No. 20-

IN THE

Supreme Court of the United States

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

JAMES BEN FEINMAN,

Petitioner,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is one bound by a judgment in personam in a class action litigation in which he or she is not designated as a party, is not a member of the class, and to which he or she has not been made a party by service of process?

2. Does judicial action enforcing a class action settlement purporting to release the vested statutory property rights of one who is not a party, is not a member of the class, and who was not served with process in the class action meet the due process requirements of the Fifth (and Fourteenth) Amendments?

3. Can a class action settlement be applied to bar claims for State law statutory attorney fee liens that accrue after the filing of the initial Complaint, in violation of Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 206 L.Ed. 2d 893 (May 14, 2020)?

4. Can an injunction be enforced against one not named in the injunction order, and who is not within the defined boundaries of FRCP 65(d)(2)?

5. Can a federal district court use an earlier injunction order to later impose an injunction on a non-party's State court litigation when the four corners of the earlier injunction order did not encompass the later State court litigation?

6. Can the "*impermissible collateral attack doctrine*" be used to affect claim preclusion against one not named as a party in a class action suit, who is not a member of the class, and who was not served with process?

7. Can a State court be enjoined by a federal district court from litigating a claim without the district court articulating the basis of the injunction under one of the specific exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In the United States Court of Appeals for the Ninth Circuit, Case No. 19-16074, In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, there is one named Plaintiff and one named Defendant.

The Plaintiff is:

JAMES BEN FEINMAN

The Defendant is:

VOLKSWAGEN GROUP OF AMERICA, INC.

RELATED CASES

James Ben Feinman v. Volkswagen Group of America, Inc., No.: CL-2018-2712, Circuit Court for the City of Roanoke. Case removed to Western District of Virginia for the Fourth Circuit on January 28, 2019.

In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., 3:15-md-02672-CRB (N. D. Cal., May 6, 2019).

In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., No. 2672 CRB (JSC); 3:15-md-02672-CRB (N.D. Cal. May 10, 2019)

Partl v. Volkswagen, AG (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig), No. 16-17157 (9th Cir. July 9, 2018).

Hill v. Volkswagen Grp. Of Am. Inc. (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Litig.), No. 17-16020 (9th Cir. Jan. 22, 2019).

Feinman v. Volkswagen Grp. of Am., Inc. (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.), No. 19-16074 (9th Cir. Aug 17, 2020).

Feinman v. Volkswagen Grp. of Am., Inc. (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.), No. 19-16074 (9th Cir. Sep. 24, 2020)

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, James Ben Feinman ("Feinman" or "Mr. Feinman"), by counsel, respectfully prays that a writ of certiorari issue to review the judgements below:

OPINIONS BELOW

The decision by the Ninth Circuit Court of Appeals denying James B. Feinman's direct repeal is reported as In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, 817 Fed. Appx. 447 (9th Cir. 2020). That opinion is attached as Appendix A. The Ninth Circuit denied Mr. Feinman's petition for rehearing on September 24 ,2020. That order is attached as Appendix H. The May 6, 2019, United States District Court for the Northern District of California's Order Granting Volkswagen's Motion to Enforce the 2.0-Liter Settlement Approval Order has been provided as Appendix B.

JURISDICTIONAL STATEMENT

The Court possesses appellate jurisdiction over this case pursuant to 28 U.S.C.S. § 1254(1). The Ninth Circuit issued its decision on August 20, 2020 and denied Feinman's Combined Petition for Rehearing on September 24, 2020. Pursuant to this Court's pandemic-related Order of March 19, 2020, Feinman files this petition on February 22, 2021.

STATEMENT OF INVOLVED CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions Involved:

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Statutes Involved:

28 U.S.C. § 2283:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Virginia Statute Involved:

Virginia Code §54.1-3932:

> A. Any person having or claiming a right of action sounding in tort, or for liquidated or unliquidated damages on contract or for a cause of action for annulment or divorce, may contract with any attorney to prosecute the same, and the attorney shall have a lien upon the cause of action as security for his fees for any services rendered in relation to the cause of action or claim. When any such contract is made, and written notice of the claim of such lien is given to the opposite party, his attorney or agent, any settlement or adjustment of the cause of action shall be void against the lien so created, except as proof of liability on such cause of action. Nothing in this section shall affect the existing law in respect to champertous contracts. In causes of action for annulment or divorce an attorney may not exercise his

> claim until the divorce judgment is final and all residual disputes regarding marital property are concluded. Nothing in this section shall affect the existing law in respect to exemptions from creditor process under federal or state law.
>
> B. Notwithstanding the provisions in subsection A, a court in a case of annulment or divorce may, in its discretion, exclude spousal support and child support from the scope of the attorney's lien.

STATEMENT OF THE CASE

In the thousands of class actions certified and settled in the United States, our law has not allowed a class action settlement to release the valuable, vested property rights of one who is not a party, is not a class member, and who was not served with process in that litigation. Yet in this case, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit" or "Court of Appeals") held that a class action settlement released the valuable property rights of a non-party and non-class member who was not served with process. That holding is such a departure from this Court's precedent on universally accepted principles of due process of law that it calls for the exercise of the Court's supervisory power. Supreme Court Rule 10.

The United States District Court for the Northern District of California ("district court"), as affirmed by the Ninth Circuit, impermissibly crossed two boundaries by holding that: (1) a class action released valuable statutory property rights belonging to one who is neither a party to the case, nor a member of the class, nor served with process in that case; and (2) a federal court may interfere with and enjoin proceedings in a State court in violation of long-standing Federalism

principles. The district court ignored the most fundamental principles of due process of law:

> (a) "*one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.*" Hansberry v. Lee, 311 U.S. 32, 40 (1940), (citing Pennoyer v. Neff, 95 U.S. 714 (1877));
>
> (b) "*[J]udicial action enforcing* [a judgment rendered in such circumstances] *against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.*" Hansberry at p. 41, (citing Postal Telegraph Cable Co. v. Newport, 247 U.S. 464 (1918), Old Wayne Mutual L. Ass'n v. McDonough, 204 U.S. 8, (1907) [clarification added]; and
>
> (c) "*[A] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.*" Martin v. Wilks, 490 U.S. 755, 761-762 (1989).[1]

The Court has articulated controlling due process principles in a number of past decisions, such as in the following:

> *Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori, may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claim of nonconsenting* [individuals]*…and, of course, a Court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.*

Local No. 93, Int'l Assoc. of Firefighters v. Cleveland, 478 U.S. 501, 529 (1986). [clarification added].

[1] In quoting caselaw and other materials, Feinman herein will use both quotation marks and italicized text. He will use emboldened text to express emphasis.

> *Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.*

Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970);

> *[O]ur cases…repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.*

Younger v. Harris, 401 U.S. 37, 45 (1971).

The underlying facts and procedural history of this case are not in dispute, as described by the Ninth Circuit:

> *In September 2015, Volkswagen (or VW) admitted that it 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 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 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.*

See, In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, 895 F. 3d 597, 603 (9th Circuit 2018).

Mr. Feinman is a practicing attorney in Lynchburg, Virginia. Part of his practice consists of representing consumers across Virginia against motor vehicle

manufacturers pursuing remedies under the Virginia Motor Vehicle Warranty Enforcement Act, and the Virginia Consumer Protection Act. Feinman:

> *undertook the representation of approximately 674 Virginia citizens who were victims of* [Volkswagen's] *fraudulent scheme.* ***In each and every individual representation, attorney Feinman perfected his lien for attorney fees pursuant to Va. Code 54.1-3932 by giving individual written notice pertaining to each individual client of the lien for attorney fees to Volkswagen Group of America, Inc.'s legal counsel.*** *The legal services rendered included representation before the Supreme Court of Virginia pursuant to the Virginia Multiple Claimant Litigation Act, before a special three-Judge panel appointed by the Supreme Court of Virginia, before the Circuit Court of Fairfax County* [Virginia] *where all 'Clean Diesel' cases filed in Virginia were transferred for coordinated hearings, in the United States District Court for the Western District of Virginia, in the United States District Court for the Northern District of California, San Francisco Division, and in the United States Court of Appeals for the Ninth Circuit. Additionally, multiple suits were filed on behalf of these clients in Circuit Courts throughout Virginia.*" (ER 163)[2]. (Emphasis added (to demonstrate that Feinman perfected the attorney's fee lien for each client's case before the district court approved the relevant class action settlement)).

While Feinman represented individual Virginia clients and pursued individual claims (not class claims) under Virginia law against Volkswagen Group of America, Inc. ("VW"), (whose corporation's principal place of business is in Fairfax County, Virginia), a multidistrict litigation styled "*In Re: Volkswagen 'Clean Diesel' Marketing, Sales Practices, and Products Liability Litigation*" was formed on

[2] Citations to the Excerpts of Records and the page number thereof are shown as (ER __). Citations to Supplemental Excerpt of Records are shown as (SER __). Citations to the Appendix are shown as (APP_).

December 8, 2015, to be litigated in the district court, the Honorable Charles R. Breyer, Senior District Court Judge presiding, D.C. No. 3:15-md-02672-CRB ("*MDL 2672*").

On January 21, 2016, the District Court entered PTO #7, appointing a Plaintiffs' Steering Committee ("PSC") of 22 attorneys asserting that: "*as to all matters common to the coordinated cases, and to the fullest extent consistent with the independent fiduciary obligations owed by any and all Plaintiffs' counsel to their clients and any putative class, [that] pretrial proceedings shall [be] conducted by and through the PSC.*" DKT #1084. Significantly, the district court acknowledged the "*independent fiduciary obligations*" of non-class counsel. Id. On February 22, 2016, the original Consolidated Consumer Class Action Complaint was filed by the PSC. DKT #1230.

On February 25, 2016, the district court entered PTO No. 11, outlining the protocol for recovery of attorney's fees for "*Common Benefit Work*". (3:15-md-02672; DKT #1254). Recovery of such fees would be limited to the PSC and "*any other counsel authorized*" by the PSC "*to perform work that may be considered for common benefit attorneys' fees and costs*". Id. The district court recognized that all other counsel are performing work "*for their own benefit and that of their respective clients*" and such work "*will not be considered Common Benefit Work.*" Id.

While the PSC engaged in the work they deemed necessary, Mr. Feinman fully exercised his "*independent fiduciary obligations*" to his clients in Virginia. Hundreds of Virginians asked Feinman to represent them and he engaged in

considerable work consisting of gathering information on each individual client's vehicle, including the Vehicle Identification Number (VIN), the purchase date, the place of purchase, the purchase amount, the vehicle's current mileage, the extent of and cost of any aftermarket parts or accessories installed, and the vehicle's current condition. Many lawsuits were drafted, filed, and served. Feinman filed briefing in the Supreme Court of Virginia, and appeared before a three-judge panel appointed by the Supreme Court of Virginia for the purpose of forming and conducting a coordinated proceeding under the Virginia Multiple Claimant Litigation Act, Va. Code §8.01-267.1. (ER 350-354).

On April 26, 2016, VW attempted to remove to federal court the cases filed by Mr. Feinman in Virginia Circuit (*i.e.*, trial) Courts. Feinman litigated the propriety of that attempted removal culminating in a decision by the U.S. District Court for the Western District of Virginia, holding that there was no federal question or diversity jurisdiction to allow federal court jurisdiction over the claims of Virginia citizens asserting Virginia law claims against VW. See, Claytor v. Volkswagen Group of America, Inc., 189 F. Supp. 3d 602 (W.D.Va. 2016). The ruling established that the many hundreds of cases filed in Virginia courts could not be removed to federal court and then transferred to the district court. It thus permitted a separate litigation in which individual claimant's cases were coordinated by one Virginia court for discovery, pre-trial motions, and eventually sent back to the Virginia Circuit Court of original filing for trial. (ER 351).

Each time a new client engaged Mr. Feinman to litigate respecting an illegal VW diesel engine, he sent VW's counsel of record in Virginia a letter establishing his lien for attorney fees and costs pursuant to Virginia Code §54.1-3932. (See, Appendix I, pg. 2).

On July 26, 2016, the PSC and VW defendants filed an 111-page "*Consumer Class Action Settlement Agreement and Release (Amended).*" ("Settlement Agreement") (ER 1924-2034) The district court preliminarily approved the proposed settlement on that same date. (ER 1892-1923)[3]. The Settlement Agreement established September 16, 2016, as the date that a member of the proposed class could opt-out of the settlement and pursue their individual claims. A member of the proposed class who failed to opt-out by that date was enjoined from individually litigating against VW.

The Settlement Class was defined as:

> *[A]ll 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.* (ER 760)

[3] An earlier version of the Consumer Class Action Settlement Agreement and Release was filed June 28, 2016.

At no time was Mr. Feinman a registered owner or lessee of any Eligible Vehicle or any Volkswagen or Audi car; he thus was not a Class member. As of the opt-out date, Feinman represented 674 Class members. After Feinman counseled his clients about the proposed settlement's benefits in comparison to the potential benefits of pursuing their individual claims, 403 of Feinman's clients chose in favor of Class membership and 271 chose to opt-out of it and pursue individual claims. After the opt-out date, Feinman dismissed all pending lawsuits for the 403 former clients who chose to remain in the Class. At that point, per the district court's orders, the PSC became the exclusive counsel for those remaining in the Class, and Feinman was discharged as counsel for the 403 now-former clients. See, 3:15-md-02672, DKT #1084.

The Settlement Agreement contained a provision whereby all Class Members released:

> *[A]ny 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."* (ER 763)

The district court held a hearing on October 18, 2016, to consider approval of the Class Action Settlement. At that time, Feinman still represented one Class member vis-à-vis the Settlement Agreement, Ronald Clark Fleshman, in an effort to intervene in the United States' suit to enforce the Clean Air Act. See, In Re Volkswagen "*Clean Diesel*" Marketing, Sales Practices, and Products Liability Litigation, 894 F.3d 1030 (2018) (App. E). Mr. Feinman appeared at the October 18, 2016, hearing for Mr. Fleshman to object to the proposed settlement because it allowed continued unlawful use of Volkswagen diesel vehicles. Id. at 1036-1037.

Other Class member objectors opposed the Settlement Agreement's approval because it did not address payment of attorneys other than the PSC and their designees. See, e.g., "*Objection of Class Members John Labudde and Jing Labudde to Class Action Settlement*." (App. J) ("Labudde Objection"). The Labudde Objection cited law applicable to attorney's fee liens and asserted to the district court that the proposed settlement was "*inequitable because it fails to deal with liens created by agreement or operation of law*." (App J, p. 11 of 12).

On October 25, 2016, the district court issued its "*Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement*" ("Settlement Approval Order"). (ER 756-803). It expressly ruled on objections based on the proposed agreement's failure to address payment to non-class counsel. The district court's ruling agreed with the factual premise of the Labudde Objection and those of other similarly objecting Class members. It held:

> *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.*** *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.* (Emphasis added) (App. G, p. 39 of 48); and see, (DKT #168).

VW did not appeal this ruling respecting the Settlement Agreement's silence regarding payment of non-class counsel. Mr. Feinman did not appeal the ruling, as he was not a Class member or a party to the litigation, and further, the district court did not rule adversely to the enforcement of his Virginia statutory attorney's fee liens. To the contrary, the Settlement Agreement was "*silent"* on the subject of non-class counsel's fee payment and the enforcement against VW of any perfected liens regarding such payment. (ER 213) The Class Action Settlement thus did not affect Feinman's vested rights under his liens as non-class counsel, and the Settlement Approval Order left him free to enforce them. Cf., Electrical Fittings Corporation v. Thomas & Betts Co., 307 U.S. 241 (1939). ("*A party may not appeal from a judgement or decree in his favor*," citing Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151 (1934)). See also, U.S. v. Good Samaritan Church, 29 F.3d 487, 488 (9th Cir. 1994).

The district court's October 25, 2016 "*Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement*" enjoined Class Members who had not opted out from participating in any State court

litigation: "*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*." (ER 801); (emphasis added).

The district court's final order approving the Class Settlement further enjoined Class members, as follows:

> ***VI. CONCLUSION***
>
> *For the foregoing reasons, the Court ORDERS the following:*
>
> *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.* (ER 801-802)

Significantly, as of the September 16, 2016, opt-out date, the PSC became the exclusive counsel to Mr. Feinman's former clients. In his later efforts to enforce his attorney's fee liens against VW, Feinman was not "*purportedly acting on behalf of any Class member(s).*"[4]

[4] FRCP 65(d)(2) provides that injunctions only bind "*(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys, and (C) other persons who are in active concert or participation*" with anyone described in (A) or (B). When the injunction was entered on October 25, 2016, Mr. Feinman was no longer the attorney for his former clients, nor in active concert or participation with them.

The issue of attorneys' fee liens soon arose. On November 22, 2016, the district court entered an "*ORDER RE: ATTORNEYS' LIENS*." (ER 750) It sua sponte ruled that VW had informed it "*that certain attorneys have placed liens on several Class Members' settlement proceeds*." (ER 750-755) The district court found that "*attorneys' liens on Class Members' recovery frustrates*" the purpose of the settlement. "*Accordingly, the Court orders Volkswagen to pay Class Members the full amount of compensation as required by the terms of the Settlement, regardless of whether an attorney purports to have placed a lien on these funds*." (ER 753).

The district court held further:

> *Even if Volkswagen provides Class Members their full compensation, however, attorneys could seek to litigate their liens in state court. This too frustrates the administration and purpose of the Settlement. Given that the Court retains jurisdiction to enforce and ensure compliance with the Settlement, it now invokes its authority under the All Writs Act to enjoin any state court proceedings regarding attorneys' lien on Class Members' settlement compensation.* (ER 754)

The district court established a procedure for attorneys to apply for compensation for performing services that benefited the Class and required that applications be submitted by November 29, 2016. (ER 750)

Mr. Feinman sought additional time to file his application and, with the district court's leave, on January 6, 2017, filed "*James B. Feinman's Objection to Adjudication of Issue of Attorney Fee Lien for Lack of Jurisdiction; Motion to Lift Injunction; and, In The Alternative, Application for Attorney's Fees in Regard to Representation of [403 named former clients]."* (ER 473-500); [clarification added].

Mr. Feinman maintained the district court lacked jurisdiction to adjudicate the statutory attorney fee lien claims of a Virginia lawyer representing that state's citizens and asserting perfected statutory lien and common law claims against VW, with its principal place of business in Virginia. Feinman contended the All Writs Act does not confer jurisdiction where subject matter jurisdiction did not exist. With the finding that there was no federal question jurisdiction established in Claytor v. Volkswagen, 189 F. Supp 3d 602 (W.D.Va. 2016), and no diversity, Feinman challenged the district court's jurisdiction to enjoin him from pursuing his claims in State court. (ER 478-480)

Mr. Feinman also asserted no injunction was appropriate because his attorney fee lien claim would not reduce the Class members' recovery. He moved the district court to remand adjudication of his attorney's fee lien claim pursuant to Lexecon, Inc. v. Milberg Weiss, 523 U.S. 26 (1998) as this was not a "*pretrial proceeding*". (ER 473-487) Finally, in the alternative, Feinman sought recovery for his time and expense in representing 403 former clients. Id. He asserted that he never performed any "*Common Benefit Work*" and had not sought payment under the class action settlement, which was "*silent*" as to non-class counsel. Id.

On April 24, 2017, the district court entered its "*Order Denying Non-Class Counsel's Motions for Attorneys' Fees*." (ER 411-420). The district court ruled that none of the non-class counsel seeking fees performed any "*Common Benefit Work*." Id. Indeed, Mr. Feinman never asserted that he did so. The district court therefore

declined to award attorney's fees to non-class counsel. Id. However, the district court **did** lift its injunction:

> *While Non-Class Counsel are **not entitled to fees from Volkswagen as part of this class action**, Non-Class Counsel may be entitled to payment of certain fees and costs pursuant to attorney-client fee agreements. This is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum. To that end, **the Court VACATES the injunction on state court actions**, to the extent those actions are brought to enforce an attorney-client fee agreement. Volkswagen, however, must continue to "directly pay consumers the full amount to which they are entitled under the Settlement" for all the reasons stated in the Court's previous Order.* (DKT #2428 at 2.*)* (ER 418); (emphasis added).

After the district court lifted the injunction, Mr. Feinman informed VW counsel that he would enforce his statutory attorney's fee lien in Virginia's State courts. VW counsel denied that the injunction had been lifted and threatened legal action. Out of an abundance of caution, Feinman appealed the April 24, 2017, "*Order Denying Non-Class Counsel's Motions for Attorneys' Fees*."

The briefing, oral argument, and ruling of the Ninth Circuit regarding the appeal of the April 24, 2017, Order demonstrate that Mr. Feinman did not appeal the district court's denial of attorney fees, but sought confirmation that the Order did not enjoin him from pursuing enforcement of his attorney's fee liens in a Virginia court. (ER 389) ("*Appellant Mr. Feinman moves this Honorable Court to hold that the District Court's injunction does not prohibit Mr. Feinman from pursuing his attorney fee lien claim against Volkswagen in Virginia State courts*"). VW conceded in its Ninth Circuit oral argument that the Order did not so enjoin

Feinman. (ER 138). Upon receiving VW's concession, the Panel acknowledged it to Feinman:

> *Judge Smith: It looks like you can be a happy man today, because apparently there is no lien that stops you from doing what you want to do.*
>
> *Mr. Feinman: Well, I don't know what - - pardon me, I don't understand when you say no lien - - no injunction?*
>
> *Judge Smith: No injunction. I apologize. No injunction stopping you - -*
>
> *Mr. Feinman: Very happy man.*
>
> *Judge Smith: We like people to be happy.*
>
> *Mr. Feinman: Thank you, sir.* (ER 138).

The Ninth Circuit's subsequent published opinion made it clear that it did not decide whether Feinman had a valid lien claim against VW. See, 914 F.3d 623, 647 (2019):

> *There is no doubt that the issues he raised are indeed moot. Whether he 'can have the relief requested – which is to say, a lien against Volkswagen pursuant to Virginia law – **is not an issue properly before us**.* (Emphasis added).

On December 28, 2018, Mr. Feinman filed a Complaint in the Circuit Court of the City of Roanoke, Virginia. (ER 162-165). He sought to enforce his statutory lien claims pursuant Virginia Code §54.1-3932. (ER 162-168). VW removed the case to the Western District of Virginia, and then to the district court, where it filed "*Volkswagen Group of America, Inc.'s Motion to Enforce 2.0-Liter Settlement Approval Order Enjoining Prohibited State Court Lawsuit Filed by Non-Class Counsel*." (ER 333-345)

VW asserted "*pursuant to the injunction in Paragraph 9 of the Court's 2.0L Settlement Approval Order, the Court should enjoin non-class counsel, James B. Feinman, from pursuing a state court action for attorney's fees from VWGOA for his individual representation of his Class-member clients who accepted the 2.0L class action settlement."* (ER 336) Volkswagen asserted "*the Court's 2.0L Settlement Approval Order permanently enjoined "Class members who have not properly opted out and any person purportedly acting on behalf of any Class Member(s)… from commenting, filing, initiating, instituting, pursuing, mentioning, enforcing, or prosecuting, either directly or indirectly, any Released Claims*." (ER 336)

VW argued that Virginia Code §54.1-3932 could not "*void*" the Class Action Settlement under the Supremacy Clause. (ER 344) In spite of the plain language of Va. Code § 54.1-3932 stating "*the attorney shall have a lien upon the cause of action*," and numerous Virginia cases stating otherwise, VW incorrectly argued that Virginia law would empower Feinman only to collect his fees from his former clients. (ER 344)

Mr. Feinman opposed Volkswagen's effort to enjoin his State court litigation. (ER 286-330). He asserted that established law throughout the United States holds an attorney's lien is not defeated by settlement between a plaintiff and a defendant. (ER 304-309; 325-327). He pointed out to the district court that its prior order approving the Class settlement had expressly stated its contemporaneous conclusion that:

> *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.* (ER 314)

Mr. Feinman asserted that Class Representatives can release only claims possessed in common with the Class. (ER 315) He stressed that he was not a member of the Class, had no opportunity to opt out of the class of which he was not a member, and the Class Representatives and Class members possessed no authority respecting his statutory lien, and therefore the Class Settlement and Release had no preclusive effect on him. (ER 315-318) Feinman presented the district court with precedent establishing that class settlements purporting to resolve issues beyond the alleged misconduct in the underlying action violate due process. (ER 317-320). Finally, he cited to Hansberry v. Lee, 311 U.S. 32 (1940), providing that "*the petitioners there were not bound by a prior judgment in an earlier litigation to which they were not parties as to do so would violate due process*." (ER 76-78)

On April 23, 2019, Mr. Feinman orally argued these matters in person to the district court. (ER 14-69) On May 6, 2019, the district court issued an order enjoining Mr. Feinman and the Virginia litigation:

> *"A substantial number of consumers who had retained their own lawyers left those lawyers (and the cases they had filed) and accepted the class settlements. The consumers who accepted the settlements released "on behalf of themselves and their . . . attorneys, ... any claims for . . . liens . . . [or] attorneys' . . . fees or costs other than fees and costs awarded by the Court in connection with this Settlement."* (2.0-Liter Settlement; ¶ 9.3, DKT #685) (ER 2) (App. B, p. 2)
>
> *"The lien claims that Feinman is currently pursuing against VW in Virginia state court are released claims. In*

> *the 2.0-liter settlement approval order, this Court enjoined releasing parties "from commencing, filing, initiating, instituting, pursuing, maintaining, enforcing or prosecuting, either directly or indirectly, any Released Claims . . . in any jurisdiction or forum, against any of the Released Parties." (Approval Order at 47 ¶ 9.) Pursuant to that Order, Feinman is enjoined from pursuing his lien claims against VW."* (ER 5) See, In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods, Liab. Litig., 2019 U.S. Dist. LEXIS 76353, **315-16 (N.D. Cal., May 6, 2019). (App. B, p.5)

The district court additionally held:

> *[B]ecause Feinman had notice of 2.0-Liter settlement, the Court construes his opposition to VW's motion to enforce the release as a belated attempt to object to the settlement; a settlement that this Court approved over two years ago and that the Ninth Circuit agreed was fair and reasonable…The Court will not consider Feinman's late objection*." (ER 3-4)

It also ruled that the release of the claims of non-class members, and non-parties unserved with process, "*was essential to the settlement's success."* (ER 4) "*It was instrumental to the success of the settlement and, indeed, VW's counsel has represented that without it 'a settlement [would] not have been achieved*.'" (Apr. 23, 2019 Hr'g Tr. 46:3-4.) (ER 5)

Mr. Feinman appealed the district court's injunctive order to the United States Court of Appeals for the Ninth Circuit. See, Feinman v. Volkswagen Grp. Of Am., Inc. (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.), 817 Fed. Appx. 447 (9th Cir., 2020). In briefing to the Ninth Circuit, Mr. Feinman again asserted:

(1) that his statutory attorney's fee lien under Virginia Code § 54.1-3932 was a vested right and a protected property interest entitled to due process protection (Case No. 19-16074, DKT #24, at pp. 1-2);

(2) that the "*most fundamental principles underlying class actions limit the powers of the representative parties to the claims they possess* ***in common with other members of the class***." National Super Spuds, Inc. v. N.Y. Mercantile Exchange, 660 F.2d 9, 16 (2d Cir, 1981 (emphasis added) (Case No. 19-16074, DKT 24 at 3-4);

(3) that he was not a member of the defined class and class representatives possessed no right or lawful authority to effect claims of non-members of the class and therefore he was not bound by their agreement (Case No. 19-16074, DKT 6 at 22, 26; DKT #24 at pp. 4-7, 11-12);

(4) that the injunction in the Settlement Approval Order was directed only to Class Members, as found at ER p. 800, 801, 219, 220, 221 (Case No. 19-16074, DKT 6 at pp. 22-23; DKT #24 at p. 6);

(5) that Mr. Feinman's statutory lien claim was his alone, and not one possessed in common with any member of the Class (Case No. 19-16074, DKT #6 at pp.2-23; DKT #24 at pp.6);

(6) that the district court's initial determination that the Settlement Agreement "*is silent as to Volkswagen's obligation to pay the fees and costs for attorneys other than Class Counsel*" must be obeyed, because a district court cannot "*render a post hoc judgment as to what the order was intended to say*" as held in Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148, (1988) (citing Atlantic Coast R.R. Co. v.

