UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANA POTVIN, LISA BULTMAN, MICHAEL MCKARRY, DAVID WABAKKEN, MOHAMED HASSAN, CHRISTINA MERRILL, ERIC LEVINE, PATRICK DONAHUEs, DEBBI BROWN, CAROL RADICE, TERRENCE BERRY, AMANDA GREEN, DAVID WILDHAGEN, KATY DOYLE, TASHIA CLENDANIEL, HOGAN POPKESS, KORY WHEELER, HARRY O'BOYLE, JOE RAMAGLI, ERIC KOVALIK, CHARLES HILLIER, LABRANDA SHELTON, ADAM MOORE, TINA GROVE, KEECH ARNSTEN, SCOTT CARTER, MIKE SHERROD, CHRISTI JOHNSON, MARY KOELZER AND MARK STEVENS, Individually And On Behalf Of All Others Similarly Situated, Plaintiffs, vs. VOLKSWAGEN AKTIENGESELLSCHAFT, VOLKSWAGEN GROUP OF AMERICA, INC., and VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC, Defendants.	Case: 2:22-cv-01537-EP-JSA

DEFENDANT'S MEMORANDUM OF LAW IN RESPONSE TO CERTAIN REQUESTS FOR EXCLUSION AND IN SUPPORT OF FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Pursuant to the Preliminary Approval Order (ECF 109), Defendant Volkswagen Group of America, Inc. ("VWGoA") respectfully submits this Memorandum of Law in response to the few requests for exclusion, and in support of final approval of the Class Settlement herein.

Significantly, of the 305,423 Settlement Class Members, **there have been no objections to the Settlement**. In addition, only 32 Settlement Class Members have submitted purported requests for exclusion (amounting to only 0.01% of the Class), 7 of which are invalid as discussed in Section IV, *infra*.

The lack of objections, and microscopic number of exclusion requests, demonstrate unequivocally that the Settlement Class strongly favors this preliminarily approved Class Settlement. The Settlement clearly meets the standards for final approval; it is fair, reasonable, and adequate, and satisfies Fed. R. Civ. P. 23 ("Rule 23") in all respects.

In this Circuit, the evaluation of a proposed Class Settlement is governed by well-settled principles. First, courts recognize that "[s]ettlements…reflect[] negotiated compromises. The role of a district court is not to determine whether the settlement is the fairest possible resolution [but only whether] the compromises reflected in the settlement…are fair, reasonable and adequate when considered from the perspective of the class as a whole." *In re Baby Products Antitrust Litig.*, 708

F.3d 163, 173-74 (3d Cir. 2013) (citation omitted); *see also Skeen v. BMW of North America, LLC*, 2016 WL 4033969, at *7 (D.N.J. July 26, 2016). As the Third Circuit has reaffirmed, "an evaluating court must…guard against demanding too large a settlement since, after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re New Jersey Tax Sales Certificates Antitrust Litig.*, 2018 WL 4232057, at *5 (3d Cir. Sept. 6, 2018) (internal quotation marks and citation omitted).

Second, there is a strong judicial policy in favor of settlements, "particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re GMC Pick-Up Fuel Tank Prods. Liab. Litig. ("GM Trucks")*, 55 F.3d 768 (3rd Cir. 1995). The benefits of class action settlements accrue to the parties as well as the courts:

> The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings…Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts [and] the parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial.

Ehrheart v. Verizon Wireless, 609 F.3d 590, 594-95 (3d Cir. 2010).

Third, there is a presumption that class settlements are fair and reasonable when, as in this action, they are the product of arm's length negotiations of disputed claims by counsel who are skilled and experienced in class action litigation. *GM*

Trucks, 55 F.3d at 785; *Sullivan v. DB Invs.*, 667 F.3d 273, 320 (3d Cir. 2011) (*en banc*); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness"). This is especially so when, as here, the Settlement was the product of intense negotiations and with the assistance of an experienced neutral mediator. *Hall v. AT&T Mobility, LLC*, 2010 WL 4053547, *26 (D.N.J. Oct. 13, 2010) ("the participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length…") (quoting *Bert v. AK Steel Corp.*, 2008 WL 4683747 (S.D. Ohio Oct. 23, 2008)); *In re National Football League Players' Concussion Injury Litigation*, 301 F.R.D. 191, 198 (E.D. Pa. 2014) (same).

