

United States District Court
Northern District of California

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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)

**ORDER GRANTING IN PART
DEALER CLASS COUNSEL’S
MOTION FOR ATTORNEYS’ FEES**

This Order Relates To:
Dkt. Nos. 2886, 3092

This MDL consists of various actions brought by consumers, dealers, securities plaintiffs, and government agencies against Volkswagen based on its use of a defeat device—software designed to cheat emissions tests and deceive federal and state regulators—in nearly 600,000 Volkswagen-, Porsche-, and Audi-branded turbocharged direct injection (“TDI”) diesel engine vehicles sold in the United States. With regard to the Volkswagen franchise dealers, the parties submitted the Volkswagen Branded Franchise Dealer Class Action Settlement Agreement and Release (the “Settlement”) on September 30, 2016 (Dkt. No. 1970), and the Court granted final approval of the Settlement on January 23, 2017 (Dkt. No. 2807). The Settlement provides that Volkswagen will “pay reasonable attorneys’ fees and costs related to the negotiation and execution” of the Settlement. (Dkt. No. 1970 ¶ 13.1.)

At the time of final approval, Dealer Class Counsel had not yet moved for its fees and costs, though it submitted a statement that it would seek no more than \$36.24 million in attorneys’ fees and costs. (Dkt. No. 2177 at 5.) Dealer Class Counsel has now submitted a motion for \$28.56 million in attorneys’ fees and costs. (Dkt. No. 2886.) Having considered the parties’ submissions, including the redacted version of Volkswagen’s opposition to counsel’s motion (Dkt.

1 No. 3056-3),¹ and the redacted version of Volkswagen’s sur-reply (Dkt. No. 3092-2),² the Court
 2 GRANTS IN PART Dealer Class Counsel’s fees motion. Under the unique circumstances leading
 3 to the settlement of this case, the Court concludes that it is appropriate to award Dealer Class
 4 Counsel \$2,954,455.00 in attorneys’ fees and \$87,538 in costs.

5 DISCUSSION

6 Federal Rule of Civil Procedure 23(h) provides that, “[i]n a certified class action, the court
 7 may award reasonable attorneys’ fees and nontaxable costs that are authorized by law or by the
 8 parties’ agreement.” Fed. R. Civ. P. 23(h). “Attorneys’ fees provisions included in proposed class
 9 action settlement agreements are, like every other aspect of such agreements, subject to the
 10 determination whether the settlement is ‘fundamentally fair, adequate, and reasonable.’” *Staton v.*
 11 *Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)). Thus, even where
 12 attorneys’ fees and costs are authorized by law or the parties’ agreement in a certified class action,
 13 “courts have an independent obligation to ensure that the award, like the settlement itself, is
 14 reasonable.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

15 I. Attorneys’ Fees

16 A. Percentage or Lodestar Method?

17 Initially, the parties dispute which method of calculating attorneys’ fees is appropriate—
 18 the percentage-of-recovery method (also known as the “percentage method”) or the lodestar
 19 method. The dispute focuses on whether the Settlement creates a common fund. Traditionally,
 20 “[a] common fund is created when the settlement sets aside a specified amount of money to be
 21

22 ¹ In its reply brief, Dealer Class Counsel objected to Volkswagen’s use of confidential settlement-
 23 related material in its opposition and moved to strike any such material. (*See* Dkt. No. 3074 at 6-
 24 7.) In determining the appropriate amount of fees, the Court has not considered any such material
 25 and therefore denies Dealer Class Counsel’s motion to strike as moot.

26 ² Volkswagen filed a five-page sur-reply in response to four supplemental declarations that Dealer
 27 Class Counsel included with its reply brief, which Volkswagen views as new evidence. (*See*
 28 Admin. Mot., Dkt. No. 3092; Supplemental Decls., Dkt. Nos. 3075-78.) The Court has reviewed
 the supplemental declarations and views them as responding to points made in Volkswagen’s
 opposition, rather than offering new evidence. To be cautious, however, the Court has considered
 Volkswagen’s sur-reply, given that “new evidence presented in reply should not be considered
 without giving the non-movant an opportunity to respond.” *Spencer v. Sharp*, 487 F. App’x 424,
 425 (9th Cir. 2012). The Court thus GRANTS Volkswagen’s administrative motion seeking leave
 to file its sur-reply and to file portions thereof related to settlement negotiations under seal.

