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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN “CLEAN DIESEL”
MARKETING, SALES PRACTICES, AND
PRODUCTS LIABILITY LITIGATION

MDL No. 2672 CRB (JSC)
CLASS ACTION

_____/

This Document Relates To: Securities Actions

City of St. Clair Shores, 15-1228 (E.D. Va.)
Travalio, 15-7157 (D.N.J.)
George Leon Family Trust, 15-7283 (D.N.J.)
Charter Twp. of Clinton, 15-13999 (E.D. Mich.)
Wolfenbarger, 15-326 (E.D. Tenn.)

_____/

**PLAINTIFFS’ NOTICE OF MOTION
FOR FINAL APPROVAL OF
SETTLEMENT AND PLAN OF
ALLOCATION, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Judge: Hon. Charles R. Breyer
Courtroom: 6
Date: May 10, 2019
Time: 10:00 a.m.

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1 **NOTICE OF MOTION FOR FINAL APPROVAL**
2 **OF SETTLEMENT AND PLAN OF ALLOCATION**

3 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

4 PLEASE TAKE NOTICE that, in accordance with Rule 23(e) of the Federal Rules of Civil
5 Procedure and the Court’s Order Granting Motion for Preliminary Approval of Settlement (“Preliminary
6 Approval Order,” ECF No. 5593), on May 10, 2019, at 10:00 a.m., Lead Plaintiff Arkansas State
7 Highway Employees’ Retirement System (“ASHERS” or “Lead Plaintiff”) and named Plaintiff Miami
8 Police Relief and Pension Fund (“Miami Police,” and together with ASHERS, “Plaintiffs”) will move
9 the Court, before the Honorable Charles R. Breyer, for (1) entry of a Judgment granting final approval
10 of the proposed settlement of this Action (the “Settlement”) and (2) entry of an Order granting approval
11 of the proposed plan of allocation of the net proceeds of the Settlement (the “Plan of Allocation”).

12 This Motion is based on the following Memorandum of Points and Authorities, the accompanying
13 Declaration of James A. Harrod in Support of (I) Plaintiffs’ Motion for Final Approval of Settlement and
14 Plan of Allocation and (II) Lead Counsel’s Motion for An Award of Attorneys’ Fees and Reimbursement
15 of Litigation Expenses (“Harrod Declaration” or “Harrod Decl.”) and its exhibits, all other prior pleadings
16 and papers in this Action, arguments of counsel, and any additional information or argument that may be
17 required by the Court.

18 A proposed Judgment and proposed Order approving the Plan of Allocation will be submitted with
19 Plaintiffs’ reply submission on May 3, 2019, after the April 18, 2019 deadline for Settlement Class
20 Members to request exclusion from the Settlement Class or object to the Settlement or Plan of Allocation
21 has passed.

22 **STATEMENT OF ISSUES TO BE DECIDED**

- 23 1. Whether the Court should approve the proposed Settlement as fair, reasonable, and
24 adequate under Rule 23(e).
- 25 2. Whether the Court should approve the Plan of Allocation as fair and reasonable.
- 26 3. Whether the Court should finally certify the Action as a class action under Rules 23(a) and
27 (b)(3) for the purposes of the Settlement only.
- 28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs ASHERS and Miami Police, on behalf of themselves and the Settlement Class,
3 respectfully submit this memorandum in support of their motion for final approval of the proposed
4 Settlement and approval of the proposed Plan of Allocation for the Settlement proceeds.¹

5 **I. PRELIMINARY STATEMENT**

6 Subject to Court approval, Plaintiffs have agreed to settle all claims in the Action in exchange for
7 a cash payment by or on behalf of VWAG of \$48 million, which has been deposited into an escrow
8 account. Plaintiffs respectfully submit that the proposed Settlement is an excellent result for the Settlement
9 Class and satisfies the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure.
10 As detailed in the accompanying Harrod Declaration and summarized in this memorandum, the proposed
11 Settlement represents approximately 33% of the likely maximum recoverable damages in the Action,
12 which is an excellent recovery for the Settlement Class.²

13 The Settlement was reached after extensive litigation and is the product of arm's-length settlement
14 negotiations that involved highly experienced counsel on both sides. The Settlement is also favorable to
15 the Settlement Class in light of the risks of continued litigation. As discussed below and in the Harrod
16 Declaration, there was a real risk in this Action that Plaintiffs would be unable to establish that Defendants
17 acted with scienter, particularly considering the significant challenges Plaintiffs faced in proving that
18 VW's senior management, including the Individual Defendants, had direct knowledge about the emissions
19 violations. Moreover, Plaintiffs faced risks in establishing that Defendants' alleged false statements about
20 Volkswagen's compliance with emissions regulations were material to investors and that the correction
21 of prior false statements, rather than other factors, was the cause of the price declines in VWAG ADRs
22 during the Class Period.

23 _____
24 ¹ Unless otherwise defined in this memorandum, all capitalized terms have the meanings defined in the
25 Stipulation and Agreement of Settlement, dated August 27, 2018 (ECF No. 5267-1) (the "Stipulation" or
26 "Settlement Stipulation") or the Harrod Declaration. Citations to "¶" herein refer to paragraphs in the
27 Harrod Declaration.

28 ² The Harrod Declaration is an integral part of this submission and, for the sake of brevity in this
memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*, the nature of
the claims asserted (¶¶ 16-18), the history of the Action (¶¶ 19-58), the negotiations leading to the
Settlement (¶¶ 59-61), the risks and uncertainties of continued litigation (¶¶ 64-90), and the terms of the
Plan of Allocation (¶¶ 100-111).

1 When the Settlement was reached, Plaintiffs and Lead Counsel were well informed of the strengths
2 and weaknesses of their case based on the extensive, hard-fought prosecution of the claims asserted in the
3 Action. Lead Counsel, *inter alia*, (i) conducted a comprehensive investigation into the claims asserted in
4 the Action and drafted the highly detailed First Consolidated Complaint and Amended Complaint;
5 (ii) researched, briefed, and argued oppositions to Defendants' two rounds of motions to dismiss the
6 complaints; (iii) filed a motion to lift the stay of discovery imposed by the PSLRA; (iv) moved for partial
7 summary judgment regarding the issues of falsity and scienter with respect to several of VWAG's alleged
8 false statements; (v) engaged in substantial fact discovery, including drafting and serving discovery
9 requests on Defendants, serving several dozen document subpoenas on nonparties, serving and responding
10 to interrogatories, obtaining and reviewing more than 4 million pages of documents produced by
11 Defendants and third parties, producing over 26,000 pages of documents to Defendants, and litigating
12 numerous discovery disputes; (vi) consulted with experts and consultants on loss causation, damages, and
13 accounting issues presented by the Action; (vii) prepared a motion for class certification, including
14 consulting with an expert on market efficiency and Class-wide damages; and (viii) negotiated the
15 Settlement with Defendants. ¶¶ 9, 19-61, 123.

