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9

UNITED STATES DISTRICT COURT

10

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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12

13 GREGORY COFFENG, MARK GLASER  
14 and JORDAN WILSON, individually and on  
behalf of all others similarly situated,

15 Plaintiffs,

16 v.

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18 VOLKSWAGEN GROUP OF AMERICA,  
INC.,

19 Defendant.

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Case No. 17-cv-01825-JD

**PLAINTIFFS' UNOPPOSED NOTICE OF  
MOTION AND SECOND RENEWED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT; MEMORANDUM OF  
POINTS AND AUTHORITIES**

DATE: August 15, 2019  
TIME: 10:00 a.m.  
JUDGE: Hon. James Donato  
CRTRM: 11, 19<sup>th</sup> Floor

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10 **Rules**

11 Federal Rule of Civil 23 ..... *passim*

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1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE THAT on August 15, 2019, at 10:00 a.m., before the  
3 Honorable James Donato, United States District Judge, at Courtroom 11, 19<sup>th</sup> Floor, of the United  
4 States District Court for the Northern District of California, 450 Golden Gate Avenue, in San  
5 Francisco, California, or at such other time as this Court may Order, Plaintiffs Gregory Coffeng,  
6 Mark Glaser, and Jordan Wilson, by and through their undersigned counsel, will move this Court  
7 in unopposed fashion for an Order granting Preliminary Approval of the classwide proposed  
8 Settlement reached in this matter (the “Unopposed Motion”). A copy of the Second Amended  
9 Settlement Agreement executed on or about May 30, 2019 (the “Settlement Agreement”) is  
10 attached as Exhibit (“Exh.”) A to the Declaration of Gary S. Graifman filed herewith (the  
11 “Graifman Decl.”). A copy of the proposed Preliminary Approval Order sought to be entered by  
12 this Court is attached as Exh. 3 to the Settlement Agreement. This Unopposed Motion is based on  
13 the accompanying Memorandum of Points and Authorities, the Graifman Decl., including the  
14 Settlement Agreement which is attached thereto including all of its exhibits, the Declaration of  
15 Cameron R. Azari, Esq., Director of Legal Notice for Hilsoft Notifications, a business unit of Epiq  
16 Global, (the “Azari Decl.”) submitted herewith, any argument of counsel, and such additional  
17 material as this Court may consider.

18 **STATEMENT OF ISSUES TO BE DECIDED**

- 19 1. Whether the putative Class, defined *infra*, should be preliminarily certified for  
20 settlement purposes, with Plaintiffs conditionally appointed Class Representatives and Plaintiffs’  
21 counsel conditionally appointed Lead Settlement Class Counsel and Class Liaison Counsel.  
22 2. Whether preliminary approval of the Settlement, defined *infra*, should be granted.  
23 3. Whether the proposed Notice, defined *infra*, of the Settlement should be  
24 disseminated to the putative Class.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I. INTRODUCTION**

27 The parties request preliminary approval of the proposed classwide settlement (the  
28 “Settlement”) resolving this proposed class action. This settlement was reached following lengthy

1 and intensive arm's length negotiations. As noted above, the operative Settlement Agreement is  
2 attached as Exhibit A to the Graifman Decl.

3 The Court, at the February 7, 2019 hearing, articulated certain issues, requested  
4 information, and provided a suggested roadmap for preliminary approval that the parties have  
5 assiduously sought to follow in this submission.

6 The Settlement is fair, reasonable and adequate for a number of reasons, including the  
7 following:

- 8 • The Settlement provides that class members who, prior to the Notice Date, incurred  
9 out-of-pocket expenses for repair/replacement of the primary engine water pump  
10 ("water pump") will receive a **100% reimbursement** of the cost of repair/replacement if  
11 the repair/replacement was performed within eight (8) years or 80,000 miles  
12 (whichever occurred first) of the vehicle's In-Service Date, and **seventy percent (70%)**  
13 **reimbursement** of the cost of repair/replacement if performed between eight (8)  
14 years/80,000 miles (whichever occurred first) and ten (10) years/100,000 miles  
15 (whichever occurred first). If a prior repair/replacement was performed at an  
16 independent repair facility, the amount of reimbursement is capped at \$950.00. The  
17 Court inquired as to the rationale for the \$950.00 "cap" for such repairs. That figure  
18 represents the average cost for the repair/replacement that would be incurred at  
19 VW/Audi dealerships in the highest (most expensive) market in the U.S., which is  
20 California (*See* Graifman Decl., ¶ 10). The cap is, therefore, very liberal and favorable  
21 to the Settlement Class Members.
- 22 • The Settlement provides for a substantial extension of the existing New Vehicle  
23 Limited Warranties ("NVLWs") applicable to the water pump of the Settlement Class  
24 Vehicles. The warranty extension will be effective on the Notice Date, and will cover  
25 repair or replacement of a failed water pump, by an authorized VW or Audi dealer, free  
26 of charge, for a period of **up to ten (10) years or 100,000 miles (whichever occurs**  
27

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1            *first*) from the Settlement Class Vehicle’s In-Service Date.<sup>1</sup> This is nearly a doubling  
2            of the existing NVLW warranty period applicable to the subject water pumps.

- 3            • While the substantial benefits provided above would, by themselves, constitute an  
4            eminently fair, reasonable and adequate settlement, Defendant has, in addition to those  
5            benefits, agreed to also (1) reimburse class members for a percentage of the cost  
6            incurred to repair engine damage that occurred as a direct result of a failure of the  
7            water pump during the period of *ten (10) years or 100,000 miles (whichever occurs*  
8            *first*) from the vehicle’s In-Service Date and prior to the Notice Date, pursuant to the  
9            percentage chart set forth in the Settlement Agreement at Article II, Sec.C, and (2)  
10           include in the 10 year/100,000 mile (whichever occurs first) extended warranty a  
11           percentage of the cost of repair/replacement, by an authorized VW or Audi dealer, of  
12           engine damage directly caused by a failure of the water pump, during that extended  
13           warranty period and after the Notice Date, subject to the same percentages that are  
14           contained in the percentage chart in the Settlement Agreement at Article II, Sec. A.  
15           These provisions were added to the already fair, reasonable and adequate Settlement in  
16           order to afford significant extra benefits to VW and Audi customers. As discussed  
17           below, a comparable class settlement was approved without these added provisions and  
18           with benefits far less significant than those afforded by this Settlement.
- 19           • The Court had inquired as to how the parties agreed upon the percentages contained in  
20           these two aforementioned added benefits. VWGoA’s data has confirmed that engine  
21           damage seldom results from a failed water pump, and this relief is, therefore, not  
22           expected to be a significant component, either of potential damages in litigation or of  
23           the Settlement. *See* Graifman Decl., ¶10. The percentages of reimbursement for this

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24  
25           <sup>1</sup> There is *no* \$950 cap for work done under the warranty extension going forward as that work  
26           will be done by VW/Audi authorized dealers free of charge within the warranty extension period.  
27           The use of a cap for reimbursement of past work done by independent service centers (“ISCs”)  
28           allows Defendant to maintain some oversight and control of the cost of repair and insure that the  
                 charges by ISCs are not fraudulent or otherwise out of the norm. This is a standard provision in  
                 most judicially approved auto defect class action settlements.



1 infrequent occurrence are fair and reasonable. They are the product of compromise  
2 between the parties resulting from substantial arm's length negotiations that sought to  
3 take into account the panoply of factors to be considered in fashioning a fair and  
4 balanced benefit, including the manner of use/driving of the vehicle and its effects on  
5 the life and condition of the engine, whether the engine was properly maintained in  
6 accordance with proper maintenance intervals, whether the engine was subjected to  
7 stresses and/or damage from external, outside or environmental causes, and the age,  
8 mileage and "wear and tear" of the engine at the time of alleged failure – all of which  
9 may affect the engine's condition at the time of, and contribute to, engine damage that  
10 allegedly occurred. The negotiated percentages further take into account the amount of  
11 time and mileage in which the class members were able to use, enjoy and benefit from  
12 their vehicles prior to the alleged damage. The percentages were, therefore, the product  
13 of compromise of disputed claims, based on many factors, and are beneficial to the  
14 Settlement Class.

- 15 • **The Comparator Settlement Demonstrates the Fairness and Adequacy of this**  
16 **Settlement.** The parties have located one other class action settlement involving failed  
17 water pumps. *See Herremans v. BMW of N.A., LLC*, CV 14-2363-GW(PJWX) (C.D.  
18 Cal.). Virtually every aspect of the proposed Settlement herein provides greater  
19 benefits to the class than the settlement that was approved in *Herremans*.

