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

MDL No. 2599
Master File No.: 15-MD-02599-MORENO
S.D. Fla. Case No.: 1:14-cv-24009-MORENO

IN RE: TAKATA AIRBAG PRODUCT LIABILITY LITIGATION
THIS DOCUMENT RELATES TO: **ECONOMIC LOSS TRACK CASES AGAINST VOLKSWAGEN GROUP OF AMERICA, INC. AND AUDI OF AMERICA, LLC**

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS, AND APPLICATION FOR CLASS COUNSEL'S ATTORNEYS' FEES, AND INCORPORATED MEMORANDUM OF LAW

PODHURST ORSECK, P.A.
Peter Prieto (FBN 501492)
Aaron S. Podhurst (FBN 63606)
Stephen F. Rosenthal (FBN 131458)
John Gravante (FBN 617113)
Matthew P. Weinshall (FBN 84783)
Alissa Del Riego (FBN 99742)
SunTrust International Center
One S.E. Third Ave., Suite 2300
Miami, Florida 33131
Phone: (305) 358-2800
Email: pprieto@podhurst.com
apodhurst@podhurst.com
srosenthal@podhurst.com
jgravante@podhurst.com
mweinshall@podhurst.com
adelriego@podhurst.com

Chair Lead Counsel for Plaintiffs

(Additional counsel listed below)

TABLE OF CONTENTS

PAGE

Class Counsel and Class Representatives respectfully move, under Rule 23 of the Federal Rules of Civil Procedure, for Final Approval of the Settlement with Volkswagen Group of America, Inc. and Audi of America, LLC (collectively "Volkswagen" or "VW"), certification of the Class defined in the Settlement, and an award of attorneys' fees to Class Counsel.[1]

INTRODUCTION

Subject to this Court's approval, Plaintiffs, on behalf of the Settlement Class, have agreed to resolve all consumer economic loss claims against VW through a Settlement worth more than $42 million. This is an outstanding result for the Class, after almost four years of intense, hard-fought litigation.

This action arises from allegations that VW manufactured and deceptively sold over one million vehicles equipped with defective airbags supplied by Takata Corporation, and its subsidiary TK Holdings, Inc. (collectively "Takata"), many of which have yet to be replaced under the largest automotive recall in United States history. From the beginning, Plaintiffs' two primary objectives of this litigation have been: (1) to ameliorate the grave safety risk that Takata's defective airbags pose to Class Members; and (2) to compensate Class Members for the economic damages they suffered from purchasing defective vehicles that were not as safe or valuable as advertised. The Settlement achieves both objectives, providing Class Members with a wide array of relief.

A key part of the Settlement is the Outreach Program, the benefits of which are evident from the success of the ongoing programs for the seven settlements this Court previously approved. The Outreach Program will utilize innovative, tailored outreach methods, well beyond those currently used by VW, to maximize Class Members' recognition of the danger of not replacing Takata airbag inflators in their vehicles and motivate them to bring their vehicles to dealerships for the Recall Remedy. These outreach methods will include direct contact via mail, telephone, social media, e-mail, texting, and door-to-door canvassing, as well as multi-media campaigns using radio, television, print, and the internet. More than nine million Recall Remedies have been performed since the outreach programs for the seven settlements commenced, substantially reducing the hazard posed by defective Takata inflators, and the Settlement Special Administrator continues to refine the programs through a data-driven process to maximize their effectiveness.

[1] The Settlement Agreement has been filed with the Court. (ECF No. 4105-1.) Capitalized terms not defined herein shall have the same definitions and meanings ascribed to them in the Settlement.

The Settlement also directly compensates Class Members, through both cash payments and substantial Customer Support and Rental Car Programs. Class Members can receive cash payments by either submitting a straightforward claim for reimbursement of reasonable expenses they incurred in connection with having the Recall Remedy performed on their vehicles, or simply by registering for payments of up to $500 through distributions made from residual funds remaining in the Fund at the end of each program year. To further incentivize Class Members who still possess Subject Vehicles to have their dangerous airbag inflators replaced, such Class Members must obtain the Recall Remedy to become eligible for a cash payment. Class Members will also receive the benefit of the Customer Support Program, which provides future coverage for repairs and adjustments of current and replacement inflators, including the expense of parts and labor, for an extended period of time. In addition, through the Rental Car Program, VW will provide a free rental or loaner vehicle to any Class Member who requests one, even just for the day when the Recall Remedy is being performed on the vehicle. This program represents a substantial departure from VW's pre-Settlement practice and a significant benefit to the Class.

Although this Settlement is similar in structure to the seven prior settlements the Court approved—a fact that strongly supports, if not conclusively establishes, the fairness, adequacy, and reasonableness of this Settlement—the litigation against VW proceeded on a separate and unique path. VW battled Plaintiffs on every front, from procedural and pleading challenges, to personal jurisdiction, to the substantive merits of Plaintiffs' claims. Only after extensive discovery, several rounds of amended complaints, and contentious motion practice did VW express any interest in negotiating a settlement.

In the face of numerous litigation obstacles and legal risks, Class Members will receive immediate and substantial relief through a negotiated resolution that simultaneously targets the extraordinary public safety hazard posed by Takata's defective airbags. When factoring in the value of the Customer Support Program, as reasonably estimated by an automotive and warranty valuation expert, the total value of the Settlement is approximately $55.5 million. By any measure, this is an outstanding result for the Class.

Because the Settlement is fair, adequate, and reasonable under Fed. R. Civ. P. 23(e) and prevailing jurisprudence, and the Class satisfies the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), Class Counsel request that the Court grant final approval of the Settlement and certify the Settlement Class. In addition, Class Counsel respectfully request that the Court award

attorneys' fees in accordance with prevailing Eleventh Circuit precedent and customary fees in similar cases, to compensate Class Counsel for their work in achieving this excellent result for the benefit of the Class and for the extensive work Class Counsel must continue to perform over the unique four-year lifespan of the Settlement.

In accordance with the Settlement Agreement, a proposed Final Order and Final Judgment encompassing these requests and reciting material terms of the Settlement are being submitted as exhibits to this motion.

BACKGROUND

A. Factual Background.

The Court is familiar with the facts giving rise to Plaintiffs' claims and VW's defenses. Plaintiffs summarize such facts below to the extent pertinent to the issues raised in this motion.

For more than fifteen years, numerous automotive companies, including VW, General Motors, FCA, and Mercedes-Benz (the "Automotive Defendants"), manufactured and sold to the unsuspecting public a staggering number of vehicles equipped with defective airbags supplied by Takata. Instead of functioning as safety devices, Takata's defective airbags have an unreasonably dangerous propensity to deploy aggressively or rupture, spraying metal shrapnel toward vehicle occupants. The common defect in Takata's airbags is tied to the inherent instability of the phase-stabilized ammonium-nitrate propellant used in Takata's airbag inflators, which are metal canisters that are supposed to release gas to inflate airbag cushions in the milliseconds following a crash.

This common defect, which affected at least 50 million airbags nationwide, has given rise to the single largest automotive recall in United States history and a terrible public safety crisis. Even though nationwide recalls have been underway for more than four years, millions of airbags have yet to be removed from vehicles and replaced with safe airbags, according to the most recent data published by the National Highway Safety Transportation Administration ("NHTSA").

Following numerous field ruptures of Takata's inflators that seriously injured or killed vehicle occupants, automakers began to recall vehicles equipped with such inflators. Honda initiated several narrow recalls from 2008 through 2012, claiming that the field ruptures resulted from limited manufacturing defects. As field ruptures continued to occur, however, the recalls expanded significantly. From April 11, 2013, through May 15, 2015, automakers initiated and expanded recalls ultimately covering millions of vehicles. On May 18, 2015, Takata entered into a Consent Order with NHTSA that required it to file Defect Information Reports, triggering recalls

of almost 34 million inflators. Given the unprecedented size of the recalls and a shortage of replacement inflators, NHTSA also entered a Coordinated Remedy Order to prioritize which vehicles should be repaired first. Takata's Consent Order has been amended several times, expanding the recall to all inflators with non-desiccated phase-stabilized ammonium-nitrate propellant, which includes at least 50 million inflators.

Plaintiffs alleged that, prior to the recalls, neither Takata nor the Automotive Defendants disclosed the common defect in Takata's inflators to Class Members. Instead, they represented that their products were safe. Plaintiffs alleged that they suffered several forms of economic damages as a result of purchasing defective airbags and vehicles that were inaccurately represented to be safe. Plaintiffs, for example, alleged that they overpaid for their vehicles with defective airbags and did not receive the benefit of their bargain, because the vehicles and airbags were of a lesser standard and quality than represented. In addition, Plaintiffs suffered damages in the form of out-of-pocket expenses, including lost wages from taking time off work to bring their vehicles to dealerships for the Recall Remedy, paying for rental cars and alternative transportation, and hiring child care while the Recall Remedy was being performed.

Beyond suffering these economic damages, many Class Members remain exposed to the unreasonable risk of serious injury or death posed by defective Takata inflators that have not been removed from their vehicles. Although supply shortages were partly responsible for low recall-completion rates at first, NHTSA has highlighted a lack of effective outreach programs from automotive companies as well.

B. Procedural History.

The following discussion recounts some of the major procedural events in this litigation. On October 27, 2014, eighteen plaintiffs filed a class action complaint in *Craig Dunn, et al. v. Takata Corp., et al.,* No. 1:14-cv-24009 (S.D. Fla.), asserting economic loss claims against several automakers and Takata. Close to one hundred similar lawsuits were eventually filed around the country. The Judicial Panel on Multidistrict Litigation subsequently consolidated the *Dunn* action for pretrial proceedings with additional class and individual actions alleging similar or identical claims before this Court in *In re Takata Airbag Products Liability Litigation*, No. 1:15-md-02599-FAM (S.D. Fla.) (ECF No. 1).

On March 17, 2015, the Court entered an Order Appointing Plaintiffs' Counsel and Setting Schedule, which designated Peter Prieto of Podhurst Orseck, P.A. as Chair Lead Counsel, David

Boies of Boies Schiller and Flexner, LLP, and Todd A. Smith of Power Rogers & Smith, PC, as Co-Lead Counsel in the Economic Loss track; Curtis Miner of Colson Hicks Eidson as Lead Counsel for the Personal Injury track; and Roland Tellis of Baron & Budd P.C., James Cecchi of Carella Byrne Cecchi Olstein P.C., and Elizabeth Cabraser of Lieff, Cabraser, Heimann & Bernstein, LLP as Plaintiffs' Steering Committee members.

On January 13, 2017, Defendant Takata Corporation signed a criminal plea agreement in which it admitted, among other things, that it "knowingly devised and participated in a scheme to obtain money and enrich Takata by, among other things, inducing the victim OEMs [Original Equipment Manufacturers] to purchase airbag systems from Takata that contained faulty, inferior, nonperforming, non-conforming, or dangerous PSAN inflators by deceiving the OEMs through the submission of false and fraudulent reports and other information that concealed the true and accurate test results for the inflators which the OEMs would not have otherwise purchased as they were." *United States v. Takata Corp.*, No. 2:16-cr-20810 GCS EAS, ECF No. 23 at B-6, B-7 (E.D. Mich. Feb. 27, 2017). Takata entered a guilty plea to one count of wire fraud as part of a settlement with the U.S. Department of Justice. *See id.* at 2-3.