16 Absent the Settlement, the Parties faced the prospect of additional protracted litigation through the
17 remainder of fact discovery, costly expert discovery, additional contested motions, a trial, post-trial motion
18 practice, individual Class member loss-causation and damages challenges, and likely ensuing appeals. The
19 Settlement avoids these risks and delays while providing a substantial, certain, and immediate benefit to
20 the Settlement Class in the form of a \$48 million cash payment.

21 The Settlement has the full support of the Court-appointed Lead Plaintiff, which is an institutional
22 investor of the type Congress favored when it passed the Private Securities Litigation Reform Act of 1995
23 ("PSLRA"). ASHERS was intimately involved in the litigation and settlement negotiations and witnessed
24 first-hand Lead Counsel's vigorous prosecution of the asserted claims. *See* Declaration of Robyn Smith
25 submitted by ASHERS (the "Smith Decl."), attached as Exhibit 1 to the Harrod Declaration, at ¶¶ 6-7.³

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27
28 ³ The Settlement also has the full support of the additional named Plaintiff, Miami Police, which was also
actively involved in the litigation and the settlement negotiations. *See* Declaration of Daniel Kerr
submitted by Miami Police (the "Kerr Decl."), attached as Exhibit 2 to the Harrod Declaration, at ¶¶ 5-6.

1 In light of the considerations discussed in this memorandum and the accompanying papers,
2 Plaintiffs and Lead Counsel submit that the Settlement is fair, reasonable, and adequate, satisfies the
3 standards of Rule 23, and provides an excellent recovery for the Settlement Class. Plaintiffs accordingly
4 respectfully request that the Court grant final approval of the Settlement and deem the Plan of Allocation,
5 presented in the mailed Notice, to be a fair and reasonable method for distributing the Net Settlement Fund
6 to eligible Settlement Class Members.

7 **II. ARGUMENT**

8 **A. THE SETTLEMENT MERITS FINAL APPROVAL BY THE COURT**

9 Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement
10 of class-action claims. *See* Fed. R. Civ. P. 23(e). A class-action settlement should be approved if the court
11 finds it “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).

12 The Ninth Circuit recognizes “a strong judicial policy that favors settlements, particularly where
13 complex class action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.
14 2008); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (“the court must
15 also be mindful of the Ninth Circuit’s policy favoring settlement, particularly in class action law suits”). Class-
16 action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties
17 of the outcome, and the typical length of the litigation. Settlements of complex cases such as this one
18 greatly contribute to the efficient utilization of scarce judicial resources and achieve the speedy resolution
19 of claims. *See, e.g., Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *10 (N.D. Cal. Apr.
20 22, 2010) (“Settlement avoids the complexity, delay, risk and expense of continuing with the litigation
21 and will produce a prompt, certain, and substantial recovery for the Plaintiff class.”).

22 Rule 23(e)(2), as amended on December 1, 2018, provides that the Court should determine whether
23 a proposed settlement is “fair, reasonable, and adequate” after considering whether:

- 24 (A) the class representatives and class counsel have adequately represented the class;
25 (B) the proposal was negotiated at arm’s length;
26 (C) the relief provided for the class is adequate, taking into account:
27 (i) the costs, risks, and delay of trial and appeal;
28

1 (ii) the effectiveness of any proposed method of distributing relief to the class, including the
2 method of processing class-member claims;

3 (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and

4 (iv) any agreement required to be identified under Rule 23(e)(3); and

5 (D) the proposal treats class members equitably relative to each other.

6 Fed. R. Civ. P. 23(e)(2). As discussed below, all of these factors strongly support approval of the
7 Settlement here.

8 To evaluate the substantive fairness of a settlement, courts in the Ninth Circuit have historically
9 considered the following factors established in cases such as *Hanlon v. Chrysler Corp.* and *Churchill*
10 *Village L.L.C. v. General Electric*:

11 (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and
12 likely duration of further litigation; (3) the risk of maintaining class action
13 status throughout the trial; (4) the amount offered in settlement; (5) the
14 extent of discovery completed and the stage of the proceedings; (6) the
15 experience and views of counsel; (7) the presence of a governmental
16 participant; and (8) the reaction of the class members to the proposed
17 settlement.

18 *Churchill*, 361 F.3d 566, 575 (9th Cir. 2004); *see also Hanlon*, 150 F.3d 1010, 1026 (9th Cir. 1998); *Lane*
19 *v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

20 The Advisory Committee Notes to the 2018 amendments to the Federal Rules of Civil Procedure
21 indicate that the four factors provided in Rule 23(e)(2) are not intended to “displace” any factor previously
22 adopted by the courts, but “rather to focus the court and the lawyers on the core concerns of procedure
23 and substance that should guide the decision whether to approve the proposal.” Advisory Committee Notes
24 to 2018 Amendments.

25 Accordingly, Plaintiffs discuss below the fairness, reasonableness, and adequacy of the Settlement
26 principally in relation to the four factors provided in Rule 23(e)(2) but also discuss the application of
27 relevant, non-duplicative *Hanlon* factors.

28 **1. Plaintiffs And Lead Counsel Have Adequately Represented The Settlement Class**

In determining whether to approve a class-action settlement, the Court should consider whether
“the class representatives and class counsel have adequately represented the class.” Fed. R. Civ. P.
23(e)(2)(A).

1 Here, both Plaintiffs and Lead Counsel have adequately represented the Settlement Class in both
 2 the litigation and the Settlement. ASHERS and Miami Police have claims that are typical of and
 3 coextensive with those of the Settlement Class, and they lack any interests that are antagonistic to the
 4 interest of other members of the Settlement Class. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d
 5 507, 512 (9th Cir. 1978); *Hanlon*, 150 F.3d at 1020. On the contrary, Plaintiffs—like all other Settlement
 6 Class Members—have an interest in obtaining the largest possible recovery from Defendants. *See In re*
 7 *Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) (“Where plaintiffs and class members share
 8 the common goal of maximizing recovery, there is no conflict of interest between the class representatives
 9 and other class members.”). Moreover, the institutional investor Plaintiffs have played an active role in
 10 supervising and participating in the litigation. *See* Smith Decl. ¶¶ 6-7; Kerr Decl. ¶¶ 5-6.

11 Plaintiffs have also retained counsel who are highly experienced in securities litigation and have
 12 successfully prosecuted may complex class action throughout the United States. *See* Ex. 4A-5 to Harrod
 13 Decl. (Bernstein Litowitz firm resume). Lead Counsel has vigorously prosecuted the Settlement Class’s
 14 claims to date by overcoming Defendants’ motions to dismiss in substantial part, winning partial summary
 15 judgment on falsity and scienter, and engaging in extensive discovery.

16 Accordingly, as the Court previously found in conditionally certifying the Settlement Class and
 17 appointing Plaintiffs as Class representatives and Lead Counsel as Class counsel, Plaintiffs and Lead
 18 Counsel have adequately represented the Settlement Class. *See* Preliminary Approval Order, ECF No.
 19 5593 at 3-4.

