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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

DAVID RASMUSSEN, an individual, on behalf
 of himself and all others similarly situated,

Plaintiff,

v.

TESLA, INC. d/b/a TESLA MOTORS, INC., a
 Delaware corporation,

Defendant.

Case No. 5:19-cv-04596-BLF

**PLAINTIFF’S NOTICE OF MOTION
 AND MOTION FOR PRELIMINARY
 APPROVAL OF CLASS
 SETTLEMENT AND DIRECTION OF
 NOTICE UNDER RULE 23(E)**

Date: December 9, 2021
 Time: 9:00 a.m.
 Judge: Hon. Beth Labson Freeman
 Courtroom: 3

1 TO THE ABOVE-NAMED COURT AND TO THE PARTIES AND TO THEIR
2 ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on December 9, 2021, at 9:00 a.m. at 280 South 1st Street,
4 5th Floor, Courtroom 3, San Jose, CA 95113, Plaintiff David Rasmussen will and hereby does
5 move the Court for an order pursuant to Fed. R. Civ. P. 23(e)(1) granting Plaintiff's Motion for
6 Preliminary Approval of Class Settlement and for Direction of Notice Under Rule 23(e). Plaintiff
7 requests that in this order the Court do the following:

- 8 (a) Grant preliminary approval of the proposed Settlement (attached as Exhibit 1 to the
9 Nelson Declaration);
- 10 (b) Certify, for settlement purposes, the Settlement Class as defined in the Settlement,
11 pursuant to Fed. R. Civ. P. 23(a) and (b)(3);
- 12 (c) Appoint Plaintiff as Settlement Class Representative representing the Settlement
13 Class;
- 14 (d) Appoint Robert J. Nelson and Nimish R. Desai of Lief Cabraser Heimann &
15 Bernstein, LLP; and Edward C. Chen of YK Law LLP as Settlement Class Counsel;
- 16 (e) Approve the proposed notice program set forth in the Settlement, including the
17 proposed forms of notice, and direct that notice be disseminated pursuant to such
18 notice program and Fed. R. Civ. P. 23(e)(1);
- 19 (f) Appoint Angeion Group as Settlement Administrator and direct Angeion Group to
20 carry out the duties and responsibilities of the Settlement Administrator as set forth
21 in the Settlement;
- 22 (g) Set deadlines for Settlement Class Members to request exclusion from the
23 Settlement Class and to object to the Settlement;
- 24 (h) Stay all non-Settlement-related proceedings in this lawsuit pending final approval of
25 the Settlement; and
- 26 (i) Schedule a Fairness Hearing and certain other dates in connection with the final
27 approval of the Settlement pursuant to Fed. R. Civ. P. 23(e)(2).


28 This motion is based on this notice of motion and motion; the accompanying memorandum

1 of points and authorities; the Settlement, including all exhibits thereto; the declarations of Robert J.
2 Nelson, Edward C. Chen, and Sean P. Gates filed herewith; the argument of counsel; all papers and
3 records on file in this matter, and such other matters as the Court may consider.

4
5 Dated: July 28, 2021

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

6
7 By: 
8 _____
Nimish R. Desai

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 NORTHERN DISTRICT OF CALIFORNIA
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DAVID RASMUSSEN, an individual, on
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v.

TESLA, INC. d/b/a TESLA MOTORS, INC., a
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Defendant.

Case No. 5:19-cv-04596-BLF

**PLAINTIFF’S MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION FOR
 PRELIMINARY APPROVAL OF CLASS
 SETTLEMENT AND DIRECTION OF
 NOTICE UNDER RULE 23(E)**

Date: December 9, 2021
 Time: 9:00 a.m.
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INTRODUCTION

1
2 The parties have reached an agreement to settle Plaintiff's claims regarding Tesla's
3 temporary limitation of maximum battery voltage in 1,743 Model S sedans ("Class Vehicles").
4 Pursuant to the terms of the Settlement,¹ Defendant Tesla, Inc. will pay \$1,500,000 to create a non-
5 reversionary common Settlement Fund, from which a \$625 payment will be made for each Class
6 Vehicle. This amount is many times the prorated value of the temporarily reduced maximum
7 voltage, and thus represents an excellent and efficient result for the Settlement Class. In return, the
8 Settlement Class will release claims related to the software updates that imposed and then restored
9 the batteries' maximum voltage.

10 The Settlement presented for the Court's consideration is fair, reasonable, and adequate, and
11 warrants preliminary approval. It is the product of detailed informal discovery regarding the scope
12 of the maximum voltage limitation in the affected vehicles, a day-long negotiation overseen by two
13 experienced and well-respected mediators, Cathy Yanni, Esq. and the Honorable Daniel Weinstein
14 (ret.) of JAMS, and months of further negotiations following the mediation. In negotiating the
15 Settlement, the parties and their counsel were well informed about the issues, the strengths and
16 weaknesses of their respective positions, and the risks of litigation faced by each side.

17 The Settlement also provides for an efficient and appropriate class notice program that
18 includes direct mail notice to all Settlement Class Members as well as the establishment of a
19 dedicated Settlement Website and an informational toll-free number. The proposed notice program
20 comports with Rule 23, due process, and best practices.