Brotherhood of Engineers, 318 U.S. 281, 290 (1976) (Case No. 19-16074, DKT #6 at p. 25);

(7) that under Ninth Circuit precedent, a party (which Mr. Feinman was **not**) "*may not appeal from a judgment or decree in his favor*" and the district court's order held the Class Settlement was "*silent*" in regard to payment of non-class counsel fees, (Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939); Public Serv. Comm'r v. Brasher Freight Lines, Inc., 306 U.S. 204, 206-7 (1939) (party may not appeal favorable decision); Clapp v. Comm., 875 F.2d 1396, 1398 (9th Cir. 1989) (Case No. 19-16074, DKT #24, at pp. 10-11);

(8) that Mr. Feinman and the Class Members were not in privity because the Class Representatives did not represent "*precisely the same right in respect to the subject matter involved*," In Re Schimmels, 127 F.3d 875, 881 (9th Cir. 1997) (Case No. 19-16074, DKT #24 at pp. 13-14); and

(9) that it is "*an obvious truism non-parties cannot be bound by an agreement*," Gulf Trading & Transp. Co. v. M V Jento, 694 F.2d 1191 (9th Cir. 1982) (Case No. 19-16074, DKT #24 at p. 16).

On August 17, 2020, the Ninth Circuit affirmed the district court. Feinman v. Volkswagen Grp. Of Am., Inc. (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.), 817 Fed. Appx. 447 (9th Cir., 2020). The Panel held that "*Feinman's statutory lien claim under Virginia law was a released claim under the settlement agreement*." (App A, p. 2) "*Feinman's arguments that he is not a member of the class and that his clients had no authority to release his statutory*

claim are nothing more than a belated objection to the settlement." (App A, pp. 2-3) The Panel held "*Feinman's argument that the settlement did not release his statutory lien claim is contrary to our ruling in Volkswagen II and the plain text of the release provision in the agreement…*"[5] (App A, p. 2)

Mr. Feinman filed a "*Combined Petition for Panel Rehearing and Rehearing En Banc*." (9th Cir., DKT #36) He asserted that granting preclusive effect to a judgment in a prior case in which Feinman was not a member of the Class, was not made a party and was not served with process violates this Court's precedents in Martin v. Wilks, 490 U.S. 755, 761-762 (1989); Firefighters, 478 U.S. at 528-529; and Zenith Radio Corp. v. Hazeltine Research Inc, 395 U.S. 100, 110 (1969).

In his combined petition, Mr. Feinman reiterated the holding of Firefighters, 478 U.S. at 529, that *"Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement...And,*

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[5] *Volkswagen II* refers to the Ninth Circuit's decision reported at Hill v. Volkswagen Grp. of Am. Inc. (In re Volkswagen "*Clean Diesel*" Mktg., Sales Practices, & Prods. Litig.), 914 F.3d 623 (9th Cir., 2019). Contrary to this Panel interpretation of *Volkswagen II*, in relevant part, at p. 647, the *Volkswagen II* decision held that:

> *"What Feinman wants from this appeal is a ruling that nothing the Northern District of California Court ruled can prohibit Feinman from seeking to enforce his attorney fee lien rights against Defendant Volkswagen…Feinman has no interest in violating a Federal Court injunction and merely seeks to assert his claim in Virginia State Courts free from jeopardy." He even concedes that "[i]f the concession of Volkswagen and the Plaintiff-Appellees that the issue is moot makes it so Feinman can have the relief requested, there is no need to go further."* ***There is no doubt that the issues he raised are indeed moot. Whether he "can have the relief requested"—which is to say, a lien against Volkswagen pursuant to Virginia law—is not an issue properly before us.***" (Emphasis added).

of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." Continuing, Feinman argued that "*[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgement or decree…The linchpin of the 'impermissible collateral attack' doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with [FRCP] Rule 17 and Rule 24*." Martin, 490 U.S. at 765; [clarification added]. As the Court has held "*a non-party with notice cannot be held in contempt until shown to be in active concert or participation [with the parties defendant, or here, the Class members]. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party*." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 112 (1969) (9th Cir., DKT #36); See also, FRCP 65(d)(2).

Mr. Feinman further argued the recent holding of Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 140 S.Ct. 1589 (2020), reaffirmed precedent to the effect that the "*various claim preclusion*" doctrines do "*not bar claims that are predicated on events that postdate the filing of the initial complaint*." Id, at 1596. As Justice Sotomayor explained, "*This is for good reason: Events that occur after the plaintiff files suit often give rise to new '[m]aterial operative facts' that 'in themselves, or taken in conjunction with the antecedent facts' create a new claim for relief*." Id, at 1597. The original class action suit against VW was filed on February 22, 2016. The opt-out date - after which date Feinman no longer represented the

403 clients and his attorney fee lien claim became choate - was September 16, 2016.[6] Feinman's attorney fee lien claim could therefore not be the subject of claim preclusion because it was "*predicated on events that postdate the filing of the initial complaint*." Id., at 1596.

Mr. Feinman argued to the Ninth Circuit the applicable law that any command of a consent decree or order must be found within its four corners. See, United States v. Armour, 402 U.S. 673, 682 (1971). And, that the interpretation of class action settlement agreements are subject to de novo review:

> *Interpretation of settlement agreements, like interpretation of contracts, are subject to de novo review. Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir.1987) (if interpretation of a contract is based on analysis of language and application of principles of contract interpretation, review is de novo); In re: United States Fin. Sec. Litig., 729 F.2d 628, 631–32 (9th Cir.1984) (interpretation of settlement agreement when restricted to language of the settlement, like contracts, is subject to de novo review). A district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal. Keith v. Volpe, 784 F.2d 1457, 1461 (9th Cir.1986); Vertex Distr. Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 892 (9th Cir.1982); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95, 98 (9th Cir.1980), cert. denied, 449 U.S. 1079, 101 S.Ct. 861, 66 L.Ed.2d 802 (1981). 899 F.2d 758.*

Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir., 1989).

[6] See, Montavon v. U. S., 864 F. Supp. 519, 522 (E.D.Va., 1994) ("Under Virginia law, such a lien comes into existence on the making of the contract of employment between the client and attorney, but then remains inchoate until judgment or recovery is obtained.")

Yet the Ninth Circuit applied an "*abuse of discretion*" standard of review, sidestepping the de novo standard appropriate to review interpretations of judicial orders. The Court had incorrectly ignored the command of Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148 (1988), holding that a district court may not *"render a post hoc judgment as to what the order was intended to say*." Feinman stressed the district court's original interpretation of the Settlement Agreement, contemporaneous with its approval of it, to resolve objections that the class settlement "*failed to deal with the liens created by agreement or operation of law,*" by holding the settlement was "*silent as to Volkswagen's obligations to pay the fees and costs of attorneys other than Class Counsel*." (App. G, p. 39 of 48)

Finally, as noted, Mr. Feinman's combined petition pointed out that *Volkswagen II* expressly held that the Court therein did not purport to decide Feinman's lien-based rights against VW under Virginia law. 914 F.3d at 647. The Panel's opinion that *Volkswagen II* "*release[d] his statutory lien claim*" constitutes an additional clear and prejudicial error.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. Due Process of Law; Questions Presented 1 through 5

The Ninth Circuit affirmed the district court's decision that a settlement reached between Class Members and VW extinguished Feinman's vested property rights. It thereby disregarded long-established, fundamental due process principles. The Ninth Circuit's holdings will not go unnoticed. They will establish a

new precedent for untold yet predictable future deprivations of vested property rights in class action cases.

In the setting of a massive class action, the extinguishment of Mr. Feinman's statutory attorney's fee liens, those of an attorney who represented individual Class members before a class was established, before it was certified, and before a settlement was reached, will effectively annul State laws that encourage the availability of consumer counsel. See, e.g., Wilkins v. Peninsula Motor Cars, Inc., 266 Va. 558, 563 (2003) ("*The fee shifting provisions of the Virginia Consumer Protection Act are designed to encourage private enforcement of the provisions of the statute.*") Massive consumer frauds by the world's largest corporations, as demonstrated here, require the services of attorneys for the hundreds of thousands of consumers who sustain losses. Virginia law encourages these attorneys to come forward, secure in the knowledge their work on a contingent basis is protected by lien if they are discharged and the plaintiff and defendant reach a settlement. It is well and good for the district court to appoint a 22-attorney PSC for a Class exceeding 475,000 consumers. But due process of law forbids Class Representatives and corporate defendants from extinguishing the vested rights arising from statutory attorney's fee liens. Those liens protect the property rights of attorneys who serve the thousands of consumers before a class is established or a settlement proposed.

The Ninth Circuit's decision violates bedrock due process principles. As Justice Ginsberg noted in Taylor v. Sturgell, 553 U.S. 880, 892 (2008):

> *A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court."* Richards*, 517 U.S., at 798, 116 S.Ct. 1761…Indicating the strength of that tradition, we have often repeated the general rule that "one is not bound by a judgment* in personam *in a litigation which he has not designated as a party or to which he has not been made a party by service of process.* (Internal citations omitted).

In Martin, 490 U.S. at 761-62, 768 (internal citations omitted), the Court held:

> *All agree that [it] is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment* in personam *in a litigation in which he is not designated as a party or to which he has not been made a party by service of process…A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.*
>
> * * *
>
> "[*P*]*arties who choose to resolve litigation through settlement may not dispose of the claims of a third party…without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting* [individuals].

Here, the Class Representatives and VW "*dispose[d] of the claims of a third party*." Martin, 490 U.S. at 768. Also, because Feinman's attorney's fee lien claim arose after the amended Complaint's filing, the Ninth Circuit's decision contravenes the holding of Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 140 S.Ct. 1589, 1596-97 (May 14, 2020) If this deprivation of Mr. Feinman's due process

rights is not reversed, he will lose valuable property, as will many others in the future.

II. The "Impermissible Collateral Attack" Doctrine and the Anti-Injunction Act; Questions Presented 6 and 7

The Ninth Circuit herein gave preclusive effect to Mr. Feinman's "*failure*" to intervene in the class action, or to appeal the Settlement Approval Order. Yet this Court has rejected the so called "*impermissible collateral attack*" doctrine:

> "***Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene,*** *is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore,* ***to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.*** *The linchpin of the 'impermissible collateral attack' doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with* [F. R. App. P.] *Rule 19 and Rule 24.*

Martin, 490 U.S. at 765; (clarification and emphasis added).

After Martin, other federal circuit courts considering application of the "*impermissible collateral attack*" doctrine have correctly rejected it. See, Northeast Ohio Coalition for the Homeless v. Husted, 837 F.3d 612, 623 (6th Cir., 2016); Pace v. Timmermann's Ranch and Saddle Shop, Inc., 795 F. 3d 748, 755 (7th Cir., 2015); Cook v. Food & Drug Adm., 733 F 3d 1, 11-12 (D.C. Cir. 2013); Massachusetts Delivery Ass'n v. Coakley, 671 F. 3d 33, 46 n.10 (1st Cir. 2012); U.S. v. Brennan, 650 F.3d 65, 118 (2d Cir. 2011). If the Court does not correct the Ninth Circuit's error, it

and other federal courts undoubtedly will recommence use of the doctrine in ways that conflict with this Court's precedent and that deprive third-party rights.

VW's argument below that Mr. Feinman was in "*privity*" with his former clients in effort to justify this claim preclusion is without merit. When the district court entered its October 25, 2016, injunction against Class members "*and any person purportedly acting on behalf of any Class Member,*" Feinman represented no such persons. He had not served as counsel to his 403 former clients since the September 16, 2016, opt-out date. On that date, the PSC became the exclusive counsel for Class members. Feinman and his former clients had no mutual or common interest in the subject matter. Mr. Feinman's only interest was to secure his attorney's fee lien. His former clients had no right or authority to affect his vested interest in the liens. Those property rights were Feinman's alone.

"*Privity*" – for the purposes of applying the doctrine of res judicata – is a legal conclusion "*designating a person so identified in interest with a party to former litigation that he represents* ***precisely the same right in respect to the subject matter involved***." In re: Schimmels, 127 F. 3d 875, 881 (9th Cir. 1997). (Emphasis added). Neither Mr. Feinman nor his former clients had "*precisely the same right in respect to the subject matter involved*" and thus privity did not exist between them so as to underpin claim preclusion.

Well-established precedent holds that any command of a consent decree or order must be found "*within its four corners…and not by reference to any 'purposes' of the parties or of the underlying statutes*." U.S. v. ITT Continental Baking Co., 420

U.S. 223, 233 (1975). The injunction within the October 25, 2016, Settlement Approval Order was clear and limited: "*9. Class Members who have not properly opted out and any person purportedly acting on behalf of any Class Member(s) are ENJOINED from…pursuing…any Released Claims…*" (ER 801-802) (App. G, p. 47 of 48). Pursuant to this Court's precedent, the Settlement Approval Order simply did not encompass Mr. Feinman or his property rights, either directly or through application of FRCP 65(d)(2).[7] The district court failed to interpret the Settlement Approval order according to the four corners of its language, and erroneously invoked the putative purposes of the parties to justify extinguishing Mr. Feinman's vested property rights. The Ninth Circuit erred by condoning this forbidden methodology to interpret the Settlement Approval Order's language. See, App. C. at pp. 4-5.

Finally, because the injunction of October 25, 2016, did not enjoin the Virginia State court from proceeding to adjudicate Mr. Feinman's State law claims, the district court was obliged in its May 6, 2019, Order to articulate a specific

[7] Moreover, the district court's finding there would not have been a settlement without the sacrifice of Feinman's lien is speculative and not supported by any evidence. VW agreed to settle without knowing what the fees of the PSC actually were, other than an agreement that their fees would be "*no more than $324 million in attorney fees, plus actual and reasonable out-of-pocket costs not to exceed $8.5 million.*" (See, District Court DKT #1730). VW ended up paying "*only*" $175 million in fees. The difference in the possible maximum VW agreed to and what it actually paid leaves ample funds to satisfy Feinman's lien. Furthermore, VW did not appeal the ruling that the Class Settlement was silent in regard to payment of non-class counsel, even after the Labudde Objection informed VW the continued existence of "*silent*" statutory attorney's fee liens. In short, the class action settlement was not dependent on extinguishing Feinman's lien. Feinman's claim of $1,500,000 for legal work on behalf of 403 former clients ($3,722 per former client) is but fifteen thousandths of one percent (0.015%) of the $10 billion set aside for the settlement. See, (App. E, at p. 8) As argued, consistent with due process, no class action settlement can be premised on a secret agreement that non-class members and non-parties unknowingly must subsidize part of the defendant's settlement costs.

exception to the Anti-Injunction Act. Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970) (Enjoining state court proceedings "*must be based on one of the specific statutory exceptions to [the Anti-Injunction Act] if it is to be upheld*" and "*the prohibition of [the Anti-Injunction Act] cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding.*").

The district court did not base the injunction of its May 6, 2019, Order on any of the specific exceptions to the Anti-Injunction Act, and for this additional reason, that Order's injunction against Mr. Feinman and the Virginia court action should be reversed on Federalism principles. Atlantic Coast Line, 398 U.S. at 287.

The Ninth Circuit's holdings should be reversed, and the litigation concerning Mr. Feinman's enforcement of his statutory attorney's fee liens remanded to the Circuit Court for the City of Roanoke, Virginia, for adjudication.

CONCLUSION

Petitioner, James B. Feinman, by counsel, therefore respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted

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APPENDIX A

NOT FOR PUBLICATION

FILED

AUG 17 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION, _____ JAMES BEN FEINMAN, Plaintiff-Appellant, v. VOLKSWAGEN GROUP OF AMERICA, INC., Defendant-Appellee.	No. 19-16074 D.C. No. 3:15-md-02672-CRB MEMORANDUM*

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

Submitted August 11, 2020**
Anchorage, Alaska

Before: RAWLINSON, MURGUIA, and R. NELSON, Circuit Judges.

James B. Feinman appeals the district court's order granting Volkswagen

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Group of America, Inc. ("Volkswagen")'s motion to enforce a class settlement approval order. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm. Because the parties are familiar with the facts and procedural history, we recite them only as necessary to resolve the issues on appeal.

We review the district court's order enforcing the class settlement and final approval order for an abuse of discretion. *See Wilcox v. Arpaio*, 753 F.3d 872, 875 (9th Cir. 2014); *California Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1031 (9th Cir. 2008).

1. Feinman's statutory lien claim under Virginia law was a released claim under the settlement agreement. We approved the settlement two years ago, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig. ("Volkswagen I")*, 895 F.3d 597, 619 (9th Cir. 2018), and subsequently held that Volkswagen did not agree to compensate non-class counsel such as Feinman under the settlement agreement, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig. ("Volkswagen II")*, 914 F.3d 623, 646 (9th Cir. 2019). Feinman's argument that the settlement did not release his statutory lien claim is contrary to our ruling in *Volkswagen II* and the plain text of the release provision in the agreement, which explicitly releases "any claims for . . . liens, . . . attorneys' . . . or other litigation fees . . . ." Similarly, Feinman's arguments that he is not a member of the class and that his clients had no authority to release his

statutory claim are nothing more than a belated objection to the settlement. *See Slaven* v. *Am. Trading Transp. Co.*, 146 F.3d 1066, 1069 (9th Cir. 1998) (holding that failure "to raise an objection to an issue before judgment" amounts to waiver (citing *Gen. Signal Corp.* v. *MCI Telecomms. Corp.*, 66 F.3d 1500, 1507 (9th Cir. 1995))).

2. Feinman's claim that the district court's injunction does not comply with the Anti-Injunction Act, 28 U.S.C. § 2283, is without merit and misapprehends the order under review on appeal. Volkswagen moved to enforce the district court's order granting final approval of the settlement—a *prior* order that enjoined class members and persons acting on their behalf from pursuing any claims released under the settlement agreement against Volkswagen. Again, we upheld that underlying final approval order two years ago in *Volkswagen I*, 895 F.3d at 619, and the district court explicitly retained jurisdiction to enforce the settlement and order. Feinman's challenge to the validity of an order already affirmed on appeal has no merit, and the district court properly enforced its prior order and injunction. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998) ("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"), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Arata v. Nu Skin Int'l, Inc.*, 96 F.3d 1265, 1269 (9th

Cir. 1996) (concluding that district court had subject matter jurisdiction to enforce the agreement where it "explicitly reserve[d] 'continuing and exclusive jurisdiction' to enforce the settlement").

3. Feinman's remaining arguments, including his claim that the settlement voids Virginia's public policy and violates the Supremacy Clause and the Full Faith and Credit Clause of the United States Constitution, are unsupported and also amount to belated attempts to collaterally attack the settlement and final approval order. As the district court noted, Volkswagen has disbursed the settlement funds to class members, and Feinman remains free to collect his fees from his clients.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

This Order Relates To:
Dkt. No. 5824
_____/

MDL No. 2672 CRB (JSC)

ORDER GRANTING VOLKSWAGEN'S MOTION TO ENFORCE THE 2.0-LITER SETTLEMENT APPROVAL ORDER

When a lawyer is hired to file a lawsuit, state law often provides the lawyer with a charging lien. The charging lien attaches to any money awarded to the plaintiff in the case. If the plaintiff, upon receiving an award, refuses to pay his attorney's fees and costs, the attorney can seek to enforce the lien in court. *See generally* 7 Am. Jur. 2d Attorneys at Law §§ 316–37 (2019) (providing an overview on charging liens).

A charging lien can also protect a lawyer who is released and replaced. If the plaintiff hires a new lawyer who later obtains a monetary award, the original lawyer may be able to rely on the charging lien to get paid for work performed prior to the change in counsel. *See, e.g.*, *Artache v. Goldin*, 173 A.D.2d 667, 667 (N.Y. App. Div. 1991) (holding that a discharged lawyer was "entitled to a charging lien for the reasonable value of services rendered prior to the date of substitution of counsel"); *Heinzman v. Fine, Fine, Legum & Fine*, 234 S.E.2d 282, 286 (Va. 1977) (holding that a "discharged attorney is entitled to a fee based upon quantum meruit for services rendered prior to discharge") (footnote omitted).

In some circumstances, a plaintiff's attorney can also use a charging lien to recover fees from the defendant. When the plaintiff's lawyer provides the defendant with notice of the lien, and the defendant later settles with the plaintiff without notifying the plaintiff's lawyer, some courts have required the defendant to pay the plaintiff's lawyer's fees. *See, e.g.*, *Watson v. Nosal Realty, LLC*, No. 4240/01, 2002 WL 1592603, at *2 (N.Y. Sup. Ct. July 2, 2002) (explaining that

"a defendant who settles a cause of action with a plaintiff, without the plaintiff's attorney's knowledge," may be held liable "for the value of the services and disbursements of his opponent's attorney") (internal quotation marks omitted); *Katopodis v. Liberian S/T Olympic Sun*, 282 F. Supp. 369, 372 (E.D. Va. 1968) (explaining that the defendant, "in negotiating the settlement with plaintiff 'behind the back' of plaintiff's counsel . . . , [and knowing] of the plaintiff's counsel's lien, . . . acted in bad faith" and "at his peril" and is therefore "liable" for the fee). To avoid this outcome, it may be the defendant's duty to determine the amount of money owed to the plaintiff's lawyer and to retain it for him. *See Fischer-Hansen v. Brooklyn Heights R. Co.*, 66 N.E. 395, 398 (N.Y. 1903); *Watson*, 2002 WL 1592603, at *2.

With respect to the "clean diesel" litigation, when the public learned that Volkswagen (or VW) had installed defeat devices in hundreds of thousands of its diesel cars, lawyers nationwide raced to file lawsuits against the company on behalf of consumers who had bought or leased the cars. Some of those lawyers gave VW notice that, pursuant to state law, they were placing charging liens on their clients' claims. (*See, e.g.*, Dkt. No. 2159 (listing certain attorneys who notified VW of charging liens).)

A different set of lawyers, which this Court appointed, thereafter negotiated class settlements with VW on behalf of consumers who had bought or leased the affected cars. (One settlement covered the 2.0-liter cars; the other covered the 3.0-liter models.) The EPA, the FTC, and the California Air Resources Board, all of which were simultaneously negotiating consent decrees with VW, participated in the negotiations and supported the settlements.

A substantial number of consumers who had retained their own lawyers left those lawyers (and the cases they had filed) and accepted the class settlements. The consumers who accepted the settlements released "on behalf of themselves and their . . . attorneys, ... any claims for . . . liens . . . [or] attorneys' . . . fees or costs other than fees and costs awarded by the Court in connection with this Settlement." (2.0-Liter Settlement ¶ 9.3, Dkt. No. 1685; *accord* 3.0-Liter Settlement ¶ 12.3, Dkt. No. 2894.)

Despite the release of lien claims, James Feinman, a lawyer who filed lawsuits against VW on behalf of some consumers who later accepted the 2.0-liter settlement, filed an action in Virginia

state court, late last year, to enforce charging liens against VW. (*See* Monahan Decl., Ex. A, Dkt. No. 5824-2.) He asserts that he gave VW notice of the liens before the settlement, and he argues that the liens entitle him to recover reasonable fees and costs from VW for work that he did for his clients before they accepted the settlement. In response to Feinman's lien action, VW filed a motion in this Court to enforce the settlement's release of lien claims. That motion is at issue.

The 2.0-liter settlement's release covers Feinman's lien claims. It not only applies to class members, but also to their attorneys, and it releases "any claims" by class members or their attorneys "for . . . liens . . . [or] attorneys' . . . fees." (2.0-Liter Settlement ¶ 9.3.)[1] Feinman has not offered any reading of the release that would leave his liens against VW intact. He urges, though, that because the liens were his own, not his clients', and because he was not a class member—and was not represented by anyone whose interests were aligned with his—the release cannot be construed as releasing his liens without violating his due process rights. (*See* Opp'n, Dkt. No. 5882 at 16-20.)