On June 25, 2017, TK Holdings Inc. and certain of its subsidiaries and affiliates filed for bankruptcy, each commencing a voluntary case under Chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware. (*See* ECF No. 1857.) On June 26, 2017, TK Holdings Inc. filed its Notice of Bankruptcy Filing and Imposition of Automatic Stay Pursuant to Section 262(a) of the Bankruptcy Code. (*Id.*)

On August 8, 2017, Plaintiffs Brett Alters and April Rockstead Barker, et al., filed a complaint in the District of New Jersey against Volkswagen Group of America, Inc., Volkswagen AG, Takata Corporation, and TK Holdings, Inc., *Alters v. Volkswagen Group of America, Inc.*, No. 17-cv-05863 (D.N.J.) ("*Alters* Complaint"), asserting economic loss claims relating to Takata PSAN inflators in Volkswagen vehicles. The JPML transferred the *Alters* action to the *Takata* MDL on September 18, 2017. (ECF No. 2044.)

On March 14, 2018, Plaintiff Michael McBride, et al., filed a complaint in the Eastern District of Virginia against Audi of America, LLC, Audi AG, and Volkswagen AG, *McBride v. Audi of America, LLC*, No. 18-cv-00284 (E.D. Va.) ("*McBride* Complaint"), asserting economic loss claims relating to Takata PSAN inflators in Audi vehicles. The JPML transferred the *McBride* action to the *Takata* MDL on March 26, 2018. (ECF No. 2467.)

On March 14, 2018, Plaintiffs filed a consolidated class action complaint in the *Takata* MDL, *Puhalla v. Volkswagen AG*, No. 15-MD-2599 (S.D. Fla.) (ECF No. 2430) ("Consolidated Class Action Complaint"), bringing together the claims of Plaintiffs who filed actions that were transferred into the MDL, as well as Plaintiffs who direct filed their claims in the MDL.

Per the Court's subsequent Order (ECF No. 2651), Plaintiffs filed, on May 18, 2018, an amended *Puhalla* complaint that removed the claims of automotive recyclers, which were placed in a separate complaint in the MDL. (ECF No. 2762 ("Amended Consolidated Class Action Complaint"); *see* ECF No. 2781).

Volkswagen moved to dismiss the amended *Puhalla* complaint (ECF No. 2988), Plaintiffs filed a response (ECF No. 3034), and Volkswagen filed a reply (ECF No. 3101). The Court heard oral argument on the motion to dismiss on December 11, 2018. (*See* ECF No. 3139.)

On May 3, 2019 (ECF No. 3394), June 20, 2019 (ECF No. 3406), and May 27, 2020 (ECF No. 3834), the Court issued Orders ruling on Volkswagen's motion to dismiss. In these Orders, the Court dismissed Volkswagen AG and Audi AG for lack of personal jurisdiction, and as to Volkswagen Group of America, Inc. and Audi of America, LLC, dismissed certain claims and allowed others to proceed. (ECF No. 3406 at 95; ECF No. 3834 at 49-51.)

Plaintiffs filed the second amended *Puhalla* complaint, which reinstated claims asserted on behalf of Florida and direct-filed Plaintiffs against Volkswagen Group of America, Inc. and Audi of America, LLC, on April 23, 2021. (ECF No. 4026) ("Second Amended Consolidated Class Action Complaint").

Written discovery and extensive document productions have taken place over the past three years (millions of pages of documents have been produced); Volkswagen has taken 17 depositions of class representatives and related individuals; and Plaintiffs have deposed at least 18 Takata witnesses and 5 Volkswagen witnesses. VW has also conducted inspections of the vehicles of the Class Representatives.

C. Settlement Negotiations.

Parallel to the hard-fought litigation track, preliminary settlement discussions began on December 11, 2020, when counsel for Plaintiffs and counsel for VW conducted an initial mediation with court-appointed mediator, Paul Huck, Jr. During this mediation, and in subsequent conferences between counsel, the Parties discussed their relative views of the law and facts and potential relief for the proposed Class and exchanged a series of counter-proposals. After

numerous phone conferences and exchanges of information, the parties ultimately reached an agreement in principle in July of 2021. Only after agreeing on the substantive terms of the Settlement did the parties begin to negotiate attorneys' fees. (*Id.*) The parties then negotiated the precise terms of the Settlement Agreement for several weeks and signed the Settlement Agreement on August 31, 2021.

Throughout the eight-month negotiation process, both in-person and by phone, the parties discussed and considered their relative views of the law, facts, and potential relief for the proposed Class, and exchanged numerus counter-proposals for key issues and concepts in a potential settlement. (*Id.*) Based on the success and fairness of the prior seven settlements reached in the MDL, Plaintiffs' counsel insisted on structuring this Settlement in a similar manner. (*Id.*) At all times, the lengthy settlement negotiations were adversarial, non-collusive, and at arm's length. (*Id.*)

TERMS OF THE SETTLEMENT

The terms of the Settlement are detailed in the Agreement, which has been filed with the Court. (ECF No. 4105-1.) The following is a summary of the material terms.

A. The Settlement Class.

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

> (1) all persons or entities who or which owned and/or leased, on the date of the issuance of the Preliminary Approval Order, Subject Vehicles distributed for sale or lease in the United States or any of its territories or possessions; and (2) all persons or entities who or which formerly owned and/or leased Subject Vehicles distributed for sale or lease in the United States or any of its territories or possessions, and who or which sold or returned, pursuant to a lease, the Subject Vehicles after February 9, 2016, and through the date of the issuance of the Preliminary Approval Order. Excluded from this Class are: (a) Volkswagen, its officers, directors, employees and outside counsel; its affiliates and affiliates' officers, directors and employees; its distributors and distributors' officers and directors; and Volkswagen's Dealers and their officers, directors, and employees; (b) Settlement Class Counsel, Plaintiffs' counsel, and their employees; (c) judicial officers and their immediate family members and associated court staff assigned to this case, any of the cases listed in Exhibit 1, or the 11th Circuit Court of Appeals; (d) Automotive Recyclers and their outside counsel and employees; and (e) persons or entities who or which timely and properly exclude themselves from the Class.

(ECF No. 4105-1, § II.A.9.)

"Subject Vehicles" means those Volkswagen vehicles listed on Exhibit 9 that contain or contained Takata PSAN inflators in their driver or passenger frontal airbags that (1) have been recalled, or (2) shall be recalled per the May 5, 2020 agreement between NHTSA and Volkswagen Group of America, Inc. regarding Takata SDI-D inflators, as indicated in Exhibit 10 to the Settlement Agreement. (*Id.*, § II.A.44.)

There are approximately 1.35 million Subject Vehicles covered in the VW Class.

B. Settlement Fund.

The Settlement requires Volkswagen to deposit a total of $42 million, less a 20% credit for the Enhanced Rental Car/Loaner Program, into a non-reversionary Qualified Settlement Fund. Non-reversionary means that no amount of the Settlement funds will revert back or be returned to Volkswagen. VW has deposited approximately 12% of the full Settlement Amount within 30 days of this Court's Preliminary Approval of the Settlement, to immediately fund the first year of the Outreach Program. The rest of the Settlement Fund payments will be made over a prescribed four-year schedule set forth in the Settlement. (*Id.*, § III.A.2.)

The Settlement Fund will be used to pay for: (a) the Outreach Program; (b) an Out-of-Pocket Claims Process to compensate Class Members for out-of-pocket expenses relating to the Takata Airbag Inflator Recall; (c) residual cash payments to Class Members who have not incurred reimbursable out-of-pocket expenses and who register for residual payments, to the extent that there are residual amounts remaining; (d) the Enhanced Rental Car/Loaner Program, which will provide rental or loaner vehicles to Class Members at no cost when the Recall Remedy is being performed or is delayed; (e) the Notice Program; (f) claims administration, including expenses associated with the Settlement Special Administrator; and (g) Court-awarded Settlement Class Counsel's fees and expenses. (*Id.*, § III.A.3.)

C. Outreach Program.

A vital feature of the Settlement is the requirement that VW fund an intensive, innovative Outreach Program aimed at maximizing the removal of dangerous inflators from Class Members' vehicles. Even though the recall has been underway for several years, hundreds of thousands of Class Members remain exposed to the continuing unreasonable danger of rupturing inflators. The Outreach Program will utilize traditional and non-traditional media well beyond the methods currently used by VW. The methods of outreach may include: (a) direct contact of Class Members via U.S. Mail, telephone, social media, e-mail, texting, and canvassing; (b) contact of Class Members by third parties (*e.g.*, independent repair shops); and (c) multi-media campaigns, such as through print, television, radio, and the internet. (*Id.*, § III.B.)

The budget for the entire Outreach Program is set at 33% of the Settlement Amount, but may be adjusted subject to agreement of the Parties. The Settlement Special Administrator will oversee and administer the Outreach Program, and will engage industry-leading consultants with specialized knowledge of different outreach methods to adjust the Outreach Program to maximize its effectiveness. In this way, the Outreach Program is designed to be flexible and nimble, geared to redirect resources to methods that prove most effective at motivating Class Members to bring their vehicles to dealerships for the Recall. The Settlement Special Administrator is also empowered to resolve disputes between the Parties about how best to design and implement the Outreach Program. (*See id.*, § III.B.)

Underscoring the public safety objective of the Settlement, VW funded the first 12 months of the Outreach Program within 30 days of Preliminary Approval. (*Id.*)

D. Out-Of-Pocket Claims Process.

Another critical feature of the Settlement is an Out-of-Pocket Claims Process, which will reimburse Class Members for reasonable out-of-pocket expenses incurred relating to the Takata Airbag Inflator Recalls. (*See id.*, § III.D.) There are two primary advantages to the Claims Process: first, it permits Class Members to recover for the reasonable expenses they actually incurred, without limiting recovery to certain pre-determined categories or amounts; and second, it furthers the public-safety goal of incentivizing Class Members who still own or lease Subject Vehicles to bring their vehicles to a dealership for the Recall Remedy, as having the Recall Remedy performed is a prerequisite to eligibility for such a payment. The Registration/Claim Form is straightforward, simple, and not burdensome. (*See id.* at Ex. 12.) It will be provided to

Class Members via the Settlement website, and VW will request that VW Dealers provide the Registration/Claim Form to Class Members when they bring their vehicles in for the Recall Remedy. (*See id.*, § III.F.)

The Settlement Special Administrator will oversee the Out-of-Pocket Claims Process, including the determination of types of reimbursable costs and the eligibility of claims for reimbursement. The Parties agreed to recommend several common types of recall-related expenses for reimbursement eligibility, all of which are identified on the Registration/Claim Form:

> (i) reasonable unreimbursed rental car and transportation expenses, after requesting and while awaiting the Recall Remedy from a VW Dealer;
>
> (ii) reasonable towing charges to a VW Dealer for completion of the Recall Remedy;
>
> (iii) reasonable childcare expenses necessarily incurred while the Recall Remedy is being performed on the Subject Vehicle by the VW Dealer;
>
> (iv) reasonable unreimbursed out-of-pocket costs associated with repairing driver or passenger front airbags containing Takata PSAN inflators;
>
> (v) reasonable lost wages resulting from lost time from work directly associated with the drop off and/or pickup of a Subject Vehicle at a VW Dealer for performance of the Recall Remedy; and
>
> (vi) reasonable fees incurred for storage of a Subject Vehicle after requesting and while awaiting a Recall Remedy part.

(*See id.*, § III.D.3.) In addition to these categories of expenses, the Settlement Special Administrator is empowered to approve and pay for other reimbursable claims that the Settlement Special Administrator deems to be a reasonable out-of-pocket expense, and Class Members are invited to submit claims for such expenses. (*Id.*, § III.D.2.)