21 Plaintiff and his undersigned counsel believe the Settlement to be in the best interests of the
22 Settlement Class Members and seek to begin the Court approval process that is required for all class
23 action settlements. Plaintiff therefore respectfully requests that the Court preliminarily approve the
24 Settlement, certify the Settlement Class for settlement purposes, direct notice to the Settlement
25 Class pursuant to the proposed notice program, schedule a Fairness Hearing, and grant the related
26 relief requested herein.

27
28 ¹ The Settlement Agreement and Release (the "Settlement") is Exhibit 1 to the July 28, 2021
Declaration of Robert J. Nelson ("Nelson Decl.") filed herewith. Unless otherwise specified,
capitalized terms herein refer to and have the same meaning as in the Settlement.

BACKGROUND

I. The Alleged Conduct

Plaintiff filed suit in August 2019, and by October 2019, the parties agreed to stay the litigation in order to pursue settlement discussions. *See* Dkt. Nos. 1, 18. Although the Complaint raised multiple issues, this proposed Settlement—and the attendant release—are narrowly focused on Plaintiff’s allegations that in May 2019, Tesla released an over-the-air software update that reduced the maximum voltage to which the batteries on certain Tesla Model S vehicles could be charged. Plaintiff further alleged that as a result of this voltage limitation, the maximum range of the Settlement Class Vehicles was reduced. Plaintiff alleged violations of state consumer protection statutes as well as common law claims, seeking damages and equitable relief.

II. Plaintiff’s Counsel’s Investigation and Informal Discovery

Prior to filing suit, and continuing through the course of informal discovery and mediation, Plaintiff’s Counsel conducted an extensive investigation into the factual and legal issues raised in this litigation. These investigative efforts have included, *inter alia*, speaking with numerous Tesla drivers about their experiences, reviewing discovery from Tesla regarding the Settlement Class Vehicles and the operative software updates, and retaining and consulting a leading expert in electric vehicle batteries. Plaintiff’s Counsel also researched and analyzed the legal issues regarding the claims pled and Tesla’s potential defenses. Nelson Decl. ¶¶ 18–21; July 28, 2021 Declaration of Edward C. Chen (“Chen Decl.”) ¶ 4.

Tesla’s data show that 1,743 Model S vehicles in the United States were subject to a 10% maximum voltage limitation caused by a May 2019 software update. *See* July 27, 2021 Declaration of Sean P. Gates (“Gates Decl.”) ¶ 2. A subsequent update in July 2019 restored about 3% of the battery voltage in these vehicles, and a third update released in March 2020 is designed to fully restore the batteries’ voltage over time as the vehicles are driven. *Id.* ¶ 3. The restoration has proceeded as planned and, to date, Tesla’s data shows that of the 1,722 vehicles for which there is data, 1,552 have had their maximum battery voltage fully restored, 79 have been restored to between 95.5% and 99%, and 34 have been restored to between 93% and 95.5%. *Id.* ¶ 4. The maximum voltage on the latter vehicles should continue to be restored over

1 time as the vehicles are driven. Of the remaining vehicles, 57 have had battery
 2 replacements. *Id.* Ready access to data from the final 21 vehicles is not available (not unusual
 3 for older vehicles), but the data above shows that the update works as planned and there is no
 4 reason to doubt that the voltage restoration update will work similarly in these vehicles. *Id.* ¶ 5.

5 In sum, Plaintiff’s Counsel’s investigation confirmed that the voltage limitation was
 6 temporary, with a 10% reduction lasting about 3 months, and a smaller 7% reduction lasting
 7 another 7 months before the corrective update was released in March 2020. Following that second
 8 update, the vehicles’ voltage showed steady restoration over time.

9 **III. Settlement Negotiations**

10 The Settlement is the product of arms-length negotiations. The parties and their counsel
 11 participated in a full-day mediation with the Honorable Daniel Weinstein (ret.) and Cathy Yanni,
 12 Esq. of JAMS on July 24, 2020. After that full day, the parties reached an agreement in principle to
 13 resolve this case. Only after agreement on the substantive terms had been reached, the parties
 14 negotiated a percent-of-the-fund attorney fee request to which Tesla would not object. Since
 15 reaching an agreement in principle, the parties have worked diligently to monitor the restoration of
 16 battery voltage in the Settlement Class Vehicles, draft the written settlement agreement, notices,
 17 and other settlement exhibits, and to select the proposed Settlement Administrator through a
 18 competitive bidding process. Nelson Decl. ¶¶ 22–28; Chen Decl. ¶ 5; Gates Decl. ¶ 6.

19 **SUMMARY OF THE SETTLEMENT TERMS**

20 **I. The Settlement Class**

21 Plaintiff seeks certification under Rule 23(b)(3), for settlement purposes, of a “Settlement
 22 Class,” defined as:

23 All United States residents who, anytime during the period from May
 24 15, 2019 through September 1, 2020, owned or leased a Tesla Model
 25 S vehicle that experienced a limitation of maximum battery voltage
 as the result of the software update issued by Tesla in May 2019.

26 *See* Settlement § I.A. Entities or persons affiliated with Tesla or the Court are excluded from the
 27 Settlement Class. *Id.* Tesla does not oppose certification of the Settlement Class for settlement
 28

1 purposes only. *Id.* § I.B.

