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13

14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16

17 DOMINIQUE PARRISH, LUDWIG  
COMBRINCK, and TRINE E. UTNE  
18 individually, and on behalf of a class of  
similarly situated individuals,

19 Plaintiffs,

20 v.

21 VOLKSWAGEN GROUP OF  
22 AMERICA, INC. a Delaware limited  
liability company,

23 Defendant.  
24

Case No.: 8:19-cv-01148-DSF-KESx

Hon. Dale S. Fischer

**NOTICE OF MOTION AND MOTION  
FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: January 24, 2022  
Time: 1:30 p.m.  
Place: Courtroom 7D

1 **TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS**  
2 **OF RECORD:**

3 **PLEASE TAKE NOTICE** that on January 24, 2022, at 1:30 p.m., or as soon  
4 thereafter as counsel may be heard, in Courtroom 7D of the above-captioned court,  
5 located at 350 West 1st Street, Los Angeles, California 90012, the Honorable Dale S.  
6 Fischer presiding, Plaintiffs Dominique Parrish, Ludwig Combrinck, and Trine E. Utne  
7 will, and hereby do, move this Court to:

- 8 1. Preliminarily approve the settlement set forth in the Settlement Agreement,  
9 attached as Exhibit 1 to the Declaration of Tarek H. Zohdy;
- 10 2. Conditionally certify the Settlement Class for settlement purposes;
- 11 3. Approve the Parties' Plan for dissemination of the proposed Class Notice  
12 ("Notice Plan");
- 13 4. Appoint Plaintiffs Dominique Parrish, Ludwig Combrinck, and Trine E.  
14 Utne as the Settlement Class Representatives;
- 15 5. Appoint Capstone Law APC and Berger Montague PC as Settlement Class  
16 Counsel;
- 17 6. Set a hearing date and briefing schedule for final settlement approval and  
18 Plaintiffs' fee and expense application.

19 This Motion, unopposed by Defendant Volkswagen Group of America, Inc., is  
20 based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of Points and  
21 Authorities in Support of Motion for Preliminary Approval of Class Action Settlement;  
22 (3) the Declaration of Tarek H. Zohdy; (4) the Declaration of Russell D. Paul; (5) the  
23 Declaration of Bradley A. Winters; (6) the Settlement Agreement and attached exhibits  
24 thereto; (7) the [Proposed] Order Granting Preliminary Approval of Class Action  
25 Settlement; (8) the records, pleadings, and papers filed in this action; and (5) such other  
26 documentary and oral evidence or argument as may be presented to the Court at or prior  
27 to the hearing of this Motion.  
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Dated: November 22, 2021

Respectfully submitted,

By: /s/ Tarek H. Zohdy

Tarek H. Zohdy  
Cody R. Padgett  
Laura E. Goolsby  
CAPSTONE LAW APC

Russell D. Paul  
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Attorneys for Plaintiffs Dominique Parrish,  
Ludwig Combrinck and Trine E. Utne

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1 **I. INTRODUCTION**

2 Plaintiffs Dominique Parrish, Ludwig Combrinck, and Trine E. Utne  
3 (“Plaintiffs”) respectfully seek preliminary approval of the Parties’<sup>1</sup> proposed Class  
4 Settlement Agreement (“Settlement”) of this action applicable to a nationwide  
5 Settlement Class of U.S. current and former owners and lessees of 490,068 model year  
6 2019 Volkswagen Jetta and model year 2018-2020 Volkswagen Tiguan vehicles. As  
7 discussed below, this Settlement, which affords substantial benefits to the Settlement  
8 Class, was the result of extensive arm’s length negotiations of highly disputed claims by  
9 experienced class action counsel. Plaintiffs claim that the transmissions in the respective  
10 Settlement Class Vehicles contain a defect that could result in a rattling noise, a  
11 jerking/hesitation, and/or an oil leak. Plaintiffs have asserted claims under theories of,  
12 *inter alia*, breach of warranty and statutory and common law fraud. Defendant  
13 Volkswagen Group of America, Inc. (“VWGoA”) denies these allegations and  
14 maintains that the subject vehicles’ transmissions are not defective, were properly  
15 designed, manufactured, marketed, distributed and sold, and function properly. VWGoA  
16 further maintains that no express or implied warranties were breached, and no consumer  
17 statutes or common law duties were violated.

18 The proposed Class Settlement was the culmination of extensive arms-length  
19 negotiations following significant motion practice, and occurred over many months  
20 during which discovery was also exchanged. The Class Settlement was ultimately  
21 reached with the assistance of a respected neutral Mediator who is highly experienced in  
22 class action settlements. The Settlement,<sup>2</sup> described more fully below, provides  
23 Settlement Class Members with immediate and valuable relief that directly addresses  
24 issues applicable to respective categories of the Settlement Class Vehicles, it is fair,

25  
26 <sup>1</sup> “Parties” is defined as Plaintiffs Dominique Parrish, Ludwig Combrinck, and  
Trine E. Utne, and Defendant Volkswagen Group of America, Inc.

27 <sup>2</sup> Unless indicated otherwise, capitalized terms used herein have the same  
28 meaning as those defined by the Settlement Agreement, attached as Exhibit 1 to the  
Declaration of Tarek H. Zohdy (“Zohdy Decl.”).

1 reasonable, and adequate, and it complies in all respects with Fed. R. Civ. P. 23 (“Rule  
2 23”). The Settlement successfully addresses the alleged transmission issues going  
3 forward while also providing a reimbursement program for Settlement Class  
4 Members to recoup paid out-of-pocket expenses for qualifying covered repairs that  
5 were incurred in the past.

6 Plaintiffs accordingly request that this Court review their negotiated Settlement  
7 Agreement, attached as Exhibit 1 to the accompanying Declaration of Tarek H. Zohdy,  
8 and enter an order: (1) granting preliminary approval of the Settlement; (2) conditionally  
9 certifying the proposed Settlement Class for settlement purposes; (3) conditionally  
10 appointing Plaintiffs as the Settlement Class Representatives and Plaintiffs’ Counsel,  
11 Capstone Law APC, and Berger Montague PC, as Settlement Class Counsel; (4)  
12 approving the Parties’ proposed Class Notice form and plan for disseminating the Class  
13 Notice (the “Notice Plan”); (5) conditionally appointing Rust Consulting, Inc., as the  
14 Settlement Claim Administrator; (6) setting deadlines for the filing of any objections to,  
15 or requests for exclusion from the Settlement and other submissions in connection with  
16 the Settlement approval process; and (7) setting a hearing date and briefing schedule for  
17 Final Approval of the Settlement and Plaintiffs’ application for service awards and  
18 attorneys’ fees and expenses.

## 19 **II. FACTS AND PROCEDURE**

### 20 **A. Overview of the Litigation and Settlement Negotiations**

21 Plaintiff Dominique Parrish, a resident of Irvine, California, is the owner of a  
22 2019 Volkswagen Jetta who complained of a rattling noise in the transmission, which he  
23 claims was not repaired by a VW dealer. Plaintiff Ludwig Combrinck, a resident of  
24 Livermore, California, leased a new 2018 Volkswagen Tiguan and complained of a  
25 transmission oil leak, which had to be repaired under warranty, and a “hard” shifting  
26 from first to second gear, which he claims was not repaired. Plaintiff Trine Utne, a  
27 resident of Salt Lake City, Utah, leased a new 2019 Volkswagen Tiguan and complained  
28 of transmission hesitation issues, which she asserts were not repaired.

1 Plaintiffs filed their initial complaint on June 10, 2019, alleging that the  
2 transmissions in their vehicles were defective and asserting claims against VWGoA for,  
3 *inter alia*, alleged violation of the consumer statutes of their states of residence, including  
4 the Consumers Legal Remedies Act (CLRA), Unfair Competition Law (UCL), breach  
5 of warranty under the Song-Beverly Warranty Act and the Magnuson-Moss Warranty  
6 Act, and unjust enrichment. (Zohdy Decl. ¶¶ 2-3.)

7 Plaintiffs filed a First Amended Class Action Complaint on July 3, 2019. (*Id.* at ¶  
8 4.) After several amendments to the Complaint [ECF 18, 35, 43, 72], Motions to  
9 Dismiss the amended complaints [ECF 36, 47], and a Decision and Order dated May 7,  
10 2020 granting in part and denying in part Defendant’s Motion to Dismiss the Third  
11 Amended Complaint [ECF 71], Plaintiffs filed their operative Fourth Amended Class  
12 Action Complaint on June 3, 2020 [ECF 72]. (*Id.* at ¶¶ 5-10.) VWGoA filed an Answer  
13 to the Fourth Amended Class Action Complaint on June 17, 2020 [ECF 73], disputing  
14 the material allegations and claims and asserting numerous substantial defenses to  
15 Plaintiffs’ allegations and claims.

