an "Eligible Vehicle," or for any other reason, are not bound by the Final Order and Judgment, and are not entitled to any recovery from the Settlement.

12. For Settlement Class Members who, because a Fix has not become available, withdraw from the class between May 1, 2018 and June 1, 2018, the statutes of limitations on claims asserted on behalf of those Settlement Class Members in this MDL shall be tolled from the date of the Preliminary Approval Order to the date such Settlement Class Members withdraw from the Settlement Class.

13. Settlement Class Counsel shall file their application for attorneys' fees and costs by **November 8, 2016**. Any responses shall be due **December 20, 2016**, and any replies shall be due **January 17, 2016**. The Court will advise the parties if a hearing is necessary.

14. The Court retains the exclusive jurisdiction to enforce, administer, and ensure compliance with all terms of the Settlement in accordance with the Settlement and this Order.

This Order disposes of Docket No. 1784.

IT IS SO ORDERED.
Dated: October 25, 2016

/s/
CHARLES R. BREYER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MDL No. 2672 CRB (JSC)

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION
_____/

This Order Relates To:
ALL ACTIONS (except the securities action)
_____/

ORDER (1) GRANTING RONALD CLARK FLESHMAN JR.'S MOTION TO AMEND AND (2) DENYING FLESHMAN'S MOTION TO INTERVENE AND MOTION TO DEPOSE THE VIRGINIA CLASS REPRESENTATIVES

The Court previously denied Ronald Clark Fleshman Jr.'s motion to intervene to object on behalf of all Virginia class members. (Dkt. No. 1742.) Fleshman has since filed two new motions. First, he again seeks to intervene as a matter of right, this time in the action brought by the United States Department of Justice ("United States"). (Dkt. No. 1760.) The United States and the Volkswagen and Porsche Defendants oppose the Motion. (Dkt. Nos. 1810, 1812.) Second, Fleshman moves for leave to depose the Virginia Class Representatives (Dkt. No. 1846[1]), which Plaintiffs oppose (Dkt. No. 1822).

[1] Fleshman's Motion for Leave to Depose was originally filed at Dkt. No. 1762 and refiled at Dkt. No. 1846 in accordance with

Having considered the parties' arguments and the relevant legal authority, the Court **DENIES** both Motions. Fleshman does not have a right to intervene and fails to provide a reasonable basis for deposing the Virginia Class Representatives.

BACKGROUND

A detailed factual and procedural background can be found in the Court's Amended Order Granting Preliminary Approval. (Dkt. No. 1698 at 2-4.) Relevant here, this multidistrict litigation includes a consolidated class action lawsuit brought by the Court-appointed Plaintiffs' Steering Committee ("PSC" or "Plaintiffs") on behalf of consumers and reseller dealerships. (*See* Dkt. Nos. 1804-05.) It also includes a lawsuit brought by the United States on behalf of the United States Environmental Protection Agency ("EPA") against Volkswagen AG; Audi AG; Volkswagen Group of America, Inc.; Volkswagen Group of America Chattanooga Operations, LLC; Dr. Ing. h.c. F. Porsche AG; and Porsche Cars North America (the "United States Action," Case No. 16-cv-295 (CRB)). (*See* Dkt. No. 1, U.S. Action.)[2] The United States asserts claims arising under Section 203 of the Clean Air Act, 42 U.S.C. § 7522. (*Id.* ¶¶ 102-31.)

---

the Court's September 8, 2016 Order to Refile under Seal. (*See* Dkt. No. 1823.)

[2] Unless otherwise noted, citations in this memorandum refer to documents filed in the master case file, Case No. 15-md-2672 (CRB). Citations to the "U.S. Action" refer to documents filed in *United States of America v. Volkswagen AG, et al.*, Case No. 16-cv-295 (CRB).

After five months of negotiations supervised by a Court-appointed Settlement Master, the PSC and the United States filed a proposed Consumer and Reseller Dealer Class Action Settlement (the "Settlement") and a Partial Consent Decree, respectively. (*See* Dkt. Nos. 1605-06; *see also* Dkt. No. 1685 (Amended Settlement).) Both agreements involve Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (collectively, "Volkswagen") and concern the 2.0-liter TDI engine vehicles ("Eligible Vehicles"). The Court preliminarily approved the Settlement on July 26, 2016 (Dkt. No. 1688) and entered its Amended Order on July 29, 2016 (Dkt. No. 1698).

DISCUSSION

A. Motion to Intervene in the United States Action

1. Legal Standard

In a class action context, courts may allow class members "to intervene and present claims or defenses, or to otherwise come into the action." Fed. R. Civ. P. 23(d)(B)(iii). Federal Rule of Civil Procedure ("Rule") 24 provides for two types intervention of right. *See* Fed. R. Civ. P. 24(a)(1)-(2).

First, Rule 24(a)(1) requires a court to "permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). Second, Rule 24(a)(2) allows a party to intervene as a matter of right when the movant "claims an interest relating to the property or transaction that is the subject of

the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

To prevail on a motion for intervention of right, the movant must demonstrate

> (1) it has a significant protectable interest relating to the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent its interest.

Peruta v. Cty. of San Diego, 824 F.3d 919, 940 (9th Cir. 2016) (citation omitted). Courts "evaluating whether Rule 24(a)(2)'s requirements are met . . . normally follow practical and equitable considerations and construe the Rule broadly in favor of proposed intervenors." *Wilderness Soc. v. United States Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (internal quotation marks omitted). Despite this liberal construction, "it is incumbent on the party seeking to intervene to show that all the requirements for intervention have been met." *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (internal quotation marks and brackets omitted). "Failure to satisfy any one of the requirements is fatal to the application[.]" *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

2. Motion to Amend

Fleshman has also filed a Motion to Amend his Reply to his Motion to Intervene to submit a proposed amended complaint in intervention. (Dkt. No. 1930; *see* Dkt. No. 1930-1.) The Court **GRANTS** the Motion to Amend and will consider Fleshman's Motion to Intervene in light of the proposed amended complaint.

3. Discussion

Fleshman seeks to intervene as a matter of right to enforce Virginia's EPA-approved State Implementation Plan ("SIP"),[3] and he argues the Clean Air Act ("CAA" or "Act") provides him an unconditional right to do so. His reliance on the CAA is misplaced.

The CAA permits citizens to commence a civil action to prosecute violations of the Act. 42 U.S.C. § 7604(a). But this citizen-suit provision is not unlimited; the statute bars such actions "if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person

---

[3] The Clean Air Act requires states to "adopt . . . a plan which provides for implementation, maintenance, and enforcement" of national ambient air quality standards and submit such plans to the EPA for approval. 42 U.S.C. § 7410(a)(1). These SIPs, "once adopted by a state and approved by the EPA, become[] controlling and must be carried out by the state." *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 695 (9th Cir. 2004), *as amended on denial of reh'g and reh'g en banc* (June 2, 2004).

may intervene as a matter of right." *Id.* at § 7604(b)(1)(B). "This section of the citizen-suit provision . . . ensures that courts are not overburdened with citizen suits that are duplicative of ongoing governmental actions under the CAA." *United States v. Dominion Energy, Inc.*, 2014 WL 1476600, at *3 (C.D. Ill. Apr. 15, 2014).

The CAA does not give Fleshman a right to intervene because he seeks to enforce different standards, limitations, or orders than the United States. Although he contends § 7604(b)(1)(B) gives him "the statutory right to intervene in *any* action related to the enforcement of the emission standards or limitations applicable to new motor vehicles" (Dkt. No. 1760 at 2 (emphasis added)), the statute is not so broad. "Whether claims of prospective intervenors must mirror claims of the United States under the citizen-suit provision of the CAA is perhaps seldom addressed in case law because the plain language of the statute so clearly requires uniformity." *Dominion Energy, Inc.*, 2014 WL 1476600, at *5. Courts require proposed statutory intervenors to assert the same claims as the original plaintiff before permitting such intervention. *See id.* at *6 (no statutory right to intervene where proposed intervenors sought "to prosecute opacity and monitoring violations of the CAA that differ from the United States' allegations of unpermitted modifications"); *United States v. Gateway Energy & Coke Co., LLC*, 2014 WL 5797647, at *4 (S.D. Ill. Nov. 7, 2014) (finding no statutory right to intervene where the proposed intervenors' "claims clearly differ from the allegations asserted in this lawsuit. To allow the proposed intervenors to intervene based on allegations that differ from those of the United

States would essentially gut the [CAA's] citizen-suit provision."); *see also United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274, 278 (W.D. Pa. 2011), *aff'd*, 727 F.3d 274 (3d Cir. 2013) (noting intervenor-plaintiffs had asserted "similar violations" and "essentially the same federal Clean Air Act claims set forth by the [original plaintiff]").

Fleshman does not seek to enforce the same standards, limitations, or orders as the United States. As an initial matter, Fleshman's proposed amended complaint does not state any claims; it offers only allegations. (*See* Dkt. No. 1930-1.) Fleshman does, however, state that he "is adopting the original Complaint filed on behalf of the EPA." (Dkt. No. 1845 at 1.) His proposed amended complaint clarifies that this includes the allegations set forth in the United States' Complaint. (*See* Dkt. No. 1930-1 ¶ 1 ("The allegations of the Complaint filed on January 4, 2016, by the United States of America at the request of the Administrator of the Environmental Protection Agency ('EPA') are incorporated herein by reference.").) Despite this assertion, Fleshman and the United States focus on different conduct by different actors, as well as different CAA provisions.

Fleshman focuses on the *EPA's* alleged failure to act in accordance with the CAA. *See* Dkt. No. 1930-1 ¶ 11 ("The Administrator and the EPA have not diligently prosecuted the mandatory, non-discretionary requirements of the Clean Air Act."), ¶ 15 ("Intervenor Ronald Clark Fleshman, Jr. asserts the Administrator and the EPA are not diligently prosecuting the defendants as required and have failed to perform the mandatory, non-discretionary requirements of the Clean Air Act in the following

respects[.]"), ¶ 15(C) ("The Administrator's enforcement of the Clean Air Act cannot apply a remedy under § 7541 of the Act for violations under § 7522 of the Act."), ¶ 15(F) ("The EPA is under a nondiscretionary duty to not create a financial incentive for the defendants to violate the Clean Air Act."). Fleshman further alleges the EPA has "impermissibly annul[led] or repeal[ed] the EPA-approved" SIPs. *See* Dkt. No. 1930-1 ¶ 10 ("Operating a motor vehicle with an inoperable emissions system violates the EPA-approved SIP of at least the following states . . . .").

In contrast, the United States' claims center on *Volkswagen's* conduct. Specifically, the United States asserts violations of (1) 42 U.S.C. § 7522(a)(1) for the sale, offer for sale, introduction into commerce, delivery for introduction into commerce, or importation of new motor vehicles not covered by a certificate of conformity ("COC"); (2) 42 U.S.C. § 7522(a)(3)(B) for the manufacture, sale, offer for sale, or installation of defeat devices on new motor vehicles; (3) 42 U.S.C. § 7522(a)(3)(A) for the incorporation of road calibration auxiliary emission control devices ("AECD") in the 2.0-liter engine vehicles; and (4) 42 U.S.C. § 7522(a)(3) for the failure to disclose AECDs in a COC application for a test group of new motor vehicles. (*See* Dkt. No. 1 ¶¶ 102-31, U.S. Action.) The United States' Complaint contains no state law claims and makes no reference to any SIPs. As such, Fleshman's proposed amended complaint attempts to enforce different standards from those currently being litigated.