1 paid by the defendant for the benefit of the entire class ‘in exchange for a release of liability.’ The
2 attorneys’ fees are then taken from the common fund, thereby reducing the amount available to
3 class members.” *Moore v. Verizon Commc’ns Inc.*, No. C 09-1823 SBA, 2014 WL 588035, at *9
4 (N.D. Cal. Feb. 14, 2014) (citation omitted). Volkswagen asserts that no common fund exists
5 from which a percentage can be taken because Dealer Class Counsel is being paid separate and
6 apart from the class members’ benefits. (*See* Dkt. No. 3056-3 at 16-17.) It insists that as a result
7 the Court can only employ the lodestar method to determine appropriate fees.

8 The Court need not resolve the common fund issue here, as even in common fund cases
9 “the district court ‘has discretion to apply either the lodestar method or the percentage-of-the-fund
10 method in calculating a fee award.’” *Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016)
11 (quoting *Fischel v. Equitable Life Assurance Soc’y*, 307 F.3d 997, 1006 (9th Cir. 2002)). Given
12 the unique circumstances leading to the Settlement, the Court, in its discretion, concludes that the
13 lodestar method, as opposed to the percentage method, is the appropriate method for determining
14 fees. Several factors support the Court’s determination.

15 First, much of the groundwork for the Settlement was laid in the negotiations leading to the
16 2.0-liter settlement. Indeed, co-Dealer Class Counsel Hagens Berman spent “hybrid time”
17 attributable to both the 2.0-liter and franchise dealer settlements, for which it was compensated
18 through the 2.0-liter fee application. (*See* Dkt. No. 3053 at 8 n.4.) Second, having reached the
19 2.0-liter settlement, Volkswagen was incentivized to settle quickly with the franchise dealers, as
20 the dealers—the ones tasked with interacting with customers during the buyback and fix
21 processes—are an integral part to implementing the consumer settlements. (*See* Dkt. No. 2483 at
22 20 (Dealer Class Counsel’s final approval motion, stating, “Volkswagen’s branded dealers are the
23 lynchpin in its Consumer Settlements. An ongoing dealer litigation would make cooperation on
24 the Consumer Settlements difficult, if not impossible, further imperiling Volkswagen’s and its
25 dealers’ ability to navigate the maelstrom.”).) Third, the high total amount of the Settlement
26 resulted substantially from the nature and value of the assets at issue—namely, Volkswagen’s
27 diesel vehicles and the franchise dealerships themselves.

28 These factors illuminate why a percentage method of calculating attorneys’ fees would

1 overcompensate Dealer Class Counsel for its work. Dealer Class Counsel did not expend
2 significant additional time procuring the Settlement, nor did it undertake significant additional
3 risk, given Volkswagen’s incentive to settle quickly. Yet because the Settlement was
4 substantial—including \$1.19 billion in required cash payments (Dkt. No. 2483 at 9)—even a
5 modest percentage of the Settlement would generate an outsized award of attorneys’ fees. Dealer
6 Class Counsel’s fee request proves the point. Specifically, counsel seeks an award of attorneys’
7 fees equivalent to 2.4% of the Settlement value, which equates to \$28.56 million. This amount is
8 well above what counsel would have received if compensated on an hourly basis. As discussed
9 more below, after subtracting fees received as part of the 2.0-liter settlement, Dealer Class
10 Counsel’s lodestar for Settlement work is, at most, \$2.04 million, and a \$28.56 million award
11 would be 14 times this amount. And the Court’s calculated lodestar is even less, only \$1.48
12 million, meaning the requested award would be a 19x lodestar multiple.

13 A multiplier in the mid to high teens is simply not appropriate here. In comparison, in the
14 2.0-liter settlement this Court approved an award of attorneys’ fees for class counsel that resulted
15 in a lodestar multiplier of 2.63. (*See* Dkt. No. 3053 at 8.) That amount is comparable to multiples
16 applied in other complex class actions. *See, e.g., Alexander v. FedEx Ground Package Sys., Inc.*,
17 No. 05-cv-00038-EMC, 2016 WL 3351017, at *3 (N.D. Cal. June 15, 2016) (rejecting a request
18 for a multiplier of approximately 4.0, and concluding that “a more typical multiplier for a
19 megafund case is . . . 3 or less”); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D.
20 Cal. 1995) (“Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex
21 class action litigation.”).