16 Following the Parties’ negotiation and filing of a Joint Rule 26(f) Report [ECF  
17 59] and negotiation of a stipulated protective order, the exchange of discovery and  
18 evidence took place. The Parties conferred regularly over the subsequent months, and  
19 simultaneous with the discovery and litigation activities, the Parties began negotiating a  
20 potential Class Settlement. After exchanges of information and months of vigorous,  
21 arm’s length settlement negotiations which did not result in agreement on all settlement  
22 terms, the Parties participated in a mediation on March 8, 2021, before Bradley A.  
23 Winters, Esq., a respected and very experienced neutral class action Mediator with  
24 JAMS. (Zohdy Decl. at ¶¶ 11-12.) With Mr. Winters’ guidance and efforts, the Parties  
25 were eventually able to negotiate a class settlement of this action. (*Id.* at ¶ 13.) The terms  
26 of the Settlement are set forth in detail in the Settlement Agreement (“S.A.”) submitted  
27 herewith for the Court’s preliminary approval. (*Id.* at ¶ 14, Ex. 1.) At all times, the  
28 Parties’ negotiations were adversarial and non-collusive (*id.*), and the Settlement

1 constitutes a fair, adequate, and reasonable compromise of the claims at issue. (*Id.* at ¶¶  
2 21-24.)

### 3 **III. MATERIAL TERMS OF THE PROPOSED SETTLEMENT**

4 Plaintiffs have claimed that the transmissions of the Settlement Class Vehicles are  
5 defective. Through detailed investigation, analysis, and information exchanged in this  
6 action, Class Counsel have determined that three alleged separate and distinct  
7 transmission issues exist, each relative to a certain segment of the Settlement Class  
8 Vehicles, to which the claims relate: (1) certain model year 2019 Volkswagen Jetta  
9 Settlement Class Vehicles might potentially experience a transmission rattling noise, (2)  
10 a smaller subset of those 2019 Volkswagen Jetta vehicles might also potentially exhibit a  
11 transmission oil leak from the cooler seal rings (S.A., ¶ I.G., I.H.), and (3) model year  
12 2018, 2019 and 2020 Volkswagen Tiguan Settlement Class Vehicles might potentially  
13 experience transmission hesitation or jerking on certain occasions (S.A., ¶ I.I.). Having  
14 narrowed the issues, the Parties were able to negotiate and fashion an appropriate Class  
15 Settlement that directly addresses these transmission issues and provides Settlement  
16 Class Members with substantial benefits with respect to each of these potential issues in  
17 the respective Settlement Class Vehicle categories. As detailed below, the Settlement  
18 provides the multiple benefits which are broken down by Settlement Class Vehicles  
19 applicable to each category. The settlement benefits are fair, reasonable, and adequate  
20 and also take into account and complement certain prior actions that were taken by  
21 VWGoA to address these distinct potential issues:

#### 22 **A. 2019 Volkswagen Jetta Settlement Class Vehicles**

#### 23 **Settlement Benefits Applicable to All 2019 Volkswagen Jetta Settlement** 24 **Class Vehicles – Alleged Transmission Rattling Noise**

##### 25 **1. All Current Owners and Lessees – Free TCM Software Update** 26 **and Installation of Damper Weight**

27 Effective on the Notice Date, VWGoA will issue a Technical Service Bulletin to  
28 its authorized dealers providing that each Class Member who currently owns or leases a

1 2019 Volkswagen Jetta Settlement Class Vehicle and presents the vehicle to an  
2 authorized Volkswagen dealer with a diagnosed and confirmed transmission rattling  
3 noise may to obtain an update of the vehicle's transmission control module software and  
4 installation of a damper weight on the drive shaft, free of charge. (*See* S.A., II.A.1.a.)  
5 This will be made available up to one year after the Notice Date (*id.*) and will address the  
6 transmission rattling noise issue that is one of the subjects of this case.

7 **2. All Current and Former Owners and Lessees - Reimbursement**  
8 **for Past Unreimbursed Out-of-Pocket Repair Expenses**

9 In addition, all Settlement Class Members who are/were current or former owners  
10 or lessees of a 2019 Volkswagen Jetta Settlement Class Vehicle may be entitled to  
11 submit a claim for reimbursement of certain unreimbursed out-of-pocket expenses that  
12 were incurred and paid, prior to the Notice Date and within 72,000-miles from the  
13 vehicle's In-Service Date (the mileage limitation of the vehicle's original New Vehicle  
14 Limited Warranty), for a Past Covered Transmission Rattling Noise Repair (a repair to  
15 address a diagnosed transmission rattling noise in a 2019 Volkswagen Jetta Settlement  
16 Class Vehicle). (*See* S.A., II.A.1.b.)

17 Reimbursement may be provided of the full amount (100%) of the paid invoice  
18 amount (parts and labor) for the Past Covered Transmission Rattling Noise Repair,  
19 subject to certain proof and other requirements set forth in the Claim Form, and  
20 limitations discussed in Section III of the Class Notice. (*Id.*)

21 If the past repair for which reimbursement is sought was performed by a service  
22 center or facility that is not an authorized Volkswagen dealer, then the Settlement Class  
23 Member must also submit documentation (such as a written estimate or invoice), or if  
24 documents are not available after a good-faith effort to obtain them, provide a  
25 declaration<sup>3</sup> signed under penalty of perjury, demonstrating that prior to that repair, they  
26

27 <sup>3</sup> The pre-printed declaration forms are clear and straightforward, and, along with  
28 the Claim Form, will be included in the Class Notice mailing. In addition, they will be  
made available on the settlement website.

1 first attempted to have the repair performed by an authorized Volkswagen dealer under  
2 the warranty, but the dealer either declined or was unable to perform the repair free of  
3 charge. (*Id.*) The Parties believe that is fair and reasonable, since the vehicle at that time  
4 would have still been covered under its original express warranty, and therefore the  
5 Settlement Class Member would have been entitled to a free repair by a Volkswagen  
6 dealer pursuant to the warranty.

7 In addition, reimbursement for a Past Covered Transmission Rattling Noise  
8 Repair performed by a service entity or facility that is not an authorized Volkswagen  
9 dealer shall not exceed a maximum reimbursement amount of \$3,500. (*Id.*)

10 **B. Additional Settlement Benefits Applicable to Owners and Lessees of a**  
11 **Certain Subset of 2019 Volkswagen Jetta Vehicles Identified by**  
12 **Vehicle Identification Number (VIN)**

13 **1. Warranty Extension for Current Owners and Lessees**

14 Effective on the Notice Date, VWGoA will extend its New Vehicle Limited  
15 Warranties applicable to certain specified 2019 Volkswagen Jetta Settlement Class  
16 Vehicles whose Vehicle Identification Numbers (VINs) are listed in Exhibit A to the  
17 Settlement Agreement, to cover repairs by an authorized Volkswagen dealer to address a  
18 diagnosed and confirmed transmission oil leak caused by the transmission oil cooler seal  
19 rings (or “O-rings”) on the transmission oil cooler of the Settlement Class Vehicle  
20 performed during a period of 12-months or 12,000-miles (whichever occurs first) from  
21 the date that the Settlement Class Vehicle’s original New Vehicle Limited Warranty  
22 period applicable to the transmission expires. The Warranty Extension is conditioned  
23 upon either (i) Service Action 38C5 (entitled “Transmission Oil Cooler Seals”, issued by  
24 VWGoA on March 25, 2020) having been performed on the vehicle prior to said repair,  
25 or (ii) the Settlement Class Member providing a declaration (that VWGoA’s records do  
26 not otherwise contradict), attesting that he/she/it was not previously notified of the  
27 availability of Service Action 38C5, and that he/she/it had the Service Action performed  
28

1 on that vehicle within thirty (30) days after the Notice Date. (*See S.A., II.A.2.a.*)<sup>4</sup>

2 The settlement website will contain a VIN Lookup Portal which will enable  
3 Settlement Class Members to verify, by their vehicle's VIN, whether their vehicle was  
4 equipped with the applicable O-rings and is covered by this warranty extension. (*Id.*)

5 The warranty extension is subject to the terms and conditions of the Settlement  
6 Class Vehicle's original New Vehicle Limited Warranty and the limitations set forth in  
7 Section III of the Class Notice. (*Id.*) Additionally, the warranty extension is transferable  
8 to subsequent owners to the extent it has not expired. (*Id.*)

9 **2. All Current and Former Owners and Lessees - Reimbursement**  
10 **for Past Unreimbursed Out-of-Pocket Repair Expenses**

11 In addition, any current or past owner/lessee of the same specified 2019  
12 Volkswagen Jetta Settlement Class Vehicles (identified by VIN in Exhibit A to the  
13 Settlement Agreement) may submit a claim for reimbursement of certain past  
14 unreimbursed out-of-pocket expenses that were incurred and paid prior to the Notice  
15 Date, and during a period of 12-months or 12,000-miles (whichever occurred first) from  
16 the date that the Settlement Class Vehicle's original New Vehicle Limited Warranty  
17 period applicable to the transmission expired, for a Past Covered Transmission Oil Leak  
18 Repair (a repair to address a diagnosed transmission oil leak which involved replacement  
19 of the O-rings on the transmission oil cooler). (*See S.A., II.A.2.b.*)

20 Reimbursement may be provided of the full amount (100%) of the paid invoice  
21 amount (parts and labor) for the Past Covered Transmission Oil Leak Repair, subject to  
22 certain proof and other requirements set forth in the Claim Form, and limitations  
23

24 \_\_\_\_\_  
25 <sup>4</sup> The reason for this condition is that on March 25, 2020, VWGoA had  
26 voluntarily issued a Service Action (38C5), applicable to these specific 2019 Jetta  
27 Settlement Class Members, which directed the same Settlement Class Members to have  
28 the transmission's O-rings (the source of the potential oil leak) to be replaced with newly  
designed O-rings by an authorized Volkswagen dealer free of charge. *See S.A., Exhibit C.* This is fair and reasonable, since, as of March 25, 2020, the applicable Settlement Class Members were supposed to have availed themselves of this free Service Action O-ring replacement which would prevent a transmission oil leak in the subject vehicle.