True, Fleshman's proposed amended complaint alleges "42 U.S.C. § 7522 prohibits the sale of the Dirty Diesel vehicles because they are not 'covered'

by a valid certificate of conformity and they were sold with a 'defeat device' installed."[4] (Dkt. No. 1930-1 ¶ 15(A).) But Fleshman still has not shown that his proposed amended complaint sufficiently mirrors the United States' complaint to mandate statutory intervention. Although the United States also asserts violations of various provisions of § 7522, it does so in relation to Volkswagen's conduct. Fleshman, however, appears to rely on § 7522 for the proposition that the Partial Consent Decree does not fully enforce the statute. *See id.* ¶ 15(A) ("The proposed Partial Consent Decree . . . do[es] not require the rescission of the sale of the affected Dirty Diesel vehicles as mandated by § 7522."). Put another way, Fleshman is concerned with the EPA's enforcement of § 7522 and the obtainment of what he believes are appropriate remedies, not how Volkswagen's actions violate the statute.

In any event, Fleshman's requested relief reveal further disparities in enforcement. The United States' desired remedies against Volkswagen consist of (1) civil monetary penalties; (2) injunctions on the sale or the importation of any new vehicles equipped with a defeat device or covered by a COC; and (3) an order for Volkswagen to take steps to mitigate excess nitrous oxides emissions. (Dkt. No. 1 at 26-28, U.S. Action.) But Fleshman's desired relief focuses solely on the EPA.[5] Specifically, he requests the Court "find

---

[4] Fleshman does not specify which provisions of § 7522 are at issue. (*See* Dkt. No. 1930-1 ¶ 15(A).)

[5] In addition to his failure to list claims, Fleshman's proposed amended complaint does not name any defendants. To the extent it also adopts the defendants named in the United States' Complaint, that Fleshman seeks remedies only against

and order" that (1) "enforcement of the law found in the 'Prohibited Acts' enumerated by Congress in 42 U.S.C. § 7522 and require the rescission of the sale of all affected Dirty Diesel vehicles with the full cost thereof placed on the defendant manufacturers;" (2) "a remedy under 42 U.S.C. § 7541 is not to be used for violations of 42 U.S.C. § 7522;" (3) the EPA has no authority to annul or repeal the EPA-approved SIPs; (4) 42 U.S.C. §§ 7413 and 7541 require the EPA to notify owners and lessees it is illegal to use their vehicles in the United States; (5) 42 U.S.C. § 7413(a)(2) requires the EPA to inform states of widespread violations of 42 U.S.C. §§ 7522 and 7541, as well as various SIPs; (6) the EPA must not impair or impede the enforcement of an SIP through a settlement that does not require compliance with such plans and eliminates available remedies; (7) "the imposition of civil penalties do not affect the defendants' obligation to comply with" or give the EPA discretion to allow continuous violations of the CAA; and (8) "the EPA cannot propose and support a monetary penalty which is an incentive to violate the Clean Air Act." (Dkt. No. 1930-1 at 11-12.) The United States seeks no such relief. That Fleshman does not appear to seek any remedies against Volkswagen further indicates that he is not attempting to enforce the same standards as the United States.

In sum, Fleshman has not shown that his proposed lawsuit in intervention seeks to enforce the same standard, limitation, or order as does the United States such that the CAA mandates his intervention. To the contrary, Fleshman purports to

---

the EPA and not any of the Volkswagen entities suggests he does not intend to litigate claims against Volkswagen.

add new claims rather than litigate the ones asserted by the United States. Even if "Fleshman has the right to enforce the emission standards and limitations in State Implementation Plans" (Dkt. No. 1845 at 3), this is not what the United States seeks to do in its lawsuit. Accordingly, the CAA does not mandate Fleshman's intervention. Indeed, to allow Fleshman to assert new claims and seek different relief risks prolonging litigation and delaying relief to other Class Members.

Fleshman's remaining arguments are specious. For instance, he argues that "[t]he Partial Consent Decree gives Volkswagen a huge financial incentive to re-publish and re-broadcast the EPA's incorrect statement that these cars remain legal to drive" and that "Volkswagen will do everything it can to . . . leave as many vehicles on the Virginia roads as possible." (Dkt. No. 1760 at 8-9.) Neither the EPA, CARB, other federal or state regulatory agency, nor a court has found the vehicles are illegal to operate or ordered consumers to stop driving them. In fact, Fleshman relied on this very argument when he sought a temporary injunction from the Nineteenth Judicial Circuit of Virginia. (Dkt. No. 1812-1 at 18-19.) The Virginia court rejected it, noting the alleged harm caused by the ongoing use of these vehicles was "merely speculative." (*Id.* at 19.)

Moreover, the Consent Decree requires Volkswagen to buy back or fix 85% of the Eligible Vehicles by June 30, 2019 (the "National Recall Rate"); failure to do so results in additional monetary penalties. (Dkt. No. 1605-1 ¶¶ 3, 10-11; App'x A ¶¶ 1, 6.1, 6.3, *id.*) Specifically, the Consent Decree requires Volkswagen to pay $85 million for each 1% that falls short of the National Recall Rate.

(App'x A ¶ 6.3, Dkt. No. 1605-1.) With such penalties at stake, Volkswagen is incentivized to take as many Eligible Vehicles off the road as possible to ensure it reaches the National Recall Rate.

4. Conclusion

As the CAA does not provide a basis for mandatory intervention, Fleshman cannot intervene as a matter of right in the United States Action.[6]

B. Motion for Leave to Depose the Virginia Class Representatives

In his second Motion, Fleshman seeks to depose the six Virginia Class Representatives. (Dkt. No. 1846 at 2; *see* Dkt. No. 1740-4 at 14, 116-20.) Fleshman has not shown that depositions are necessary to test the fairness and adequacy of the Settlement.

1. Legal Standard

"While objectors are entitled to meaningful participation in the settlement proceedings and leave to be heard, they are not automatically entitled to discovery or to question and debate every provision of the proposed compromise." *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 619 (S.D. Cal. 2005) (internal quotation marks and citations omitted). In other words, objectors do not have an absolute right to discovery. *In re Cmty.*

[6] The United States also contends the Motion is untimely. (Dkt. No. 1810 at 10-12.) The Court need not address this argument as the CAA does not mandate Fleshman's intervention.

Bank of N. Va., 418 F.3d 277, 316 (3d Cir. 2005). Discovery may be appropriate only under certain circumstances, for instance, "if lead counsel has not conducted adequate discovery or if the discovery conducted by lead counsel is not made available to objectors." (*Id.*) Courts faced with a request for discovery consider "(1) the nature and amount of previous discovery; (2) whether there is a reasonable basis for the discovery requests; and (3) the number and interests of objectors." *Wixon v. Wyndham Resort Dev. Corp.*, 2011 WL 3443650, at *2 (N.D. Cal. Aug. 8, 2011) (citing *Hemphill*, 225 F.R.D. at 620).

2. Discussion

Fleshman explains that he "had intended to depose these [Virginia] Class Representatives after intervening as a party." (Dkt. No. 1846 at 7.) Though his prior, unsuccessful motion did not mention depositions (*see* Dkt. No. 1672), his Motion to Depose the Virginia Class Representatives is, in essence, a second bite at the apple. In any event, Fleshman has not shown a basis to take depositions.

a. *The Nature and Amount of Previous Discovery*

The nature and amount of previous discovery weighs against permitting depositions. Fleshman presents no evidence—indeed, does not even argue—that Class Counsel have not conducted adequate discovery or that discovery has not been made available to objectors. To the contrary, the Court has already determined that Class Counsel conducted

sufficient discovery to engage in informed settlement negotiations. (Dkt. No. 1698 at 22; *see* Dkt. No. 1609 at 6 (noting that Volkswagen produced over 12 million pages of documents and that Counsel had reviewed approximately 70% of them).) Fleshman offers no reason to believe this was not in fact the case. Thus, this factor weighs against allowing Fleshman to depose the Virginia Class Representatives.

b. *Reasonable Basis for Discovery Requests*

Fleshman also fails to provide a reasonable basis to depose the Virginia Class Representatives. His argument that depositions are necessary to determine the fairness and adequacy of the Settlement is unpersuasive. Indeed, the information he seeks to discover would be of little use.

First, Fleshman contends that "[d]iscovery must be obtained to learn why the Virginia Subclass representatives have not insisted that the EPA and Volkswagen correct their false statements that the Dirty Diesels are legal to drive in Virginia." (Dkt. No. 1846 at 5.) But as noted earlier, no court or government agency has declared it illegal to drive an Eligible Vehicle. Moreover, assuming without deciding that Fleshman is correct that "Virginia law makes it illegal to operate a motor vehicle in the Commonwealth with an inoperable emissions system" (Dkt. No. 1846 at 4 (citing 9 Va. Code Ann. § 5-40-5670(A)(3))), the Settlement in fact addresses this concern. By requiring Volkswagen to buyback or fix the vehicles, the Settlement ensures that Eligible Vehicles will be taken off the road or brought into compliance.

Second, Fleshman agues "[d]iscovery must be obtained to learn why claims were not made based on the Virginia Motor Vehicle Warranty Act" which he contends "allows full refund of all money paid to Virginia consumers on the admitted facts of this case, but inexplicably was not pled nor was the relief provided thereby sought." (Dkt. No. 1846 at 5.) Because of this, "[d]iscovery must be obtained to learn why the Virginia Subclass representatives agreed to a settlement where lessees get no refund of their payments when Virginia law, under these admitted facts, allows lessees a full refund." (*Id.* at 5-6.) This argument is based on a flawed interpretation of the law—Fleshman does not seem to have finished reading the statute. The Virginia Motor Vehicle Warranty Act provides that a manufacturer that is unable "conform [a] motor vehicle to any applicable warranty by repairing or correcting any defect or condition" must

> [a]ccept return of the motor vehicle and refund to the consumer, lessor, and any lienholder as their interest may appear the full contract price, including all collateral charges, incidental damages *less a reasonable allowance for the consumer's use of the vehicle up to the date of the first notice of nonconformity that is given to the manufacturer, its agents or authorized dealer*. [ ] *The subtraction of a reasonable allowance for use shall apply to either a replacement or refund of the motor vehicle*.

Va. Code. Ann. § 59.1-207.13(A)(2) (emphasis added). Only "[m]ileage, expenses, and reasonable loss of use

necessitated by attempts to conform such motor vehicle to the express warranty may be recovered by the consumer." (*Id.* (emphasis added).) The Settlement reflects this reality. By calculating the Buyback and Restitution amounts based on the September 2015 NADA Clean Trade-In value, the Settlement takes into account the value of the vehicle minus any depreciation for use. Although the Consolidated Consumer Class Complaint did not assert a claim under the Virginia Motor Vehicle Warranty Act, the recovery provided under the terms of the Settlement is consistent with the possible recovery under that statute. Fleshman therefore fails to provide any reasonable basis to depose the Virginia Class Representatives.

c. *Number and Interests of Objectors*

The small number of objectors weighs against allowing Fleshman to take depositions. The deadline for filing objections has passed, and , only 0.0% of Class Members objected to the Settlement;that is, out of 489,000 Class Members, 482 timely objected. (Dkt. No. 1976 at 3.) That so few Class Members have objected weighs against allowing discovery. *See In re Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. & Sales Practices Litig.*, 2011 WL 1496342, at *2 (N.D. Cal. Apr. 20, 2011) (where only 36 objections were filed out of class of 522,000 members, "the likelihood of the court granting [unnamed class member's] discovery requests is decreased because the court will give great weight to the interests of the majority of the class members."); *Hemphill*, 225 F.R.D. at 620 (having received only 9 objections after the mailing of more than 27,000 notices, "[t]he fact

that Movants represent only a small number of the thousands of class members also weighs against Movants' discovery requests.").

3. Conclusion

Fleshman presents no basis to allow him to depose the Virginia Class Representatives. The reasons he provide are based on flawed understandings of the law or his own unsubstantiated beliefs. Moreover, information obtained in a deposition could not affect his or any other Class Member's decision to opt out of the Settlement given that the deadline to do so has passed.

CONCLUSION

For the foregoing reasons, the Court **DENIES** both Motions. The CAA does not mandate intervention under these circumstances, and Fleshman fails to provide a basis to depose the Virginia Class Representatives.

This Order disposes of Dkt. Nos. 1760, 1762, 1846, and 1930.

IT IS SO ORDERED.