Feinman had notice of the 2.0-liter settlement and its precise terms before the Court approved it. In a motion for attorneys' fees that he filed after settlement approval, he requested fees for, among other things, time that he spent reviewing the settlement and advising his clients on whether to accept it. (*See* Feinman's Fees Mot., Dkt. No. 2643-6 at 13-15.) Indeed, before settlement approval, Feinman even objected to the settlement on behalf of one of his clients. (*See* Objection, Dkt. No. 1893.) But he never objected to paragraph 9.3 of the settlement, which is the release.

Because Feinman had notice of the 2.0-liter settlement, the Court construes his opposition to VW's motion to enforce the release as a belated attempt to object to the settlement; a settlement that this Court approved over two years ago and that the Ninth Circuit agreed was fair and

[1] The settlement did leave open the possibility that this Court would award fees to non-class counsel if they demonstrated that their work benefited the class. (*See* 2.0-Liter Settlement ¶ 9.3 (explaining that the release did not apply to "fees and costs awarded by the Court in connection with this Settlement").) Non-class counsel were not able to make such a showing. VW was thus not required to pay their fees as part of the class action. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 1474312, at *5 (N.D. Cal. Apr. 24, 2017) (denying non-class counsel's motions for attorneys' fees), *aff'd*, 914 F.3d 623 (9th Cir. 2019).

reasonable. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 617 (9th Cir. 2018). The Court will not consider Feinman's late objection. VW reasonably relied on the release's scope when it agreed to settle, and the Court will not modify the release at this juncture. *See also Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York*, 302 A.D.2d 183, 188 (N.Y. App. Div. 2002) (noting that a lawyer may waive or forfeit a charging lien by neglect).

The Court also notes that the release of attorneys' lien claims against VW was essential to the settlement's success. When this MDL began there was an ongoing harm that needed to be remedied: approximately 600,000 cars were emitting dangerous pollutants in the United States at levels that greatly exceeded legal limits. (*See* Feb. 25, 2016 Hr'g Tr. 12:20-13:14 (explaining that this ongoing environmental harm required urgent action by class counsel, VW, and the government).) To incentivize consumers to stop driving the cars, VW offered to buy the cars back at pre-scandal prices. The expectation was that consumers would then use those funds to buy or lease replacement cars.

The incentive worked. Within four months of approval, VW had taken possession of 137,979 2.0-liter TDI cars, 28 percent of the total number. (*See* Feb. 27, 2017 Claims Supervisor's Report, Dkt. No. 2979 at 56.) And within 24 months of approval, VW had removed from commerce or modified 455,394 2.0-liter TDI cars, approximately 94 percent of the total number. (*See* Nov. 26, 2018 Claims Supervisor's Report, Dkt. No. 5585 at 36.)[2]

If class members had not released their lawyers' lien claims, it is unlikely that these results would have been achieved. Without the release, VW likely would have been unable to disburse the settlement funds directly to consumers. If it had nonetheless done so, it would have risked later court orders requiring it to pay additional money (above what it had paid class members) to satisfy the liens. Without VW disbursing the settlement funds directly to consumers, it is probable

[2] Consumers had the option to return their cars to VW or to keep their cars but to have them modified. Both options included financial incentives, as VW agreed to make restitution payments to participating class members in either scenario. (*See* Approval Order, Dkt. No. 2102 at 6-7.) The buyback has been the preferred option. As of November 18, 2018, 85 percent of class members who selected a remedy had chosen the buyback over the modification. (See Nov. 26, 2018 Claims Supervisor's Report, Dkt. No. 5585 at 11.)

that consumers would have hesitated to return their polluting cars, which would have left the cars on the road and their emissions in the air.

Even if VW had made partial payments to class members, but held back the remaining funds until it knew for certain whether it would be required to satisfy charging liens, harmful ripple effects could have resulted. In such a scenario, consumers wouldn't have known the exact amounts that they stood to gain by participating in the settlement. And with that uncertainty, they may have refused to participate in the settlement and may have kept driving their VW cars.

VW's prompt payment of the settlement funds directly to affected consumers was needed to quickly remove the polluting cars from the road. The release gave VW assurances that it could distribute the funds to consumers without penalty. It was instrumental to the success of the settlement and, indeed, VW's counsel has represented that without it "a settlement [would] not have been achieved." (Apr. 23, 2019 Hr'g Tr. 46:3-4.)

While the 2.0-liter settlement released Feinman's liens against VW, the Court notes that his liens against the *res* itself were not affected by the settlement. VW has disbursed the settlement funds to class members, and if Feinman believes he has a right to a portion of those funds, he may seek to recover against his clients. Whether such a recovery is warranted is a matter that is not before this Court.

The lien claims that Feinman is currently pursuing against VW in Virginia state court are released claims. In the 2.0-liter settlement approval order, this Court enjoined releasing parties "from commencing, filing, initiating, instituting, pursuing, maintaining, enforcing or prosecuting, either directly or indirectly, any Released Claims . . . in any jurisdiction or forum, against any of the Released Parties." (Approval Order at 47 ¶ 9.) Pursuant to that Order, Feinman is enjoined from pursuing his lien claims against VW.

IT IS SO ORDERED.

Dated: May 6, 2019

CHARLES R. BREYER
United States District Judge

APPENDIX C

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,

San Francisco, California
Tuesday, April 23, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:
Law Office of James B. Feinman
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Lynchburg, VA 24504

BY: JAMES B. FEINMAN, ESQ.

For Defendant Volkswagen:
Sullivan & Cromwell, LLP
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BY: SHARON L. NELLES, ESQ.

Reported By:
Vicki Eastvold, RMR, CRR
Official Reporter

Tuesday - April 23, 2019 **9:51 a.m.**

P R O C E E D I N G S

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THE CLERK: Calling Civil Action C15-2672, In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation.

Counsel, please step forward or state your appearances using the microphones. Thank you.

MS. NELLES: Good morning, Your Honor. Sharon Nelles from Sullivan & Cromwell on behalf of Volkswagen Group of America.

MR. FEINMAN: Good morning, Your Honor, James B. Feinman, Lynchburg, Virginia, on behalf of myself.

THE COURT: So this matter is on in response to a motion filed by Volkswagen to seek an interpretation of the settlement agreement in which the class action, consumer class action matter, was resolved. Is that a fair way of saying it? And the plaintiff, Mr. Feinman, is here in opposition to that motion.

MR. FEINMAN: Correct, Your Honor.

THE COURT: I assume -- so I have a number of questions. Why don't you come forward, Mr. Feinman, so everybody can hear on the --

You are -- first, you are representing yourself in this matter, is that correct?

MR. FEINMAN: That's correct, Your Honor.

THE COURT: So this is on your behalf, not on behalf of the clients whom you've represented in connection with the settlement -- or, in connection with the claims against Volkswagen.

MR. FEINMAN: Yes, sir. Yes, sir. I'll answer any questions Your Honor wants. Or if you want me to make a presentation --

THE COURT: I want to ask questions. But I want to make sure in doing so I am accurate in what the -- in what we're --

MR. FEINMAN: Yes, certainly.

THE COURT: -- adjudicating at this point.

Since it -- now, this may be collateral to this particular issue. Collateral, in some sense. Is that you filed an action in Virginia seeking certain relief against Volkswagen for certain claims against Volkswagen. That matter was removed to federal court, and that matter is awaiting a decision by the multi-district litigation panel as to whether it should be related to the Volkswagen class action in my court.

MR. FEINMAN: Yes, sir. To be precise and accurate, I filed a lawsuit in Virginia state court in Roanoke, Virginia, seeking to enforce an attorney's fee lien provided by the General Assembly of Virginia in the statute giving lawyers a lien. This was done after we had been to the Ninth Circuit.

When Your Honor entered the order on April 24, 2017, it was my understanding of that order that I was free to proceed to assert my attorney's fee lien granted by the Commonwealth of Virginia.

As -- I think I should back up just a second to make sure the Court understands the facts.

Every client that I had, as well as every other client I've ever had for the last 33 years, in Virginia when we get -- when a plaintiff's lawyer gets a client, we send a letter to the defendant or the defendant's counsel asserting the statute and putting them on notice of the lien. That perfects the lien, under Virginia law. Then we go forward. It's just a matter of course that we do.

There's very few cases where the defendants don't honor the lien. It's kind of rare that that happens. But that's what happened --

THE COURT: Very few cases in which what?

MR. FEINMAN: The defendant does not honor the lien. It doesn't happen very often, but it does happen. Do you follow what I'm --

THE COURT: I understand what you're saying, but I'm not here to develop a record as to what is the procedure in Virginia. I find what you've said - you know, it may shed some light on your position.

But what I'm here to adjudicate is not the fairness of the

Virginia statute; that is, to say the procedure and so forth and so on. I'm here to adjudicate whether Volkswagen has a valid claim, right, interpretation, whatever we want to say, in the relief that they're seeking. That's what's before me. I don't feel I need to interpret Virginia law. So that's another issue. I mean, that's something that I don't think I'm required to do.

But let me ask you some basic questions because I think that I am interested and it may shed some light on what is the procedure that you follow. And as I understand the procedure you follow is you represent a client -- in this case, let's talk about approximately 400 clients --

MR. FEINMAN: 403. Yes, sir.

THE COURT: -- 403 clients who actually are members of the class and who did not opt out of the class in front of me.

MR. FEINMAN: Correct. When I started my representation there was no class certified. There was no settlement. This was all prior -- when I undertook representation, it was all prior to any certification of a class and prior to any class settlement.

THE COURT: Well, then I don't think it was prior to any notice of the MDL. You're not telling me that the 400 people you represented were all on board in your collection of cases prior to December of -- is it '15 or '16? I get the years confused. What year was the disclosure?

MS. NELLES: 2016.

THE COURT: 2016. So in other words, the --

MR. FEINMAN: 2015.

MS. NELLES: Oh. 2015, Your Honor.

MR. FEINMAN: It was September 18, 2015, was when the EPA Notice of Violation --

THE COURT: That's right. Nobody knew about it before -- when I say "nobody" I'm saying --

MR. FEINMAN: I didn't. None of my clients did.

THE COURT: Nor did I. Okay. So we're now talking about subsequent to September of 2015.

MR. FEINMAN: Yes, sir.

THE COURT: The MDL order was, by the MDL panel, was entered in December of 2015. I don't think -- I understand you may have had a number of clients, but you're not representing to me you had all 400 clients before December of 2015, in two months?

MR. FEINMAN: I can tell you the exact date that that happened. I mean, because we have letters, you know, where --

THE COURT: I'm not asking you for your proof. I'm just asking you are you representing to me -- not that -- I don't think it's going to make any difference at all but I just -- I'm just curious because I want to go through the process with you for a few minutes. Curious as to whether or not 400 people came on board -- that is, into your -- seeking legal

services from you -- in that two-month period.

MR. FEINMAN: Your Honor, I'm capable of determining the exact date. I don't have that in front of me so I'm only relying on memory.

THE COURT: Yes. Yes.

MR. FEINMAN: Which is -- that's all I can tell you at this point. I can give you the exact dates. But my memory is that the vast bulk of them I think I undertook representation between September 18, 2015, and the end of that year. But that's just from memory, Your Honor. It's capable of accurate determination. I just don't have that in front of me.

THE COURT: In December of that year, however, the MDL panel entered its order. I think it was the first week of December, thereabouts, creating the MDL. Putting that aside --

MR. FEINMAN: Yes, sir.

THE COURT: -- I just want to put a context of it. So you -- I think it's fair to say to you -- a number of clients came in before that date but possibly not all 400.

MR. FEINMAN: I think that's accurate. I'm just going from memory. That could --

THE COURT: Let me move forward.

MR. FEINMAN: Yes, sir.

THE COURT: I need you to tell me -- the claim says -- what is the letter that you send to Volkswagen? Do you say to Volkswagen -- or, to a putative defendant --

MR. FEINMAN: Yes, sir.

THE COURT: Do you say: This is to advise you that I represent X.

MR. FEINMAN: Yes, sir.

THE COURT: X has a claim against Volkswagen. I am hereby, and according to the laws of the Commonwealth of Virginia, asserting an attorney's lien.

And then does it say, for example -- maybe it's in the record. I don't know. Does it say: Attorneys lien in the amount of X as a percentage X? Or, does it simply say: An attorney's lien.

MR. FEINMAN: It simply says attorney's fee. It doesn't assert the amount.

THE COURT: It doesn't assert the amount. So it simply says: We have a lien on -- and I have to believe it uses the word something like a claim, a settlement, a reimbursement, a disbursement, something related to a payment by Volkswagen of some compensation in connection with the claim.

MR. FEINMAN: Yes, sir. And the federal courts in Virginia have held and ruled --

THE COURT: I -- I just really -- wait, Mr. Feinman.

MR. FEINMAN: I'm sorry.

THE COURT: I just want to know the facts.

MR. FEINMAN: Yes, sir.

THE COURT: I don't want -- at this point -- we'll talk about the law in a minute but I need to know the facts because the facts give rise to whatever interpretation the law is going to permit.

Okay. So --

MR. FEINMAN: So --

THE COURT: No, no, no. You got to listen to my questions.

MR. FEINMAN: Yes, sir.

THE COURT: All right. Okay. So you then send that letter.

MR. FEINMAN: Yes.

THE COURT: Now I'd like to talk about the ordinary course. That is, your expectation of the procedure that you would follow. And I don't know whether it's the same in Virginia as it is in California. I've never practiced in Virginia. Of course, I've practiced in California.

California, the procedure would be that -- we'll use Volkswagen as an example, that is the defendant, would resolve the claim through settlement or otherwise, and be required by virtue of the resolution of the claim to pay something. Called a settlement, or a disbursement, or however it's characterized.

And that -- then my question is -- and we'll use an example, theoretical example, that one of your clients of the 403 was entitled to $20,000. That was what the resolution of

the claim would be.

According to your expectation and your understanding of Virginia law, what, then, would happen? Volkswagen has $20,000. Your client is entitled to $20,000. What then happens next?

MR. FEINMAN: Okay. Your Honor, the way I have to answer that, based on my 33 years practice, is that when we're pursuing a case that allows for fee shifting, if we go to court and we win, we become the prevailing party, then our fees are determined by the court. I've never had it done any other way so that's the only way I've ever seen it.

THE COURT: On fee shifting.

MR. FEINMAN: In a fee shifting case, which is what this was. Under Virginia law, under our Consumer Protection Act and our fraud, there is fee shifting which allows the prevailing party, if they're the plaintiff, to recover fees. And that was the type of action that I was pursuing on behalf of these 403 people, as well as --

THE COURT: Let's take the two cases and then we'll decide what this is.

MR. FEINMAN: Okay.

THE COURT: Let's take the non-fee-shifting case. You represent people in which attorney's lien applies absent a fee shifting case.

MR. FEINMAN: Yes. Right.

THE COURT: Let's take those first. What then happens in the case where your client gets $20,000 -- is entitled to $20,000 --

MR. FEINMAN: Right.

THE COURT: -- you have a lien, and it's a non-fee-shifting case. What happens?

MR. FEINMAN: Correct. Well, the law of Virginia says that the client --

THE COURT: I actually want to -- just remember, remember, Mr. Feinman, all I want you to tell me is what -- is what you expect next. I assume you expect whatever the law requires. Okay.

MR. FEINMAN: But what I'm trying to tell you, Your Honor, there's two different answers depending on the facts. If the client discharges the plaintiff's attorney, there's one thing that happens. If the client doesn't discharge the attorney, it's a different thing that happens.

THE COURT: Let's assume further that you have not been discharged.

MR. FEINMAN: That I have not been discharged. If I have not been discharged, then what happens is, you know, in the normal course the -- let's just say it's a car accident case -- the insurance company will send me the agreed amount that was settled and I will, with my client's approval, deposit it in my client's trust account and disburse it according to my

fee agreement with my client. That's what usually happens.

THE COURT: When you say they send you the check --

MR. FEINMAN: Yes, sir.

THE COURT: -- are you saying that they make the check payable to you? Payable to you or your -- and your client? Payable to your trust account? What do they make the check -- to whom do they make the check payable?

MR. FEINMAN: I would say in the vast majority of cases it's payable to James B. Feinman and my client. There are a few cases where -- I had one last week where because that particular client was very badly injured and he's going to need a special needs trust, they sent the check to me, James B. Feinman, for the benefit of that particular client. So --

THE COURT: You've answered that question now. I have another question.

MR. FEINMAN: Yes, sir.

THE COURT: Okay. If the case (sic) goes to James B. Feinman, payable to James B. Feinman, your procedure is, as I understand it, you would, with your client's consent, deposit -- and I assume the client's consent is something that's achieved by the fee agreement that you have with your client. Or, maybe subsequent. Or sometimes it's --

MR. FEINMAN: Well, it starts with our agreement, yeah, when the client retains me. It starts then.

THE COURT: Yeah, but doesn't the agreement provide --

maybe it doesn't -- I'm now telling you what my agreements provided -- that the client consents that any funds that you receive in connection with the claim be deposited in the attorney/client trust account.

MR. FEINMAN: Well, my typical fee agreements don't say that. What typically happens in my case, if we agree on a settlement, the client gives me permission to accept a proposed -- an offer. And then when the money comes in, I call them. I tell them: The check's payable to you and me. It has to go in my client trust account for five banking days before we can disburse and then we can disburse. If you want to come up here and sign the check, you can do that. Or if you give me permission over the phone to just sign it for you, I'd do that. And that's what I do. That's what I do. 98 percent of them don't want to sign.

THE COURT: Fair enough. That's fine. They don't want to -- why drive down to the attorney's office, especially in a defective Volkswagen, and sign. It goes into the trust account for so many days to make sure it clears, and then you make a disbursement. Got it.

Now, question. Your fee, is that fee taken out of the funds that Volkswagen has provided to you in terms of a settlement?

MR. FEINMAN: Yes, sir.

THE COURT: Okay. And did you have in these cases,

these 400 cases, a standard fee?

MR. FEINMAN: Well, what my -- what my -- I can only answer this truthfully. In my arrangement --

THE COURT: Well, that's a good idea.

MR. FEINMAN: Right. And my arrangement was --

THE COURT: Unless you want to spend a lot of time in San Francisco, it's a good idea that you answer truthfully.

Go right ahead. I'm being facetious. Go right ahead.

MR. FEINMAN: My agreement was that it was a contingency fee agreement. And if we were successful in court, Volkswagen would pay my fees because of the fee shifting statutes that we were proceeding under. So that's a situation that I have had countless times.

THE COURT: I don't understand your answer. Are you saying that your fee agreement with your client, under the terms and conditions of this particular type of representation, was that your client -- you received $20,000 in my hypothetical. You put it in your trust account. My question is: Would you take your fees out of the $20,000, or would you not?

MR. FEINMAN: Yes, I would.

THE COURT: Okay, fine. Now my next question is: What -- you must have -- since it's a contingency case, I assume it was -- I assume there was a percentage. And what was the typical percentage that you were entitled to under your fee

agreement?

MR. FEINMAN: Okay. The typical arrangement was, which is been approved by the Supreme Court of Virginia in other cases -- I know you don't want to hear that but this was the typical arrangement --

THE COURT: No. I'm delighted. I'm not suggesting you're doing anything unethical. I'm not suggesting that you're doing anything that's somehow contrary to some law out there.

MR. FEINMAN: The typical arrangement is one-third of whatever is recovered, or my hourly rate times the hours incurred, whichever of the two is greater. And the reason why I have that structure is because I --

THE COURT: I understand. You don't have to give me a reason.

MR. FEINMAN: Okay, good.

THE COURT: Okay. So in these cases --

MR. FEINMAN: Yes, sir.

THE COURT: -- is it your -- for the most part -- I'm not talking about every single case of the 403 cases -- was it your expectation at the time of the settlement that your fee would be one-third of the recovery given to your client? In other words, that's another way of asking: In the run-of-the-mill 403 cases, wouldn't the vast majority of those cases entitle you, under law, to the fee of 33 and-a-third

percent of the recovery?

MR. FEINMAN: I don't think so, and I can tell you why. It's because under Virginia law when a client, in effect, discharges the lawyer and accepts a settlement outside of that arrangement, then the fee is determined on what's called, as you know, *quantum meruit* basis. So we go -- in that situation, which is what happened here --

THE COURT: Oh, so tell me --

MR. FEINMAN: Yes, sir.

THE COURT: That's helpful.

MR. FEINMAN: Yes, sir.

THE COURT: So it is your understanding of the 403 clients that you had, that you were discharged prior to the settlement?

MR. FEINMAN: I think that's fair. I think that when they elected to accept a settlement and not opt out, I think that the essence of that is that I was discharged and they were accepting the settlement that was offered, in effect, by the plaintiffs' steering committee or by Volkswagen through the plaintiffs' steering committee.

I mean, I think that's the only way I could characterize it is that I was discharged.

THE COURT: So your entitlement to your fees, then, would not necessarily be a third of the recovery. It would be whatever your hourly rate was times the number of hours you

devoted to that representation.

MR. FEINMAN: I think that -- it would be on a *quantum meruit* basis, which would include what Your Honor just said. The evidence on determining what would be reasonable under a *quantum meruit* basis would include what Your Honor just described.

THE COURT: And was that -- okay. First of all, may I ask, inquire, what is your hourly -- what was your hourly rate that you negotiated with your client as of 2016?

MR. FEINMAN: 2015. I believe it was $400 to $450 an hour. I'd have to look at it, just to be honest with you.

THE COURT: And was it --

MR. FEINMAN: But it's right in there.

THE COURT: With 400 clients --

MR. FEINMAN: Yes, sir.

THE COURT: -- was there sort of an average number of hours that you spent with respect to one client? I mean, are we talking about ten hours? We talking about 100 hours? On the average. On the average.

MR. FEINMAN: Well, you know, some of them talked a lot.

THE COURT: I understand. You have to give me an average.

MR. FEINMAN: Well, Your Honor, I submitted that, and it's all --

THE COURT: I know it's all in the record, but I just don't have it in front of me. You can refresh my recollection. Maybe defense counsel knows. I don't know.

MR. FEINMAN: It was, you know -- a lot of the work that I did was collective work which applied to all of them. And then, obviously, I had individual work for individuals. So, you know, I think it came out to somewhere between -- you know, this is off the stop of my head -- somewhere between $2,500 and $3,500 per client, something like that, on an hourly basis. That's, again, off the top of my head.

THE COURT: Okay. Fair enough.

MR. FEINMAN: Which is considerably less than a one-third of $20,000, if we're using that example. Right.

THE COURT: Right. Now, I think that takes care of the case of the non-fee-shifting -- non-fee-shifting claim. And it may very well take care of the entirety of the case. So my question to you is: Even in those cases in which you maintain there was a fee shifting provision, would it be your practice, or would it have been your practice, to nevertheless take the *quantum meruit* basis of your entitlement from the settlement? I think the answer is "yes," but --

MR. FEINMAN: What happens in that situation -- if we don't go to court and go all the way through the process, there's -- the defendant offers a settlement before that happens -- what I do is I talk to my client and we reach an

agreement on a fee.

If -- and in many cases what happens -- and I don't -- I'm trying not to anger Your Honor --

THE COURT: No, no, no. You're not going to anger me. Don't worry about that.

MR. FEINMAN: Well, there's a case in Virginia that says that on this type of arrangement, a fee-shifting arrangement, it's the *Lambert versus Sea Oats* case, the Supreme Court of Virginia held that no defendant can ask the plaintiff's attorney the amount of their attorney's fees before the case on the merits is resolved for the client. Only then do we determine the amount of the fees in a fee-shifting situation.

So, you know, that's if we go all the way through the court.

THE COURT: No, but I'm not sure this answers my question. You're -- in my hypothetical, client X -- each client, by the way, in this case, in these cases, would have a different entitlement. Not necessarily different, but they would be part of a group that we get 8,000, part of a group that gets 5,000, part of a group that gets 20,000, depending on how long they owned the product. But that's not unusual because damages are individualized.

So you have 403 clients -- and more, actually -- but we're only talking about the 403 clients. They come in. You meet

with them. And they say: Volkswagen has offered me in my case $20,000. And they discuss it with you. And you advise them, I assume. That's what you're there for. And they -- whatever your advice was, and I'm not discussing that at this point -- whatever your advice was, they then discharged you because they said: I am taking the $20,000 from the class settlement.

You are discharged. That's the way you interpreted it. Is that correct?

MR. FEINMAN: Yeah. What it boiled down to, with all my clients -- I think I had 674 all together -- they either had to opt -- as Your Honor knows, they either had to opt out and remain my clients, or they didn't and they would be part of the class and represented by the class counsel. So the way I saw it was at that decision I was discharged. If they decided not to opt out, I was discharged.

Your Honor, may I get a cup of water, please?

THE COURT: Oh, certainly.

MR. FEINMAN: Thank you. I'm sorry. My mouth is just --

THE COURT: No, no. That's all right.

(Pause.)

MR. FEINMAN: Thank you. Thank you very much.

THE COURT: Sure. And take your time. You're the only thing on my calendar.

MR. FEINMAN: I love being here. It's fine, Your

Honor.

THE COURT: We're all surprised, it's so nice. Because it's been awfully wet in California --

MR. FEINMAN: That's good.

THE COURT: -- until now. But this is good. And I appreciate your coming out here. That's very nice of you.

So I think my question -- I have to go back because I'm sort of losing my train of thought. But in those cases where there is a, quote, "fee shifting --

MR. FEINMAN: Yes, sir.

THE COURT: -- arrangement," in your view, did you have any -- would you approach the payout from the settlement any differently from those cases in which there was no fee shifting?

You've described the fee-shifting arrangement. Or you've described the non-fee-shifting arrangement. But I don't think I understand how you would treat the $20,000 settlement any differently. Or putting it in another way, would you do the same type of calculation in, quote, a "fee shifting case" --

MR. FEINMAN: Right.