2 The Settlement Class is substantially narrower than the proposed definition in the
3 Complaint. *See* Dkt. No. 1 (Complaint) ¶¶ 124–25. The Settlement Class definition reflects the
4 scope of the Settlement and the attendant release and does not encompass other conduct referenced
5 in the Complaint. *See* Procedural Guidance for Class Action Settlements,
6 <https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements> (last
7 updated Dec. 5, 2018) (hereinafter, “Procedural Guidance”), Prelim. Approval §§ 1(a) & 1(c).

8 **II. The Settlement Fund**

9 Under the Settlement, Tesla will create a Settlement Fund of \$1,500,000. The Settlement
10 Fund will be used to pay only the settlement payments to Settlement Class Members and attorneys’
11 fees and expenses. Tesla will separately pay any notice and settlement administration costs. *See*
12 Settlement § II.A.1; *see also* Procedural Guidance, Prelim. Approval § 1(f).

13 **A. Payments to Settlement Class Members**

14 The entirety of the Settlement Fund, less Court-awarded attorneys’ fees and expenses for
15 Plaintiff’s Counsel and any service award for Plaintiff, will be distributed to the Settlement Class.

16 Once fees, costs, and the service award are deducted, the Settlement will fund a \$625
17 payment for each Class Vehicle. Those who owned or leased the Class Vehicle over the relevant
18 time period will receive this entire payment. For the relatively small percentage of Settlement Class
19 Members who may have owned or leased their cars for only part of the relevant period (*i.e.*, the
20 Class Vehicle was sold or transferred to a new lessee during this time), the \$625 payment will be
21 prorated. *See* Settlement § II.B.

22 **B. Diagnostic for In-Warranty Vehicles**

23 As part of the Settlement, Tesla has also agreed to maintain diagnostic software for in-
24 warranty vehicles to notify owners and lessees of vehicles that Tesla determines may need battery
25 service or repair for certain battery issues. *See* Settlement § II.A.2.

26 **C. Administrative Costs**

27 The Settlement Administrator’s fees and costs—*i.e.*, costs incurred in implementing the
28 notice program, administering claims, mailing checks, and performing the other administrative

1 tasks described in the Settlement—will be paid separately by Tesla. Settlement § II.A.4.

2 The proposed Settlement Administrator, Angeion Group (“Angeion”), was selected through
3 a competitive bidding process. Tesla, in consultation with Plaintiff’s Counsel, received and
4 analyzed bids from three very experienced administrators as part of this process. Gates Decl. ¶ 6;
5 Nelson Decl. ¶¶ 27–28. Angeion is a well-known administration firm that has successfully
6 administered numerous class settlements and judgments. Nelson Decl. ¶ 27. Angeion estimates
7 that the Administrative Costs in this case will be approximately \$30,000. *Id.*; *see also* Procedural
8 Guidance, Prelim. Approval § 2.

9 **D. Attorneys’ Fees, Expenses, and Service Awards**

10 Pursuant to the Settlement, Plaintiff’s Counsel will apply to the Court for an award of
11 reasonable attorneys’ fees and reimbursement of litigation expenses in a total amount not to exceed
12 \$410,000, inclusive of \$36,111.86 in expenses. As a percentage of the fund, this is approximately
13 27%, or 25% exclusive of costs. Plaintiff’s Counsel will also apply for a services award of up to
14 \$1,000 for the Plaintiff, to compensate him for his efforts and commitment on behalf of the
15 Settlement Class. Plaintiff’s Counsel’s fee application will be filed no later than thirty-five (35)
16 days in advance of the opt-out and objection deadline. Any attorneys’ fees, expenses, and service
17 awards granted by the Court will be paid from the Settlement Fund. *See* Settlement §§ IV.H.3, V.

18 **III. Notice Program**

19 The parties’ proposed notice program is set forth in Section IV of the Settlement, and
20 consists of the following:

21 **A. Direct Notice to Settlement Class Members**

22 Within 14 days of the Preliminary Approval Order, Tesla will provide the Settlement
23 Administrator with a list of the affected VIN numbers and Settlement Class Members’ contact
24 information. *See* Settlement § IV.A. Within 100 days of the Preliminary Approval Order, the
25 Administrator shall send direct Summary Notice to all Settlement Class Members via the U.S.
26 Postal Service. *Id.* § IV.C. The proposed form of the postcard notice is attached to the Settlement
27 as Exhibit B. The Settlement Administrator will promptly re-mail any postcard notices returned as
28 undeliverable with forwarding address information to the new address. *Id.* § IV.D.

1 **B. Settlement Website and Toll-Free Number**

2 In addition, at least one day before any direct notices are sent, the Settlement Administrator
3 will establish a Settlement Website where Settlement Class Members can view the Settlement, the
4 long-form Class Notice (substantially in the form attached as Exhibit A to the Settlement), and
5 other key case documents, and obtain further information about the Settlement and their rights. The
6 Settlement Administrator will also establish a Toll-Free Number where Settlement Class Members
7 can obtain additional information and request that a hard copy of the full Class Notice be mailed to
8 them. *See* Settlement § IV.B.

9 **C. CAFA Notice**

10 Within ten days of the filing of this motion, Tesla (or the Settlement Administrator at
11 Tesla’s direction) will serve a notice of the proposed Settlement, in accordance with 28 U.S.C.
12 § 1715, upon the appropriate State and Federal officials. Settlement § III.B; *see also* Procedural
13 Guidance, Prelim. Approval § 10.