1 discussed in Section III of the Class Notice.

2 This reimbursement program properly takes into account that, as explained above,  
3 Service Action 38C5 was issued by VWGoA on March 25, 2020, and directed  
4 owners/lessees of these Settlement Class Vehicles to have the O-rings replaced by an  
5 authorized Volkswagen dealer free of charge. *See* S.A., Exhibit C. Thus, for any Past  
6 Covered Transmission Oil Leak Repair that was performed prior to July 1, 2020—  
7 approximately three months after Service Action 38C5 was issued (a very fair and  
8 reasonable leeway period), the Settlement Class Member shall be entitled to receive  
9 reimbursement of the full amount (100%) of the paid invoice cost of the Past Covered  
10 Transmission Oil Leak Repair (parts and labor).

11 If, however, the Past Covered Transmission Oil Leak Repair was performed on or  
12 after July 1, 2020, then in order to qualify for reimbursement, the Settlement Class  
13 Member must also submit either (a) proof that Service Action 38C5 was performed on  
14 the vehicle prior to that repair, or (b) if Service Action 38C5 was not performed on the  
15 vehicle, a declaration attesting, under penalty of perjury, that he/she/it was not notified of  
16 that Service Action prior to the repair and VWGoA's records do not show otherwise.  
17 (*Id.*)

18 If the Past Covered Transmission Oil Leak Repair was performed by a service  
19 entity or facility that is not an authorized Volkswagen dealer, then the Settlement Class  
20 Member must also submit documentation (such as a written estimate or invoice), or if  
21 documents are not available after a good-faith effort to obtain them, a declaration signed  
22 under penalty of perjury confirming that prior to the repair the Settlement Class Member  
23 first attempted to have it performed by an authorized Volkswagen dealer, but the dealer  
24 declined or was unable to perform the repair free of charge under the existing warranty.  
25 (*Id.*) In addition, reimbursement for a Past Covered Transmission Oil Leak Repair  
26 performed by a service entity or facility that is not an authorized Volkswagen dealer  
27 shall not exceed a maximum reimbursement amount (parts and labor) of \$500. (*Id.*)  
28

**C. 2018, 2019 and 2020 Volkswagen Tiguan Settlement Class Vehicles**

**1. Warranty Extension for Current Owners and Lessees**

Effective on the Notice Date, VWGoA will extend its New Vehicle Limited Warranties applicable to 2018, 2019, and 2020 Volkswagen Tiguan Settlement Class Vehicles to cover repairs, by an authorized Volkswagen dealer, to address a diagnosed condition of transmission hesitation or jerking performed during a period of 12-months or 12,000-miles (whichever occurs first) from the date that said Settlement Class Vehicle’s original New Vehicle Limited Warranty period applicable to the transmission expires, provided that Recall 24GB (entitled “Engine and Transmission Control Module (ECM/TCM” issued by VWGoA on September 16, 2020) was previously performed on the applicable vehicle prior to the extended warranty repair.<sup>5</sup> (*See* S.A., II.B.1.)

This warranty extension is subject to the terms and conditions of the vehicle’s original New Vehicle Limited Warranty and the limitations set forth in Section III of the Class Notice. (*Id.*) This extended warranty shall be transferable to subsequent owners to the extent it has not expired. (*Id.*)

**2. All Current and Former Owners and Lessees - Reimbursement for Past Unreimbursed Repair Expenses**

In addition, Settlement Class Members may also be entitled to submit a claim for reimbursement of certain unreimbursed out-of-pocket expenses that were incurred and paid, prior to the Notice Date and during a period of 12-months or 12,000 miles (whichever occurred first) from the date that the settlement Class Vehicle’s original New Vehicle Limited Warranty period applicable to the transmission expired, for a Past

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<sup>5</sup> The Parties believe that this is fair and reasonable because, on September 16, 2020, VWGoA had voluntarily issued a Recall (24GB entitled “Engine and Transmission Control Module (ECM/TCM)” applicable to the 2018-2020 Volkswagen Tiguan Settlement Class Vehicles which, among other things, provided for owners and lessees of these vehicles to have a free software update performed on the TCM, by an authorized Volkswagen dealer, to improve driveability. *See* S.A., Exhibit D. Performance of that Recall would have addressed the alleged potential transmission hesitation/jerking issue regarding those vehicles, so the same goes for the reimbursement for past repair remedy, discussed *infra*.

1 Covered Transmission Hesitation/Jerking Repair (a repair to address a diagnosed  
2 condition of transmission hesitation or transmission jerking in a 2018, 2019 or 2020  
3 Volkswagen Tiguan Settlement Class Vehicle).

4 If the Past Covered Transmission Hesitation/Jerking Repair was performed prior  
5 to December 1, 2020 (2-1/2 months after the aforementioned Recall 24GB [which  
6 addressed this issue] was instituted), then reimbursement may be provided of the full  
7 amount (100%) of the paid invoice amount (parts and labor) for the Past Covered  
8 Transmission Hesitation/Jerking Repair, subject to certain proof and other requirements  
9 set forth in the Claim Form, and limitations discussed in Section III of the Class Notice.  
10 If said repair was performed on or after December 1, 2020, then the Settlement Class  
11 Member may still be entitled to said 100% reimbursement if either: (i) Recall 24GB was,  
12 in fact, performed on the Settlement Class Vehicle prior to the repair, or (ii) the  
13 Settlement Class Member submits a declaration (not otherwise contradicted by  
14 VWGoA's records) showing that he/she/it was not notified of that Recall prior to said  
15 repair (*See S.A., II.B.2*).

16 If the Past Covered Transmission Hesitation/Jerking Repair was performed by a  
17 service entity or facility that is not an authorized Volkswagen dealer, then the Settlement  
18 Class Member must also submit documentation (such as a written estimate or invoice),  
19 or if documents are not available after a good-faith effort to obtain them, a declaration  
20 signed under penalty of perjury, confirming that prior to the repair, he/she/it first  
21 attempted to have the repair performed by an authorized Volkswagen dealer, but the  
22 dealer declined or was unable to perform the repair free of charge under the existing  
23 warranty. (*Id.*)

24 In addition, reimbursement for a Past Covered Transmission Hesitation/Jerking  
25 Repair performed by a service entity or facility that is not an authorized Volkswagen  
26 dealer shall not exceed a maximum reimbursement amount (parts and labor) of \$3,000.  
27 (*Id.*)

28 The Settlement provides a reasonable period of within 75 days after the Notice

1 Date for Class Members to submit claims for reimbursement to the Claim Administrator.  
2 S.A. ¶ II.D(1), and Ex. A thereto (Claim Form). As discussed *infra*, the Class Notice  
3 contains robust information about the case, the proposed Settlement, the Class Members’  
4 rights and options, applicable deadlines, how to call or email the Claim Administrator  
5 with any questions about the Settlement or requests for assistance, and when and how to  
6 submit a reimbursement claim and the information and documentation needed to do so.  
7 In addition, the Claim Form, which will accompany the mailing of the Class Notice, sets  
8 forth in detail exactly what information and documentation is needed for a valid claim  
9 for reimbursement.

#### 10 **D. Release of Claims/Liability**

11 In consideration of the Settlement benefits, VWGoA and its related entities and  
12 affiliates (the “Released Parties,” as defined in S.A. ¶ I.R.) will receive a release of  
13 claims and potential claims related to the transmissions in the Settlement Class Vehicles  
14 that are the subject of this litigation and Settlement, including the claims that were or  
15 could have been asserted in the litigation (the “Released Claims,” as defined in S.A. ¶  
16 I.Q.). The scope of the release properly reflects the issues, allegations and claims in this  
17 case, and specifically excludes claims for personal injury and property damage (other  
18 than damage to the Settlement Class Vehicle itself).