THE COURT: -- in determining to what extent you would pay some portion of the settlement --

MR. FEINMAN: Right.

THE COURT: -- to you.

MR. FEINMAN: We're talking about a non-fee-shifting

case now.

THE COURT: No, no, no. I've talked about the non-fee-shifting.

MR. FEINMAN: Okay.

THE COURT: The non-fee-shifting case, my understanding in simple terms --

MR. FEINMAN: Okay.

THE COURT: -- is that $20,000 comes in.

MR. FEINMAN: Right.

THE COURT: You have been -- quote, you have viewed yourself as being constructively or actually discharged. And you would get the $20,000 under the normal procedure that you anticipated. You then would apply your hourly rate against the number of hours you devoted for that client's representation.

MR. FEINMAN: Right.

THE COURT: And let's say it's -- in the typical case you said it's sometimes between 2,500 and 3,500. Let's just call it 3,000.

MR. FEINMAN: In this case, Yes, sir.

THE COURT: Theoretical case.

MR. FEINMAN: Yes, sir.

THE COURT: Theoretical case. Yes, in this case -- not theoretical in terms of what you believe your clients owed you, but theoretical as to any particular client as on the average -- you take $3,000 from 20,000. The client would get

17,000, you would get 3,000. That's the way it would work in the non-fee-shifting case. And my question to you is: Does it work the same way in the fee shifting case?

MR. FEINMAN: I just have to back up because I got to make sure I understand.

In the case that you just described, I was discharged. Is that correct? Or I was not?

THE COURT: In the case I just described --

MR. FEINMAN: Yes, sir.

THE COURT: -- the client opted to remain as a member of the class, which you interpreted to be a discharge --

MR. FEINMAN: Discharge.

THE COURT: -- of you. Of counsel.

MR. FEINMAN: All right. In that case, what happens in Virginia is that, you know, I make a demand on the defendant. Say, Hey, look you settled this case --

THE COURT: Wait. $20,000 has been sent to you.

MR. FEINMAN: Oh, it wouldn't be sent to me if I was discharged. That's what I'm saying.

THE COURT: Well, wait a minute. Wait. I'm now talking about the theoretical case. The theoretical -- I know it didn't happen this way. Okay?

MR. FEINMAN: Okay.

THE COURT: Because of my orders, it didn't happen that way. But I'm asking you in your -- in the normal course

of your -- of the type of representation you spent 33 years doing --

MR. FEINMAN: Right. Yes, sir.

THE COURT: -- the check for $20,000 goes to James B. Feinman, Attorney at Law, and it may or may not include the name of the client, and/or whatever it says. But that's it.

Now I'm talking about in the theoretical case, would you then take out the $3,000 from the $20,000 in both cases where there is not only a non-fee-shifting arrangement, but there is a fee shifting -- I mean, when I say "arrangement" -- non-fee-shifting statute versus a fee-shifting statute. Would there be any difference?

MR. FEINMAN: And I've been discharged, is that correct?

THE COURT: Yeah. You have been --

MR. FEINMAN: Okay. I've been discharged. I would never get the check. They would never send it to me. If I've been discharged, the money's not coming to me. I no longer represent that client. That doesn't happen, okay? I've been discharged. It doesn't come to me. What's left for me to do --

THE COURT: Let's take the case -- I'll take it -- okay, fine. That's fine. Let me take the case where you haven't been discharged.

MR. FEINMAN: All right.

THE COURT: You haven't been discharged. $20,000 comes to you.

MR. FEINMAN: Yes, sir.

THE COURT: And you put it in your trust account.

MR. FEINMAN: Yes, sir.

THE COURT: Is there any -- is there any calculation as to -- oh. Well, you take the less of -- well, wait. Maybe I'm wrong here. This is helpful. I am wrong. Okay. So where you haven't been discharged --

MR. FEINMAN: Right.

THE COURT: -- your view is under your fee agreement you're entitled to one-third.

MR. FEINMAN: Well, what happens -- I'll tell you what happens.

THE COURT: My real question is --

MR. FEINMAN: Yes, sir.

THE COURT: -- is there a difference between the two cases where there's a fee shifting statute and where there's not a fee shifting statute?

MR. FEINMAN: Yes.

THE COURT: And you haven't been discharged and you got the $20,000.

MR. FEINMAN: Yes.

THE COURT: And you're entitled to the greater, under your fee agreement. Of the greater of the --

MR. FEINMAN: There's not a fee shifting statute, then my contract calls for a percentage. And I do three different cases, primarily. I do --

THE COURT: Okay. Wait. I got that. Now let's have the fee shifting. There's a fee shifting --

MR. FEINMAN: Yes, sir.

THE COURT: -- statute.

MR. FEINMAN: I'll tell you how that works. But let me just talk about in the case where there's no fee shifting statute, I have a percentage, and we reach a settlement. I haven't been discharged.

Then when I explain the offer to my client, I make sure that they again understand, you know, the offer is 20,000, my fee will be -- I'm pretty good at calculating these -- I think it's $6,666.66. But I would have to check that with a calculator. According to our fee agreement. Then when the money comes in, I disburse that and that's all agreed. That's that situation.

Now in the same situation, I haven't been discharged, and there's a fee-shifting statute, and the defendant offers a settlement before we complete -- you know, I go all the way through the process. There are two things that happen. There's two different avenues that can happen, you know.

Sometimes I tell the defendant that, Okay, my client will accept $20,000, but they have a fee shifting agreement, you

have to pay my fees in addition to that. And after we resolve the client's case, I will submit my bill. You have to stipulate that my client's the prevailing party. And if we can agree on my bill, then we'll agree on it. If we can't, we submit it to the court for a resolution.

That's what happens.

So then sometimes -- in most cases -- like, I do a whole lot of lemon law cases. Ford, Chrysler, they agree to that and we work it out. Very rarely do we have to go to court to get the court to resolve that. Although we have, and it's -- I have several cases like that over 33 years. They're written opinions.

Anyway, sometimes the defendant will say, Look, we don't want to do that. It's one number. You and your client figure out how to resolve it. So then in that situation, I talk to my client and see if we can work out something. If my client will agree to that, then it's worked out. If my client doesn't agree to that, there's no settlement.

Remember, I haven't been discharged. I'm still representing. So that's all in the process of negotiation. So if we can't work out either one of those scenarios, then the case doesn't settle. But if we can work out one of those two scenarios, then the case settles. And we're all -- everybody knows what everybody's doing and we're all on the same page and that happens on a weekly basis.

THE COURT: I'm not quite sure you're all on the same page. But at least you're on the same page as your client.

MR. FEINMAN: Right. And with the defendant. They know how much they're paying --

THE COURT: No, they don't. They don't. In other words -- well, in the last case that you mentioned --

MR. FEINMAN: Yes, sir.

THE COURT: -- the one in which you and your client are unable to agree as to a split --

MR. FEINMAN: Right.

THE COURT: -- Volkswagen -- we'll use Volkswagen as an example. Says, Look, I'm going to pay $20,000. It's up to you and your client to decide how to spend that, how to allocate that. And you and your client are unable to arrive at an agreement.

MR. FEINMAN: Right. That case doesn't settle.

THE COURT: In that case, there is no settlement.

MR. FEINMAN: Right. We keep fighting.

THE COURT: All right. But, you see, Volkswagen in that particular case has offered $20,000, and not $22,000, or not some other sum. Or not offered to split the $20,000 either according to the way you want to do it or the way your client wants to do it. And in that case, there is no settlement. I understand that. That's accurate, right?

MR. FEINMAN: Yes, sir.

THE COURT: Let me just think a minute.

MR. FEINMAN: Sure.

THE COURT: Okay. I think that covers that category of questions. I have a different category of questions which now relates to what you did. Okay?

MR. FEINMAN: Yes, sir.

THE COURT: I'm out of the theoretical.

MR. FEINMAN: Okay.

THE COURT: Now I'm going back to -- I don't want to say the beginning. I'm going back to the course of the litigation. Up to the -- well, at least I want to cover through the final approval of the settlement. Okay? The class action settlement.

MR. FEINMAN: I think that's October of 2016. Is that right?

THE COURT: Yes. And you seem to have the facts very well in hand. Okay. As I understand it -- now at this point, you're representing 600 or 700 -- roughly six-plus clients.

MR. FEINMAN: Yes, sir.

THE COURT: Okay. And you have -- and there is a class action. And you have received notice of the class action. I don't know to what extent -- and I'm not sure I need to get into this. You filed lawsuits, you know, in state court, federal court, so forth.

But let's assume -- I assume you did file some actions.

MR. FEINMAN: A lot. Yes, sir.

THE COURT: You filed a lot of actions. And they were filed -- were they filed exclusively in state court?

MR. FEINMAN: Exclusively in state court. As you know, my clients are Virginians, and Volkswagen is headquartered in Fairfax, Virginia. There's no diversity. We did litigate on behalf of all these people --

THE COURT: Wait, wait, wait. I'm not there yet. I'm just saying where you filed. You filed in state court in Virginia.

MR. FEINMAN: Right. And they were removed to federal court.

THE COURT: And Volkswagen removed them to federal court.

MR. FEINMAN: And I made a motion to remand and was successful in front of Judge Conrad in the Western District of Virginia.

THE COURT: Okay. And --

MR. FEINMAN: May of 2016.

THE COURT: May of 2016 --

MR. FEINMAN: Yes, sir.

THE COURT: -- they were remanded. All of them?

MR. FEINMAN: Well, Your Honor, what happened was it was kind of like -- let's see how to explain this.

I think if my memory's correct, I think I had three

separate suits that they removed. And each one of those suits contained a number of plaintiffs that had been joined together. And they removed those three, and so I made my motion to remand.

And what we did was we made -- I don't know what you call it -- an agreement or an understanding that we would get Judge Conrad's ruling and that would be -- that would, you know, they didn't remove any more, and all the ones that had been removed were sent back. So no more were removed after Judge Conrad ruled. There was no federal question jurisdiction. And I think Your Honor made, not too long ago, the same ruling.

THE COURT: Okay, now -- well, let's leave my rulings aside just for a minute.

MR. FEINMAN: Yes, sir.

THE COURT: So notwithstanding whether the case was pending in state court in Virginia or federal court in Virginia, your clients were designated as a member of a class.

MR. FEINMAN: Well, not at that point in time. No, sir.

THE COURT: Well, I'm now talking about when -- you received notice of the MDL. I'm sorry. You received --

When was the notice sent to -- I'm now asking Volkswagen. When was notice sent to the putative members of a class? Was it sent before the class certification? How does that work?

MS. NELLES: Right. It was --

MR. FEINMAN: It was afterwards.

THE COURT: Let me ask Volkswagen.

MS. NELLES: Your Honor, notice was sent after preliminary approval but before final approval. So in the summer of 2016.

THE COURT: So we have the summer of 2016.

MR. FEINMAN: Yes, sir.

THE COURT: And in the summer of 2016 your clients, or you, received notice of that -- a preliminary approval of a settlement which could impact your clients was approved by this court.

MR. FEINMAN: It was -- I believe -- of course, we have to go back and check the record. But going from memory here, I believe it was late June there was --

THE COURT: Late June. Would be early summer. Okay. At any rate, that was the notice that went out.

MR. FEINMAN: I think the proposed settlement became a matter of public record because it was filed in the court. I don't think any notice on that went out until well after that. I mean, I'm going to say August, but we would have to check the record. The notice to my client --

THE COURT: Volkswagen -- and I'm not sure dates are critical here, but --

MR. FEINMAN: I knew somewhere in the middle -- mid summer of 2016 -- that there was a proposed settlement. There

was an opt-out deadline. I'm going to try to say it was September 18 or 12, or something.

THE COURT: That does sound right. But the proposed settlement that went out that you received notice, however, you know, that there was a preliminary approval of a settlement --

MR. FEINMAN: Yes.

THE COURT: -- and you received --

MR. FEINMAN: That didn't happen until September, I don't think. I don't think Your Honor made a preliminary approval of the settlement until September, is my memory. This is all a matter of record.

THE COURT: I understand.

MS. NELLES: I believe it was July of 2016 was preliminarily approved.

THE COURT: You're quite right.

MR. FEINMAN: Okay.

THE COURT: It's all a matter of record.

MR. FEINMAN: Yes.

THE COURT: I'm not going to recreate a record. Let's just assume Volkswagen's recollection is correct. And that's consistent with your --

MR. FEINMAN: It's sometime between June and September, obviously. Yeah, I'll agree.

THE COURT: And in that notice of preliminary approval there was, in fact, a disclosure of the terms and conditions of

the settlement. Is that correct?

MR. FEINMAN: I think so.

THE COURT: And my question to you is once you received notice of the terms of the settlement --

MR. FEINMAN: Yes, Your Honor.

THE COURT: -- did you take any action on your client's behalf with respect to that proposed settlement?

MR. FEINMAN: Yes.

THE COURT: Okay. What did you do?

MR. FEINMAN: I did several things. I discussed it with countless numbers of them. I wrote them. I have to go back and see all this. It's all a matter of record. I think I wrote them and explained to them what the situation was. We talked to countless numbers of them explaining, you know, what they would receive under the proposed settlement and what they wouldn't. You know, what we thought we could accomplish so they could make a rational decision about what they wanted to do. And I did that. I also filed objections to the proposed settlement. And we did that. That's all a matter of record, as well.

THE COURT: Okay. So your objections to the proposed settlement were filed with this Court, is that correct?

MR. FEINMAN: Yes, sir. Certainly.

THE COURT: In the -- and I don't have them right in front of me right now, but you can refresh my recollection.

Did your objections to the proposed settlement address the question of the release?

MR. FEINMAN: In some ways it did. In some ways it didn't.

THE COURT: Tell me -- I don't want to know about the ways it didn't.

MR. FEINMAN: Okay.

THE COURT: But I want you to identify for me your objections that you filed that dealt with the question of the terms of the release.

MR. FEINMAN: It primarily focused on our position, which is still our position today, that the vehicles are illegal -- illegally imported, illegal to sell, and illegal to drive, and that the release was going to terminate Volkswagen's liability while the settlement called for all laws to be enforced.

So that put my clients, as well as other clients, in the position of the laws would be enforced against them at some later time because the settlement did not require the vehicles to be removed from use. And that when the law was enforced against them, Volkswagen's liability would already be terminated and that would be an unjust proposition. And that was the focus of our objection to the release.

THE COURT: Okay. Now I'd like to ask you more specific questions.

MR. FEINMAN: Yes, sir.

THE COURT: Paragraph 9.3 of the settlement agreement includes the following release of claims. Do you have it before you?

MR. FEINMAN: I will.

THE COURT: Okay.

MR. FEINMAN: Let's see. I'm getting there.

(Pause.)

MR. FEINMAN: Yes, sir. I have it in front of me.

THE COURT: And it says: In consideration for the settlement class members -- and I'm going to skip words because it's just too long -- on behalf of themselves and attorneys who may claim through or under them any and all claims that have arisen out of the 2.0-liter TDI matter, without limitation, any claims for liens, injunctive relief, attorneys, litigation fees or costs, other than fees and costs awarded by the Court in connection with this settlement.

It's a release of those claims.

My question to you is: In your objection that you filed with the Court, did you object to any of the language that is found in 9.3 of the class release?

MR. FEINMAN: The simple answer to that is "no." If you want me to take awhile, I will. But the answer is "no."

THE COURT: No. I'm not going to ask you why you didn't.

MR. FEINMAN: Okay.

THE COURT: I'm just going to ask you whether you did.

MR. FEINMAN: No, I didn't.

THE COURT: Okay. All right. Now, that release was included in your understanding, was it not, in the final approval of the class settlement?

MR. FEINMAN: That's -- yes. That's my understanding.

THE COURT: Okay. And prior to -- or, going to -- coincidental with this period of time, your clients decided to remain members of the class.

MR. FEINMAN: Well, if they didn't opt out by the opt-out date, that's correct. My memory --

THE COURT: And they did so after consulting with you.

MR. FEINMAN: Most did.

THE COURT: Some did not.

MR. FEINMAN: I can't say 100 percent of the 403 did.

THE COURT: Fair enough. Sure. But a number of them did.

MR. FEINMAN: Many, many.

THE COURT: Many, many. And I don't know -- I don't know that I need to get into the advice as to whether or not you told them "take it," "don't take it," but 400 took it and 200 didn't. Or, 300 didn't. Or whatever that number is.

MR. FEINMAN: I think I had 274 that did not.

THE COURT: Okay. So you had roughly two-thirds -- 60

percent, 55 percent, 60 percent of your clients decided to take it.

MR. FEINMAN: That's correct.

THE COURT: All right. As to the clients that took it, they have been compensated, is that correct, by Volkswagen?

MR. FEINMAN: You know, after the opt out, after they did not opt out, I considered myself discharged. The Court had appointed the plaintiffs' steering committee to represent them. I considered myself discharged.

THE COURT: Okay.

MR. FEINMAN: And what happened after that, I don't really know. I mean --

THE COURT: Okay. Now my next question is --

MR. FEINMAN: Yes, sir.

THE COURT: -- did you advise Volkswagen subsequent to the period of time that the clients either opted in -- I mean, either opted out or didn't, that Volkswagen would owe you some percentage or some amount of money under your agreement and the laws of the state of Virginia with respect to the claim? Did you advise Volkswagen of that fact?

MR. FEINMAN: I had written them before putting them on notice, which is what the law of Virginia requires.

THE COURT: That was before the settlement had been achieved.

MR. FEINMAN: That's correct.

THE COURT: Now I'm asking you, at any time during the point of time that there was preliminary approval of the class, to final approval of the class, did you advise Volkswagen that notwithstanding that fee settlement agreement you would be looking to Volkswagen to compensate them for -- to satisfy the lien that you had perfected? Did you advise them of that fact in that period of time?

MR. FEINMAN: I don't believe so.

THE COURT: Okay.

MR. FEINMAN: At that period of time, I don't believe I was really having, you know -- I got to think back on this. I think the only communication that I had with Volkswagen counsel at that time were local Virginia counsel. I don't think I had started any communication or correspondence with their New York counsel at that time that I can remember.

But to answer your question, no, I don't think I did.

THE COURT: Okay. All right. Let me see what else I have.

MR. FEINMAN: May I step to get some more water, Your Honor?

THE COURT: Yes. You know what I'm going to do? I'm going to take a five-minute recess then I'll come back. Five minutes.

(Recess taken at 10:46 a.m.)

(Proceedings resumed at 10:52 a.m.).

THE COURT: Okay. Let me -- let the record show parties are present.

Let me come back to some earlier questions that I asked.

As I understand your position, is that it was your view that when the client took the position that they wanted to remain a member of the class, you were effectively -- you viewed it as an effective discharge against you.

MR. FEINMAN: My understanding was that, Your Honor, this Court, had appointed the plaintiffs' steering committee to represent the class. And the people in the class had a choice to either continue in the class and be represented by the plaintiffs' steering committee, or to opt out and be represented by me.

THE COURT: Right.

MR. FEINMAN: In my case. In my clients' case. So when those 403 clients that we're here on today in September of 2016 did not exercise their right to opt out, they were exercising their right to remain in the class and be represented by the plaintiffs' steering committee which Your Honor had appointed to do. To represent them. So at that point, I was no longer -- I considered myself discharged at that point in those 403 cases.

THE COURT: And as such, you would not accept or receive -- maybe it's "receive," I don't know whether "accept" -- accept or receive the funds of your clients' entitlement to

the settlement.

MR. FEINMAN: I did not anticipate doing that, no. I didn't think that was going to happen. I thought I was going to have to enforce my lien, the way we do it in Virginia, in those circumstances. Which is what I've done.

THE COURT: Now you have a lien against the recovery.

MR. FEINMAN: The lien is, the way the statute's worded, is on the cause of action. And that any settlement that occurs after the defendant is put on notice in the form required by the statute, that any settlement after that is not effective against that cause of action. The attorney may still collect their lien from the defendant on a *quantum meruit* basis after he's been discharged. And I think that's the same law in California, I think it's the same law in New York.

THE COURT: And as I understand it historically, or in this case, you have actually asserted a claim against -- you asserted a claim against Volkswagen for -- we'll say for your *quantum meruit* representation of a consumer, or a member of the class.

MR. FEINMAN: That's the lawsuit that I filed --

THE COURT: In Virginia.

MR. FEINMAN: -- in late December in Virginia state court.

THE COURT: And in connection with that lawsuit who were the parties, other than Volkswagen?

MR. FEINMAN: Well, I was the plaintiff.

THE COURT: I mean, other than yourself, obviously.

MR. FEINMAN: That was it. That was it.

THE COURT: My question is, have you sued your clients?

MR. FEINMAN: Negative. No, sir. I have not.

THE COURT: So you haven't asserted any claim against your clients.

MR. FEINMAN: Correct.

THE COURT: But it is your view, or is it, that your clients owe you some portion of -- that they owe you for the *quantum meruit* of your claim?

MR. FEINMAN: No. No. That is not my view. I don't believe that's the law of Virginia. I believe that Volkswagen owes me my fee.

THE COURT: Do your clients owe you the fee?

MR. FEINMAN: No. I don't believe in this situation my clients owe me a fee in this situation. That's not the law of Virginia, sir.

THE COURT: I'm just asking you. So they don't owe you the fee; the fee is exclusively the responsibility of Volkswagen under the laws of Virginia.

MR. FEINMAN: In this factual situation, yes, sir.

THE COURT: And so a client who has been discharged who accepts the fee --

MR. FEINMAN: I don't follow you. Client has been discharged.

THE COURT: Your client who has discharged you. Sorry.

MR. FEINMAN: Right.

THE COURT: By remaining a member of the class.

MR. FEINMAN: Yes, sir.

THE WITNESS: Thereby obviates his -- his or her -- responsibility to pay you any funds.

MR. FEINMAN: Well, I think at that point in time it's up in the air because the settlement hasn't been approved.

THE COURT: No. After approval.

MR. FEINMAN: Yeah. After approval. The way I see it, a settlement has been reached between the defendant, Volkswagen, and my former client who's now represented by the plaintiffs' steering committee.

THE COURT: And that former client does not owe you any money.

MR. FEINMAN: At that point in time when the settlement funds are paid directly to my client, the way I understand it under Virginia law, that the defendant does so at their own peril.

THE COURT: No. My question is, does your client owe you any money?

MR. FEINMAN: Well, Your Honor, I don't know the exact

answer to that because we never go against the client. We always go against the defendant who has, under the law, the duty to protect the lien. So that's what we do. I'm not aware of any case in Virginia where the lien was enforced against a client. A former client. There may have been a case, but I'm not aware of those. I'm aware of many cases where it's enforced against the defendant.

THE COURT: And it was not your intention to go against the client for any of these funds.

MR. FEINMAN: That's correct.

THE COURT: Okay.

MR. FEINMAN: I don't think the law requires me to.

THE COURT: Okay, Mr. Feinman.

I do want -- we've been going for an hour. I do want to hear briefly from Volkswagen as to what their position is.

MR. FEINMAN: All right. Your Honor. I just answered your questions. I did want to present --

THE COURT: You've also filed your motion and briefs. So it's not like I'm unaware of your position. I know we haven't talked about your position as you wanted perhaps to talk about your position, but I read through your position. I read through Volkswagen's opposition. I had, as a result, a number of questions. And it took an hour to get -- I mean, you were very responsive. Please, don't think that I don't think -- you were unprofessional. You were responsive. You

enlightened -- you indicated to the Court what your responses were. I appreciate it. I want to hear briefly from Volkswagen.

MR. FEINMAN: Yes, sir, Your Honor. And if I may, given that it is their motion, I would like the opportunity to respond.

THE COURT: Sure. Okay. Briefly.

MS. NELLES: Thank you, Your Honor. Sharon Nelles from Sullivan & Cromwell on behalf of Volkswagen Group of America.

It's clear the Court has read the papers on both sides and has an appreciation for what the issues are here today. I'm happy to stand on those papers or answer any questions or anything I can do that would be helpful.

THE COURT: I have one question.

MS. NELLES: Sure.

THE COURT: Was it, in your opinion --

MS. NELLES: Yes.

THE COURT: -- having negotiated for many months, in intensive negotiations in order to achieve a settlement, would a settlement have been achieved if in fact Volkswagen found itself liable for attorney's fees in addition to those that were given to class counsel in connection with this matter? To both class counsel and to counsel who contributed to the common benefit. Would a settlement have been achieved?

MS. NELLES: Yes. Your Honor, I think if it had been understood or if it had been such that the release that prohibited such claims was unenforceable, not only would a settlement not have been achieved, any potential settlement, if it was turned out to be wrong in the interpretation, it would be frankly utter chaos. To have a situation where a federal court order which prohibits pursuing individualized claims for fees against a defendant after a settlement where fees are limited to those that are authorized by this Court would put not only this particular settlement in jeopardy, but I think clearly any national federal settlement in jeopardy.

THE COURT: Okay. Thank you, Ms. Nelles.

Now invite Mr. Feinman to respond to that argument.

MR. FEINMAN: Well, Your Honor, I would respond respectfully by saying that that question and that answer is speculative at this point. And I would further assert that, you know, a settlement in these circumstances does not have the power or the authority to destroy a property right of mine. Like I said, when the opt-out date passed, and 403 of my clients did not exercise the right to opt out, which is the same thing as exercising the right to stay in and to be represented by the plaintiffs' steering committee, I was discharged at that point. That was in September.

When Your Honor approved this release in October, I was no longer their attorney because you had appointed the plaintiffs'

steering committee to be their attorney, not me. And they had chosen to go with that.

Then you approved the settlement, and then the settlement happened according to however the money changed hands after that.

THE COURT: You know, I have a recollection. Let me just -- you said something that triggered a recollection.

My recollection is -- and I could be wrong because a lot has happened -- that somehow I extended the time for the opt outs so that the opt outs or opt ins, or however you want to call it --

MR. FEINMAN: I understand.