22 To be sure, an occasional outsized attorneys’ fees award may be just the type of outcome
23 that motivates class action lawyers to take difficult cases. This is the position of Professor Brian
24 T. Fitzpatrick, Dealer Class Counsel’s “fee expert.”³ (*See* Dkt. 3078 ¶ 8.) Here, though, the

25 ³ Volkswagen objects to Professor Fitzpatrick’s declarations as improper expert testimony. (Dkt.
26 3056-3 at 23 n.17.) While “federal courts typically prohibit lawyers, professors, and other experts
27 from interpreting the law for the court or from advising the court about how the law should apply
28 to the facts of a particular case,” *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d
1037, 1042 (D. Ariz. 2005), here Professor Fitzpatrick’s opinion actually elucidates the Court’s
reasoning, and the Court consequently discusses his declaration herein.

1 franchise dealer class action and its Settlement were intrinsically linked with the 2.0-liter class
 2 action and settlement, and applying the percentage method would “yield[] an unreasonable result,”
 3 while “the lodestar approach would avoid a ‘windfall.’” *Fischel*, 307 F.3d at 1003, 1007.

4 Professor Fitzpatrick also opines that the percentage method is the “more popular method
 5 of calculating attorneys’ fees today” in common fund class actions. (Dkt. 2888 ¶¶ 10-11.) This
 6 does not alter the Court’s conclusion, though, as district courts still have discretion to use the
 7 lodestar method in common fund cases where doing so promotes the ultimate goal—
 8 reasonableness. *See Fischel*, 307 F.3d at 1007. For the reasons discussed, the percentage method
 9 would not lead to a reasonable award here. Further, in the cases Professor Fitzpatrick cites where
 10 the percentage method was used, the lodestar multiplier (when calculated as a cross-check)
 11 averaged 3.3, with a high of 6.2—significantly lower than the 19x multiplier sought here. (*See*
 12 Dkt. No. 2888 ¶ 11.)⁴

13 While use of the lodestar method results in a more modest award of attorneys’ fees, the
 14 Court nevertheless recognizes, as it has previously, that Dealer Class Counsel achieved a great
 15 result for the franchise dealer class members, even in the face of uncertain risk and litigation
 16 length. The attorneys’ fees calculation set forth below reasonably compensates Dealer Class
 17 Counsel for its efforts.

18 **B. Lodestar Calculation**

19 The lodestar method for determining reasonable attorneys’ fees has two parts. *See Van*

20
 21 ⁴ *See, e.g., In Re: Oil Spill by the Oil Rig “Deepwater Horizon”*, MDL No. 2179, 2016 WL
 22 6215974 (E.D. La. Oct. 25, 2016) (lodestar multiplier of 2.3); *In re Credit Default Swaps Antitrust*
 23 *Litig.*, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016) (lodestar multiplier of 6.0); *In re Payment*
 24 *Card Antitrust Litig.*, 991 F. Supp. 2d 437, 448 (E.D.N.Y. 2014) (lodestar multiplier of 3.4); *In re*
 25 *Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82 (D.D.C. 2013) (lodestar multiplier less
 26 than 2.0); *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008) (lodestar
 27 multiplier of 5.2); *In re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 486 (E.D. Pa. 2008)
 28 (lodestar multiplier of 2.6); *In re Tyco Int’l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249 (D.N.H.
 2007) (lodestar multiplier of 2.7); *In re AOL Time Warner, Inc. Sec.*, 2006 WL 3057232
 (S.D.N.Y. Oct. 25, 2006) (lodestar multiplier of 3.7); *In re WorldCom, Inc. Sec. Litig.*, 388 F.
 Supp. 2d 319 (S.D.N.Y. 2005) (lodestar multiplier of 4.0); *In re Visa Check/Mastermoney*
Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003) (lodestar multiplier of 3.5); *In re Prudential*
Ins. Co. of Am. Sales Practice Litig., 106 F. Supp. 2d 721, 736 (D.N.J. 2000) (lodestar multiplier
 of 2.1).