14 **D. Opt-Out and Objection Procedures**

15 Any person within the Settlement Class definition may request to be excluded from the
16 Settlement by sending a signed request, including their contact information and stating their desire
17 to be excluded, to the Settlement Administrator, postmarked or delivered by the deadline stated in
18 the Notice. Any Settlement Class Member who does not submit a timely and valid exclusion
19 request may object to the Settlement, Plaintiff’s Counsel’s application for attorneys’ fees and
20 expenses, and/or the request for a service award. To be considered, an objection must be in writing,
21 must be filed with or mailed to the Court and mailed to the Settlement Administrator, must be
22 filed/postmarked by the deadline stated in the Notice, and must include the information required by
23 the Class Notice. The parties propose that the deadline for exclusion requests and objections (the
24 “Exclusion/Objection Deadline”) be set for forty-five (45) days after the Notice Date. Settlement
25 §§ IV.G.1, IV.H.2; *see also* Procedural Guidance, Prelim. Approval § 9.

26 **IV. Release**

27 In exchange for the consideration provided under the Settlement, Settlement Class Members
28 will release Tesla from any claims arising from or relating to the changes to maximum battery

1 voltage caused by the software updates Tesla issued in May 2019, July 2019 and March 2020.
2 Settlement § VI.B. The scope of the release tracks the conduct addressed by this Settlement, and
3 not the other issues initially raised by Plaintiff in the Complaint. *See id.*; *see also* Procedural
4 Guidance, Prelim. Approval § 1(c).

5 ARGUMENT

6 **I. Overview of the Class Settlement Approval Process**

7 Pursuant to Rule 23(e), a class action settlement must be approved by the court before it can
8 become effective. The process for court approval is comprised of two principal steps:

- 9 (1) Preliminary approval of the proposed settlement and direction of
10 notice to the class; and
- 11 (2) A final approval hearing, at which argument concerning the
12 fairness, adequacy, and reasonableness of the settlement is
presented.

13 By this motion, Plaintiff respectfully asks the Court to take the first step and enter an order
14 preliminarily approving the Settlement and directing notice to the Settlement Class, pursuant to the
15 parties' proposed notice program, under Rule 23(e)(1).

16 **II. The Proposed Settlement Meets the Standards for Preliminary Approval**

17 In evaluating a motion for preliminary settlement approval, the court conducts a preliminary
18 assessment of the factors that will be evaluated at the final approval stage. Fed. R. Civ. P. 23(e)(1).
19 Those factors include whether: (1) the class representatives and class counsel have adequately
20 represented the class; (2) the proposed settlement was negotiated at arm's length; (3) the relief
21 provided is adequate under pertinent case circumstances; and (4) the settlement treats class
22 members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). The ultimate touchstone for the
23 analysis is whether the proposed settlement is "fair, reasonable, and adequate." *Id.*

24 In evaluating a proposed settlement, the Court should consider the strong public policy
25 favoring "settlements, particularly where complex class action litigation is concerned." *In re*
26 *Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *accord Churchill Vill., L.L.C. v. Gen.*
27 *Elec.*, 361 F.3d 566, 576 (9th Cir. 2004). "[T]he decision to approve or reject a settlement is
28 committed to the sound discretion of the trial judge because [they are] 'exposed to the litigants and

1 their strategies, positions, and proof.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
2 1998). The Settlement here readily meets all standards for preliminary settlement approval.

3 **A. The Settlement Is the Product of Good Faith, Informed, Arm’s-Length**
4 **Negotiations (Fed. R. Civ. P. 23(e)(2)(B)).**

5 “Before approving a class action settlement, the district court must reach a reasoned
6 judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion
7 among, the negotiating parties.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir.
8 1992); *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011) (citing
9 three non-dispositive factors of disproportionate attorneys’ fees, the inclusion of a clear-sailing
10 provision, and a provision whereby unclaimed funds revert to the defendant); *see also* Fed. R. Civ.
11 P. 23(e)(2)(B).

12 The Settlement is the product of arms-length negotiations between the parties and their
13 qualified and informed counsel, preceded by the exchange of informal discovery and Plaintiff’s
14 Counsel’s investigation. Throughout their negotiations, the parties were represented by counsel
15 experienced in the prosecution, defense, and settlement of complex class actions. The parties
16 participated in a full-day mediation with two experienced and well-respected mediators, the
17 Honorable Daniel Weinstein (ret.) and Cathy Yanni, Esq. of JAMS, and were able to reach an
18 agreement on key deal terms through that effort. The mediation was followed by months of further
19 negotiation and informal discovery.

20 As Plaintiff’s Counsel will detail more fully in a separate motion, counsel anticipate
21 requesting that the Court award a total of 25% of the common Settlement Fund for fees
22 (approximately \$375,000), plus costs of \$36,111.86. This is well within Ninth Circuit guidelines,
23 and thus not disproportionate. *See In Re Bluetooth*, 654 F.3d at 942 (noting that “courts typically
24 calculate 25% of the fund as the ‘benchmark’ for a reasonable fee award”); *see also* Newberg (5th
25 ed.) §§ 15:73, 15:104. Nor is there any reversion of funds to Tesla. *See* Procedural Guidance,
26 Prelim. Approval § 1(h).