THE COURT: -- were aware of the proposed fee arrangement and how it would be paid. I did so -- let me just -- I did so, and I did so in an order, I did so because my concern was that while the fees would not be paid out of the settlement, in order to determine over what Volkswagen's overall exposure was -- that is, they said, We would be willing to pay X amount of dollars, I don't know, or fees, or however it was characterized -- a class member should know that in order to make an informed decision as to whether or not to opt out.

So I think I extended the opt-out period. Now I'm asking Ms. Nelles if my recollection as --

You're shaking your head. But let me just -- the record

is the record.

MR. FEINMAN: Right.

THE COURT: But if I'm off base, Ms. Nelles will tell me I'm off base. Go ahead.

MR. FEINMAN: I'll just say. My shaking my head means I don't remember what Your Honor's talking about.

THE COURT: Well, okay. I do.

MR. FEINMAN: I don't.

THE COURT: But I could be wrong.

MS. NELLES: Yes, Your Honor. You're not wrong. You did extend the opt-out period by, I believe, a matter of ten days to maybe two weeks. And during that period and before the opportunity for objections was going to expire you required Volkswagen to put a statement -- both the PSC and Volkswagen to put a statement on the record regarding how they were going to determine fees. And initially the PSC did put in the record the maximum amount they would be seeking.

THE COURT: Right.

MR. FEINMAN: I remember that. And that had to do with the fees of the plaintiffs' steering committee. I do remember that. But I don't remember anything about fees regarding non-plaintiff steering committee lawyers.

THE COURT: I'm not saying that I did.

MS. NELLES: Your Honor?

MR. FEINMAN: That's what I thought you were referring

to. And I don't remember that. I do remember what she just referred to. That dealt with the plaintiffs' steering committee.

THE COURT: Counsel referred to extending the opt-out period.

MS. NELLES: Your Honor, if I may.

THE COURT: Yes.

MS. NELLES: There was a course of events -- Let me come up. Thank you.

THE COURT: Sure.

MS. NELLES: Course of events which I think might be coming a little bit confused because of so much that happened so quickly.

Is that you may recall that after that -- after the request for fees came in, several attorneys did in fact file notices of liens against any proceeds to class members. And what happened then is the Court entered a temporary order -- entered an order temporarily enjoining payment.

THE COURT: No, I recall that. I recall that. I'm sure everybody recalls that.

MS. NELLES: Yes.

THE COURT: But that was after final approval.

MR. FEINMAN: I think so.

MS. NELLES: It was following final approval and prior to the award of fees.

THE COURT: Right. Okay.

Anything else, Mr. Feinman?

MR. FEINMAN: Well, yes, Your Honor. I think there was an objection made prior to final approval.

THE COURT: Really?

MR. FEINMAN: That -- I think it's in your order that you discussed it that there was objection made that said this makes no provision for payment of private attorneys. And Your Honor wrote at that time that -- if I can -- this quote: "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 designate to perform work in connection with this litigation." Close quote.

I think that the Court got it right then that the settlement was silent as to that, and it's still silent today. Now they want to make the settlement speak volumes as to Volkswagen's obligations to pay the fees and costs, but the contemporaneous ruling and construction that Your Honor made at that time was correct. And then --

THE COURT: It depends on what's meant by "is silent." But go ahead.

MR. FEINMAN: Okay. What I'm saying, Your Honor, is that Volkswagen's position is incorrect. Because my attorney's fee lien was a perfected property right. And by its very nature, a settlement between the defendant and the plaintiff

who discharges his former lawyer does not release the lien.

The plaintiff cannot release the attorney's lien. At the time Your Honor approved the settlement and the release that went with it, I was no longer the people in the class's attorney. I had been discharged. They had no interest -- we had no common interest at that point in time. They could not have released my fees.

The class representatives and the class got a great benefit out of approving that class action settlement, and I got nothing out of it. They did not -- at that point in time, they didn't own my claim. I owned my claim, according to the law of Virginia. They had no right to resolve it.

I think that's what the *Hansberry* case says. I think it's a fundamental principle of class action litigation that class representatives can only release claims they possess in common with the class. We provide you Supreme Court citation on that.

My state law attorney fee lien is my claim, and only my claim. No class representative had authority or power to release it. My claim is based on different factual predicate all together when compared to the factual predicate that the class claims are based on.

To do what Volkswagen wants this Court to do would be to destroy a very valuable property right given to me by state law in a manner contrary to well-settled law.

There's nothing about my attorney fee lien that affects

the settlement in any way. The settlement says Volkswagen is not entitled to any credit for the amounts it paid the class and cannot recover from the class any attorney's fees that they have to pay. There's no legitimate reason for this federal court to enjoin the proceedings in the Virginia state court, which is in essence what's happening.

Congress has not authorized such an injunction. I don't believe it's necessary in aid of this Court's jurisdiction. I don't believe it's necessary to protect or effectuate this Court's judgment. All doubts are resolved by not issuing such an injunction.

There's no strong and unequivocal showing here that this Court's already ruled the settlement is silent regard paying nonclass counsel. I don't believe that's even equivocal. I believe that's a correct and clear ruling.

The *Hansberry* case that we provided to the Court provided to the Court states, quote, "One is not bound by judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States prescribe." Close quote.

It goes on to say that to allow such release to be made by representatives, quote, "whose substantial interests are not necessarily or probably the same as those they are deemed to

represent, does not afford that protection to absent parties which due process requires. The representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation and conflict in the litigants." Close quote.

What the Supreme Court was saying is that to let a class representative release claims they do not possess or own when they get something in return is just a conflict of interest that we will not allow.

I think that the record here shows Volkswagen has put me through years and years of delay and expense to prevent me from recovering the pay the public policy of Virginia says I'm entitled to recover.

I beg this Honorable Court to end this today and deny Volkswagen's motion to enforce a settlement agreement against me for the reasons stated in the written submissions and stated today.

Your Honor, they have -- no class had any authority to destroy my property right given to me by state law. And I'm entitled to collect it, and that's what I've tried to do. I've been respectful of this Court in every way that I know how. I'm not interested -- not interested -- I'll do everything I can not to violate any order of this Court or any other court. But, you know, I'm entitled under Virginia law to do what I'm

doing. And I ask that this Court deny their motion which is geared solely to stop that.

THE COURT: Okay. Submitted?

MR. FEINMAN: Unless Your Honor has other questions.

THE COURT: I don't. Submitted?

MS. NELLES: Certainly, Your Honor.

THE COURT: Okay. So it's the ruling of this Court that Volkswagen has been released from the claim submitted by Mr. Feinman. That, for several reasons.

Number one is that I believe that the release is valid and it applies to Mr. Feinman's claim. And number two, it's abundantly clear that this settlement would not have been achieved but for a release of these claims that you assert and perhaps others would assert as well.

It is my intention, Mr. Feinman, to write an order setting forth my reasons for the opinion, but I wanted to rule today so that any other court which is concerned about the settlement agreement entered into by Volkswagen and your clients -- and your clients -- be interpreted in the way that the Court feels is the appropriate interpretation of that claim.

And so I wanted to rule that way today. I expect shortly within the next two weeks to get a -- what I hope is a reasoned opinion out of this court. And, obviously, while you disagree with it, the remedies are available to you to seek review.

I also want to point out that I think you've been entirely

professional. You have treated this court with great respect. I appreciate your courtesy, I appreciate your directness, I appreciate your candor. And so, you know, while I've ruled against you, I hope you know that it was based upon my understanding of the merits of your claim and hardly and does not impact or shouldn't reflect in any way the lack of zeal or professionalism with which you brought this claim to the attention of the parties.

So thank you very much. And we're in recess now.

MR. FEINMAN: Your Honor, if I may --

MS. NELLES: Thank you, Your Honor.

THE COURT: Go ahead Mr. Feinman. Sure.

MR. FEINMAN: I need to know, Your Honor. With all respect, am I enjoined? I need to know that.

THE COURT: I will issue an order setting forth exactly the nature of the relief that is being sought. But I want -- the one thing I certainly think you should advise, if you're going back to court in the next two weeks before you get my order, you should certainly -- my expectation is that you would advise any court of this Court's ruling in that regard. And I will try to make it as definitive as I can, as possible.

MR. FEINMAN: Yes, sir, Your Honor. I just wanted to know if the Court is enjoining the state court proceeding and enjoining -- and/or enjoining me. Because I don't want to run afoul of anything. And if that's the case, there is a

different remedy. And, you know, I just want to know where I am.

THE COURT: And all I'm saying, Mr. Feinman, because you've been extraordinarily patient up till now, wait two weeks --

MR. FEINMAN: Okay.

THE COURT: -- get the Court's opinion, and then act accordingly.

MR. FEINMAN: All right. Certainly.

THE COURT: Thank you very much.

MS. NELLES: Thank you, Your Honor.

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Wednesday, April 24, 2019

Vicki Eastvold, RMR, CRR
U.S. Court Reporter

APPENDIX D

914 F.3d 623
United States Court of Appeals, Ninth Circuit.

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; 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,
Bishop, Heenan & Davies,
Objector-Appellant,
v.
Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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,

Law Office of Maloney & Campolo, LLP, Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,

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James Ben Feinman; Ronald Clark Fleshman, Jr., Objectors-Appellants,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,

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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; 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,

Lemberg Law, LLC, Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,

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; 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,

Nagel Rice, LLP, Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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,
Strong Law Offices, Objector-Appellant,
v.
Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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

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Hyde & Swigart, Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

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; 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,

The Driscoll Firm, P.C.,

Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,

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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; 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,

Viles and Beckman, LLC,

Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

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; 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,

Holton Law Firm, PLLC,

Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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,
Makarem & Associates, APLC, Objector-Appellant,
v.
Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; Carmel Rubin; Daniel Sullivan; Matthew Cure; Denise De Fiesta; Mark Rovner; Wolfgang Steudel; Anne Mahle; David McCarthy; 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,
Law Office of Samuel W. Bearman, LLC; Sellers Skievaski Kuder LLP; Artice McGraw, PA, Objectors-Appellants,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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,
Harrell & Nowak, LLC, Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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,

Egolf Ferlic Harwood, LLC, Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

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; Carmel Rubin; Daniel Sullivan; Matthew Cure; Denise De Fiesta; Mark Rovner; Wolfgang Steudel; Anne Mahle; David McCarthy; 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,

Ryder Law Firm, P.C., Objector-Appellant,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North

America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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,
Paul S. Rothstein, Objector-Appellant,
v.
Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.
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; 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,

Hawks Quindel, S.C.; Habush Habush & Rottier, S.C., Objectors-Appellants,

v.

Volkswagen Group of America, Inc.; Volkswagen, AG; Audi, AG; Audi of America, LLC; Porsche Cars North America, Inc.; Robert Bosch GMBH; Robert Bosch, LLC, Defendants-Appellees.

No. 17-16020, No. 17-16065, No. 17-16067, No. 17-16068, No. 17-16082, No. 17-16083, No. 17-16089, No. 17-16092, No. 17-16099, No. 17-16123, No. 17-16124, No. 17-16130, No. 17-16132, No. 17-16156, No. 17-16158, No. 17-16172, No. 17-16180

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Argued and Submitted December 19, 2018 San Francisco, California

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Filed January 22, 2019

Synopsis

Background: Following approval of settlement of multi-district litigation between motor-vehicle manufacturer and class of owners and lessees of certain model motor-vehicles, resolving owners' and lessees' claims predicated on the manufacturer's use of a "defeat device," i.e., software designed to cheat emissions tests in those vehicles, and award of $175 million in attorney fees and costs for class counsel, attorneys and law firms that did not serve as class counsel and were not compensated out of the $175 million filed 244 motions for attorney fees and costs. The United States District Court for the Northern District of California, Charles R. Breyer, J., 2017 WL 1474312, denied the motion. Non-class counsel appealed.

Holdings: The Court of Appeals, Milan D. Smith, Jr., Circuit Judge, held that:

[1] non-class counsel had standing to challenge district court's fee order;

[2] non-class counsel was not entitled to attorney fees based on work performed before appointment of class counsel;

[3] non-class counsel was not entitled to attorney fees based on work performed after appointment of class counsel;

[4] district court supplied necessary level of explanation for its decision denying non-class counsel attorney fees;

[5] non-class counsel was not entitled to attorney fees under settlement agreement; and

[6] non-class counsel was not entitled to attorney fees under equitable principles of quantum meruit or unjust enrichment.

Affirmed.

West Headnotes (11)

[1] **Federal Courts** ⇐ Costs and attorney fees

An order denying attorney fees is reviewed for abuse of discretion.

[2] **Federal Courts** ⇐ Questions of Law in General

Federal Courts ⇐ "Clearly erroneous" standard of review in general

A district court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo.

[3] **Federal Courts** ⇐ Persons Entitled to Seek Review or Assert Arguments; Parties; Standing

Non-class counsel had standing to challenge district court's fee order granting class counsel

$175 million in attorney fees and costs and not awarding non-class counsel attorney fees and costs, following settlement of multi-district litigation between motor-vehicle manufacturer and class of owners and lessees of certain model motor-vehicles, resolving owners' and lessees' claims predicated on the manufacturer's use of a "defeat device," i.e., software designed to cheat emissions tests in those vehicles; non-class counsel suffered an injury, i.e., deprivation of attorney fees, that was caused by conduct complained of, i.e., district court's fee order awarding attorney fees to class counsel, and would be redressed by judicial relief. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 23.

[4] **Compromise, Settlement, and Release** ⇐ Class settlements

Non-class counsel could only be entitled to attorneys' fees if they provided substantial benefit to the class, following settlement in multi-district litigation between motor-vehicle manufacturer and class of owners and lessees of certain model motor-vehicles, resolving owners' and lessees' claims predicated on the manufacturer's use of a "defeat device," i.e., software designed to cheat emissions tests in those vehicles; fee shifting was not expressly authorized by governing statute, opponents did not act in bad faith or willfully violate a court order, and the underlying class action did not feature a traditional common fund from which attorneys' fees were procured. Fed. R. Civ. P. 23.

1 Cases that cite this headnote

[5] **Compromise, Settlement, and Release** ⇐ Class settlements

Non-class counsel was not entitled to attorneys' fees based on work they performed before appointment of class counsel, in action brought by class of motor-vehicle owners and lessees alleging that motor-vehicle manufacturer used a "defeat device," i.e., software designed to cheat emissions tests, in their vehicles, absent any indication that the counsels' work on behalf of their individual clients contributed to the negotiation or crafting of the settlement resolving the owners' and lessees' claims, or otherwise benefited the class in any meaningful way. Fed. R. Civ. P. 23.

1 Cases that cite this headnote

[6] **Federal Civil Procedure** ⇐ Class actions

Work performed by non-class counsel after appointment of class counsel, including fielding inquiries from prospective clients, explaining the process and mechanics of settlement, and remaining updated on the case, did not benefit the class, and thus non-class counsel was not entitled to attorneys' fees based on that work in action brought by motor-vehicle owners and lessees alleging that motor-vehicle manufacturer used a "defeat device," i.e., software designed to cheat emissions tests, in their vehicles; such work was specifically mandated by district court's pretrial order (PTO), which emphasized that only court-appointed counsel and those attorneys working on assignments therefrom were doing so for the common benefit and that all other counsel reviewing those filing and orders for their own benefit and that of their respective clients would not be considered common benefit work, and non-class counsel was required to abide by the PTO. Fed. R. Civ. P. 23.

2 Cases that cite this headnote

[7] **Federal Civil Procedure** ⇐ Attorney fees

A district court must articulate with sufficient clarity the manner in which it made its determination regarding whether to award attorneys' fees.

[8] **Federal Civil Procedure** ⇐ Attorney fees

District court supplied necessary level of explanation for its decision denying non-class counsels' 244 motions for attorneys' fees and costs, and thus district court did not abuse its discretion in denying the motions following settlement of multi-district litigation between motor-vehicle manufacturer and owners and lessees of certain model motor-vehicles,

resolving owners' and lessees' claims predicated on the manufacturer's use of a "defeat device," i.e., software designed to cheat emissions tests in those vehicles, and award of $175 million in attorneys' fees and costs for class counsel; district court sufficiently set forth guidance provided by rule governing class actions and relevant appellate decisions, and then accurately described the various work non-class counsel performed both before and after the appointment of class counsel, none of which constituted evidence that non-class counsels' services benefited the class. Fed. R. Civ. P. 23.

[9] **Compromise, Settlement, and Release** ⇐ Costs and fees of litigation

Compromise, Settlement, and Release ⇐ Class settlements

Non-class counsel was not entitled to attorneys' fees under settlement agreement between motor-vehicle manufacturer and owners and lessees of manufacturer's vehicles, resolving owners' and lessees' claims predicated on the manufacturer's use of a "defeat device," i.e., software designed to cheat emissions tests in those vehicles; agreement clearly provided only that the manufacturer agreed to pay reasonable attorneys' fees and costs by class counsel in connection with the action as well as work performed by other attorneys designated by class counsel to perform work in connection with the action, and non-class counsel was not designated by class counsel to perform work in connection with the action.

1 Cases that cite this headnote

[10] **Attorneys and Legal Services** ⇐ Performance of services; benefit to client

Federal Civil Procedure ⇐ Class actions

Non-class counsel was not entitled to attorneys' fees under equitable principles of quantum meruit or unjust enrichment following settlement of motor-vehicle owners' and lessees' class action against motor-vehicle manufacturer, resolving owners' and lessees' claims predicated on the manufacturer's use of a "defeat device," i.e., software designed to cheat emissions tests in those vehicles, and award of $175 million in attorneys' fees and costs for class counsel; because non-class counsel's efforts did not benefit the class, neither the class members nor class counsel were unjustly enriched at non-class counsels' expense.

[11] **Federal Courts** ⇐ Particular cases

Non-class counsel's appeal from district court's lien order and preliminary injunction, enjoining efforts to assert attorney fee lien claims under state law, was moot, in multi-district litigation between motor-vehicle manufacturer and owners and lessees of certain model motor-vehicles; district court had vacated the lien order and its injunction, and they were no longer in effect.

Attorneys and Law Firms

*635 Bruce H. Nagel (argued) and Diane E. Sammons, Nagel Rice, LLP, Roseland, New Jersey; James B. Feinman (argued), James B. Feinman & Associates, Lynchburg, California; Sara Khosroabadi and Joshua B. Swigart, Hyde & Swigart, San Diego, California; for Objectors-Appellants.

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David Boies, Boies Schiller & Flexner LLP, Armonk, New York; W. Daniel "Dee" Miles III, Beasley Allen Law Firm, Montgomery, Alabama; Benjamin L. Bailey, Bailey Glasser LLP, Charleston, West Virginia; Steve W. Berman, Hagens Berman, Seattle, Washington; Rosemary M. Rivas, Levi & Korsinsky LLP, San Francisco, California; David Seabold Casey Jr., Casey Gerry Schenk Franca Villa Blatt & Penfield LLP, San Diego, California; J. Gerard Stranch IV, Branstetter Stranch & Jennings, PLLC, Nashville, Tennessee; Lesley E. Weaver, Bleichmar Fonti & Auld LLP, Oakland, California; Roland K. Tellis, Baron & Budd P.C., Encino, California; for Plaintiffs-Appellees.

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

Appeal from the United States District Court for the Northern District of California, Charles R. Breyer, District Judge, Presiding, D.C. No. 3:15-md-02672-CRB

Before: MILAN D. SMITH, JR. and JACQUELINE H. NGUYEN, Circuit Judges, and JANE A. RESTANI,* Judge.

OPINION

M. SMITH, Circuit Judge:

Appellants are lawyers and law firms that represented class members in an underlying class action that secured a settlement of more than $10 billion and an additional award of $175 million in fees for class counsel. Non-class counsel filed 244 motions for attorneys' fees. In a single order, the district court denied all of the motions, determining that the lawyers neither performed common benefit work nor *636 followed the proper procedures for compensation. We affirm.[1]

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

On September 18, 2015, the Environmental Protection Agency (EPA) issued a Notice of Violation (NOV) in which it alleged that Defendants-Appellees Volkswagen Group of America, Inc., Volkswagen, AG, and Audi, AG (collectively, Volkswagen) used "defeat devices" in 500,000 Volkswagen- and Audi-branded TDI "clean diesel" vehicles. As the district court later explained,

> [T]he 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 [the California Air Resources Board] 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.

Two months later, the EPA issued a second NOV to Volkswagen and Defendant-Appellee Porsche Cars of North America, Inc., which implicated the companies' 3.0-liter diesel engine vehicles.

II. Procedural Background

A. Commencement of Lawsuits

Soon after the issuance of the NOVs, consumers nationwide commenced hundreds of lawsuits. One such action was spearheaded by Appellant Nagel Rice, LLP (Nagel Rice), an illustrative law firm that represented forty-three Volkswagen owners from various states. Nagel Rice filed a complaint in New Jersey federal court on September 21, 2015—three days after the issuance of the first NOV and two months before the eventual consolidation of all related cases. During this early representation, Nagel Rice asserts that it performed various activities related to the litigation, including conducting research, fielding calls from prospective clients and the media, and communicating with German legal counsel regarding potential jurisdictional and evidentiary issues.

Eventually, on December 8, 2015, the Judicial Panel on Multidistrict Litigation consolidated the various lawsuits and transferred them to the U.S. District Court for the Northern District of California. Ultimately, the district court received more than one thousand Volkswagen cases as part of this multidistrict litigation (MDL), titled *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, MDL 2672.

B. Pretrial Orders

On December 9, 2015—the day after the consolidation and transfer—the district court issued its first pretrial order (PTO), in which it announced its intent "to appoint *637 a Plaintiffs' Steering Committee(s) to conduct and coordinate the pretrial

stage of this litigation with the defendants' representatives or committee." Nagel Rice was one of the firms that submitted papers to be selected either as Lead Counsel or as a member of the Plaintiffs' Steering Committee (PSC).

The district court selected a twenty-one-member PSC following the application process, and appointed it and Lead Counsel (together, Class Counsel) in its seventh PTO (PTO No. 7). This PTO asserted that "as to all matters common to the coordinated cases, and to the fullest extent consistent with the independent fiduciary obligations owed by any and all plaintiffs' counsel to their clients and any putative class, [ ] pretrial proceedings shall [be] conducted by and through the PSC."

In its eleventh PTO (PTO No. 11), filed on February 25, 2016, the district court outlined its protocol for common benefit work and expenses. The court explained that "[t]he recovery of common benefit attorneys' fees and cost reimbursements will be limited to 'Participating Counsel,' " which it defined as

> Lead Counsel and members of the Plaintiffs' Steering Committee (along with members and staff of their respective firms), any other counsel authorized by Lead Counsel to perform work that may be considered for common benefit compensation, and/or counsel who have been specifically approved by this Court as Participating Counsel prior to incurring any such cost or expense.

It further elaborated that "Participating Counsel shall be eligible to receive common benefit attorneys' fees and reimbursement of costs and expenses only if the time expended, costs incurred, and activity in question were (a) for the common benefit of Plaintiffs; (b) timely submitted; and (c) reasonable." As to the first requirement—"for the common benefit of Plaintiffs"—the district court explained that

> [o]nly Court-appointed Counsel and those attorneys working on assignments therefrom that require them to review, analyze, or summarize those filings or Orders in connection with their assignments are doing so for the common benefit. *All other counsel are reviewing those filings and Orders for their own benefit and that of their respective clients and such review will not be considered Common Benefit Work.*

(emphasis added). Class Counsel later reported that "Lead Counsel took advantage of the authority granted in PTO 7 to enlist and authorize nearly 100 additional firms to perform the necessary common benefit work, which was then tracked pursuant to the protocol set forth in PTO 11."[2]

The PTOs' guidance notwithstanding, Nagel Rice claims that, although it was not selected to be Lead Counsel or a member of the PSC, it "appeared telephonically in almost every court appearance relative to the case and provided continual updates to clients via email," and "fielded scores of telephone calls from clients and other class members seeking information relative to the settlement and the process for submitting objections and claims." Similarly, another lawyer, Appellant James Ben Feinman, ***638** extensively litigated on behalf of 403 individual clients in Virginia state and federal courts, in addition to monitoring the MDL. There is no indication in the record that Nagel Rice, Feinman, or any other Appellants fully complied with the PTOs in performing these efforts.

C. Settlement Process

Class Counsel, along with ninety-seven additional plaintiffs' firms that Lead Counsel enlisted pursuant to PTO No. 11, embarked on an aggressive settlement process that, in the words of Settlement Master Robert S. Mueller III, "involved at least 40 meetings and in-person conferences at various locations, including San Francisco, New York City, and Washington, DC, over a five-month period. A number of these sessions lasted many hours, both early and late, and weekends were not excluded." The efforts undertaken by this group included drafting a 719-page consolidated class action complaint, selecting class representatives, requesting and reviewing more than 12 million pages of Volkswagen documents, and conducting settlement negotiations.

The district court preliminarily approved the resulting Consolidated Consumer Class Action Settlement (the Settlement) on July 29, 2016. In their motion for preliminary approval, the class action's plaintiffs (Plaintiffs) asserted that "[n]one of the settlement benefits for Class Members will be reduced to pay attorneys' fees or to reimburse expenses of Class Counsel. Volkswagen will pay attorneys' fees and costs separately and in addition to the Settlement benefits to Class Members."

The court filed its final approval of the Settlement on October 25, 2016. As of November 2017—one year before the end of the claims period—the claims of more than 300,000 class members had been submitted and finalized, resulting in payments of nearly $7 billion.

D. Recovery of Attorneys' Fees

Notably, for purposes of these appeals, section 11.1 of the Settlement read in part as follows:

> Volkswagen agrees to pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as the work performed by other attorneys designated by Class Counsel to perform work in connection with the Action in an amount to be negotiated by the Parties and that must be approved by the Court.... If the Parties reach an agreement about the amount of attorneys' fees and costs, Class Counsel will submit the negotiated amount to the Court for approval.... The Parties shall have the right to appeal the Court's determination as to the amount of attorneys' fees and costs.

Volkswagen and Class Counsel eventually agreed to an award of $175 million in attorneys' fees and costs, which the district court granted on March 17, 2017.