Dated: October 4, 2016

/s/ CHARLES R. BREYER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-17183
D.C. No. 3:15-md-02672-CRB
Northern District of California, San Francisco

In re: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,

---

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; ELIZABETH EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT;

RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS, Plaintiffs-Appellees,

RONALD CLARK FLESHMAN, Jr., Proposed Intervenor, Objector-Appellant,

v.

VOLKSWAGEN, AG; VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC, Defendants-Appellees

ORDER

Before: TASHIMA, W. FLETCHER, and BERZON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Berzon and Fletcher vote to deny the petition for rehearing en banc, and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

FILED OCT 29 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-17060
D.C. No. 3:15-md-02672-CRB
Northern District of California, San Francisco

In re: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,

---

JASON HILL; BRETT ALTERS; RAY PRECIADO; ANNE DUNCAN ARGENTO; STEVEN R. THORNTON; SIMON W. BEAVEN; SUSAN TARRENCE; FARRAH P. BELL; JULIET BRODIE; SCOTT BAHR; SARAH BURT; CARLA BERG; AIMEE EPSTEIN; ALAN BANDICS; GEORGE FARQUAR; KEVIN BEDARD; MARK HOULE; ELIZABETH BEDARD; REBECCA KAPLAN; THOMAS W. AYALA; HELEN KOISK-WESTLY; BRIAN J. BIALECKI; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; ELIZABETH EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE;

MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; MELANI BUCHANAN FARMER; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; HERBERT YUSSIM; NICHOLAS BOND; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS, Plaintiffs,

and

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

VOLKSWAGEN, AG; VOLKSWAGEN GROUP OF AMERICA, INC.; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC, Defendants-Appellees,

v.

RONALD CLARK FLESHMAN, Jr., Proposed Intervenor, Movant-Appellant.

ORDER

Before: TASHIMA, W. FLETCHER, and BERZON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Berzon and Fletcher vote to deny the petition for rehearing en banc, and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

FILED OCT 29 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

U.S.C.A. Const. Art. I § 1
Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

42 U.S.C.A. § 7522 (excerpt)
Prohibited acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

(1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part or part C in the case of clean-fuel vehicles (except as provided in subsection (b));

* * *

(3)(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

(B) for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use; or

(4) for any manufacturer of a new motor vehicle or new motor vehicle engine subject to standards prescribed under section 7521 of this title or part C of this subchapter –

(A) to sell or lease any such vehicle or engine unless such manufacturer has complied with (i) the requirements of section 7541(a) and (b) of this title with respect to such vehicle or engine, and unless a label or tag is affixed to such vehicle or engine in accordance with section 7541(c)(3) of this title, or (ii) the corresponding requirements of part C in the case of clean fuel vehicles unless the manufacturer has complied with the corresponding requirements of part C [1]

(B) to fail or refuse to comply with the requirements of section 7541(c) or (e) of this title, or the corresponding requirements of part C in the case of clean fuel vehicles

(C) except as provided in subsection (c)(3) of section 7541 of this title and the corresponding

requirements of part C in the case of clean fuel vehicles, to provide directly or indirectly in any communication to the ultimate purchaser or any subsequent purchaser that the coverage of any warranty under this chapter is conditioned upon use of any part, component, or system manufactured by such manufacturer or any person acting for such manufacturer or under his control, or conditioned upon service performed by any such person, or

(D) to fail or refuse to comply with the terms and conditions of the warranty under section 7541(a) or (b) of this title or the corresponding requirements of part C in the case of clean fuel vehicles with respect to any vehicle; or

(5) for any person to violate section 7553 of this title, 7554 of this title, or part C of this subchapter or any regulations under section 7553 of this title, 7554 of this title, or part C of this subchapter.

No action with respect to any element of design referred to in paragraph (3) (including any adjustment or alteration of such element) shall be treated as a prohibited act under such paragraph (3) if such action is in accordance with section 7549 of this title. Nothing in paragraph (3) shall be construed to require the use of manufacturer parts in maintaining or repairing any motor vehicle or motor vehicle engine. For the purposes of the preceding sentence, the term “manufacturer parts” means, with respect to a motor vehicle engine, parts produced or sold by the manufacturer of the motor vehicle or motor vehicle engine. No action with respect to any device or element of design referred to

in paragraph (3) shall be treated as a prohibited act under that paragraph if (i) the action is for the purpose of repair or replacement of the device or element, or is a necessary and temporary procedure to repair or replace any other item and the device or element is replaced upon completion of the procedure, and (ii) such action thereafter results in the proper functioning of the device or element referred to in paragraph (3). No action with respect to any device or element of design referred to in paragraph (3) shall be treated as a prohibited act under that paragraph if the action is for the purpose of a conversion of a motor vehicle for use of a clean alternative fuel (as defined in this subchapter) and if such vehicle complies with the applicable standard under section 7521 of this title when operating on such fuel, and if in the case of a clean alternative fuel vehicle (as defined by rule by the Administrator), the device or element is replaced upon completion of the conversion procedure and such action results in proper functioning of the device or element when the motor vehicle operates on conventional fuel.

(b) Exemptions; refusal to admit vehicle or engine into United States; vehicles or engines intended for export

(1) The Administrator may exempt any new motor vehicle or new motor vehicle engine, from subsection (a), upon such terms and conditions as he may find necessary for the purpose of research, investigations, studies, demonstrations, or training, or for reasons of national security.

(2) A new motor vehicle or new motor vehicle engine offered for importation or imported by any person in violation of subsection (a) shall be refused admission into the United States, but the Secretary of the Treasury and the Administrator may, by joint regulation, provide for deferring final determination as to admission and authorizing the delivery of such a motor vehicle or engine offered for import to the owner or consignee thereof upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part. The Secretary of the Treasury shall, if a motor vehicle or engine is finally refused admission under this paragraph, cause disposition thereof in accordance with the customs laws unless it is exported, under regulations prescribed by such Secretary, within ninety days of the date of notice of such refusal or such additional time as may be permitted pursuant to such regulations, except that disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate consumer, of a new motor vehicle or new motor vehicle engine that fails to comply with applicable standards of the Administrator under this part.

* * *

42 U.S.C.A. § 7521 (excerpt)
Emission standards for new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section--

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) In general

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

* * *

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator

shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to requirements prescribed under this subchapter without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

* * *

(b) Emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen; annual report to Congress; waiver of emission standards; research objectives

(1)(A) The regulations under subsection (a) of this section applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall

contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of hydrocarbons from light-duty vehicles and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

(B) The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of

those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that--

(i) the ability of such manufacturer to meet emission standards in the 1975 and subsequent model years was, and is, primarily dependent upon technology developed by other manufacturers and purchased from such manufacturers; and

(ii) such manufacturer lacks the financial resources and technological ability to develop such technology.

(C) The Administrator may promulgate regulations under subsection (a)(1) of this section revising any standard prescribed or previously revised under this subsection, as needed to protect public health or welfare, taking costs, energy, and safety into account. Any revised standard shall require a reduction of emissions from the standard that was previously applicable. Any such revision under this subchapter may provide for a phase-in of the standard. It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i) of this section shall not be modified by the Administrator after November 15, 1990, for any model year before the model year 2004.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards are based (if not promulgated prior to November 15, 1990), shall be promulgated by regulation within 180 days after November 15, 1990.

* * *

(3) Upon the petition of any manufacturer, the Administrator, after notice and opportunity for public hearing, may waive the standard required under subparagraph (B) of paragraph (1) to not exceed 1.5 grams of oxides of nitrogen per vehicle mile for any class or category of light-duty vehicles or engines manufactured by such manufacturer during any period of up to four model years beginning after the model year 1980 if the manufacturer demonstrates that such waiver is necessary to permit the use of an innovative power train technology, or innovative emission control device or system, in such class or category of vehicles or engines and that such technology or system was not utilized by more than 1 percent of the light-duty vehicles sold in the United States in the 1975 model year. Such waiver may be granted only if the Administrator determines--

(A) that such waiver would not endanger public health,

(B) that there is a substantial likelihood that the vehicles or engines will be able to comply with the applicable standard under this section at the expiration of the waiver, and

(C) that the technology or system has a potential for long-term air quality benefit and has the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act [42 U.S.C.A. § 6201 et seq.] upon the expiration of the waiver.

No waiver under this subparagraph granted to any manufacturer shall apply to more than 5 percent of such manufacturer's production or more than fifty thousand vehicles or engines, whichever is greater.

* * *

(d) Useful life of vehicles

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that except where a different useful life period is specified in this subchapter useful life shall--

(1) in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use

compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000 miles (or the equivalent), whichever first occurs;

(2) in the case of any other motor vehicle or motor vehicle engine (other than motorcycles or motorcycle engines), be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate; and

(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.

* * *

19 U.S.C.A. § 1595a
Aiding unlawful importation

(a) Importation, removal, etc. contrary to laws of United States

Except as specified in subsection (b) or (c) of section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, may be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

(b) Penalty for aiding unlawful importation

Every person who directs, assists financially or otherwise, or is in any way concerned in any unlawful activity mentioned in the preceding subsection shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.

(c) Merchandise introduced contrary to law

Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

(1) The merchandise shall be seized and forfeited if it--

(A) is stolen, smuggled, or clandestinely imported or introduced;

(B) is a controlled substance, as defined in the Controlled Substances Act (21 U.S.C. 801 et seq.), and is not imported in accordance with applicable law;

(C) is a contraband article, as defined in section 80302 of Title 49 ; or

(D) is a plastic explosive, as defined in section 841(q) of Title 18 , which does not contain a detection agent, as defined in section 841(p) of such title.

(2) The merchandise may be seized and forfeited if--

(A) its importation or entry is subject to any restriction or prohibition which is imposed by law relating to health, safety, or conservation and the merchandise is not in compliance with the applicable rule, regulation, or statute;

(B) its importation or entry requires a license, permit or other authorization of an agency of the United States Government and the merchandise is not accompanied by such license, permit, or authorization;

(C) it is merchandise or packaging in which copyright, trademark, or trade name protection violations are involved (including, but not limited to,

violations of section 1124 , 1125 , or 1127 of Title 15 , section 506 of Title 17 , or section 2318 or 2320 of Title 18);

(D) it is trade dress merchandise involved in the violation of a court order citing section 1125 of Title 15 ;

(E) it is merchandise which is marked intentionally in violation of section 1304 of this title; or

(F) it is merchandise for which the importer has received written notices that previous importations of identical merchandise from the same supplier were found to have been marked in violation of section 1304 of this title.

(3) If the importation or entry of the merchandise is subject to quantitative restrictions requiring a visa, permit, license, or other similar document, or stamp from the United States Government or from a foreign government or issuing authority pursuant to a bilateral or multilateral agreement, the merchandise shall be subject to detention in accordance with section 1499 of this title unless the appropriate visa, license, permit, or similar document or stamp is presented to the Customs Service; but if the visa, permit, license, or similar document or stamp which is presented in connection with the importation or entry of the merchandise is counterfeit, the merchandise may be seized and forfeited.

(4) If the merchandise is imported or introduced contrary to a provision of law which governs the

classification or value of merchandise and there are no issues as to the admissibility of the merchandise into the United States, it shall not be seized except in accordance with section 1592 of this title.

(5) In any case where the seizure and forfeiture of merchandise are required or authorized by this section, the Secretary may--

(A) remit the forfeiture under section 1618 of this title, or

(B) permit the exportation of the merchandise, unless its release would adversely affect health, safety, or conservation or be in contravention of a bilateral or multilateral agreement or treaty.

(d) Merchandise exported contrary to law

Merchandise exported or sent from the United States or attempted to be exported or sent from the United States contrary to law, or the proceeds or value thereof, and property used to facilitate the exporting or sending of such merchandise, the attempted exporting or sending of such merchandise, or the receipt, purchase, transportation, concealment, or sale of such merchandise prior to exportation shall be seized and forfeited to the United States.