27 **B. Plaintiff and Plaintiff’s Counsel Have and Continue to Zealously Represent**
28 **the Class (Fed. R. Civ. P. 23(e)(2)(A)).**

Plaintiff and Plaintiff’s Counsel have pursued this action on behalf of the Settlement Class

1 vigorously and efficiently. *See* Fed. R. Civ. P. 23(e)(2)(A). As discussed above and in the attached
 2 declarations, Plaintiff’s Counsel have thoroughly investigated and researched the factual and legal
 3 issues involved, conducted substantial informal discovery, and retained a leading expert in the field.
 4 *See* Background § II, *supra*. Likewise, Plaintiff has personally been actively engaged—he provided
 5 detailed information about his experiences, including through data downloads obtained from his
 6 vehicle, served as a conduit of information regarding other potential Settlement Class Members,
 7 and communicated regularly with counsel up to and including evaluating and approving the
 8 proposed Settlement. Nelson Decl. ¶¶ 38–39.

9 **C. The Settlement Represents a Strong Result for the Settlement Class,**
 10 **Particularly Given the Risks and Likely Duration of Ongoing Litigation**
 11 **(Fed. R. Civ. P. 23(e)(2)(C)).**

12 The Settlement provides substantial monetary relief. After attorneys’ fees and costs are
 13 deducted, every Settlement Class Member will receive a \$625 payment.² The payment amounts
 14 represent a strong result for the Settlement Class, particularly given the substantial risks, costs, and
 15 delay of continued litigation.

16 One way to put the \$625 per Class Vehicle payment into perspective is to compare it against
 17 the value of the temporary reduction in maximum battery voltage of the Class Vehicle batteries.
 18 That value can be estimated as the product of three figures: the lost kilowatt-hours,³ the cost of a
 19 kilowatt-hour per month,⁴ and the number of months of reduced maximum battery voltage. Under
 20 these assumptions, the lost value is about \$175 per Class Vehicle. The Settlement provides for
 21 many times that amount.

22 Were the parties to litigate, achieving even \$175 per Class Vehicle would be a risky and

23 ² For the Class Vehicles that had multiple owners or lessees during the relevant time period, the
 \$625 payment will be prorated.

24 ³ As detailed above, the vehicles lost about 10% of maximum battery voltage for 2 months, and 7%
 25 of maximum battery voltage for another 10 months until March 2020, when the restoration software
 26 update was released. Between March 2020 and the present, Class Vehicles’ voltage was gradually
 27 restored as a function of how much they were driven and charged. However, to simplify the
 28 exercise, and to develop a best-case scenario against which to measure the Settlement, this damages
 estimate assumes the entire 7% loss was realized for a full 22 months, until March 2021.

⁴ As far back as 2017, Plaintiffs estimate that the cost of Tesla battery capacity was approximately
 \$133/kWh. *See* Dkt. No. 1 (Complaint) ¶ 71 n.24. At a warranted life of 8 years (96 months), that
 works out to approximately \$1.39/kWh-month.

1 uncertain endeavor. At the outset, Tesla would of course rigorously dispute liability, and the
2 litigation would continue even as the batteries would have been fully restored, undercutting the
3 Class's claims of harm. Even assuming Plaintiff were to overcome all pre-trial obstacles, achieve
4 class certification, prevail at trial, and survive any appeals, Tesla would have numerous arguments
5 for significantly reducing the damages amount. For example, given the wealth of charging data at
6 its disposal, Tesla may be able to demonstrate that many Settlement Class Members rarely needed
7 access to the full 100% of battery voltage given their day-to-day driving and charging habits.
8 Moreover, as noted above, many Settlement Class Vehicles had their voltage restored well before
9 the March 2021 date assumed in the hypothetical calculation—indeed, the corrective update was
10 released a full year prior, in March 2020. Further, Tesla would likely represent that the relevant
11 software updates served to increase the overall life of the batteries, thereby conferring a benefit that
12 must be offset from any potential damages. Finally, as is common in consumer class litigation,
13 Tesla would certainly seek to parlay these damages issues into liability and injury issues that, it
14 would argue, undermine class certification.

15 While Plaintiff believes the Class could overcome Tesla's defenses and challenges, they are
16 indicative of the risks, hurdles, and delays that the Settlement Class would face should this matter
17 proceed in litigation. The proposed Settlement provides considerable monetary relief for the
18 Settlement Class while allowing them to avoid the risks of unfavorable rulings on these and other
19 issues. The Settlement also provides prompt relief, of particular importance here given that the
20 underlying conduct has ceased and, as set forth above, maximum battery voltage has been entirely
21 or almost entirely restored for the vast majority of the Settlement Class Vehicles. Continued
22 litigation would likely add several more years before there is a resolution. *See* Procedural
23 Guidance, Prelim. Approval § 1(e).

