**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

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| **IN RE: TAKATA AIRBAG PRODUCT LIABILITY LITIGATION**<br><br>**THIS DOCUMENT RELATES TO:**<br><br>**ECONOMIC LOSS TRACK CASES AGAINST VOLKSWAGEN GROUP OF AMERICA, INC. AND AUDI OF AMERICA, LLC** | MDL No. 2599<br><br>Master File No.15-MD 2599-FAM<br><br>S.D. Fla. Case No. 1:14-cv-24009-FAM |

**VOLKSWAGEN GROUP OF AMERICA, INC.'S AND AUDI OF AMERICA, LLC'S MEMORANDUM OF LAW IN RESPONSE TO THE OBJECTIONS TO FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT**

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Defendants Volkswagen Group of America, Inc. and Audi of America, LLC (collectively, "Volkswagen") respectfully submit this Memorandum of Law in response to the objections filed to the Volkswagen class action settlement of this matter (the "Volkswagen Settlement") and in support of final approval of the Volkswagen Settlement.

## INTRODUCTION

Out of the 2,244,844 potential class members who received notices informing them of the Volkswagen Settlement ("Class Notice"), just seven have lodged objections[1] (only one of which was submitted properly).[2] This handful of Objectors contends principally that the Volkswagen Settlement favors certain class members over others and that the Outreach Program

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[1] Attorney N. Albert Bacharach, Jr., who represented Objectors to the Honda and Ford settlements (ECF Nos. 2340-1, 3110), filed substantively identical objections on behalf of Carl Adams (ECF No. 4156 ("Adams Obj.")), Margaret Virginia Duda (ECF No. 4157 ("Duda Obj.")), and Steve Jones (ECF No. 4158 ("Jones Obj.")). Attorney Sam Cannata filed substantively identical objections on behalf of Colleen Murphy (ECF No. 4154 ("Murphy Obj.")) and Alexander Miron (ECF No. 4155 ("Miron Obj.")). Mr. Cannata previously represented an individual who objected unsuccessfully to the BMW, Mazda, Nissan, Honda, Subaru, and Toyota settlements. (ECF No. 2278.) Attorney John Pentz filed an objection on behalf of James Pentz (ECF No. 4153 ("Pentz Obj.")) and also represented unsuccessful Objectors to each of the prior settlements in this multidistrict litigation. (*Id.* at 16.) Finally, Mr. Foster Malone filed a *pro se* objection. (ECF No. 4149 ("Malone Obj.").)

[2] Contrary to the Court's clear instruction in the order preliminarily approving the Volkswagen Settlement (No. 14-24009, ECF No. 1853 at 14-15 (S.D. Fla.)), all six Objectors represented by counsel provided deficient information concerning their counsel's history of objecting to settlements. (Pentz Obj. at 15-16; Murphy Obj. at 2; Miron Obj. at 2; Adams Obj. at 14; Duda Obj. at 13-14; Jones Obj. at 13-14.) The required disclosures serve an important purpose, *i.e.*, to "provide information this Court needs to help it evaluate whether the objector's criticisms of the Settlement are the sincere views of an interested Class Member that may likewise reflect the views of other Settlement Class Members, or are instead contrived arguments fashioned by 'professional objector' lawyers that do not reflect Settlement Class members' views, but are instead potentially fashioned in attempt to leverage payments to themselves from Class Counsel in exchange for withdrawing such objections or declining to appeal from any settlement approval order on behalf of their client." *Sanchez-Knutson* v. *Ford Motor Co.*, No. 14-61344, 2017 U.S. Dist. LEXIS 96560, at *13 (S.D. Fla. June 20, 2017).

is ineffective or redundant with the ongoing recall campaigns that are being overseen by the National Highway Traffic Safety Administration ("NHTSA").[3]

These objections are baseless. The Volkswagen Settlement provides proportionate, tangible benefits to *all* class members, with the greatest benefits going to those who incurred the most out-of-pocket expenses. And as this Court has previously recognized, the flexible Outreach Program goes well beyond what the recall campaign overseen by NHTSA ("NHTSA Recall Campaign") requires and serves the important purpose of encouraging owners and lessees of class vehicles who have not yet completed their safety recalls to do so. The Court should overrule all of the objections for the reasons discussed below, as it has previously done with respect to nearly identical objections in connection with the prior Takata-related settlements, including some raised by the very same attorneys who raised them here.