- 20 ○ In *Herremans*, the Court gave final approval to a nationwide settlement  
21 providing one hundred percent reimbursement for class members only for pre-  
22 Notice repairs that occurred up to a period of *seven (7) years or 84,000 miles*  
23 (whichever occurs first), and up to a *maximum reimbursement amount of*  
24 *\$500.00* regardless of whether the repair was performed by an authorized dealer  
25 or an independent repair shop. (*See Herremans* Final Approval, ECF Doc. No.  
26 75, a copy of which is annexed to the Graifman Decl. as Exh. C). Here, the  
27 within Settlement, by comparison, provides reimbursement for pre-Notice Date  
28 class vehicle engine water pump repairs/replacement that occurred during a

1 period of ten (10) years or 100,000 miles (whichever occurred first). In and of  
2 itself, the one hundred percent reimbursement for past repairs in this case is for  
3 8 years or 80,000 miles – one (1) year or 10,000 miles longer than *Herremans*,  
4 and without any maximum reimbursement cap if the repair was performed by  
5 an authorized VW or Audi dealer. In addition, with respect to water pump  
6 repairs/replacements performed by an independent repair shop, the  
7 reimbursement cap of \$950.00 in this case is almost double the amount that was  
8 approved in *Herremans*.

- 9 ○ The settlement approved in *Herremans* also provided for a much shorter  
10 extended warranty for the water pump of seven (7) years or 84,000 miles  
11 (whichever comes first), in sharp contrast to the extended warranty in this  
12 Settlement of up to ten (10) years or 100,000 miles (whichever occurs first).
- 13 ○ In addition, unlike the Settlement in this case, the approved *Herremans*  
14 settlement does not provide for any reimbursement for engine damage caused  
15 by a water pump failure, nor did it include any percentage of coverage for such  
16 engine damage in its extended warranty.

- 17 • **Revisions to the Release Language.** The release language in the Settlement  
18 Agreement has been amended to address the concern of the Court raised at the  
19 February 7, 2019 hearing. The release language (Settlement Agreement at Art. I, Sec.  
20 O, p. 6) clearly spells out the type and nature of the claims released, and is  
21 conspicuously limited in scope to claims/potential claims that relate to or arise from the  
22 primary engine water pump of Settlement Class Vehicles. This is standard release  
23 language of a settlement agreement and does not exceed the scope of the claims that  
24 were or could have been asserted in this putative nationwide class action.
- 25 • **Robust Class Notice Plan.** Working with Claims/Notice Administrator, Epiq Global,  
26 the parties have created an extremely robust Class Notice Program. This program  
27 successfully addresses Your Honor’s comments and provides for class notice in several  
28 different ways:

- 1           o Individual direct mail notice – Within 100 days of the entry of the Preliminary  
2           Approval Order, direct mail notice will be sent to the Settlement Class  
3           Members at current or last known addresses that are obtained and aggregated by  
4           IHS Markit/Polk (“Polk”) from the records of the DMVs in all 50 states, as  
5           done with a formal recall notice. Prior to mailing the Class Notice, an address  
6           search through the United States Postal Service’s National Change of Address  
7           database will be conducted to update the address information for Settlement  
8           Class Vehicle owners and lessees. For each individual Class Notice that is  
9           returned as undeliverable, the Claim Administrator shall re-mail all Class  
10          Notices where a forwarding address has been provided. For the remaining  
11          undeliverable notice packets where no forwarding address is provided, the  
12          Claim Administrator shall perform an advanced address search (e.g. a skip  
13          trace) and re-mail any undeliverable to the extent any new and current  
14          addresses are located.
- 15          o Email Notice – As a supplement to the Direct Mail Notice, email notice will be  
16          provided to all Settlement Class Members for whom a facially valid email  
17          address is available from Polk. The Email Notice content will be substantially  
18          the same as the mailed notice, and will use an embedded html text format that  
19          will provide easy to read text without certain graphics and other elements that  
20          would increase the likelihood that the message could be blocked by Internet  
21          Service Providers (ISPs) and/or SPAM filters. Each Email Notice will be  
22          transmitted with a unique message identifier. For any Email Notice for which a  
23          bounce code is received indicating that the message was undeliverable, at least  
24          one additional attempt will be made to deliver the Notice by email. In addition,  
25          the Email Notice will include an embedded link to the case website which will  
26          provide recipients with easy access to copies of the mailed notice, the  
27          Settlement Agreement, the online Claim Form, and other information about the  
28          Settlement. *See* Azari Decl., ¶¶ 19-20.

- 1           ○ Social Media Banner Notices – As an additional Notice, there will be Social  
2           Media Banner Notices, which run online banner notice ads about the Settlement  
3           on *Facebook* and *Instagram*, the two largest social media outlets in the world,  
4           targeting owners/lessees of Volkswagen and Audi vehicles and persons  
5           interested in Volkswagen and Audi. The banner notice ads will also allow users  
6           to identify themselves as potential Settlement Class members and directly link  
7           them to the Settlement Website for more information. *Id.*, ¶¶ 21-22.
- 8           ○ Sponsored Search Listings – In addition, there will be Sponsored Search  
9           Listings acquired on the three most highly-visited Internet search engines,  
10          *Google*, *Yahoo!* and *Bing*, to facilitate class members locating the Settlement  
11          Website through the use of various search terms. As a result of the sponsored  
12          listing, the Settlement Website will appear at the top of the page of any related  
13          search results. *See Id.*, ¶23.
- 14          ○ Based on prior automotive settlements, the Claims/Notice Administrator  
15          expects to successfully “deliver individual notice to over 90-95% of the  
16          Settlement Class,” *Id.*, ¶27, an extraordinary percentage for any class  
17          settlement.
- 18          • **Informational Settlement Website.** The Claims/Notice Administrator will also  
19          maintain an informational Settlement Website that includes the relevant documents in  
20          the case including the Settlement Agreement, Class Notices, Claim Forms, “Frequently  
21          Asked Questions,” applicable Orders and deadlines, and a toll-free number to contact  
22          the Claim Administrator with any questions. The Settlement Website will also include  
23          a portal or portals allowing class members to file a claim online, object<sup>2</sup> or opt out, and

24          <sup>2</sup> At the February 7, 2019 hearing, the Court expressed its desire to permit Settlement Class  
25          Members to file objections with the Settlement Administrator online via the Settlement Website.  
26          Although counsel has added that to the within motion and draft proposed class notices, counsel  
27          anticipate a potential problem with such a procedure because objections are formal pleadings  
28          which seek to put before the Court a challenge to one or more aspects of the settlement, and which  
29          should be mailed to or filed directly with the Court by the class member. Indeed, the Northern  
30          District Procedural Guidance for Class Action Settlements, at §5, states that “the notice should  
31          instruct class members who wish to object to the settlement to send their written objections **only**

1 will include information instructing class member how and when to file a claim, opt  
2 out or object, if they so choose.

- 3 • **Revised Deadlines for Opting Out/Objections.** The opt out and objection deadlines  
4 are now set at sixty (60) days after the filing of the motion for attorney fees. *See*  
5 Graifman Decl. Exh. B. (setting forth the proposed schedule for notice and submissions  
6 through the final approval hearing process (the “Proposed Schedule”). There is no  
7 language concerning discovery concerning objectors or sanctions in the notice.

8 Pursuant to Federal Rule of Civil 23, Plaintiffs now file this renewed Motion for  
9 Preliminary Approval, so that: (i) notice of the proposed Settlement can be disseminated to the  
10 Settlement Class Members; (ii) the Settlement Class Members can be given an opportunity to avail  
11 themselves of the Settlement, opt-out of the Settlement Class, or file any objections to the  
12 proposed Settlement. *See* Fed. R. Civ. P. 23(e)(1) (directing that any notice of class action  
13 settlement may only be disseminated with prior court approval); *see also Jaffe v. Morgan Stanley*  
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15 **to the court...**” (emphasis added). Although the N.D. Guidance does not govern over the Court’s  
16 directives, counsel respectfully believe having objections sent to or filed directly with the Court,  
17 rather than the Settlement Administrator, alleviates any potential jurisdictional or procedural  
18 problems, and is the better and more appropriate practice that Your Honor, and other courts, have  
19 followed in the past. *See, e.g., Huntsman v. Southwest Airlines, Co.*, 2018 U.S. Dist. LEXIS  
20 207009, \*12-13 (N.D. Cal. Dec. 5, 2018) (Donato, J.) (objections to “be submitted to the  
21 Court either by mailing the comment or objection to the Class Action Clerk, United States District  
22 Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102,  
23 or by filing them in person at any location of the United States District Court for the Northern  
24 District of California”); *Brickman v. Fitbit, Inc.*, 15-cv-02077, Dkt. No. 275 (N.D. Cal. Dec. 17,  
25 2018) (Donato, J.) (granting preliminary approval of settlement and approving settlement notices  
26 stating “In order to be effective, Notice of Intent to Object must be filed with the Court by June  
27 16, 2019, and copies sent to” the attorneys. ...”); *Miranda v. Coach, Inc.*, 14-cv-02031, Dkt. No.  
28 79 (N.D. Cal. June 22, 2016) (Donato, J.) (requiring preliminary approval motion to be revised, in  
part, because “objections should be sent directly to the Court” and not merely to the Settlement  
Administrator). *See also Gaudin v. Saxon Mortgage Serv., Inc.*, 2015 U.S. Dist. LEXIS 95720  
(N.D. Cal. July 21, 2015) (While preliminary approval papers provided that objections should be  
sent to the settlement administrator, Judge Tigar, in granting preliminary approval, wrote that he  
“will approve the class notice subject to the following alterations: Any objections to the  
settlement should only be mailed to the court...[which] will file the objections on the Court’s  
electronic filing system. As currently worded, the long-form notice requires objections to be sent  
to the settlement claims administrator, which is unnecessary, as electronic filing of an objection on  
the case docket constitutes service on the parties”).