20 **2. The Settlement Was Reached After Substantial Discovery And Arm’s- Length Negotiations Between Experienced Counsel**

21 In weighing approval of a class-action settlement, the Court must consider whether the settlement
 22 “was negotiated at arm’s length.” Fed. R. Civ. P. 23(e)(2)(B). Courts have traditionally considered other
 23 related circumstances in determining the “procedural” fairness of a settlement, including (i) counsel’s
 24 understanding of the strengths and weakness of the case based on factors such as “the extent of discovery
 25 completed and the stage of the proceedings”;⁴ (ii) the “experience and views of counsel”;⁵ and (iii) the
 26

27 ⁴ *See Hanlon*, 150 F.3d at 1026 (fifth factor).

28 ⁵ *See id.* (sixth factor).

1 absence of any indicia of collusion.⁶ These circumstances strongly support the approval of the Settlement
2 here.

3 As courts in this District have found, the fact that the Parties reached the Settlement after arm's-
4 length negotiations between experienced counsel creates a presumption of its fairness. *See In re Netflix*
5 *Privacy Litig.*, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) (“Courts have afforded a presumption
6 of fairness and reasonableness of a settlement agreement where that agreement was the product of non-
7 collusive, arms’ length negotiations conducted by capable and experienced counsel”); *Stewart v. Applied*
8 *Materials, Inc.*, 2017 WL 3670711, at *6 (N.D. Cal. Aug. 25, 2017) (in deciding whether to approve a
9 proposed class-action settlement, “[t]he recommendations of plaintiffs’ counsel should be given a
10 presumption of reasonableness”); *Linney v. Cellular Alaska P’ship*, 1997 WL 450064, at *5 (N.D. Cal.
11 July 18, 1997) (“The involvement of experienced class action counsel and the fact that the settlement
12 agreement was reached in arm’s length negotiations, after relevant discovery had taken place create a
13 presumption that the agreement is fair.”), *aff’d*, 151 F.3d 1234 (9th Cir. 1998).

14 Indeed, the Settlement merits a presumption of fairness because it was achieved after arm’s-length
15 negotiations between well-informed and experienced counsel after a substantial amount of discovery was
16 completed in the Action. ¶¶ 59-61; *see In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *3 (C.D. Cal.
17 Oct. 25, 2016); *Nat’l Rural Telecomms. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)
18 (finding that “a settlement following sufficient discovery and genuine arms-length negotiation is presumed
19 fair.”); *Eisen v. Porsche Cars N. Am., Inc.*, 2014 WL 439006, at *4 (C.D. Cal. Jan. 30, 2014) (approving
20 settlement when record established that “all counsel had ample information and opportunity to assess the
21 strengths and weaknesses of their claims and defenses”).

22 In addition, as noted above, the Parties and their counsel were knowledgeable about the strengths
23 and weaknesses of the case before reaching the agreement to settle it. Lead Counsel conducted a detailed,
24 substantive investigation into the allegations in the First Consolidated Complaint and Amended Complaint
25 by, among other things, reviewing SEC filings, analyst research reports, investor conference calls, press
26 releases, media reports, Volkswagen advertisements and marketing materials, information from
27

28 ⁶ *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

1 government and private actions filed against Defendants, and other public materials. ¶¶ 25-27, 39. Lead
2 Counsel also performed extensive legal research in preparing the complaints, the briefing in opposition to
3 Defendants’ two rounds of motions to dismiss, and Plaintiffs’ motion for partial summary judgment. ¶¶ 25,
4 30-35, 39-41, 45-48. After the motions to dismiss the Amended Complaint were decided, Lead Counsel
5 obtained a substantial amount of fact discovery, including over 4 million pages of documents produced
6 by Defendants and third parties, the review of which was underway at the time of the Settlement. ¶¶ 50-
7 57. Lead Counsel also consulted with experts regarding accounting, loss causation, and damages to
8 enhance their understanding of the subject matter of the Action. ¶¶ 26, 58, 81-85, 103, 123, 136. Finally,
9 the Parties engaged in extensive settlement negotiations, including the exchange of information
10 concerning Class-wide damages and other merits-based considerations, which further informed the Parties
11 of the strength of each side’s arguments. ¶¶ 59-61.

12 The conclusion of Lead Counsel that the Settlement is fair and reasonable and in the best interests
13 of the Settlement Class further supports its approval. “The recommendation of experienced counsel
14 carries significant weight in the court’s determination of the reasonableness of the settlement.”
15 *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *see also DirectTV*, 221 F.R.D. at 528
16 (“‘Great weight’ is accorded to the recommendation of counsel . . . because ‘parties represented by
17 competent counsel are better positioned than courts to produce a settlement that fairly reflects each
18 party’s expected outcome in the litigation’”) (citation omitted). Here, as discussed above, Lead Counsel
19 has a thorough understanding of the merits and risks of the Action and extensive prior experience in
20 securities litigation. ¶¶ 64-90, 122. Therefore, Lead Counsel’s belief that the Settlement represents a favorable
21 outcome for Settlement Class Members should be given substantial weight.

22 In addition, Plaintiffs, who have a substantial financial interest in the outcome of the case and
23 actively supervised the litigation, strongly endorse the Settlement. *See* Smith Decl. ¶¶ 6-7; Kerr Decl.
24 ¶¶ 5-6. Courts have considered “the role taken by the lead plaintiff in [the settlement] process, a factor
25 somewhat unique to the PSLRA.” *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *3 (N.D.
26 Cal. Nov. 26, 2007). Under the PSLRA, the Plaintiffs’ support for a settlement should be accorded “special
27 weight” because plaintiffs “have a better understanding of the case than most members of the class.”
28 *DirectTV*, 221 F.R.D. at 528; *see also In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *5

1 (S.D.N.Y. Nov. 7, 2007) (a settlement reached “under the supervision and with the endorsement of a
2 sophisticated institutional investor . . . is ‘entitled to an even greater presumption of reasonableness’”).

3 Further, the Settlement has none of the indicia of possible collusion identified by the Ninth Circuit,
4 such as a clear-sailing fee agreement or a provision that would allow settlement proceeds to revert to
5 Defendants. *See Bluetooth Headset*, 654 F.3d at 947. In short, the Settlement here was reached after arm’s-
6 length negotiations by capable counsel and was not a product of fraud, overreaching, or collusion among
7 the Parties.

8 **3. The Relief That The Settlement Provides For The Settlement Class Is**
9 **Adequate, Taking Into Account The Costs And Risks Of Further**
10 **Litigation And All Other Relevant Factors**

11 In determining whether a class-action settlement is “fair, reasonable, and adequate,” the Court
12 must consider whether “the relief provided for the class is adequate, taking into account . . . the costs,
13 risks, and delay of trial and appeal,” as well as other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). This
14 factor under Rule 23(e)(2)(C) essentially encompasses four of the seven factors of the traditional *Hanlon*
15 analysis: (1) the strength of Plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further
16 litigation; (3) the risk of maintaining class-action status throughout the trial; and (4) the amount offered
17 in settlement. *See Hanlon*, 150 F.3d at 1026. As demonstrated below, each of these factors supports
18 approval of the Settlement under Rule 23(e)(2)(C).