**LEGAL STANDARD**

At the final approval stage, a district court must determine whether a settlement "is fair, adequate and reasonable and . . . not the product of collusion between the parties." *Nelson* v. *Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) (quoting *Bennett* v. *Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)); *see also* FED. R. CIV. P. 23(e)(2).

[3] One Objector, citing no evidence, objects on the ground that the Volkswagen Settlement "does not include compensation of [his] claim for emotional distress." (Malone Obj. at 1.) However, objections that seek a greater award "without providing any basis, evidence, or facts to support his contention" are routinely overruled. *Almanzar* v. *Select Portfolio Serv., Inc.*, No. 14-22586, 2016 WL 1169198, at *3 (S.D. Fla. Mar. 25, 2016) (Moreno, J.); *see also Carter* v. *Forjas Taurus S.A.*, No. 13-24583, 2016 WL 3982489, at *11 (S.D. Fla. July 22, 2016) ("An unsupported belief that a better deal could be possible is not a basis to overturn a settlement."). Moreover, the Volkswagen Settlement concerns "all actions where only *economic damages* without personal injuries are claimed by plaintiffs." (No. 15-80335, ECF No. 9 at 2 (S.D. Fla.) (emphasis added).) The Objector seeking emotional distress damages would therefore not be entitled to the relief he seeks through the Volkswagen Settlement. *See Simmons* v. *Bradshaw*, No. 14-80425, 2016 WL 4718410, at *17 (S.D. Fla. May 4, 2016) ("[U]nlike awards for economic damages, there is an inherent subjectivity and imprecision to . . . emotional distress awards[.]").

This Court's determination is "informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett*, 737 F.2d at 986; *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits.").

When analyzing whether a settlement is fair, adequate, and reasonable, Federal Rule of Civil Procedure Rule 23(e)(2) instructs district courts to consider whether (i) "the class representatives and class counsel have adequately represented the class;" (ii) "the proposal was negotiated at arm's length;" (iii) "the relief provided for the class is adequate[;]" and (iv) "the proposal treats Class Members equitably relative to each other." FED. R. CIV. P. 23(e)(2). Courts in the Eleventh Circuit also 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, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986.

## ARGUMENT

### I. THE CLASS MEMBERS' OVERWHELMING SUPPORT FOR THE VOLKSWAGEN SETTLEMENT FAVORS APPROVAL.

As this Court has previously held, "a low number of objections suggests that the settlement is reasonable, while a high number of objections would provide a basis for finding that the settlement was unreasonable." *Saccoccio* v. *JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 694 (S.D. Fla. 2014) (Moreno, J.); *see also Lipuma* v. *Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) ("[A] low percentage of objections points to the reasonableness of a proposed settlement and supports its approval."); *Fabricant* v. *Sears Roebuck & Co.*, No. 98-1281, 2002 WL 34477904, at *3 (S.D. Fla. Sept. 18, 2002) (Moreno, J.) ("The small

number of exclusions and objections from Class members relative to the size of the Class, and the lack of merit to the objections that were made, support approval of this Settlement."). Here, class member support for the settlement is overwhelming.

For this settlement, 2,244,844 notices were mailed to potential class members. (ECF No. 4159-1 at ¶ 12.) Yet only 17 class members opted out of the Volkswagen Settlement and a mere seven objected—amounting to less than 0.0011 percent of class members in total. (*Id.* at ¶ 37.) As this Court has previously determined, such overwhelming support strongly favors approval. *See Hall* v. *Bank of Am., N.A.*, No. 12-22700, 2014 WL 7184039, at *5 (S.D. Fla. Dec. 17, 2014) (Moreno, J.) (approving settlement where only "nine objections [were] filed on behalf of seventeen Class Members which equates to less than .0016% of the class" after notice was issued to "over 1,000,000 class members nationwide"); *see also Faught* v. *Am. Home Shield Corp.*, 668 F.3d 1233, 1238 (11th Cir. 2011) (affirming final approval where only 0.033% of class members requested exclusion and only 24 class members and one state attorney general filed objections).