1 & Co., Inc., No. C 06-3903 THE, 2008 WL 346417, at\*11 (N.D. Cal. Feb. 7, 2008) (Henderson,  
2 J.) (once court grants preliminary approval it is proper to stay and enjoin members of settlement  
3 class from litigating before this or other courts matters covered by proposed settlement).

4 This Unopposed Motion for preliminary approval also seeks to set the date for the Final  
5 Approval and Fairness Hearing on the proposed Settlement. *See* Settlement Agreement, ¶ IX(A).  
6 For the Court’s convenience, annexed as Exhibit B to the Graifman Decl. is a Proposed Schedule  
7 which provides for the calculation of relevant future dates, including the Notice Date, date for  
8 filing papers in support of settlement and Class Counsel’s application in support of fee application,  
9 the deadline for objections and opt outs, and the settling parties’ date to file responsive papers to  
10 any objections to the Settlement. The Proposed Schedule is based on the pertinent dates  
11 contemplated in the Settlement Agreement.

12 Class Counsel respectfully submit that the Unopposed Motion should be granted. The  
13 Settlement reached is fair, reasonable and adequate—it provides Class Members with substantial  
14 benefits including a meaningful and significant warranty extension and generous reimbursement  
15 for pre-notice repair costs, as explained in more detail below. *See* Settlement Agreement, ¶¶ II(A),  
16 (B) and (C).

17 The proposed Settlement, therefore, provides meaningful redress for the claims and  
18 allegations pled in the Amended Complaint (Dkt. 52). The gravamen of the Amended Complaint  
19 is that VWGoA allegedly withheld material disclosures concerning the allegedly defective primary  
20 engine water pump used in the following vehicles (hereinafter “Settlement Class Vehicle(s)”: (i)  
21 certain 2008 through and including 2014 model year Audi motor vehicles equipped with the 2.0L  
22 TSI or TFSI turbocharged engine; and (ii) certain 2008 through and including 2014 model year  
23 Volkswagen motor vehicles equipped with the 2.0L TSI turbocharged engine.<sup>3</sup> Settlement Class

24 <sup>3</sup> Because not every vehicle during these model years contained the water pump component at  
25 issue, the Class Vehicles involve certain Vehicle Identification Numbers (“VIN” or “VIN’s”) and  
26 Class Members will readily be able to determine if their VIN is included in the Settlement. (Exh. 4  
27 to Settlement Agreement lists the VIN’s and the Class Vehicles (*see* Dkt. 64-4, 64-6 (submitted to  
28 the Court as an unredacted version of document sought to be sealed))). Exh. 4 was subject to the  
pending Motion to Seal (Dkt. 64) which was granted by the Court on May 10, 2019, (Dkt. 74)  
because it contains private and confidential information about Settlement Class members’ vehicles  
which is protected from public disclosure by the laws of the United States and Germany. There are

1 Vehicles equipped with 2.0L EA888 TSI or TFSI turbocharged four cylinder multi-valve engines  
2 include, but are not limited to, engine codes CCTA, CAEB, CAED and CBFA (hereinafter “class  
3 engines” or “class engine”).<sup>4</sup>

4 These claims are vigorously disputed. VWGoA maintains that the primary engine water  
5 pumps in the Settlement Class Vehicles are not defective; that no warranties (express or implied)  
6 or laws (statutory or common) have been violated; and that no wrongdoing has occurred in  
7 connection with the water pumps and the Settlement Class Vehicles.

8 The Settlement of this vigorously disputed action provides substantial benefits both for  
9 those Settlement Class Members whose vehicles have previously manifested a water pump failure  
10 and been repaired at their owners’ expense (reimbursement), and for those Settlement Class  
11 Members whose vehicles experience a water pump failure more than 20-days following the date  
12 the class notice is mailed and within 10 years or 100,000 miles (whichever occurs first) from the  
13 vehicle’s In-Service Date (“Warranty Extension”).

14 The proposed Settlement contains reimbursement provisions whereby, subject to said proof  
15 of adherence and proper documentation, including proof of repair and payment of expenses, those  
16 Settlement Class Members who, prior to 20-days after the Notice Date, and within 100,000 miles  
17 or 10 years of the In-Service Date of the vehicle (whichever came first), paid out-of-pocket  
18 expenses to repair or replace a failed primary engine water pump, can seek reimbursement for all  
19 or part of those expenses. Under the reimbursement portion of the Settlement, Class Members who  
20 have paid out-of-pocket for repair or replacement of a failed primary engine water pump within  
21 eight (8) years or 80,000 miles (whichever occurred first) from the vehicle’s In-Service Date and  
22 prior to the Notice Date, will receive one hundred percent (100%) reimbursement of the paid  
23 invoice amount for the repair or replacement, subject to certain adjustments (*e.g.* for goodwill or  
24

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25 approximately 875,000 vehicles in the Settlement Class. A DVD with the confidential VIN data  
26 for approximately 875,000 Class members’ vehicles was provided to the Court on September 13,  
2018.

27 <sup>4</sup> Class Vehicles include certain model year Audi A3, A4, A5 and Q5, and certain model year  
28 Volkswagen CC, Beetle, EOS, Golf/GTI, Jetta, Passat, Sports Wagon and Tiguan, *inter alia*, that  
were distributed and warranted by VWGoA in the United States and Puerto Rico.

1 full/partial payments/reimbursements received by them under an insurance policy, some other  
 2 extended warranty or service contract). *See* Settlement Agreement, ¶ II(B). Settlement Class  
 3 Members who have paid out-of-pocket for repair or replacement of a failed primary engine water  
 4 pump after eight (8) years or 80,000 miles (whichever occurred first) and up to ten (10) years or  
 5 100,000 miles (whichever occurred first) of the vehicle’s In-Service Date and prior to the Notice  
 6 Date, will receive seventy percent (70%) reimbursement of the paid invoice amount for the repair  
 7 or replacement, subject to certain similar adjustments. *See* Settlement Agreement, ¶ II(B).

8           This reimbursement provision of the Settlement Agreement for failed water pumps applies  
 9 regardless of whether the pre-Notice repair was made by an authorized VW or Audi dealership or  
 10 at an Independent Service Center of the Settlement Class Member’s choice. *Id.*, ¶ II(B)(1)(c) (if  
 11 made at an independent service center and not an authorized dealer, the amount for such  
 12 reimbursement is capped at \$950.00 if it is subject to the 100% reimbursement, and 70% of that  
 13 amount if subject to the 70% reimbursement). Based upon information informally exchanged in  
 14 this case, the \$950.00 cap exceeds the average U.S. cost (parts and labor) for the  
 15 repair/replacement of a failed water pump at VW and Audi dealerships. In fact, it represents the  
 16 highest average cost by dealerships in any state in the U.S., which is the state of California (See  
 17 Decl. of Gary Graifman). The cap is, therefore, very liberal, fair and reasonable. Notably, this cap  
 18 is substantially higher than, and indeed almost double the amount of, the similar cap that was  
 19 approved in the *Herremans* case, discussed *supra*.

20           In addition, if, within 10 years or 100,000 miles (whichever occurred first) of the vehicle’s  
 21 In-Service Date and prior to the Notice Date, a Settlement Class Member paid for the cost of  
 22 repair/replacement of a damaged engine that was caused directly by the failure of the water pump,  
 23 he/she will be entitled to a percentage of reimbursement of the out-of-pocket expenses paid for  
 24 such engine repair or replacement pursuant to the following sliding scale schedule based upon the  
 25 age and mileage of the vehicle at the time of repair (the “Schedule”):

26 ///

27 ///

28 ///



Time from in-service date	Less than 50,000 miles	50,001 to 60,000 miles	60,001-70,000 miles	70,001-80,000 miles	80,001 to 100,000 miles
4 years or less	100% <sup>5</sup>	70%	50%	40%	25%
4-5 years <sup>6</sup>	70%	50%	40%	30%	20%
5-6 years	50%	40%	35%	25%	15%
6-7 years	40%	30%	25%	20%	10%
7-8 years	30%	25%	20%	15%	10%
8-10 years	25%	20%	15%	10%	5%

The Settlement provides a cap of \$4,000 for such reimbursement if the engine was repaired or replaced by an independent service center rather than an authorized VW or Audi dealer. The \$4,000.00 cap amount is substantially higher than the average cost of repair or replacement, by authorized VW/Audi dealers, of engine damage attributable to a failed water pump. In fact, VW's data reflects that the cost of more than 99% of all water pump related dealer repairs, including repairs of engine damage directly caused by a failed water pump, is \$2,000 or less. *See* Graifman Decl., ¶ 10; Settlement Agreement, Section II.C.