In November 2016, Volkswagen informed the district court that it had begun receiving "notices of representation from [attorneys] purporting to assert attorneys' fee liens on payments made to certain class members under" the Settlement. The district court also began to receive motions for attorneys' fees and costs. In response, the court issued an order regarding attorneys' liens (the Lien Order) on November 22, 2016. It noted that a purpose of the Settlement was to "ensure[ ] Class Members who participate in a Buyback have sufficient cash to purchase a comparable replacement vehicle and thus facilitate[ ] removal of the polluting vehicles from the road." The court continued,

> ***639** An attorneys' lien on a Class Member's recovery frustrates this goal. By diverting a portion of Class Members' compensation to private counsel, a lien reduces Class Members' compensation and places them in a position where they must purchase another vehicle but lack the funds to do so. Put another way, attorneys—notably, attorneys who did not have a hand in negotiating the Settlement—stand to profit while their clients are left with inadequate compensation.

Accordingly, pursuant to its power under the All Writs Act, the district court "enjoin[ed] any state court proceeding relating to an attorneys' lien on any Class Member's recovery under the Settlement."

However, acknowledging that "some attorneys may have provided Class Members with compensable services," the court also established a procedure for recovery of attorneys' fees, requiring "a separate application for each Class Member" that would include "the amount sought; the specific legal service(s) provided, including time records; and the terms of the fee agreement that require such an award." The court ultimately received 244 applications, including one from Nagel Rice.

Feinman, the Virginia lawyer who continued his litigation activities even after consolidation and appointment of Class Counsel, filed an objection to the Lien Order injunction and requested more time to comply with the procedure for fee applications. In his objection, he explained the propriety of his attorney's lien in Virginia, and called into question the district court's federal question jurisdiction over the claims of his clients. He concluded that "this Honorable Court has no right, authority or power to annul or repeal Virginia law in regard to statutorily-created liens for attorneys' fees. To do so violates the property rights of Mr. Feinman without due process of law, and violates the Full Faith and Credit Clause of the United States."

After reviewing the 244 fee applications, the district court issued an order (the Fee Order) in which it determined that "Volkswagen did not agree to pay these fees and costs as part of the Settlement, and [ ] Non-Class Counsel have not offered evidence that their services benefited the *class*, as opposed to their individual clients," and consequently denied the motions. The court concluded that "Non-Class Counsel's filing of individual and class complaints prior to the MDL did not benefit the class" because, due to the short time between the first NOV and consolidation of the MDL, little pretrial activity occurred that might have driven settlement negotiations. It also noted that although "Non-Class Counsel offer[ed] evidence that ... they fielded hundreds of phone calls from prospective and actual clients," these efforts "at most benefited individual class members, not the class as a whole." As for work undertaken after appointment of Class Counsel, the court determined that, due to its PTOs, "Non-Class Counsel [ ] were on notice that they would not receive common benefit compensation for these efforts," and had also been informed of the required compensation procedure outlined in PTO No. 11. Finally, the district court concluded that "the time Non-Class Counsel spent advising class members on the terms of the Settlement" was "duplicative of that undertaken by Class counsel, and therefore did not 'confer[ ] a benefit *beyond* that conferred by lead counsel.' " (alteration in original) (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 191 (3d Cir. 2005)). Consequently, the court denied the 244 fee applications.

In denying the applications, the district court also recognized that "[w]hile Non-Class *640 Counsel are not entitled to fees from Volkswagen as part of this class action, Non-Class Counsel may be entitled to payment of certain fees and costs pursuant to attorney-client fee agreements." Accordingly, the court vacated the Lien Order and its accompanying injunction on state court actions to facilitate such recovery.

These appeals followed.

STANDARD OF REVIEW AND JURISDICTION

[1] [2] An order denying attorneys' fees is reviewed for abuse of discretion. *Lane v. Residential Funding Corp.*, 323 F.3d 739, 742 (9th Cir. 2003). "Findings of fact are reviewed for clear error; conclusions of law are reviewed de novo." *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016). We have jurisdiction pursuant to 28 U.S.C. § 1291.

ANALYSIS

Nagel Rice and the other Appellants that signed its brief (collectively, Nagel Appellants) suggest that "[t]his appeal presents an issue of first impression in the Ninth Circuit: whether Independent Counsel who performed services and incurred costs in a multi-district litigation prior to the appointment of Lead Counsel are entitled to an award of fees and costs, or are only the firms appointed to leadership roles entitled to a fee award for services performed prior to their appointment." In truth, however, the central issue before us is narrower: whether the district court abused its discretion when it denied Appellants' motions for attorneys' fees. Appellants' challenges to the Fee Order raise various legal issues, which we will address in turn.

I. Standing

As a threshold matter, Volkswagen argues that Appellants lack standing to appeal. It premises this contention on our previous determination that "the right to seek attorney's fees [is vested] in the prevailing party, not her attorney, and [ ] attorneys therefore lack standing to pursue them." *Pony v. County of Los Angeles*, 433 F.3d 1138, 1142 (9th Cir. 2006). Because Appellants are law firms and lawyers that appeal in their own names (with the exception of Appellant Ronald Clark Fleshman, Jr., who is one of Feinman's clients and joins his attorney's appeal), Volkswagen contends that Appellants lack standing to vindicate a right that is properly vested with their clients, the underlying class members.

We disagree. Nagel Appellants correctly observe that the cases on which Volkswagen relies, *Pony* included, concerned *statutory* attorneys' fees provisions. *See Pony*, 433 F.3d at 1142 (discussing fees authorized pursuant to 42 U.S.C. § 1988). Here, by contrast, Appellants did not seek fees pursuant to statute, and so we cannot base our conclusion on *Pony* or other similar cases.

[3] Instead, we conclude that, as a matter of first principles, Appellants have the most compelling case for standing because they suffered an injury (deprivation of attorneys' fees) that was caused by the conduct complained of (the Fee Order) and would be redressed by judicial relief. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *cf. Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1088–89 (9th Cir. 2011) (concluding that class plaintiffs in a non-common fund case lacked standing to appeal an attorneys' fee award to class counsel because it did not affect class plaintiffs' recovery and so they were not " 'aggrieved' by the fee award" (quoting *641 *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994))). Here, Appellants were aggrieved by the district court's denial of their motions for attorneys' fees. Therefore, we conclude that Appellants properly have standing to challenge the Fee Order.[3]

II. The Fee Order

Federal Rule of Civil Procedure 23 permits a court to "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Various courts, including our own, have determined that even non-class counsel can be entitled to attorneys' fees. *See, e.g.*, *Stetson*, 821 F.3d at 1163–65 (9th Cir. 2016) (indicating that an objector can be entitled to attorneys' fees in a class action); *In re Cendant*, 404 F.3d at 195 (concluding that an attorney who "creates a substantial benefit for the class" can be "entitled to compensation whether or not chosen as lead counsel").

[4] Although Rule 23 permits an award of fees when authorized by law or the parties' agreement, courts

> 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. The reasonableness of any fee award must be considered against the backdrop

of the "American Rule," which provides that courts generally are without discretion to award attorneys' fees to a prevailing plaintiff unless (1) fee-shifting is expressly authorized by the governing statute; (2) the opponents acted in bad faith or willfully violated a court order; or (3) "the successful litigants have created a common fund for recovery or *extended a substantial benefit to a class*."

In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011) (emphasis added) (citations omitted) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 275, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (Marshall, J., dissenting)). Here, there is no dispute that neither the first nor the second scenario is applicable. Therefore, Appellants would be entitled to attorneys' fees only if they contributed to the creation of a common fund or otherwise benefited the class. Because the underlying class action did not feature a traditional common fund from which attorneys' fees were procured,[4] Appellants could only have collected fees if they provided ***642** a substantial benefit to the class, as the district court correctly recognized. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051–52 (9th Cir. 2002) ("Because objectors did not ... substantially benefit the class members, they were not entitled to fees." (citing *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wash.2d 52, 847 P.2d 440, 449–50 (1993))).

This is the central issue across the consolidated appeals: whether Appellants' efforts meaningfully benefited the class, and whether the district court abused its discretion when it concluded that they did not and denied their fee motions on that basis.

A. Common Benefit Work

We ultimately conclude that the district court did not abuse its discretion when it determined that the efforts of non-Class Counsel for which they sought fees did not benefit the class such that they would be entitled to compensation.

In their reply brief, Nagel Appellants summarize the efforts for which they sought reimbursement:

- Commencing hundreds of lawsuits nationwide after public disclosure of the first NOV and before the advent of the MDL;
- Filing motions, including "at least four motions to preserve evidence" and "at least three motions for interim lead counsel positions";
- Conducting early settlement efforts prior to consolidation;
- Conducting preliminary discovery;

Presenting "at least eight conferences for attorneys across the country to analyze, discuss, and refine approaches to bringing the cases";

Securing the appointment of two mediators in several New Jersey actions prior to consolidation;

Researching potential causes of action;

- "Fielding and vetting [ ] hundreds of phone calls from prospective clients," as well as press inquiries;
- Communicating and coordinating with other attorneys;
- "Communicating with prospective German legal counsel regarding potential jurisdiction issues and possible efforts to secure key evidence from a foreign country";
- "[A]ppearing in New Orleans with a group of other local law firms to argue in support of the transfer and consolidation of all the cases to the State of New Jersey, where [Volkswagen] is incorporated and where it maintains key management offices";
- Appearing telephonically in court appearances and providing updates to clients after the appointment of Class Counsel.

Our analysis will first consider those efforts undertaken prior to the appointment of Class Counsel, before addressing work performed subsequently.

i. Work Before Appointment of Class Counsel

[5] As Plaintiffs correctly note, "[E]ven assuming these activities are all attributable to the Appellants, [they] fail to establish how, precisely, these activities benefitted the Class. This shortcoming is fatal to Appellants' appeals." In *In re Cendant*, a case on which Nagel Appellants frequently rely, the court distinguished between work that benefits a class and other, non-compensable work:

> [W]e do not think that attorneys can simply manufacture fees for themselves by filing a complaint in a securities class action. On the other hand, attorneys who alone discover grounds for a suit, based on their own investigation rather than ***643** on public reports, legitimately create a benefit for the class, and comport with the purposes of the securities laws. Such attorneys should

> generally be compensated out of the class's recovery, even if the lead plaintiff does not choose them to represent the class. More generally, attorneys whose complaints contain factual research or legal theories that lead counsel did not discover, and upon which lead counsel later rely, will have a claim on a share of the class's recovery.

404 F.3d at 196–97 (footnote omitted). Undoubtedly, Appellants undertook various pre-consolidation efforts on behalf of *their individual clients*, but there is no indication, either in the voluminous record they provided or in the briefs, that this work contributed to the negotiation or crafting of the Settlement or otherwise benefited the class in any meaningful way. Appellants may have filed complaints and conducted preliminary discovery and settlement work on behalf of their clients before consolidation of the MDL and appointment of Class Counsel, but they do not appear to have discovered grounds for suit outside of the information contained in the widely publicized NOVs, or otherwise provided guidance or insights that were later used in securing the Settlement. In short, Appellants have not demonstrated that, in Plaintiffs' words, "they engaged in serious settlement efforts, much less that any such efforts contributed to the class settlement framework that was ultimately reached, approved, and successfully implemented." Therefore, the district court did not abuse its discretion when it concluded that there "was little to any pretrial activity in the cases filed by Non-Class Counsel, and the filings alone did not materially drive settlement negotiations with Volkswagen."[5]

ii. Work After Appointment of Class Counsel

[6] Nagel Appellants indicate that most of their post-appointment efforts consisted of fielding inquiries from prospective clients, explaining the process and mechanics of the Settlement, and "remain[ing] updated on the case." Such work was specifically mandated by PTO No. 11, which also emphasized that "[o]nly Court-appointed Counsel and those attorneys working on assignments therefrom that require them to review, analyze, or summarize those filings or Orders in connection with their assignments are doing so for the common benefit. *All other counsel are reviewing those filings and Orders for their own benefit and that of their respective clients and such review will not be considered Common Benefit Work.*" (emphasis added). The district court applied similar restrictions to attendance at status conferences ("Individual attorneys are free to attend any status conference ... but except for Lead Counsel and members of the Plaintiffs' Steering Committee or their designees, attending and listening to such conferences is not compensable Common Benefit Work"), pleading and brief preparation (the court specified that "factual and legal research and preparation of *consolidated* class action complaints and related briefing" would be compensable), and attendance at seminars ("Except as approved by Lead Counsel, attendance at seminars ... shall not qualify as Common *644 Benefit Work"). (emphasis added). Therefore, under the PTOs issued pursuant to the managerial authority possessed by the district court, Appellants' post-appointment work did not benefit the class and hence was not compensable.

No Appellant challenges the PTOs or the district court's authority to issue them. Indeed, the Federal Judicial Center has noted that a court will often "need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation," and further encouraged that "[e]arly in [complex] litigation, the court should define designated counsel's functions, determine the method of compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions." *Manual for Complex Litigation* §§ 10.22, 14.215 (4th ed. 2004); *see also Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) ("It is well established that '[d]istrict courts have inherent power to control their docket.' " (alteration in original) (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998))); *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1388 (9th Cir. 1986) (permitting district court's pretrial order to govern recovery of attorneys' fees). Accordingly, given the district court's inherent power to manage the MDL, as well as its discretion in granting attorneys' fees, there is no dispute that Appellants were required to abide by the PTOs, including PTO No. 11. We are told that nearly 100 other law firms followed the PTOs, and received compensation accordingly. But there is no indication in the record before us that Appellants fully adhered to the PTOs' guidance and procedures.

iii. Summation

Ultimately, we agree with Plaintiffs' summary of the work undertaken by Appellants and attested to by the voluminous documentation provided to the district court:

> Appellants chose to represent individual clients who were Class Members in a consolidated class action prosecuted by a leadership team appointed by the District Court. In so choosing, these attorneys knowingly undertook work that the District Court had correctly concluded would inure only to the benefit of their individual clients, and not to the Class as a whole. In other words, these lawyers knew that, although their work might establish a right to recovery under their respective attorney-client agreements and subject to the ethical constraints on lawyers, it would not be compensable through any petition in the MDL.

Appellants point to nothing in the 13,000-page record that indicates that the work they performed on behalf of their individual clients, either before or after appointment of Class Counsel, informed the Settlement or otherwise benefited the class.[6] Furthermore, the district court explicitly precluded compensation for many of these efforts in its PTOs.[7]

As the Third Circuit concluded in *In re Cendant*, "The mere fact that a non-designated ***645** counsel worked diligently and competently with the goal of benefiting the class is *not* sufficient to merit compensation. Instead, only attorneys 'whose efforts create, discover, increase, or preserve' the class's ultimate recovery will merit compensation from that recovery." 404 F.3d at 197 (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 n.39 (3d Cir. 1995)). Here, the record clearly indicates that Appellants worked diligently and presumably competently for their clients. But because there is no indication that any of these efforts actually benefited the class and complied with the PTOs, the district court did not abuse its discretion, by either applying the wrong law or relying on erroneous factual determinations, when it denied Appellants' motions for attorneys' fees.

B. Additional Arguments

Nagel Appellants advance three additional arguments as to how the district court abused its discretion when it issued the Fee Order.[8] We will consider each in turn.

i. Explanation of Denial

[7] [8] Nagel Appellants assert that "[t]he District Court should have, but did not, support its denial with a clear explanation based upon an evaluation of the underlying fee petitions. This was legal error." We disagree. The district court was required only to "articulate with sufficient clarity the manner in which it ma[de] its determination." *Carter v. Caleb Brett LLC*, 757 F.3d 866, 869 (9th Cir. 2014) (quoting *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988)); *see also McGinnis v. Ky. Fried Chicken of Cal.*, 51 F.3d 805, 809 (9th Cir. 1994) (determining that "when ruling on the appropriate amount of fees, no rote recitation [of factors] is necessary" where the court's "decision gives [ ] no basis for doubting that [it] was familiar with controlling law" and there is no "factor which the judge failed to consider"). Here, the district court sufficiently explained its decision. It first set forth the guidance provided by Rule 23 and relevant appellate decisions, and then accurately described the various work Appellants performed both before and after the appointment of Class Counsel—none of which constituted "evidence that their services benefited the class as a whole." This is all that we require: a description of the applicable standard and an engagement with the facts as illustrated by the fee motions. It would be unreasonable to expect the court to undertake an extensive analysis of ***646** each individual motion[9] when all that is needed is engagement with the controlling law and explanation of the court's reasoning. As Volkswagen notes, "The fact that Appellants' fee motions were all found deficient for similar reasons does not make the District Court's ruling insufficiently reasoned." Because the district court's order supplied the necessary level of explanation for its decision, it did not abuse its discretion in this regard.

ii. Parties' Agreement

[9] Noting that Rule 23 permits recovery of fees "that are authorized ... by the parties' agreement," Fed. R. Civ. P. 23(h), Nagel Appellants contend that the district court incorrectly concluded that Volkswagen did not agree to pay the fees at issue here as part of the Settlement. But the Settlement clearly provided only that "Volkswagen agrees to pay reasonable attorneys' fees and costs for work performed *by Class Counsel* in connection with the Action as well as the work performed *by other attorneys designated by Class Counsel* to perform work in connection with the Action." (emphases added). No other document filed as part of the Settlement indicates any additional commitment on Volkswagen's part. Although Nagel Appellants suggest that class members were "led to believe—via the Settlement Agreement—that their attorneys would be reasonably compensated by Defendants,"[10] this proposition is belied by the Settlement's Long Form Notice, which read,

> Class Counsel will represent you at no charge to you, and any fees Class Counsel are paid will not affect your compensation under this Class Action Settlement. *If you want to be represented by your own lawyer, you may hire one at your own expense.* It is possible that you will receive less money overall if you choose to hire your own lawyer to litigate against Volkswagen rather than receive compensation from this Class Action Settlement.

(emphasis added).[11] Accordingly, there was no agreement between the parties, either explicit or implicit, that Volkswagen would compensate Appellants for their efforts.

iii. Quantum Meruit and Unjust Enrichment

[10] Lastly, Nagel Appellants suggest that the district court erred when it failed to consider the equitable principles of quantum meruit and unjust enrichment. However, although a court's power to award attorneys' fees might be derived from equity, the existence of this power alone does not vitiate the long-recognized requirement that the work of a lawyer in a case like this must benefit the class. If, as the district court concluded, Appellants did not provide a substantial benefit, then neither the class members nor Class Counsel would have been unjustly enriched at Appellants' *647 expense. Nagel Appellants' invocation of quantum meruit therefore only begs the original question of whether non-Class Counsel's efforts benefited the class. As they did not, no unjust enrichment occurred.

III. The Lien Order

Feinman, in his separate brief, ostensibly appeals, like the other Appellants, from the Fee Order. He indicates that "[t]his is an appeal from the United States District Court for the Northern District of California in which the trial court determined Volkswagen is not required to pay Non-Class Counsel attorney fees and costs." However, the main focus of his appeal, as evidenced by his preliminary statement, is the "injunction issued by the District Court for the Northern District of California in the Volkswagen Clean Diesel litigation enjoining efforts to assert attorney fee lien claims under State law"—the Lien Order. It is that injunction, and not the Fee Order, that is the basis of Feinman's various arguments: that the injunction violated the Anti-Injunction Act; that the district court did not have subject matter jurisdiction to issue the injunction as to his Virginia lien; that the injunction had the effect of imposing the cost of removing polluting vehicles from the roadway on him; that the injunction was premised on an unfounded legal premise; that the injunction violated his due process rights; and that the injunction violated the Fifth Amendment. Indeed, Feinman's conclusion and request for relief references only the Lien Order and *not* the Fee Order.

[11] The district court already vacated the Lien Order and its injunction, and so they are no longer in effect. Therefore, all of the issues contained in Feinman's brief were rendered moot, and we need not consider them. *See* Berkeley Cmty. Health Project v. City of Berkeley, 119 F.3d 794, 795 (9th Cir. 1997) ("Because the district court has vacated its preliminary injunction, this appeal is dismissed as moot."). Both Feinman's opening brief and his reply brief demonstrate that he is, in effect, asking us for an advisory opinion: "What Feinman wants from this appeal is a ruling that nothing the Northern District of California Court ruled can prohibit Feinman from seeking to enforce his attorney fee lien rights against Defendant Volkswagen. ... Feinman has no interest in violating a Federal Court injunction and merely seeks to assert his claim in Virginia State Courts free from jeopardy." He even concedes that "[i]f the concession of Volkswagen and the Plaintiff-Appellees that the issue is moot makes it so Feinman can have the relief requested, there is no need to go further." There is no doubt that the issues he raised are indeed moot. Whether he "can have the relief requested"—which is to say, a lien against Volkswagen pursuant to Virginia law—is not an issue properly before us.[12]

*648 CONCLUSION

We are sympathetic to Appellants, and have no doubt that many of them dutifully and conscientiously represented their clients. This is not necessarily a case where latecomers attempt to divide spoils that they did not procure.[13] But Appellants' efforts do not entitle them to compensation from the MDL, when the record indicates that they did not perform work that benefited the class, and that they neglected to follow the protocol mandated by the district court. We commend the district court's efforts to successfully manage a massive and potentially ungainly MDL, and conclude that the court did not abuse its discretion when it determined that Appellants were not entitled to compensation.

Accordingly, we AFFIRM the district court's denial of Appellants' motions for attorneys' fees.

All Citations

914 F.3d 623, Fed. Sec. L. Rep. P 100,335, 19 Cal. Daily Op. Serv. 768, 2019 Daily Journal D.A.R. 568

Footnotes

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

1 Various appellants filed eighteen separate notices of appeal from the district court's order, seventeen of which are consolidated here. (The eighteenth appeal—*Autoport, LLC v. Volkswagen Group of America, Inc.*, No. 17-16066—was later severed from the consolidation and is addressed in a concurrently filed memorandum disposition.) The law firms represented in fifteen of the seventeen consolidated appeals signed on to the brief prepared by Appellants Nagel Rice, LLP and Hyde & Swigart, while Appellants James Ben Feinman and Ronald Clark Fleshman, Jr. submitted their own, separate brief. Appellant Bishop, Heenan & Davies LLC did not sign either of these briefs, and did not submit its own.

2 For example, PSC chair Elizabeth Cabraser attested that "prior to the filing of the Consolidated Consumer Class Action Complaint, [she] requested all firms who had submitted leadership applications and other interested firms to submit information on plaintiffs interested in serving as proposed class representatives. Information on [ ] nearly 600 plaintiffs was submitted by dozens of firms. All of these firms were asked to submit their time for this effort under PTO 11." (citation omitted).

3 We note that Nagel Appellants premise their standing argument on cases involving common settlement funds, from which both the Supreme Court and this court have acknowledged that litigants *and* lawyers have a right to recover fees. *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); Vincent v. Hughes Air W., Inc., 557 F.2d 759, 769 (9th Cir. 1977). However, as the district court correctly noted, "[t]he Settlement's Funding Pool is not a traditional common fund from which settlement proceeds are to be paid.... Volkswagen agreed to pay Plaintiffs' fees and costs in addition to the payments to the Class rather than from the fund created for payments to the Class." *Cf.* 5 William B. Rubenstein, *Newberg on Class Actions* § 15:53 (5th ed. 2018) ("[I]n common fund cases the prevailing litigants [pay] their own attorney's fees.... [T]he common fund doctrine allows a court to distribute attorney's fees *from the common fund that is created for the satisfaction of class members' claims* ..." (emphasis added)). Although Nagel Appellants invoked the common fund doctrine in their brief, their counsel at oral argument clearly stated that they sought fees not from the $10 billion-plus class settlement, but instead from the separate $175 million fee recovery that Volkswagen paid Class Counsel. Absent a traditional common fund from which both class members *and* Class Counsel drew money, this is not a traditional common fund case, and so Nagel Appellants cannot rely on common fund precedent as controlling when different considerations apply to standing in non-common fund cases.

4 *See supra* note 3.

5 Although Nagel Appellants claim that Class Counsel's work "consisted of combining/duplicating the work of others to file an amended complaint followed by their negotiation of the terms of the settlement and the preparation of settlement documents," and thus "was *ipso facto* the ongoing work by all counsel in the early months following the September 2015 public disclosure of the cheat devices," this assertion is countered by Class Counsel's motion for attorneys' fees, which recounted their extensive, non-duplicative efforts on behalf of the Settlement.

6 In their reply brief, Nagel Appellants suggest that one firm, Appellant Ryder Law Firm, P.C. (Ryder), benefited the class by "provid[ing] the Court with comments in relation to the proposed settlement." However, the excerpts of the record to which Nagel Appellants point do not demonstrate that Ryder actually did this, let alone that its contributions were utilized in any way by Class Counsel, Volkswagen, or the district court.

7 Additionally, the district court expressly set forth a process through which non-Class Counsel could receive reimbursement for any work that was "for the common benefit of Plaintiffs," was "timely submitted," and was "reasonable." However, no Appellant argues that it was authorized by Lead Counsel to perform work, of common benefit or otherwise, and then submitted time records as required by the district court's protocol.

8 In the "Issues Presented" section of their opening brief, Nagel Appellants identify a fourth additional issue: "whether the District Court erred in the selection of the lead firms by requesting that the firms indicate the support of other firms applying for the appointment and considering this 'popularity' factor." However, they provide no substantive argument to accompany this issue, either in that introductory section or anywhere else in the brief, and the issue is not raised in the opposition briefs or in Nagel Appellants' reply. We will therefore treat the issue as waived. *See* In re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1424 (9th Cir. 1994) ("[L]ack of argument waives an appeal of [an] issue."). Incidentally, a district

court's selection of class counsel is reviewed for abuse of discretion, *see* Sali v. Corona Reg'l Med. Ctr., 889 F.3d 623, 634–35 (9th Cir. 2018), and we see no indication that the district court's consideration of this or any other factor when it selected Class Counsel constituted such an abuse.