As far as the timing of payments to Class Members, the first set of reimbursements to eligible Class Members who have completed and filed a Registration/Claim Form will be made on a rolling basis by the Settlement Special Administrator no later than 180 days after the Effective Date. Reimbursements for following years will be made on a rolling basis as claims are submitted and approved. (*Id.*)

For the reimbursements that occur in years one through three, reimbursements will be made on a first-in-first-out basis until the Settlement Fund is depleted for that year. If there are no more funds to reimburse eligible Class Members in that particular year, then those Class Members will be moved to subsequent years for reimbursement. For reimbursements to eligible Class Members that are to occur in year four, the last year of the reimbursement process, out-of-pocket-expense

payments will be made for the amounts approved by the Settlement Special Administrator, unless the approved reimbursements to eligible Class Members exceed the amount of the Settlement Fund remaining. If this event occurs, then reimbursements will be made on a pro rata basis until the available amount is exhausted. (*Id.*)

E. Residual Distribution Payments.

The settlement program offers Class Members an additional way to receive a cash payment. Rather than submit a claim for out-of-pocket expenses, Class Members have the option of registering for a Residual Distribution of up to $250 from the Settlement Fund. Residual Distributions will be funded with the monies remaining in the fund at the end of each of the four settlement program years, after all payments are made for the Outreach Program and approved claims for out-of-pocket expenses. (*See id.*, § III.E.)

Class Members are eligible for a Residual Distribution if they just registered for a residual payment or if they submitted claims in that year, or prior program years, that were previously rejected. Subject to certain exceptions, funds remaining after payment of the maximum residual payment to all Class Members in any given year shall be rolled over into the following year's settlement program. The settlement program will last for at least four years. (*See id.*, § III.E.)

The Settlement is structured to maximize cash payments to Class Members. Any funds that remain at the end of the last settlement program year after the Residual Distribution, if any, is made, may be distributed, unless it is administratively unfeasible, on a per capita basis to Class Members who: (a) previously submitted claims that were paid; (b) previously submitted claims that were rejected and have not received any prior claims payments; or (c) registered for a residual payment only. Alternatively, the Parties may elect to fund additional Outreach Program activities with such remaining funds. The residual payment from this last Settlement program year is limited to $250 per Class Member, as well. Thus, it is possible for a Class Member who simply registers for Residual Distribution payments to receive $500 over the course of the Settlement—$250 from the initial Residual Distribution at the end of the year the Class Member registers, and $250 from the final Residual Distribution at the end of the settlement program. (*See id.*, § III.E.)

Finally, if there are any funds remaining in the Settlement Fund after all of the foregoing payments have been made through the last program year, those funds may be distributed to all Class Members on a per capita basis, unless it is administratively unfeasible. If the Settlement Special Administrator determines it to be administratively unfeasible (*e.g.*, because the cost of

distributing the remaining funds would consume them), then those funds may be distributed *cy pres*, with the Court's approval. (*See id.*, § III.E.)

F. Rental Car/Loaner Program.

Another aspect of the Settlement relief—the Rental Car/Loaner Program—is designed to address any inconvenience or additional costs certain Class Members may face in getting the Recall Remedy performed on their vehicles due to supply shortages of replacement parts or the time needed to perform the Recall Remedy. Any Class Member who brings a recalled Subject Vehicle to a dealership for the Recall Remedy and requests a rental/loaner vehicle will be provided one for free, until the Recall Remedy is performed on the Subject Vehicle. Commencing no later than the issuance date of the Preliminary Approval Order, this additional benefit furthers public safety and reduces a potential impediment to Class Members having the Recall Remedy performed on their vehicle. (*See id.*, § III.C.)

In exchange for providing the Enhanced Rental Car/Loaner Program, VW shall receive a credit of 20% of the Settlement Amount. One quarter of the credit shall be applied to each of the four annual payments that VW must make into the Settlement Fund, such that the full credit is realized at the time of the Year Four Payment. (*See id.*, §§ III.B, III.C.) A leading valuation expert, Kirk Kleckner, whose work has been cited with approval by a number of courts, has determined within a reasonable degree of professional certainty that the value of the Rental Car Program exceeds the credit that VW receives for implementing it. (*See* Ex. C (Kleckner Report), ¶ 2.b.)

The Settlement Special Administrator is charged with monitoring VW's compliance with the Enhanced Rental Car/Loaner Program. Every six months, VW must certify to the Settlement Special Administrator that it is complying with the program, and the Settlement Special Administrator is authorized to audit and confirm VW's compliance. (*See id.*, § III.C.)

G. Customer Support Program.

In addition to the monetary elements of the Settlement, VW has also agreed to provide Class Members with a Customer Support Program that provides future coverage for repairs and adjustments (including parts and labor) necessary to correct any defects in the materials or workmanship of (1) Takata PSAN inflators contained in the driver or passenger front airbag modules of Subject Vehicles, or (2) replacement driver or passenger inflators installed pursuant to the Takata Airbag Recall in the Subject Vehicles. (ECF No. 4105-1, § III.G.) This benefit protects

Class Members from incurring additional expenses if their Subject Vehicle had the Recall Remedy performed, but the new inflator is in any way defective or breaks.

Eligible Class Members may begin seeking the Customer Support Program benefits 30 days after the Court's issuance of the Final Order, a date chosen to give VW sufficient lead time to coordinate with their dealers regarding how to implement this benefit. The Customer Support Program benefit will be automatically transferred and will remain with the Subject Vehicle regardless of ownership. It does not apply, however, if a replacement airbag inflator deploys normally. Nor does the Customer Support Program extend to inoperable vehicles and vehicles with a salvaged, rebuilt, or flood-damaged title. (*See id.*, § III.G.)

The duration of the Customer Support Program benefit for each Class Member depends on whether the Recall Remedy has already been performed and whether the Subject Vehicle contains a desiccated Takata PSAN inflator. The Settlement provides as follows:

> (i) If the Subject Vehicle has been recalled and the Recall Remedy has been completed as of the date of the issuance of the Court's Preliminary Approval Order, then the Customer Support Program will last for 10 years measured from the date the Recall Remedy was performed on the Subject Vehicle or 150,000 miles measured from the date the Subject Vehicle was originally sold or leased by a Volkswagen Dealer ("Date of First Use"), whichever comes first. However, each eligible vehicle will receive coverage for at least 75,000 miles measured from the date the Recall Remedy was performed on the Subject Vehicle, or two years measured from the date of the issuance of the Court's Preliminary Approval Order, whichever is later.
>
> (ii) If the Subject Vehicle has been or will be recalled and the Recall Remedy has not been completed as of the date of the issuance of the Court's Preliminary Approval Order, then the Customer Support Program will last for (a) 10 years from the Date of First Use, or, if the Recall Remedy is subsequently performed on the Subject Vehicle, the date the Recall Remedy is performed, or (b) 150,000 miles measured from the Date of First Use, whichever comes first. However, each eligible vehicle will receive coverage for at least 75,000 miles measured from the date the Recall Remedy was performed on the Subject Vehicle, or two years measured from the date of the issuance of the Court's Preliminary Approval Order (or from the date the Recall Remedy is subsequently performed, if it is), whichever is later.

(*Id.*, § III.G).

Mr. Kleckner, the automotive and warranty valuation expert, has determined within a reasonable degree of professional certainty that the value to Class Members of the Customer Support Program is $13.5 million. (Ex. C (Kleckner Decl.), ¶ 2.a.)

H. Release.

Upon entry of final judgment, Class Members agree to give a broad release to the "Released Parties," defined essentially as VW and all related entities and persons, of all claims "regarding the subject matter of the Actions,"

> arising from, related to, connected with, or in any way involving the Claims or the Actions, the Subject Vehicles' driver or passenger front airbag modules containing desiccated or non-desiccated Takata PSAN inflators, and any and all claims involving the Takata Airbag Inflator Recalls that are, or could have been, alleged, asserted or described in the Alters Complaint, the McBride Complaint, the Consolidated Class Action Complaint, the Amended Consolidated Class Action Complaint, the Second Amended Consolidated Class Action Complaint, the Actions or any amendments of the Actions.

(ECF No. 4105-1, § VII.B.) There are two important exceptions carved from the releases: for personal injury and physical property damage claims and for claims against certain "Excluded Parties."

First, the Settlement Agreement provides that "Plaintiffs and Class Members are *not* releasing and are expressly reserving all rights relating to claims for bodily injury, wrongful death or physical property damage (other than to the Subject Vehicle) arising from an incident involving a Subject Vehicle, including the deployment or non-deployment of a driver or passenger front airbag with a Takata PSAN inflator." (*Id.*, § VII.D.)

Second, the Settlement Agreement also reserves and does not release claims against "Excluded Parties," who are defined as Takata (and all related entities and persons) and all other automotive manufacturers and distributors (and all their related entities and persons), specifically including other, non-VW Defendants in the Action. (*See id.*, § VII.E.)

I. Notice Program.

The Settlement proposed, and the Court approved in its Preliminary Approval Order, a robust Notice Program designed to satisfy Rule 23 and constitutional due process. Notifying Class Members of the Settlement, in both English *and* Spanish, is being accomplished through a combination of the Direct Mail Notices, Publication Notice (in newspapers, magazines and/or other media outlets), Radio Notice, notice through the Settlement website (www.AutoAirbagSettlement.com), a Long Form Notice, and other forms of notice, such as banner notifications on the internet. (*See* Ex. B (Azari Decl.).) The details of each form of notice are set forth in the declaration of Cameron R. Azari, Esq., of Epiq Systems, Inc., the Settlement Notice Administrator, included as Exhibit 11 to the Settlement Agreements (ECF No. 4105-1), and in Mr.

Azari's more recent declaration submitted as an exhibit in support of this motion (Ex. B (Azari Decl.)).

The Settlement accomplished a reduction in administrative expenses by employing a single Settlement Notice Administrator to issue notice for all Settlements reached in this MDL and utilizing a combined Settlement website to inform Class Members of the terms of the Settlement Agreement, their rights, dates and deadlines, and related information. The website includes, in .pdf format, relevant Settlement documents, including the Registration/Claim Form, both in English *and* Spanish. (Ex. B (Azari Decl.), ¶¶ 24, 54-55.)

Class Members also received Direct Mail Notice by U.S. Mail. (*Id.*, ¶¶ 7-8, 13-25.) The Direct Mail Notice informs potential Class Members of the various ways they can obtain the Long Form Notice (via the website, mail or a toll-free telephone number), and the general structure of the Settlement. (*Id.* at Ex. 2.) The Settlement Notice Administrator also re-mailed Direct Mail Notices returned by the U.S. Postal Service with a forwarding address and, for returned mail without a forwarding address, researched better addresses and promptly re-mailed copies of the applicable notice to any better addresses. (*Id.*, ¶¶ 7-8, 13-25.)

The Settlement Notice Administrator also established a toll-free telephone number that provides settlement-related information to Class Members using an Interactive Voice Response system, with an option to speak with live operators. (*Id.*, ¶ 58-59.)

The Long Form Notice, attached as Exhibit 6 to the Settlement Agreement, also follows a standardized form. (*Id.* at Ex. 3.) It advises Class Members of the general terms of the Settlement, including information on the definition of the Class, the relief to be provided, and what claims are to be released; notifies them of and explains their rights to opt out of or object to the Settlement; discloses the amount of attorneys' fees and expenses that Settlement Class Counsel may request; and explains that such fees and expenses—as awarded by the Court—will be paid from the Settlement Fund. (*Id.*) The Long Form Notice also includes the Registration/Claim Form. (*Id.*) The Registration/Claim Form (attached as Exhibit 12 to the Settlement Agreement) informs the Class Member that the form must be fully completed and timely returned within the Claim Period to be eligible to obtain monetary relief pursuant to this Agreement. (ECF No. 4105-1 at Ex. 12.)

To comply with the Class Action Fairness Act, the Settlement Notice Administrator also sent to each appropriate State and Federal official the materials specified in 28 U.S.C. § 1715 and otherwise complied with its terms. (Ex. B (Azari Decl.), ¶ 12.)