42 U.S.C.A. § 7604
Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court

of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any

other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means--

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

Alabama

Ala. Admin. Code 335-3-9-.04

(3) Other Exhaust Emission Control Systems. Any other exhaust emission control system, other than air injection or engine modification which is installed or incorporated in a motor vehicle in compliance with Federal motor vehicle pollution control regulations shall be maintained in good operable conditions as specified by the manufacturer and shall be used at all times that the motor vehicle is operated.

Original: 39 FR 14338
Revision *55* FR 10062

Arizona

Ariz. Admin. Code R18-2-1029

For the purposes of A.R.S. §§ 28-955 and 49-447, a registered motor vehicle shall have in operating condition all emission control devices installed by the vehicle manufacturer to comply with federal requirements for motor vehicle emissions or equivalent after-market replacement parts or devices.

68 FR 2912

Connecticut

Conn. Agencies Regs. 14-164c-4a

(a) Any motor vehicle presented for inspection which is required, pursuant to the regulations of the Commissioner of Environmental Protection as authorized by sections 14-164c and 22a-174 of the Connecticut General Statutes, to be equipped with an "air pollution control system or mechanism," as defined by subsection (a) of section 22a-174-200 of the Regulations of Connecticut State Agencies, shall be deemed to have failed to meet emissions standards if such control system or mechanism is found to have been removed, to have been dismantled or is otherwise inoperable. Such control system or mechanism may be inspected prior to emissions inspection, during emissions inspection, after a vehicle has failed a required emissions inspection, or in connection with on-road testing.

(b) Any motor vehicle not meeting emissions standards pursuant to subsection (a) of this section, whether during periodic emissions inspection or on-road testing, shall be required to pass a reinspection within thirty (30) days of such failure or the owner thereof shall be subject to denial of registration for such vehicle as provided in subsection (n) of section 14-164c of the Connecticut General Statutes.

73 FR 74019

Delaware (applies to Sussex County only)

7 Del. Admin. Code 1126-3.0

Also cited as Code Del. Regs. 7 1000 1126

Effective January 1, 1983, no motor vehicle that is subject to this regulation may be granted registration in the State of Delaware unless the motor vehicle is in compliance with the applicable emissions standards, regardless of its pass/fail status of other tests normally performed at the official inspection station.

75 FR48566

District of Columbia

18 DCMR Chapter 7

Section 751

751. Compliance with Exhaust Emission Standards

751.1 No motor vehicle shall be allowed to operate on the streets or highways of the District that does not comply with the exhaust emission standards prescribed pursuant to §752, except as provided in this section.

751.2 After December 31, 1982, no owner of a motor vehicle shall operate or allow the operation of a vehicle on the streets and highways of the

District that does not comply with the exhaust emission standards prescribed pursuant to §752, except as provided in this section.

64 FR 31498

Georgia (vehicle emissions regulations only apply to certain counties)

Ga. Comp. R. & Regs. 391-3-20-.06

(1) Covered vehicles are expected to meet emission standards at all times. EPD may use remote sensing technology or other methods established by the Director to identify covered vehicles that appear to be producing exhaust emissions in excess of the applicable emission standards. EPD may notify the owner of an identified vehicle to present his or her vehicle for an emission inspection under Rules 391-3-20-.04 and 391-3-20-.05. An owner so notified by EPD must present his or her vehicle for an emission inspection within thirty (30) days. Vehicles which fail such inspection shall be required to be re-inspected and pass such re-inspection as required by Rule 391-3-20-.15.

Original: 62 FR 42916

Revision 67 FR 45909

Revision 68 FR 40786

Hawaii

Haw. Code R. 11-60.1-34
(d) No person shall remove, dismantle, fail to maintain, or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control system or mechanism of a motor vehicle as required by the provisions of the Act except as permitted or authorized by law.

77 FR25084

Illinois

Ill. Admin. Code tit. 35, § 240.103

Except as permitted or authorized by law, no person shall fail to maintain in good working order or remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of the air pollution control systems or mechanisms of a motor vehicle as required by rules or regulations of the Board and the United States Environmental Protection Agency to be maintained in or on the vehicle.

79 FR 47377

Maryland

COMAR 11.14.08.06

11.14. 08.06 Certificates

C. Fail Certificate.

(1) If a vehicle inspected at a vehicle emissions inspection station does not meet all applicable standards specified in Regulation .09 of this chapter during an inspection, the vehicle is considered not to be in compliance and the contractor shall issue a fail certificate which includes the following information:

(a) The type of failure and the reason for failure; and

(b) A statement indicating any availability of warranty coverage as provided by the Clean Air Act, 42 U.S.C. §7541.

(2) A vehicle issued a fail certificate may be operated through the period of permitted operation.

(3) A person may not operate a vehicle after the end of the period of permitted operation unless a pass certificate or a waiver certificate has been issued for the vehicle or the vehicle owner has been granted a time extension.

68 FR 2208

Minnesota

Minn. R. 7023.0120

No person shall remove, alter, or otherwise render inoperative any air pollution control system.

No person shall operate a motor vehicle unless all air pollution control systems are in place and in operating condition.

No person shall rent, lease, offer for sale, or in any manner transfer ownership of a motor vehicle unless all air pollution control systems are in place and in operating condition.

The requirements of this part shall not restrict or prohibit the removal of any air pollution control system for repair or replacement.

EPA has no notation for a FR citation for this regulation, but states that it is effective for federal purposes as of7/21/1982. (https://yosemite.epa.gov/r5/r5ard.nsf/977585e33633852b862575750057311a/712f45796868ba338625756ffi04c429e!OpenDocument)

Nevada

Nev. Admin. Code 4458.575

I. Except as otherwise provided in this section, a person shall not:

(a) Sell, offer to sell, display for sale, operate or penn it the operation of or leave standing any motor vehicle which is required by state or federal law to be equipped with a device for the control of pollution unless the device is correctly installed and in operating condition in accordance with the specifications of the vehicle manufacturer and any applicable state or federal statute or regulation.

(b) Disconnect, alter or modify any such required device.

73 FR 38124

New Jersey

N.J. Admin. Code§ 7:27-14.3

(e) No person shall cause, suffer, allow or pennit any emission control apparatus or element of design installed on any diesel-powered motor vehicle or diesel engine to be disconnected, detached, deactivated, or in any other way rendered inoperable or less effective, in respect to limiting or controlling emissions than it was designed to be by the original equipment or vehicle manufacturer, except for the purposes of diagnostics, maintenance, repair or replacement and only for the duration of such operations.

74 FR 17781

North Dakota

N.D. Admin. Code 33-15-08-02

1. No person shall intentionally remove, alter, or otherwise render inoperative, exhaust emission control, crankcase ventilation, or any other air pollution control device which has been installed as a requirement of federal law or regulation.

2. No person shall operate a motor vehicle originally equipped with air pollution control devices as required by federal law or regulation unless such devices are in place and in operating condition.

44 FR63102

Rhode Island

R.I. CodeR. 47-1-37:1.12

(f) Operation of a Non-Complying Vehicle. No person may register or continue to operate on the highways of Rhode Island, a motor vehicle which is subject to the provisions of Rhode Island I/M Program which is not in compliance with the requirements thereof.

66 FR 9661

Virginia

9 VAC 5-40-5670

A. Emission control systems.

1. No owner or other person shall cause or permit the removal, disconnection or disabling of a crankcase emission control system or device, exhaust emission control system or device, fuel evaporative emission control system or device, or other air pollution control system or device which has been installed on a motor vehicle in accordance with federal laws and regulations while such motor vehicle is operating in the Commonwealth of Virginia.

2. No owner or other person shall attempt to defeat the purpose of any such motor vehicle pollution control system or device by installing any part or component which is not a standard factory replacement part or component of the device.

3. No motor vehicle or engine shall be operated with the motor vehicle pollution control system or device removed or otherwise rendered inoperable.

4. The provisions of this section shall not prohibit or prevent shop adjustments or replacement of equipment for maintenance or repair, or the conversion of engines to low polluting fuels such as, but not limited to, natural gas or propane.

B. Visible emissions.

1. No owner or other person shall cause or permit the emission of visible air pollutants from gasoline-powered motor vehicles for longer than five consecutive seconds after the engine has been brought up to operating temperature.

2. No owner or other person shall cause or permit the emission of visible air pollutants from diesel-powered motor vehicles of a density equal to or greater than 20% opacity for longer than 10 consecutive seconds after the engine has been brought up to operating temperature.

C. In commercial or residential urban areas, propulsion engines of motor vehicles licensed for commercial or public service use shall not be left running for more than three minutes when the vehicle is parked, unless the propulsion engine is providing auxiliary power for other than heating or air conditioning; except that:

1. Tour buses may idle for up to 10 minutes during hot weather in order to maintain power to the air conditioning system; and

2. Diesel powered vehicles may idle for up to 10 minutes to minimize restart problems.

VA Code Ann. § 46.2-1048

Pollution control systems or devices.

No motor vehicle registered in the Commonwealth and manufactured for the model year 1973 or for subsequent model years shall be operated on the highways in the Commonwealth unless it is equipped with an air pollution control system, device, or combination of such systems or devices installed in accordance with federal laws and regulations.

It shall be unlawful for any person to operate a motor vehicle, as herein described, on the highways in the Commonwealth with its pollution control system or device removed or otherwise rendered inoperable.

It shall be unlawful for any person to operate on the highways in the Commonwealth a motor vehicle, as described in this section, equipped with any emission control system or device unless it is of a type installed as standard factory equipment, or comparable to that designed for use upon the particular vehicle as standard factory equipment.

No motor vehicle, as described in this section, shall be issued a safety inspection approval sticker unless it is equipped as provided under the foregoing provisions of this section or if it violates this section.

The provisions of this section shall not prohibit or prevent shop adjustments or replacements of equipment for maintenance or repair or the conversion of engines to low polluting fuels, such as, but not limited to, natural gas or propane, so long as such action does not degrade the antipollution capabilities of the vehicle power system.

The provisions of this section shall not apply to converted electric vehicles.

Wisconsin

Wis. Admin. Code NR § 485.06

(1) No person may tamper with or fail to maintain in good working order any air pollution control equipment which has been installed on a motor vehicle by the manufacturer prior to sale unless the person repairs or restores the equipment or replaces the equipment with new identical or comparable tested replacement equipment. Catalytic converters must be original equipment or EPA-certified equipment except as specified in sub.

(2). Air pollution control equipment includes but is not limited to:

(a) Positive crankcase ventilation equipment.

(b) Exhaust emission control equipment.

(c) Evaporative fuel loss control equipment.

(d) Any control equipment operating on principles such as thermal decomposition, catalytic oxidation or reduction, absorption, or adsorption.

78 FR 57501

Wyoming

Wyo. Admin. Code § ENV AQ Ch. 13 s 2

(a) No person shall intentionally remove, alter or otherwise render ineffective or inoperative, exhaust

emission control crank case ventilation or any other air pollution control device or system which has been installed on a motor vehicle or stationary internal combustion engine as a requirement of any federal law or regulation.

(b) No person shall operate a motor vehicle or other internal combustion engine originally equipped with air pollution devices or systems as required by any federal law or regulation unless such devices or systems are in place and in operating condition.

EXHIBIT 2

STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the Plea Agreement (the "Agreement") between the United States Department of Justice (the "Department") and Volkswagen AG ("VW AG"). VW AG hereby agrees and stipulates that the following information is true and accurate. VW AG admits, accepts, and acknowledges that under U.S. Jaw it is responsible for the acts of its employees set forth in this Statement of Facts, which acts VW AG acknowledges were within the scope of the employees' employment and, at least in part, for the benefit of VW AG. All references to legal terms and emissions standards, to the extent contained herein, should be understood to refer exclusively to applicable U.S. laws and regulations, and such legal terms contained in this Statement of Facts are not intended to apply to, or affect, VW AG's rights or obligations under the laws or regulations of any jurisdiction outside the United States. This Statement of Facts does not contain all of the facts known to the Department or VW AG; the Department's investigation into individuals is ongoing. The following facts took place during the time frame specified in the Third Superseding Information and establish beyond a reasonable doubt the charges set forth in the criminal Information attached to this Agreement:

Relevant Entities and Individuals

1. VW AG was a motor vehicle manufacturer based in Wolfsburg, Germany. Under U.S. law, VW AG acts through its employees, and conduct undertaken by VW AG, as described herein, reflects conduct undertaken by employees. Pursuant to applicable German stock corporation law, VW AG was led by a Management Board that was supervised by a Supervisory Board. Solely for purposes of this Statement of Facts, unless otherwise indicated, references in this Statement of Facts to "supervisors" are to senior employees below the level of the VW AG Management Board.