#### 19 **E. Claim Submission and Administration**

20 The Parties agreed to retain Rust Consulting, Inc., as the Settlement Claim  
21 Administrator. S.A. ¶ I.B. The Claim Administrator will carry out the Notice Plan  
22 (discussed below), disseminate the CAFA notice, administer any requests for exclusion,  
23 and administer the Claims process including the review and determination of  
24 reimbursement claims, and distribution of payments to eligible Claimants whose claims  
25 are complete and have been approved under the Settlement terms. (*Id.* ¶ III.A., III.B.,  
26 IV.) Pursuant to the Settlement, VWGoA will pay all administrative costs (*Id.* ¶ III.A.)  
27 separate and apart from any benefits to which the Settlement Class Members may be  
28 entitled. Thus, none of the Settlement Administration costs will be borne by the Class

1 Members in any way.

2 The Settlement also provides for a fair, equitable, and straightforward claims  
3 process for Settlement Class Members. For each complete claim that is approved, the  
4 Claim Administrator will mail a reimbursement check to the Settlement Class Member  
5 within the later of 100 days after submission of the completed Claim, or 100 days after  
6 the Effective Date of the Settlement. (*Id.* ¶ III.B.) Significantly, the Settlement provides  
7 that if a claim and/or its supporting documentation is incomplete or deficient, the Claim  
8 Administrator will mail the Settlement Class Member a letter or notice outlining the  
9 deficiencies and affording a 30-day period to cure them. (*Id.*) In addition, any Settlement  
10 Class Member that disagrees with the ultimate denial of his/her/its/their reimbursement  
11 claim, in whole or in part, may request an “attorney review” of that decision within 14  
12 days of such denial. (*Id.*, ¶ II.C.(5).) If an attorney review is requested, Class Counsel and  
13 Defense Counsel will confer and make good faith efforts to resolve the disputed denial.  
14 (*Id.*)

15 Finally, as discussed above, the Class Notice, its accompanying Claim Form, and  
16 the settlement website all provide the necessary details, including how and by when  
17 reimbursement claim must be submitted, what information and documentary proof is  
18 required for a valid claim, and how to contact the Claim Administrator, or Class Counsel,  
19 with any questions or requests for assistance with respect to a claim. Indeed, the Class  
20 Notice and settlement website provide the mailing address, the email address and a toll-  
21 free telephone number for Class Members to contact the Claim Administrator.

22 **F. The Proposed Class Notice and Plan for Dissemination (“Notice**  
23 **Plan”)**

24 The Settlement Agreement contains an effective Notice Plan to be paid for by  
25 solely by VWGoA. S.A. ¶ IV. Class Notice will be mailed to Settlement Class Members  
26 via first class mail within 120 days after entry of the Court’s Order preliminarily  
27 approving this proposed Settlement. Settlement Class Members will be located based on  
28 the Settlement Class Vehicles’ VIN (vehicle identification) numbers and using the

1 services of IHS/Polk or Experian. (*Id.* ¶ IV.B.2.) These established services obtain vehicle  
2 ownership histories through state title and registration records, thereby identifying the  
3 names and addresses of record of the Settlement Class Members.<sup>6</sup> In addition, after the  
4 Class Notice is mailed, for any individual mailed Notice that is returned as undeliverable,  
5 the Claim Administrator will re-mail to any provided forwarding address, and for any  
6 undeliverable notice packets where no forwarding address is provided, the Claim  
7 Administrator will perform an advanced address search (e.g., a skip trace) and re-mail  
8 any undeliverable Class Notice packets to any new and current addresses located. (*Id.* ¶  
9 IV.B.3.)

10 In addition to the mailing, the Claim Administrator will, with input from counsel  
11 for both Parties, establish a dedicated Settlement website that will include details  
12 regarding the lawsuit, the Settlement and its benefits, and the Settlement Class Members’  
13 legal rights and options including objecting to or requesting to be excluded from the  
14 Settlement and/or not doing anything; instructions on how and when to submit a claim for  
15 reimbursement; instructions on how to contact the Claim Administrator by e-mail, mail or  
16 (toll-free) telephone; copies of the Class Notice, Claim Form, Settlement Agreement,  
17 Motions and Orders relating to the Preliminary and Final Approval processes and  
18 determinations, and important submissions and documents relating thereto; important  
19 dates pertaining to the Settlement including the deadline to opt-out of or object to the  
20 Settlement, the deadline to submit a claim for reimbursement, and the date, place and time  
21 of the Final Fairness Hearing; and answers to Frequently Asked Questions (FAQs). (*Id.* ¶  
22 IV.B.5.)

23 The Class Notice (Ex. E to Settlement Agreement) is very detailed and more than  
24 complies with Rule 23(c)(2)(B). It “clearly and concisely states in plain, easily  
25

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26 <sup>6</sup> The 120-day time period for mailing of the Class Notice is needed to obtain the  
27 vehicle ownership and history records from the DMVs and/or state agencies of the 50  
28 states and Puerto Rico, which typically takes a long time to obtain, and for the Claim  
Administrator to identify the names and last known addresses of the Settlement Class  
Member to whom the Class Notice will be mailed.

1 understood language” the nature of the action; the Settlement Class definition; the class  
2 claims, issues and/or defendant’s positions; the Settlement terms and benefits available  
3 under the Settlement; the claim submission process including details and instructions  
4 regarding how and when to submit a Claim for reimbursement and the required  
5 proof/documentation for a Claim; the release of claims under the Settlement; the manner  
6 of and deadline by which Settlement Class Members may object to the Settlement, Class  
7 Counsel’s requested fee/expense award, and/or the Plaintiffs’ requested service awards;  
8 the manner of and deadline by which a Settlement Class Member may request to be  
9 excluded from the Settlement; the binding effect of the Settlement and release upon  
10 Settlement Class Members that do not timely and properly exclude themselves from the  
11 Settlement; the procedure by which Settlement Class Members may appear at the final  
12 fairness hearing individually and/or through counsel; the settlement website address; how  
13 to contact the Claim Administrator (through the dedicated toll-free number, email or by  
14 mail) with any questions about the settlement or requests for assistance, the identities of  
15 and contact information for Class Counsel; and other important information about the  
16 Settlement and the Settlement Class Members’ rights. *See* S.A., Ex. E.

17 Pursuant to 28 U.S.C. § 1715, the Class Action Fairness Act of 2005, the Claim  
18 Administrator will also provide timely notice to the U.S. Attorney General and the  
19 applicable State Attorneys General (“CAFA Notice”) so that they may review the  
20 proposed Settlement and raise any comments or concerns to the Court’s attention prior to  
21 final approval. S.A. ¶ IV.A.

22 **G. Proposed Class Counsel Fees, Litigation Expenses, and Class**  
23 **Representative Service Awards**

24 The requested Class Counsel Fees and Expenses and Class Representative  
25 Service Awards will be the subject of a separate fee motion, to be filed pursuant to the  
26 schedule set forth in the Preliminary Approval Order.

27 **IV. ARGUMENT**

28 This is a strong settlement, with robust relief for the Class that will effectively

1 address the issues in this action. It is the product of extensive arm’s length negotiations,  
2 with the assistance of a Mediator, between skilled and experienced class action counsel  
3 regarding vigorously disputed claims. As set forth below, the Court should grant  
4 preliminary approval of the class settlement, conditionally certify the settlement class for  
5 settlement purposes, and approve and direct the implementation of the Parties’ Notice  
6 Plan, as all applicable criteria for same are readily met.

7 **A. The Court Should Grant Preliminary Settlement Approval**

8 Under Rule 23(e), a proposed class settlement should be approved when it is fair,  
9 reasonable, and adequate after considering whether: (a) the class representatives and  
10 class counsel have adequately represented the class; (b) the proposal was negotiated at  
11 arm’s length; (c) the relief provided for the class is adequate, taking into account: (i) the  
12 costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method  
13 of distributing relief to the class, including the method of processing class-member  
14 claims; and (iii) any agreement required to be identified under Rule 23(e)(3); and, (d) the  
15 proposal treats class members equitably relative to each other.

16 In the Ninth Circuit, “there is a strong judicial policy that favors settlements,  
17 particularly where complex class action litigation is concerned.” *In re Hyundai & Kia*  
18 *Fuel Econ. Litig.*, 926 F.3d 539, 556, 568 (9th Cir. 2019) (en banc); *In re Syncor ERISA*  
19 *Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). For preliminary approval, the Court  
20 evaluates whether the settlement is within the “range of reasonableness,” and whether  
21 notice to the class and the scheduling of a final approval hearing should be ordered. *See*  
22 *generally*, 3 Conte & Newberg, *Newberg on Class Actions*, § 7.20 (4th ed. 2002). “At  
23 the preliminary approval stage, the bar to meet the ‘fair, reasonable and adequate’  
24 standard is lowered.” *In re Nat’l Football League Players’ Concussion Inj. Litig.*, 961 F.  
25 Supp. 2d 708, 714 (E.D. Pa. 2014) (The Court need only review the parties’ proposed  
26 settlement to determine whether it is within the permissible “range of possible judicial  
27 approval” and thus, whether the notice to the class and the scheduling of the formal  
28 fairness hearing is appropriate. Newberg, § 11:25).