The Settlement also provides a generous and substantial Warranty Extension relating to the Settlement Class Vehicles' water pumps. Under the Warranty Extension, and subject to proof of adherence to the vehicle's maintenance schedule relating to the coolant system, Defendant

<sup>5</sup> Covered under original vehicle powertrain warranty terms.

<sup>6</sup> For VW Settlement Class Vehicles in which the New Vehicle Limited Warranty period is 5 years or 60,000 miles (whichever occurs first) from the In-Service Date, the reimbursement percentage shall be one hundred percent (100%) for unreimbursed out-of-pocket expenses incurred within 5 years or 60,000 miles (whichever occurs first) warranty period, but not exceeding the maximum reimbursement amount of \$4,000.00 if the repair/replacement was performed by an independent service center and not an authorized VW dealer.

1 VWGoA will extend the New Vehicle Limited Warranties (“NVLW”) applicable to the Settlement  
2 Class Vehicles to cover repair or replacement of a failed primary engine water pump, by an  
3 authorized Volkswagen or Audi dealer, for a period of 10 years or 100,000 miles (whichever  
4 occurs first) from the vehicle’s In-Service Date, subject to certain terms and conditions (the  
5 “Extended Warranty”). *Id.* This Warranty Extension almost doubles the 5 years or 60,000 miles  
6 (whichever occurs first) durational limits of VWGoA’s original NVLW applicable to the subject  
7 water pumps.

8 In addition, for those Settlement Class Members whose water pumps fail after the Notice  
9 Date and during the Settlement’s Warranty Extension period, if there is engine damage that is  
10 caused directly by the failure of the water pump, the Warranty Extension also provides for  
11 coverage of a percentage of the cost of the engine repair or replacement, by an authorized VW or  
12 Audi dealer, based upon the same sliding scale percentage Schedule set forth above in the section  
13 for reimbursement for past failures. *See* Settlement Agreement, Section II.A.

14 The Court also inquired at the February 7<sup>th</sup> hearing as to how the percentages in connection  
15 with reimbursement for directly-related engine damage were derived. This was not a necessary  
16 part of the Settlement relief; indeed, it was not even offered in *Herremans*, in which a class  
17 settlement that involved an allegedly defective water pump was approved. This was added to this  
18 Settlement to afford an extra benefit for VW and Audi customers over and above the other  
19 substantial benefits that, standing alone, are fair, reasonable, adequate and worthy of approval.  
20 Engine damage seldom results from a failed water pump, and this relief is, therefore, not expected  
21 to be a significant component, either of potential damages in litigation or of the Settlement. The  
22 percentages of reimbursement for this infrequent occurrence are very fair and reasonable. They are  
23 the product of substantial arm’s length negotiations of disputed claims that take into account  
24 Defendant’s position throughout this litigation and negotiation that there are factors such as  
25 driving habits, use of the vehicle, maintenance of the engine and its components, any unrelated  
26 damage to the engine by any source, as well as the age, mileage and “wear and tear” of the engine  
27 at the time of the alleged damage - - all of which affects the engine’s condition, the amount of use  
28 the class member has obtained from the engine prior to the damage, and the value of what is being

1 replaced. The percentages for this aspect of the Settlement are a reasonable arm's length  
2 compromise of disputed claims, factor in many differing issues, and offer a substantial added  
3 benefit to the Settlement.

4 Notably, the overall settlement consideration is not subject to any aggregate monetary cap.  
5 In addition to the foregoing substantive relief, under the Settlement Agreement, VWGoA will bear  
6 the cost of the class notice, claims administration, and approved reasonable attorneys' fees and  
7 expenses. *Id.*, ¶¶ IV(A) and (B). By any objective standard, the Settlement warrants preliminary  
8 approval. Indeed, such automotive classwide settlements that have provided a cash reimbursement  
9 or prospective warranty extension option have been granted final approval by California federal  
10 courts. *See Herremans v. BMW of N.A., LLC, supra* (granting final approval to a nationwide class  
11 settlement which extended the manufacturer's warranty for failed water pumps to seven years or  
12 84,000 miles, whichever occurred first); *see also Sadowska v. Volkswagen Group of America, Inc.*,  
13 No. CV 11-665, 2013 WL 9600948, at \*3 (C.D. Cal. Sept. 25, 2013) (granting final approval to  
14 nationwide class settlement that called for defendant car manufacturer to extend warranty to lesser  
15 of 10 years or 100,000 miles and offer reimbursement for repairs already undertaken); *Browne v.*  
16 *American Honda Motor Co.*, Case No. CV 09-06750 MMM (DTBx), 2010 WL 9499072, at \*4  
17 (C.D. Cal. Jul. 29, 2010) (granting final approval to nationwide class settlement that provided  
18 coverage for future brake repairs for a period of up to three years or a reimbursement option  
19 covering up to 50 percent of repair costs already undertaken).

20 The revised Class Notice program for the proposed Settlement fully complies with Rule 23  
21 and due process concerns, as it fully advises Settlement Class Members of their rights under the  
22 Settlement. It is very robust, and in response to the Court's comments, the revised Settlement  
23 Notice Plan provides that class notice is to be disseminated not only through individual notice  
24 through the United States mail, (still the "gold standard" of Notice), but also through email notice,  
25 social media notice, and sponsored search listings. *See Azari Decl.*; *see also* Exh. 5 to Settlement  
26 Agreement (proposed form of Notice); Settlement Agreement, ¶¶ V(b)(1), (2) and (3).  
27 Additionally, the Settlement Agreement also calls for the dissemination of the Notice on a  
28

1 Settlement website. *See* Settlement Agreement, ¶ V(b)(6) (calling for publication of a settlement  
2 website containing copies of the Class Notice).

3 The revised Settlement also incorporates the Court’s directive that Class Members will  
4 have sixty (60) days from the filing of the motion for an award of attorneys’ fees and expenses to  
5 file Requests for Exclusion to the Settlement or Objections to the Settlement, and may do so by  
6 various methods such as by mail or filing with the Claim Administrator through a portal in the  
7 Settlement Website, as clearly indicated in the Notice.<sup>7</sup> The language suggested by the Northern  
8 District of California Procedural Guidance for Class Action Settlements (“N.D. Proc. Guidance”)  
9 has been incorporated into the Settlement Notice to be disseminated.

10 Certification of a Settlement Class for settlement purposes only, also merits preliminary  
11 approval. Here, the Settlement Class definition closely tracks the putative class definition alleged  
12 in the Amended Complaint. *Compare* Settlement Agreement, ¶ I(Q) (Settlement Class definition)  
13 *with* Amended Complaint, ¶ 14 (putative class defined in complaint). As detailed below, Plaintiffs  
14 meet the Rule 23 criteria for conditional certification of the Settlement Class for settlement  
15 purposes only.

#### 16 **Recent Procedural History**

17 The initial Motion for Preliminary Approval of the Settlement was filed pursuant to the  
18 Court’s scheduling order on September 11, 2018, and the Preliminary Approval Hearing was  
19 scheduled for October 25, 2018. *See* Dkt. 65, *et seq.* Thereafter, on October 22, 2018, the parties,  
20 on their own accord, entered into an Amended Settlement Agreement that added an additional  
21 settlement benefit. *See* Dkt. 66-2. On October 23, 2018, the parties filed a Stipulation Requesting  
22 Revised Preliminary Approval Order Based Upon Amended Settlement Agreement. *See* Dkt. 66,  
23 *et seq.* Thereafter, on October 24, 2018 (Dkt. 68), the Court vacated the hearing set for October  
24 25, 2018, and ordered the parties to resubmit the motion and follow the Northern District of  
25 California Procedural Guidance for Class Action Settlements, which were expected to be

26 \_\_\_\_\_  
27 <sup>7</sup> As discussed *supra*, the parties respectfully request that the Court reconsider its initial desire to  
28 permit objections to be filed with the Claim Administrator online via the settlement website, and  
direct that any objections be mailed to, or filed directly with, the Court by Settlement Class  
Members.

1 promulgated shortly thereafter, and which, in fact, were posted on the Court’s website on  
2 November 2, 2018. *See* Dkt. 68; *see also* N.D. Proc. Guidance.