9 In the aggregate, these 244 motions included more than 13,000 pages of supporting documentation.

10 This assertion is apparently based on language in the Long Form Notice that indicated that "Volkswagen will pay attorneys' fees and costs in addition to the benefits it is providing to the class members in this Settlement." However, on the previous page, the Notice specified that only Class Counsel would receive those fees.

11 Nagel Appellants note that this language appeared under the heading "Do I need to hire my own attorney ... ?" and therefore, "[g]iven that Independent Counsel had already been retained prior to the Notice, Class Members would assume the provision, expressed in a future tense, did not apply." But however misleading the Long Form Notice might have been on this point, this ambiguity certainly did not constitute an agreement that Volkswagen would pay non-Class Counsel's fees.

12 We might infer from Feinman's opening brief that his jurisdictional challenge applies to the Fee Order as well as the vacated injunction. Such an argument would have no merit. We have held that "[a] transferee judge exercises all the powers of a district judge in the transferee district under the Federal Rules of Civil Procedure," which includes "authority to decide all pretrial motions, including dispositive motions such as motions to dismiss, motions for summary judgment, motions for involuntary dismissal under Rule 41(b), motions to strike an affirmative defense, *and motions for judgment pursuant to a settlement*." In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1230–31 (9th Cir. 2006) (emphasis added); *see also* K.C. ex rel. Erica C. v. Torlakson, 762 F.3d 963, 968 (9th Cir. 2014) ("There is no debate that a federal court properly may exercise ancillary jurisdiction 'over attorney fee disputes collateral to the underlying litigation.' " (quoting Fed. Sav. & Loan Ins. Corp. v. Ferrante, 364 F.3d 1037, 1041 (9th Cir. 2004))). Therefore, the district court had jurisdiction over the attorneys' fees motions.

13 *See generally* Florence White Williams, *The Little Red Hen* (1918).

End of Document

APPENDIX E

895 F.3d 597
United States Court of Appeals, Ninth Circuit.

IN RE VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,
Jason Hill et al., Plaintiffs-Appellees,
Tori Partl; Marcia Weese; Rudolf Sodamin; Greg R. Siewert and Scott Siewert; Ronald Clark Fleshman, Jr.; Derek R. Johnson, Objectors-Appellants,
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,

Nos. 16-17157
|
16-17158
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16-17166
|
16-17168
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16-17183
|
16-17185
|
Argued and Submitted December 7, 2017, Pasadena, California
|
Filed July 9, 2018

Synopsis

Background: Vehicle owners filed class actions against vehicle manufacturer, alleging that manufacturer's installation of devices designed to cheat on emission tests constituted breach of warranty, breach of contract, unjust enrichment, and violation of consumer protection, securities, and racketeering laws. Following transfer by the Judicial Panel on Multidistrict Litigation, the United States District Court for the Northern District of California, Charles R. Breyer, No. 3:15-md-02672-CRB, Senior District Judge, granted final approval of settlement agreement setting aside $10 billion to fund a suite of remedies for class members. Some class members filed appeals and the appeals were consolidated.

Holdings: The Court of Appeals, Berzon, Circuit Judge, held that:

[1] there was no irreparable conflict of interest that prevented named class representatives from adequately representing vehicle sellers or prohibited commingling of vehicle owners and vehicle sellers into a single class;

[2] district court did not abuse its discretion in determining that reversion clause in agreement was a reasonable provision and not a sign of collusion or unfairness;

[3] class member's objections to agreement did not demand a response from the district court;

[4] rule governing attorney fees in class actions allowed district court to approve agreement before class counsel had filed a fee motion;

[5] claim that agreement would expose class members to criminal or civil liability and vehicle confiscation was wholly speculative; and

[6] class member's failure to timely opt out of settlement class did not constitute excusable neglect.

Affirmed.

West Headnotes (38)

[1] **Compromise, Settlement, and Release** ⇨ Class actions, claims, and settlements in general

Federal Civil Procedure ⇨ Factors, grounds, objections, and considerations in general

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.

2 Cases that cite this headnote

[2] **Federal Courts** ⇐ Class actions

Federal Courts ⇐ Class actions

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.

10 Cases that cite this headnote

[3] **Federal Courts** ⇐ Class actions

Denial of a class member's motion to exclude herself from the class out of time is reviewed for abuse of discretion.

[4] **Federal Civil Procedure** ⇐ Factors, grounds, objections, and considerations in general

In the settlement context, a court must pay undiluted, even heightened, attention to class certification requirements. Fed. R. Civ. P. 23.

[5] **Federal Civil Procedure** ⇐ Representation of class; typicality; standing in general

The adequacy-of-representation inquiry under rule establishing prerequisites of class actions serves to uncover conflicts of interest between named parties and the class they seek to represent. Fed. R. Civ. P. 23(a)(4).

[6] **Constitutional Law** ⇐ Class Actions

Federal Civil Procedure ⇐ Representation of class; typicality; standing in general

Serious conflicts of interest can impair adequate representation by the named plaintiffs in a class action, yet leave absent class members bound to the final judgment, thereby violating due process. U.S. Const. Amend. 14; Fed. R. Civ. P. 23(a)(4).

6 Cases that cite this headnote

[7] **Constitutional Law** ⇐ Class Actions

Federal Civil Procedure ⇐ Representation of class; typicality; standing in general

The existence of a conflict of interest between named parties and the class they seek to represent 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. U.S. Const. Amend. 14; Fed. R. Civ. P. 23(a)(4).

[8] **Federal Civil Procedure** ⇐ Representation of class; typicality; standing in general

The initial inquiry in assessing adequacy of representation is whether the named plaintiffs and their counsel have any conflicts of interest with other class members. Fed. R. Civ. P. 23(a)(4).

9 Cases that cite this headnote

[9] **Federal Civil Procedure** ⇐ Representation of class; typicality; standing in general

Adequacy-of-representation inquiry in class actions factors in competency and conflicts of class counsel. Fed. R. Civ. P. 23(a)(4).

[10] **Federal Civil Procedure** ⇐ Representation of class; typicality; standing in general

General standard for assessing adequacy of representation, whether named plaintiffs and their counsel have any conflicts of interest with other class members, must be broken down for specific application; conflicts within classes come in many guises. Fed. R. Civ. P. 23(a)(4).

7 Cases that cite this headnote

[11] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements

Federal Civil Procedure ⇐ Representation of class; typicality; standing in general

Aside from 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. Fed. R. Civ. P. 23(a)(4).

[12] **Federal Civil Procedure** ⇐ Consumers, purchasers, borrowers, and debtors

In class action against vehicle manufacturer, there was no irreparable conflict of interest, either in the structure of the class or terms of the settlement, that prevented named class representatives from adequately representing vehicle sellers or prohibited commingling of vehicle owners and vehicle sellers into a single class; vehicle owners comprised the vast majority of the class and were the ones with leverage enough to obtain the benefits for the class and seller restitution provided for by settlement agreement fairly compensated for economic losses incurred by sellers when they sold their vehicles. Fed. R. Civ. P. 23(a)(4).

1 Cases that cite this headnote

[13] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements

Federal Courts ⇐ Class actions

The district court must undertake a stringent review of class settlements, exploring comprehensively all factors, and giving a reasoned response to all non-frivolous objections, whereas appellate review of the district court's reasoning is extremely limited; appellate court reverses only upon a strong showing that the district court's decision was a clear abuse of discretion.

1 Cases that cite this headnote

[14] **Federal Courts** ⇐ Class actions

Appellate court holds district courts to a high procedural standard in their review of a settlement in a class action, but it rarely overturns an approval of a class action consent decree on appellate review for substantive reasons.

[15] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements in general

Compromise, Settlement, and Release ⇐ Negotiation at arm's length; fraud or collusion

A proposed settlement that is fair, adequate, and free from collusion will pass judicial muster in a class action.

4 Cases that cite this headnote

[16] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements in general

The uncommon risks posed by class-action settlements demand serious review by the district court.

1 Cases that cite this headnote

[17] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements

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, appellate court imposes upon district courts a fiduciary duty to look after the interests of absent class members.

1 Cases that cite this headnote

[18] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements in general

Factors that a district court may consider when weighing a proposed settlement in a class action 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.

9 Cases that cite this headnote

[19] **Federal Courts** ⇐ Class actions

When 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 appellate court requires 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 certain class members to infect the negotiations.

3 Cases that cite this headnote

[20] **Compromise, Settlement, and Release** ⇐ Negotiation at arm's length; fraud or collusion

Compromise, Settlement, and Release ⇐ "Clear sailing" provisions

A few warning signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect settlement negotiations are attorneys' fees out of proportion to class member compensation, clear-sailing arrangements, and agreements in which unawarded attorneys' fees revert to the defendants.

5 Cases that cite this headnote

[21] **Compromise, Settlement, and Release** ⇐ "Clear sailing" provisions

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.

1 Cases that cite this headnote

[22] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements in general

Compromise, Settlement, and Release ⇐ Negotiation at arm's length; fraud or collusion

The relative degree of importance to be attached to any particular factor to decide whether a proposed class settlement is fair, adequate, and free from collusion will depend upon the unique facts and circumstances presented by each individual case.

1 Cases that cite this headnote

[23] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements in general

Deciding whether a settlement in a class action is fair is ultimately an amalgam of delicate balancing, gross approximations, and rough justice 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.

[24] **Compromise, Settlement, and Release** ⇐ Role, Authority, and Discretion of Court

The decision to approve or reject a settlement in a class action is committed to the sound discretion of the trial judge.

1 Cases that cite this headnote

[25] **Federal Courts** ⇐ Judgment by confession or consent

Appellate court 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.

[26] **Compromise, Settlement, and Release** ⇐ Antitrust, trade regulation, fraud, and consumer protection

District court did not abuse its discretion in determining that reversion clause in settlement agreement between class of vehicle owners and vehicle manufacturer was a reasonable provision in the agreement and not a sign of collusion or unfairness; vehicle manufacturer had every incentive to buy back or fix as many eligible vehicles as possible given that its Department of Justice consent decree would fine it for failure to do so, there was little chance that class members would forego benefits under agreement given that they were worth at least thousands of dollars, and 336,000 class members of 490,000 total had registered to claim settlement benefits before hearing on fairness of settlement.

[27] **Compromise, Settlement, and Release** ⇐ Nature of Relief Provided and Method of Distribution

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.

[28] **Compromise, Settlement, and Release** ⇐ Negotiation at arm's length; fraud or collusion

A reversion clause in a class-action settlement agreement 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.

1 Cases that cite this headnote

[29] **Compromise, Settlement, and Release** ⇐ Negotiation at arm's length; fraud or collusion

A reversion clause in a class-action settlement agreement 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.

6 Cases that cite this headnote

[30] **Compromise, Settlement, and Release** ⇐ Verdict, findings, and conclusions

To exercise its discretion appropriately, a district court must explain why the reversionary component of a class-action settlement negotiated before class certification is consistent with proper dealing by class counsel and defendants.

2 Cases that cite this headnote

[31] **Compromise, Settlement, and Release** ⇐ Views of parties, claimants, or class members; opposition or approval

Class member's objections to settlement agreement between class of vehicle owners and vehicle manufacturer, that additional claim-processing steps for class members with liens created individualized questions of law or fact defeating predominance and that long-form notice did not adequately explain effects of a vehicle lien on eligibility for settlement benefits, were frivolous and, thus, did not demand a response from the district court; settlement did not deny recovery or exclude from class membership vehicle owners with liens or loans and notice explained that settlement provided additional compensation to class members with outstanding loans to help them clean up title and deliver their vehicles to manufacturer. Fed. R. Civ. P. 23(b)(3).

[32] **Federal Courts** ⇐ Class actions

To survive appellate review, the district court must show it has explored comprehensively all factors regarding fairness of settlement agreement in a class action before approving it, and must give a reasoned response to all non-frivolous objections.

2 Cases that cite this headnote

[33] **Compromise, Settlement, and Release** ⇐ Class actions, claims, and settlements in general

Procedural burden on the district court, to explore comprehensively all factors regarding fairness of settlement agreement in a class action and to give a reasoned response to all non-frivolous objections, helps to ensure the substantive fairness of the settlement.

2 Cases that cite this headnote

[34] **Compromise, Settlement, and Release** ⇐ Proceedings for Approval

Federal Civil Procedure ⇐ Attorney fees

Rule governing attorney fees in class actions did not require that class counsel's fee motion be filed before deadline for class members to object to, or opt out of, substantive settlement, thus allowing district court to approve settlement before class counsel had filed a fee motion. Fed. R. Civ. P. 23(h).

3 Cases that cite this headnote

[35] **Federal Courts** ⇐ Questions Considered

Court of Appeals would not address class member's argument that district court erred in not ensuring that notice of class counsel's fee motion was directed to class members in a reasonable manner, where argument was a challenge to the fee award rather than to district court's order approving the settlement. Fed. R. Civ. P. 23(h).

5 Cases that cite this headnote

[36] **Federal Courts** ⇐ Particular cases

Claim that settlement agreement between class of vehicle owners and vehicle manufacturer would expose hundreds of thousands of class members to criminal or civil liability and to the possibility of vehicle confiscation if they drove their vehicles before approved emission modification was wholly speculative and, thus, Court of Appeals would affirm district court's approval of agreement, where Environmental Protection Agency and vast majority of states had stated unequivocally that they would permit unmodified vehicles to stay on the road, and none had specifically declared them illegal to drive. Fed. R. Civ. P. 6(b), 60(b)(1).

1 Cases that cite this headnote

[37] **Federal Courts** ⇐ Class actions

On review of district court's decision denying class member's late motion to opt out, appellate courts are not to substitute their ideas of fairness for those of the district judge in the absence of evidence that district court acted arbitrarily, and such evidence must constitute a clear showing of abuse of discretion.

[38] **Federal Civil Procedure** ⇐ Options; withdrawal

Class member's failure to timely opt out of settlement class did not constitute excusable neglect and, thus, district court did not abuse its discretion in denying her motion to opt out late, where member had actual and timely notice of the proper method of excluding herself from settlement and class member was therefore squarely responsible for the failure to opt out on time.

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Appeal from the United States District Court for the Northern District of California, Charles R. Breyer, Senior District Judge, Presiding, D.C. No. 3:15-md-02672-CRB

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

OPINION

BERZON, Circuit Judge:

***603** *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 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 consumer class actions and chair of the Plaintiffs' Steering Committee (PSC) charged with coordinating pretrial work on behalf ***604** 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, 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 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]

***605** 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]

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 ***606** 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]

DISCUSSION

[1] "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.

[2] [3] 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.

I. Certification of the class

[4] 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, 117 S.Ct. 2231, 138 L.Ed.2d 689 (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. ***607** 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 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.

[5] [6] [7] "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, 117 S.Ct. 2231. 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, 61 S.Ct. 115, 85 L.Ed. 22 (1940)).[13]

[8] [9] [10] [11] 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, 117 S.Ct. 2231. 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, 119 S.Ct. 2295, 144 L.Ed.2d 715 (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*, ***608** 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (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).

[12] 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.

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. ***609** 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, 117 S.Ct. 2231; *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" 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 at 1021. There was no abuse of discretion in certifying the class.[17]

II. The settlement

[13] [14] 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 ***610** 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 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

[15] [16] [17] 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.

[18] [19] [20] [21] 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 *611 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 certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 946–47.[19]

[22] [23] [24] [25] 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.

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

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

[26] 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.

[27] [28] [29] 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* *612 *Allen*, 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.

[30] 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 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

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

[32] [33] "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 substantive *613 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 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]

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

*614 *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.

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

[34] 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 ***615** 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]

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 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

[35] Relatedly, two objectors argue that the district court erred by not ensuring ***616** 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

[36] 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, 894 F.3d 1030, 2018 WL 3235533 (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 ***617** 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 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.
>
> ...
>
> ***618** 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

[37] 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, 113 S.Ct. 1489, 123 L.Ed.2d 74 (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)).

[38] 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 ***619** 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.**

All Citations

895 F.3d 597, 101 Fed.R.Serv.3d 257, 18 Cal. Daily Op. Serv. 6812, 2018 Daily Journal D.A.R. 6697

Footnotes

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

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.

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.

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).

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.

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

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.

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, 117 S.Ct. 2231; *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, 117 S.Ct. 2231; *see also* Hanlon, 150 F.3d at 1021. The objection here raises no questions about that aspect of adequacy of representation.

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.

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).

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.

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).

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.

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

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.

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).

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.

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.

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

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.

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.

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APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

_____/

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

_____/

MDL No. 2672 CRB (JSC)

ORDER DENYING NON-CLASS COUNSEL'S MOTIONS FOR ATTORNEYS' FEES

Six months ago, this Court approved a settlement between Volkswagen and owners and lessees of certain model Volkswagen and Audi 2.0-liter TDI diesel vehicles, resolving claims predicated on Volkswagen's use of a "defeat device" in those vehicles—software designed to cheat emissions tests. Shortly after final approval of the 2.0-liter Settlement, plaintiffs' Lead Counsel, and the 21 other attorneys the Court appointed to the Plaintiffs' Steering Committee ("PSC," and together with Lead Counsel, "Class Counsel"), filed a motion for $167 million in attorneys' fees and $8 million in costs on behalf of "all counsel performing common benefit services under the provisions of [Pretrial Order No.] 11" for work performed in connection with the consolidated class action complaint and resulting settlement. (Dkt. No. 2175 at 5.) The Court granted Class Counsel's motion in March. (Dkt. No. 3053.)

Now before the Court are 244 motions for attorneys' fees and costs filed by attorneys who did not serve as Class Counsel, and who were not compensated out of the $175 million ultimately awarded for common benefit work (collectively referred to as "Non-Class Counsel").[1] Non-Class Counsel, in many instances, filed complaints against Volkswagen in courts throughout the United

[1] A list of the docket entries for the 244 motions is attached to this Order as an Appendix.

States prior to consolidation of the litigation before this Court. Before and after the Court appointed Class Counsel, Non-Class Counsel also monitored the proceedings, and ultimately advised their clients on the Settlement's terms. For these services, they seek attorneys' fees and costs from Volkswagen. Because Volkswagen did not agree to pay these fees and costs as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the *class*, as opposed to their individual clients, the Court DENIES the motions. To the extent that Non-Class Counsel seek to enforce their fee agreements with individual clients, however, they may bring such claims in an appropriate venue.

BACKGROUND

After the public learned in September 2015 that Volkswagen had installed defeat devices in its "clean diesel" 2.0-liter TDI vehicles, ligation quickly ensued. Attorneys filed complaints against Volkswagen on behalf of consumers across the country, and government entities launched criminal and civil investigations. (*See* Dkt. No. 1609 at 11.) On December 8, 2015, the Judicial Panel on Multidistrict Litigation transferred all related federal actions to this Court, where more than 1,200 cases have since been consolidated. (*See* Dkt. No. 2175-1 ¶ 3.)

In January 2016, the Court appointed Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein, LLP as Plaintiffs' Lead Counsel and as Chair of the PSC, to which the Court also named 21 other attorneys. (*See* Pretrial Order No. 7, Dkt. No. 1084.) The Court tasked the PSC with conducting and coordinating the MDL litigation, but vested Lead Counsel with authority to retain the services of other attorneys to perform work for the benefit of the class. (*See id.* ¶ 2; Pretrial Order No. 11, Dkt. No. 1254 at 1-2.)

In the months that followed, Class Counsel prosecuted the consumers' civil cases and worked with Volkswagen, federal and state agencies, and the Court appointed Settlement Master, to try and resolve the claims asserted. (*See* Dkt. No. 1609 at 11-12.) Class Counsel filed initial and amended consolidated class action complaints, conducted common discovery, and ultimately negotiated the 2.0-liter Settlement with Volkswagen (Dkt. No. 1685), which the Court approved on October 25, 2016. (Dkt. No. 2102.) With regard to attorneys' fees and costs, the Settlement Agreement provides that Volkswagen will "pay reasonable attorneys' fees and costs for work

performed by Class Counsel in connection with the Action as well as work performed by other attorneys designated by Class Counsel to perform work in connection with the Action . . . ." (Dkt. No. 1685 ¶ 11.1.) The Settlement Agreement defines Class Counsel as "Lead Counsel [*i.e.*, Ms. Cabraser] and the PSC." (*Id.* ¶ 2.19.)

In early November 2016, Class Counsel filed a motion seeking $167 million in attorneys' fees and $8 million in costs on behalf of "all counsel performing common benefit services under the provisions of [Pretrial Order No.] 11." (Dkt. No. 2175 at 5.) In addition to seeking fees for work performed by the PSC, the motion also sought fees for the work of nearly 100 other law firms who Lead Counsel authorized to perform common benefit work. (*See* Dkt. No. 2175-1 ¶ 7.) The common benefit work included not only time spent drafting pleadings and participating in negotiations, but also time spent communicating with class members, which includes 20,000 communications between PSC attorneys and class members. (*Id.* ¶ 3.) Class Counsel's fees motion also included 21,287 hours of reserve time to cover work necessary to "guide the hundreds of thousands of Class Members through the remaining 26 months of the Settlement Claims Period." (*Id.* ¶ 15.) Recognizing that counsel had achieved an extraordinary result for the class and the public as a whole, the Court granted the fees motion in March of this year. (Dkt. No. 3053 at 3.)

At the time the Court awarded fees, it noted that various class members' private attorneys—i.e., Non-Class Counsel—had also filed motions for fees and costs. (*Id.* at 2 n.1.) Some non-class attorneys began filing these motions even before the Court approved the 2.0-liter Settlement (*see, e.g.*, Dkt. No. 2029, filed on October 13, 2016), while the bulk of the motions were filed in late December 2016 and early January 2017. Some non-class attorneys initially took a different approach, placing liens on several class members' settlement proceeds. (*See* Dkt. No. 2159.) The Court, in two related orders, enjoined any state court action seeking to enforce fee-related liens, assignments, trust-account agreements, or other means that could diminish class members' recovery under the Settlement. (Dkt. Nos. 2247, 2428.) The Court also ordered Volkswagen to pay class members the full amount to which they were entitled under the terms of the Settlement. (*Id.*)

In total, Non-Class Counsel have now filed 244 motions for attorneys' fees and costs. The motions vary in length and detail, but ultimately raise similar bases for relief. A significant number of the motions seek fees for time spent filing individual and class complaints against Volkswagen prior to the centralization of proceedings before this Court.[2] Many of the motions also seek fees for time spent communicating with class members—both before and after the Court appointed Class Counsel—monitoring MDL proceedings, and ultimately advising clients on the 2.0-liter Settlement.[3]

On February 13, 2017, Volkswagen filed an omnibus opposition to Non-Class Counsel's motions for attorneys' fees and costs. (Dkt. No. 2903.) Volkswagen argues that it has no obligation to pay the fees of Non-Class Counsel under the Settlement or governing law. Non-Class Counsel responded by filings numerous reply briefs in support of their motions.[4]

DISCUSSION

The question at issue is whether the Court should require Volkswagen to pay Non-Class Counsel attorneys' fees and costs as a result of the 2.0-liter Settlement. Because Volkswagen did not agree to pay these fees, and because Non-Class Counsel's work did not benefit the class as a whole, the answer is no.

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[2] (*See, e.g.*, Dkt. No. 2272 at 5 ("We were one of the first filed complaints in the Commonwealth of Pennsylvania."); Dkt. No. 2531 (filed putative class action complaint in the Central District of Illinois); Dkt. No. 2588 (filed putative class action complaint in the Eastern District of Virginia); Dkt. No. 2729 (filed complaints in 14 district courts on behalf of 697 individuals who purchased Volkswagen vehicles).)

[3] (*See, e.g.*, Dkt. No. 2696 ("Met and corresponded with Plaintiff regarding his individual claims, settlement, and various other issues arising during [the] course of this litigation."); Dkt. No. 2532 ("Counsel[ed] and advise[d] the Class Member as to developments in the [MDL]" and the "'pros and cons' of the [Settlement]."); Dkt. No. 2648 at 6 (participated in "discussions with class members after each hearing and regarding the Settlement").)

[4] Many non-class attorneys argue in their reply briefs that the Court should disregard Volkswagen's opposition as untimely. (*See, e.g.*, Dkt. No. 2927 at 2-3; Dkt. No. 2952 at 2.) Volkswagen filed its omnibus opposition on February 13, 2017, more than 14 days after each non-class attorney filed his or her motion. *See* Local Rule 7-3(a). Under the unique circumstances at issue, however, where Volkswagen needed to respond to 244 separate motions, and where these motions were filed on a rolling basis, the Court concludes that Volkswagen filed its opposition within a reasonable period of time. In the future, however, Volkswagen (and other parties seeking to file pleadings outside of the time periods prescribed in the Local Rules) should seek leave in advance to file late pleadings.

Federal Rules of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The second of these two avenues clearly does not apply here, because Volkswagen did not agree to pay the fees at issue as part of the Settlement Agreement. The Settlement Agreement provides that Volkswagen will "pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as work performed by other attorneys *designated by Class Counsel* to perform work in connection with the Action." (Dkt. No. 1685 ¶ 11.1 (emphasis added).) Non-Class Counsel are, by definition, not "Class Counsel," nor do they assert that the fees at issue are for work "designated by Class Counsel." Non-Class Counsel therefore cannot demonstrate that an award of attorneys' fees and costs is "authorized . . . by the parties' agreement." Fed. R. Civ. P. 23(h).[5]

The first avenue under Rule 23(h)—that the Court may award fees and costs that are authorized by law—also does not apply. In "common fund" cases, a court may award non-class counsel a reasonable attorney's fee only if counsel's work conferred a benefit on the *class*, as opposed to on an individual client. *See In re Cendant Corp. Secs. Litig*, 404 F.3d 173, 191 (3d Cir. 2005) ("Non-lead counsel will have to demonstrate that their work conferred a benefit on the class *beyond* that conferred by lead counsel." (emphasis in original)); *Gottlieb v. Barry*, 43 F.3d 474, 489 (10th Cir. 1994) (holding that non-lead counsel should receive compensation if "they have . . . conferred a benefit on the class"); *cf. Stetson v. Grissom*, 821 F.3d 1157, 1164 (9th Cir. 2016) (holding that, to be entitled to an award of attorneys' fees, an objector "must increase the fund or otherwise substantially benefit the class members" (internal quotation marks omitted)). Non-Class Counsel have not made such a showing here.