J. Settlement Administration.

The Settlement Special Administrator is charged with administering all aspects of the Settlement, with the exception of the Notice Program, which the Settlement Notice Administrator shall handle, in coordination with the Settlement Special Administrator. The Court appointed Patrick A. Juneau, of Juneau David APLC, to serve as Settlement Special Administrator, the same position to which he was appointed for the seven prior settlements, which likewise maximizes efficiency. His responsibilities will include (1) overseeing and administering the Outreach Program, (2) auditing and confirming VW's compliance with the Enhanced Rental Car/Loaner Program, and (3) overseeing and administering the Out-of-Pocket Claims Process and Residual Distribution, a function which requires the exercise of discretion, to determine the reasonableness and eligibility of Class Members' claims for out-of-pocket expenses and to deny any fraudulent claims. (ECF No. 4105-1, § IV.K.)

K. Attorneys' Fees.

Class Counsel did not begin to negotiate attorneys' fees and expenses until after agreeing to the principal terms set forth in the Settlement Agreement. (*Id.*, § VIII; Ex. A (Prieto Decl.), ¶ 21.) The Settlement Agreement provides that Settlement Class Counsel agree to limit their request to the Court for attorneys' fees and expenses to no more than 30% of the Settlement Amount, which equates to $12.6 million. Likewise, VW agrees not to oppose such a request. Attorneys' fees and expenses awarded to Class Counsel for work done on behalf of the Class will be paid from the Settlement Fund. (ECF No. 4105-1, § VIII.)

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

L. Proposed Final Order and Final Judgment.

To ensure that the Court retains jurisdiction to enforce and interpret the Settlement and that the ultimate resolution is consistent with the Parties' Agreement, the Settlement includes a proposed Final Order and Final Judgment as exhibits and specifies the minimum requirements of any Final Order and Final Judgment. (ECF No. 4105-1, § IX.B. & Ex. 4, 5.) Among other things, the Settlement calls for the proposed Final Order and Final Judgment to dismiss Plaintiffs' claims with prejudice, incorporate the Release set forth in the Agreement, issue a permanent injunction

against Class Members instituting or prosecuting any claims released pursuant to the Settlement, address any issues relating to Telephone Consumer Protection Act and Outreach Program, and make the requisite findings to approve and implement the Settlement. (*Id.*)

MEMORANDUM OF LAW

I. The Court Should Grant Final Approval To The Settlement.

Rule 23(e) requires judicial approval for the settlement of claims brought on a class basis. Fed. R. Civ. P. 23(e). "[S]uch approval is committed to the sound discretion of the district court." *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are guided by the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially applicable to class actions, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See*, *e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) (citing cases).

Rule 23(e) provides five requirements that must be satisfied for a proposed class settlement to win final approval:

> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under the subdivision (e); the objection may be withdrawn only with the court's approval.

Saccoccio v. JP Morgan Chase Bank, N.A., 297 F.R.D. 683, 690 (S.D. Fla. 2014) (Moreno, J.) (citing Fed. R. Civ. P. 23(e)).

Here, all five requirements of Rule 23(e) are easily satisfied. The Parties have filed the Settlement Agreement, there are no additional agreements to disclose, a fairness hearing is scheduled for March 7, 2022, Class Members have until February 14, 2022, to object to or opt out of the Settlement, and as discussed below, notice to the Class was reasonable and the Settlement is fair, reasonable, and adequate. *Id*.[2]

A. The Approved Notice Program Gave the Best Practicable Notice to Class Members and Satisfied Rule 23 and Due Process.

"For a court to exercise jurisdiction over the claims of absent Class members, there must be minimal procedural due process protection." *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007). This requires that class members receive notice that is "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 v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)). Such notice "should describe the action and the plaintiffs' rights in it," as well as provide each class member "with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.*

This minimal due process requirement is captured in Rule 23(c)(2)(B), which provides that class members in Rule 23(b)(3) actions must receive "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). Notice by "United States mail, electronic means, or other appropriate means" is expressly permitted. *Id*.

The Settlement's Notice Program, as the Court properly determined in its Preliminary Approval Order

> is reasonably calculated under the circumstances to apprise the Class of the pendency of the Action, class certification for settlement purposes only, the terms of the Settlement, their rights to opt-out of the Class and object to the Settlement, Settlement Class Counsel's Fee Application, and the request for service awards for Plaintiffs. . . . . The notices and Notice Program satisfy all applicable requirements of law, including, but not limited to, Rule 23 and the constitutional requirement of due process.

[2] Any objections to the Settlement will be addressed in Plaintiffs' response, which is due on February 28, 2022.

(ECF No. 1853, ¶ 12.) The Settlement's Notice Program has been and continues to be implemented in accordance with the Court's Order. (Ex. B (Azari Decl.), ¶¶ 7-11.)

As detailed in the declaration of the Notice Administrator, notices were mailed to 2,244,844 potential Class Members, as identified from vehicle information provided by VW and data acquired from IHS Automotive, driven by Polk. (Ex. B (Azari Decl.), ¶ 22.) The Notice Administrator also utilized address updating services (both prior to mailing and on undeliverable pieces) and re-mailing protocols to maximize the number of Class Members reached by Direct Mail Notices. (*Id.*) In addition, notice was provided via widely circulated weekly publications, including *People*, *Sports Illustrated*, and *Parade*, and popular monthly publications, including *Better Homes & Gardens*, *Car and Driver*, *Motor Trend*, and *People en Español*. (*Id.*, ¶¶ 29-31.) Notices also appeared in U.S. Territory newspapers throughout Puerto Rico (notices were published in Spanish in the two newspapers), American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands. (*Id.*) Further, prominent internet banner advertisements (on desktop and mobile devices), in both English and Spanish, ran on a variety of websites purchased through Epsilon Ad Network, Verizon Ad Network, and Google Display Network, and banner advertisements also ran on Facebook and Instagram. (*Id.*, ¶ 9.) Notice also was provided through 30-second radio spots aired nationwide on AM and FM stations covering a variety of music formats, sports programming, and talk radio (including spots in Spanish where appropriate). (*Id.*, ¶¶ 27-28.) XM spots were also purchased to compliment traditional radio networks. (*Id.*.) Coverage was further enhanced by a neutral Informational Release, Sponsored Search Listings, a Case Website, which has hosted 222,791 visits to date, and a toll-free telephone line, which has handled 9,773 calls representing 71,365 minutes of use for all eight settlements as of January 20, 2022. (*Id.*, ¶ 58.)

Based on the Notice Administrator's estimates, the combined measured individual notice, broadcast media, print publication, and online banner notice effort will reach approximately 95% of all U.S. adults aged 18+ who owned or leased one of the Subject Vehicles. (*Id.*, ¶ 10.) On average, each person will have had approximately 3.6 opportunities for exposure to the notice. (*Id.*) The media notice effort alone will have reached 83.8% of all U.S. adults aged 18+ who owned or leased one of the Subject Vehicles. (*Id.*) The actual reach and frequency of the Notice Programs are consistent with other court-approved notice programs in settlements of similar magnitude and exceeded due process requirements. (*Id.*)

This far-reaching Notice Program provides the Court with personal jurisdiction over all members of the Class, because they have received the notice required for due process. *See Shutts*, 472 U.S. at 811-12; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998) ("[T]he district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class."). As required, the Court-approved notice described "the substantive claims . . . [and] contained information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104-05 (5th Cir. 1977). The Direct Mail Notice sent to Class Members, among other things, described the Class, the release, and the amount and proposed distribution of the Settlement proceeds, and it informed Class Members of their right to opt-out and object, the procedures for doing so, and the time and place of the Fairness Hearing. (Ex. B (Azari Decl.), ¶¶ 13-25, Ex. 2.) The Notice also informed Class Members that a class judgment would bind them unless they opted out, that Class Counsel would be seeking attorneys' fees of up to 30% of the Settlement Amount, and that additional information could be obtained via the Class Website, where copies of the Agreement and Long-Form Notice were made and remain available for download. (*Id.*) The Long-Form Notice, furthermore, provided detailed information about the Settlement, in a logical question-and-answer format. (*Id.* at Ex. 3.)

In short, Class Members were provided with the best practicable notice "reasonably calculated, under [the] circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

B. The Settlement is Fair, Reasonable, and Adequate.

"The Court should approve a proposed class action settlement where it is 'fair, adequate and reasonable and is not the product of collusion between the parties.'" *Saccoccio*, 297 F.R.D at 691 (quoting *Bennett*, 737 F.2d at 986). In general, a settlement is fair, reasonable, and adequate when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741, at *2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)). Importantly, the Court is "not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much

from a settlement as they might have recovered from victory at trial." *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000) (citations omitted). Instead, "[i]n considering the settlement, the district court may rely upon the judgment of experienced counsel for the parties." *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). "Absent fraud, collusion, or the like, the district court 'should be hesitant to substitute its own judgment for that of counsel.'" *Id.* (quoting *Cotton*, 559 F.2d at 1330).

Rule 23(e) highlights several factors relevant to determining whether a proposed settlement is fair, reasonable, and adequate:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e). Since "[c]ourts have generated lists of factors to shed light on [the fairness, adequacy, and reasonableness of a proposed settlement]," the considerations identified in Rule 23(e) do "*not displace any factor*," but instead seek "to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See* Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment (emphasis added).

Indeed, the "core concerns" emphasized in the amended rule, *id.*, are encompassed in the list of factors that prevailing Eleventh Circuit law instructs courts to consider: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range

of possible recovery at which a settlement is fair, reasonable, and adequate; (4) the complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the settlement; (6) the stage of proceedings at which the settlement was achieved; and (7) the existence of fraud or collusion among the parties in reaching the settlement. *Bennett*, 737 F.2d at 986; *accord Montoya v. PNC Bank, N.A.*, No. 14-cv-20474, 2016 WL 1529902, at *8 (S.D. Fla. Apr. 13, 2016). Decisional law from this Circuit analyzing the fairness, adequacy, and reasonableness of class settlements, therefore, remains applicable under Rule 23(e)(2).

As explained below, an analysis of the factors emphasized in Rule 23(e)(2) and prevailing Eleventh Circuit law shows the Settlement to be fair, reasonable, and adequate.

i. The Settlement is the product of adequate representation from the Class Representatives and Class Counsel and good-faith, informed, arm's-length negotiations.

The first two factors highlighted in amended Rule 23(e)(2)—adequate representation of the Class and arm's-length negotiations—examine "the conduct of the litigation and of the negotiations leading up to the proposed settlement." *See* Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. Although the Court, in its Preliminary Approval Order, already found that the Class Representatives and Class Counsel adequately represent the Class, the focus at the final approval stage is on "the actual performance of counsel acting on behalf of the class." *Id.* Pertinent information includes "[t]he conduct of negotiations," as well as "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, [which] may indicate whether counsel negotiating on behalf of the class had an adequate information base." *Id.* These first two factors thus overlap with the Eleventh Circuit's instruction to consider the existence of "fraud or collusion in arriving at the settlement" and "the stage of proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 982. Given the extensive, hard-fought litigation that preceded this Settlement, there is no doubt that these factors support final approval.

