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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

14 IN RE: VOLKSWAGEN ‘CLEAN DIESEL’
15 MARKETING, SALES PRACTICES, AND
16 PRODUCTS LIABILITY LITIGATION

MDL No. 02672-CRB (JSC)

16 This document relates to:

17 PLAINTIFF J. BERTOLET, INC.’S
18 NOTICE OF MOTION, MOTION, AND
19 MEMORANDUM IN SUPPORT OF
20 PRELIMINARY APPROVAL OF
21 FRANCHISE DEALER SETTLEMENT
22 AGREEMENT, PROVISIONAL
23 CERTIFICATION OF DEALER
24 SETTLEMENT CLASS, AND
25 APPROVAL OF CLASS NOTICE

17 *Napleton Orlando Imports, LLC et al. v.*
18 *Volkswagen Group of America, Inc. et al.,*
19 *Case No. 3:16-cv-02086-CRB*

Hearing: October 18, 2016
Time: 8:00 a.m.
Court: 6, 17th Floor

20 NAPLETON ORLANDO IMPORTS, LLC
21 d/b/a NAPLETON’S VOLKSWAGEN OF
22 ORLANDO, an Illinois limited liability company,
23 NAPLETON SANFORD IMPORTS, LLC d/b/a
24 NAPLETON’S VOLKSWAGEN OF SANFORD,
25 an Illinois limited liability company, and
26 NAPLETON AUTOMOTIVE OF URBANA,
27 LLC d/b/a NAPLETON VOLKSWAGEN OF
28 URBANA, a Florida limited liability company,
individually, and J. BERTOLET, INC. dba J.
BERTOLET VOLKSWAGEN, on behalf of itself
and all similarly situated persons and entities,

The Honorable Charles R. Breyer

Plaintiffs,

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v.

VOLKSWAGEN GROUP OF AMERICA, INC., a
New Jersey Corporation, VW CREDIT, INC., a
Delaware corporation, VOLKSWAGEN AG, a
German corporation, ROBERT BOSCH, LLC, a
Michigan limited liability company, and ROBERT
BOSCH GmbH, a German corporation.

Defendants.

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on October 18, 2016, at 8:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Judge Charles R. Breyer of the United States District Court of the Northern District of California, San Francisco Division, in Courtroom 6, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff J. Bertolet, Inc., individually and on behalf of a proposed class of Volkswagen-branded franchise dealers, will and hereby does move the Court pursuant to Federal Rules of Civil Procedure 23 for an order:

- 1) preliminarily approving the proposed Franchise Dealer Class Settlement of this case with the Volkswagen Defendants;¹
- 2) Provisionally certifying the proposed Franchise Dealer Class;
- 3) Approving and directing notice to the Franchise Dealer Class; and
- 4) Scheduling a final fairness hearing.

This unopposed motion is based on this notice of motion and motion for preliminary approval of settlement, the following memorandum of points and authorities, the declarations in support, the accompanying settlement agreement and proposed form of notice, the pleadings and the papers on file in this action, and such other matters as the Court may consider.

¹ Volkswagen Defendants, as defined in the Franchise Dealer Class Action Settlement, are Volkswagen AG, Volkswagen Group of America, Volkswagen Credit Incorporated, and Volkswagen Group of America Chattanooga Operations, LLC.

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I. INTRODUCTION

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2 Plaintiff J. Bertolet, Inc., seeks preliminary approval of its Volkswagen-Branded Franchise
3 Dealer Class Action Settlement and Release (“Franchise Dealer Settlement”); provisional
4 certification of a class of Volkswagen-branded franchise dealers (the “Franchise Dealer Class”);
5 approval of class notice; and setting a schedule for final approval of the Settlement. The
6 Settlement class is defined as all Volkswagen-branded franchise dealers in the United States as of
7 September 18, 2016. The cash component of the Settlement in the amount of up to \$1.208 billion
8 (assuming 100% participation of all 652 Franchise Dealer Class members) is a remarkable result
9 which will provide an *average payout to the 652 Franchise Dealer Class members exceeding \$1.85*
10 *million each*. And there is no required claims process: every Franchise Dealer Class member who
11 does not opt-out of the settlement will automatically receive their settlement payment. Individual
12 Dealer Settlement payments are a multiple of the monthly financial support payments already
13 being paid by Volkswagen to its franchise dealers, which has widespread approval among the
14 Franchise Dealer Class members as being fair. Moreover, attorneys’ fees and expenses will be
15 paid by Volkswagen *in addition to the Settlement benefits*, and thus will not reduce the actual cash
16 payments to Franchise Dealer Class members.

17 The Franchise Dealer Settlement also provides for the continuation of certain incentive
18 benefits to dealers, and a standstill on capital investment expenditures otherwise required in dealer
19 franchise and transactional agreements. Specifically: (1) “VIP” and “CSI” payments will continue
20 at their current level for 12 months following the end of the opt-out period for the Settlement;
21 (2) any capital investment requirements in current agreements with Volkswagen may be deferred
22 for two years at the Franchise Dealer Class member’s option; and (3) for any future transfer of a
23 dealership proposed to Volkswagen within 1 year of the end of the opt-out period, Volkswagen will
24 not require a capital investment by the transferee as a condition to approving the transfer.

25 This recovery to the Franchise Dealer Class is outstanding, particularly given the immediate
26 need for cooperation among Volkswagen and its franchise dealers to effectuate the terms of the \$10
27 billion plus consumer class action settlement that this presently pending approval before this Court.

1 The proposed Franchise Dealer Settlement was reached after extensive negotiations between
2 experienced and informed counsel, including multiple in-person meetings and subsequent
3 discussions. Without any obvious deficiencies, the settlement agreement readily meets the
4 standards for preliminary approval. *See* Sections III & IV(A).

5 The proposed Franchise Dealer Class readily meets the requirements of Rule 23(a) for
6 provisional certification. With 652 class members, the numerosity requirement is met. There are
7 ample common questions of law and fact flowing directly from Volkswagen’s admitted use of a
8 “defeat device” in over 550,000 new vehicles sold through Volkswagen-branded franchise dealers.
9 The Franchise Dealer Class representative, J. Bertolet, Inc., brings claims identical to, and thus
10 typical of all members of the Franchise Dealer Class. J. Bertolet’s interests are directly aligned
11 with those of the Franchise Dealer Class and he has diligently pursued this action on their behalf.
12 Plaintiff’s counsel, Hagens Berman and Bass Sox Mercer, are unquestionably qualified to serve as
13 Franchise Dealer Class Counsel.

14 The requirements of Rule 23(b)(3) are also met in this case. The common issues of law and
15 fact clearly predominate over any individualized issues; and a class action is the superior method of
16 resolving these common claims for Volkswagen’s 652 similarly situated franchise dealers. For
17 these reasons, the Franchise Dealer Class should be provisionally certified. *See* Section IV(B)(3).

18 The proposed Class Notice will be provided to each of the 652 Franchise Dealer Class
19 members. Class members are ongoing business concerns, with current or very recent contracts and
20 ongoing business relations with Volkswagen. As such, overnight express delivery of the Class
21 Notice to Franchise Dealer Class members (with telephonic follow-up, if necessary) will be 100%
22 effective in reaching every member of the Franchise Dealer Class. The notice is written in plain
23 English, clearly conveys to Franchise Dealer Class members their options and rights, and provides
24 exactly the monetary amount and other benefits each Franchise Dealer Class member will receive
25 from this settlement if they do not opt-out. All of this constitutes notice in the reasonable manner
26 required under Rule 23(e). *See* Section IV(C).

1 Finally, Plaintiffs' Lead Counsel propose a detailed schedule providing ample opportunity
2 for Franchise Dealer Class members to reach a decision on the Franchise Dealer Settlement, opt-
3 out, or object, if they see fit, and for the Court to reach an informed decision on final approval of
4 the proposed Settlement. Accordingly, Plaintiff respectfully requests an order: (1) preliminarily
5 approving the proposed Franchise Dealer Settlement; (2) Provisionally certifying the proposed
6 Franchise Dealer Class; (3) Approving and directing notice to the Franchise Dealer Class; and
7 (4) Scheduling a final fairness hearing.

8 II. BACKGROUND AND PROCEDURAL HISTORY

9 A. Factual Background

10 By now the Court is well-acquainted with the Volkswagen emissions scandal, the facts
11 underlying the hundreds of complaints that were filed, and the proposed Consumer Settlement and
12 Government Settlements. On April 6, 2016, an auto group owned by Edward Napleton, with three
13 Volkswagen-branded franchise dealerships in Florida and Illinois ("Napleton Dealerships"), filed a
14 proposed class action against Volkswagen on behalf of a proposed class of all Volkswagen
15 franchise dealers in the Northern District of Illinois, for, *inter alia*, the marked decrease in the
16 value of his own, and all Volkswagen-branded franchise dealerships in the United States since
17 disclosure of the emissions scandal. On April 20, 2016, this lawsuit (the "Napleton Action") was
18 transferred to the MDL for pre-trial proceedings.