19 **a. The Amount Offered In Settlement**

20 The amount of a settlement “is generally considered the most important [factor], because the
21 critical component of any settlement is the amount of relief obtained by the class.” *Destefano v. Zynga,*
22 *Inc.*, 2016 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016).

23 “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery
24 does not per se render the settlement inadequate or unfair.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
25 454, 459 (9th Cir. 2000). In assessing the recovery, a fundamental question is how the value of the
26 settlement compares to the amount the class potentially could recover at trial, discounted for risk, delay,
27 and expense. “Naturally, the agreement reached normally embodies a compromise; in exchange for the
28 saving of cost and elimination of risk, the parties each give up something they might have won had they
proceeded with litigation.” *Officers of Justice v. Civ. Serv. Comm’n of City and Cnty. of S.F.*, 688 F. 2d

1 615, 624 (9th Cir. 1982); *see also Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *11 (S.D.N.Y.
2 Mar. 24, 2014) (holding that settlement amount must be judged “not in comparison with the possible
3 recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs’
4 case”).

5 Here, the Settlement Amount—\$48 million in cash—represents a significant recovery for the
6 Settlement Class. The Settlement is approximately *six times* the size of the median securities-class-action
7 settlement in the Ninth Circuit between 2009 and 2018 (\$8.3 million). *See* Cornerstone Research,
8 *Securities Class Action Settlements 2018 Review and Analysis* (2019), at 19 (Harrod Decl. Ex. 6)
9 (“Cornerstone Report”). More importantly, the proposed recovery would provide a substantial financial
10 benefit to the Settlement Class in comparison to overall potential damages and eliminate the significant
11 risk that the Settlement Class could recover less, or even nothing at all, if the Action continued. ¶¶ 4, 64-
12 90.

13 Plaintiffs’ damages expert has estimated that the likely maximum recoverable damages for the
14 Settlement Class in the Action would be \$147 million. ¶¶ 6, 91-92. Thus, the \$48 million Settlement
15 represents approximately 33% of the likely recoverable damages that would have been established if
16 Plaintiffs prevailed at trial (assuming a favorable resolution of the loss-causation and damages issues).
17 Indeed, Defendants would have raised several other arguments concerning loss causation and damages
18 that would have substantially reduced the Class-wide damages. ¶¶ 81-85. This recovery is many multiples
19 above the typical percentage recovery in securities actions, which are known to present complicated
20 questions of proof for plaintiffs. For example, one study has found that, from 2009 to 2017, in all securities
21 class actions where damages were estimated to be in the range of \$75–\$149 million, the median settlement
22 recovery was only 5.0% of damages (before reductions for attorneys’ fees and litigation expenses). *See*
23 *Cornerstone Report* at 6. Based on these statistics, courts have routinely approved and even lauded
24 settlements with substantially lower percentage recoveries than here. *See, e.g., In re Biolase, Inc. Sec.*
25 *Litig.*, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (finding that settlement recovery of 8% of
26 maximum recoverable damages “equals or surpasses the recovery in many other securities class actions”);
27 *Omnivision*, 559 F. Supp. 2d at 1042 (finding that settlement yielding 9% of potential damages was “higher
28 than the median percentage of investor losses recovered in recent shareholder class action settlements”);

1 *McPhail v. First Command Fin. Planning, Inc.*, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding
 2 that securities-class-action settlement recovery of 7% of estimated damages “weigh[s] in favor of final
 3 approval”); *IBEW v. Int’l Game Tech.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving
 4 settlement representing “about 3.5% of the maximum damages that Plaintiffs believe[d] could be recovered
 5 at trial” and finding it “within the median recovery in securities class actions settled in the last few years”).

6 When viewed in this context and relative to other securities recoveries nationwide, the recovery
 7 achieved in this case is extremely favorable to the Settlement Class. Indeed, it is even more so in light of
 8 the substantial risks of establishing liability and damages here, as discussed below.

9 **b. The Strength Of Plaintiffs’ Case And The**
 10 **Significant Risks Of Continued Litigation**

11 Courts evaluating proposed class-action settlements consider the strength of the plaintiffs’ case
 12 and the risks of further litigation. *See Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).
 13 To determine whether the proposed Settlement is fair, reasonable, and adequate, the Court “must balance
 14 the risks of continued litigation, including the strengths and weaknesses of plaintiff’s case, against the
 15 benefits afforded to class members, including the immediacy and certainty of a recovery.” *Knapp v. Art.com,*
 16 *Inc.*, 283 F. Supp. 3d 823, 831 (N.D. Cal. 2017).

17 In considering whether to enter into the Settlement, Plaintiffs, represented by counsel experienced
 18 in securities litigation, weighed the risks inherent in establishing the elements of their claims, including
 19 risks of proving falsity, materiality, scienter, loss causation, and recoverable damages, as well as the
 20 expense and likely duration of the Action. Plaintiffs and Lead Counsel believed in the merits of the claims
 21 they asserted, but also recognized that there were considerable risks. Plaintiffs and Lead Counsel were
 22 aware that, in order to defeat a summary-judgment motion and prevail at trial, they would have to prove
 23 not only that Defendants’ statements about Volkswagen’s emissions violations were false or misleading
 24 but also that those statements were material; that Defendants knew or were reckless in not knowing that
 25 their statements were false when made; and that those statements were corrected and caused recoverable
 26 damages for the Settlement Class. Each of these elements is addressed in turn below.

27 **Materiality.** Defendants contended that any false or misleading statements they may have made in
 28 Volkswagen’s marketing materials and about Volkswagen’s compliance with U.S. emissions regulations,

1 particularly in the subject vehicles' emissions-compliance stickers, were not material to investors and thus
2 not actionable. ¶¶ 72-74, 76. In particular, Defendants argued and would have continued to argue that
3 statements in vehicle stickers and marketing brochures about Volkswagen vehicles' compliance with
4 emissions regulations were not directed to investors in VWAG ADRs and could not be presumed to be
5 relied upon by investors under the fraud-on-the-market doctrine.

6 **Scienter.** A defendant's state of mind in a securities case "is the most difficult element of proof and
7 one that is rarely supported by direct evidence" such as an admission. *Amgen*, 2016 WL 10571773, at *3;
8 *see also In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (noting that
9 scienter is a "complex and difficult [element] to establish at trial"). Had the litigation continued, proof of
10 scienter would have been extremely challenging here, as Plaintiffs faced a significant hurdle in
11 establishing that VW's senior management, including the Individual Defendants, had direct knowledge
12 about the emissions violations. ¶¶ 77-80.

13 For example, Defendants argued and would have continued to argue that VW's senior management
14 were not aware of the defeat devices until shortly before the end of the Class Period, and that VWAG's
15 guilty plea in the criminal case concerning the emissions scandal addressed only one of Defendants'
16 alleged misrepresentations and did not establish that knowledge of the defeat devices reached senior
17 executives whose scienter is attributable to VWAG. ¶¶ 78, 80.