## II. ALL CLASS MEMBERS RECEIVE TANGIBLE BENEFITS UNDER THE VOLKSWAGEN SETTLEMENT.

The Volkswagen Settlement provides a range of benefits to all class members, including the (i) Outreach Program; (ii) Enhanced Rental/Car Loaner Program; (iii) Out-of-Pocket Claims Process; (iv) Customer Support Program; and (v) Residual Distributions, if funds remain. Even so, four Objectors argue that the Volkswagen Settlement treats certain class members unfairly. Specifically, they claim that class members who no longer possess their vehicles or who have already replaced their inflators will not benefit from the Outreach Program. (Pentz Obj. at 2; Adams Obj. at 4; Duda Obj. at 4; Jones Obj. at 4.) But this does not render the Volkswagen Settlement unfair, inadequate, or unreasonable.

"[T]here is no rule that settlements benefit all class members equally," *Holmes* v. *Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983), and that the parties negotiated a settlement agreement addressing the different needs of different class members does not undermine the fairness of the Volkswagen Settlement. Indeed, "almost every settlement will involve different awards for various class members." *Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999). Federal Rule of Civil Procedure 23(e)(2)(D) requires a district court to consider whether "the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D). But treating class members *equitably* does not mean providing *entirely equal* benefits to all class members. Rather, a settlement agreement is fair, adequate, and reasonable when it "properly accounts for differences among individual Class Members and treats Class Members equitably in the division of the settlement." *Kuhr* v. *Mayo Clinic Jacksonville*, 530 F. Supp. 3d 1102, 1117 (M.D. Fla. 2021); *see also In re Health Ins. Innovations Sec. Litig.*, No. 17-2186, 2020 WL 10486665, at *2, 7 (M.D. Fla. Oct. 21, 2020) (approving class action settlement that apportioned payments of the settlement fund to class members "based on when they purchased, acquired, and/or sold their shares of common stock and/or options, as developed by Plaintiff's expert economist and damages consultant").

The Objectors' claim that certain class members will receive little or no value from the Volkswagen Settlement is unfounded. Rather, the Volkswagen Settlement provides equitable, tangible benefits to *all* class members. Any class member who has had his or her inflator replaced may take advantage of the Out-of-Pocket Claims Process, Customer Support Program, and Residual Distribution. Moreover, the Residual Distribution process is open to all class members, even those who no longer own the subject vehicles.

In any event, the Objectors ignore that settlements are negotiated between the parties who must take into account the strengths and weaknesses of the parties' positions as well as the risks and uncertainties of continued litigation. *See Carter*, 2016 WL 3982489, at *11 ("The Objectors incorrectly focus on their perceived losses, without considering the benefits to the Class and the significant savings in cost, time, and uncertainty."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1348 (S.D. Fla. 2011) ("[B]ut for the Settlement, Plaintiffs and the class faced a multitude of potentially serious, substantive defenses, any one of which could have precluded or drastically reduced the prospects of recovery."). Without settlement, there would be substantial uncertainty as to whether Plaintiffs would recover at all given that (i) Takata deceived car manufacturers, including Volkswagen, about the existence of potential issues with the relevant airbags, as Takata acknowledged in its criminal plea agreement with the U.S. government, *see United States* v. *Takata Corp.*, No. 16-20810, ECF No. 23 at B-6, B-7 (E.D. Mich. Feb. 27, 2017); (ii) there have been no ruptures on the road in any Volkswagen vehicle; and (iii) Volkswagen is replacing inflators for all affected vehicles at no charge to customers. *See Perez* v. *Asurion Corp.*, 501 F. Supp. 2d 1360, 1380 (S.D. Fla. 2007) ("The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable.").

Thus, the Court should reject these objections as it has done when considering similar objections raised in the prior Takata-related settlement.[4]

[4] (*See, e.g.*, Ford Resp. to Obj. at 5 (ECF No. 3146) ("Ford Resp.") (collecting objections); Spaeth & Maggard Obj. to Honda and Nissan Settlements at 2 (ECF No. 2263) ("Spaeth Obj."); Toyota Resp. to Obj. at 9 (ECF No. 2125) ("Toyota Resp.") (collecting objections); Honda Resp. to Obj. at 6 (ECF No. 2316) ("Honda Resp.") (collecting objections); Ford Final Approval Order at ¶ 17 (ECF No. 3182) ("Ford Final Approval Order"); Nissan Final Approval Order at ¶ 17 (ECF No. 2388) ("Nissan Final Approval Order"); Honda Final Approval Order at ¶ 17 (ECF

## III. THERE ARE NO SUBSTANTIAL CONFLICTS BETWEEN ANY CLASS MEMBERS, INCLUDING THE CLASS REPRESENTATIVES.

Because class members will receive proportionate, rather than equal, benefits from the Volkswagen Settlement, the Objectors argue that there are conflicting interests among class members. (Pentz Obj. at 3-5; Adams Obj. at 4-5; Duda Obj. at 4-5; Jones Obj. at 4-5.) One Objector further argues that the class representatives do not adequately represent the class because they would not benefit from the Outreach Program—mistakenly equating awareness of the NHTSA Recall Campaign with participation in the recall. (Pentz Obj. at 2-3.)