And fourth, a class action settlement should be approved if the district court finds "that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Third Circuit has identified nine factors—known as the *Girsh* factors—that bear upon this analysis: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *GM*

Trucks, 55 F.3d at 785-86 (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)). In addition, the Third Circuit has identified several additional relevant and partially overlapping factors – known as the "*Prudential*" factors: (1) the maturity of the underlying issues; (2) the comparison between the results for settlement class members as compared to other claimants; (3) the ability to opt out of the settlement; (4) whether attorneys' fees are reasonable; and (5) whether the claims process is fair and reasonable. *Prudential II*, 148 F.3d 283, 323 (3d Cir. 1998).

As shown below and in Class Counsel's Unopposed Motion for Final Approval of Class Action Settlement (ECF 111, "Final Approval Motion"), the proposed Class Settlement clearly meets these factors, is clearly fair, reasonable and adequate under Rule 23, and should be granted final approval.

II. THIS SETTLEMENT SATISFIES ALL OF THE *GIRSH* FACTORS

Factor 1 – The Complexity and Duration of the Litigation

This factor clearly supports final approval of the Settlement. As addressed during the preliminary approval process, and reiterated in Plaintiffs' Final Approval Motion (ECF 111), this putative class action involves very complex automotive issues relating to complex vehicle components in the putative class vehicles. The factual and legal claims are highly disputed, and litigation of this action through full discovery, summary judgment motions, a class certification motion, other pre-trial proceedings, *in limine* motions, a potential trial, and potential appeals, would

undoubtedly be complex, expensive, and lengthy in duration - - with the result uncertain. *See Careccio v. BMW of North America LLC*, 2010 WL 1752347, *4 (D.N.J. Apr. 29, 2010); *In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 571 (9th Cir. 2019).

Factor 2 – The Reaction of the Class to the Settlement

The Class' reaction to the Settlement has been resoundingly positive. As discussed, of the 305,423 Settlement Class Members, **there are no objections to the Settlement and only a mere 32 requests for exclusion** (0.01% of the Class). Such an overwhelmingly positive response from the Class strongly favors final approval. *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) (objections by 29 members of a class comprised of 281 "strongly favors settlement"); *Varacallo, supra,* 226 F.R.D. at 237 (exclusions amounting to about .06% of the class, and objections amounting to about .003% of the class constituted "extremely low" numbers that "weighed in favor of approving" the proposed settlement); *In re Mercedes Benz Emissions Litigation*, 2021 WL 7833183, *10 (D.N.J. Aug. 2, 2021) (18 objections out of 438,290 members indicates that "the Class as a whole…favors approval"); *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 643 (D.N.J. 2004) ("Courts [have] construe[d] class member's failure to object to proposed settlement terms as evidence that the settlement is fair and reasonable."); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995) (100 objections

out of 30,000 class members weighs in favor of final approval of the class settlement); *Myers v. Medquist, Inc.*, 2009 WL 900787, *12 (D.N.J. Mar. 31, 2009) (noting that based on the low number of objectors and opt-outs, the court was "justified in assuming more than 98% of the Class Members" approved the settlement).

In addition, "CAFA" notice of the Settlement was timely sent to the U.S. Attorney General and the applicable State Attorneys General (Settlement Agreement § IV.A; Declaration Lara Jarjoura dated December 2, 2024, ECF 112), and none have objected to, or raised any concern about, this Settlement.

Factor 3 – The Stage of the Proceedings

As this Court found in its Preliminary Approval Order, "[t]he proceedings that occurred before the Parties entered into the Settlement Agreement afforded counsel for both sides the opportunity to adequately assess the claims and defenses in the Action, the relative positions, strength, weaknesses, risks and benefits to each party, and as such, to negotiate a Settlement Agreement that is fair, reasonable and adequate and reflects those considerations." (ECF 109, ¶8). Nothing has changed since the settlement was preliminarily approved that would contradict this prior finding, and as such, this factor is readily satisfied.

Factors 4 and 5 – The Risks of Establishing Liability and Damages

This action involves highly disputed claims regarding the design, manufacture, marketing, sale, and warranting of complex vehicles and components. Defendant maintains that the Settlement Class Vehicles were properly designed, manufactured, marketed, and distributed; that they are not defective; that there was no breach of any express or implied warranty; and that no applicable statutes or legal obligations were violated. Moreover, the majority of Settlement Class Members have never experienced and will never experience any problem with their vehicles' front door wiring harness.

Defendant also has numerous significant defenses to this action which, if litigated to conclusion, could bar completely and/or substantially reduce all or many Settlement Class Members' potential recoveries under the applicable state laws. These defenses include lack of standing, lack of manifestation of the alleged issue, lack of privity with Defendants, absence of a duty to disclose under applicable states' laws, prudential mootness based on the recall that addressed and remedied the alleged issue, "economic loss rule" bars to recovery, other statutory and common law bars to recovery, lack of recoverable damages, and many other common law and statutory defenses applicable to particular Settlement Class Members' claims.