18 Plaintiffs would also have faced enormous challenges in obtaining the evidence necessary to
19 establish Defendants' scienter due to the absence of any discovery procedures under German law like
20 those available in the United States. Indeed, Plaintiffs' ability to obtain testimony in support of their
21 scienter allegations, as well as other aspects of the case, would have been either difficult (if German-
22 resident witnesses were unwilling to testify voluntarily, as was likely because many were under risk of
23 personal legal jeopardy), or procedurally onerous and expensive (due to the need for travel to Germany or
24 other locations in Europe and for translation and other services). ¶ 79.

25 Further, the difficulty of proving Defendants' scienter is underscored by the fact that despite
26 Plaintiffs' discovery efforts and investigations by multiple prosecutors, regulators, and other private
27 parties (in both the United States and Europe), little evidence has ever been uncovered directly linking
28 any of the Individual Defendants to the alleged fraud. Considering the Court's ruling on Plaintiffs' motion

1 for partial summary judgment, which established that Plaintiffs could prove scienter only by
2 demonstrating that one of the Individual Defendants, or another VW employee, who made a false and
3 misleading statement had knowledge or acted recklessly with respect to the emissions fraud, the lack of
4 evidence showing a direct link between the Individual Defendants and the fraud is significant. Indeed, if
5 Plaintiffs were unable to meet the standard of proof established by the Court and demonstrate that
6 Defendants acted with scienter, this would have resulted in zero recovery for the Settlement Class. ¶ 80.

7 **Loss Causation.** Plaintiffs also faced substantial challenges in proving that the revelation of the
8 truth about Defendants' false and misleading statements caused the declines in the prices of VWAG
9 ADRs, and in establishing the amount of Class-wide damages. ¶¶ 81-85. Defendants would have argued
10 that the fraud concerning the subject vehicles' violations of emissions standards was fully revealed to
11 investors no later than September 22, 2015, if not earlier, and that none of the declines associated with
12 Plaintiffs' subsequent alleged corrective disclosures revealed any truth concerning the fraud to investors,
13 and thus that the subsequent declines could not satisfy the applicable loss-causation standards. ¶¶ 82-83.
14 If accepted by the Court or a jury, this argument would have reduced the Class's recoverable damages by
15 50% or more. Defendants would also have made substantial arguments that the price declines on many of
16 Plaintiffs' alleged corrective-disclosure dates were not due to revelation of the alleged misstatements or
17 omissions, but instead were responses to repetitive details about the previously disclosed emissions
18 problem, additional governmental investigations, or unrelated news about Volkswagen. ¶ 84. Indeed, at
19 summary judgment and trial and on appeal, Defendants would have challenged each of the claimed
20 corrective disclosures as inadequate to support loss causation. *Id.*

21 The resolution of these disputed issues regarding damages and loss causation would have come
22 down to a battle of experts, and Defendants would undoubtedly have been able to present a well-qualified
23 expert who would opine that the Class's damages were small or nonexistent. ¶85. As Courts have long
24 recognized, the uncertainty as to which side's expert's view might be credited by the jury presents a
25 substantial litigation risk. *See In re Celera Corp. Sec. Litig.*, 2015 U.S. Dist. LEXIS 157408, at *17 (N.D.
26 Cal. Nov. 20, 2015) (finding that risks related to the "battle of experts" weighed in favor of settlement
27 approval); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) ("[P]roof of
28

1 damages in securities cases is always difficult and invariably requires expert testimony which may, or
2 may not be, accepted by a jury.”).

3 **c. The Risk of Maintaining Class-Action Status Through Trial**

4 At the time the Settlement was reached, Plaintiffs had prepared their motion for class certification
5 (due on July 27, 2018, just nine days after the settlement in principle was reached) but had not yet filed it.
6 While Plaintiffs fully believe that this Action is appropriate for class treatment, if the litigation had
7 continued, Defendants would undoubtedly have raised various challenges to certification of the Class
8 (¶ 86), including whether the locations of individual Class members’ purchases of unlisted, over-the-
9 counter VWAG ADRs created individual questions as to the applicability of § 10(b) to those transaction
10 under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), precluding class certification. *Id.*
11 Even assuming that Plaintiffs obtained class certification, there was a risk of an interlocutory Rule 23(f)
12 appeal or decertification at a later stage in the proceedings. Accordingly, the risk and uncertainty
13 surrounding certification of the Settlement Class also support approval of the Settlement. *See Bendon v.*
14 *DTG Operations, Inc.*, 2018 WL 4976511, at *5 (C.D. Cal. Aug. 22, 2018); *In re Volkswagen “Clean*
15 *Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 2017 WL 2212783, at *14 (N.D. Cal. May 17, 2017).

16 **d. The Complexity, Expense, and Likely Duration of Litigation**

17 Courts consistently recognize that the expense, complexity, and possible duration of the litigation
18 are key factors in evaluating the reasonableness of a settlement. *See, e.g., Torrissi*, 8 F.3d at 1375-76
19 (finding that “the cost, complexity and time of fully litigating the case” rendered the settlement fair).
20 “Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to
21 lengthy and expensive litigation with uncertain results.” *In re LinkedIn User Privacy Litig.*, 309 F.R.D.
22 573, 587 (N.D. Cal. 2015). Due to the “notorious complexity” of securities class actions in particular,
23 settlement is often appropriate because it “circumvents the difficulty and uncertainty inherent in long,
24 costly trials.” *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, 2006 WL 903236, at *8 (S.D.N.Y.
25 Apr. 6, 2006); *see also In re Heritage Bond Litig.*, 2005 WL 1594403, at *6 (C.D. Cal. June 10, 2005)
26 (finding that class actions have well-deserved reputation as most complex litigation).

27 Continuing litigation through the conclusion of fact discovery, expert discovery, class certification,
28 summary judgment, trial, and appeals would have been extremely expensive and would have delayed any

1 recovery for Settlement Class Members, possibly for years. *See Zynga*, 2016 WL 537946, at *10; *Amgen*,
 2 2016 WL 10571773, at *3 (“A trial of a complex, fact-intensive case like this could have taken weeks,
 3 and the likely appeals of rulings on summary judgment and at trial could have added years to the
 4 litigation.”). And even with a verdict at trial affirmed on appeal, the Settlement Class would have faced a
 5 potentially complex, lengthy, and (almost certainly) contested claims-administration process.⁷ Barring
 6 settlement, there is no question that resolution of this case would take considerable time and require
 7 additional expenses, with the end result far from certain. *See Hartless v. Clorox Co.*, 273 F.R.D. 630, 640
 8 (S.D. Cal. 2011) (“Considering these risks, expenses and delays, an immediate and certain recovery for
 9 class members . . . favors settlement of this action.”), *aff’d in relevant part*, 473 F. App’x 716 (9th Cir.
 10 2012).