19 As alleged in the Dealer Action, Volkswagen artificially propped up the investment value
20 and return on Volkswagen-branded franchise dealers such that, when the emissions scandal was
21 revealed on September 18, 2015, and in the weeks and months thereafter, Volkswagen-branded
22 franchise dealerships plummeted in value and return on investment, causing extraordinary and
23 ever-increasing investment damages to the owners of Volkswagen-branded franchise dealerships in
24 the United States.

25 B. Procedural History

26 On April 6, 2016, Napleton Orlando Imports, LLC dba Napleton's Volkswagen of Orlando,
27 Napleton's Sanford Imports, LLC dba Napleton's Volkswagen of Sanford, and Napleton
28

1 Automotive of Urbana, LLC dba Napleton Volkswagen of Urbana (collectively, the “Napleton VW
2 Dealerships”) filed the Napleton Action. On April 20, 2016, the Napleton Action was transferred
3 to the MDL for pre-trial proceedings. Declaration of Steve W. Berman (“Berman Decl.”), ¶ 2,
4 filed concurrently herewith.

5 Prosecution of a remedy for Volkswagen-branded franchise dealers followed two distinct,
6 but ultimately merged, tracks. First, from soon after the emissions scandal became public,
7 Volkswagen-branded dealers nominated a “Dealer Investment Committee” (“DIC”) to engage
8 Volkswagen in discussions concerning an appropriate remedy for U.S. franchise dealers to
9 compensate them for the substantial losses they were experiencing—and which were increasing—
10 they believed as a result of the emissions scandal. The DIC engaged Bass Sox Mercer (“BSM”),
11 one of proposed Dealer Class Counsel, to represent it in negotiations with Volkswagen. Berman
12 Decl., ¶ 3.

13 Second, Hagens Berman (“HB”), counsel for Napleton Dealerships and the other proposed
14 Dealer Class Counsel, began extensive pre-filing investigation and research early in 2016 and
15 continued it until shortly before filing the Napleton Action. Thereafter, HB multiplied its efforts in
16 developing a complete picture of the emissions fraud as related to franchise dealer claims and the
17 damages flowing therefrom, including engaging noted economic and damages experts. And given
18 the extensive cost expected, and then confirmed, for the Consumer Lawsuits, HB took great care to
19 assess Volkswagen’s ability to pay damages to dealers, and its need for dealer cooperation in
20 effectuating the then-expected settlement of the Consumer Lawsuits. Berman Decl., ¶ 4.

21 On July 18, 2016, HB sent Volkswagen a request for dealer-specific document discovery.
22 The requested documents included historical dealer-by-dealer vehicle deliveries, composite
23 financial statements, Units in Operation figures, buy/sale agreements, and several categories of
24 internal communication and reports relating to the projected impact on dealers from the emissions
25 scandal. Berman Decl., ¶ 5. On July 20, 2016, HB sent Volkswagen its second request for
26 documents, including documents relating to: dealer inventory of TDI vehicles, Letters of Intent for
27 potential new dealerships and projections for such new dealerships, marketing planning and
28

1 budgeting, dealer and consumer-facing incentive programs, and certain communications between
2 Volkswagen and its dealers. Berman Decl., ¶ 6.

3 Beginning on July 22, 2016, and continuing thereafter, Volkswagen electronically produced
4 thousands of pages of documents, including detailed spreadsheets and financial records. Attorneys
5 at HB reviewed the entire production, and certain portions were shared with HB's retained
6 damages and economic experts. In addition, attorneys at Hagens Berman searched the 12 million-
7 plus pages of electronic discovery produced in the consumer action to retrieve hundreds of
8 documents that were particularly relevant to the Dealer Action, Volkswagen's knowledge of harm
9 to dealers, and assessment of damages suffered by dealers. Berman Decl., ¶ 7.

10 In July 2016, after each of BSM and HB had devoted significant, non-overlapping resources,
11 time and effort to prosecution of franchise dealer claims related to the emissions scandal, the two
12 firms agreed to work together to efficiently forge the best possible result for all 652 Volkswagen-
13 branded franchise dealers in the proposed Franchise Dealer Class. The two firms together had
14 multiple meetings with Volkswagen and its attorneys from Sullivan & Cromwell ("S&C") in New
15 York, and via telephone and electronic communications. Berman Decl., ¶ 8. After months of
16 rigorous investigation, research, document review, consultation with experts, communication and
17 negotiation, a settlement term sheet was agreed in late August 2016 and shared with the Court's
18 Settlement Master, Robert S. Mueller, and then presented to the Court, which occurred on August
19 26, 2016. *See* Dkt. No. 1774. Berman Decl., ¶ 11.

20 The Court ordered submission of a final settlement agreement and this motion and
21 supporting documents on September 30, 2016, setting in motion a further intense flurry of work by
22 HB, BSM, Volkswagen and its counsel at S&C. Berman Decl., ¶ 12.

23 On September 30, 2016, HB and BSM filed the Volkswagen-Branded Franchise Dealer
24 Amended and Consolidated Class Action Complaint ("Complaint"), adding J. Bertolet, Inc., dba J.
25 Bertolet Volkswagen as plaintiff and proposed Class Representative. The Complaint spanned 130
26 pages and set forth in detail the allegations relating to the Franchise Dealer Class claims against
27

1 Volkswagen and against Bosch. The Complaint reflects the extensive labors undertaken by HB
2 and BSM in prosecution of this action. Berman Decl., ¶ 13.

3 On September 30, 2016, the Settlement Agreement that Plaintiff now proposes for approval
4 was completed, agreed and executed. Berman Decl., ¶ 14.

5 **III. SUMMARY OF KEY SETTLEMENT TERMS**

6 **A. The Settlement Class**

7 The proposed settlement class (the “Franchise Dealer Class”) is the same class defined in
8 the Complaint:

9 All persons or entities who owned a Volkswagen-branded franchise
10 dealership that operated in the United States as of September 18,
2015.

11 Excluded from the Franchise Dealer Class are all persons who make a timely election to be
12 excluded from the Franchise Dealer Class.

13 **B. Benefits to Franchise Dealer Class Members Who Do Not Opt-Out of the Settlement**

14 **1. New Cash Payments Representing Lost Value of Dealership Investment.**

15 Volkswagen will pay a maximum amount of \$1,208,000,000.00 (assuming 100%
16 participation) to Franchise Dealer Class members who do not opt-out of the Settlement
17 (“Settlement Class Members”). The funds will be allocated to Settlement Class Members *pro rata*,
18 based upon the ratio of each dealer’s current dealer support payments from Volkswagen to the total
19 of all dealer support payments being paid by Volkswagen. No claim form is necessary, every
20 Settlement Class Member who does not opt out will automatically receive their allocated share of
21 the cash payment. On average, Settlement Class Members will receive approximately
22 \$1,850,000.00

23 Fifty percent of each Settlement Class Members’ cash benefit (the “Initial Payment”) will
24 be paid within 30 days of the Settlement Opt-Out Date, provided such Settlement Class Member
25 has executed an Individual Release (that mimics the Settlement Release described below).

26 Settlement Class Members who do not execute the Individual Release will receive their Initial
27 Payment with 30 days of the Effective Date of the Settlement. The remaining 50% of the cash

1 payment will be paid in 18 equal monthly installments beginning 30 days after each Settlement
2 Class Members' Initial Payment. Cash payments under the Settlement are assignable by
3 Settlement Class Members through approved buy/sale agreements of dealerships.

4 **2. Continuation of Incentives and Other Support Payments.**

5 Volkswagen agrees to continue its "VIP" and "CSI" incentive payments to Settlement Class
6 Members for at least 12 months following the Opt-Out Date. In addition, Volkswagen will
7 continue to pay its monthly dealer support payments until after the Opt-Out Date.

8 **3. Standstill of Capital Investment Obligations.**

9 To the extent any Settlement Class Member is obligated under an existing agreement with
10 Volkswagen to make capital investments (i.e., remodel, new construction, etc.) in its dealership, the
11 Settlement Class Member may defer, at its option, such obligations for two years after the Opt-Out
12 Date. Likewise, Volkswagen agrees not to require capital investment in connection with the sale of
13 a dealership for any sale that is formally proposed to Volkswagen within one year of the Opt-Out
14 Date.