24 This District's Procedural Guidance for Class Action Settlements advise that parties seeking
25 preliminary settlement approval should also include certain information about a prior settlement in a
26 similar case, for comparative purposes. *See* Procedural Guidance, Prelim. Approval § 11. While
27 there is no exact analogue here, there are some useful comparators. First, in *Sheikh v. Tesla, Inc.*,
28 5:17-cv-02193 (N.D. Cal. filed Apr. 19, 2017), Tesla purchasers sued the company for failing to

1 timely provide promised “autopilot” features. Thus, like here, the issue was a temporary
2 impairment of a vehicle feature. In *Sheikh*, each class member received between \$25 and \$280,
3 significantly less than the payment here. See *Sheikh*, Dkt. No. 44-1 at ECF Page 8. Second, in *In re*
4 *Hyundai & Kia Fuel Econ. Litig.*, 2:13-ml-02424-GW-FFM (C.D. Cal. filed Feb. 6, 2013), the
5 plaintiffs complained of a misrepresented fuel economy for their internal combustion engine
6 vehicles. There, like here, the underlying issue can be described as how far the vehicle could travel
7 on a single tank or charge. However, in *Hyundai*, the impairment was best described as permanent,
8 not temporary like it is here, in that the subject vehicles simply would not achieve the fuel economy
9 the defendants promised. In that case, the class members’ payments ranged from \$140 to \$1,420,
10 with the vast majority of class vehicles commanding less than the \$625 achieved here. *Hyundai*,
11 Dkt. No. 354-1 at Page ID 6230-232. Moreover, the *Hyundai* settlement required the class
12 members to submit claims (*id.* at Page ID 6234), versus the automatic payouts provided for in the
13 Settlement.

14 Compared to either of these settlements, both of which were recently approved by District
15 Courts in California, the Settlement fares very well. It provides greater or comparable sums for a
16 temporary impairment, and without the requirement of any claims process.

17 **D. The Settlement Treats Class Members Equitably (Fed. R. Civ. P. 23(e)(2)(D)).**

18 All Settlement Class Vehicles lost the same percentage of their maximum battery voltage
19 based on an over-the-air software update, and all of the vehicles were subject to the same remedial
20 updates in the coming months that worked to restore voltage. The proposed allocation of settlement
21 payments ensures that Settlement Class Members are treated equitably, because all Settlement Class
22 Vehicles command the same payment.

23 **E. The Proposed Method of Distributing Relief Is Effective (Fed. R. Civ. P.
24 23(e)(2)(C)(ii)).**

25 The Settlement provides for an efficient and effective distribution of settlement payments.
26 Payments will be mailed by the Settlement Administrator to all Class Members, with appropriate
27 steps taken to find updated address information and re-mail undeliverable checks as needed. See
28 Settlement § IX.C.2.

1 **F. Plaintiff’s Counsel Will Seek Reasonable Attorneys’ Fees and Reimbursement**
 2 **of Their Litigation Expenses (Fed. R. Civ. P. 23(e)(2)(C)(iii)).**

3 Plaintiff’s Counsel will move for an award of reasonable attorneys’ fees and reimbursement
 4 of their litigation expenses. Fed. R. Civ. P. 23(e)(2)(C)(iii). Plaintiff’s Counsel anticipate
 5 requesting that the Court award a total of 25% of the common Settlement Fund for fees
 6 (approximately \$375,000), plus costs of \$36,111.86. Plaintiff’s Counsel will file their fee
 7 application, which will provide the supporting basis for their request, at least 35 days in advance of
 8 the Exclusion/Objection Deadline, and it will be available on the Settlement Website after it is filed.
 9 *See* Settlement § IV.H.3. As with the payments to Settlement Class Members, any attorneys’ fees
 10 and expenses awarded by the Court will be paid from the Settlement Fund following the Effective
 11 Date of the Settlement. *Id.* § V.

12 Based on their preliminary review, Plaintiff’s Counsel’s total combined hours in this case
 13 through July 21, 2021 are approximately 528.5 hours, for a total combined lodestar of
 14 approximately \$381,028.00 during that period. Nelson Decl. ¶¶ 30–34, 36; Chen Decl. ¶ 7.
 15 Plaintiff’s Counsel’s total combined litigation expenses in this case through December 31, 2020 are
 16 approximately \$36,111.86. Nelson Decl. ¶ 35; Chen Decl. ¶ 8. Based on the above numbers, a fee
 17 and award equal to 25% of the Settlement Fund would represent a 0.98 multiplier on Plaintiff’s
 18 Counsel’s approximate lodestar through July 21, 2021. *See* Procedural Guidance, Prelim. Approval
 19 § 6. Plaintiff’s Counsel will continue to incur time in seeking settlement approval and on
 20 implementation efforts should the Settlement be approved.⁵

21 **III. The Court Should Provisionally Certify the Settlement Class.**

22 When a settlement is reached before certification, a court must determine whether to
 23 provisionally certify the settlement class. *See, e.g., Manual for Compl. Litig.*, § 21.632 (4th ed.
 24 2014); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). Provisional class
 25 certification is warranted under Rule 23(b)(3).

26
 27
 28 ⁵ Finally, there are no agreements between the parties other than the Settlement. *See* Fed. R. Civ. P. 23(e)(3) (“[T]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal.”).