11 Thus, the risk, expense, complexity, and likely duration of further litigation support approval of the
 12 Settlement. The present value of a certain recovery now, as opposed to the mere chance for a possibly
 13 greater one years later, supports approval of a settlement that eliminates the expense and delay of
 14 continued litigation and the risk that the Settlement Class could receive no recovery. *See id.* (holding that
 15 courts “shall consider the vagaries of litigation and compare the significance of immediate recovery by
 16 way of the compromise to the mere possibility of relief in the future, after protracted and expensive
 17 litigation”).

18 **e. All Other Factors Established By Rule 23(e)(2)(C) Support Approval**
 19 **Of The Settlement**

20 Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is
 21 adequate in light of “the effectiveness of any proposed method of distributing relief to the class, including
 22 the method of processing class-member claims,” “the terms of any proposed award of attorney’s fees,
 23 including timing of payment,” and “any agreement required to be identified under Rule 23(e)(3).” Fed. R.

24 _____
 25 ⁷ In other securities-fraud class actions that have gone to trial, the time from a verdict to a final judgment
 26 has been as long as seven years. *See Jaffe Pension Plan v. Household Int’l, Inc.*, No. 1:-02-cv-05893,
 27 Verdict Form, ECF No. 1611 (N.D. Ill. May 7, 2009) & Final Judgment and Order of Dismissal With
 28 Prejudice, ECF No. 2267 (N.D. Ill. Nov. 10, 2016); *see also Vivendi Universal, S.A. Sec. Litig.*, Civ. No.
 02-5571 (RJH/HBP), Verdict Form, ECF No. 998 (S.D.N.Y. Feb. 2, 2010) (jury verdict issued on Jan. 29,
 2010) & Final Judgment Approving Class Action Settlement of All Remaining Claims, ECF No. 1317
 (S.D.N.Y. May 9, 2017).

1 Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors also supports approval of the Settlement or is neutral and
2 does not suggest any basis for inadequacy of the Settlement.

3 First, the procedures for processing Settlement Class Members' claims and distributing the
4 proceeds of the Settlement to eligible claimants are well established, effective methods that have been
5 widely used in securities-class-action litigation. Here, the proceeds of the Settlement will be distributed
6 to Settlement Class Members who submit eligible Claim Forms with required documentation to the Court-
7 approved Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"). Epiq, an
8 independent company with extensive experience administering securities class actions, will review and
9 process the claims under Lead Counsel's supervision, provide claimants with an opportunity to cure any
10 deficiencies in their claims or request review of the denial of their claims by the Court, and then mail or
11 wire claimants their *pro rata* share of the Net Settlement Fund (as calculated under the Plan of Allocation)
12 upon approval of the Court.⁸ This type of claims processing is standard in securities class actions and has
13 long been used and found to be effective. This claim procedure is necessary because neither Plaintiffs nor
14 Defendants possess individual investors' trading data that would allow the Parties to create a claims-free
15 process to distribute Settlement funds.

16 Second, the relief provided for the Settlement Class in the Settlement is also adequate when the
17 terms of the proposed award of attorney's fees are taken into account. As discussed in the accompanying
18 Fee Memorandum, the proposed attorneys' fees of 25% of the Settlement Fund (net of litigation expenses),
19 to be paid upon approval by the Court, are reasonable in light of the efforts of Plaintiffs' Counsel and the
20 risks in the litigation. Most important with respect to the Court's consideration of the fairness of the
21 Settlement is the fact that approval of the requested attorneys' fees is entirely separate from approval of
22 the Settlement, and neither Plaintiffs nor Lead Counsel may terminate the Settlement based on this Court's
23 or any appellate court's ruling with respect to attorneys' fees. *See* Stipulation ¶ 17.

24 Lastly, the amended Rule 23 asks the Court to consider the proposed Settlement's fairness in light
25 of any agreements required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). Here,
26

27 ⁸ The Settlement is not a claims-made settlement. If the Settlement is approved, Defendants will have no
28 right to the return of any portion of the Settlement based on the number or value of claims submitted. *See*
Stipulation ¶ 14.

1 the only agreement so required to be identified (other than the Stipulation itself) is the Parties' confidential
2 Supplemental Agreement, which establishes the conditions under which VWAG would be able to
3 terminate the Settlement if the number of Settlement Class Members who request exclusion from the
4 Settlement Class reaches a specified threshold. This type of agreement is a standard provision in securities
5 class actions and has no negative impact on the fairness of the Settlement.

6 **4. The Settlement Treats Class Members Equitably Relative To Each Other**

7 The proposed Settlement treats members of the Settlement Class equitably relative to one another.
8 As discussed below in Part II, under the Plan of Allocation, eligible claimants approved for payment by
9 the Court will receive their *pro rata* share of the recovery based on their transactions in VWAG ADRs.
10 Plaintiffs will receive precisely the same level of *pro rata* recovery (based on their Recognized Claims as
11 calculated under the Plan of Allocation) as all other similarly situated Settlement Class Members.

12 **5. The Reaction Of The Settlement Class To The Settlement**

13 One *Hanlon* factor not included in Rule 23(e)(2) that should be considered in assessing the
14 proposed Settlement's fairness and adequacy is the Settlement Class's reaction to the proposed Settlement.
15 *See, e.g., Amgen*, 2016 WL 10571773, at *4.

16 In accordance with the Preliminary Approval Order, Epiq began mailing copies of the Notice
17 Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and nominees
18 on December 19, 2018. *See* Declaration of Alexander Villanova Regarding (A) Mailing of the Notice and
19 Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received
20 to Date ("Villanova Decl."), Exhibit 3 to the Harrod Declaration, at ¶¶ 3, 5.

21 Through April 3, 2019, Epiq had mailed a total of 217,587 copies of the Notice Packet to potential
22 Settlement Class Members and nominees. *See id.* ¶ 8. In addition, the Summary Notice was published in
23 *Investor's Business Daily* and transmitted over the PR Newswire. *See id.* ¶ 9. The Notice states the
24 essential terms of the Settlement and informs potential Settlement Class Members of, among other things,
25 their right to opt out of the Settlement Class or object to the Settlement, the Plan of Allocation, or Lead
26 Counsel's motion for attorneys' fees and expenses. The deadline set by the Court for Settlement Class
27 Members to exclude themselves or object to the Settlement is April 18, 2019. To date, nine requests for
28 exclusion have been received (*see* Villanova Decl. ¶ 15), and no objections to the Settlement, the Plan of

1 Allocation, or Lead Counsel’s fee and expense application have been filed on the Court’s docket. As
 2 provided in the Preliminary Approval Order, Plaintiffs will file reply papers on May 3, 2019, after the
 3 deadline for requesting exclusions or objecting has passed, that will address all requests for exclusion and
 4 objections received at one time.

5 * * *

6 In sum, all of factors to be considered under Rule 23(e)(2) support a finding that the Settlement is
 7 fair, reasonable, and adequate.

8 **B. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE**

9 In addition to seeking final approval of the Settlement, Plaintiffs seek approval of the proposed
 10 Plan of Allocation for the Settlement proceeds.