15 **4. Treatment of Dealer Inventory of Volkswagen Diesel Vehicles.**

16 For used diesel vehicles for which Volkswagen is unable to provide an approved emissions
17 modification ("AEM"), Volkswagen will repurchase such vehicles from the Dealer Settlement
18 Class Member at the same gross amount that an Eligible Owner would receive (a) under the
19 Consumer Settlement Agreement for 2.0-liter used No AEM Vehicles, and (b) under a future
20 potential consumer settlement, if any, for 3.0-liter used No AEM Vehicles. For new diesel vehicles
21 with no AEM, Volkswagen will repurchase such vehicles from Dealer Settlement Class Members
22 for the net wholesale cost that was paid by the Settlement Class Member for such vehicles. For all
23 vehicles repurchased from Dealer Settlement Class Members, Volkswagen will pay the reasonable
24 carrying and storage costs of such vehicles from the date such vehicle is determined to have no
25 AEM until Volkswagen retrieves them, and if it fails to retrieve them within one year of
26 repurchase, Dealer Settlement Class Members may ship such cars to Volkswagen at its sole
27 expense.

1 For new, unused Model Year 2015 2.0L diesel vehicles for which Volkswagen is able to
2 provide an AEM, Volkswagen will offer a TDI Lease Program and a TDI Service Loan Program.
3 The TDI Lease Program will provide consumers leasing such AEM Vehicles attractive lease terms
4 with substantial subvention. The lease program will be administered by VCI, and VCI will
5 maintain ownership of the New MY15 AEM Vehicles placed into the lease program.

6 The TDI Service Loan Program will be a 12-month service loan car program for the New
7 MY15 AEM Vehicles currently in the inventory of Dealer Settlement Class Members whereby
8 Dealer Settlement Class Members will be charged a monthly rental fee below the current standard
9 price of 2% of MSRP per month, and have the option, but not the requirement, to buy such New
10 MY15 AEM Vehicles at the end of the 12-month program if all of the steps of the AEM have been
11 completed for the vehicle(s).

12 **C. Release of Claims**

13 If the settlement becomes final, Class Representative Plaintiff and Settlement Class
14 Members will release all claims in the Complaint against Volkswagen AG, Volkswagen Group of
15 America, Inc., Volkswagen Credit, Inc., and Volkswagen Group of America Chattanooga
16 Operations, LLC. Claims relating to Robert Bosch GmbH and Robert Bosch, LLC (collectively,
17 “Bosch”) are not subject to any release in the Agreement. Except for the right to assert as a
18 defense to any termination of dealership by Volkswagen, Settlement Class Members will
19 essentially wipe the slate clean as to any disputes they have with Volkswagen as of the Effective
20 Date of the Settlement.

21 **D. Notice of the Settlement**

22 Because each Franchise Dealer Class member has a present (or very recent) Dealer
23 Agreement with Volkswagen, the identity and contact information for each Franchise Dealer Class
24 member is known to Volkswagen. Volkswagen will send Class Notice via overnight express mail
25 to each Franchise Dealer Class member address of operations and notice address under the
26 applicable Dealer Agreement (if different). Volkswagen will follow up each mailing with a
27 telephone call to confirm that every member of the Franchise Dealer Class has received Class
28

1 Notice. HB and BSM will be available to consult with Franchise Dealer Class members
2 concerning the terms of the Settlement and their opt-out rights, should any Franchise Dealer Class
3 members so desire.

4 **E. Claims-Paid Settlement**

5 The Settlement is “claims-paid”, meaning that Settlement Class Members need not
6 complete any form or claims procedure in order to obtain their benefits under the Settlement. By
7 returning an Individual Release, as described above, Settlement Class Members will be able to
8 obtain the cash portion of the Settlement sooner, but the cash payments and all other benefits will
9 accrue to Settlement Class Members no later than the Effective Date of the Settlement, whether or
10 not the Individual Release is ever executed.

11 **F. Costs of Settlement Administration**

12 The Settlement specifies that all costs associated with administration of the Settlement will
13 be paid by Volkswagen. Under the circumstances of this case, the parties agree that a third-party
14 settlement, claims or notice administrator is not necessary.

15 **G. Attorneys’ Fees**

16 The Settlement provides that attorneys’ fees to Dealer Class Counsel shall be paid by
17 Volkswagen *in addition to the benefits provided to Settlement Class Members*. As a result,
18 Settlement Class Members’ benefits under the Settlement will not be reduced to pay attorneys’ fees
19 or reimburse litigation expenses with respect to this settlement. Volkswagen and Plaintiffs’
20 attorneys have only recently initiated discussions concerning fees and expenses and have not
21 agreed on the amount of attorneys’ fees to be paid in this case, deferring such discussions until
22 after substantive terms of the Settlement were settled.² Attorneys’ fees and expenses to be awarded
23 in this case will be subject to Court approval after opportunity for Settlement Class Members to
24 object, pursuant to Fed. R. Civ. P. 23(h).

25
26
27 ² See *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 444-45 (3d Cir. 2016), as
28 amended May 2, 2016.

1 **IV. ARGUMENT**

2 **A. The Court Should Preliminarily Approve the Settlement**

3 Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement of class
4 action claims. Approval of a settlement is a multi-step process, beginning with preliminary
5 approval, followed by notice to the class and the filing of any objections, and concluding with a
6 motion for final approval and fairness hearing.³ Preliminary approval is thus not a dispositive
7 assessment of the fairness of the proposed settlement, but rather determines whether it falls within
8 the “range of possible approval.”⁴ Preliminary approval establishes an “initial presumption” of
9 fairness, such that notice may be given to the class and the class may have a full and fair
10 opportunity to consider the proposed settlement.⁵

11 Preliminary approval of a settlement and notice to the proposed class is appropriate if the
12 proposed settlement: (1) appears to be the product of serious, informed, non-collusive
13 negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment
14 to class representatives or segments of the class; and (4) falls with the range of possible approval.⁶
15 The “initial decision to approve or reject a settlement proposal is committed to the sound discretion
16 of the trial judge.”⁷

17 As is the case here, when proposed class counsel are experienced, and support the
18 settlement, which was reached through arms-length negotiations, a presumption of fairness
19 applies.⁸ The final test of fairness, in the Ninth Circuit, turns on analysis of the following factors:
20 the strength of plaintiffs’ case; the risk, expense, complexity and likely duration of continued

21 ³ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632, 320-21 (2004). All internal
22 citations and quotations omitted and all emphasis added, unless otherwise indicated.

23 ⁴ *Id.*; see also *Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-02 (E.D. Cal.
2011).

24 ⁵ *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

25 ⁶ See *Bickley v. Schneider Nat’l, Inc.*, 2016 WL 4157355, at *1 (N.D. Cal. Apr. 25, 2016);
26 *Zepeda v. PayPal, Inc.*, 2015 WL 6746913, at *4 (N.D. Cal. Nov. 5, 2015); *Fraley v. Facebook,*
Inc., 2012 WL 5838198, at *1 n.1 (N.D. Cal. Aug. 17, 2012); *Tableware*, 484 F. Supp. 2d at 1079.

27 ⁷ *Officers for Justice v. Civ. Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982) (“*OFJ*”).

28 ⁸ See *Nobles v. MBNA Corp.*, 2009 WL 1854965, at *6 (N.D. Cal. June 29, 2009).

1 litigation; the risk of certification and maintaining class action status through trial; the discovery
 2 completed; the size of the settlement; the stage of the case at which settlement is proposed, the
 3 experience and views of counsel; government involvement in the case; and the reaction of class
 4 members to the proposed settlement.⁹ The particulars of the case and proposed settlement
 5 determine the weight to be provided each factor.¹⁰

6 In addition to substance of the settlement itself, the Court must also ensure the settlement is
 7 procedurally fair; that it is “not the product of fraud or overreaching by, or collusion between, the
 8 negotiating parties.”¹¹ Because this settlement is substantively fair when weighing the factors
 9 above, and was reached through procedurally fair, arms-length negotiations, it should be
 10 preliminarily approved.

11 **1. The Settlement Is Substantively Fair, Reasonable and Adequate Resolution of**
 12 **the Franchise Dealer Litigation.**

13 **a. Plaintiff’s case is strong, thus the substantial recovery is warranted.**

14 Volkswagen purposefully used the Defeat Device to obtain EPA and CARB approval for its
 15 2009-15 diesel passenger vehicles. As evidenced by the Consumer Settlements and the swift
 16 resolution of the related DOJ and FTC civil actions, there is a compelling case for liability. This
 17 liability extends to alleged investment losses suffered by owners of Volkswagen’s U.S. franchise
 18 dealers because the losses directly flow from the alleged conduct. Dealers had and still have
 19 thousands of new and used TDI cars on their lots that became immediately unsalable when
 20 Volkswagen issued its broad stop sale orders. When consumers learned of the emissions scandal,
 21 the entire market for Volkswagen’s diesel cars immediately disappeared and the tarnished brand
 22 name also caused precipitous decreases in sales of all Volkswagen cars. This factor weighs in
 23 favor of approval of the settlement because there is clear and meaningful relationship between the
 24 strength of the case and the benefits provided in the settlement.