1 Preliminary approval should be granted if “the proposed settlement appears to be  
2 the product of serious, informed, non-collusive negotiations, has no obvious deficiencies,  
3 does not improperly grant preferential treatment to class representatives or segments of  
4 the class, and falls within the range of possible approval.” *Ruch v. AM Retail Grp., Inc.*,  
5 2016 WL 1161453, at \*7 (N.D. Cal. Mar. 24, 2016) (quoting *In re Tableware Antitrust*  
6 *Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)). All of the criteria for preliminary  
7 approval are met here.

8 The instant Settlement, reached with the assistance of respected third-party  
9 Mediator Bradley A. Winters, Esq., of JAMS, is clearly not the product of collusion.  
10 (See Declaration of Bradley A. Winters submitted herewith [“Winters Decl.”], ¶9.)  
11 Indeed, there is no collusion unless it is demonstrated “that class counsel have allowed  
12 pursuit of their own self-interests...to infect the negotiations,” *Allen v. Bedolla*, 787 F.3d  
13 1218, 1224 (9th Cir. 2015); see also *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d  
14 935, 947 (9th Cir. 2011), and that has clearly not occurred in this case. Moreover, while  
15 the Parties have agreed to a maximum “clear sailing” counsel fee/expenses amount  
16 (which is ultimately subject to the Court’s determination after class counsel’s fee motion  
17 is filed), there was no discussion of counsel fees, expenses, or of any class representative  
18 service awards until after the many months of settlement negotiations and the ultimate  
19 agreement was reached with respect to the material terms of this Class Settlement. The  
20 settlement negotiations were at all times, including during the Mediation, arduous,  
21 adversarial, and conducted at arm’s length. (See Winters Decl. at ¶¶9, 10.)

22 In addition, counsel for both sides are very skilled and experienced class action  
23 counsel who were aptly able to evaluate the risks of proceeding through litigation and  
24 trial of this action, including the risks of non-recovery or substantially diminished  
25 recovery, denial of class certification, summary judgment, and a defense verdict at trial  
26 and/or as a result of any appeals. The Settlement here affords substantial benefits to the  
27 Settlement Class without incurring those risks or the significant delays in recovery that  
28 would result from continued litigation through trial and appeals.

1           Lastly, aside from the “clear sailing” provision, none of the *Bluetooth* Factors  
2 are present here. Plaintiffs’ Counsel do not seek a disproportionate share of fees and  
3 there is no “reverter” of unclaimed funds to VWGoA, as the Settlement does not provide  
4 for the establishment of a common fund. Indeed, the payment of counsel fees does not  
5 reduce or in any way affect the benefits afforded the Settlement Class herein. And, the  
6 settlement was negotiated at arm’s-length and after mediation. Further, by agreeing to  
7 resolve counsel fees amicably, the Parties averted the potential “second major litigation”  
8 on attorneys’ fees that Courts disfavor. *See Hensley v. Eckerhart*, 461 U.S. 424, 437  
9 (1983) (“A request for attorney’s fees should not result in a second major litigation.”).

### 10                           **1.     The Settlement is Entitled to a Presumption of Fairness**

11           In reviewing what is “otherwise a private consensual agreement negotiated  
12 between the parties to a lawsuit,” the court’s scrutiny should be “limited to the extent  
13 necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
14 overreaching by, or collusion between, the negotiating parties and that the settlement,  
15 taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice*  
16 *v. Civil Service Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). A non-collusive settlement,  
17 negotiated by experienced class counsel with the involvement of a respected mediator, is  
18 entitled to “a presumption of fairness.” *In re Toys “R” Us-Del., Inc. FACTA Litig.*, 295  
19 F.R.D. 438, 450 (C.D. Cal. 2014). The proposed Settlement is the product of many  
20 months of negotiations between counsel and mediation before respected mediator  
21 Bradley A. Winters. Based on these factors, the Settlement is entitled to a presumption of  
22 fairness. *See id.* (finding a presumption of fairness where the settlement was reached  
23 following a mediation).

### 24                           **2.     The Views of Experienced Counsel Should Be Accorded** 25                           **Substantial Weight**

26           The fact that sophisticated parties with experienced counsel have agreed to settle  
27 their dispute should be given considerable weight by courts, since “parties represented  
28 by competent counsel are better positioned than courts to produce a settlement that fairly

1 reflects each party’s expected outcome in the litigation.” *In re Pac. Enters. Sec. Litig.*, 47  
2 F.3d 373, 378 (9th Cir. 1995). Here, the Parties achieved a settlement after a thorough  
3 analysis of relevant documents and data and the strengths, weaknesses, and potential  
4 risks regarding the Parties’ respective claims and defenses. The expectations of all  
5 Parties are embodied by the Settlement, which, as set forth above, is non-collusive, being  
6 the product of arms’-length negotiations and finalized with the assistance of an  
7 experienced mediator. Plaintiffs and the putative class were, at all times, represented by  
8 experienced class action counsel possessing significant experience in automotive defect  
9 and class action matters. (*See, e.g.*, Zohdy Decl. ¶¶ 25-28; Declaration of Russell D. Paul  
10 [“Paul Decl.”] ¶¶ 4-6.) Likewise, VWGoA’s counsel, Herzfeld & Rubin, P.C., is a  
11 renowned defense firm with significant experience in automotive class action litigation.  
12 The Parties’ recommendation to approve this Settlement should therefore “be given  
13 great weight.” *Eisen v. Porsche*, 2014 WL 439006, at \*5 (C.D. Cal. Jan. 30, 2014)  
14 (crediting the experience and views of counsel in approving a settlement resolving  
15 automotive defect allegations).

### 16 3. The Extent of Discovery Completed Supports Preliminary 17 Approval

18 Both before and after the action was filed, Plaintiffs thoroughly investigated and  
19 researched their claims, which allowed Plaintiffs’ Counsel to better evaluate both the  
20 design and functionality of the subject transmissions and VWGoA’s representations.  
21 (Zohdy Decl. ¶¶ 15-21.) Among other tasks, Plaintiffs fielded numerous inquiries from  
22 putative Class Members and investigated many of their reported claims. (*Id.*) Plaintiffs  
23 also researched publicly available materials as well as consumer complaints and  
24 discussions of transmission-related problems in articles and forums online, in addition to  
25 various manuals and technical service bulletins (“TSBs”) discussing the alleged defect.  
26 (*Id.*) Finally, they conducted research into the various causes of actions and other similar  
27 automotive actions. (*Id.*)

28 As to the discovery, in response to Plaintiffs’ written discovery efforts, Plaintiffs

1 received approximately 1,500 documents consisting of thousands of pages of relevant  
2 information, including spreadsheets with thousands of rows of data, owners' manuals,  
3 maintenance and warranty manuals, internal VWGoA investigation reports, Technical  
4 Service Bulletins, field reports, warranty data, etc. (*Id.*) Informal information was also  
5 provided by Defendant. All of this discovery and information was thoroughly and  
6 meticulously reviewed and analyzed by Class Counsel (*Id.*), enabling us to accurately  
7 assess the issues and potential claims in this matter and the strengths and weaknesses of  
8 the Parties' respective positions. (*Id.*) In addition, over the course of litigation, Plaintiffs  
9 responded to numerous Class Members who contacted Class Counsel to report issues  
10 with their Class Vehicles and seek relief. (*Id.*) Class Counsel also conducted detailed  
11 interviews with Class Members regarding their pre-purchase research, their purchasing  
12 decisions, and their repair histories, and Class Counsel developed a plan for litigation  
13 and settlement based in part on Class Members' reported experiences with their Class  
14 Vehicles and with VWGoA dealers. (*Id.*)

15 By engaging in a thorough investigation and evaluation of Plaintiffs' claims,  
16 Class Counsel can opine that this Settlement, for the consideration and on the terms set  
17 forth in the Settlement Agreement, is under all of the pertinent considerations, fair,  
18 reasonable, and adequate, and worthy of preliminary approval herein. (Zohdy Decl. ¶ 21;  
19 Paul Decl. ¶ 13.)