11 The standard for approval of a plan of allocation in a class action under Rule 23 is the same as the
 12 standard applicable to the settlement as a whole—the plan must be “fair, reasonable, and adequate.” *Class*
 13 *Plaintiffs v. Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992); *see also Omnivision*, 559 F. Supp. 2d at 1045.
 14 An allocation formula need only have a reasonable basis, particularly if recommended by experienced
 15 class counsel. *See Heritage Bond*, 2005 WL 1594403, at *11. Moreover, “[a] plan of allocation that
 16 reimburses class members based on the extent of their injuries is generally reasonable.” *In re Oracle Sec.*
 17 *Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994); *Omnivision*, 559 F. Supp. 2d at 1045 (“It is
 18 reasonable to allocate the settlement funds to class members based on the extent of their injuries or the
 19 strength of their claims on the merits.”).

20 The Plan of Allocation is included at pages 10 to 14 of the Notice mailed to Settlement Class
 21 Members. *See* Notice attached as Exhibit A to the Villanova Decl. at pp. 10-14. Lead Counsel developed
 22 the Plan of Allocation with the assistance of Plaintiffs’ damages expert. ¶ 101. The Plan provides for the
 23 distribution of the Net Settlement Fund to Settlement Class Members who submit Claim Forms that are
 24 approved for payment by the Court on a *pro rata* basis based on the extent of their injuries attributable to
 25 the alleged fraud. ¶¶ 103-107.

26 In developing the Plan of Allocation, Plaintiffs’ expert calculated the estimated amount of likely
 27 recoverable artificial inflation in the per-ADR closing prices of VWAG ADRs that was alleged to have
 28 been proximately caused by Defendants’ alleged false and misleading statements and omissions. ¶ 103.

1 To calculate the estimated artificial inflation, Plaintiffs' damages expert considered (i) price changes in
2 VWAG Ordinary ADRs and VWAG Preferred ADRs due to the allegedly materially false and misleading
3 public announcements and other representations and omissions, adjusting for price changes that were
4 attributable to market, industry, or currency factors; (ii) price changes in VWAG Ordinary ADRs and
5 VWAG Preferred ADRs in reaction to public announcements and other statements and events regarding
6 Volkswagen in which the alleged misrepresentations and omissions were alleged to have been revealed to
7 the market, adjusting for price changes that were attributable to market, industry, or currency factors;
8 (iii) the allegations in the Complaint; and (iv) the evidence developed in support of those allegations, as
9 advised by Lead Counsel. *Id.*; Notice ¶ 54. The same methodology would have been proffered by Plaintiffs
10 at summary judgment and trial had the Action not settled.

11 The Plan of Allocation calculates a "Recognized Loss Amount" or "Recognized Gain Amount"
12 for each purchase or acquisition of a VWAG Ordinary ADR or a VWAG Preferred ADR during the Class
13 Period that is identified on a Settlement Class Member's Claim Form and for which adequate
14 documentation is provided. ¶ 104. The calculation of Recognized Loss and Gain Amounts depends upon
15 several factors, including when the security was purchased and sold and the purchase and sales price. *Id.*
16 In general, Recognized Loss or Gain Amounts will be the lower of (i) the difference between the estimated
17 alleged artificial inflation on the date of purchase and the estimated alleged artificial inflation on the date
18 of sale, or (ii) the difference between the actual purchase price and sales price. *Id.*⁹ Claimants who
19 purchased VWAG ADRs during the Class Period but did not hold the securities through at least one of
20 the dates where artificial inflation was allegedly removed from the price of the securities will have no
21 Recognized Loss Amount as to those transactions because any loss they suffered would not have been
22 caused by the disclosure of the alleged fraud. ¶ 105; Notice ¶ 55.

23 Also, as explained in Plaintiffs' Notice of Unopposed Motion for Preliminary Approval of the
24 Settlement and Memorandum of Points and Authorities in Support Thereof (ECF No. 5267) (the
25 "Preliminary Approval Motion"), because the Court dismissed Plaintiffs' claims based on VWAG's
26 financial statements before May 2014, the Recognized Loss Amounts for ADRs purchased from

27 ⁹ For VWAG ADRs sold during the PSLRA's 90-day look-back period or held as of the end of that period,
28 the Plan of Allocation also limits Recognized Loss Amounts based on the average price of the ADRs
during that period, consistent with the PSLRA. *See* Notice ¶¶ 57(b)-(c), 58(b)-(c).

1 November 19, 2010, through April 30, 2014, will be reduced by half. *See* Notice ¶¶ 56, 59. This adjustment
 2 reflects Lead Counsel’s assessment that proving Defendants’ liability for the period before May 2014
 3 would be much more difficult than for the post-April 2014 portion of the Class Period. The Court
 4 dismissed Plaintiffs’ claims based on VWAG’s financial statements before May 2014 largely on the basis
 5 of scienter, and similar arguments would apply to all of Plaintiffs’ claims during that period. Specifically,
 6 proving Defendants’ scienter would be more difficult for the earlier period due to an absence of evidence
 7 that before May 2014, top management were told about the defeat devices and warned about potential
 8 fines for using them. Moreover, since claims related to VWAG’s financial statements after May 2014
 9 were not dismissed, Plaintiffs had additional avenues of recovery in the post-April 2014 portion of the
 10 Class Period. Thus, discounting the weaker claims for the earlier period is fair, reasonable, and appropriate
 11 under Ninth Circuit law. *See* Preliminary Approval Order at 11 (finding 50% reduction for Recognized
 12 Loss Amounts on VWAG ADRs purchased during the period from November 19, 2010 through April 30,
 13 2014 to be “reasonable”); *see also In re HP Sec. Litig.*, No. 3:12-cv-05980-CRB (Breyer, J.), ECF Nos.
 14 268, 269, 280 (approving plan of allocation that discounted claims that had been dismissed by the Court
 15 to 15%); *Portal Software*, 2007 WL 4171201, at *5-6 (approving allocating 5% of settlement fund to
 16 dismissed claims and 95% to sustained claims, and noting that “Courts endorse distributing settlement
 17 proceeds according to the relative strengths and weaknesses of the various claims”); *In re Am. Apparel,*
 18 *Inc. Shareholder Litig.*, 2014 WL 10212865, at *19 (C.D. Cal. July 28, 2014) (approving discounting
 19 dismissed claims by 10%).