The significant risks to Plaintiffs of further litigation make the outcome very uncertain, and clearly favor final approval of this excellent Class Settlement.

Factor 6 – The Risks of Maintaining a Class Action

This factor also favors final approval. In the absence of a class settlement there would be significant risks to Plaintiffs of not obtaining class certification and/or not maintaining it through trial or appeal.

Numerous individualized factual and legal issues would likely predominate and adversely affect the ability to certify a class in the litigation context. They include individualized issues relating to whether and to what extent any Settlement Class Member ever experienced any front door wiring harness failure, and if so, the circumstances and root causes of such failure; whether, when and under what circumstances any Settlement Class Member ever presented any such alleged issue to an authorized dealership for examination and repair; the different conditions of each Settlement Class Vehicle; whether and to what extent the vehicle may have sustained damage by accidents, environmental factors and/or other outside sources; individual facts and circumstances of each Settlement Class Member's purchase or leasing of, and decision-making concerning, his/her vehicle; what, if anything, each Settlement Class Member may have seen, heard or relied upon prior to purchase or lease; whether the Settlement Class Member purchased his/her vehicle new, second-hand, or third-hand or more, and if so, each said vehicle's prior history, use and maintenance; whether or to what extent any Settlement Class Member can establish

any entitlement to damages or other relief; and myriad other issues individual to each Settlement Class Member.

In addition, material differences among the laws of the 50 states regarding the various causes of action alleged in this case would likely preclude certification of a "nationwide" class if this action were litigated rather than settled.

In contrast, these issues do not preclude class certification for settlement purposes, since the Court will not be faced with the significant manageability problems of a trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Sullivan*, 667 F.3d at 302-03 ("the concern for manageability that is a central tenet in the certification of a litigation class is removed from the equation" in the case of a settlement class); *In re Merck & Co., Inc. Vytorin Erisa Litigation*, 2010 WL 547613, *5 (D.N.J. Feb. 9, 2010) (citing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 519 (3d Cir. 2004)) (manageability concerns that arise in litigation classes are not present in settlement classes); *O'Brien v. Brain Research Labs, LLC*, 2012 WL 3242365, at *9 (D.N.J. Aug. 9, 2012) ("because certification is sought for purposes of settlement and is not contested, the concerns about divergent proofs at trial that underlie the predominance requirement are not present here"); *Beneli v. BCA Financial Services, Inc.*, 324 F.R.D. 89, 96 (D.N.J. 2018) (same).

Thus, this Settlement provides very significant benefits which would likely not be available to the Settlement Class outside the context of a class settlement.

Factor 7 – Defendant's Ability to Withstand a Greater Judgment

Courts routinely find that the seventh factor is only relevant when the Parties use the defendant's inability to pay to justify a reduced settlement. *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 440 (3d Cir. 2016). This does not apply here, so this factor is neutral.

Factors 8 and 9 – The Range of Reasonableness of the Settlement in Light of the Best Recovery and Risks of Litigation

This Settlement provides very significant benefits to the Settlement Class. First, for current owners and lessees of Settlement Class Vehicles, it provides a robust warranty extension covering the cost of repair or replacement, by an authorized Volkswagen dealer, of a failed front door wiring harness that was modified and/or installed in the Settlement Class Vehicle pursuant to Recall 97GF, during a period of up to 5 years or 60,000 miles (whichever occurs first) from the date that the Recall repair was performed on the vehicle. This is a very substantial extension of these vehicles' original New Vehicle Limited Warranties which run from the vehicles' In-Service Dates rather than a later date that a replacement part may have been installed.

Second, for current and former owners and lessees of Settlement Class Vehicles, the Settlement provides for reimbursement of past paid expenses for repair or replacement of a failed front door wiring harness in a Settlement Class Vehicle

which occurred prior to the Notice Date and within 7 years or 100,000 miles (whichever occurred first) of the Settlement Class Vehicle's In-Service Date.

This is an excellent Class Settlement of which this Court rightfully granted preliminary approval. In doing so, the Court preliminarily found that the Settlement is "fair, reasonable, and adequate under Rule 23" (Preliminary Approval Order, ECF 109 at ¶6). Nothing has changed since that time that would warrant a different determination for final approval. The settlement clearly meets the requirements of Rule 23, especially when considering the appreciable risks to Plaintiffs of non-certification in the litigation context, non-recovery, or at the very least, a substantially reduced or delayed recovery in the absence of this Settlement. Accordingly, the Settlement, to which there has been no objection, should be granted final approval.