26 ⁹ See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

27 ¹⁰ See *OFJ*, 688 F.2d at 625.

28 ¹¹ See *id.*

1 **b. There would be substantial risk, expense and complexity in continuing**
 2 **the litigation, which could last for years and would imperil the**
 3 **Consumer Settlements.**

4 Notwithstanding the substantial evidence that Plaintiff can bring to bear in this case, there
 5 are always risk factors in litigation. Here, Volkswagen has already agreed to pay up to \$15 billion
 6 of settlements stemming from the diesel emissions scandal, and this is just in the United States.
 7 Volkswagen is still facing criminal probes in the U.S., and it is facing dozens of lawsuits in
 8 international fora. As such, a long complex litigation could result in a Pyrrhic victory if
 9 Volkswagen’s resources are depleted in the process.¹² Moreover, Volkswagen’s branded dealers
 10 are the lynchpin in its Consumer Settlements. An ongoing dealer litigation would make
 11 cooperation on the Consumer Settlements difficult, if not impossible, further imperiling
 12 Volkswagen’s ability to navigate the maelstrom. This factor supports approval of the settlement
 13 because it is important not just to Class Members, but also to Volkswagen to promptly resolve this
 14 litigation.

15 **c. The Franchise Dealer Class carries material certification risk.**

16 While liability evidence is strong in this case, certification draws a different test and may be
 17 challenging to achieve and maintain in this case. Principal concerns are the sophistication of class
 18 members and the size of potential recoveries. Each Franchise Dealer Class Member is itself a
 19 substantial business operation that has either in-house counsel, or ready access to legal counsel that
 20 could pursue its individual case. In addition, dealers’ losses are at a level that could support
 21 individual litigation—as evidenced by the fact that this settlement will provide, on average, \$1.85
 22 million to each Franchise Dealer Class Member. As an ongoing litigation progressed, the many,
 23 varied business pressures on dealer operations could put pressure on the cohesiveness of the
 24 ongoing class. This factor supports approval of the settlement because manageability of a
 25 settlement class is not a requirement of provisional certification and at present Franchise Dealer
 26 Class Members interests and concerns are substantially aligned and cohesive.

27 ¹² See, e.g., *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007) (rejecting settlement objections
 28 premised on Plaintiff prevailing at trial because “any such victory would run the risk of being a
 Pyrrhic one....”).

1 **d. Beyond the substantial discovery discussed in the Consumer Settlement,**
2 **proposed Dealer Class Counsel obtained and reviewed discovery**
3 **specifically geared to the unique aspects of franchise dealers' claims**
4 **against Volkswagen.**

5 Discovery reviewed in the consumer actions against Volkswagen revealed substantial and
6 material evidence of liability and the participants in the alleged diesel fraud. But this alone was not
7 sufficient to properly evaluate liability, causation and potential damages in franchise dealers' case
8 against Volkswagen. As a result, proposed Dealer Class Counsel requested and obtained from
9 Volkswagen extensive discovery relating to franchise dealers' case. All of this discovery was
10 reviewed, and much of it was reviewed by and included within the analysis of noted economic
11 experts who had been retained by the proposed Dealer Class Counsel. In addition, much
12 investigation and research was directed toward the Franchise Dealer Class Members to assess the
13 effects of the diesel emissions scandal on their operations, expectations and investment value. This
14 factor supports approval because ample discovery was completed to properly assess the case,
15 evaluate damages, and inform settlement discussions.

16 **e. The settlement is by all measures substantial and adequately reflects the**
17 **magnitude of harm to the Franchise Dealer Class.**

18 The Settlement in this case is \$1,208,000,000.00 if there is 100% participation by the
19 Franchise Dealer Class members. By any measure, it is one of the largest settlements in history.
20 And in terms of raw size for automotive settlements it ranks behind only the Volkswagen
21 Consumer Settlement, and the Toyota Sudden Unintended Acceleration settlement, which was
22 approximately \$1.5 billion. And unlike those cases that had hundreds of thousands of class
23 members that would share in the settlement, this settlement class has only 652 members, thus the
24 average recovery by each Franchise Dealer Class Member will be about \$1.85 million, a sum that
25 likely exceeds the amount of most class action settlements. The size of the settlement clearly
26 supports approval of the settlement because it is extraordinary by any measure and reflects the
27 strength of Franchise Dealer Class Members' case against Volkswagen and Volkswagen's need to
28 have the cooperation of Franchise Dealer Class Members to effectuate the Consumer Settlement
29 and ensure its very ongoing survival.

1 **f. In light of the unique facts and circumstances of this case, that it is**
2 **being settled at an early stage of the case is not a concern.**

3 This case is still in an early stage. While adequate discovery to assess the adequacy of the
4 settlement has been obtained and reviewed, there has been no motions practice yet in the case.
5 However, the circumstances of the diesel emissions scandal, and Volkswagen's need to effectuate a
6 prompt resolution for consumers, regulators, and dealers suggests that an early resolution of the
7 dealer case is not only desirable, but indeed required. The ongoing viability and cooperation of
8 Volkswagen's franchise dealer network is essential to the Consumer Settlement. For this reason,
9 the early stage of settlement does not militate against preliminary or final approval.

10 **g. Plaintiffs' counsel and Volkswagen counsel are highly experienced class**
11 **action and automotive dealer litigators and they fully support the**
12 **Settlement.**

13 Hagens Berman is one of the most experienced plaintiffs class firms in the country,
14 especially in the context of massive automotive class cases. Hagens Berman has had and currently
15 has a leadership role in the largest automotive class cases in history, including *In re: Toyota SUA*,
16 which settled for over \$1.3 billion, and *In re Hyundai/Kia MPG*, which settled for nearly \$400
17 million; the massive GM ignition switch case, which is currently in active litigation, and the
18 Volkswagen consumer case, for which Hagens Berman Managing Partner, Steve W. Berman, is a
19 member of the Plaintiffs' Steering Committee. Bass Sox Mercer is a nationwide leader in the
20 representation of automotive dealers in lawsuits and other actions against automobile
21 manufacturers. Its depth of knowledge and experience in the particular type of dispute at issue in
22 this case brings necessary perspective to dealers' damages in this case and concerns about ongoing
23 litigation. Hagens Berman and Bass Sox Mercer strongly support this settlement. It provides
24 Franchise Dealer Class Members with genuine and substantial financial support to compensate
25 them for the loss in the value of their dealerships. It also, through the non-monetary aspects of the
26 Settlement, provides a cooperative path forward where Volkswagen and its dealers can work
27 cooperatively toward remediation of the diesel emissions scandal and recovery of the brand.

1 Counsel’s judgment that the Settlement is fair and reasonable is entitled to great weight.¹³
2 “[A]bsent fraud, collusion, or the like, [the Court] should be hesitant to substitute its own judgment
3 for that of counsel.”¹⁴

4 Likewise, Volkswagen’s counsel, Sullivan & Cromwell, strongly support the Settlement.
5 As Volkswagen’s counsel throughout the diesel emissions scandal, S&C is intimately familiar with
6 the needs and resources of Volkswagen, and its goals and intentions going forward. The strong
7 support of the very experienced counsel involved in the negotiation of the Settlement support its
8 preliminary approval.

9 **h. The extensive involvement of government in response to the Volkswagen**
10 **emissions scandal supports approval of this Settlement.**

11 Government regulators and the Department of Justice did not have a direct role in the
12 negotiation of this Settlement, yet their critical presence in the Consumer Settlement and ongoing
13 criminal investigation support approval of this Settlement. The EPA, CARB, and the Department
14 of Justice were a guiding force in the Consumer Settlement, which will swiftly reduce ongoing
15 environmental damage by removing the polluting cars from the road and requiring substantial (over
16 \$2.5 billion worth) environmental mitigation by Volkswagen. But the success of the Consumer
17 Settlement depends on, and requires the extensive cooperation of the Franchise Dealer Class. This
18 Settlement assures that cooperation.

19 **i. Plaintiffs’ counsel are confident the Settlement will be broadly**
20 **supported by the Franchise Dealer Class.**

21 Plaintiffs’ counsel, Bass Sox Mercer, was hired by the Dealer Investment Committee
22 (“DIC”) to seek a negotiated resolution with Volkswagen for all Volkswagen-branded franchise
23 dealers. The DIC, in turn, consists of five current Franchise Dealer Class Members who were
24 nominated to the DIC by their peers. The DIC fully support this Settlement, and based on their

25 ¹³ See *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576-77 (9th Cir. 2004); *OFJ*, 688 F.2d at 625
26 (same); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff’d*, 661 F.2d 939
27 (9th Cir. 1981) (“the fact that experienced counsel involved in the case approved the settlement
28 after hard-fought negotiations is entitled to considerable weight”).