This Court is well aware of how hard and zealously the Parties and their counsel litigated for more than three years, prior to reaching the Settlement. (Ex. A (Prieto Decl.), ¶ 26.) Plaintiffs continue to litigate these cases against other Defendants, and the sharply contested nature of the proceedings in this case readily shows the lack of fraud or collusion behind the Settlement. *See, e.g.*, *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 n.3 (S.D. Fla. 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (court had "no doubt that this case has been

adversarial, featuring a high level of contention between the parties"); *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000) ("This was not a quick settlement, and there is no suggestion of collusion."); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988) (record showed no evidence of collusion, but to the contrary showed "that the parties conducted discovery and negotiated the terms of settlement for an extended period of time"), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

Class Counsel also negotiated the Settlement vigorously. (Ex. A (Prieto Decl.), ¶¶ 21-22, 27-29.) Plaintiffs were represented by experienced counsel at these arms-length negotiations. (*Id.*) The lawyers and law firms involved are among the most experienced in complex commercial and class action litigation in the country. (*Id.*) During the extensive, adversarial negotiations, the Parties exchanged countless proposals while the litigation continued and intensified on a parallel track. (*Id.*) These negotiations were conducted in the absence of collusion. (*Id.*)

The negotiations, moreover, were informed by a well-developed factual record that enabled Class Counsel to make a reasoned judgment as to the Settlement. *See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995) (considering "the degree of case development that class counsel have accomplished prior to settlement" to ensure that "counsel had an adequate appreciation of the merits of the case before negotiating"). While "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations," *Ressler*, 822 F. Supp. at 1555, Plaintiffs reached the Settlement with the benefit of extensive discovery. (Ex. A (Prieto Decl.), ¶¶ 20, 31.) More than 10 million pages of documents have been produced thus far in discovery from Takata, VW, and other automakers; at least 23 depositions of Takata and VW witnesses have been conducted; and Class Counsel have engaged in extensive discussions and meetings with experts and consultants. (*Id.*) This advanced discovery positioned Class Counsel to evaluate with confidence the strengths and weaknesses of Plaintiffs' claims and prospects for success at class certification, summary judgment, and trial. *See Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-Civ, 2008 WL 649124, at *5 (S.D. Fla. Jan. 31, 2008) ("Class Counsel had substantial information to adequately evaluate the merits of the case and weigh the benefits against further litigation."). So too has the process of defending the depositions of 17 VW Class Representatives, which has afforded Class Counsel insights into issues bearing on class certification and damages. (Ex. A (Prieto Decl.), ¶¶ 20, 31.)

This extensive discovery allowed Class Counsel to thoroughly evaluate the strengths and weaknesses of their claims against VW. (Ex. A (Prieto Decl.), ¶ 31.) Before settling, Class Counsel had already developed ample information and performed extensive analyses from which "to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988).

ii. The Settlement relief provided for the Class is far more than adequate.

In evaluating the adequacy of relief provided for the Class, Rule 23(e)(2) instructs courts to account for "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2). Each of these factors favor final approval of this Settlement.

The costs, risks, and delay of trial and appeal, absent a Settlement in this action, are difficult to overstate. At a minimum, the Settlement will avert years of highly complex and expensive litigation. (Ex. A (Prieto Dec.), ¶¶ 30, 32-34.) This case involves more than one million Class Members and massive alleged damages. The claims and defenses are complex; litigating them is and has been difficult and time consuming. (*Id.*, ¶¶ 32-34, 41-56.) The traditional means for handling claims like those at issue here would unduly tax the court system, require an immense expenditure of public and private resources, and ultimately would be impracticable. The Settlement is the best vehicle for Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Ongoing litigation would involve substantial, expensive fact and expert discovery, lengthy additional pretrial proceedings in this Court and the appellate courts and, ultimately, a trial and appeal. Absent the Settlement, litigation against VW would likely continue for at least two or three more years. *See United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (noting that "a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial"); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 317, 325-26 & n.32 (N.D. Ga. 1993) (noting that "adjudication of the claims of two million claimants could last half a millennium").

In contrast, the Settlement will provide immediate and substantial benefits to more than one million consumers. As stated in *In re Shell Oil Refinery*, 155 F.R.D. 552 (E.D. La. 1993):

> The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush."

Id. at 560 (alterations in original) (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (noting that complex litigation "can occupy a court's docket for years on end, depleting the resources of the parties and taxpayers while rendering meaningful relief increasingly elusive"). Especially because the "demand for time on the existing judicial system must be evaluated in determining the reasonableness of the settlement," *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (citation omitted), there can be no reasonable doubt as to the adequacy of the Settlement, which provides immediate, tangible, and significant benefits to the Class.

Beyond certain delay and additional costs, continued litigation would carry significant risks for Plaintiffs and the Class. While Plaintiffs and Class Counsel are quite confident in the strength of their case, they are also pragmatic and aware of the various defenses available to VW, as well as the risks inherent in any litigation. (Ex. A (Prieto Decl.), ¶¶ 32-34, 41-56.) For example, VW has claimed that it was deceived by Takata as to the safety of its inflators, and Takata pleaded guilty to a count of wire fraud based on providing allegedly misleading test results to certain automakers. (*Id.*) VW has argued that these charges, which may portray it as a "victim," are a "game changer" and ultimately absolve it of any liability, while Takata's bankruptcy blocks Plaintiffs from recovering any substantial sums from it. (*Id.*) In addition, the dismissal of VW's German parent on personal jurisdiction grounds has limited the evidence that Plaintiffs have been able to gather in discovery. (*Id.*) Further, although Plaintiffs believe that they could prevail in a litigated class certification battle, VW would assert numerous arguments against certification of all or parts of the Class, which presents risks. (*Id.*) And even if Plaintiffs were successful, VW would inevitably seek interlocutory review of class certification rulings via Rule 23(f) in the Court of Appeals, delaying the progress towards trial for months, if not years.

Given the myriad risks attending these claims, the Settlement cannot be seen as anything but a fair compromise. *See, e.g.*, *Bennett v. Behring Corp.,* 96 F.R.D. 343, 349-50 (S.D. Fla. 1982) (plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as

to the fact and amount of damage," which made it "unwise [for plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial"), *aff'd*, 737 F.2d 982 (11th Cir. 1984); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 248 (S.D. Ohio 1991) (citing the "very real potential that the [c]lass could come away from a long expensive trial with nothing," the court rejected the argument "that the Class should get more").

The Settlement provides substantial relief to Class Members and addresses an extraordinary national public safety crisis without further delay and through methods that the prior seven settlements have demonstrated are effective. The Settlement has a total value of $55.5 million including the estimated value of the Customer Support Program, according to a valuation presented in the declaration of a recognized automotive valuation expert, Kirk Kleckner, submitted as an exhibit to this motion. (Ex. C (Kleckner Decl.), ¶ 2.) Yet even without this valuation, the $42 million Settlement Amount represents roughly 20% of Class Members' estimated damages recovery under a relatively conservative method of calculating damages that rests on the prices VW paid for and marked up the defective Takata airbags. (Ex. A (Prieto Decl.), ¶ 35.) The additional value of the Customer Support Program only increases the range of recovery as a percentage of the possible damages that Class Members could recover if they were to prevail at trial, cementing a finding that the value of the Settlement is well within the range of reasonableness.

By any reasonable measure, this recovery is a significant achievement considering the obstacles that Plaintiffs faced and continue to confront in the litigation, including *Daubert* challenges to damage experts' methodologies, class certification, interlocutory Rule 23(f) appeals of class certification, motions for summary judgment, trial, and post-trial appeals. Given the substantial benefits that the Settlement provides to Class Members and the extraordinary public safety crisis that the Settlement addresses, the Settlement is fair and represents a reasonable and adequate recovery for the Class. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990) (holding that a court should be guided by the "important maxim[]" that "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"); *Thompson v. Metrop. Life Ins. Co.*, 216 F.R.D. 55, 64 (S.D.N.Y. 2003) (holding that a settlement must be evaluated "in light of the attendant risks with litigation"); *Great Neck Capital Appreciation Inves. P'ship, L.P. v. PriceWaterHouseCoopers, L.L.P.*, 212 F.R.D. 400, 409-10 (E.D. Wis. 2002) ("The mere

possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement."); *see also Bennett*, 737 F.2d at 986 ("[C]ompromise is the essence of settlement.").

The effectiveness of the Settlement's methods of distributing this relief to Class Members, moreover, cannot seriously be disputed. The process of submitting a claim for a cash payment, for example, is as simple as possible: claims can be submitted online or by mail; claim forms are straightforward and easy to understand; claims for a flat residual payment require nothing more than basic biographical information; and claims for specific out-of-pocket expenses simply require identification of the expenses and encourage Class Members to submit supportive documents if they are available. (ECF No. 4105-1 at Ex. 12.) As the Eleventh Circuit concluded in affirming the approval of a settlement with a similar claims process, "the use of a claims process is not inherently suspect," and it is not "particularly difficult or burdensome" to require the completion of a straightforward form that can be submitted either online or by mail. *Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir. 2015). The use of a claims process here is further justified by the public safety benefit it provides—as Class Members who possess Subject Vehicles must obtain the Recall Remedy before submitting a claim, it further incentivizes Class Members to remove dangerous Takata inflators from their vehicles.

The Outreach Program likewise directly benefits Class Members by motivating and making it easier for them to obtain the Recall Remedy for their vehicles. As recounted in the Settlement Special Administrator's recent Status Report, the outreach programs implemented in the prior seven settlements are utilizing innovative "techniques and approaches not previously applied in the recall industry, with a focus on personalized targeted direct campaigns." (ECF No. 3049 at 1.) These sophisticated, direct outreach efforts have unquestionably yielded a tangible and substantial safety benefit for Class Members, as "969,848 recall remedies have been completed since the transition of the Outreach Programs to the [Settlement Special Administrator] and Outreach Program Vendors." (*Id.* at 7.)

In addition, the two other components of Settlement relief for Class Members—the Customer Support Program and the Rental Car Program—are automatically provided to the Class. Every Class Member who brings a recalled Subject Vehicle to a dealership for the Recall Remedy can receive a rental or loaner car. And every Subject Vehicle receives the coverage of the Customer Support Program.

The terms and timing of the requested attorneys' fees further support the adequacy and fairness of the Settlement Relief, because, as explained in Section IV, *infra*, the requested fees are reasonable, if not less, than prevailing Eleventh Circuit law calls for. *See Poertner*, 618 F. App'x at 628 (affirming district court's determination that "the settlement's allocation of benefits was fair" because the court's award of fees was a reasonable percentage of the fund established for the benefit of the class). Rule 23 acknowledges, in addition, that awards of attorneys' fees remain governed by Rule 23(h), which was not amended, and that "no rigid limits exist for such awards." *See* Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. The advisory committee also observed that "the relief actually delivered to the class can be a significant factor in determining the appropriate fee award." *Id.* This consideration only further supports the adequacy of the Settlement and reasonableness of the requested fees, because this Settlement does *not* contain a reversionary provision—*i.e.*, unclaimed or unused funds will *not* revert to VW. Instead, ***all*** of the Settlement monies will be spent one way or another for the benefit of the Class; if there is any money left after paying Class Member claims, attorneys' fees and expenses, settlement administration costs, and for the Outreach Program, the funds will be redistributed in the form of additional cash payments to class members, or if that is not administratively feasible, to a Court-approved *cy pres* recipient.

The final factor identified in the amended version of Rule 23(e)(2)(C)—consideration of any agreement required to be identified under Rule 23(e)(3)—is inapplicable, because there are no other agreements to disclose, aside from the Settlement Agreement itself, which has been filed already. Thus, each of the factors highlighted by Eleventh Circuit law and the amended version of Rule 23(e)(2)(C) as bearing on the adequacy of Settlement's relief supports final approval.

iii. The Settlement treats Class Members equitably relative to each other.

The equitable treatment factor "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others." *See* Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *Id.*

This factor further supports final approval here, because all Class Members are treated equitably relative to each other. No set of Class Members is singled out for preferential or

disadvantageous treatment. The Customer Support Program, for example, is provided to all Class Members across the board. (ECF No. 4105-1, § III.G.) The Rental Car Program, likewise, is available to any Class Member who brings a recalled Subject Vehicle to a dealership for the Recall Remedy. (*Id.*, § III.C.) Similarly, as to claims for out-of-pocket expenses, the Settlement establishes broad guidelines and a simple procedure for eligible categories of expenses, and any Class Member who has incurred such expenses may submit a claim for reimbursement. (*Id.*, §§ III.D, III.E.) This process appropriately "account[s] for differences among [Class Members'] claims," *id.*, tying the amounts of compensation provided to the different amounts of damages suffered. *See In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 346 (3d Cir. 2010) (holding that providing different awards for various class members "do[es] not, without more, demonstrate conflicting or antagonistic interests within the class"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999) ("[A]lmost every settlement will involve different awards for various class members.").