Federal Rule of Civil Procedure 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class," which is assessed by examining "whether any substantial conflicts of interest exist between the representatives and the class." *Richardson* v. *Progressive Am. Ins. Co.*, No. 18-715, 2022 WL 154426, at *14 (M.D. Fla. Jan. 18, 2022). "[T]he existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." *Valley Drug Co.* v. *Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). A fundamental conflict of interest has been found, for instance, "where the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of the unnamed class members." *Richardson*, 2022 WL 154426, at *15 (citing *Valley Drug Co.*, 350 F.3d at 1189-90). Class members receiving differing but equitable benefits from the Volkswagen Settlement are not in substantial conflict with one another. Notably, some of the named Plaintiffs are in different positions and stand to receive different benefits under the Volkswagen Settlement. Certain named Plaintiffs sold or traded in their vehicles before

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No. 2385) ("Honda Final Approval Order"); Toyota Final Approval Order at ¶ 17 (ECF No. 2168) ("Toyota Final Approval Order").)

receiving a replacement inflator. (Second Am. Compl. at ¶¶ 107, 111, 124 (ECF No. 4026).) Others have already received temporary or final replacement inflators. (*Id.* at ¶¶ 101, 109, 122-23, 133, 143, 146, 151-52, 156.) These are the very individuals the Objectors contend are receiving little to no value from the Volkswagen Settlement, yet they have given their approval. The Court has already considered and rejected similar challenges when approving the other settlement agreements in this matter, and should do the same here.[5]

## IV. THE OUTREACH PROGRAM IS BENEFICIAL TO THE CLASS MEMBERS AND GOES WELL BEYOND THE NHTSA RECALL CAMPAIGN.

The Volkswagen Settlement, like prior Takata-related settlements, incorporates an Outreach Program designed to reach class members who have yet to replace their inflators. One Objector argues that the Outreach Program is duplicative of the notice already provided to class members through the Class Notice and NHTSA Recall Campaign. (Pentz Obj. at 6-8.) Four Objectors challenge the efficacy of the Outreach Program by pointing to the efforts employed by other car manufacturers already participating in the Outreach Program, which they contend do not impart value to the class. (Pentz Obj. at 11-12; Adams Obj. at 2-4; Duda Obj. at 2-4; Jones Obj. at 2-4.) Both arguments fail.

The parties have explicitly agreed to design the Outreach Program in order "to significantly increase Recall Remedy completion rates via traditional and non-traditional outreach efforts, *including by expanding those currently being used by Volkswagen and conducted in connection with NHTSA's November 3, 2015 Coordinated Remedy Order and amendments thereto*." Volkswagen Settlement Agreement at 20 (ECF No. 4105-1)

[5] (*See, e.g.*, Ford Resp. at 8 (collecting objections); Spaeth Obj. at 2-5; Subaru Resp. to Obj. at 7 (ECF No. 2124) (collecting objections); Ford Final Approval Order at ¶ 17; Nissan Final Approval Order at ¶ 17; Subaru Final Approval Order at ¶ 17 (ECF No. 2166).)

("Volkswagen Settlement Agreement") (emphasis added). In order to achieve this goal, the Outreach Program—which is developed through coordination by the parties, NHTSA, and the Independent Monitor of the Takata recalls and is subject to oversight by this Court—will be flexibly designed to reach (and persuade) individuals who have yet to bring their vehicles in for a recall remedy despite having received Class Notice and notices through the NHTSA Recall Campaign. *Id.* at 20-21.