2. Audi AG ("Audi") was a motor vehicle manufacturer based in Ingolstadt, Germany and a subsidiary approximately 99.55% owned by VW AG. Under U.S. Jaw, Audi AG acts through its employees, and conduct undertaken by Audi AG, as described herein, reflects conduct undertaken by employees.

3. Volkswagen Group of America, Inc. ("VW GOA") was a wholly owned subsidiary of VW AG based in Herndon, Virginia. Under U.S. law, VW GOA acts through its employees, and conduct undertaken by VW GOA, as described herein, reflects conduct undertaken by employees.

4. VW AG, Audi AG, and VW GOA are collectively referred to herein as "VW."

5. "VW Brand" was an operational unit within VW AG that developed vehicles to be sold under the "Volkswagen" brand name.

6. Company A was an automotive engineering company based in Berlin, Germany, which specialized in software, electronics, and technology support for vehicle manufacturers. VW AG owned fifty percent of Company A's shares and was Company A's largest customer.

7. "Supervisor A," an individual whose identity is known to the United States and VW AG, was the supervisor in charge of Engine Development for all of VW AG from in or about October 2012 to in or about September 2015. From July 2013 to September 2015, Supervisor A also served as the supervisor in charge of Development for VW Brand, where he supervised a group of approximately 10,000 VW AG employees. From in or about October 2011, when he joined VW, until in or about July 2013, Supervisor A served as the supervisor in charge of the VW Brand Engine Development department.

8. "Supervisor B," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2005 to in or about April 2007.

9. "Supervisor C," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine

Development department from in or about May 2007 to in or about March 2011.

10. "Supervisor D," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about October 2013 to the present.

11. "Supervisor E," an individual whose identity is known to the United States and VW AG, was a supervisor with responsibility for VW AG's Quality Management and Product Safety department who reported to the supervisor in charge of Quality Management from in or about 2007 to in or about October 2014.

12. "Supervisor F," an individual whose identity is known to the United States and VW AG, was a supervisor within the VW Brand Engine Development department from in or about 2003 until in or about December 2012.

13. "Attorney A," an individual whose identity is known to the United States and VW AG, was a German-qualified in-house attorney for VW AG who was the in-house attorney principally responsible for providing legal advice in connection with VW AG's response to U.S. emissions issues from in or about May 2015 to in or about September 2015.

U.S. NOx Emissions Standards

14. The purpose of the Clean Air Act and its implementing regulations was to protect human

health and the environment by, among other things, reducing emissions of pollutants from new motor vehicles, including nitrogen oxides ("NOx").

15. The Clean Air Act required the U.S. Environmental Protection Agency ("EPA") to promulgate emissions standards for new motor vehicles. The EPA established standards and test procedures for light-duty motor vehicles sold in the United States, including emission standards for NOx.

16. The Clean Air Act prohibited manufacturers of new motor vehicles from selling, offering for sale, introducing or delivering for introduction into U.S. commerce, or importing (or causing the foregoing with respect to) any new motor vehicle unless the vehicle complied with U.S. emissions standards, including NOx emissions standards, and was issued an EPA certificate of conformity.

17. To obtain a certificate of conformity, a manufacturer was required to submit an application to the EPA for each model year and for each test group of vehicles that it intended to sell in the United States. The application was required to be in writing, to be signed by an authorized representative of the manufacturer, and to include, among other things, the results of testing done pursuant to the published Federal Test Procedures that measure NOx emissions, and a description of the engine, emissions control system, and fuel system components, including a detailed description of each Auxiliary Emission Control Device ("AECD") to be installed on the vehicle.

18. An AECD was defined under U.S. law as "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." The manufacturer was also required to include a justification for each AECD. If the EPA, in reviewing the application for a certificate of conformity, determined that the AECD "reduced the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use," and that (1) it was not substantially included in the Federal Test Procedure, (2) the need for the AECD was not justified for protection of the vehicle against damage or accident, or (3) it went beyond the requirements of engine starting, the AECD was considered a "defeat device." Whenever the term "defeat device" is used in this Statement of Facts, it refers to a defeat device as defined by U.S. law.

19. The EPA would not certify motor vehicles equipped with defeat devices. Manufacturers could not sell motor vehicles in the United States without a certificate of conformity from the EPA.

20. The California Air Resources Board ("CARB") (together with the EPA, "U.S. regulators") issued its own certificates, called executive orders, for the sale of motor vehicles in the State of California. To obtain such a certificate, the manufacturer was required to satisfy the standards set forth by the State of California, which were equal to or more stringent than those of the EPA.

21. As part of the-application for a certification process, manufacturers often worked in parallel with the EPA and CARB. To obtain a certificate of conformity from the EPA, manufacturers were required to demonstrate that the light-duty vehicles were equipped with an on-board diagnostic ("OBD") system capable of monitoring all emissions-related systems or components. Manufacturers could demonstrate compliance with California OBD standards in order to meet federal requirements. CARB reviewed applications from manufacturers, including VW, to determine whether their OBD systems were in compliance with California OBD standards, and CARB's conclusion would be included in the application the manufacturer submitted to the EPA.

22. In 1998, the United States established new federal emissions standards that would be implemented in separate steps, or Tiers. Tier ll emissions standards, including for NOx emissions, were significantly stricter than Tier I. For light-duty vehicles, the regulations required manufacturers to begin to phase in compliance with the new, stricter Tier II NOx emissions standards *in* 2004 and required manufacturers to fully comply with the stricter standards for model year 2007. These strict U.S. NOx emissions standards were applicable specifically to vehicles in the United States.

VW Diesel Vehicles Sold in the United States

23. In the United States, VW sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused the foregoing

actions (collectively, "sold in the United States") the following vehicles containing 2.0 liter diesel engines ("2.0 Liter Subject Vehicles"):

a. Model Year ("MY") 2009-2015 VW Jetta;
b. MY 2009-2014 VW Jetta Sportwagen;
c. MY 2010-2015 VW Golf;
d. MY 2015 VW Golf Sportwagen;
e. MY 2010-2013, 2015 Audi A3;
f. MY 2013-2015 VW Beetle and VW Beetle Convertible; and
g. MY 2012-2015 VW Passat.

24. VW sold in the United States the following vehicles containing 3.0 liter diesel engines ("3.0 Liter Subject Vehicles"):

a. MY 2009-2016 VW Touareg;
b. MY 2009-2015 Audi Q7;
c. MY 2014-2016 Audi A6 Quattro;
d. MY 2014-2016 Audi A7 Quattro;
e. MY 20 14-2016 Audi ASL; and
f. MY 2014-2016 Audi QS.

25. VW GOA's Engineering and Environmental Office ("EEO") was located in Auburn Hills, Michigan, in the Eastern District of Michigan. Among other things, EEO prepared and submitted applications (the "Applications") for a certificate of conformity and an executive order (collectively, "Certificates") to the EPA and CARB to obtain authorization to sell each of the 2.0 Liter Subject Vehicles and 3.0 Liter Subject Vehicles in the United States (collectively, the "Subject Vehicles"). VW

GOA's Test Center California performed testing related to the Subject Vehicles.

26. VW AG developed the engines for the 2.0 Liter Subject Vehicles. Audi AG developed the engines for the 3.0 Liter Subject Vehicles and the MY 2013-2016 Porsche Cayenne diesel vehicles sold in the United States (the "Porsche Vehicles").

27. The Applications to the EPA were accompanied by the following signed statement by a VW representative:

> The Volkswagen Group states that any element of design, system. or emission control device installed on or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause the emission into the ambient air of pollutants in the operation of its motor vehicles or motor vehicle engines which cause or contribute to an unreasonable risk to public health or welfare except *as* specifically permitted by the standards prescribed under section 202 of the Clean Air Act. The Volkswagen Group further states that any element of design, system, or emission control device installed or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of

> the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk to public safety.
>
> . . .
>
> All vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

28. Based on the representations made by VW employees in the Applications for the Subject Vehicles, EPA and CARB issued Certificates for these vehicles, allowing the Subject Vehicles to be sold in the United States.

29. Upon importing the Subject Vehicles into the United States, VW disclosed to U.S. Customs and Border Protection ("CBP") that the vehicles were covered by valid Certificates by affixing an emissions label to the vehicles' engines. These labels stated that the vehicles conformed to EPA and CARB emissions regulations. VW affixed these labels to each of the Subject Vehicles that it imported into the United States.

30. VW represented to its U.S. customers, U.S. dealers, U.S. regulators and others in the United States that the Subject Vehicles met the new and stricter U.S. emissions standards identified in paragraph 22 above. Further, VW designed a specific marketing campaign to market these vehicles to U.S. customers as "clean diesel" vehicles.

VW AG's Criminal Conduct

31. From approximately May 2006 to approximately November 2015, VW AG, through Supervisors A-F and other VW employees, agreed to deceive U.S. regulators and U.S. customers about whether the Subject Vehicles and the Porsche Vehicles complied with U.S. emissions standards. During their involvement with design, marketing and/or sale of the Subject Vehicles and the Porsche Vehicles in the United States, Supervisors A-F and other VW employees: (a) knew that the Subject Vehicles and the Porsche Vehicles did not meet U.S. emissions standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles and the Porsche Vehicles met U.S. emissions standards when, in fact, they did not; and (c) attempted to and did conceal these facts from U.S. regulators and U.S. customers.

The 2.0 Liter Defeat Device in the United States

32. In at least in or about 2006, VW AG employees working under the supervision of Supervisors B, C, and F were designing the new EA 189 2.0 liter diesel engine (later known as the Generation 1 or "Gen 1 ") for use in the United States that would be the cornerstone of a new project to sell passenger diesel vehicles in the United States. Selling diesel vehicles in the U.S. market was an important strategic goal of VW AG. This project became known within VW as the "US '07" project.

33. Supervisors B, C, and F, and others, however, realized that VW could not design a diesel engine

that would both meet the stricter U.S. NOx emissions standards that would become effective in 2007 and attract sufficient customer demand in the U.S. market. Instead of bringing to market a diesel vehicle that could legitimately meet the new, more restrictive U.S. NOx emissions standards, VW AG employees acting at the direction of Supervisors B, C, and F and others, including Company A employees, designed, created, and implemented a software function to detect, evade and defeat U.S. emissions standards.

34. While employees acting at their direction designed and implemented the defeat device software, Supervisors B, C, and F, and others knew that U.S. regulators would measure VW's diesel vehicles' emissions through standard U.S. tests with specific, published drive cycles. VW AG employees acting at the direction of Supervisors B, C, and F, and others designed the VW defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or "dyno") or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. regulators. If the vehicle's software detected that it was being tested, the vehicle performed in one mode, which satisfied U.S. NOx emissions standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx, sometimes 35 times higher than U.S. standards.

35. In designing the defeat device, VW engineers borrowed the original concept of the dual-mode, emissions cycle-beating software from Audi. On or about May 17, 2006, a VW engineer, in describing the Audi software, sent an email to employees in the VW Brand Engine Development department that described aspects of the software and cautioned against using it in its current form because it was "pure" cycle-beating, i.e., as a mechanism to detect, evade and defeat U.S. emissions cycles or tests. The VW AG engineer wrote (in German), "within the clearance structure of the pre-fuel injection the acoustic function is nearly always activated within our current US'07-data set. This function is pure [cycle-beating] and can like this absolutely not be used for US'07."