3 Plaintiffs filed the revised preliminary approval motion on December 7, 2018 (Dkt. 69, *et*  
4 *seq.*), which the Court set for hearing (pursuant to the parties’ request) on February 7, 2019. *See*  
5 Dkt. 70. At the February 7<sup>th</sup> hearing, the Court indicated that the settlement was nearly ready for  
6 approval, but would need certain specified revisions and explanations, and laid out the roadmap  
7 for preliminary approval. Counsel have followed that roadmap and now respectfully resubmit the  
8 Settlement for Preliminary Approval. In addition, the parties have revised the Settlement  
9 Agreement to conform to the Court’s concerns and suggestions, revised the Class Notices to  
10 incorporate them, as well as language from the N.D. Proc. Guidance, and revised the Notice Plan  
11 for Notice to the Class. In addition, the information requested in the N.D. Proc. Guidance is set  
12 forth herein below at Point III.

## 13 **II. PRELIMINARY APPROVAL SHOULD BE GRANTED**

### 14 **A. The Settlement Class Should Be Conditionally Certified**

15 This is a putative class action, and as such, the proposed Settlement Agreement calls for  
16 certification of a Settlement Class for settlement purposes only. *See* Settlement Agreement, ¶ 1(Q)  
17 (defining Settlement Class). The use of such settlement classes is common and proper in the  
18 resolution of class action litigation. *See, e.g., Gribble v. Cool Transports, Inc.*, Case No. CV 06-  
19 04863 GAF (SHx), 2008 WL 5281665, at \* 3, (C.D. Cal. Dec. 15, 2008) (approving settlement  
20 class as part of final approval of class action settlement); *In re Connecticut General Life Ins. Co.*,  
21 No. Civ. S-07-0819 RRB EFB, 1997 WL 910387, at \*1 ¶ 2 (C.D. Cal. Feb. 13, 1997) (certifying  
22 “for purposes of settlement, the Settlement Class defined in Section II and Exhibit E of the  
23 Settlement Agreement”); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust*  
24 *Litig.*, No. MDL 150, 1993 WL 39306, at \*2 (C.D. Cal. Jan. 12, 1993) (granting preliminary  
25 approval and certifying “for purposes of this settlement only, Temporary Settlement Classes as  
26 defined in the Settlement Agreement.”).

27 Here, subject to certain exclusions, the Settlement Class is defined as: “All persons and  
28 entities who purchased or leased a Settlement Class Vehicle, as defined in Section I (R) of this

1 Agreement, in the United States of America and Puerto Rico.” Settlement Agreement, ¶ I(Q). The  
 2 Settlement Class definition sets forth an identifiable class, and generally tracks the putative class  
 3 definition originally pled in the Amended Complaint. *See* Amended Complaint, ¶¶ 1-2 (alleging  
 4 class definition).

5 **1. The Settlement Class Satisfies The Numerosity Requirement.**

6 Rule 23 (a)(1) requires that “the class [be] so numerous that joinder of all members is  
 7 impracticable.” Fed. R. Civ. P. 23 (a)(1). This action meets that requirement. Material obtained by  
 8 Plaintiffs’ counsel during discovery in this action confirms that approximately 875,000 Settlement  
 9 Class Vehicles were distributed by VWGoA within the United States and Puerto Rico.  
 10 Unquestionably, this more than satisfies the numerosity requirement for class certification. *See*  
 11 *Lowdermilk v. United States Bank National Assoc.*, 479 F.3d 994, 997 (9th Cir. 2007) (numerosity  
 12 criteria satisfied by plaintiff’s mere allegation that class size “exceeds 30 persons.”).

13 **2. The Settlement Class Satisfies The Commonality Requirement.**

14 Rule 23 (a)(2) requires that “there [be] questions of law or fact common to the class.” Fed.  
 15 R. Civ. P. 23 (a)(2). “To establish commonality, ‘[t]he existence of shared legal issues with  
 16 divergent factual predicates is sufficient, as is a common core of salient facts coupled with  
 17 disparate legal remedies.’” *Parra v. Bashas, Inc.*, 536 F.3d 975, 978 (9th Cir. 2008) (*quoting*  
 18 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). Here, commonality is met. The  
 19 claims of the putative Class Members arise from the same allegations in the Amended Complaint,  
 20 namely, does there exist a defect in the Settlement Class Vehicles’ primary engine water pump?

21 Further, the Settlement Class also shares this commonality requirement in that all  
 22 Settlement Class Members whose vehicles experience the manifestation of the alleged common  
 23 defect (engine water pump failure) are entitled to relief if their claim meets the requirements of the  
 24 Settlement. This is because a key provision of the Settlement Agreement permits eligible members  
 25 to obtain reimbursement from VWGoA for certain out-of-pocket costs previously incurred by the  
 26 Settlement Class Member in having to repair/replace the original primary engine water pump  
 27 within the time and mileage parameters of the Settlement. *See* Settlement Agreement, ¶¶ II(B) and  
 28 (C) (detailing settlement consideration).

1                   **3. The Settlement Class Satisfies The Typicality Requirement.**

2                   Rule 23 (a)(3) requires that “the claims or defenses of the representative parties are typical  
3 of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “The typicality prerequisite of  
4 Rule 23(a) is fulfilled if ‘the claims or defenses of the representative parties are typical of the  
5 claims or defenses of the class.’” *Simpson v. Fireman’s Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D.  
6 Cal. 2005) (quoting *Hanlon*, 150 F.3d at 1020). “[R]epresentative claims are ‘typical’ if they are  
7 reasonably co-extensive with those of absent class members; they need not be substantially  
8 identical.” *Hanlon*, 150 F.3d at 1020. The typicality criteria are satisfied in this case. Plaintiffs  
9 Gregory Coffeng, Mark Glaser, and Jordan Wilson own class vehicles equipped with primary  
10 water pumps alleged in the Amended Complaint and experienced a manifestation of the alleged  
11 defect that required repairs at costs that varied among the Plaintiffs. *See* Amended Complaint, ¶¶  
12 10-12. Because Plaintiffs are members of the proposed Settlement Class, and assert the same  
13 causes of action on behalf of themselves and all absent class members, their claims are typical.

14                   **4. The Class Representatives Satisfy The Adequacy Requirement.**

15                   Rule 23 (a)(4) requires that “the representative parties will fairly and adequately protect the  
16 interests of the class.” Fed. R. Civ. P. 23(a)(4). “Resolution of two questions determines legal  
17 adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other  
18 class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously  
19 on behalf of the class?” *Hanlon*, 150 F.3d at 1020. There are no conflicts of interest that exist here.  
20 Plaintiffs seek the same remedy as all class members; namely, relief to address the claim that the  
21 vehicle has manifested or is unduly prone to manifest a failure of the primary engine water pump.  
22 Plaintiffs’ interests are fully aligned with the interests of the Settlement Class members.

23                   Counsel for Plaintiffs are highly experienced in class action litigation, and have been  
24 involved in many class actions and settlements. *See* Exhibits D-F to the Graifman Decl. (resumes  
25 of class counsels’ law firms).<sup>8</sup> Their track record in this action before this Court evidences their  
26 adequacy to serve as Class counsel.

27 <sup>8</sup> Exhibit D to the Graifman Decl. is the firm resume of Kantrowitz, Goldhamer & Graifman, P.C.;  
28 Exhibit E is the firm resume of Thomas P. Sobran, P.C.; and Exhibit F is the firm resume of Stull,  
Stull & Brody.

1                   **5. The Settlement Class Satisfies The Necessary Criteria Of Rule 23(b).**

2                   In addition to meeting all the class certification requirements enumerated in Rule 23(a), a  
3 movant must also satisfy at least one of the requirements of Rule 23(b). *See Zinser v. Accufix*  
4 *Research Int., Inc.* 253 F.3d 1180, 1886, *amended* 273 F.3d 1266 (9th Cir. 2001). Here, the  
5 Settlement provides monetary relief, and the criteria set forth in Rule 23(b)(3) is pertinent. This  
6 section provides that class certification is appropriate if the criteria of Rule 23(a) are met, and if:

7                   [T]he court finds that the questions of law or fact common to class  
8 members predominate over any questions affecting only individual  
9 members, and that a class action is superior to other available  
methods for fairly and efficiently adjudicating the controversy.

10 Fed. R. Civ. P. 23(b)(3).

11                   The “predominance” and “superiority” requirements of Rule 23(b)(3) are readily satisfied  
12 in this case. “To establish predominance of common issues, a party seeking class certification is  
13 not required to show that the legal and factual issues raised by the claims of each class member are  
14 identical. Rather, the predominance inquiry focuses on whether the proposed class is ‘sufficiently  
15 cohesive to warrant adjudication by representation.’” *Friedman v. 24 Hour Fitness USA Inc.*, CV  
16 06-6282 AHM (CTx), 2009 WL 2410889, at \*6 (C.D. Cal. Aug. 6, 2009) (*quoting Local Joint*  
17 *Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162  
18 (9th Cir. 2001)). Here, this cohesiveness assuredly exists because the overarching inquiry and  
19 interest of all putative class members is whether the members of the Settlement Class are entitled  
20 to relief from VWGoA for an alleged defect in the primary engine water pump present in their  
21 particular Settlement Class Vehicle. This evidence and proof as to the existence of a legally  
22 cognizable claim to obtain such relief, therefore, would predominate over any individual issues in  
23 adjudicating this case.