¹⁴ *Nat’l Rural Telecomms. Coop. v. DIRECTV*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (citation
omitted).

1 interactions with other Franchise Dealer Class Members, they are confident that the Settlement will
2 receive overwhelming support from Franchise Dealer Class Members throughout the United States.

3 Thus, each of the factors to be evaluated for final approval suggest that this Settlement is
4 substantively fair and should receive preliminary approval.

5 **2. The Settlement Is the Result of Arm’s-Length Negotiations.**

6 This settlement arises out of extended, informed, arm’s-length negotiations between
7 counsel for the parties. The parties reached agreement after months of intensive investigation,
8 dealer-specific document discovery, expert retention and consultation. As a result, Plaintiffs’
9 Counsel had ample information to participate in an informed, and thus reasonable negotiation
10 process.¹⁵ And with that knowledge to bring to bear, Plaintiffs’ counsel held multiple settlement
11 meetings and communications with Volkswagen’s counsel, who were similarly very sophisticated
12 and well-informed. While a neutral mediator was not present at the settlement discussions,
13 Director Mueller, the Court’s Settlement Master appointed in the MDL was provided the initial
14 term sheet and final Settlement, and has indicated his belief that the Settlement should be submitted
15 to the Court for approval.¹⁶

16 In short, these non-collusive and fully informed negotiations between sophisticated sets of
17 counsel support preliminary approval of the settlement agreement. As the Ninth Circuit has stated,
18 “We put a good deal of stock in the product of an arms-length, non-collusive, negotiated
19 resolution.”¹⁷

20 Plaintiffs respectfully request that the Court preliminarily approve the settlement
21 agreement.
22
23

24 _____
25 ¹⁵ See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding
26 “significant investigation, discovery and research” supported the district court’s conclusion “that
27 the Plaintiffs had sufficient information to make an informed decision about the Settlement”).

28 ¹⁶ See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (finding
the presence of a neutral mediator “a factor weighing in favor of a finding of non-collusiveness”).

¹⁷ *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

1 **B. The Court Should Certify the Franchise Dealer Class**

2 Class certification—whether through motions practice or uncontested in conjunction with a
 3 proposed settlement—requires: (1) that “the class is so numerous that joinder of all parties is
 4 impracticable; (2) there are questions of law and fact common to the class; (3) the claims or
 5 defenses of the representative parties are typical of the claims or defenses of the class; and (4) the
 6 representative parties will fairly and adequately protect the interests of the class.”¹⁸ Where a
 7 proposed class seeks monetary damages, and not just injunctive relief, “questions of law and fact
 8 common to class members [must] predominate over any questions affecting only individual
 9 members,” and the class action must be “superior to other available methods for fairly and
 10 efficiently adjudicating the controversy.”¹⁹ But unlike in a contested class certification process,
 11 which is a precursor to trial, a proposed settlement class does not require a showing that a trial on
 12 class claims would present no manageability issues—precisely because there will be no trial that
 13 needs to be managed.²⁰

14 **1. The Proposed Class is Ascertainable.**

15 Although not specified in Rule 23, courts imply a prerequisite that the proposed class be
 16 ascertainable.²¹ “A class definition should be precise, objective, and presently ascertainable.”²²
 17 Ascertainability is satisfied when it is “administratively feasible for the court to determine whether
 18 a particular individual is a member.”²³

19 The Settlement Class definition here utilizes objective criteria that make class membership
 20 objectively verifiable. The identity of Class members is easily ascertainable through reference to
 21

22 ¹⁸ Fed. R. Civ. P. 23(a).

23 ¹⁹ Fed. R. Civ. P. 23(b)(3).

24 ²⁰ *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

25 ²¹ *Galvan v. KDI Distrib.*, 2011 U.S. Dist. LEXIS 127602, at *8 (C.D. Cal. Oct. 25, 2011); *In re Northrop Grumman Corp. ERISA Litig.*, 2011 U.S. Dist. LEXIS 94451, at *26 n.61 (C.D. Cal. Mar. 29, 2011).

26 ²² *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 574 (C.D. Cal. 2007) (internal quotations omitted).

27 ²³ *In re Northrop Grumman*, 2011 U.S. Dist. LEXIS 94451, at *26 n.61 (internal quotation omitted).

1 “objective criteria,”²⁴ because Volkswagen knows precisely who its franchise dealers are and have
 2 been. The exact identity and whereabouts of each of the 652 members of the Franchise Dealer
 3 Class is known.

4 **2. Each of the Rule 23(a) Requirements Are Met**

5 **a. The Class is so numerous that joinder is impracticable.**

6 Rule 23(a)(1) requires that the class be so numerous that joinder of all members is
 7 “impracticable.”²⁵ Numerosity “depends on the facts and circumstances of each case and does not,
 8 as a matter of law, require any specific minimum number of class members.”²⁶ Courts generally
 9 find numerosity when a class includes at least 40 members.²⁷ Class size does not have to be
 10 “exactly determined” at the certification stage; “a class action may proceed upon estimates as to the
 11 size of the proposed class.”²⁸

12 Here, the numerosity requirement is easily met because there are 652 Franchise Dealer
 13 Class Members. This number of Class members clearly makes joinder impracticable.²⁹

14 **b. Numerous common issues exist.**

15 Plaintiffs must demonstrate that there are questions of fact and law that are common to the
 16 class in order to satisfy Rule 23(a)(2). “[A] common question ‘must be of such a nature that it is
 17 capable of classwide resolution – which means that the determination of its truth or falsity will
 18 resolve an issue that is central to the validity of each of the claims in one stroke.’”³⁰ The
 19
 20
 21

22 ²⁴ See *Agne v. Papa John’s Int’l*, 286 F.R.D. 559, 566 (W.D. Wash. 2012).

23 ²⁵ *Hanlon*, 150 F.3d at 1019.

24 ²⁶ *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1340 (W.D. Wash. 1998).

25 ²⁷ See *Z.D. v. Grp. Health Coop.*, 2012 WL 1977962, at *3 (W.D. Wash. June 1, 2012).

26 ²⁸ *Hartman v. United Bank Card Inc.*, 2012 WL 4758052, at *10 (W.D. Wash. Oct. 4, 2012).

27 ²⁹ See *Brown v. Consumer Law Assocs., LLC*, 283 F.R.D. 602, 612 (E.D. Wash. 2012) (class of
 28 894 debt settlement customers satisfied numerosity requirement).

³⁰ *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *17 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131
 S. Ct. 2541, 2551 (2011)).

1 “existence of shared legal issues with divergent factual predicates is sufficient, as is a common core
2 of salient facts coupled with disparate legal remedies within the class.”³¹

3 Commonality is liberally and permissively construed.³² It requires only “a single
4 *significant* question of law or fact.”³³ A defendant’s actions need not affect each Class member in
5 the same manner and individual differences in damages will not defeat class treatment.³⁴

6 This litigation centers around one single and common core question: whether Volkswagen
7 defrauded consumers, government regulators and its own franchise dealers by installing and
8 utilizing illegal defeat device software to fraudulently obtain the EPA required Certificates of
9 Compliance. The relatively low commonality hurdle is satisfied here. The claims of all Franchise
10 Dealer Class Members involve this same overriding question. This issue is central to this case and
11 is sufficient to establish commonality.

12 **c. The Class Representative’s claims are typical of those of other Class**
13 **members.**

14 Rule 23(a)(3) requires that the class representative’s claims are typical of the class. “The
15 test of typicality ‘is whether other members have the same or similar injury, whether the action is
16 based on conduct which is not unique to the named plaintiffs, and whether other class members
17 have been injured by the same course of conduct.’”³⁵ “Typicality refers to the nature of the claim
18 or defense of the class representative, and not to the specific facts from which it arose or the relief
19

20
21 ³¹ *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 U.S. Dist. LEXIS 95083, at
22 *15 (C.D. Cal. Nov. 13, 2008) (quoting *Hanlon*, 150 F.3d at 1019).

23 ³² *Hanlon*, 150 F.3d at 1019; *see also Kirkpatrick v. Ironwood Commc’ns, Inc.*, 2006 U.S. Dist.
LEXIS 57713, at *11-14 (W.D. Wash. Aug. 16, 2006); *Rodriguez v. Carlson*, 166 F.R.D. 465, 472
(E.D. Wash. 1996).

24 ³³ *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original); *accord*
25 *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1203 (W.D. Wash. 2008), *amended in part*, 2008 WL
2275558 (W.D. Wash. June 3, 2008).

26 ³⁴ *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d at 1342; *Brown*, 283 F.R.D. at 612 (citing
27 *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1026 (9th Cir. 2011)).