#### 20 **4. The Proposed Settlement Is Well Within the Range of** 21 **Reasonableness**

22 The proposed Settlement is well within the range of reasonableness, particularly  
23 when considering the risks of prosecuting the action. In its evaluation, "the district  
24 court's determination is nothing more than an amalgam of delicate balancing, gross  
25 approximations, and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal  
26 quotation omitted). Thus, there is "no single formula" to be applied, but the court may  
27 presume that the parties' counsel and the mediator arrived at a reasonable range of  
28 settlement by considering the plaintiffs' likelihood of recovery. *Rodriguez v. West Pub.*

1 *Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). And this Circuit expressly rejected any  
2 requirement that the settling parties value maximum damages that can be obtained at  
3 trial, as that figure would be inherently speculative. *Lane v. Facebook, Inc.*, 696 F.3d  
4 811, 818 (9th Cir. 2012) (“[N]ot only would such a requirement be onerous, it would  
5 often be impossible... [since] the amount of damages of a given plaintiff (or class of  
6 plaintiffs) has suffered in a question of fact that must be proved at trial.”).

7 This Settlement offers substantial benefits to Class Members, including warranty  
8 extensions, reimbursement for out-of-pocket costs, and a free software upgrade for the  
9 relevant transmission control modules. When weighed against the risk of further  
10 litigation, the Settlement clearly falls within the range of reasonableness. To be sure,  
11 while Plaintiffs believe that their case is strong on the merits, VWGoA has raised a  
12 number of substantive defenses that present serious risks to Plaintiffs’ case. These  
13 defenses include, among others, that the subject vehicles’ transmissions are not defective  
14 under relevant legal standards, that no warranties were breached nor statutes violated,  
15 and that issues that certain Class members may have experienced were rectified through  
16 the voluntary issuance of a Service Action. In addition, Defendant maintains that this  
17 action is not suited for class certification outside of a settlement because of, *inter alia*, the  
18 many predominating individual issues as to liability and damages such as each putative  
19 class member’s purchase or leasing decision-making; what information, if any, was  
20 viewed and/or relied upon by each putative class member prior to purchase or lease, and  
21 the inherently individualized issues concerning each putative class member and subject  
22 vehicle such as the condition of each putative class vehicle, each owner’s/lessee’s  
23 maintenance of his/her/its vehicle and transmission, each owner’s/lessee’s use and  
24 manner of driving, and additional factors, all of which may significantly affect the  
25 performance of any vehicle’s transmission. Other inherently individualized issues  
26 include whether, and if so, to what extent, any putative class vehicle has, or would ever,  
27 experience any of the alleged transmission-related issues; what issue, if anything, any  
28 given owner may have presented to any dealership under the vehicle’s applicable

1 warranty, when and what occurred in each instance, and whether any applicable  
2 warranty was breached under each putative class member’s specific circumstances, and  
3 also, the myriad differences among the 50 states’ laws, including burdens of proof, with  
4 respect to the various legal claims asserted, that would render it very difficult to certify a  
5 nationwide class in the litigation context.

6 It is also noteworthy that even the existence of a defect alone does not *ipso facto*  
7 lead to legal liability or establish concrete damages under federal or state statutes, *see*,  
8 *e.g.*, *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 991-92 (N.D. Cal. 2010) (granting  
9 defendant’s motion for summary judgment and finding alleged ignition-lock defect not a  
10 safety risk), *aff’d*, 462 F. App’x 660 (9th Cir. 2011).

11 While Plaintiffs would vigorously dispute these claims, consumers bringing  
12 automotive defect actions are frequently denied class certification due to lack of  
13 common proof.<sup>7</sup> Recently, a California district court denied class certification involving  
14 a theory based on material omission of a automotive defect. *See Stockinger v. Toyota*  
15 *Motor Sales, U.S.A., Inc.*, 2020 WL 1289549, at \*6 (C.D. Cal. Mar. 3, 2020) (finding  
16 plaintiffs failed to satisfy the commonality and predominance requirements of Rule 23 in  
17 a similar automotive defect action alleging material omissions and breaches of the  
18 implied warranty of merchantability). *Stockinger* underscores the heightened litigation  
19 risk for Plaintiffs seeking class certification. In contrast, class certification in the  
20 settlement context is different because, unlike litigation, the court does not need to be  
21 concerned with manageability issues that predominating individual factors might cause.  
22 *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *In re Hyundai & Kia Fuel*  
23 *Econ. Litig.*, 926 F.3d at 556 (en banc).

24  
25  
26 <sup>7</sup> *See, e.g.*, *Grodzitsky v. Am. Honda Motor Co.*, 2014 WL 718431 (C.D. Cal. Feb.  
27 19, 2014) (denying certification due to lack of evidence that common materials were used  
28 for all defective “window regulators” in the class); *Cholakyan v. Mercedes-Benz USA, LLC*,  
281 F.R.D. 534, 553 (C.D. Cal. 2012) (“There is also no evidence that a single design flaw  
that is common across all of the drains in question is responsible for the alleged water leak  
defect...”).

1 This body of recent case law demonstrates that, had the case continued, “plaintiffs  
2 [would] face[] a substantial risk of incurring the expense of a trial without any recovery.”  
3 *In re Toys “R” Us-Del FACTA Litig.*, 295 F.R.D. at 451. Indeed, the risk of continuing  
4 litigation, including the risk of new adverse statutory or case law, increased costs, and  
5 expiration of a substantial amount of time, weigh heavily in favor of settlement.  
6 *Rodriguez*, 563 F.3d at 966. In particular, a class action such as this, involving over  
7 490,068 vehicles, has the strong potential to engulf plaintiffs and attorneys in protracted,  
8 resource-draining court battles, the outcome of which is uncertain. *See, e.g., Aarons v.*  
9 *BMW of N. Am. LLC*, 2014 WL 4090564 \*11-13 (C.D. Cal. Apr. 29, 2014) (approving a  
10 settlement for repairs/reimbursement of transmission defect and observing that “it is the  
11 very uncertainty of outcome in litigation and avoidance of wasteful and expensive  
12 litigation that induce consensual settlements.” [citation omitted]).

13 Aside from certification risk in the litigation context, Plaintiffs could face the  
14 termination of their action at summary judgment or at trial. *See In re Portal Software,*  
15 *Inc. Sec. Litig.*, 2007 WL 4171201, \*3 (N.D. Cal. Nov. 26, 2007) (recognizing that  
16 “inherent risks of proceeding to... trial and appeal also support the settlement”). And if  
17 Plaintiffs prevail in some fashion on class certification and/or trial, appeals would be  
18 likely and any benefits to which certain Class Members may be entitled could be  
19 significantly reduced, delayed or offset by their substantial additional use, mileage and  
20 the vehicles’ ordinary wear and tear by the time any such recovery might occur.

21 In light of the substantial risks of continued litigation, including the risk of  
22 maintaining class certification, the significant benefits secured for the Class by the  
23 proposed Settlement, which directly address the issues in this case, are clearly a fair,  
24 reasonable, and adequate compromise of the issues in dispute.

## 25 5. Equitable Method of Allocating Relief to Class Members

26 The Rule 23(e)(2) factor turns on whether the proposed settlement “treats class  
27 members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). “Matters of  
28 concern could include whether the apportionment of relief among class members takes

1 appropriate account of differences among their claims, and whether the scope of the  
2 release may affect class members in different ways that bear on the apportionment of  
3 relief.” Fed. R. Civ. P. 23(e)(2)(D), Advisory Committee’s Notes.

4 Here, the settlement treats all class members equitably, and indeed, the same  
5 within the categories of the Settlement Class Vehicles they own(ed) or lease(d). All  
6 current and former owners and lessees of the categories of Settlement Class Vehicles  
7 involved are, if they meet the very reasonable Settlement terms, eligible for the same  
8 respective substantial benefits under this Settlement which address the alleged issue  
9 applicable to their vehicles. This includes addressing the particular issues prospectively,  
10 be it by a software update that resolves the issue and/or a by warranty extension covering  
11 a potential future repair of the issue, and also, addressing it retrospectively, by a  
12 reimbursement if the Class Member previously paid certain out-of-pocket expenses for a  
13 covered repair of the issue applicable to their Settlement Class Vehicle. Thus, the  
14 settlement treats all Class Members equitably, further supporting its preliminary  
15 approval.

16 Finally, though the class representatives will receive an additional \$5,000, the  
17 extra payment is in recognition for the service they have performed on behalf of the  
18 Settlement Class prior to and during this litigation.

19 **B. Conditional Class Certification Is Appropriate for Settlement**  
20 **Purposes**

21 This Settlement contemplates conditional certification of a Settlement Class  
22 consisting of all persons and entities who purchased or leased a Settlement Class Vehicle  
23 in the United States of America and Puerto Rico. Excluded from the Settlement Class  
24 are: (a) all Judges who have presided over the Action and their spouses; (b) all current  
25 employees, officers, directors, agents and representatives of Defendant, and their family  
26 members; (c) any affiliate, parent or subsidiary of Defendant and any entity in which  
27 Defendant has a controlling interest; (d) anyone acting as a used car dealer; (e) anyone  
28 who purchased a Settlement Class Vehicle for the purpose of commercial resale; (f)



1 anyone who purchased a Settlement Class Vehicle with salvaged title and/or any  
2 insurance company who acquired a Settlement Class Vehicle as a result of a total loss;  
3 (g) any insurer of a Settlement Class Vehicle; (h) issuers of extended vehicle warranties  
4 and service contracts; (i) any Settlement Class Member who, prior to the date of the  
5 Settlement Agreement, settled with and released Defendant or any Released Parties from  
6 any Released Claims, and (j) any Settlement Class Member who files a timely and  
7 proper Request for Exclusion from the Settlement Class. (S.A. § I.T.) The Settlement  
8 Class is well-defined, and the exclusions are typical for these cases.