24                   Similarly, the “superiority” requirement of Rule 23(b)(3) is also satisfied in this case. In  
25 determining the superiority of a class action, courts consider the following four factors: (1) the  
26 class members’ interests in individually prosecuting separate actions; (2) whether any litigation  
27 concerning the controversy has already been brought by class members; (3) the desirability of  
28 concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in



1 managing a class action.<sup>9</sup> See Fed. R. Civ. P. 23(b)(3)(a)-(d). Here, those factors clearly militate  
2 in favor of class certification. Although the cost of repairing or replacing a failed primary engine  
3 water pump could be significant, the cost of individually litigating such a case against VWGoA  
4 would easily exceed the cost of any relief that could be obtained by any lone owner or lessee. This,  
5 alone, warrants a finding that a class action is a superior method of adjudication. See *Tchoboian v.*  
6 *Parking Concepts, Inc.*, 2009 WL 2169883, at \*7 (C.D. Cal. Jul. 16, 2009) (Selna, J.) (granting  
7 motion for class certification and noting that “[t]his superiority inquiry requires a comparative  
8 evaluation of alternative mechanisms of dispute resolution.”); *Baghdasarian v. Amazon.com, Inc.*,  
9 Case No. CV 05-8060 AG (CTx), 2009 WL 2263581, at \*7 (C.D. Cal., Jul. 7, 2009) (the  
10 superiority inquiry is geared to address “the problem that small recoveries do not provide the  
11 incentive for any individual to bring a solo action prosecuting his or her rights.”).

12 Since the proposed Settlement Class meets the applicable requirements for certification  
13 under Federal Rule of Civil Procedure 23, the proposed Settlement Class should be conditionally  
14 certified for purposes of settlement. At the Fairness Hearing, the Court will have further  
15 opportunity to revisit this conditional certification in deciding whether to grant Final Approval to  
16 the Settlement Agreement and certification of the Settlement Class.

17 **B. The Notice Plan Should Be Approved.**

18 Rule 23 and due process concerns require notice to be provided to absent class members in  
19 order to inform them of the proposed Settlement, and grant them the opportunity to opt-out or  
20 object. See Fed. R. Civ. P. 23(c)(2). The notice and means of disseminating it must be the “best  
21 notice practicable” under the circumstances. See *Mullane v. Central Hanover Trust*, 339 U.S. 306,  
22 314 (1950). As set forth above and in the Azari Decl., the parties propose to disseminate the notice  
23 of the proposed Class Action Settlement (“Notice”) through a robust program. That includes Notice  
24 by several independent and effective means: (i) Notice sent individually, by way of United States  
25 mail, to the current or last known addresses of the absent Class Members for which the Class

26 \_\_\_\_\_  
27 <sup>9</sup> Manageability is not a factor to assess in deciding whether the superiority requirement has been  
28 met in the class settlement context *Browning v. Yahoo! Inc.*, Case No. C04-01463 HRL, 2007 WL  
4105971, at \*9 (N.D. Cal. Nov. 16, 2007) (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 619  
(1997)).

1 Member's identity and address are reasonably ascertainable from the DMV records of all states  
 2 and industry-recognized databases (Settlement Agreement, ¶¶ V(b)(1)-(3) (setting forth Notice  
 3 Plan and notice terms under the Settlement Agreement));<sup>10</sup> (ii) Email notice to all Settlement Class  
 4 Members whose email addresses are reasonably available (Azari Decl., ¶¶ 19-20); (iii) Social  
 5 Media Notice whereby banner ad notices will appear online on *Facebook* and *Instagram*,  
 6 specifically targeted to Audi and Volkswagen owners (Azari Decl., ¶ 12, 21-22); and (iv)  
 7 "Sponsored Search Listings" (Azari Decl., ¶ 23). The Settlement Agreement also calls for the  
 8 Settlement Administrator to establish a Settlement Website that, among other things, will provide  
 9 additional Notice of the Settlement and will contain copies of the VW and Audi Class Notices as  
 10 well as the pertinent settlement documents, orders, deadlines, instructions on how to submit  
 11 claims, opt out or object to the Settlement, FAQs and answers, and other information. *See*  
 12 Settlement Agreement, ¶ V(b)(6). As discussed *supra*, this very robust Notice Program is expected  
 13 to reach 90-95% of the Settlement Class, an extraordinary percentage that more than satisfies any  
 14 reasonableness and due process considerations (Azari Decl., ¶ 27).

15 The proposed form of Notice complies with due process requirements, Rule 23, and the  
 16 Court's comments and concerns discussed at the last hearing. The form Notices for VW and Audi  
 17 Class Members are both attached as Exhibit 5 to the Settlement Agreement, and the Notices  
 18 inform absent Class Members as to the terms of the Settlement, their right to avail themselves of  
 19 the Settlement, opt-out, or object, procedures to follow for submitting claims, opting out or  
 20 objecting to the Settlement, applicable deadlines, as well as the binding effect of the Settlement  
 21 upon Members of the Settlement Class who do not opt-out. *See* Exhibit 5 to Settlement  
 22 Agreement. The Notices also identify the Settlement Website, where the pertinent information is

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23 <sup>10</sup> The Claims Administrator, Epiq Global, will use the same company, IHS Markit Polk, to  
 24 acquire the names and addresses of Settlement Class Vehicle owners and lessees that  
 25 manufacturers use to aggregate data for recall notices mandated by NHTSA. *See* Settlement  
 26 Agreement, ¶ V(b)(2). Individual service of notice *via* U.S. mail has been held, as a matter of law,  
 27 to satisfy the due process concerns and to meet the "best practicable notice" standard. *See In re*  
 28 *Laser Arms Corp. Securities Litig.*, 794 F. Supp. 475, 496 (S.D.N.Y. 1979) ("Therefore, the Court  
 finds that notice by first class mail is the 'best practicable notice.'"); *Peil v. National*  
*Semiconductor Corp.*, 86 F.R.D. 357, 375 (E.D. Pa. 1980) ("In the present case, the best notice  
 practicable would apparently be obtained by a first class mailing.").

1 also available, and provide contact information for the Claim Administrator in the event of any  
2 questions. The form of Notice provides for 60-days for exclusions and objections to be filed, as  
3 directed by the Court, and incorporates the suggested language from the N.D. Proc. Guidance for  
4 opt outs and objections. The VW and Audi forms of Notice and the proposed plan of  
5 dissemination should, therefore, also be approved.

6 **C. The Substantive Terms of the Settlement Are Fair, Reasonable**  
7 **and Adequate, and Should Be Granted Preliminary Approval**

8 Preliminary approval should be granted because the Settlement terms are fair, reasonable  
9 and adequate. Ultimately, the decision to grant preliminary approval to a settlement of a class  
10 action is a matter left to the discretion of the trial court. *See Castro v. Zenith Acquisition Corp.*,  
11 2007 WL 81905, at \*1 (N.D. Cal. Jan. 9, 2007). In exercising that discretion the Court should bear  
12 in mind that “there is an overriding public interest in settling and quieting litigation,” and this is  
13 “particularly true in class action suits.” *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9<sup>th</sup>  
14 Cir. 1976). Recognizing that a settlement represents an exercise of judgment by the negotiating  
15 parties, *Torrisi v. Tucson Elec. Power*, 8 F.3d 1370, 1375 (9th Cir. 1993), the Ninth Circuit held  
16 that “the court’s intrusion upon what is otherwise a private consensual agreement negotiated  
17 between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned  
18 judgment that the agreement is not the product of fraud or overreaching by, or collusion between,  
19 the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate  
20 to all concerned.” *Officers for Justice v. Civil Service Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982).

21 The general standard by which courts are guided when deciding whether to grant  
22 preliminary approval to a class action settlement is whether the proposed settlement falls within  
23 the range of what could be “fair, adequate, and reasonable,” so that notice may be given to the  
24 proposed class, and a hearing for final approval may be scheduled. *Class Plaintiffs v. Seattle*, 955  
25 F.2d 1268, 1276 (9th Cir. 1992); *see also Gattreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir.  
26 1982) (If the court finds that the proposed settlement is “within the range of possible approval”  
27 and that notice should be given, “the next step is the fairness hearing.”).

1 This proposed Settlement assuredly satisfies the foregoing criteria. The terms of the  
2 Settlement provide Settlement Class Members with substantial and meaningful benefits that  
3 address the issue alleged in the Amended Complaint. Each qualifying Settlement Class Member  
4 may be entitled to receive hundreds and potentially thousands of dollars to reimburse the cost of a  
5 covered repair. Eligible Settlement Class Members also are provided a Warranty Extension benefit  
6 for the primary engine water pump that almost doubles the time and mileage duration of the  
7 original VWGoA New Vehicle Limited Warranty with respect to the subject water pumps.  
8 Settlement Agreement, ¶ II(A). As noted above, this Settlement compares extremely favorably to  
9 the closest comparator, being a prior settlement involving failed motor vehicle engine water  
10 pumps, settled in the Central District of California.