28 ³⁵ *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v.*
Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)).

1 sought.”³⁶ “Under the ‘permissive standards’ of this Rule, ‘representative claims are ‘typical’ if
 2 they are reasonably co-extensive with those of absent class members; they need not be substantially
 3 identical.’”³⁷ The “focus should be on the defendants’ conduct and plaintiff’s legal theory, not the
 4 injury caused to the plaintiff.”³⁸

5
 6 The proposed Class Representative here is J. Bertolet Volkswagen. Bertolet’s claims arise
 7 from a common course of conduct of Volkswagen and a common legal theory. His interests are
 8 typical of and closely aligned with those of the absent Class members. J. Bertolet Volkswagen is a
 9 Volkswagen-branded franchise dealer who, like every Franchise Dealer Class member, sells
 10 Volkswagen cars to consumers. He, and every Franchise Dealer Class member, was injured by
 11 Volkswagen’s diesel emissions scandal, and particularly the stop sale order on all Volkswagen
 12 diesel cars, and the precipitous decline in the value of the Volkswagen brand. Thus, because
 13 J. Bertolet’s claims rely on facts and legal theories identical to those of the Class, the typicality
 14 requirement is satisfied.

15 **d. The Class Representative and its counsel adequately represent the
 16 interests of the Class.**

17 Rule 23(a)(4) requires that the representative parties fairly and adequately protect the
 18 interests of the class. The relevant inquiries are: “(1) do the named plaintiffs and their counsel
 19 have any conflicts of interest with other class members and (2) will the named plaintiffs and their
 20 counsel prosecute the action vigorously on behalf of the class?”³⁹

21 Here, the proposed Class representative is committed to the action and has devoted
 22 substantial time to assisting counsel with this action, providing documents and reviewing
 23 pleadings. Berman Decl., ¶ 15. The proposed Class representative has no interests that are

24 _____
 25 ³⁶ *Id.*

26 ³⁷ *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *18 (quoting *Hanlon*, 150 F.3d at 1020).

27 ³⁸ *Costelo v. Chertoff*, 258 F.R.D. 600, 608 (C.D. Cal. 2009) (quoting *Simpson v. Fireman’s
 28 Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005)).

³⁹ *Ellis*, 657 F.3d at 985 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.
 1998)); see also *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *20.

1 antagonistic to other Class members, and in fact shares a strong and identical interest in protecting
2 Class members and the Volkswagen community as a whole. Berman Decl., ¶ 16.

3 Similarly, class counsel are well qualified, possess no conflicts of interest, and have already
4 proven capable of prosecuting this action vigorously on behalf of the Class. Plaintiffs' counsel has
5 litigated this action along both its prongs since its inception. Hagens Berman thoroughly
6 investigated then filed the first franchise dealer action stemming from the diesel emissions scandal,
7 and Bass Sox Mercer was retained by the Dealer Investment Counsel, a group of Volkswagen
8 dealers that were nominated by Franchise Dealer Class members to represent their interests in
9 discussions with Volkswagen. While Hagens Berman has extensive experience in handling
10 complex commercial litigation, including class actions;⁴⁰ Bass Sox Mercer has represented auto
11 dealerships in disputes with manufacturers for years and are widely regarded as one of the
12 country's preeminent dealer-side law firms.⁴¹ By melding the firms' expertise in this action, there
13 can be no question that they are adequate.

16 **3. The Requirements of Rule 23(b)(3) Are Met.**

17 A class may be certified under Rule 23(b)(3) when “questions of law or fact common to the
18 class members predominate over any questions affecting only individual members” and the class
19 action mechanism is “superior” to other methods of adjudicating the controversy.⁴²

20 **a. Common issues of law and fact predominate.**

21 “The predominance inquiry ... asks whether proposed classes are sufficiently cohesive to
22 warrant adjudication by representation.”⁴³ “The focus is on the relationship between the common
23 and individual issues.”⁴⁴ Here the common issues of law and fact clearly predominate over issues

24
25 ⁴⁰ See Berman Decl., Ex. A (HB Firm Resume).

26 ⁴¹ See Berman Decl., Ex. B (BSM Firm Resume).

27 ⁴² Fed. R. Civ. P. 23(b)(3).

28 ⁴³ *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011).

⁴⁴ *Id.*

1 affecting only individual plaintiffs. The common issues are Volkswagen’s development and use of
2 the Defeat Device, resulting stop sale orders and brand damage. The individual issues are each
3 franchise dealer’s interactions with Volkswagen. But the latter will have little effect, if any, on
4 damages or any other aspect of the case because the allegations against Volkswagen simply do not
5 turn on the identity or any individual characteristics of the franchise dealer. Every Volkswagen-
6 branded franchise dealer was subject to the stop sale orders, everyone had to hold the frozen
7 inventory of diesels, and everyone suffered huge losses in brand value when the diesel emissions
8 scandal was exposed. It is difficult to imagine a single individual dealer issue that would affect, let
9 alone predominate, the overriding common issue of development and use of the Defeat Device.

10 **b. The class action mechanism is superior to any other methods of**
11 **adjudication.**

12 The “superiority” element is satisfied because, through class certification, the nature,
13 knowledge of Volkswagen, intent, and effect of the Defeat Device can be determined in one
14 proceeding for Volkswagen-branded franchise dealers. “When common questions present a
15 significant aspect of the case and they can be resolved for all members of the class in a single
16 adjudication, there is clear justification for handling the dispute on a representative rather than on
17 an individual basis.”⁴⁵ Also, in this case, the fact that 652 individual claims “would not only
18 unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs” weighs
19 heavily in favor of a class action.⁴⁶ While the payments each Settlement Class Member will
20 receive in this case are large, each such dealer has an ongoing and vital relationship with
21 Volkswagen. Litigating an individual case against their sole supplier of inventory is a highly
22 undesirable, and risk-fraught endeavor. Moreover, Volkswagen needs the cooperation of its dealer
23 network to effectuate the terms of the massive Consumer Settlement and government consent
24 decree. Such cooperation would be difficult, perhaps impossible, if Volkswagen were engaged in
25 hundreds of dealer lawsuits.

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27 ⁴⁵ *Hanlon*, 150 F.3d at 1022.

28 ⁴⁶ *See id.* at 1023.

1 A class action is superior here, not only based on judicial economy, but because it truly
 2 represents the only option for franchised dealers and Volkswagen alike to resolve the claims and
 3 move forward in a cooperative manner that helps sustain the franchise dealers and Volkswagen and
 4 its ability to effectuate the Consumer Settlement and ameliorate the environmental damage from its
 5 diesel vehicles.

6 For these reasons, the proposed Franchise Dealer Class meets the requirements of Rule
 7 23(a) and 23(b)(3) and the Court should grant provisional certification for purposes of effecting the
 8 proposed Settlement.

9 **C. The Proposed Manner and Form of Notice Satisfies Rule 23**

10 Rule 23(e)(1) requires that a court approving a class action settlement “direct notice in a
 11 reasonable manner to all class members who would be bound by the proposal.”⁴⁷ A class action
 12 settlement notice “is satisfactory if it generally describes the terms of the settlement in sufficient
 13 detail to alert those with adverse viewpoints to investigate and to come forward and be heard.”⁴⁸

14 The proposed plan for notice will be 100% effective in alerting each Franchise Dealer Class
 15 Member to the Settlement and its terms. It is necessarily then “the best notice that is practicable
 16 under the circumstances.”⁴⁹

17 Moreover, the proposed notice of settlement follows, as closely as possible, the language
 18 recommended by this District’s Procedural Guidance for Class Action Settlements⁵⁰ and required
 19 by the Ninth Circuit.⁵¹ There will be links to the Settlement website that will contain the notice of
 20 settlement, key court documents, and other important information about the case. With this
 21

22 _____
 23 ⁴⁷ Fed. R. Civ. P. 23(e)(1).

24 ⁴⁸ *Churchill Vill.*, 361 F.3d at 575; *see also* Fed. R. Civ. P. 23(c)(2)(B) (describing specific
 information to be included in the notice).

25 ⁴⁹ Fed. R. Civ. P. 23(c)(2)(B).

26 ⁵⁰ *See* <http://www.cand.uscourts.gov/ClassActionSettlementGuidance> (last visited August 4,
 2016).

27 ⁵¹ *E.g.*, *In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015); *Lane v.*
 28 *Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012); *Rodriguez*, 563 F.3d at 962.

1 motion, plaintiffs provide their proposal for the notice of settlement, which Volkswagen has
2 reviewed and also approves.⁵²

3 Courts have found that notice plans estimated to reach a minimum of 70 percent are
4 constitutional and comply with Rule 23. Here, the notice will reach 100% of the Franchise Dealer
5 Class. These notice provisions meet the requirements of Rule 23 and will allow the Class a full
6 and fair opportunity to review and respond to the proposed settlement.