First, Non-Class Counsel's filing of individual and class complaints prior to the MDL did

[5] At least one non-class law firm has offered evidence that it provided substantive information to PSC counsel upon request. (*See* Dkt. No. 2176-2 ¶ 8.) That law firm, however, does not currently seek compensation for that work, for which it may have already been compensated as part of the award of attorneys' fees made to Class Counsel. Other non-class attorneys assert that they made suggestions to the PSC regarding the language used in the consolidated class action complaints. (*See, e.g.*, Dkt. No. 2316.) Those attorneys, however, have not submitted evidence that Lead Counsel requested and authorized this work.

not benefit the class. These cases were consolidated before this Court as part of a multidistrict litigation less than three months after the public disclosure of Volkswagen's use of a defeat device. And approximately four months after the disclosure, the Court appointed Class Counsel to prosecute the consolidated consumer class action. There consequently was little to any pretrial activity in the cases filed by Non-Class Counsel, and the filings alone did not materially drive settlement negotiations with Volkswagen. *See In re Cendant*, 404 F.3d at 191, 196, 204 (explaining that non-class counsel should not normally be compensated for "fil[ing] complaints and otherwise prosecut[ing] the early stages of litigation," which is best viewed as an "entrepreneurial effort," rather than as work that benefits the class). The relatively short time period between the public disclosure of Volkswagen's use of a defeat device and the consolidation of proceedings also distinguishes this case from *Gottlieb*, 43 F.3d at 488-89, where the Tenth Circuit reversed a district court order that did not award fees to non-class counsel who had "vigorously pursued [numerous] cases for *sixteen months* before class counsel was designated." *Id.* at 488 (emphasis added). Here, by contrast, Non-Class Counsel simply did not have the time needed to materially impact the consolidated class proceedings.

Second, Non-Class Counsel offers evidence that, before the appointment of Class Counsel, they fielded hundreds of phone calls from prospective and actual clients, and consulted with prospective class members about their potential legal claims. While undoubtedly requiring time and effort, this work at most benefited individual class members, not the class as a whole. *See, e.g., In re Auction Houses Antitrust Litig.*, No. 00-CIV-0648., 2001 WL 210697, at *4 (S.D.N.Y. Feb. 26, 2001) (finding no reason "for the class as a whole to compensate large numbers of lawyers for individual class members for keeping abreast of the case on behalf of their individual clients"). Further, the significant majority of 2.0-liter class members did not retain private counsel. In the 244 motions at issue, counsel seek fees for their work representing 3,642 class members, which represents only 0.74 percent of the total class of 490,000. (*See* Dkt. No. 1976 at 6.) That such a small percentage of class members actually retained Non-Class Counsel makes it even less likely that Non-Class Counsel's services benefited the class as a whole.

Third, Non-Class Counsel seek fees and expenses for services provided after the Court

appointed Class Counsel, including time spent monitoring class proceedings, keeping class members informed, and ultimately advising class members on the terms of the proposed Settlement. Similar to Non-Class Counsel's efforts prior to the appointment of Class Counsel, the Court "cannot see how the monitoring itself benefits the class as a whole, as opposed to the attorney's individual client." *In re Cendant Corp.*, 404 F.3d at 201. Further, after this Court appointed Class Counsel, it explained that only "Court-appointed Counsel and those attorneys working on assignments . . . that require them to review, analyze or summarize . . . filings or Orders [in these proceedings] are doing so for the common benefit." (Dkt. No. 1253 at 4.) Non-Class Counsel therefore were on notice that they would not receive common benefit compensation for these efforts.

As for the time Non-Class Counsel spent advising class members on the terms of the Settlement, this work was duplicative of that undertaken by Class Counsel, and therefore did not "confer[] a benefit *beyond* that conferred by lead counsel." *In re Cendant Corp.*, 404 F.3d at 191. As noted in Class Counsel's motion for attorneys' fees, by the time the Court approved the 2.0-liter Settlement, the law firms comprising the PSC had logged over 20,000 communications with class members, responding to questions and requests for information. (*See* Dkt. No. 2175-1 ¶ 3.) Additionally, as part of an expansive Settlement Notice Program, the parties established a Settlement call center and website, which—as of the final Settlement approval hearing on October 18, 2016—had respectively received more than 130,000 calls and more than 1 million visits. (*See* Dkt. No. 2102 at 26.) Lead Counsel's fees award also included 21,287.4 hours of reserve time to cover additional work necessary to, among other things, guide the class members through the remaining Settlement Claims Period. (*See* Dkt. No. 2175-1 ¶ 15.) Thus, even without retaining Non-Class Counsel, class members could, did, and continue to obtain legal advice from Lead Counsel and the PSC.

Finally, Non-Class Counsel's requests for fees and costs for work performed after the Court appointed Class Counsel are deficient in another—procedural—respect. In Pretrial Order No. 11, this Court explained that all plaintiffs' attorneys needed to obtain Lead Counsel's authorization to perform compensable common benefit work. (*See* Dkt. No. 1254 at 1-2 (noting

that the recovery of common benefit attorneys' fees would be limited to Lead Counsel, members of the PSC, and "any other counsel authorized by Lead Counsel to perform work that may be considered for common benefit compensation").) As noted above, Non-Class Counsel have not asserted that they obtained authorization from Lead Counsel to perform the common benefit work for which they now seek compensation, as required.

In sum, because Volkswagen did not agree to pay the fees and costs at issue as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the class as a whole, Volkswagen is not required to pay Non-Class Counsel's attorneys' fees and costs as a result of the 2.0-liter Settlement.[6]

***

While Non-Class Counsel are not entitled to fees from Volkswagen as part of this class action, Non-Class Counsel may be entitled to payment of certain fees and costs pursuant to attorney-client fee agreements. This is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum. To that end, the Court VACATES the injunction on state court actions, to the extent those actions are brought to enforce an attorney-client fee agreement. Volkswagen, however, must continue to "directly pay consumers the full amount to which they are entitled under the Settlement" for all the reasons stated in the Court's previous Order. (Dkt. No. 2428 at 2.)

To the extent that a non-class attorney brings an action against his or her client or makes a demand to enforce a fee agreement, the Court orders that attorney to first provide his or her client

[6] Certain non-class counsel argue that they are entitled to attorneys' fees because they filed complaints bringing claims under statutes with fee-shifting provisions, providing that a "prevailing party" may recover attorneys' fees and expenses. (*See, e.g.*, Dkt. No. 2356 at 2-3 (citing South Carolina Dealers Act, S.C. Code § 56-15-110); Dkt. No. 2243 at 2 (citing Magnuson-Moss Warranty Act, 15 U.S.C. § 2310).) To the extent that class members are prevailing parties as a result of the 2.0-liter Settlement, however, they prevailed because of the work of Lead Counsel and the PSC, not because of Non-Class Counsel's efforts. As a result, awarding fees to Non-Class Counsel under these provisions would be inappropriate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (reasoning that a "prevailing party" should be awarded fees based on the "value of a lawyer's services"). Further, the Ninth Circuit has held that, "[a]pplication of the common fund doctrine to class action settlements does not compromise the purposes underlying fee-shifting statutes," and "common fund fees can be awarded [even] where statutory fees are available." *Staton v. Boeing Co.*, 327 F.3d 938, 968-69 (9th Cir. 2003).

with a copy of this Order, and to file a certificate of service with this Court.

IT IS SO ORDERED.

Dated: April 24, 2017

CHARLES R. BREYER
United States District Judge

United States District Court
Northern District of California

APPENDIX

The following are the docket numbers that correspond with each motion for attorneys' fees and costs resolved by this Order.

Dkt. Nos. 2029, 2176, 2208, 2224, 2228, 2241, 2243, 2272, 2286, 2288, 2291, 2292, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2303, 2304, 2305, 2308, 2309, 2310, 2312, 2313, 2314, 2315, 2316, 2317, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2335, 2337, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2370, 2376, 2382, 2384, 2393, 2395, 2396, 2401, 2402, 2406, 2420, 2427, 2451, 2462, 2463, 2472, 2474, 2476, 2478, 2503, 2527, 2530, 2531, 2532, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2583, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2605, 2607, 2608, 2609, 2610, 2611, 2612, 2618, 2621, 2623, 2628, 2631, 2634, 2635, 2642, 2643, 2644, 2646, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2725, 2726, 2727, 2729, 2730, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2806.

APPENDIX G

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

_____/

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

_____/

MDL No. 2672 CRB (JSC)

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 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.

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

(*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

[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).

billion funding pool. (*Id.* ¶ 1.)

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*

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

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 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.

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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.

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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 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

[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.

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

- *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.

- *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]

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

- *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) ("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.

- *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.

- *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.

- *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).

- *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.

- *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.

- *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

- *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.").

- *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

- *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).

- *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 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

[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.

> (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.

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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

CHARLES R. BREYER
United States District Judge

United States District Court
Northern District of California

APPENDIX H

FILED

SEP 24 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

---

JAMES BEN FEINMAN,

Plaintiff-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,

Defendant-Appellee.

No. 19-16074

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

ORDER

Before: RAWLINSON, MURGUIA, and R. NELSON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and 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 (Docs. 36, 37).

APPENDIX I

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated Code of Virginia
Title 54.1. Professions and Occupations (Refs & Annos)
Subtitle IV. Professions Regulated by the Supreme Court (Refs & Annos)
Chapter 39. Attorneys (Refs & Annos)
Article 5. Fees (Refs & Annos)

VA Code Ann. § 54.1-3932

§ 54.1-3932. Lien for fees

Currentness

A. Any person having or claiming a right of action sounding in tort, or for liquidated or unliquidated damages on contract or for a cause of action for annulment or divorce, may contract with any attorney to prosecute the same, and the attorney shall have a lien upon the cause of action as security for his fees for any services rendered in relation to the cause of action or claim. When any such contract is made, and written notice of the claim of such lien is given to the opposite party, his attorney or agent, any settlement or adjustment of the cause of action shall be void against the lien so created, except as proof of liability on such cause of action. Nothing in this section shall affect the existing law in respect to champertous contracts. In causes of action for annulment or divorce an attorney may not exercise his claim until the divorce judgment is final and all residual disputes regarding marital property are concluded. Nothing in this section shall affect the existing law in respect to exemptions from creditor process under federal or state law.

B. Notwithstanding the provisions in subsection A, a court in a case of annulment or divorce may, in its discretion, exclude spousal support and child support from the scope of the attorney's lien.

Credits
Acts 1988, c. 765; Acts 2001, c. 495.

VA Code Ann. § 54.1-3932, VA ST § 54.1-3932
The statutes and Constitution are current through the 2021 Regular Session cc. 1 & 2.

End of Document

APPENDIX J

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Attorneys for Objector John Labudde and Jing Labudde

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE VOLKSWAGEN "CLEAN DIESEL" MAREKTING, SALES PRACTICES, AND PRODUCTS LIABITY LITIATION	**MDL No.: 2672-CRB (JSC)** **OBJECTION OF CLASS MEMBER JOHN LABUDDE AND JING LABUDDE TO CLASS ACTION SETTLEMENT**

TABLE OF CONTENTS

Objectors John Labudde and Jing Labudde, (hereinafter "Objectors" or "The Lubuddes") through their counsel, hereby file this Objection to the Class Action Settlement in this case. The Labuddes file this objection on their behalf as well as for the benefit of other consumers affected by the proposed class settlement. They are Eligible Owners of a 2011 Volkswagen Sportwagen TDI, VIN# 3VWPL7AJXBM705827, residing in San Jose, California. Objectors purchased the Vehicle in 2011 and presently own the vehicle. They are members of the class.

For the reasons discussed below, Objectors respectfully request this Court deny Final Approval of the Class Action Settlement.

I. INTRODUCTION

Like so many Volkswagen TDI owners, Mr. and Mrs. Labbude were shocked and appalled to learn of the misrepresentation and blatant fraud committed by Volkswagen. In September 2015, Mr. and Mrs. Labudde were unaware of any class investigation and whether there would ultimately be a class. Additionally, Mr. and Mrs. Labudde were not certain they would qualify as Class Members if there was a Class Action. In an effort to protect their rights as owners of an affected Volkswagen TDI, Mr. and Mrs. Labudde sought Hyde & Swigart to file a lawsuit against Volkswagen which was filed on June 2, 2016. Mr. and Mrs. Labudde's complaint alleges causes of action including California Consumers Legal Remedies Act; California Vehicle Code; and the California Song-Beverly Consumer Warranty Act against Volkswagen which allow for attorneys fees and costs.

Mr. and Mrs. Labudde object to the proposed Class Action settlement because as currently proposed, the Settlement offers no compensation for attorneys fees, such as Mr. and Mrs. Labuddes' attorneys who are not Class Counsel, or who are not otherwise designated by Class Counsel to perform work in connection with the class case. As such, the settlement creates a lien against Mr. and Mrs. Labuddes' recovery. Mr. and Mrs. Labudde are now forced with the decision to

either accept settlement under the class action and pay legal fees and costs from their recovery or continue litigation in their individual capacity.

The Labuddes are not the only Class Members to face this predicament. Faced with an instantaneous depreciation of value for the affected TDI's and not knowing how Volkswagens's unlawful actions would further affect these cars, Plaintiffs such as the Labuddes sought guidance from firms who either filed lawsuits or advised Volkswagen of legal representation. The hours spent by attorneys in researching, filing complaints, opposing motions for removal, attending hearings, advising class members and addressing their concerns are considerable.

II. FACTS

On November 4, 2015, Mr. and Mrs. Labudde retained Hyde & Swigart, a consumer law firm, to represent them with respect to claims of Volkswagen's violations of the California Consumers Legal Remedies Act, California Vehicle Code, and California Song-Beverly Consumer Warranty Act. Mr. and Mrs. Labudde are two of hundreds of Volkswagen owners to have done so.

The agreement between Mr. Labudde and the firm contemplated that the case would be handled on a fee shifting basis: that is, under the agreement, if his car is repurchased, legal fees were to be paid by Defendant. The retainer agreement also provides contains language pertaining to a lien for recovery if any.

On January 15, 2016, Hyde & Swigart informed Volkswagen of Mr. and Mrs. Labuddes' claims and demand for relief. In response, Volkswagen acknowledged the demand by letter dated February 8, 2016. Subsequently, at Mr. and Mrs. Labuddes' request, Hyde & Swigart filed a Complaint in San Mateo, California, Case No: CIV538473. The firm compiled documents pertinent to their case, answered their questions. The Complaint alleges violations of the California Consumers Legal Remedies Act; California Vehicle Code; and California Song-Beverly Consumer Warranty Act.

Subsequent to filing the complaint, Volkswagen was served with the complaint. On July 3, 2016, Volkswagen filed a Motion for Removal to the Central District of California, Case No.: 3:16-cv-03753-CRB. The case was subsequently transferred to this MDL action. At present, the firm has expended numerous hours, used various resources and incurred costs in representing Mr. and Mrs. Labudde in this action.

A. CLASS ACTION SETTLEMENT

On July 29, 2016, this Court issued an Amended Order granting Preliminary Approval of Settlement in the above-captioned matter. The settlement covers a nationwide class of individuals who were owners, lessees, or sellers of affected 2009 through 2015 Volkswagen or Audi 2.0L TDI vehicles. The proposed settlement provides Mr. and Mrs. Labudde with a choice of remedies as Eligible owners. These choices include receiving a monetary amount for Owner Restitution and either (1) the Repurchase option, or (2) owners may decide to keep their vehicle and wait for an Emissions Modification Fix, if and when EPA and CARB approve the Fix.

The Settlement Agreement negotiated by Class Counsel also releases all of Mr. and Mrs. Labuddes' claims to fees or costs shifting payable to their counsel by Defendant. Specifically, the "Released Claims" in the Agreement include:

> 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. (emphasis supplied)

Included in this Settlement, Volkswagen agreed to pay reasonable attorneys' fees and costs for work performed by Lead Plaintiffs' Counsel and the PSC (collectively, "Class Counsel"), as well as other attorneys designated by Class Counsel to perform work in connection with this MDL, excluding work performed on MDL cases brought under the securities laws, for physical injury, and on behalf of Volkswagen or competitive dealers. (Dkt. No. 1685 ¶ 11.1.) These Attorneys' fees are subject to the Court's approval. *Id*.

Although Class Counsel has not file an application for Attorneys' Fees pursuant to Rule 23(h) Class Counsel says it "will do so in connection with final approval and under Rule 23(h). ECF No. 1730. Instead, Class Counsel has filed a 3 and 1/4 page statement contending they will be seeking "no more than $324 million in attorneys' fees, plus actual and reasonable out-of-pocket costs, not to exceed $8.5 million." ECF No. 1730. This short and conveniently vague statement does not allow Class Members to make an informed decision as to whether they should object. *In re Mercury Interactive Corp. Securities Litigation,* 618 F.3d 98, 993 (9th Cir. 2010) (application for attorney's fees, costs, and incentive awards must be filed before the deadline for filing objections).

B. NOTICE TO HYDE & SWIGART CLIENTS

After the Court issued the Amended Order, attorneys at Hyde & Swigart, understanding their duties as counsel and the importance of this settlement offer from Volkswagen, began contacting clients in an effort to explain the settlement terms. Hyde & Swigart guided each of its clients through the registration process in an effort to determine the exact amount of the class settlement for each client. After obtaining the settlement offers for each client, Hyde & Swigart contacted each client and discussed those offers with the client. The Labuddes, as well as other

consumer clients represented by Hyde & Swigart received Notice related to the Class Action Settlement. Not only was notice mailed directly to the Labuddes, a represented party, Hyde & Swigart was not copied. The Notice states on Page 3:

> **Attorneys' Fees**
> In class actions, the court must approve all plaintiffs' attorneys' fees and costs. Volkswagen has agreed to pay the attorneys' fees and costs that the court approves in addition to the settlement benefits described above. This means that class members will receive 100% of the compensation described in this Notice, and that their compensation will not be reduced by attorneys' fees or costs. (emphasis added).

To register for the settlement and obtain exact settlement figures, VW owners are required to register through www.VWCourtSettlement.com. The website has no place for a consumer to indicate they are represented by separate counsel. After registration, consumers receive Settlement Packages from Volkswagen that ask they contact class counsel with questions. Although Class Counsel and Volkswagen are on notice that a subset of consumers, like the Labuddes, are represented by counsel, yet these packages were not copied to their lawyers firms.

III. ARGUMENT

Under Federal Rule of Civil Procedure 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). In evaluating a proposed class action settlement under Rule 23(e), the legal standard in the Ninth Circuit is whether the settlement "is fundamentally fair, adequate, and reasonable." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

Mr. Labudde objects to the settlement because the proposed Settlement offers no compensation for attorneys who are not Class Counsel, or who are not otherwise designated by Class Counsel to perform work in connection with this case. As such, his recovery from the class is greatly diminished.

A. CONSUMERS ARE ENTITLED TO FEES FOR INDIVIDUAL REPRESENTATION

A number of statutes enable consumers who succeed in actions for lemon law/breach of warranty/fraud to recover fees. Mr. Labudde, and all consumers situated similarly to him, are entitled to the award of fees to their counsel. Civil Code section 1794, subdivision (a), says that

> "any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief." And subdivision (d) section 1794 provides:
> "If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action."

The Labuddes are the prevailing party in this action, because under the terms of the Class Action settlement Volkswagen has agreed to repurchase the Labuddes vehicle providing them with a net monetary gain. Cal. Civ. Proc. § 1032 (a)(4).

Additionally, FRCP 23(h) does not prohibit providing for payment of fees to non-class counsel. FRCP 23(h) states that "[t]he court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." In addition, Federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. *Hall v. Cole*, 412 U.S. 1, 1946. (1973). In the context of class actions, the Tenth Circuit has indicated non-designated counsel may be entitled to attorney fees, stating, "[w]e fail to see why the work of counsel later designated as class counsel should be fully compensated, while the work of counsel who were not later designated class counsel…should be wholly uncompensated." *Gottlieb v. Barry*, 43 F.3d 474, 489

(10th Cir. 1994). Therefore, Hyde & Swigart is entitled to attorneys fees earned prior to the Labuddes' acceptance of settlement under the Class Action.

B. Settlement Creates a Lien

California allows for the use of an attorney's lien, either by an express provision in the attorney fee contract, or by implication where the retainer agreement provides that the attorney is to look to the judgment for payment for legal services rendered. *Carroll v. Interstate Brands Corp.*, 99 Cal. App. 4th 1168, 1172, 121 Cal. Rptr. 2d 532, 534 (2002). An attorney's lien is a "secret" lien; it is created and takes effect at the time the fee agreement is executed, Additionally, the attorney's security interest is protected even without notice of lien. *Id*. at 1175. Therefore, where an attorney's lien was created before the filing of an action, the attorney's lien has priority over a lien created after the action was commenced. *Id.*

Successor counsel in the possession of settlement or other proceeds against which a predecessor attorney has asserted a lien has a fiduciary obligation to the attorney lienholder with respect to the funds. *See Johnstone v. State Bar*, 64 Cal. 2d 153, 155-56 (1966); *In re Respondent P*, 2 Cal. State Bar Ct. Rptr. 622, 632 (Rev. Dep't 1993); *Cal. Form. Opn*. 2008-175. That duty includes the duty to inform predecessor counsel of the fact and amount of settlement. *In re Riley, 3 Cal. State Bar Ct. Rptr.* 91, 111-15 (Rev. Dep't 1994); *Cal. Form. Opn*. 2008-175. Moreover, a third party (e.g., the defendant or the defendant's insurer) with notice of the plaintiff's former counsel's attorney's lien, may be civilly liable to the lienholder for paying out the funds directly to successor counsel and the Plaintiff. *See Levin v. Gulf Ins. Group*, 69 Cal. App. 4th 1282, 1287-88 (1999).

Hyde & Swigart represents Mr. and Mrs. Labudde in their litigation filed in State Court against Volkswagen. The Court appointed Class Counsel creating an attorney-client relationship between the Labuddes and Class Counsel once the Labuddes action was transferred to this Court. Courts have held that class certification gives rise to an attorney-client relationship between potential class

members and class counsel. *Tedesco v. Mishkin*, 629 F.Supp. 1474, 1483 (S.D.N.Y. 1986). *See, e.g., Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1207 n. 28 (11th Cir.1985) (finding that "[a]t a minimum, class counsel represents all class members as soon as a class is certified ... if not sooner") (*citing Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n. 15 (2d Cir.1978) (internal citations omitted)); *Fulco v. Continental Cablevision, Inc.*, 789 F.Supp. 45, 47 (D. Mass.1992).

This Court's appointment of Class Counsel now affects Hyde & Swigart's representation of the Labuddes in that Hyde & Swigart will be effectively discharged from further representation of the Labuddes should they decide to continue with the class settlement. Since the proposed Settlement does not allow for attorneys' fees for non Class Counsel, the Labuddes are now liable for compensating Hyde & Swigart for attorneys' fees and costs they believed Volkswagen would have been responsible for. For this reason, the Labuddes and other similarly situated class members risk receiving less than the Class Action settlement. This is hardly the result the parties intended, and highlights the need for an amendment to the proposed Settlement incorporating payment of attorney's fees for non-Class Counsel.

The Notice provided to Class Members failed to provide necessary information for the Class to evaluate the entirety of the settlement. Knowing that the Labuddes were represented by Counsel, and the failure to inform the Labuddes and Class Members of the potential for a diminished settlement amount due to the lien is misleading. Here, the consumers' ability to make an informed decision about the settlement and its financial impact was and is being hampered by lack of information from Class Counsel and Volkswagen about how legal fees and costs incurred by predecessor counsel would be handled.

With respect to the Labuddes and other Class Members who face the potential of a lien, the settlement is not fundamentally fair, adequate, and reasonable. The proposed settlement agreement divides class members into two

separate classes: those who have never been individually represented, and those who have privately retained, as is their right, counsel of their choosing who will now be required to pay attorneys' fees out of their settlement proceeds. Inequitably, the proposed settlement provides for the payment of attorneys' fees for those who have not retained separate counsel, but does not award attorney's fees for those who had.

IV. CONCLUSION

In its current form, the settlement is inequitable because it fails to deal with the liens created by agreement or operation of law. As discussed above, this Court has the ability to exercise its equitable powers, and award attorneys' fees to those consumers who in an effort to protect their rights against Volkswagen sought legal advice and protection.

The Labuddes seek a modification of proposed settlement to award attorneys' fees separate from any common fund created. As proposed in Class Counsel's short statement regarding Attorneys' fees, no legal fees from the common fund are sought. Rather, Class Counsel will be seeking fees *in* addition to the funds offered consumers, just like in an ordinary lemon law/breach of warranty action. There is no reason, then, that the Settlement ought to preclude an award of attorneys' fees to individuals' lawyers. Such an award is necessary to prevent inequality amongst class members who are required to pay attorneys' fees out of their settlement proceeds, and those who do not. Therefore, The Labuddes respectfully request the proposed settlement agreement be modified to include an award of attorneys' fees for non-class counsel, so as to prevent inequity amongst the class.

Date: September 16, 2016

Hyde & Swigart

By: s/ Joshua B. Swigart
Joshua B. Swigart
Attorneys for John Labudde

and Jing Lauded

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2016, I electronically filed a copy of the foregoing using the CM/ECF system, which sent a notification of such filing to counsel of record.

On the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope as follows:

Clerk of the Court/Judge Charles R. Breyer
Philip Burton Federal Building & United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Elizabeth Cabraser
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111

Sharon L. Nelles
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

[X] BY MAIL, by placing a copy thereof in a separate envelope for each addressee named above, addressed to each addressee respectively, and then sealed each envelope and, with the postage fully prepaid, deposited each in the United States mail at San Diego, California in accordance with our business' practice.

Date: September 16, 2016

By: s/ Joshua B. Swigart
Joshua B. Swigart