### 9 **1. The Proposed Class Meets the Requirements of Rule 23**

10 An analysis of the requirements of Rule 23(a) and (b)(3), commonly referred to as  
11 numerosity, commonality, typicality, adequacy, predominance, and superiority, shows  
12 that certification of this proposed Settlement Class, for purpose of settlement, is  
13 appropriate here. *See Amchem Prods., Inc.*, 521 U.S. at 620 ; Manual for Complex  
14 Litigation, § 21.632. In this regard, the Court must apply the criteria for class  
15 certification “differently in litigation classes and settlement classes.” *In re Hyundai &*  
16 *Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc). For example, in  
17 deciding whether to certify a litigation class, a district court must be concerned with  
18 manageability at trial, where potentially predominating individualized issues could  
19 present intractable manageability issues. However, such “manageability is not a concern  
20 in certifying a settlement class where, by definition, there will be no trial.” *Id.* Thus, the  
21 Ninth Circuit en banc court in *Hyundai* recognized that in the settlement class  
22 certification context, the element of predominance is “readily met” in cases such as this.  
23 *Hyundai*, 926 F.3d at 559.

### 24 **2. The Proposed Class Is Sufficiently Numerous and** 25 **Ascertainable**

26 The numerosity requirement is met where “the class is so numerous that joinder  
27 of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Generally, courts will find a  
28 class sufficiently numerous if it consists of 40 or more members. *Vasquez v. Coast*

1 *Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal. 2009) (numerosity is  
 2 presumed at a level of 40 members). Here, the Settlement Class consists of current and  
 3 former owners and lessees of 490,068 vehicles, clearly satisfying this requirement:

4 <b>Model</b>	<b>Vehicles Sold in the United States</b>
5 2019 Volkswagen Jetta Vehicles	179,766
6 2018-2020 Volkswagen Tiguan Vehicles	310,302
<b>Total</b>	<b>490,068</b>

7 And while there is no threshold “ascertainability” requirement in this Circuit,  
 8 *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 n.4 (9th Cir. 2017), here the  
 9 Settlement Class is easily ascertainable through, for example, the vehicle ownership and  
 10 registration records of each state’s department of motor vehicle records, the obtaining of  
 11 which is part of the Notice Plan discussed *supra*.

### 12 **3. There Are Questions of Law and Fact that Are Common to the** 13 **Class**

14 The second Rule 23(a) requirement is commonality, which is satisfied “if there  
 15 are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The operative  
 16 criterion for commonality is “the capacity of a classwide proceeding to generate  
 17 common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v.*  
 18 *Dukes*, 564 U.S. 338, 350 (2011). The “commonality requirement has been ‘construed  
 19 permissively,’ and its requirements deemed minimal.” *Estrella v. Freedom Fin’l*  
 20 *Network*, 2010 WL 2231790, at \*7 (N.D. Cal. June 2, 2010) (quoting *Hanlon v.*  
 21 *Chrysler Corp.*, 150 F.3d 1011, 1018-20 (9th Cir. 1998)). A single common question of  
 22 law or fact satisfies this requirement. *See Wal-Mart Stores, Inc.*, 564 U.S. at 369.

23 Here, each Class Member purchased a Settlement Class Vehicle equipped with a  
 24 subject transmission that Plaintiffs claim contained a defect that was not disclosed.  
 25 VWGoA contends that these transmissions are not defective. The issues in this case,  
 26 including whether the subject transmissions are defective, as alleged, whether the  
 27 defect(s) was/were previously known to Defendant, and whether Defendant allegedly  
 28 breached a duty to disclose, are issues common to the settlement Class and involve

1 common questions of fact and law. Such issues have been viewed by courts as the  
 2 overarching common questions that have resulted in class treatment in other automotive  
 3 defect cases. *See, e.g., Hanlon*, 150 F.3d at 1020 (allegedly defective rear liftgate  
 4 latches); *Browne v. American Honda Motor Co., Inc.*, 2010 WL 9499072, at \*1 (C.D.  
 5 Cal. July 29, 2010) (allegedly defective braking system); *Parkinson v. Hyundai Motor*  
 6 *Am.*, 258 F.R.D. 580, 595-97 (C.D. Cal. 2008) (allegedly defective flywheels);  
 7 *Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 526 (N.D. Cal. 2004) (allegedly  
 8 defective engine intake manifolds); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th  
 9 Cir. 2006) (allegedly defective throttle body assembly); *see also, Wolin v. Jaguar Land*  
 10 *Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (holding that whether the  
 11 LR3's alignment geometry was defective, whether Land Rover was aware of the defect,  
 12 whether Land Rover concealed the nature of the defect in violations of consumer  
 13 protection statutes, and whether Land Rover was obligated to pay for or repair the  
 14 alleged defect pursuant to the express or implied terms of its warranties are all common  
 15 issues of law or fact that satisfy the commonality requirement).

16 And, since each Settlement Class Member purchased or leased a Settlement Class  
 17 Vehicle, the respective alleged damages, if any, would also be subject to common  
 18 factual and legal questions.

#### 19 **4. Plaintiffs' Claims Are Typical of the Proposed Settlement Class**

20 "In determining whether typicality is met, the focus should be on the defendants'  
 21 conduct and plaintiff's legal theory, not the injury caused to the plaintiff." *Lozano v.*  
 22 *AT&T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007). Thus, typicality is  
 23 "satisfied when each class member's claim arises from the same course of events, and  
 24 each class member makes similar legal arguments to prove the defendant's liability."  
 25 *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citation omitted).

26 Here, the Class Members' claims arising from the alleged defect(s) are reasonably  
 27 coextensive with the claims asserted by the named Plaintiffs. (Fourth Amended  
 28 Complaint ¶¶ 15-48.) As with the named Plaintiffs' claims, each Class Member's

1 claims arise from the same alleged course of conduct—Defendant’s alleged failure to  
 2 disclose a known transmissions defect. Plaintiffs’ claims are thus typical of the Class, as  
 3 “they are reasonably coextensive with those of absent class members.” Plaintiffs and  
 4 Class Members would also similarly benefit from the relief provided by the Settlement.  
 5 Accordingly, typicality is satisfied.

6 **5. Plaintiffs and Plaintiffs’ Counsel Will Adequately Represent**  
 7 **the Interests of the Proposed Settlement Class**

8 Adequacy is satisfied because “the representative parties will fairly and  
 9 adequately protect the interests of the class,” Fed. R. Civ. P. 23(a)(4); specifically: (a) the  
 10 proposed representative Plaintiffs do not have conflicts of interest with the proposed  
 11 class, and, (b) Plaintiffs are represented by qualified and competent counsel. *Hanlon*,  
 12 150 F.3d at 1020. Here, Plaintiffs are adequate class representatives, as they have no  
 13 conflict of interest with the proposed Class. In fact, Plaintiffs share a common interest in  
 14 holding VWGoA accountable for selling vehicles with an Alleged Defect that they did  
 15 not disclose to their customers. Moreover, there is no “irreparable conflict of interest,”  
 16 either in the structure of the class or the terms of the settlement.” *In re Volkswagen*  
 17 *“Clean Diesel Mktg., Sales Pracs., & Prod. Liab. Litig.”*, 895 F.3d 597, 608 (9th Cir.  
 18 2018). In addition, Plaintiffs are represented by competent counsel well-versed in  
 19 prosecuting automotive litigation and class actions. (*See, e.g.*, Zohdy Decl. ¶¶ 25-28, Ex.  
 20 2; Paul Decl. ¶¶ 4-6.)

21 **6. Common Issues Predominate Over Individual Issues**

22 “In addition to meeting the conditions imposed by Rule 23(a), the parties seeking  
 23 class certification must also show that the action is maintainable under Fed. R. Civ. P.  
 24 23(b)(1), (2) or (3).” *Hanlon*, 150 F.3d at 1022. The predominance inquiry under Rule  
 25 23(b)(3) asks “whether the common, aggregation-enabling issue are more prevalent or  
 26 more important than the non-common, aggregation-defeating, individual issues.” *Tyson*  
 27 *Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted).