1 **A. The Requirements of Rule 23(a) are Satisfied.**

2 **1. Numerosity (Rule 23(a)(1))**

3 Rule 23(a)(1) requires that “the class is so numerous that joinder of all class members is
4 impracticable.” Fed. R. Civ. P. 23(a)(1). A “class of 41 or more is usually sufficiently numerous.”
5 *5 Moore’s Federal Practice—Civil* § 23.22 (2016); *see also Hernandez v. Cty. of Monterey*, 305
6 F.R.D. 132, 153 (N.D. Cal. 2015). Here, the Settlement Class includes owners or lessees of 1,743
7 vehicles.

8 **2. Commonality (Rule 23(a)(2))**

9 Rule 23(a)(2) requires that there be one or more questions common to the class.
10 Commonality “does not turn on the number of common questions, but on their relevance to the
11 factual and legal issues at the core of the purported class’ claims.” *Jimenez v. Allstate Ins. Co.*, 765
12 F.3d 1161, 1165 (9th Cir. 2014). “Even a single question of law or fact common to the members of
13 the class will satisfy the commonality requirement.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,
14 369 (2011). This case raises a core common question of whether Tesla’s temporary voltage
15 limitation violated state consumer protection or property tort laws.

16 **3. Typicality (Rule 23(a)(3))**

17 Under Rule 23(a)(3), a plaintiff’s claims are “typical” if they are “reasonably coextensive
18 with those of absent class members; they need not be substantially identical.” *Parsons v. Ryan*, 754
19 F.3d 657, 685 (9th Cir. 2014) (citation omitted). “The test of typicality is whether other members
20 have the same or similar injury, whether the action is based on conduct which is not unique to the
21 named plaintiffs and whether other class members have been injured by the same course of
22 conduct.” *Hernandez*, 305 F.R.D. at 159. Plaintiff’s claims and those of the Settlement Class are
23 based on the same course of conduct and the same legal theories. Moreover, Plaintiff and the
24 Settlement Class Members all suffered the same type of alleged harm in having their maximum
25 battery voltage temporarily reduced.

26 **4. Adequacy of Representation (Rule 23(a)(4))**

27 Rule 23(a)(4)’s adequacy inquiry asks “(1) do the named plaintiffs and their counsel have
28 any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel

1 prosecute the action vigorously on behalf of the class?” *Evon v. Law Offices of Sidney Mickell*, 688
 2 F.3d 1015, 1031 (9th Cir. 2012). Plaintiff’s Counsel have extensive experience litigating and
 3 resolving class actions, and are well qualified to represent the Settlement Class.⁶ As explained
 4 above, Plaintiff’s Counsel vigorously investigated these claims and negotiated the Settlement, and
 5 will continue to fairly and adequately protect the interests of the Settlement Class.⁷ Likewise,
 6 Plaintiff has demonstrated his commitment to the Settlement Class, including by providing
 7 pertinent information about his experiences, regularly communicating with their counsel about the
 8 case, and reviewing and approving the proposed Settlement.⁸ Finally, Plaintiff and Plaintiff’s
 9 Counsel share the Settlement Class’s interest in obtaining relief from Tesla for the alleged
 10 violations.

11 **B. The Requirements of Rule 23(b)(3) Are Satisfied**

12 In addition to the requirements of Rule 23(a), at least one of the prongs of Rule 23(b) must
 13 be satisfied. Here, Plaintiff seeks certification under Rule 23(b)(3), which requires that “questions
 14 of law or fact common to the class members predominate over any questions affecting only
 15 individual members, and that a class action is superior to other available methods for fairly and
 16 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

17 “The predominance inquiry ‘asks whether the common, aggregation-enabling, issues in the
 18 case are more prevalent or important than the non-common, aggregation-defeating, individual
 19 issues.’” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted)). At its
 20 core, “[p]redominance is a question of efficiency.” *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359,
 21 362 (7th Cir. 2012). The Ninth Circuit favors class treatment of claims stemming from a “common
 22 course of conduct,” like those alleged in this case. *See In re First Alliance Mortg. Co.*, 471 F.3d
 23 977, 989 (9th Cir. 2006).

24 Common questions predominate here. Those questions include whether Tesla’s temporary
 25 reduction in maximum battery voltage—via software updates that were pushed out to all Settlement
 26

27 ⁶ Nelson Decl. ¶¶ 9–13; Chen Decl. ¶ 3.

28 ⁷ See Background § II, *supra*.

⁸ Nelson Decl. ¶¶ 38–39.

1 Class Vehicles—was material to a reasonable consumer, unfair or deceptive, and effectively a
 2 taking or conversion of Settlement Class Members’ property. The Ninth Circuit has affirmed class
 3 settlements where, as here, a “common nucleus of facts” animate the claims. *In re Hyundai & Kia*
 4 *Fuel Econ. Litig.*, 926 F.3d 539, 563 (9th Cir. 2019).⁹ Moreover, under the proposed Settlement,
 5 there will not need to be a class trial, meaning there are no potential concerns about individual
 6 issues, if any, creating trial inefficiencies. *See Amchem Prods.*, 521 U.S. at 620 (“Confronted with
 7 a request for settlement-only class certification, a district court need not inquire whether the case, if
 8 tried, would present intractable management problems . . . for the proposal is that there will be no
 9 trial.”).