36. Throughout in or around 2006, Supervisor F authorized VW AG engineers to use the defeat device in the development of the US'07 project, despite concerns expressed by certain VW AG employees about the propriety of designing and activating the defeat device software. In or about the fall of 2006, lower level VW AG engineers, with the support of their supervisors, raised objections to the propriety of the defeat device, and elevated the issue to Supervisor B. During a meeting that occurred in or about November 2006, VW AG employees briefed Supervisor B on the purpose and design of the defeat device. During the meeting, Supervisor B decided that VW should continue with production of the US'07 project with the defeat device, and instructed those in attendance, in sum and substance, not to get caught.

37. Throughout 2007, various technical problems arose with the US'07 project that led to internal discussions and disagreements among members of the VW AG team that was primarily responsible for ensuring vehicles met U.S. emissions standards. Those disagreements over the direction of the project were expressly articulated during a contentious meeting on or about October 5, 2007, over which Supervisor C presided. As a result of the meeting, Supervisor C authorized Supervisor F and his team to proceed with the US '07 project despite knowing that only the use of the defeat device software would enable VW diesel vehicles to pass U.S. emissions tests.

38. Starting with the first model year 2009 of VW's new engine for the 2.0 Liter Subject Vehicles through model year 2016, Supervisors A-D and F, and others, then caused the defeat device software to be installed in the 2.0 Liter Subject Vehicles marketed and sold in the United States.

The 3.0 Liter Defeat Device in the United States

39. Starting in or around 2006, Audi AG engineers designed a 3.0 liter diesel for the U.S. market. The 3.0 liter engine was more powerful than the 2.0 liter engine, and was included in larger and higher-end model vehicles. The 3.0 liter engine was ultimately placed in various Volkswagen, Audi and Porsche diesel vehicles sold in the United States for model years 2009 through 2016. In order to pass U.S. emissions tests, Audi engineers designed and installed software designed to detect, evade and

defeat U.S. emissions standards, which constituted a defeat device under U.S. law.

40. Specifically, Audi AG engineers calibrated a defeat device for the 3.0 Liter Subject Vehicles and the Porsche Vehicles that varied injection levels of a solution consisting of urea and water ("AdBlue") into the exhaust gas system based on whether the vehicle was being tested or not, with less NOx reduction occurring during regular driving conditions. 1n this way, the vehicle consumed less AdBlue, and avoided a corresponding increase in the vehicle's AdBlue tank size, which would have decreased the vehicle's trunk size, and made the vehicle less marketable in the United States. ln addition, the vehicle could drive further between service intervals, which was also perceived as important to the vehicle's marketability in the United States.

Certification of VW Diesel Vehicles in the United States

41. VW employees met with the EPA and CARB to seek the certifications required to sell the Subject Vehicles to U.S. customers. During these meetings, some of which Supervisor F attended personally, VW employees misrepresented, and caused to be misrepresented, to the EPA and CARB staff that the Subject Vehicles complied with U.S. NOx emissions standards, when they knew the vehicles did not. During these meetings, VW employees described, and caused to be described, VW's diesel technology and emissions control systems to the EPA and CARB staff in detail but omitted the fact that the engine

could not meet U.S. emissions standards without using the defeat device software.

42. Also as part of the certification process for each new model year, Supervisors A-F and others certified, and/or caused to be certified, to the EPA and CARB that the Subject Vehicles met U.S. emissions standards and complied with standards prescribed by the Clean Air Act. Supervisors A-F, and others, knew that if they had told the truth and disclosed the existence of the defeat device, VW would not have obtained the requisite Certificates for the Subject Vehicles and could not have sold any of them in the United States.

Importation of VW Diesel Vehicles in the United States

43. In order to import the Subject Vehicles into the United States, VW was required to disclose to CBP whether the vehicles were covered by valid certificates for the United States. VW did so by affixing a label to the vehicles' engines. VW employees caused to be stated on the labels that the vehicles complied with applicable EPA and CARB emissions regulations and limitations, knowing that if they had disclosed that the Subject Vehicles did not meet U.S. emissions regulations and limitations, VW would not have been able to import the vehicles into the United States. Certain VW employees knew that the labels for the Porsche Vehicles stated that those vehicles complied with EPA and CARB emissions regulations and limitations, when in fact the VW employees knew they did not.

Marketing of "Clean Diesel" Vehicles in the United States

44. Supervisors A and C and others marketed, and caused to be marketed, the Subject Vehicles to the U.S. public as "clean diesel" and environmentally friendly, when they knew the Subject Vehicles were intentionally designed to detect, evade and defeat U.S. emissions standards.

45. For example, on or about November 18, 2007, Supervisor C sent an email to Supervisor F and others attaching three photos of himself with California's then-Governor, which were taken during an event at which Supervisor C promoted the 2.0 Liter Subject Vehicles in the United States as "green diesel."

The Improvement of the 2.0 Liter Defeat Device in the United States

46. Following the launch of the Gen 1 2.0 Liter Subject Vehicles in the United States, Supervisors C and F, and others, worked on a second generation of the vehicle (the "Gen 2"), which also contained software designed to detect, evade and defeat U.S. emissions tests. The Gen 2 2.0 Liter Subject Vehicles were launched in the United States in or around 2011.

47. In or around 2012, hardware failures developed in certain of the 2.0 Liter Subject Vehicles that were being used by customers on the road in the United States. VW AG engineers hypothesized that vehicles equipped with the defeat device stayed in "dyno"

mode (i.e., testing mode) even when driven on the road outside of test conditions. Since the 2.0 Liter Subject Vehicles were not designed to be driven for longer periods of time in "dyno" mode, VW AG engineers suspected that the increased stress on the exhaust system from being driven too long in "dyno" mode could be the root cause of the hardware failures.

48. In or around July 2012, engineers from the VW Brand Engine Development department met, in separate meetings, with Supervisors A and E to explain that they suspected that the root cause of the hardware failures in the 2.0 Liter Subject Vehicles was the increased stress on the exhaust system from being driven too long in "dyno" mode as a result of the use of software designed to detect, evade and defeat U.S. emissions tests. To illustrate the software's function, the engineers used a document. Although they understood the purpose and significance of the software, Supervisors A and E each encouraged the further concealment of the software. Specifically, Supervisors A and E each instructed the engineers who presented the issue to them to destroy the document they had used to illustrate the operation of the defeat device software.

49, VW AG engineers, having informed the supervisor in charge of the VW AG Engine Development department and within the VW AG Quality Management and Product Safety department of the existence and purpose of the defeat device in the 2.0 Liter Subject Vehicles, then sought ways to improve its operation in existing 2.0 Liter Subject Vehicles to avoid the hardware

failures. To solve the hardware failures, VW AG engineers decided to start the 2.0 Liter Subject Vehicles in the "street mode" and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to the "dyno mode." To increase the likelihood that the vehicle in fact realized that it was being tested on the dynamometer for compliance with U.S. emissions standards, the VW AG engineers activated a "steering wheel angle recognition" feature. The steering wheel angle recognition interacted with the software by enabling the vehicle to detect whether it was being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road.

50. Certain VW AG employees again expressed concern, specifically about the expansion of the defeat device through the steering wheel angle detection, and sought approval for the function from more senior supervisors within the VW AG Engine Development department. In particular, VW AG engineers asked Supervisor A for a decision on whether or not to use the proposed function in the 2.0 Liter Subject Vehicles. In or about April 2013, Supervisor A authorized activation of the software underlying the steering wheel angle recognition function. VW employees then installed the new software function in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance.

51. VW employees falsely told, and caused others to tell, U.S. regulators, U.S. customers and others in

the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Subject Vehicles when, in fact, VW employees knew that the update also used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was undergoing emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems.

The Concealment of the Defeat Devices in the United States- 2.0 Liter

52. In or around March 2014, certain VW employees learned of the results of a study undertaken by West Virginia University's Center for Alternative Fuels, Engines and Emissions and commissioned by the International Council on Clean Transportation (the "ICCT study"). The ICCT study identified substantial discrepancies in the NOx emissions from certain 2.0 Liter Subject Vehicles when tested on the r9ad compared to when these vehicles were undergoing EPA and CARB standard drive cycle tests on a dynamometer. The results of the study showed that two of the three vehicles tested on the road, both 2.0 Liter Subject Vehicles, emitted NOx at values of up to approximately 40 times the permissible limit applicable during testing in the United States.

53. Following the ICCT study, CARB, in coordination with the EPA, attempted to work with VW to determine the cause for the higher NOx emissions in the 2.0 Liter Subject Vehicles when being driven on the road as opposed to on the dynamometer undergoing standard emissions test cycles. To do

this, CARB, in coordination with the EPA, repeatedly asked VW questions that became increasingly more specific and detailed, as well as conducted additional testing themselves.

54. In response to learning about the results of the ICCT study, engineers in the VW Brand Engine Development department formed an ad hoc task force to formulate responses to questions that arose from the U.S. regulators. VW AG supervisors, including Supervisors A, D, and E, and others, determined not to disclose to U.S. regulators that the tested vehicle models operated with a defeat device. Instead, Supervisors A, D, and E, and others decided to pursue a strategy of concealing the defeat device in responding to questions from U.S. regulators, while appearing to cooperate.

55. Throughout 2014 and the first half of2015, Supervisors A, D, and E, and others, continued to offer, and/or cause to be offered, software and hardware "fixes" and explanations to U.S. regulators for the 2.0 Liter Subject Vehicles' higher NOx measurements on the road without revealing the underlying reason the existence of software designed to detect, evade and defeat U.S. emissions tests.

56. On or about April 28, 2014, members of the VW task force presented the findings of the ICCT study to Supervisor E, whose supervisory responsibility included addressing safety and quality problems in vehicles in production. Included in the presentation was an explanation of the potential financial consequences VW could face if the defeat device was discovered by U.S. regulators, including but not

limited to applicable fines per vehicle, which were substantial.

57. On or about May 21, 2014, a VW AG employee sent an email to his supervisor, Supervisor D, and others, describing an "early round meeting" with Supervisor A, at which emissions issues in North America for the Gen 2 2.0 Liter Subject Vehicles were discussed, and questions were raised about the risk of what could happen and the available options for VW. Supervisor D responded by email that he was in "direct touch" with the supervisor in charge of Quality Management at VW AG and instructed the VW AG employee to "please treat confidentially" the issue.

58. On or about October 1, 2014, VW AG employees presented to CARB regarding the ICCT study results and discrepancies identified in NOx emissions between dynamometer testing and road driving. In response to questions, the VW AG employees did not reveal that the existence of the defeat device was the explanation for the discrepancies in NOx emissions, and, in fact, gave CARB various false reasons for the discrepancies in NOx emissions including driving patterns and technical issues.

59. When U.S. regulators threatened not to certify VW model year 2016 vehicles for sale in the United States, VW AG supervisors requested a briefing on the situation in the United States. On or about July 27, 2015, VW AG employees presented to VW AG supervisors. Supervisors A and D were present, among others.

60. On or about August 5, 2015, in a meeting in Traverse City, Michigan, two VW employees met with a CARB official to discuss again the discrepancies in emissions of the 2.0 Liter Subject Vehicles. The VW employees did not reveal the existence of the defeat device.

61. On or about August 18, 2015, Supervisors A and D, and others, approved a script to be followed by VW AG employees during an upcoming meeting with CARB in California on or about August 19, 2015. The script provided for continued concealment of the defeat device from CARB in the 2.0 Liter Subject Vehicles, with the goal of obtaining approval to sell the Gen 3 model year 2016 2.0 Liter Subject Vehicles in the United States.

62. On or about August 19,2015, in a meeting with CARB in El Monte, California, a VW employee explained, for the first time to U.S. regulators and in direct contravention of instructions from supervisors at VW AG, that certain of the 2.0 Liter Subject Vehicles used different emissions treatment depending on whether the vehicles were on the dynamometer or the road, thereby signaling that VW had evaded U.S. emissions tests.