20 Further, under the Plan of Allocation, claimants’ Recognized Loss Amounts will be netted against
 21 their Recognized Gain Amounts, if any, to determine the claimants’ “Recognized Claims,” and the Net
 22 Settlement Fund will be allocated *pro rata* to Authorized Claimants based on the relative size of their
 23 Recognized Claims. ¶ 107; Notice ¶¶ 65, 69.¹⁰

24
 25
 26 ¹⁰ As discussed in the Preliminary Approval Motion, the Plan of Allocation also identifies a proposed *cy*
 27 *pres* recipient of any residual funds that may remain after one or more distributions of the Net Settlement
 28 Fund: the Investor Protection Trust, a 501(c)(3) nonprofit organization devoted to investor education.
 ¶ 108; Notice ¶ 70. However, under the Plan, 100% of the Net Settlement Fund will be distributed to
 eligible claimants, and if any funds remain after the initial distribution (for example, as a result of uncashed
 or returned checks), subsequent distributions to eligible claimants will be conducted until the residual
 amount left is so small that a further distribution would not be cost effective. Only then would a donation

1 Plaintiffs and Lead Counsel believe that the proposed Plan of Allocation will result in a fair and
 2 equitable distribution of the Settlement proceeds among Settlement Class Members who suffered losses
 3 as a result of the conduct alleged in the Action, similar to the result if Plaintiffs prevailed at trial. ¶ 109.
 4 Moreover, as of April 3, 2019, more than 217,000 copies of the Notice, which contains the Plan of
 5 Allocation and advises Settlement Class Members of their right to object to the Plan, have been mailed
 6 to potential Settlement Class Members, *see* Villanova Decl. ¶ 8, and, to date, no objections to the Plan of
 7 Allocation have been filed on the Court’s docket. *See* ¶ 111. For all of these reasons, Plaintiffs
 8 respectfully request that the Court approve the proposed Plan of Allocation.

9 **C. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED**

10 The Court’s Preliminary Approval Order conditionally certified the Settlement Class under Rules
 11 23(a) and (b)(3) for purposes of the Settlement. ECF No. 5593 at 1-4. For all of the reasons stated in the
 12 Preliminary Approval Order and Plaintiffs’ Preliminary Approval Motion (ECF No. 5267 at 8-15),
 13 Plaintiffs respectfully request that the Court grant final certification of the Settlement Class under Rules
 14 23(a) and (b)(3). *See* Preliminary Approval Order (ECF No. 5593) at 1-4 (analyzing how the Action
 15 satisfies each element for class certification).

16 **D. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS**
 17 **OF RULE 23 AND DUE PROCESS**

18 The Notice provided to the Settlement Class satisfied all the requirements of due process, Rule 23,
 19 and the PSLRA. For any class certified under Rule 23(b)(3), due process and Rule 23 require that class
 20 members be given “the best notice that is practicable under the circumstances, including individual notice
 21 to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B); *see also*
 22 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). In addition, the Court must direct notice of a
 23 settlement in a “reasonable manner to all class members who would be bound by the proposal.” Fed. R.
 24 Civ. P. 23 (e)(1). Notice of a class-action settlement “is satisfactory if it generally describes the terms of
 25 the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward
 26 and be heard.” *See Churchill*, 361 F.3d at 575; *Luna v. Marvell Tech. Grp.*, 2018 WL 1900150, at *2 (N.D.

27 _____
 28 to the *cy pres* recipient be made. *See* Preliminary Approval Order at 9 (finding that the Settlement’s *cy pres*
 procedures are “consistent with Ninth Circuit Law”).

1 Cal. Apr. 20, 2018) (same); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 330 (C.D. Cal. 2016)
2 (“Settlement notices must fairly apprise the prospective members of the class of the terms of the proposed
3 settlement and of the options that are open to them in connection with the proceedings.”).

4 Both the substance of the Notice and the method of its dissemination to potential members of the
5 Settlement Class satisfied these standards here. The Notice provides the necessary information for
6 Settlement Class Members to make an informed decision regarding the Settlement and contains all of the
7 information required by Rule 23(c)(2)(B), the PSLRA (15 U.S.C. § 78u-4(a)(7)), and this District’s
8 Procedural Guidelines for Class Action Settlements. The Notice informed Settlement Class Members of,
9 among other things, (1) the nature of the Action and the claims asserted; (2) the definition of the Settlement
10 Class; (3) the amount of the Settlement; (4) the reasons why the parties are proposing the Settlement;
11 (5) the estimated average recovery per affected VW Ordinary or Preferred ADR; (6) the maximum amount
12 of attorneys’ fees and expenses that will be sought; (7) the identity and contact information for the
13 representatives of Lead Counsel who are reasonably available to answer questions from Settlement Class
14 Members; (8) Settlement Class Members’ right to opt out of the Settlement Class or to object to the
15 Settlement, the Plan of Allocation, or the requested attorneys’ fees or expenses; (9) the binding effect of
16 a judgment on Settlement Class Members; and (10) the dates and deadlines for Settlement-related events.
17 The Notice also contains the Plan of Allocation and provides Settlement Class Members with information
18 on how to submit a Claim Form in order to be eligible to receive a distribution from the Net Settlement
19 Fund.

20 As noted above, in accordance with the Court’s Preliminary Approval Order, Epiq, the Court-
21 approved Claims Administrator, began mailing copies of the Notice Packet to potential Settlement Class
22 Members and nominees on December 19, 2018. *See Villanova Decl.* ¶¶ 3, 5. As of April 3, 2019, Epiq
23 had mailed 217,587 copies of the Notice Packet by first-class mail to potential Settlement Class Members
24 and nominees. *See id.* ¶ 8. In addition, Epiq arranged for the Summary Notice to be published in *Investor’s*
25 *Business Daily* and transmitted over the PR Newswire on December 31, 2018. *See id.* ¶ 9. Epiq established
26 a dedicated settlement website, www.VolkswagenADRLitigation.com, to provide potential Settlement
27 Class Members with information concerning the Settlement and access to downloadable copies of the
28 Notice and Claim Form, as well as copies of the Stipulation, Preliminary Approval Order, and Complaint.

1 *See id.* ¶ 14. Copies of the Notice and Claim Form are also available on Lead Counsel’s website,
2 www.blbglaw.com. ¶ 98.

3 This combination of individual first-class mail to all Settlement Class Members who could be
4 identified with reasonable effort, supplemented by notice in an appropriate, widely circulated publication,
5 transmission over a newswire, and publication on internet websites, was “the best notice . . . practicable
6 under the circumstances.” Fed. R. Civ. P. 23(c)(2)(B); *see, e.g., Hayes v. MagnaChip Semiconductor*
7 *Corp.*, 2016 WL 6902856, at *4-5 (N.D. Cal. Nov. 21, 2016) (approving similar notice program); *Zynga*,
8 2016 WL 537946, at *7 (finding individual notice mailed to class members combined with summary
9 publication constituted “the best form of notice available under the circumstances”); *Portal Software*, 2007
10 WL 4171201, at *1.

11 In sum, the Notice fairly apprises Settlement Class Members of their rights with respect to the
12 Settlement, is the best notice practicable under the circumstances, and complies with the Court’s
13 Preliminary Approval Order, the Federal Rules of Civil Procedure, the PSLRA, and due process.

14 **III. CONCLUSION**

15 For the reasons stated in this memorandum and in the Harrod Declaration, Plaintiffs respectfully
16 request that the Court grant final approval of the proposed Settlement and approve the Plan of Allocation.

17 Dated: April 5, 2019

Respectfully submitted,

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