10 Rule 23(b)(3)’s superiority inquiry calls for a comparative analysis of whether a class action
 11 is “superior to other available methods for fair and efficient adjudication of the controversy.” *Id.* at
 12 615; *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010)
 13 (“[T]he purpose of the superiority requirement is to assure that the class action is the most efficient
 14 and effective means of resolving the controversy.”). Class treatment is superior to other methods
 15 for the resolution of this case. Plaintiff is unaware of any consumers filing individual actions
 16 regarding the issues raised in this case, and the size of each Settlement Class Member’s individual
 17 damages would be dwarfed by the expense of prosecuting an individual case. *See Just Film, Inc. v.*
 18 *Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017) (class action superior where the “risks, small recovery,
 19 and relatively high costs of litigation make it unlikely that plaintiffs would individually pursue their
 20 claims”) (internal quotation marks omitted). Moreover, it would be far more efficient for the Court
 21 and the parties to have a single resolution (as with the proposed Settlement here), rather than
 22 multiple separate cases about the same issue.

23 **IV. The Proposed Notice Program Complies with Rule 23 and Due Process.**

24 Before a proposed class settlement may be finally approved, the Court “must direct notice in
 25 a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P.

26 ⁹ As set forth in the Settlement Agreement, Tesla does not oppose conditional certification of the
 27 Settlement Class solely for purposes of the settlement embodied in the Settlement Agreement. If,
 28 for any reason, the Settlement is not approved by the Court, Tesla reserves all its defenses to class
 certification, and the Settlement Agreement provides that the stipulation for certification will
 become null and void and may not be used for any purpose. *See Settlement § I.B.*

1 23(e)(1)(B). Where certification of a Rule 23(b)(3) settlement class is sought, the notice must also
2 comply with Rule 23(c)(2)(B), which requires:

3 the best notice that is practicable under the circumstances, including
4 individual notice to all members who can be identified through
5 reasonable effort. The notice may be by one or more of the
6 following: United States mail, electronic means, or other appropriate
7 means. The notice must clearly and concisely state in plain, easily
8 understood language: (i) the nature of the action; (ii) the definition
9 of the class certified; (iii) the class claims, issues, or defenses; (iv)
10 that a class member may enter an appearance through an attorney if
11 the member so desires; (v) that the court will exclude from the class
12 any member who requests exclusion; (vi) the time and manner for
13 requesting exclusion; and (vii) the binding effect of a class judgment
14 on members under Rule 23(c)(3).

15 Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

16 The proposed notice program here (Settlement § IV) meets all applicable standards. The
17 notice program includes direct notice to all Settlement Class Members via U.S. Mail; the
18 establishment of a Settlement Website where Settlement Class Members can view the Settlement,
19 the long-form Class Notice, and other key case documents; and the establishment of a Toll-Free
20 Number where Settlement Class Members can get additional information. Moreover, the proposed
21 forms of notice (*see* Settlement Exs. A & B) inform Settlement Class Members, in clear and concise
22 terms, about the nature of this case, the Settlement, and their rights, including all of the information
23 required by Rule 23(c)(2)(B). The Court should approve the proposed notice program.

24 **V. The Court Should Schedule a Fairness Hearing and Related Dates.**

25 The next steps in the settlement approval process are to notify Settlement Class Members
26 of the proposed Settlement, allow Settlement Class Members an opportunity to exclude
27 themselves or file comments or objections, and hold a Fairness Hearing. The parties propose the
28 following schedule:

1 2	Last day for Tesla to provide its Customer Data to the Settlement Administrator	14 days after entry of Preliminary Approval Order
3	Last day for Settlement Administrator to mail Summary Notice	100 days after entry of Preliminary Approval Order
4	Last day for Plaintiff and Settlement Class Counsel to file motion for attorneys' fees, expenses and service awards	35 days before Exclusion/Objection Deadline
5	Exclusion/Objection Deadline	45 days after Notice Date
6 7 8 9	Last day for the Parties to file motion for final approval of the Settlement, any responses to objections, and any replies in support of motion for final settlement approval and/or Settlement Class Counsel's application for attorneys' fees, expenses and service awards	14 days before Fairness Hearing
10	Fairness Hearing	Date to be set by the Court

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court do the following:


- (a) Grant preliminary approval of the proposed Settlement;
- (b) Certify, for settlement purposes, the Settlement Class as defined in the Settlement, pursuant to Fed. R. Civ. P. 23(a) and (b)(3);
- (c) Appoint Plaintiff as Settlement Class Representative representing the Settlement Class;
- (d) Appoint Robert J. Nelson and Nimish R. Desai of Lief Cabraser Heimann & Bernstein, LLP; and Edward C. Chen of YK Law LLP as Settlement Class Counsel;
- (e) Approve the proposed notice program in the Settlement, including the proposed forms of notice, and direct that notice be disseminated pursuant to such notice program and Fed. R. Civ. P. 23(e)(1);
- (f) Appoint Angeion as Settlement Administrator and direct Angeion to carry out the duties and responsibilities of the Settlement Administrator specified in the Settlement;
- (g) Set deadlines for Settlement Class Members to request exclusion from the Settlement Class and to object to the Settlement;

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- (h) Stay all non-Settlement-related proceedings in this lawsuit pending final approval of the Settlement; and
- (i) Schedule a Fairness Hearing and certain other dates in connection with the final approval of the Settlement pursuant to Fed. R. Civ. P. 23(e)(2).

Dated: July 28, 2021

Respectfully submitted,

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