7 **D. The Proposed Schedule for Dissemination of Notice and Final Approval**

8 Plaintiffs propose the following schedule for the dissemination of class notice and final
9 approval:

Event	Deadline
Hearing and order re preliminary approval	
Notice to be sent by overnight express carrier to each Franchise Dealer Class member and settlement website to be launched	[one week from preliminary approval order]
Last day for motion for attorneys' fees, costs, expenses, and service awards	[two weeks before objection deadline]
Last day to file objections to the settlement or requests for exclusion from the class ("Opt-Out Date")	[45 days from notice]
Last day for motion in support of final approval of settlement	[two weeks after objection deadline]
Last day for response to objections, reply in support of motion for final approval, and reply in support of motion for attorneys' fees, costs, expenses, and service awards	[one week prior to the final fairness hearing]
Final Fairness Hearing	[three weeks after motion for final approval], unless otherwise ordered by the Court

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28 ⁵² The Class Notice is attached as Exhibit 1 to the Settlement Agreement.

V. CONCLUSION

With this Settlement, plaintiffs have secured recovery of \$1,208,000,000.00 for Franchise Dealer Class members plus valuable non-cash benefits limiting pending capital investment requirements. The Settlement will assure the ongoing success and vitality of Volkswagen’s dealer network and cement their cooperation in the Consumer Settlement and amelioration of the environmental damage caused by Volkswagen’s alleged defeat device fraud. The Settlement was reached only after extensive arms-length negotiations and is supported by the Court’s Settlement Master. Plaintiffs respectfully request that this Court enter an order: (1) preliminarily approving the proposed class action settlement; (2) provisionally certifying the Franchise Dealer Class; (3) approving the manner and form of notice; and (4) setting a final fairness hearing.

DATED: September 30, 2016.

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Steve W. Berman

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Counsel for Plaintiffs and the proposed Franchise Dealer Class

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Steve W. Berman
STEVE W. BERMAN

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10 *Counsel for Plaintiffs Napleton Orlando Imports, LLC, Napleton Sanford Imports, LLC, Napleton Automotive of Urbana, LLC and J. Bertolet, Inc.*

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 IN RE: VOLKSWAGEN ‘CLEAN DIESEL’
15 MARKETING, SALES PRACTICES, AND
16 PRODUCTS LIABILITY LITIGATION

MDL No. 02672-CRB (JSC)

17 This document relates to:

[PROPOSED] ORDER GRANTING
PRELIMINARY APPROVAL OF
FRANCHISE DEALER SETTLEMENT
AGREEMENT, PROVISIONAL
CERTIFICATION OF DEALER
SETTLEMENT CLASS, AND
APPROVAL OF CLASS NOTICE

18 *Napleton Orlando Imports, LLC et al. v.*
19 *Volkswagen Group of America, Inc. et al.,*
20 Case No. 3:16-cv-02086-CRB

The Honorable Charles R. Breyer

20 NAPLETON ORLANDO IMPORTS, LLC
21 d/b/a NAPLETON’S VOLKSWAGEN OF
22 ORLANDO, an Illinois limited liability company,
23 NAPLETON SANFORD IMPORTS, LLC d/b/a
24 NAPLETON’S VOLKSWAGEN OF SANFORD,
25 an Illinois limited liability company, and
26 NAPLETON AUTOMOTIVE OF URBANA,
27 LLC d/b/a NAPLETON VOLKSWAGEN OF
28 URBANA, a Florida limited liability company,
individually, and J. BERTOLET, INC. dba J.
BERTOLET VOLKSWAGEN, on behalf of itself
and all similarly situated persons and entities,

Plaintiffs,

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v.

VOLKSWAGEN GROUP OF AMERICA, INC., a
New Jersey Corporation, VW CREDIT, INC., a
Delaware corporation, VOLKSWAGEN AG, a
German corporation, ROBERT BOSCH, LLC, a
Michigan limited liability company, and ROBERT
BOSCH GmbH, a German corporation.

Defendants.

1 This matter comes before the Court on the Motion by J. Bertolet, Inc. for Preliminary
2 Approval of Franchise Dealer Settlement Agreement, filed September 30, 2016 (“Preliminary
3 Approval Motion”). Plaintiff J. Bertolet, Inc. and Volkswagen¹ entered into a Volkswagen-Branded
4 Franchise Dealer Settlement Agreement and Release, dated September 30, 2016 (“the Franchise
5 Dealer Settlement” or “the Settlement”), to settle all claims against Volkswagen in the
6 Volkswagen-Branded Franchise Dealer Amended and Consolidated Class Action Complaint
7 (“Complaint”). The Settlement Agreement sets forth the terms and conditions for a proposed
8 Settlement and dismissal with prejudice of Volkswagen from the Complaint.

9 The Court has carefully considered the Preliminary Approval Motion, and the associated
10 Declarations, the Franchise Dealer Settlement, the arguments of counsel, and the record in this
11 case, and is otherwise advised in the premises. The Court hereby gives its preliminary approval to
12 the Franchise Dealer Settlement; finds that the Franchise Dealer Settlement is sufficiently fair,
13 reasonable, and adequate to allow dissemination of notice of the Franchise Dealer Settlement to the
14 Franchise Dealer Class and to hold a Fairness Hearing; orders that Class Notice be sent to the
15 Franchise Dealer Class in accordance with the Franchise Dealer Settlement and this Order; and
16 schedules a Fairness Hearing to determine whether the proposed Franchise Dealer Settlement is
17 fair, reasonable, and adequate.

18 IT IS HEREBY ORDERED AND ADJUDGED:

19 1. The Franchise Dealer Settlement is hereby incorporated by reference in this Order, and
20 all terms and phrases used in this Order shall have the same meaning as in the Franchise Dealer
21 Settlement.

22 2. This Court has personal jurisdiction over all Franchise Dealer Class Members and
23 subject matter jurisdiction to approve the Franchise Dealer Settlement.

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27 ¹ For purposes of the Franchise Dealer Settlement and this Order, “Volkswagen” includes
28 Volkswagen AG, Volkswagen Group of America, Inc., Volkswagen Credit, Inc., and Volkswagen
Group of America Chattanooga Operations, LLC.

1 3. The Court preliminarily approves the Volkswagen-Branded Franchise Dealer
2 Settlement Agreement and Release and finds that the proposed Settlement is sufficiently fair,
3 reasonable, and adequate to warrant providing notice to the Franchise Dealer Class.

4 4. The Franchise Dealer Settlement appears to be the result of intensive, informed and
5 non-collusive negotiations between experience class counsel and defense counsel. The Settlement
6 has no obvious deficiencies, does not grant preferential treatment to any section of the Franchise
7 Dealer Class or Class Representative, and appears to be fair, reasonable and adequate.

8 5. The Court preliminarily certifies for settlement purposes only the following Franchise
9 Dealer Class pursuant to Federal Rule of Civil Procedure 23(b)(3):

10 All persons or entities who owned a Volkswagen-branded franchise
11 dealership that operated in the United States as of September 18,
12 2015.

12 Excluded from the Franchise Dealer Class are all persons who make a timely election to be
13 excluded from the Franchise Dealer Class.

14 6. Volkswagen shall retain all rights to assert that the Lawsuits may not be certified as a
15 class action except for settlement purposes.

16 7. The Court finds, for purposes of preliminary approval and for settlement purposes
17 only, that (a) members of the Franchise Dealer Class are so numerous as to make joinder of all
18 Franchise Dealer Members impracticable; (b) there are questions of law or fact common to
19 members of the Franchise Dealer Class; (c) the claims of the Class Representative are typical of the
20 claims of the Franchise Dealer Class members; (d) Class Representative and Class Counsel will
21 fairly and adequately protect the interests of the Franchise Dealer Class Members; (e) questions of
22 law or fact common to Franchise Dealer Class Members predominate over questions affecting only
23 individual Franchise Dealer Class Members; and (f) a class action is superior to other available
24 methods for the fair and efficient adjudication of the controversy.

25 8. The Court appoints J. Bertolet, Inc. as representative of the Franchise Dealer Class.

26 9. The Court appoints Hagens Berman Sobol Shapiro LLP and Bass Sox Mercer as Class
27 Counsel.

1 10. The Court finds that the unique nature of the Settlement does not require a third-party
2 claims administrator to be appointed and, instead, finds that Volkswagen is uniquely suited to
3 fairly, adequately, and efficiently provide Class Notice to Franchise Dealer Class Members in
4 compliance with all due process requirements.