The scope of the Outreach Program is expected to be similar to those of the other programs approved by this Court in the prior Takata-related settlements. (*Compare* Volkswagen Settlement Agreement at 21, *with, e.g.*, Ford Final Approval Order at ¶ 10; Toyota Final Approval Order at ¶ 10; Honda Final Approval Order at ¶ 10.) As demonstrated by the outreach programs employed by other car manufacturers, the Settlement Special Administrator's outreach efforts go well beyond those used in the NHTSA Recall Campaigns. Through these outreach programs, consumers have been sent personalized, hand-written letters packaged in "large-sized envelopments," including "UPS-style envelope[s]" that stand out amongst other mailings. (Settlement Special Administrator Report at 2 (ECF No. 4140) ("SSA Report").) Moreover, outreach program vendors have actively searched for and located affected vehicles on the road and placed recall notifications on those vehicles. (*Id.* at 2-3.) Various state departments have been engaged through the outreach programs to deploy letters informing residents of those states how to complete the recall. (*Id.* at 4.) Recent initiatives also include offering individuals "dealer-branded" merchandise and developing video content to be used in emails and on streaming services and social media platforms. (*Id.* at 3.) To ensure that the proper vehicle owners and lessees are being efficiently targeted, consumers have been sent mailings asking whether they still possess affected vehicles. (*Id.*) If not, recipients may notify the Settlement

Special Administrator that they no longer have an affected vehicle. (*Id.*) Furthermore, the Settlement Special Administrator and outreach program vendors have requested appointments with dealerships to replace inflators via "mystery shopping" calls, relaying information gleaned from the calls to car manufacturers in order to improve dealership participation. (*Id.*)

The Settlement Special Administrator's efforts have been unquestionably successful thus far in implementing outreach programs for other car manufacturers. The overall recall completion rate for the six manufacturers already participating in an outreach program is 84.7%, compared to only 75.4% for those manufacturers that do not participate. *See Takata Recall Spotlights: Completion Rates*, NHTSA, https://www.nhtsa.gov/equipment/takata-recall-spotlight#completion-rates (last visited Feb. 28, 2022). Moreover, the Settlement Special Administrator tracks the efficacies of various methodologies employed in the outreach programs of other manufacturers and will be able to use this information to better reach those who have not yet been responsive to the NHTSA Recall Campaign. (*See generally* SSA Report.)

One Objector argues that the Outreach Program is "reaching the point of diminishing returns," and that the settlement should instead provide monetary incentives for obtaining the recall remedy. (Pentz Obj. at 6, 11-12.)[6] But those class members who have yet to replace their inflators are the very individuals who are *most* in need of the Outreach Program, and the Volkswagen Settlement explicitly contemplates that "[t]he Outreach Program may also include . . . *incentives for Class Members to bring their Subject Vehicles to Volkswagen Dealers*

[6] Three Objectors baldly assert, without any support whatsoever, that the Outreach Program would be more effective if the Settlement Special Administrator were to hire a behavioral economist. (Adams Obj. at 3-4; Duda Obj. at 3-4; Jones Obj. at 3-4.) In any event, the Volkswagen Settlement provides that "[t]he Settlement Special Administrator shall work in good faith with the consultants and the Parties" and provides flexibility to experiment with diverse methodologies. (Volkswagen Settlement Agreement at 21.)

*for the completion of the Recall Remedy*." (Volkswagen Settlement Agreement at 21 (emphasis added).) Moreover, the claims process set forth in the Volkswagen Settlement *already includes* a monetary incentive for individuals to replace their inflators. Any class member who replaces his or her inflator can submit a claim for out-of-pocket expenses as well as up to two residual payments of up to $250 each, if funds remain. (*Id.* at 28-29.) For these reasons, the Court has rejected similar objections raised when assessing prior Takata-related settlement agreements and should do the same here.[7]

**CONCLUSION**

For the foregoing reasons, the Court should overrule all objections to the Volkswagen Settlement and enter an order granting final approval of the settlement using the proposed final order submitted with Plaintiffs' motion. (*See* ECF No. 4143-5).

[7] (*See, e.g.*, Ford Resp. at 9 (collecting objections); Spaeth Obj. at 6, 8-9; Toyota Resp. at 10 (collecting objections); Ford Final Approval Order at ¶ 17; Nissan Final Approval Order at ¶ 17; Toyota Final Approval Order at ¶ 17.)

Dated: February 28, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of the foregoing Request was filed via CM/ECF and served on all counsel of record via electronic notices generated by CM/ECF on February 28, 2022.

By: /s/ *Gerald E. Greenberg*

Gerald E. Greenberg