11 By any measure, the Settlement terms are fair, adequate and reasonable. This is particularly  
12 true when considered in light of the uncertain prospects and risks faced by Plaintiffs and the  
13 putative class. This is an arm's length negotiation and resolution of a vigorously disputed claim.  
14 VWGoA maintains that the water pump is not defective and that no warranties or laws (statutory  
15 or common) have been violated. VWGoA vigorously denies any liability or wrongdoing, and  
16 intends to vigorously contest not only the ultimate liability and claim for damages, but also  
17 Plaintiffs' anticipated motion for class certification. Although Plaintiffs remained confident in the  
18 merits of their case, the results were not predictable with any degree of certainty. If class  
19 certification were not granted in the litigation, Class Members would have to seek redress in  
20 individual actions in which the amounts in controversy would be substantially less than the cost of  
21 prosecuting the actions. VWGoA also has the right to appeal any class certification or ultimate  
22 decision entered against it. An appeal to the Ninth Circuit would likely take an extended period of  
23 time to resolve, meaning ultimate relief to the class would likely be substantially delayed.

24 **D. The Settlement Was the Product of Adversarial Arm's-Length**  
25 **Negotiation**

26 The fact that the discussions and negotiations leading up to the Settlement were conducted  
27 in vigorous and arm's-length fashion also serve as added indicia of the fairness of the settlement.  
28 The settlement negotiations commenced after the parties had exchanged meaningful informal

1 discovery and fully briefed and argued a Motion to Dismiss and, after the hearing on Defendants’  
2 Motion (*see* Dkt. 51), amendment of the Complaint (*see* Dkt. 52), and Plaintiffs’ counsel  
3 consulted with automotive experts. These actions occurred prior to engaging in settlement talks.  
4 At the point of settlement discussions, each side had a *bona fide* basis on which to make an  
5 informed assessment of the value, strengths, and potential weaknesses of their respective case and  
6 defenses.

7       It is undeniable that the settlement negotiations here were non-collusive and adversarial in  
8 nature. The parties thoroughly engaged in extended negotiations during which several extensions  
9 of time were required. In addition, the parties agreed on the material terms of this Settlement prior  
10 to the onset of any discussions relating to reasonable attorney fees and expenses which counsel  
11 have only recently resolved, thus further attesting to the adversarial, *bona fide*, and arm’s-length  
12 nature of the negotiations. *Id.*

13       Because the proposed Settlement amounts to a reasonable means of resolving this  
14 litigation, and because the risks, expense and delays of potential recovery inherent in continuing to  
15 litigate this matter are significant and uncertain, this proposed Settlement meets the standard for  
16 preliminary approval and should be preliminarily approved accordingly.

17 **III. THE PARTIES HAVE INCORPORATED THE MATERIAL REQUESTED IN THE**  
18 **NORTHERN DISTRICT’S PROCEDURAL GUIDANCE**

19       The following information is provided pursuant to the N.D. Proc. Guidance:

20       a)     The litigation class has not been certified and there is no difference between the  
21 Settlement Class and the class proposed in the operative Amended Complaint. N.D. Proc.  
22 Guidance, ¶ 1(a);

23       b)     The claims released in this matter are all claims that were or could have been  
24 brought in this putative nationwide class action and that relate to or arise from the primary engine  
25 water pump (“water pump”) of the Settlement Class Vehicles. N.D. Proc. Guidance, ¶ 1(c). The  
26 Release specifically exempts any claims for personal injury or property damage other than damage  
27 to the vehicle itself resulting from the primary engine water pump;

1 c) Class Counsel believe that the recovery under the Settlement would be parallel to  
2 and/or not materially less than that which could realistically be received in the case, although there  
3 is also the possibility of denial of class certification or a defense verdict after trial. As discussed in  
4 more detail above, this Settlement has substantial Extended Warranty and Reimbursement benefits  
5 that are clearly fair, reasonable and adequate, and, in fact, exceed the settlement benefits of the  
6 comparable water pump class action, discussed *supra*, that was approved by the Central District of  
7 California. N.D. Proc. Guidance, ¶ 1(e);

8 d) The proposed Claim Forms (annexed as Exhibit 1 to the Amended Settlement  
9 Agreement) are clear, easily understandable, and will be disseminated with the Class Notice *via*  
10 First Class Mail directly to each of the identified Settlement Class Members. Class Notice will  
11 also be sent *via* email where available and will be made available through the social media and  
12 internet banner ad links to the Settlement Website. While the number or percentage of claims is  
13 difficult to know, a reasonable estimate based on other settlements and the calculated warranty  
14 rate, is expressed herein. The Settlement benefit here is substantial and provides an incentive to  
15 submit a claim if such expenses had been incurred. Counsel believe that a reasonable estimate of  
16 claims may be in the range of approximately 30,000 claims. N.D. Proc. Guidance, ¶ 1(g). Class  
17 Counsel bases that opinion on the claims history in another case involving many of the same  
18 vehicles as the Class Vehicles herein (albeit different components), *In re Volkswagen Timing*  
19 *Chain Products Liability Litig*, Civil Action No. 16-cv-2765 (JLL) (D.N.J.) (“*In re Volkswagen*  
20 *Timing Chain Litig.*”) (pending final approval).<sup>11</sup> The estimated claims in that matter, which has  
21 approximately half the number of vehicles of the within matter, supports such an estimate. N.D.  
22 Proc. Guidance, ¶ 1(g). In addition, the warranty rate herein, based on discovery, was  
23 approximately 10% over an 8 year period. If calculated for a 6 year period instead of 8, that rate,  
24 adjusted to 7.5% for the reduction in years, would exceed this conservative estimate of 30,000  
25 claims for reimbursement (based on over 800,000 Class Vehicles) by a significant amount. Class  
26

27 <sup>11</sup> *In re Volkswagen Timing Chain Litig.* encompassed approximately 477,000 class vehicles.  
28 This class action includes approximately 875,000 class vehicles, a portion of which subsumes the  
same vehicles as *In re Volkswagen Timing Chain Litig.*

1 Counsel believes their estimate is also supported by another nationwide class action settlement  
2 that Class Counsel was directly involved in as co-lead counsel and which also involved overseeing  
3 the post-approval claims process. *See In Re Nissan AT Transmission Cooler Defect Litigation*, 10-  
4 cv-7493 (VB), 2013 WL 4080946 (S.D.N.Y. May 30, 2013) (opinion on motion for final  
5 approval) (“*In re Nissan AT Cooler*”. There were approximately 17,000 claims received for  
6 reimbursement in that claims administration process. A substantial number of Nissan class  
7 members also received the additional benefit of future repair work done under the extended  
8 warranty (in addition to the reimbursement for past repairs). The within action has an Extended  
9 Warranty to 100,000 miles or 10 years (whichever occurs first) and, based on counsel’s previous  
10 experience in other cases, such as *In re Nissan AT Cooler*, the *future* repairs which will be made  
11 under the Warranty Extension will add an additional future group that benefits from the Settlement  
12 that is equal to one half of the reimbursement claims for past repairs, thus, adding another  
13 approximately 15,000 class members (to the 30,000 or so seeking past reimbursement) who would  
14 benefit. N.D. Proc. Guidance, ¶ 1(g).

15 e) There is no settlement fund, and no cap on the recovery for the Class.  
16 Reimbursements will be made on a claims-made basis to Class Members who submit qualified  
17 claims in this action. There is no reversion or *cy pres* involved in this Settlement. N.D. Proc.  
18 Guidance, ¶¶ 1(h) & 8.

19 f) The proposed Settlement Administrator is Epic Global. N.D. Proc. Guidance, ¶ 2.  
20 Epic Global is one of the premier Settlement Administration companies in the U.S., with years of  
21 experience and recognized excellence in numerous approved class action settlements. Moreover,  
22 Epiq Global was the judicially approved Settlement Claims Administrator in *In re Volkswagen*  
23 *Timing Chain Litig.* (concerning many of the same vehicles as the Class Vehicles herein), and has  
24 extensive experience working with IHS Markit Polk. Class Counsel and defense counsel have  
25 agreed that Epic Global would be the most appropriate Claims Administrator for use in this case.  
26 Utilizing the same Claims Administer in this case as in the previous case involving VWGoA (and  
27 a large portion of the same Settlement Class Vehicles) will result in substantial efficiencies. The  
28 cost of claims administration will be borne by Defendant and will not affect the recovery to any

1 Settlement Class Member. Therefore, the Court need not approve such costs; however, if the Court  
2 deems that necessary, the parties understand that this will not occur until the Final Approval  
3 Hearing. N.D. Proc. Guidance, ¶ 2.