In sum, all the factors identified by the Eleventh Circuit and in amended Rule 23(e)(2) strongly support a finding that the Settlement is fair, reasonable, and adequate.

II. The Court Should Grant Final Certification Of The Settlement Class.

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

Class certification is appropriate where: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and 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). Certification of a class seeking monetary compensation also requires a showing that "questions of law and fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

In its Preliminary Approval Order, this Court previously found the requirements of Rule 23(a) and 23(b)(3) to be satisfied for the Class defined in the Settlement Agreement. (ECF No. 1853, ¶ 7.) As the Class definition has not changed since preliminary approval, there is no reason for this Court to depart from its previous findings that certification of the Class is warranted.

In particular, as the Court previously recognized (ECF No. 1853, ¶ 7(a)), the numerosity requirement of Rule 23(a) is easily satisfied here, because the Class consists of more than one million people throughout the United States, and joinder of all such persons is impracticable. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area"). The commonality requirement is satisfied as well, because there are many questions of law and fact common to the Class that center on VW's conduct in manufacturing and selling vehicles equipped with defective Takata airbags while representing that those vehicles were safe, as alleged in the Fourth Amended Consolidated Class Action Complaint. *See In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 673-74 (S.D. Fla. 2011) ("[W]here a common scheme of deceptive conduct has been alleged, the commonality requirement should be satisfied.") (internal quotation marks omitted).

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

Plaintiffs also satisfy the adequacy of representation requirement. Adequacy under Rule 23(a)(4) relates to: (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake the litigation. *Fabricant*, 202 F.R.D. at 314. The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Emp. Ret. Plan*, 221 F.3d 1235,

1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiffs' interests are coextensive with, and not antagonistic to, the interests of the Class, because Plaintiffs and absent Class Members have an equally great interest in the relief offered by the Settlement, and absent Class Members have no diverging interests. Further, Plaintiffs are represented by qualified and competent counsel with extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Class Counsel have devoted substantial time and resources to vigorous litigation of the Action from inception through the date of the Settlement.

With respect to predominance, Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks omitted). The predominance requirement is satisfied because liability questions common to all Class Members substantially outweigh any possible issues that are individual to each Class Member. The salient evidence necessary to establish Plaintiffs' claims is common to both the Class Representatives and all members of the Class—they would all seek to prove that VW's vehicles have a common defect and that VW's conduct was wrongful and deceptive. And the evidentiary presentation changes little if there are 100 class members or 1 million: in either instance, Plaintiffs would present the same evidence of VW's omissions, marketing, and promised warranties, and the same evidence of the Subject Vehicles' alleged common defect. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) ("[I]f common issues truly predominate over individualized issues in a lawsuit, then 'the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.'") (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 322 (5th Cir. 1978)).

Furthermore, there can be no doubt that resolution of more than one million claims in one action is far superior to individual lawsuits. *See* Fed. R. Civ. P. 23(b)(3). "Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1176 (9th Cir. 2010).

Because all requirements of Rule 23 are satisfied, this Court should certify the Class defined in the Settlement.

III. Class Counsel's Fee Application.

As indicated in the Court-approved notice disseminated to the Class, and consistent with District and Eleventh Circuit precedent, Class Counsel respectfully request a fee and expense award of $12,600,000, which represents 30% of the conservative $42,000,000 Settlement Amount, and 22% of the $55.5 million full value of the Settlement, which is inclusive Mr. Kleckner's valuation of the Customer Support Program.[3] This fee request is squarely within, if not below, the guidelines set forth by the Eleventh Circuit in *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), and its progeny. It also comports with fee awards regularly approved in successive settlements from multi-defendant class actions. For the reasons set forth below, the requested attorneys' fee award is appropriate, fair, and reasonable, and should be approved.

A. The Law Awards Class Counsel Fees From The Common Fund Created By Their Efforts.

As the Court is well aware, when a class settlement establishes a calculable monetary benefit for class members, attorneys' fees should be awarded to class counsel, under the longstanding common benefit doctrine, based on a percentage of the monetary benefit obtained. *Camden I*, 946 F.2d at 771; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Following from the premise that those who receive the benefit of a lawsuit without contributing to its costs are "unjustly enriched," the common benefit doctrine "allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing*, 444 U.S. at 478; *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). The Supreme Court, the Eleventh Circuit, and courts in this District, therefore, have all held that "the law is well established that 'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *Cifuentes v. Regions Bank*, No. 11-cv-23455, 2014 WL 1153772, at *7 (S.D. Fla. Mar. 20, 2014) (Moreno, J.) (quoting *Boeing*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to

[3] The Eleventh Circuit has affirmed a district court's reliance on the value of a class settlement's enhanced warranty, as estimated by a valuation expert, to award class counsel attorneys' fees, recognizing that the enhanced warranty "is itself a significant tangible benefit." *Carter v. Forjas Taurus, S.A.*, No. 16-15277, 2017 WL 2813844, at *5 (11th Cir. June 29, 2017).

compensation for their services from the common fund, but the amount is subject to court approval.").

Appropriate awards of attorneys' fees in cases like this encourage redress for wrongs caused to entire classes of persons and deter future misconduct:

> [C]ourts . . . have acknowledged the economic reality that in order to encourage 'private attorney general' class actions brought to enforce . . . laws on behalf of persons with small individual losses, *a financial incentive is necessary to entice capable attorneys*, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, *time-consuming cases for which they may never be paid*.

Mashburn v. Nat'l Healthcare, Inc., 684 F. Supp. 679, 687 (M.D. Ala. 1988) (emphasis added); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Given the risk, responsibility, and effort required, reasonable compensation in line with established precedent is necessary to ensure the availability of counsel for plaintiffs:

> If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear . . . . We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome.

Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375-76 (D. Minn. 1985); *see also Gevaerts v. TD Bank*, No. 1:14-CV-20744-RLR, 2015 WL 6751061, at *10 (S.D. Fla. Nov. 5, 2015) (holding that the common benefit doctrine serves the goal of "removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class") (internal quotation marks omitted).

In the Eleventh Circuit, in particular, class counsel fee awards must be based on a percentage of the common fund generated through a class action settlement. In *Camden I*—the controlling authority in the Eleventh Circuit dealing with the issue of attorneys' fees in common-fund class-action cases—the court held that "the percentage of the fund approach [as opposed to the lodestar approach] is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I,* 946 F.2d at 774. The Eleventh Circuit recently reaffirmed this rule, holding that "*Camden I* and the percentage method remain the law in

this Circuit." *In re Equifax Inc. Customer Data Security Breach Litig.*, 999 F.3d 1247, 1280 (11th Cir. 2021).

When using the percentage-of-the-fund approach, furthermore, "courts compensate class counsel for their work in extracting non-cash relief from the defendant in a variety of ways. When the non-cash relief can be reliably valued, courts often include the value of this relief in the common fund and award class counsel a percentage of the total fund." *In re: Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319391, at *13 (S.D. Fla. Aug. 5, 2013); *see Carter*, 2017 WL 2813844, at *5 (holding that fee award was "a reasonable percentage of the settlement value" when considering the value of an "enhanced warranty, which is itself a significant tangible benefit").

The "majority of common fund fee awards," the Eleventh Circuit has observed, "fall between 20% to 30% of the fund." *Camden I*, 946 F.2d at 774-75; *see Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011) (affirming fee award above the "25% benchmark"); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) (directing district courts "to view [the 20% to 30%] range as a 'benchmark,' which 'may be adjusted in accordance with the individual circumstances of each case'") (quoting *Camden I*, 946 F.2d at 774-75). Thus, "[c]ourts nationwide," the Eleventh Circuit recently noted with approval, "have repeatedly awarded fees of 30 percent or higher." *In re Equifax*, 999 F.3d at 1281 (quoting *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011)).

Our fee request, whether calculated as 22% of the $55.5 million total value of the Settlement or 30% of the more conservative $42 million Settlement Amount, falls squarely within the Eleventh Circuit's benchmark, particularly given the circumstances of this litigation. *See Waters*, 190 F.3d at 1294 (approving fee award where the district court determined that the benchmark should be 30% and then adjusted the fee award higher based on the circumstances of the case); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1203 (determining that "the 25% 'benchmark' should be considered *a floor for a fee award* in this case, and that the percentage should be adjusted upward" based on the circumstances of the case) (emphasis added).

B. The *Johnson* Factors Support Class Counsel's Requested Fee.

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the former Fifth Circuit identified the following twelve factors to consider in determining an appropriate fee award:

> (1) the time and labor required; (2) the difficulty of the issues; (3) the skill required; (4) the preclusion of other employment by the attorney because he accepted the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Faught, 668 F.3d at 1242-43 (citing *Johnson*, 488 F.2d at 717-19). As explained below, it is clear that all pertinent *Johnson* factors favor Class Counsel's request.

i. The requested fee comports with customary fees awarded in similar cases.

The fee requested here easily falls within the range of fees typically awarded in similar cases, particularly in this District and Circuit. As noted, scores of decisions have recognized, a fee award of 20% to 30% of a common fund is the benchmark in this District and Circuit. *See, e.g.*, *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366; *In re Sunbeam*, 176 F. Supp. 2d at 1333-34. Numerous decisions in this District, alone, have awarded attorneys' fees within or above this range, confirming the fairness and reasonableness of the fee requested here. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366 (awarding fees of 30% of $410 million); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1210 (awarding fees equaling 31¼% of settlement of over $1 billion including interest); *Love v. Blue Cross & Blue Shield Assoc.*, No. 03-cv-21296 (S.D. Fla. Apr. 20, 2008) (ECF No. 1286) (awarding 38% of $130 million settlement); *In re Managed Care Litig.*, No. 00-md-1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding $50 million in fees and costs in settlement involving $100 million fund and non-monetary business practice changes).[4]

The requested fee is also consistent with the awards this Court previously approved for the seven prior settlements in this MDL, ranging between 20% and 30%. *See, e.g.*, *In re Takata Airbag Prod. Liab. Litig.*, No. 15-MD-02599, 2017 WL 5290875, at *1 (S.D. Fla. Nov. 1, 2017) (30%); *In re Takata Airbag Prod. Liab. Litig.*, No. 15-MD-02599 (Feb. 28, 2018) (ECF No. 2386) (20%).

[4] *See In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (34.06% of approximately $359 million settlement); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (35.1%)); *see also Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) (finding that 33% is the norm, but awarding 38% of the settlement fund).

The requested fee also aligns with awards regularly approved in comparable multi-defendant class actions. Indeed, as the following examples demonstrate, courts regularly issue successive fee awards in multi-defendant class actions at percentages equal to or higher than the percentage requested by Class Counsel here.