63. On or about September 3, 2015, in a meeting in El Monte, California with CARB and EPA, Supervisor D, while creating the false impression that he had been unaware of the defeat device previously, admitted that VW had installed a defeat device in the 2.0 Liter Subject Vehicles.

64. On or about September 18, 2015, the EPA issued a public Notice of Violation to VW stating that the EPA had determined that VW had violated the Clean Air Act by manufacturing and installing defeat devices in the 2.0 Liter Subject Vehicles.

The Concealment of tire Defeat Devices in the United States – 3.0 Liter

65. On or about January 27, 2015, CARB informed VW AG that CARB would not approve certification of the Model Year 2016 3.0 Liter Subject Vehicles until Audi AG confirmed that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as had been identified by the ICCT study and as were being addressed by VW with the 2.0 Liter Subject Vehicles.

66. On or about March 24, 2015, in response to CARB 's questions, Audi AG employees made a presentation to CARB, during which Audi AG employees did not disclose that the Audi 2.0 and 3.0 Liter Subject Vehicles and the Porsche Vehicles in fact contained a defeat device, which caused emissions discrepancies in those vehicles. The Audi AG employees informed CARB that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as the 2.0 Liter Subject Vehicles when, in fact, the 3.0 Liter Subject Vehicles possessed at least one defeat device that interfered with the emissions systems to reduce NOx emissions on the dyno but not on the road. On or about March 25, 2015, CARB, based on the misstatements and omissions made by the Audi AG representatives, issued an executive

order approving the sale of Model Year 2016 3.0 Liter Subject Vehicles.

67. On or about November 2, 2015, EPA issued a Notice of Violation to VW AG, Audi AG and Porsche AG, citing violations of the Clean Air Act related to EPA's discovery that the 3.0 Liter Subject Vehicles and the Porsche Vehicles contained a defeat device that resulted in excess NOx emissions when the vehicles were driven on the road.

68. On or about November 2, 2015, VW AG issued a statement that "no software has been installed in the 3-liter V6 diesel power units to alter emissions characteristics in a forbidden manner."

69. On or about November 19,2015, Audi AG representatives met with EPA and admitted that the 3.0 Liter Subject Vehicles contained at least three undisclosed AECDs. Upon questioning from EPA, Audi AG representatives conceded that one of these three undisclosed AECDs met the criteria of a defeat device under U.S. law.

70. On or about May 16, 2016, Audi AG representatives met with CARB and admitted that there were additional elements within two of its undisclosed AECDs, which impacted the dosing strategy in the 3.0 Liter Subject Vehicles and the Porsche Vehicles.

71. On or about July 19, 2016, in a presentation to CARB, Audi AG representatives conceded that elements of two of its undisclosed AECDs met the definition of a defeat device.

72. Supervisors A-F and others caused defeat device software to be installed on all of the approximately 585,000 Subject Vehicles and the Porsche Vehicles sold in the United States from 2009 through 2015.

Obstruction of Justice

73. As VW employee~ prepared to admit to U.S. regulators that VW used a "defeat device" in the 2.0 Liter Subject Vehicles, counsel for VW GOA prepared a litigation hold notice to ensure that VW GOA preserved documents relevant to diesel emissions issues. At the same time, VW GOA was in contact with VW AG to discuss VW AG preserving documents relevant to diesel emissions issues. Attorney A made statements that several employees understood as suggesting the destruction of these materials. In anticipation of this hold taking effect at VW AG, certain VW AG employees destroyed documents and files related to U.S. emissions issues that they believed would be covered by the hold. Certain VW AG employees also requested that their counterparts at Company A destroy sensitive documents relating to U.S. emissions issues. Certain Audi AG employees also destroyed documents related to U.S. emissions issues. The VW AG and Audi AG employees who participated in this deletion activity did so to protect both VW and themselves from the legal consequences of their actions.

74. Between the August 19, 2015 and September 3, 2015 meetings with U.S. regulators, certain VW AG employees discussed issues with Attorney A and others.

75. On or about August 26, 2015, VW GOA's legal team sent the text of a litigation hold notice to Attorney A in VW AG's Wolfsburg office that would require recipients to preserve and retain records in their control. The subject of the e-mail was "Legal Hold Notice - Emissions Certification of MY2009-2016 2.0L TDI Volkswagen and Audi vehicles." The VW GOA legal team stated that VW GOA would be issuing the litigation hold notice to certain VW GOA employees the following day. On or about August 28, 2015, Attorney A received notice that VW GOA was issuing that litigation hold notice that day. Attorney A indicated to his staff on August 31 that the hold would be sent out at VW AG on September 1. Among those at VW AG being asked to retain and preserve documents were Supervisors A and D and a number of other VW AG employees.

76. On or about August 27, 2015, Attorney A met with several VW AG engineers to discuss the technology behind the defeat device. Attorney A indicated that a hold was imminent, and that these engineers should check their documents, which multiple participants understood to mean that they should delete documents prior to the hold being issued.

77. On or about August 31, 2015, a meeting was held to prepare for the September 3 presentation to CARB and EPA where VW's use of the defeat device in the United States was to be formally revealed. During the meeting, within hearing of several participants, Attorney A discussed the forthcoming hold and again told the engineers that the hold was imminent and recommended that they check what

documents they had. This comment led multiple individuals, including supervisors in the VW Brand Engine Development department at VW AG, to delete documents related to U.S. emissions issues.

78. On or about September 1, 2015, the hold at VW AG was issued. On or about September 1, 2015, several employees in the VW Brand Engine Development department at VW AG discussed the fact that their counterparts at Company A would also possess documents related to U.S. emissions issues. At least two VW AG employees contacted Company A employees and asked them to delete documents relating to U.S. emissions issues.

79. On or about September 3, 2015, Supervisor A approached Supervisor D's assistant, and requested that Supervisor D's assistant search in Supervisor D's office for a hard drive on which documents were stored containing emails of VW AG supervisors, including Supervisor A. Supervisor D's assistant recovered the hard drive and gave it to Supervisor A. Supervisor A later asked his assistant to throw away the hard drive.

80. On or about September 15,2015, a supervisor within the VW Brand Engine Development department convened a meeting with approximately 30-40 employees, during which Attorney A informed the VW AG employees present about the current situation regarding disclosure of the defeat device in the United States. During this meeting, a VW AG employee asked Attorney A what the employees should do with new documents that were created, because they could be harmful to VW AG. Attorney

A indicated that new data should be kept on USB drives and only the final versions saved on VW AG's system, and then, only if "necessary."

81. Even employees who did not attend these meetings, or meet with Attorney A personally, became aware that there had been a recommendation from a VW AG attorney to delete documents related to U.S. emissions issues. Within VW AG and Audi AG, thousands of documents were deleted by approximately 40 VW AG and Audi AG employees.

82. After it began an internal investigation, VW AG was subsequently able to recover many of the deleted documents.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT AND COMPLIANCE
ASSURANCE

SEP 18, 2015

VIA CERTIFIED MAIL RETURN RECEIPT
REQUESTED

Volkswagen AG
Audi AG, Inc.
Volkswagen Group of America, Inc.
Thru:

David Geanacopoulos
Executive Vice President Public Affairs and General
Counsel
Volkswagen Group of America, Inc.
2200 Ferdinand Porsche Drive
Herndon, VA 20171

Stuart Johnson
General Manager
Engineering and Environmental Office
Volkwagen Group of America, Inc.
3800 Hamlin Road
Auburn Hills, MI 48326

Re: Notice of Violation

Dear Mr. Geanacopoulos and Mr. Johnson:

The United States Environmental Protection Agency (EPA) has investigated and continues to investigate Volkswagen AG, Audi AG, and Volkswagen Group of America (collectively, VW) for compliance with the Clean Air Acts (CAA), 42 U.S.C. §§ 74-1-7671q, and its implementing regulations. As detailed in this Notice of Violation (NOV), the EPA has determined that VW manufactured and installed defeat devices in certain model year 2009 through 2015 diesel light-duty vehicles equipped with 2.0 liter engines. These defeat devices bypass, defeat, or render inoperative elements of the vehicles' emission control system that exist to comply with CAA emission standards. Therefore, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(b). Additionally, the EPA has determined that, due to the existence of the defeat devices in these vehicles, these vehicles do not conform in all material respects to the vehicle specifications described in the applications for the certificates of conformity that purportedly cover them. therefore, VW also violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1) by selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing these vehicles, or for causing any of the foregoing acts.

Law Governing Alleged Violations

This NOV arise under Pat A of Title II of the CAA, 42 U.S.C. §§ 7521-7554, and the regulations promulgated thereunder. In creating the CAA, Congress found, in part, that "the increasing use of motor vehicles … has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2). 42 U.S.C. § 7401 (a)(2). Congress' purpose in

creating the CAA, in part, was to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution." CAA § 101(b)(1)-(2), 42 U.S.C. § 7401(b)(1)-(2). The CAA and the regulations promulgated thereunder aim to protect human health and the environment by reducing emissions of nitrogen oxides (NOx) and other pollutants from mobile sources of air pollution. Nitrogen oxides are a family of highly reactive gases that play a major role in the atmospheric reactions with volatile organic compounds (VOCs) that produce ozone (smog) on hot summer days. Breathing ozone can trigger a variety of health problems including chest pain, coughin, throat irritation, and congestion. Breathing ozone can also worsen bronchitis, emphysema, and asthma. Children are at greatest risk of experiencing negative health impacts from exposure to ozone.

The EPA's allegations here concern light-duty motor vehicles for which 40 C.F.R. Part 86 sets emission standards and test procedures and section 203 of the CAA. 42 U.S.C. § 7522 sets compliance provisions. Light-duty vehicles must satisfy emission standards for certain air pollutants, including NOx. 40 C.F.R. § 86.1811-04. The EPA administers a certification program to ensure that every vehicle introduced into the United States commerce satisfies applicable emission standards. Under this program, the EPA issues certificates of conformity (COC's) , and

thereby approves the introduction of vehicles into United States Commerce.

To obtain a COC, a light-duty vehicle manufacturer must submit a COC application to the EPA for each test froup of vehicles that it intends to enter into United States commerce. 40 C.F.R. § 86.1843-01. The COC application must include, among other things, a list of all auxiliary emission control devices (AECDs) installed on the vehicles. 40 C.F.R. § 86.1844-01(d)(11). An AECD is "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system." 40 C.F.R. § 86.1803-01. The COC application must also include "a justification for each AECD, the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and [a] rationale for why it is not a defeat device." 40 C.F.R. § 86.1844-01(d)(11).

A defeat device is an AECD "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless: (1) Such conditions are substantially included in the Fedearl emission test procedure; (2) The need for the AECD is justified in terms of protecting the vehicle against damagae or accident; (3) The AECD does not go beyond the requirements of engine starting; or (4) The AECD applies only for emergency vehicles . . . ." 40 C.F.R. § 86.1803.01.

Motor vehicles equipped with defeat devices, such as at issue here, cannot be certified. EPA, *Advisory Circular Number 24: Prohibition of use of Emission Control Defeat Device* (Dec. 11, 1972); *see also* 40 C.F.R. §§86-1809-01, 86-1809-10, 86-1908-12. Electronic control systems which may receive inputs from multiple sensors and control multiple actuators that affect the emission control system's performance are AECDs. EPA, *Advisory Circular Number 24-2: Prohibition of Emission Control Defeat Devices – Optional Objective Criteria* (Dec. 6, 1978). "Such elements or design could be control system logic (i.e., computer software), and/or calibrations, and/or hardware items." *Id.*

"Vehicles are covered by a certificate of conformity only if they are in all material respects as described in the manufacturer's application for certification . . . ." 40 C.F.R. § 86.1848-10(c)(6). Similarly, a COC issued by EPA, including those issued to VW, state expressly, "[t]his certificate covers only those new motor vehicles or vehicle engines which conform, in all material respects, to the design specifications" described in the application for that COC. *See also* 40 C.F.R. §§ 86.1844-01 (listing required content for COC applications). 86.1848-01(b) (authorizing the EPA to issue COC's on any terms that are necessary or appropriate to assure that new motor vehicles satisfy the requirements of the CAA and its regualtions).