5 11. Class Notice. The Court approves the proposed Class Notice. Volkswagen is aware of
6 the current addresses and contact information for those of the 652 Franchise Dealer Class Members
7 who currently own and operate a Volkswagen dealership. For those of the 652 Franchise Dealer
8 Class Members who do not currently own and operate a Volkswagen dealership, Volkswagen will
9 mail the notice to the last known address and in addition Class Counsel will work with Volkswagen
10 using their combined reasonable, best efforts to identify and send the notice to their current
11 addresses. Volkswagen will provide Class Notice by (i) overnight express mail substantially
12 similar to the form attached as Exhibit 1 to the Settlement (“Class Notice”); (ii) Plaintiffs’ Counsel
13 will email notice substantially similar to the Class Notice; and (iii) Plaintiffs’ Counsel will
14 establish a content-neutral settlement website at www.vwdealersettlement.com that will contain
15 notice substantially similar to the Class Notice, as well as further information about the Settlement,
16 including access to the pleadings (“Settlement Website”).

17 12. Volkswagen shall use its best efforts to complete the Class Notice process by the
18 **Mailed Notice Date** listed in Paragraph 26 of this Order.

19 13. The Court finds that the procedures outlined in the Franchise Dealer Settlement for
20 identifying Franchise Dealer Class Members and providing notice to them constitute reasonable
21 and the best practicable notice under the circumstances and an appropriate and sufficient effort to
22 locate addresses for Franchise Dealer Class Members such that no additional efforts to do so shall
23 be required.

24 14. The Court finds that the Class Notice plan, including the form, content, and method of
25 dissemination of the Class Notice to Franchise Dealer Class Members as described in the Franchise
26 Dealer Settlement, (i) is the best practicable notice; (ii) is reasonably calculated, under the
27 circumstances, to apprise Franchise Dealer Class Members of the pendency of the action and of
28 their right to object to and/or exclude themselves from the proposed Settlement; (iii) is reasonable

1 and constitutes due, adequate, and sufficient notice to all Persons entitled to receive notice; and
2 (iv) meets all applicable requirements of Federal Rule of Civil Procedure 23 and due process.

3 15. Exclusions/Objections. The Court approves the procedures set forth in the Franchise
4 Dealer Settlement for exclusions from and objections to the Settlement.

5 16. Any Franchise Dealer Class Member who wishes to be excluded from the Dealer
6 Settlement Class must comply with the terms set forth in the Franchise Dealer Settlement.
7 Franchise Dealer Class Members who wish to exclude themselves from (“opt out of”) the
8 Settlement must send a written request for exclusion (“Exclusion Request”) by the
9 **Exclusion/Objection Deadline** listed in Paragraph 26 of this Order, as provided in the Class
10 Notice. Class Counsel shall submit the name, city, and state of residence of all Settlement Class
11 Members who submit Exclusion Requests to the Court at the time Class Counsel file their motion
12 for final approval of the Franchise Dealer Settlement.

13 17. All Franchise Dealer Class Members will be bound by the Franchise Dealer Settlement
14 unless such Franchise Dealer Class Members timely file a valid Exclusion Request. Any Franchise
15 Dealer Class Member who submits a timely Exclusion Request shall be deemed to have waived
16 any rights or benefits under the Franchise Dealer Settlement. If a Franchise Dealer Class Member
17 has submitted an Exclusion Request, they may not submit an Objection.

18 18. The Court preliminarily enjoins all Franchise Dealer Class Members, unless and until
19 they submit a timely Exclusion Request pursuant to the Franchise Dealer Settlement, (i) from
20 filing, commencing, prosecuting, intervening in, or participating as plaintiff, claimant, or class
21 member in any other lawsuit or administrative, regulatory, arbitration, or other proceeding in any
22 jurisdiction with respect to the Released Claims; and (ii) from filing, commencing, or prosecuting a
23 lawsuit or administrative, regulatory, arbitration, or other proceeding as a class action on behalf of
24 any Franchise Dealer Class Members, based on the Released Claims.

25 19. Dealer Settlement Class Members who wish to object to any aspect of the Settlement
26 must file with the Court a written statement containing their objection (“Objection”) by the
27 **Exclusion/Objection Deadline** listed in Paragraph 26 of this Order, as provided in the Class
28 Notice. Any Dealer Settlement Class Member who does not make his or her objection in the

1 manner provided in the Class Notice shall be deemed to have waived such objection and shall
2 forever be foreclosed from making any objection to the fairness or adequacy of the Settlement as
3 set forth in the Franchise Dealer Settlement and/or to the award of attorneys' fees and expenses to
4 Class Counsel. At their sole discretion, Class Counsel shall be permitted to depose any objector
5 within 30 days of the filing of the objection. Such deposition shall occur within a reasonable
6 distance of objector's residence and shall be limited to three hours.

7 20. Any attorney hired by, representing, or assisting (including, but not limited to, by
8 drafting or preparing papers for a Dealer Settlement Class Member) a Dealer Settlement Class
9 Member or governmental entity for the purpose of objecting to any term or aspect of the Franchise
10 Dealer Settlement or intervening in the action shall file with the Clerk of the Court a notice of
11 appearance no later than the **Exclusion/Objection Deadline** listed in Paragraph 26 of this Order.

12 21. The Court directs Class Counsel and Volkswagen to promptly furnish to each other
13 copies of any and all objections, motions to intervene, notices of intention to appear, and other
14 communications that come into its possession (except as otherwise expressly provided in the
15 Franchise Dealer Settlement).

16 22. The Court orders that the certification of the Franchise Dealer Class and preliminary
17 approval of the proposed Franchise Dealer Settlement are undertaken on the condition that they
18 shall be vacated if the Settlement is terminated or disapproved in whole or in part by the Court, or
19 any appellate court and/or other court of review, or if any of the Parties invokes the right to
20 withdraw from the Settlement as provided in the Franchise Dealer Settlement Agreement, in which
21 event the Agreement, the Settlement, the fact of their existence, any of their terms, any press
22 release or other statement or report by the Parties or by others concerning the Settlement
23 Agreement, the Settlement, their existence, or their terms, any negotiations, proceedings, acts
24 performed, or documents executed pursuant to or in furtherance of the Settlement Agreement or the
25 Settlement shall not be offered or received in evidence, or otherwise used by any party or witness
26 for any purpose whatsoever, in any trial of this action or any other action or proceedings, nor shall
27 they be deemed to constitute any evidence or admission of liability or wrongdoing on the part of
28 Volkswagen, which is expressly and unequivocally denied by Volkswagen.

1 23. Because the Franchise Dealer Settlement does not resolve all claims against all parties
2 named in the Complaint, there shall be no stay of the action against Robert Bosch, GmbH and
3 Robert Bosch LLC.

4 24. Class Counsel shall file a petition for fees and expenses by the **Fee Petition Deadline**
5 listed in Paragraph 26 of this Order. Class Counsel shall file reply briefs and any other
6 supplemental final approval papers by the **Fee Petition Reply Deadline** listed in Paragraph 26 of
7 this Order.

8 25. The **Final Fairness Hearing** shall be held at the date and time listed in Paragraph 26
9 of this Order, for the purpose of determining (a) whether the Settlement is fair, reasonable, and
10 adequate and should be finally approved by the Court; (b) the merit of any objections to the
11 Settlement; (c) the requested Fee and Expense Award to Class Counsel; and (d) entry of the
12 District Court Approval Order and Judgment approving the Settlement.

13 26. The Court directs that the following deadlines are established by this Order. The Court
14 may, for good cause, extend any of the deadlines set forth in this Order without further notice to the
15 Settlement Class:

Event	Deadline
Hearing and order re preliminary approval	_____, 2016
Notice to be sent by overnight express carrier to each Franchise Dealer Class member and settlement website to be launched (“ Mailed Notice Date ”)	_____, 2016 [one week from preliminary approval order]
Last day for motion for attorneys’ fees, costs, expenses, and service awards (“ Fee Petition Deadline ”)	_____, 2016 [two weeks before objection deadline]
Last day to file objections to the settlement or requests for exclusion from the class (“ Exclusion/Objection Deadline ” or “ Opt-Out Date ”)	_____, 2016 [45 days from notice]

1 Last day for motion in support of final approval 2 of settlement	_____, 2016 [two weeks after objection deadline]
3 Last day for response to objections, reply in 4 support of motion for final approval, and reply 5 in support of motion for attorneys’ fees, costs, expenses, and service awards (“ Petition Reply Deadline ”)	_____, 2016 [one week prior to the final fairness hearing]
6 Final Fairness Hearing 7 8	_____, 2016 at 8:00 a.m. [three weeks after motion for final approval], unless otherwise ordered by the Court

9 27. The Court shall maintain continuing jurisdiction over these proceedings for the benefit
 10 of the Franchise Dealer Class.

11 IT IS SO ORDERED

12 DATED:

 13 HON. CHARLES R. BREYER
 14 UNITED STATES DISTRICT JUDGE