- **Urethane MDL**: The court approved three successive awards of **33-1/3%** of settlements totaling almost $1 billion. *See In re Urethane Antitrust Litig.*, No. 04-md-1616 (D. Kan. July 29, 2016) (ECF No. 3276); *In re Urethane Antitrust Litig.*, No. 04-md-1616 (D. Kan. Dec. 13, 2011) (ECF No. 2210); *In re Urethane Antitrust Litig.*, No. 04-md-1616 (D. Kan. July 22, 2009) (ECF No. 995).
- **CRT MDL**: The court approved successive fee awards of **30%** of nine separate settlements totaling more than $200 million. *In re CRT Antitrust Litig.*, No. 07-cv-5944 (N.D. Cal. June 8, 2017) (ECF No. 5169); *In re CRT Antitrust Litig.*, No. 07-cv-5944, 2016 WL 183285 (N.D. Cal. Jan. 14, 2016).
- **TFT-LCD Flat Panel MDL:** The court approved a fee award of **28.5%** from each of ten settlements totaling $1.08 billion. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013).
- **Municipal Derivatives MDL**: The court approved fees between **29%** and **33-1/3%** of successive settlements collectively exceeding $200 million. *See In re Municipal Derivatives Antitrust Litig.*, No. 08-cv-2516 (S.D.N.Y. July 8, 2016) (ECF No. 2029); *In re Municipal Derivatives Antitrust Litig.*, No. 08-cv-2516 (S.D.N.Y. June 6, 2014) (ECF No. 1903); *In re Municipal Derivatives Antitrust Litig.*, No. 08-cv-2516 (S.D.N.Y. Dec. 14, 2012) (ECF No. 1744).
- **Checking Account Overdraft MDL**: The Court approved successive fee awards of **30%** of more than ten settlements totaling over $1 billion. *See, e.g., In re: Checking Account Overdraft Litig.*, No. 1:09-M D-02836-JLK, 2014 WL 11370115, at *1 (S.D. Fla. Jan. 6, 2014); *In re: Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319392, at *1 (S.D. Fla. Aug. 5, 2013); *In re: Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319244, at *1 (S.D. Fla. Aug. 2, 2013); *In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2012 WL 4174502, at *1 (S.D. Fla. Sept. 19, 2012); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011).

The awards in these cases are consistent with the results of empirical studies of attorneys' fee awards. These studies are discussed in detail in the declaration of a distinguished expert on attorneys' fees in class actions, Professor Brian Fitzpatrick, submitted in support of this motion. (Ex. D (Fitzpatrick Decl.), ¶¶ 22-28.) Mr. Fitzpatrick is a professor of law at Vanderbilt Law School and a visiting professor at Harvard Law School. (*Id.*, ¶ 1.) After graduating *summa cum laude* from the University of Notre Dame and first in his class at Harvard Law School, he served as a law clerk for Judge Diarmuid O'Scannlain on the Ninth Circuit and Justice Antonin Scalia on

the United States Supreme Court. (*Id.*) Professor Fitzpatrick has published numerous articles on class actions and attorneys' fees, including: *An Empirical Look at Compensation in Consumer Class Actions*, 11 New York University Journal of Law & Business 767 (2015); *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 Journal of Empirical Legal Studies 811 (2010); *Do Class Action Lawyers Make Too Little?*, 158 University of Pennsylvania Law Review 2043 (2010); and *The End of Objector Blackmail?*, 62 Vanderbilt Law Review 1623 (2009). (*Id.* at App. 1.)

As explained in his declaration, Professor Fitzpatrick's own study of fees found that, in cases within the Eleventh Circuit, the average fee awarded was 28.1% and the median fee awarded was 30%. (Ex. D (Fitzpatrick Decl.), ¶ 23.) Half of the fee awards within the Eleventh Circuit, then, utilized a fee percentage higher than the percentage requested here. (*See id.*) Professor Fitzpatrick observes that Class Counsel's fee request is "even more modest than the [study] suggests because the data from [his] empirical study was exclusive of class counsel's expenses," whereas Class Counsel's fee request here is inclusive of Class Counsel's substantial litigation expenses. (*Id.*) Based on the circumstances of this litigation and his extensive expertise, Professor Fitzpatrick concludes that "the fee award requested here is reasonable." (*Id.*, ¶ 31.)

Class Counsel's fee request, moreover, is below the average in the private marketplace, where contingency fee arrangements often approach or equal 40% of any recovery. *See, e.g., Kirchoff v. Flynn*, 786 F.2d 320, 325 n.5 (7th Cir. 1986) (observing that "40 percent is the customary fee in tort litigation"); *In re Pub. Serv. Co. of New Mexico*, 1992 WL 278452, at *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery."); *see also In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."). "In tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring).

Class Counsel's requested fee, equivalent to 30% of the conservative $42 million Settlement Amount or 22 % of the $55.5 million total value of the Settlement, inclusive of the

estimated value of the Customer Support Program, comports easily with customary fees awarded in similar cases.[5]

ii. The claims against VW required substantial time and labor.

The tremendous effort Class Counsel have brought to bear over the past four years prosecuting and settling the claims against VW also strongly supports the reasonableness of Class Counsel's fee request. This effort has demanded the investment, on a contingency basis, of immense amounts of Class Counsel's time, labor, and resources. (Ex. A (Prieto Decl.), ¶¶ 41-46.) Over the past four years, to advance Plaintiffs' claims against VW, Class Counsel have spent tens of thousands of hours prosecuting the case against VW and have, among other things:

- Conducted an initial investigation of claims against VW to develop the facts and legal theories that formed the basis of the allegations in the complaint and drafted and filed the complaint, amended complaint, second amended complaint, third amended complaint, and fourth amended complaint.
- Interviewed and reviewed complaints from hundreds of consumers and potential class members to gather information about VW's conduct and its impact upon consumers.
- Prepared state-by-state legal assessments to determine which state common law doctrines and consumer protection statutes provided Plaintiffs with viable claims.
- Sought out witnesses and former employees of VW and Takata across the globe, from the United States to Germany to Japan.

[5] *See also James v. JPMorgan Chase Bank, N.A.*, No. 15-cv-2424-T-23JSS, 2017 WL 2472499, at *2 (M.D. Fla. June 5, 2017) (30%); *Warren v. Cook Sales, Inc.*, No. 15-cv-0603, 2017 WL 325829, at *9 (S.D. Ala. Jan. 23, 2017) (30%); *Comeens v. HM Operating, Inc.*, No. 14-cv-00521, 2016 WL 4398412, at *4 (N.D. Ala. Aug. 18, 2016) (33⅓%); *Diakos v. HSS Sys., LLC*, No. 14-cv-61784, 2016 WL 3702698, at *7 (S.D. Fla. Feb. 5, 2016) (Scola, J.) (33⅓%); *Duque v. 130 NE 40th St., LLC*, No. 14-cv-23965, 2016 WL 7442797, at *3 (S.D. Fla. Jan. 27, 2016) (33%); *Camp v. City of Pelham*, No. 10-cv-01270, 2015 WL 12746716, at *3 (N.D. Ala. Dec. 16, 2015) (41%); *Pierre-Val v. Buccaneers Ltd. P'ship*, No. 14-cv-01182, 2015 WL 12843849, at *2 (M.D. Fla. Dec. 7, 2015) (32%); *Gevaerts v. TD Bank*, No. 14-cv-20744-RLR, 2015 WL 6751061, at *14 (S.D. Fla. Nov. 5, 2015) (30%); *Vogenberger v. ATC Fitness Cape Coral, LLC*, No. 14-cv-436-FTM-29CM, 2015 WL 1883537, at *4 (M.D. Fla. Apr. 24, 2015) (33%); *Amason v. Pantry, Inc.*, No. 09-cv-02117, 2014 WL 12600263, at *3 (N.D. Ala. July 3, 2014) (30%); *Cifuentes v. Regions Bank*, No. 11-cv-23455-FAM, 2014 WL 1153772, at *8 (S.D. Fla. Mar. 20, 2014) (Moreno, J.) (30%); *In re Friedman's, Inc. Sec. Litig.*, No. 03-cv-3475, 2009 WL 1456698 (N.D. Ga. May 22, 2009) (30%); *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-cv-61677-Martinez, 2008 WL 649124 (S.D. Fla. 2008) (30%); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334 (S.D. Fla. 2007) (30%).

- Defended the complaints from several Rule 12(b) motions to dismiss filed by VW, as well as scores of motions filed by other Defendants that raised issues relevant to Plaintiffs' claims against VW.
- Researched and defended against VW's challenge to personal jurisdiction.
- Successfully moved for leave to file a second amended complaint, over VW's objections.
- Drafted and served three sets of interrogatories and four sets of document requests on VW, including a set of more than 100 written document requests seeking relevant and probative documents and information in its possession—with an eye toward class certification, summary judgment, and trial.
- Participated in countless meet-and-confer discussions with VW's counsel to resolve various discovery disputes pertaining to Plaintiffs' requests, discovery protocols, and the production of witnesses for depositions.
- Established and staffed a large document review team consisting of more than 40 attorneys from 13 different law firms to review, sort, and code more than ***10 million*** pages of documents produced by Defendants; established uniform coding procedures for electronic review of the documents produced; maintained constant contact with team members to ensure that all counsel became aware of significant emerging evidence in real time; funded the hosting of this massive, multi-year document review project on an online platform by a vendor at great expense.
- Retained and worked closely with consultants and experts to analyze, among other things, ammonium nitrate and its explosive properties, the functionality and risk of Takata inflators, VW's validation procedures, VW's relevant documents, and the measurement of Plaintiffs' damages.
- Deposed over 23 Takata and VW witnesses, each of which required weeks of preparation, a consequence of the sheer volume of documents produced, as well as the breadth of issues and timespan that had to be covered.
- Prepared responses to Defendants' interrogatories and requests for production of documents directed to 17 named VW Plaintiffs, and prepared for and defended depositions of Plaintiffs.
- Convened numerous in-person meetings to strategize and carefully review the development of Plaintiffs' case against VW.
- Prepared and repeatedly updated timelines, lists of hot documents, and case summaries for the case against VW.
- Held frequent conference calls to coordinate the vast effort undertaken by at least twenty-six (26) law firms across the country to prosecute claims against VW, oversee various tasks and projects, and maximize efficiency.
- Prepared for and attended numerous days of negotiations at various locations around the country in an attempt to settle the Action, and after reaching an

> agreement in principle, engaged in lengthy discussions over drafting the terms of the Settlement Agreement.

(*Id.*, ¶ 41.)

The substantial time Class Counsel devoted to Plaintiffs' claims against VW was *not* duplicative of the work performed for, or compensated from, the prior seven settlements. The actual litigation against each automaker, and particularly VW, proceeded on distinct and independent tracks. (*Id.*, ¶ 42.) Each Defendant, for example, identified *different* witnesses with relevant knowledge; produced *different* documents in response to Plaintiffs' discovery requests; disputed *different* aspects of Plaintiffs' discovery requests; and raised *different* arguments and defenses. (*Id.*)

All told, Class Counsel's steadfast and coordinated work paid great dividends for the Class. (*Id.*, ¶ 43.) Each of the above-described efforts was essential to achieving the Settlement currently before the Court. (*Id.*) Taken together, the time, expertise, effort, and resources Class Counsel devoted to prosecuting and settling the Action of nationwide importance justify the benchmark fee Class Counsel are now seeking. (*Id.*)

iii. The issues involved were novel and difficult and required the exceptional skill of a highly talented group of attorneys.

This Court, we believe, regularly witnessed the high quality of Class Counsel's legal work, which has conferred an exceptional benefit on the Class in the face of daunting litigation obstacles and highly sophisticated defense counsel. (*Id.*, ¶ 44.) As the Court is aware, it is a formidable and complicated challenge to successfully prosecute a case like this. (*Id.*) Moreover, the orderly and effective management of this massive MDL, with claims against one of the world's largest automotive companies asserted on behalf of more than one million consumers, presented challenges that many law firms and lawyers simply would not be able to meet. (*Id.*)

Indeed, litigation of a case like this requires counsel highly trained in class action law and procedure as well as the specialized issues these cases present. (*Id.*, ¶ 45.) All of the lawyers representing Plaintiffs, and in particular those whom this Court appointed to represent Plaintiffs, possess these attributes, and their participation as Class Counsel added significant value to the representation of this large Class consisting of more than one million individuals. (*Id.*) The record before this Court establishes that the Action involved a wide array of complex and novel challenges, which Class Counsel met at every juncture based on their collective, extensive

experience in complex litigation and class actions. (*Id.*) Respectfully, the skill and diligence demonstrated by Class Counsel in this litigation supports the requested fee.