28 “When one or more of the central issues in the action are common to the class and

1 can be said to predominate, the action may be proper under Rule 23(b)(3) even though  
2 other important matters will have to be tried separately, such as damages or some  
3 affirmative defenses peculiar to some individual class members.” *Id.* And if “just one  
4 common question predominates,” the action may be considered proper under Rule  
5 23(b)(3), and regardless whether “other important matters [would] have to be tried  
6 separately.” *See Hyundai*, 926 F.3d at 557.

7 In the context of a class settlement, the predominance of a common issue or  
8 issues is much easier to establish because manageability at trial is no longer of any  
9 concern. *Amchem*, *supra*, 521 U.S. at 620. Indeed, the predominance inquiry in the  
10 context of a nationwide settlement should be considered under “three guideposts”:

11 [F]irst, that commonality is informed by the defendant’s  
12 conduct as to all class members and any resulting injuries  
13 common to all class members; second, that variations in state  
14 law do not necessarily defeat predominance; and third, that  
concerns regarding variations in state law largely dissipate  
when a court is considering the certification of a settlement  
class.

15 *Sullivan v. DB Invs. Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc); *see also*, *Wakefield*  
16 *v. Wells Fargo & Co.*, 2014 WL 7240339, at \*4 (N.D. Cal. Dec. 18, 2014) (adopting  
17 *Sullivan*’s analysis that state law variations dissipate in a settlement class). Under similar  
18 guiding principles, the Ninth Circuit en banc court recently confirmed that predominance  
19 is not defeated by certifying a nationwide settlement class alleging state law violations.  
20 *See Hyundai*, 926 F.3d at 561-62.

21 Here, for purposes of settlement, the predominance test is satisfied, as the  
22 proposed Settlement makes available the relief for all Class Members based on easily  
23 ascertainable criteria, bypassing whatever individual evidentiary and factual issues that  
24 could arise in litigation in determining liability or damages. Consequently, common  
25 questions predominate over individual issues that might have arisen had this action  
26 continued to be litigated.

1                   **7. A Class Settlement Is Superior to Other Available Means of**  
2                   **Resolution**

3                   Similarly, there can be little doubt that resolving all Class Members’ claims in this  
4 action is superior to a panoply of individual lawsuits by owners/lessees of more than  
5 490,000 vehicles. “From either a judicial or litigant viewpoint, there is no advantage in  
6 individual members controlling the prosecution of separate actions. There would be less  
7 litigation or settlement leverage, significantly reduced resources and no greater prospect  
8 for recovery.” *Hanlon*, 150 F.3d at 1023. Indeed, the very favorable terms of this  
9 Settlement negotiated on behalf of the Class demonstrate the advantages of negotiating a  
10 resolution on a class-wide basis.

11                   Moreover, this is a complex automotive case in which the damages sought by  
12 each Class Member would be far outweighed by the very significant costs that would be  
13 required for him/her/it to prove the existence of a design defect in a vehicle’s  
14 transmission, a violation of a consumer fraud statute, causation and damages, in a single  
15 individual lawsuit. *See Smith v. Cardinal Logistics Mgmt. Corp.*, 2008 WL 4156364, at  
16 \*\*32-33 (N.D. Cal. Sep. 5, 2008) (finding that class members had a small interest in  
17 personally controlling the litigation even where the average amount of damages were  
18 \$25,000-\$30,000 per year). In addition, the sheer number of separate trials that would  
19 otherwise be required also weighs in favor of settlement.

20                   Finally, in the settlement context, there can be no objection that class proceedings  
21 would present the sort of intractable management problems that sometimes override the  
22 collective benefits of class actions, “for the proposal is that there be no trial.” *Amchem*,  
23 521 U.S. at 620.

24                   **8. The Proposed Notice to the Settlement Class**

25                   Before approving a class settlement, “[t]he court must direct notice in a  
26 reasonable manner to all class members who would be bound by the proposal.” Fed. R.  
27 Civ. P. 23(e)(1). Where the settlement class is certified under Rule 23(b)(3), the notice  
28 must also be the “best notice that is practicable under the circumstances, including

1 individual notice to all members who can be identified through reasonable effort.” Fed.  
2 R. Civ. P. 23(c)(2)(B).

3 Here, the Parties agreed to provide individual notice by U.S. mail. (S.A. § IV.B.1)  
4 In addition, the Parties have agreed to establish a settlement website, on which will be  
5 posted the long-form Class Notice as well as the Claim Form, Settlement Agreement, and  
6 important submissions relative to the Settlement approval process; details regarding the  
7 lawsuit, the Settlement and its benefits, and the Settlement Class Members’ legal rights  
8 and options including objecting to or requesting to be excluded from the Settlement and/or  
9 not doing anything; instructions on how and when to submit a claim for reimbursement;  
10 instructions on how to contact the Settlement Claim Administrator by e-mail, mail, or  
11 (toll-free) telephone; important dates pertaining to the Settlement including the deadline to  
12 opt-out of or object to the Settlement, the claim submission deadline, and the Fairness  
13 Hearing date, place and time; and answers to Frequently Asked Questions (FAQs). (*Id.* at  
14 § IV.B.6.)

15 For purposes of identifying Settlement Class Members, the Claim Administrator  
16 shall obtain from IHS/Polk, Experian, or a similar source, the names and current or last  
17 known addresses of Settlement Class Vehicle owners and lessees that can reasonably be  
18 obtained, based upon the VINs of Settlement Class Vehicles to be provided by VWGoA  
19 pursuant to the governing Stipulated Protective Order. (*Id.* at § IV.B.2.)

20 Prior to mailing the Class Notice, an address search through the United States  
21 Postal Service’s National Change of Address database shall be conducted to update the  
22 address information for Settlement Class Vehicle owners and lessees. (*Id.* at § IV.B.3.)  
23 For each individual Class Notice that is returned as undeliverable, the Claim  
24 Administrator shall re-mail all Class Notices where a forwarding address has been  
25 provided. (*Id.*) For the remaining undeliverable notice packets where no forwarding  
26 address is provided, the Claim Administrator shall perform an advanced address search  
27 (e.g., a skip trace) and re-mail any undeliverable notice packets to the extent any new  
28 and current addresses are located. (*Id.*)

1 Any Settlement Class Member who wishes to be excluded from the Settlement  
2 Class must, by the date specified in the Preliminary Approval Order and recited in the  
3 Class Notice—which is to be no later than 30 days after the Notice Date—submit a  
4 written request for exclusion (“Request for Exclusion”) to the Claim Administrator,  
5 Class Counsel, and Defense Counsel at the addresses and in the manner specified in the  
6 Class Notice. (*Id.* at § V.B.)

7 Any Settlement Class Member who intends to object to the fairness of this  
8 Settlement Agreement or the requested amount of Class Counsel Fees and Expenses  
9 and/or Settlement Class representative service award, must, by the date specified in the  
10 Preliminary Approval Order and recited in the Class Notice—also no later than 30-days  
11 after the Notice Date—file any such objection with the Court in person or via the Court’s  
12 electronic filing system, or, if not filed with the Court by either method, mail the  
13 objection to the Court and to the Claim Administrator, Class Counsel, and Defense  
14 Counsel at the addresses specified in the Class Notice. (*Id.* at V.A.) The Class Notice  
15 also spells out clearly what information and/or materials are required for a valid and  
16 timely objection. *See* Zohdy Decl. Ex. E.

17 Plaintiffs request that the Court approve this Notice Plan as the best practicable  
18 under the circumstances. *See, e.g., Rannis v. Recchia*, 380 F. App’x. 646, 650 (9th Cir.  
19 2010) (finding mailed notice to be the best notice practicable where reasonable efforts  
20 were taken to ascertain class members addresses); *see also Patrick v. Volkswagen Group*  
21 *of America*, 2021 WL 3616105, \*5 (C.D. Cal. March 10, 2021). The Class Notice  
22 complies with Rule 23(c)(2)(B) in that they “clearly and concisely state in plain, easily  
23 understood language” the nature of the action; the class definition; the class claims,  
24 issues, or defenses; that the class member may appear through counsel; that the court  
25 will exclude from the class any member who requests exclusion; the time and manner  
26 for requesting exclusion; and the binding effect of a class judgment on class members.  
27 (*See* S.A., Exhs. A-B.) The notice is also consistent with the sample provided by the  
28 Federal Judiciary Center.



1 In compliance with the Attorney General notification provision of the Class  
2 Action Fairness Act, 28 U.S.C. § 1715, the Claim Administrator shall provide notice of  
3 this proposed Settlement to the Attorney General of the United States, and the Attorneys  
4 General of each state in which a known Settlement Class Member resides. (*Id.* at §  
5 IV.A.)

6 **II. CONCLUSION**

7 The Parties have negotiated a fair and reasonable settlement. Accordingly, for the  
8 forgoing reasons, Plaintiffs move the Court to preliminarily approve the Settlement  
9 Agreement.

10  
11  
12 Dated: November 22, 2021

Respectfully submitted,

13  
14 By: /s/ Tarek H. Zohdy

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