III. THE RELEVANT *PRUDENTIAL* FACTORS SUPPORT APPROVAL

This Settlement also readily satisfies the additional factors the Third Circuit identified in *Prudential II*, which are: (1) the maturity of the underlying issues; (2) the comparison between the results for settlement class members as compared to other claimants; (3) the ability to opt out of the settlement; (4) whether attorneys' fees are reasonable; and (5) whether the claims process is fair and reasonable. *Prudential II*, 148 F.3d 283, 323 (3d Cir. 1998).

With respect to (1), this Court has already found, as stated in the Preliminary Approval Order, that the "proceedings that occurred before the Parties entered into the Settlement Agreement afforded counsel for both sides the opportunity to adequately assess the claims and defenses in the Action…." (ECF 109, ¶8). With respect to (2), the Settlement affords significant benefits to the Settlement Class Members which, from our perspective, and given the significant defenses and impediments to recovery and class certification in this case, are significantly more than an individual would likely achieve outside of this Settlement. With respect to (3), the Settlement Class Members were afforded an ample and reasonable amount of time for opting out of the Settlement Class, if they so wished, and were provided clear and easy directions in the Class Notice for doing so. Regarding factor (4), the Parties did not begin to discuss the issue of reasonable Class Counsel fees and expenses until after reaching agreement on the material terms of this Settlement, and the agreement ultimately reached is subject to this Court's approval. And finally, with respect to factor (5), the claims process is fair and reasonable, consistent with other automotive class settlements approved in this District, was clearly spelled out in the Class Notice, and is being administered by an experienced third-party claim administration company, JND Legal Administration.

Accordingly, all of the *Prudential* factors are clearly met as well.

IV. THE COURT SHOULD DENY THE UNTIMELY AND/OR INVALID REQUESTS FOR EXCLUSION

The Preliminary Approval Order (ECF 109, ¶18) mandated that in order to be valid, a request for exclusion from the proposed settlement must be "postmarked no later than forty-five (45) days after the Notice Date," and include all of the following information:

(a) the full name, address and telephone number of the person or entity seeking to be excluded from the Settlement Class and the model, model year and VIN of the Settlement Class Vehicle;

(b) a statement that he/she/it is a present or former owner or lessee of a Settlement Class Vehicle; and

(d) a specific and unambiguous statement that he/she/it desires to be excluded from the Settlement Class.

The Notice Date was October 10, 2024, meaning that requests for exclusion had to be postmarked no later than November 25, 2024. These were basic and simple requirements, and pursuant to the Preliminary Approval Order, "[a]ny Settlement Class Member who fails to submit a timely and complete Request for Exclusion sent to the proper addresses shall remain in the Settlement Class and shall be subject to and bound by all determinations, orders and judgments in the Action concerning the Settlement, including but not limited to the Released Claims set forth in the Settlement Agreement" (ECF 109, ¶19).

The Class Notice similarly advised that individuals that do not exclude themselves "from the Settlement by taking the steps described" in the Class Notice "will remain in the Settlement Class and will be bound by all terms and provisions of the Settlement Agreement, including the release of claims…." (ECF 98-2, p. 75).

Here, of the 32 requests for exclusion that were received, 4 are untimely and also invalid because they fail to state whether the person seeking exclusion is a current or former owner or lessee of a Settlement Class Vehicle, as was required (Julio Gomez Juarez and Juanita Gaxiola Isaguirre [Exhibit A], Tyrina Quinn [Exhibit B], Olga Voznuk [Exhibit C] and Marina Gonzalez [Exhibit D]). In addition, 2 of the requests for exclusion are invalid because they identify vehicles that are not part of the Settlement Class (Marianne Foresch [Exhibit E] and Marc Buck [Exhibit F]). Finally, one request is invalid because it fails to state that the person requesting exclusion is a current or former owner or lessee of a Settlement Class Vehicle, as was also required (Mia Fiske [Exhibit G]).

Accordingly, these untimely and/or invalid requests for exclusion should be rejected.

V. CONCLUSION

For the foregoing reasons, VWGoA respectfully requests that this Court grant final approval of the Class Settlement and reject the seven untimely and/or invalid

requests for exclusion; together with such other and further relief as the Court deems just and proper.

Dated: December 9, 2024

Respectfully submitted,

By: */s/ Homer B. Ramsey*

Homer B. Ramsey
hramsey@shb.com
Michael B. Gallub (*Pro Hac Vice*)
mgallub@shb.com
Brian T. Carr
bcarr@shb.com (*Pro Hac Vice*)
SHOOK, HARDY & BACON L.L.P.
101 Hudson Street, 21st Floor
Jersey City, New Jersey 07302
Telephone: (201) 660-9995

Attorneys for Defendant