The CAA makes it a violation "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where

a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or to such us." CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), 40 C.F.R. § 86.1854-12(a)(3)(ii). Additionally, manufacturers are prohibited from selling, offering for sale, introducing into commerce, or importing, any new motor vehicle unless that vehicle is covered by and EPA issued COC. CAA § 203(a)(1), 42 U.S.C. § 7522(a)(1), 40 C.F.R. § 86.1854-12(a)(1). It is also a violation to cause any of the foregoing acts. CAA § 203(a), 42 U.S.C. § 7522(a), 40 C.F.R. § 86-1854-12(a).

Alleged Violations

Each VW vehicle identified by the table below has AECDs that were not described in the application for the COC that purportedly covers the vehicle. Specifically, VW manufactured and installed software in the electronic control module (ECM) of these vehicles that sensed when the vehicle was being tested for compliance with EPA emission standard. For ease of reference, the EPA is calling thes the "switch." The "switch" senses whether the vehicle is being tested or not based on various inputs including the position of the steering wheel, vehicle speed, the duration of the engine's operation, and barometric pressure. These inputs precisely track the parameters of the federal test procedure used for emission testing for EPA certification purposes.

During EPA emission testing, the vehicles' ECM ran software which produced compliant emission results under and ECM calibration that VW referred to as the "dyno calibration" (referring to the equipment used in emission testing, called a dynamometer). At all other times during normal vehicle operation, the "switch" was activated and the vehicle ECM software ran a separate "road calibration: which reduce the effectiveness of the emission control system (specifically the selective catalytic reduction or the lean NOx trap). As a result, emissions of NOx increased by a factor of 10 to 40 times above the EPA compliant levels, depending on the type of drive cycle (e.g., city, highway).

The California Air Resources Board (CARB) and the EPA were alerted to emissions problems with these vehicles in May 2014 when West Virginia University's (WVU) Center for Alternative Fuels, Engines & Emissions published results of a study commissioned by the International Council on Clean Transportation that found significantly higher in-use emissions from two light duty diesel vehicles (a 2012 Jetta and a 2013 Passat). Over the course of the year following the publication of the WVU study, VW continued to asset to CARB and the EPA that the increased emissions from these vehicles could be attributed to various technical issues and unexpected in-use conditions. VW issued a voluntary recall in December 2014 to address the issue. CARB, in coordination with the EPA, conducted follow up testing of these vehicles both in the laboratory and during normal road operation to confirm the efficacy of the recall. When the testing showed only a limited benefit to the recall, CARB

broadened the testing to pinpoint the exact technical nature of the vehicles' poor performance, and to investigate why the vehicles' onboard diagnostic system was not detecting the increased emissions. none of the potential technical issues suggested by VW explained the higher test results consistently confirmed during CARB's testing. It became clear that CARB and the EPA would not approve certificates of conformity for VW's 2016 model year diesel vehicles until VW could adequately explain the anomalous emissions and ensure the agencies that the 2016 model year vehicles would not have similar issues. Only then did VW admit it had designed and installed a defeat device in these vehicles in the form of a sophisticated software algorithm that detected when a vehicle was undergoing emissions testing.

VW knew or should have known that its "road calibration" and "switch" together bypass, defeat, or render inoperative elements of the vehicle design related to compliance with the CAA emission standards. This is apparent given the design of those defeat devices. As described above, the software was designed to track the parameters of the federal test procedure and cause emission control system to underperform when the software determined that the vehicle was not undergoing the federal test procedure.

VW's "road calibration" and "switch" are AECDs[1] that were neither described nor justified in the

[1] There may be numerous engine maps associated with VW's "road calibration" that are AECDs, and that may also be defeat

applicable COC application, and are illegal defeat devices. Therefor each vehicle identified by the table below does not conform in a material respect to the vehicle specification described in the COC application. As such, VW violated section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), each time it sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported (or caused any of the foregoing with respect to) one of the hundreds of thousands of new motor vehicles within these test groups. Additionally, VW violated section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), each time it manufactured and installed into these vehicles and ECM equipped with the "switch" and "road calibration."

The vehicles are identified by the table below. All vehicles are equipped with 2.0 liter diesel engines.

Model Yr.	EPA Test	Make and Model(s)
2009	9VWXV02.035N	VW Jetta, VW Jetta Sportwagen
2009	9VWXV02.0U5N	VW Jetta, VW Jetta Sportwagen
2010	AVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2011	BVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3

---

devices. For Ease of description, the EPA is referring to these maps collectively as the "road calibration"

2012	CVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	CVWXV02.0U4S	VW Passat
2013	DVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2013	DVWXV02.0U4S	VW Passat
2014	EVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2014	EVWXV02.0U4S	VW Passat
2015	FVGAV02.0VAL	VW Beetle, VW Beetle Convertible, VW Golf, VW Golf Sportwagen, VW Jetta, VW Passat, Audi A3

Enforcement

The EPA's investigation into this matter is continuing. The above table represents specific violations that the EPA believes, at this point, are sufficiently supported by evidence to warrant the allegations in this NOV. The EPA may find additional violations as the investigation continues.

The EPA is authorized to refer this matter to the United States Department of Justice for initiation of appropriate enforcement action. Among other things, persons who violate section 203(a)(3)(B)of the CAA, 42 U.S.C. § 7522(a)(3)(B), are subject to a civil penalty of up to $3,750 for each violation that occurred on or after January 13, 2009.[2] CAA § 205(a), 42 U.S.C. § 7524(a): 40 C.F.R. § 19.4. IN addition, any manufacturer who, on or after January 13, 2009, sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused any of the foregoing acts with respect to any new motor vehicle that was not covered by an EPA-issued COC is subject, among other things, to a civil penalty of up to $37,500 for each violation.[3] CAA § 205(a), 42 U.S.C.§ 7524(a): 40 C.F.R. § 19.4. The EPA may seek, and district courts may order, equitable remedies to further address these alleged violations. CAA § 204(a), 42 U.S.C. § 7523(a).

The EPA is available to discuss this matter with you. Please contact Meetu Kaul, the EPA attorney assigned to this matter, to discuss this NOV. Ms. Kaul can be reached as follows:

Meetu Kaul
U.S. EPA, Air Enforcement Division
1200 Pennsylvania Avenue, NW
William Jefferson Clinton Federal Building
Washington, DC 20460
(202) 564-5472
kaul.meetuepa.gov

---

[2] $2,750 for violations occurring prior to January 13, 2009
[3] $32500 for violations occurring prior to January 13, 2009

Sincerely,

/s/

Phillip A. Brooks
Director
Air Enforcement Division
Office of Civil Enforcement

Copy:
Todd Sax, California Air Resources Board
Walter Benjamin Fisherow, United States Department of Justice
Stuart Drake, Kirkland & Ellis LLP

Frequent Questions about Volkswagen Violations

For Consumers and Owners of Affected Vehicles

I own a Volkswagen diesel vehicle. Where can I learn more about the VW settlement and what should I do now?

In **June, 2016** Volkswagen entered into a multi-billion dollar settlement to partially resolve alleged Clean Air Act violations based on the sale of approximately 500,000 model year 2009 to 2015 motor vehicles containing 2.0 liter diesel engines. Under the settlement Volkswagen must offer every owner and lessee of an affected 2.0 liter vehicle the option of a buyback or lease termination. Additionally, Volkswagen must offer owners and lessees the option of an Emissions Modification in accordance with certain performance and design requirements.

In **December 2016**, Volkswagen entered into a proposed settlement with EPA and California to partially resolve alleged Clean Air Act violations based on the sale of approximately 83,000 model year 2009 to 2015 diesel motor vehicles containing 3.0 liter engines. Under the 3.0 liter partial settlement Volkswagen agreed to recall and repair the following 3.0 liter diesel models to achieve the emissions standards to which they were originally certified:

- Model year 2013 – 2015 Audi Q7

- Model year 2014 – 2016 Audi A6, A7, A8, Q5
- Model year 2013 – 2016 Porsche Cayenne
- Model year 2013 – 2016 VW Toureg

Volkswagen also agreed to buy back or offer lease termination at no cost to owners of the following 3.0 liter diesel vehicles models, which cannot be repaired to achieve compliance with the certification standards without compromising important consumer attributes such as reliability and durability. However, the settlement allows Volkswagen to propose an emissions modification which would significantly reduce the emissions, and if approved by regulators, provide vehicle owners with the option of keeping their vehicle:

- Model year 2009 through 2012 Volkswagen Toureg
- Model year 2009 through 2012 Audi Q7 diesels.

The 3.0 liter proposed settlement does not resolve any consumer claims, claims by the Federal Trade Commission, or any claims by individual owners or lessees in the ongoing multidistrict litigation proceeding related to the 3.0 liter violations. The State of California has also secured a separate resolution for the 3.0 liter violations that addresses issues specific to vehicles and consumers in California.

What should I do if I own an affected 2.0 liter Volkswagen diesel vehicle?

Consumers can visit https://www.vwcourtsettlement.com/en/ now to submit a claim and sign up for email updates to get notifications for when options become available. The buyback and lease termination options are now available. Eligible consumers have until September 1, 2018 to submit a claim.

What should I do if I own an affected 3.0 liter Volkwagen diesel vehicle?

Review information for owners and lessees at https://www.vwcourtsettlement.com/en/.

Will EPA take or confiscate my vehicle?

Absolutely not. EPA will not confiscate your vehicle or require you to stop driving. For more detail about choices and options for owners or lessees of diesel vehicles under the settlement visit VWCourtSettlement.com or Volkswagen Clean Air Act Partial Settlement.

Can I turn off the defeat device myself?

No. The device is embedded in the software code that runs the engine control computer.

General Information

What pollutants are being emitted?

Vehicles emit an array of pollutants. EPA standards control the allowable emission levels of nitrogen oxides (NOx), hydrocarbons, carbon monoxide, carbon dioxide, particulate matter, and certain toxic chemicals. The VW defeat device affects the way the NOx control system operates, resulting in higher NOx emission levels from these vehicles than from vehicles with properly operating emission controls.

How does NOx pollution affect people's health?

NOx pollution contributes to atmospheric levels of nitrogen dioxide, ground-level ozone, and fine particulate matter. Exposure to these pollutants has been linked with a range of serious health effects, including increased asthma attacks and other respiratory illnesses that can be serious enough to send people to the hospital. Exposure to ozone and particulate matter have also been associated with premature death due to respiratory-related or cardiovascular-related effects. Children, the elderly, and people with pre-existing respiratory disease are particularly at risk for health effects of these pollutants.

How much more pollution is being emitted than should be?

NOx emission levels from the 2.0 liter vehicles with defeat devices were 10 – 40 times higher than emission standards. NOx emissions levels from the

3.0 liter vehicles were up to nine times higher than the emission standards.

Is this contributing to bad air quality in my city/area?

All vehicles emit some pollution that, along with emissions from other sources, affects local air quality. Vehicles with high emission levels have a disproportionate impact. EPA emission standards are designed to protect local air quality and maintain clean and healthy air. The VW diesels with the defeat device do not comply with EPA emission standards.

My children have asthma. Is it safe for them to ride in a Volkswagen?

Yes. The excess NOx emissions would not be expected to enter the passenger compartment, and the emissions from a single vehicle are not the primary concern. However, while individual vehicles don't create a health threat, collectively these emissions add up to air pollution that can cause adverse health effects.

Where can I get more information?

For more information please visit the following pages:

EPA's Volkswagen Clean Air Act Settlement
California Air Resource Board website
Volkswagen court settlement website

You may also send an email to VW_Settlement@epa.gov

Contact Us to ask a question, provide feedback, or report a problem.