4 g) The content of the Class Notice in this action is easily understandable and  
5 straightforward and conforms with the Class Notice approved by the U.S. District Court in prior  
6 cases, including *In re Volkswagen Timing Chain Litig.*, in which Epiq Global disseminated a  
7 similar notice. N.D. Proc. Guidance, ¶ 3. The Class Notice in this case, as set forth above, includes  
8 verbatim the language suggested in the N.D. Proc. Guidance, ¶ 3, and incorporates the comments  
9 and concerns that this Court articulated at the February 7, 2019 hearing. Further explanation of the  
10 notice program is set forth, *supra*, at § II.B at 20-22.

11 h) The parties understand that the Court will not consider or approve the request for  
12 attorney fees until the Final Approval Hearing and Class Counsel will include their fee request in  
13 the Motion for Final Approval. However, the parties can now report that they have reached  
14 agreement on Class Counsel's request for attorneys' fees and expenses. The parties had not  
15 discussed the issue of attorney fees prior to agreement on the material terms of this Settlement  
16 and, as the Court may recall, had not reached agreement even at the time of the February 7, 2019  
17 hearing before the Court. They have only reached agreement on the issue recently, after continued  
18 negotiations. The agreed-upon total combined limit amount for Class Counsel fees and expenses  
19 in this action is two million four hundred thousand dollars (\$2,400,000), and that sum will be set  
20 forth in the Class Notice. Class Counsel respectfully submit that while it would be premature to set  
21 forth the current lodestar at this time, as this matter was placed on an early settlement track, and  
22 the work of Class Counsel is continuing and will undoubtedly increase in the future, Class  
23 Counsel report a combined current lodestar of \$799,477.25 and expenses of \$18,652.25.<sup>12</sup> Class

24 <sup>12</sup> See *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1029-30 (9<sup>th</sup> Cir.1998) recognizing that counsel  
25 should be entitled to payment for the future work required of them ("Class counsel presented  
26 affidavits to the district court justifying their fees on the basis of their work on the individual state  
27 class actions. The fee award also includes all future services that class counsel must provide  
28 through the life of the latch replacement program. They must remain available to enforce the  
contractual elements of the settlement agreement and represent any class members who encounter  
difficulties. The factual record provides a sufficient evidentiary basis for the district court's  
approval of the fee request.").



1 Counsel continue to incur time and expense as the approval process continues, as class notices are  
 2 finalized and implemented, settlement administrative matters including the settlement website are  
 3 addressed, the objection and opt-out process continues, and the claims process, and the issues  
 4 arising therein, need to be addressed. In Class Counsel's experience, the amount of work to reach  
 5 final approval, to address requests and questions by Class Members, and to deal with settlement  
 6 administrative and claims approval matters, can be substantial. Class Counsel estimates that the  
 7 lodestar at the time of Final Approval will be in the range of approximately two million dollars  
 8 (\$2,000,000.00). Counsel would be in a position to address any further questions the Court may  
 9 have, if any, relating to lodestar or value based upon the benefit to the Settlement Class at the  
 10 preliminary or final approval hearing.<sup>13</sup> The fees paid to Class Counsel will have no reduction on  
 11 any aspect of Class Members' recovery.

12 i) As set forth in the proposed Class Notice, an incentive award for each of the three  
 13 (3) Class Representatives will be sought in the amount of \$2,500.00. The Class Representatives  
 14 fully participated in the litigation and settlement process. Class Representatives provided  
 15 necessary documents and support to Class Counsel, and reviewed the Complaint together with  
 16 other pleadings and documents. Class Counsel were able to understand the nature of the defect  
 17

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18 <sup>13</sup> Class Counsel respectfully submit that attorney fees based on the percentage-of-the-fund  
 19 calculation and methodology is a method often applied in automobile defect cases in the Ninth  
 20 Circuit. *See Seifi v. Mercedes Benz USA, LLC*, Case No. 12-cv-05493-TEH (N.D. Cal. Aug. 18,  
 21 2015), ECF Doc. 208, *Order Granting Award of Attorneys Fees, Reimbursement of Expenses and*  
 22 *Class Representative Award* at ¶ 9 ("Class Counsel request that the Court grant approval of the  
 23 requested award of Counsel Fees in the sum of Two Million Four Hundred Eleven Thousand Eight  
 24 Hundred Eighty Two Dollars (\$2,411,882). . . . It appears that utilizing the percentage-of-fund  
 25 method of calculation, the requested Counsel Fee is well below the twenty five percent (25%)  
 26 benchmark recognized in the Ninth Circuit. ***For cases using the percentage-of-the fund method,***  
 27 ***twenty five percent (25%) of the overall figure is considered a 'benchmark award of attorneys***  
 28 ***fees.***" (emphasis added) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d at 1029); see also *In re*  
*Toyota Motor Corp.*, No. 8:10ML-02151-JVS, 2013 U.S. Dist. LEXIS 94485, at \*211 (C.D. Cal.  
 June 17, 2013) (valuing the relief involving the installation of a brake override system at \$400  
 million); *Trew v. Volvo Cars of N. Am., LLC*, No. S-05-1379-RRB, 2007 U.S. Dist. LEXIS 55305,  
 at \*15 (S.D. Cal. July, 31, 2007) (valuing the extension of warranty replacing a throttle module at  
 \$24 million based on part replacement costs and applying a percentage method to determine fees).  
 Class Counsel herein believes the value of this settlement preliminarily will exceed \$35 million  
 based on the anticipated number of claims and Warranty Extension repairs.

1 alleged herein because of, in part, the valuable input from the Class Representatives, and their  
2 imparting the circumstances surrounding their respective failures and providing the invoices and  
3 repair information to counsel. The Class Representatives further reviewed the Amended  
4 Complaint and provided input thereto and reviewed the opposition to Defendant's motion to  
5 dismiss. They discussed the settlement process with Class Counsel, and allowed their names to be  
6 placed in the public record as Plaintiffs in this case on behalf of a class of similar owners and  
7 lessees, tens of thousands of whom will now benefit because of their efforts, by receiving  
8 reimbursement or utilizing the extended warranty to have the work done at Defendant's expense.  
9 Class Counsel is mindful of this Court's previous decisions on incentive awards.<sup>14</sup> However,  
10 counsel believes that a modest incentive award is warranted in this matter. Counsel also  
11 understand that no determination is needed at the preliminary approval stage. Nonetheless, the  
12 N.D. Proc. Guidance impels counsel to raise it, and as such counsel addresses it herein briefly and  
13 preliminarily. The incentive award requested here is reasonable based on other comparable  
14 incentive awards in automotive defect cases. *See In Re Nissan AT Cooler, supra*, at \*15; *see also*  
15 *Seifi v. Mercedes Benz U.S.A., LLC*, Case No. 12-cv-05493-TEH (N.D. Cal. Aug. 8, 2015), Dkt.  
16 208 at p. 4 (awarding incentive awards of \$9,000 each to class representatives and holding "The  
17 incentive awards sought are justified and in line with incentive awards approved by this Court. *See*  
18 *Bellinghausen v. Tractor Supply Co.*, No. 13-cv-2377-JSC, 2015 WL 1289342, at \*17 (N.D. Cal.  
19 Mar. 20, 2015) (awarding named class plaintiff \$15,000 incentive award 'in light of the time and  
20 effort Plaintiff expended for the benefit of the class.');

21 *Navarro v. Servisair*, No. 08-cv-2716,  
22 MHP, 2010 WL 1729538, at \*4 (N.D. Cal. Apr. 27, 2010) ('Based on this active participation, an  
23 incentive award of \$10,000.00 is reasonable.'). The award requested herein is not contingent on  
any of the class members endorsing or approving the settlement. N.D. Proc. Guidance, ¶ 7.

24 j) There is no *cy pres* award contemplated in this case. N.D. Proc. Guidance, ¶ 8.

25  
26  
27 <sup>14</sup> *E.g.*, *See Relente v. Viator, Inc.*, 2015 WL 3613713 (N.D. Cal. June 9, 2015); *Myles v.*  
28 *AlliedBarton Sec. Serv., LLC*, 2014 WL 6065602 (N.D. Ca. Nov. 12, 2014); *Stokes v. Interline*  
*Brands, Inc.*, 2014 WL 5826335 (N.D. Cal. Nov. 10, 2014).

1 k) The parties intend to comply with the Class Action Fairness Act and have already  
2 provided notice to the Attorney General of the United States and the State Attorneys General of  
3 the proposed Settlement in accordance with 28 U.S.C. ¶ 1715(b). N.D. Proc. Guidance, ¶ 10.

4 l) The N.D. Proc. Guidance, ¶ 11 requests information for at least one past  
5 comparable class action settlement. As noted above, counsel verily believes the within action  
6 compares extremely favorably to the *Herremans v. BMW of N.A., LLC* matter as discussed above.

7 **IV. CONCLUSION**

8 For all the foregoing reasons, Plaintiffs respectfully request that this Unopposed Motion be  
9 granted.

10 STULL, STULL & BRODY

11 Dated: June 7, 2019

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