The quality of opposing counsel with whom Class Counsel sparred also bears on an assessment of the quality of representation. *See Walco*, 975 F. Supp. at 1472 (explaining that "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results"); *accord Camden I*, 946 F.2d at 772 n.3; *Johnson*, 488 F.2d at 718. VW was represented by some of the most able, sophisticated, and diligent attorneys in the country, and they fought hard at every turn to protect their client's interests. (Ex. A (Prieto Decl.), ¶ 50.) These were worthy, highly skilled adversaries.

iv. The claims against VW entailed considerable risk.

This Settlement was far from a foregone conclusion, evidenced by the preceding years of intense litigation. VW mounted vigorous defenses to Plaintiffs' claims, denying any and all liability in the Action and contesting this Court's personal jurisdiction. (*Id.*, ¶¶ 47-56.) The success achieved under these circumstances thus represents a genuine milestone.

In weighing the "undesirability" factor, courts consider, among other things, the "expense and time involved in prosecuting [the] litigation on a contingent basis, with no guarantee or high likelihood of recovery." *Waters v. Cook's Pest Control, Inc.*, No. 2:07-CV-00394-LSC, 2012 WL 2923542, at *18 (N.D. Ala. July 17, 2012). "[T]his factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk." *In re Sunbeam*, 176 F. Supp. 2d at 1336. "Undesirability" and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit—not retroactively, with the benefit of hindsight. *Lindy Bros. Builders, Inc. v. Am. Radiator & Std. Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473.

Prosecuting the Action was risky from the outset, with numerous obstacles to overcome. (Ex. A (Prieto Decl.), ¶ 48.) As discussed earlier, VW has raised jurisdictional challenges; it has contested liability by claiming, for example, that it was deceived by Takata; it has contested Plaintiffs' damages theories; and it certainly would contest a motion for certification of a litigation class. (*Id.*, ¶¶ 49-51.) Each of these obstacles and risks, standing alone, could have impeded Plaintiffs' successful prosecution of these claims at trial (and in any appeal). (*Id.*, ¶ 52.) Together, they overwhelmingly show that Plaintiffs' claims against VW were far from a "slam dunk" and that, in light of all the circumstances, the Settlement achieved an excellent class-wide result. (*Id.*)

v. Class Counsel pursued this Action on a pure contingency basis, and were precluded from other employment as a result.

Class Counsel prosecuted the Action entirely on a contingent fee basis. (*Id.*, ¶ 53.) Meeting the immense time and expense demands of the case limited the ability of Class Counsel to work on numerous other matters, all without any guarantee that such a substantial investment of time and effort would ever be reimbursed. (*Id.*, ¶¶ 53-56.) This significant risk of nonpayment or underpayment warrants the requested fee.

Numerous cases recognize that contingent-fee risk is an important factor in determining the fee award. "A contingency fee arrangement often justifies an increase in the award of attorney's fees." *In re Sunbeam*, 176 F. Supp. 2d at 1335 (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also In re Cont. Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment); *Ressler*, 149 F.R.D. at 656 ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award."); *accord Walters v. Atlanta*, 652 F. Supp. 755, 759 (N.D. Ga. 1985), *modified*, 803 F.2d 1135 (11th Cir.); *York v. Ala. State Bd. of Educ.*, 631 F. Supp. 78, 86 (M.D. Ala. 1986).

Public policy concerns—especially ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs whose individual claims would defy vindication—further justifies the requested fee award. As courts in this District have observed:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . *A contingency fee arrangement often justifies an increase in the award of attorney's fees.* This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, *especially in light of the risks of recovering nothing.*

Behrens, 118 F.R.D. at 548 (emphasis added).

The progress of the Action to date readily demonstrates the inherent risk that Class Counsel faced in prosecuting these cases on a contingency fee basis. (Ex. A (Prieto Decl.), ¶ 55.) To mount the enormous and ongoing effort of conducting discovery in this Action and litigating before this Court for almost four years, Class Counsel have invested tens of millions of dollars in time, as well as millions of dollars in expenses, for the benefit of the Class in this Settlement. (*Id.*)

Uncompensated expenditures of this magnitude can severely damage or even destroy some law firms. It cannot be disputed that the Action entailed substantial risk of nonpayment and resulting financial hardship for Class Counsel's practices. (*Id.*)

Furthermore, the time Class Counsel spent on the Action was time that could not be spent on other matters. (*Id.*, ¶ 56.) Indeed, Class Counsel repeatedly turned away work on other matters as a result. (*Id.*) This factor strongly militates in favor of the requested fee.

vi. Class Counsel achieved an excellent result.

As explained earlier, the Settlement represents an outstanding result for the Class. (*Id.*, ¶ 57.) With a total value of approximately $55.5 million the Settlement will achieve the two primary objectives of this litigation: it will accelerate the removal of dangerous, defective Takata airbag inflators from Class Members' vehicles, through an innovative, flexible Outreach Program; and it will compensate Class Members for the economic damages they suffered, in a manner that reinforces the public safety benefits of the Settlement. (*Id.*, ¶ 57.) Instead of facing additional years of costly and uncertain litigation, Class Members will receive an immediate benefit. (*Id.*) The Settlement represents an exceptional achievement by any measure.

vii. The remaining *Johnson* factors and additional considerations favor approving Class Counsel's fee request.

The remaining *Johnson* factors likewise support granting Class Counsel's fee request. As noted, the burdens of this litigation have precluded Class Counsel's pursuit of other cases. (Ex. A (Prieto Decl.), ¶ 59.) The relatively small size of most of the firms representing Plaintiffs, and the major commitment involved in pursuing this representation, prevented Class Counsel firms from working on other matters and accepting other representations. (*Id.*) In fact, over the past three years, Class Counsel firms have repeatedly turned away work, or refused to become involved in other cases, because of the significant time and effort that this case and MDL demanded. (*Id.*) In addition, Class Counsel's fee request is firmly rooted in "the economics involved in prosecuting a class action." *See In re Sunbeam*, 176 F. Supp. 2d at 1333. Class Counsel have advanced millions of dollars in out-of-pocket costs and expenses, which the requested fee award will include and cover. Without adequate compensation and financial reward in the event of a successful outcome, cases such as this simply could not and would not be pursued, because it would not be possible to undertake the ever-present risk of an unsuccessful outcome and recovering nothing.

Finally, and unlike most settlements, Class Counsel's work in connection with the Settlement will *not* end at Final Approval. (Ex. A (Prieto Decl.), ¶ 61.) The Settlement will last

for at least four years and will require substantial involvement of Class Counsel to oversee and adjust the Outreach Program and Out-of-Pocket Claims Process. (*Id.*) For example, to support and represent Class Members' interests in connection with the prior seven settlements, Class Counsel have participated in scores of meetings and conference calls to address aspects of the Outreach Program and the Out-of-Pocket Claims Process. This process, which will last for at least the next four years, will demand an extraordinary amount of time, diligence, and effort on the part of Class Counsel. The requested fee award will cover this extensive and important work by Class Counsel over the next four years as well. *See Vogenberger v. ATC Fitness Cape Coral, LLC*, No. 14-cv-436, 2015 WL 1883537, at *4 (M.D. Fla. Apr. 24, 2015) (weighing "the time and effort by Plaintiffs' counsel that still will be necessary to effectuate the settlement" as a factor to support 33% fee award); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1216 (holding that class counsel's post-approval work "supports the application of a higher fee percentage award").

CONCLUSION

The Settlement, worth as much as $55.5 million, constitutes an outstanding result by any measure. The Settlement easily satisfies the fairness and reasonableness standard embodied in Rule 23(e), as well as the class certification requirements of Rules 23(a) and (b)(3). Class Counsel's fee request is reasonable under the circumstances of this case. The request satisfies the guidelines of *Johnson* and *Camden I*, given the outstanding result, the considerable risks of litigation, the extremely complicated nature of the factual and legal issues, and the time, effort, and skill required to litigate claims of this nature to a satisfactory conclusion.

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

1. Grants final approval to the Settlement;

2. Certifies the proposed Class defined in the Settlement pursuant to Rule 23(b)(3) and (e) for settlement purposes only, appoints as Class Counsel the attorneys and firms identified as Class Counsel in the Preliminary Approval Order, and appoints as Class Representatives the individuals identified as Class Representatives in the Preliminary Approval Order;

3. Awards Class Counsel attorneys' fees from the Settlement equivalent to 30% of the $42 million Settlement Amount; and

4. Enters Final Judgment dismissing the Action with respect to VW with prejudice, in accordance with the proposed Final Order and Final Judgment submitted as exhibits hereto.

Dated: January 21, 2022

Respectfully submitted,

PODHURST ORSECK, P.A.

/s/ Peter Prieto

Peter Prieto (FBN 501492)
Aaron S. Podhurst (FBN 63606)
Stephen F. Rosenthal (FBN 131458)
John Gravante (FBN 617113)
Matthew P. Weinshall (FBN 84783)
Alissa Del Riego (FBN 99742)
SunTrust International Center
One S.E. Third Ave., Suite 2300
Miami, Florida 33131
Phone: (305) 358-2800
Fax: (305) 358-2382
Email: pprieto@podhurst.com
apodhurst@podhurst.com
srosenthal@podhurst.com
jgravante@podhurst.com
mweinshall@podhurst.com
adelriego@podhurst.com

Chair Lead Counsel for Plaintiffs

COLSON HICKS EIDSON Lewis S. "Mike" Eidson mike@colson.com Curtis Bradley Miner curt@colson.com 255 Alhambra Circle, PH Coral Gables, FL 33134 T: 305-476-7400 *Plaintiffs' Personal Injury Track Lead Counsel*	**SMITH LACIEN LLP** Todd A. Smith tsmith@smithlacien.com 70 W Madison St Suite 5770, Chicago, IL 60602 (312) 509-8900 *Plaintiffs' Economic Damages Track Co-Lead Counsel*
BOIES, SCHILLER & FLEXNER LLP David Boies, Esq. Motty Shulman (Fla Bar. No. 175056) 333 Main Street Armonk, NY 10504 Tel: (914) 749-8200 Fax: (914) 749-8300 Email: dboies@bsfllp.com mshulman@bsfllp.com Stephen N. Zack (Fla. Bar No. 145215) 100 Southeast 2nd Street, Suite 2800 Miami, FL 33131 Tel: (305) 539-8400 Fax: (305) 539-1307 Email: szack@bsfllp.com mheise@bsfllp.com *Plaintiffs' Economic Damages Track Co-Lead Counsel*	**LIEFF CABRASER HEIMANN & BERNSTEIN LLP** Elizabeth Cabraser ecabraser@lchb.com 275 Battery St., Suite 3000 San Francisco, CA 94111-3339 T: 415-956-1000 David Stellings 250 Hudson Street, 8th Floor New York, NY 10012 212-355-9500 dstellings@lchb.com *Plaintiffs' Steering Committee*

CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, PC James E. Cecchi jcecchi@carellabyrne.com 5 Becker Farm Road Roseland, NJ 07068-1739 T: 973 994-1700 f: 973 994-1744 *Plaintiffs' Steering Committee*	**BARON & BUDD, PC** Roland Tellis rtellis@baronbudd.com David Fernandes dfernandes@bardonbudd.com Mark Pifko mpifko@baronbudd.com 15910 Ventura Blvd., Suite 1600 Encino, CA 91436 T: 818-839-2333 J. Burton LeBlanc 9015 Bluebonnet Blvd. Baton Rouge, LA 70810 T: 225-761-6463 *Plaintiffs' Steering Committee*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 21, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

By: */s/ Peter Prieto*
Peter Prieto