1 *Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

2 First, a court determines the “lodestar” amount by multiplying the
3 number of hours reasonably expended on the litigation by a
4 reasonable hourly rate. The party seeking an award of fees must
5 submit evidence supporting the hours worked and the rates claimed.
6 A district court should exclude from the lodestar amount hours that
7 are not reasonably expended because they are “excessive, redundant,
8 or otherwise unnecessary.” *Hensley v. Eckerhart*, 461 U.S. 424, 434
9 (1983).

10 *Id.* Once the court determines the lodestar amount, the Court may in “‘rare’ and ‘exceptional’
11 cases” adjust the lodestar upward or downward “using a ‘multiplier’ based on factors not
12 subsumed in the initial calculation.” *Id.* (citing *Blum v. Stevenson*, 465 U.S. 886, 897, 898-901
13 (1984)). Such adjustments must be supported by “specific evidence on the record and detailed
14 findings by” the court. *Id.* (internal quotation marks omitted).

15 **1. Lodestar Amount**

16 Step one of the lodestar method requires the Court to determine a “lodestar” amount by
17 multiplying the number of hours counsel reasonably expended on this litigation by a reasonable
18 hourly rate. *See id.* Dealer Class Counsel asserts that it spent 4,792 hours in negotiating and
19 achieving the Settlement and that an additional 1,114 hours should be reserved for implementation
20 of the Settlement. (Dkt. No. 2963 ¶ 12.) The billing rates for these hours range from \$158 per
21 hour for paralegal time to \$950 hour for lead counsel’s time, with an average rate of \$502 per
22 hour. (*Id.* ¶ 5.) Dealer Class Counsel’s estimated lodestar breaks down as follows:

23 HB ⁵ Exclusive Franchise Dealer Action Fees	\$1,166,213.00
24 BSM ⁶ Exclusive Franchise Dealer Action Fees	\$311,014.50
25 HB Hybrid VW Emissions Time (50%)	\$1,491,036.80
26 Reserve for Settlement Implementation	\$560,000.00
27 Total	\$3,528,264.30

28 (*Id.* ¶ 11.)

⁵ HB stands for co-Class Counsel Hagens Berman.

⁶ BSM stands for co-Class Counsel Bass Sox & Mercer.

1 Volkswagen contends that Dealer Class Counsel's lodestar is overstated for three reasons:
2 (1) the lodestar total improperly includes Hagens Berman's "hybrid time" attributable to both the
3 2.0-liter and franchise dealer settlements; (2) the reserve time for settlement implementation is
4 unnecessary; and (3) Dealer Class Counsel did not provide adequate documentation relating to the
5 hours spent. The Court addresses each argument in turn.

6 First, regarding Hagens Berman's "hybrid time," the Court has already determined that
7 such time was properly compensable through the PSC's application for fees relating to the 2.0-liter
8 settlement. (*See* Dkt. No. 3053 at 8 n.4.) The amount of \$1,491,036.80 for "hybrid time" should
9 therefore be excluded from the lodestar here. In fact, in its reply brief, Dealer Class Counsel also
10 does not include "hybrid time" in its lodestar calculation. (*See* Dkt. No. 3074 at 18.)

11 Second, the Court agrees that, given the nature of the Settlement, no reserve time is
12 required for its implementation. Volkswagen has begun making settlement payments to Franchise
13 Dealer Class Members, and it is not clear that there is much, if any, additional work for Class
14 Counsel to do. The reserve of \$560,000 should thus be excluded.

15 Third, Dealer Class Counsel's documentation of its hours spent is sufficient. Volkswagen
16 contends that it cannot determine why Dealer Class Counsel spent 1,081 hours (\$457,883.85 of
17 lodestar) on "Administrative" work. (Dkt. No. 3056-3 at 26.) But Dealer Class Counsel explains
18 that, in addition to administrative tasks, it included in the Administrative category "all time spent
19 discussing the settlement with dealers." (Dkt. 2963 ¶ 12.) Volkswagen also asserts that it cannot
20 understand why—given the quick resolution of the dealer claims—1,097 hours (\$625,575 of
21 lodestar) were spent on "Pleadings/Briefs/Pre-trial Motions/Legal" work. (Dkt. 3056-3 at 26.)
22 The Court is satisfied, however, with Dealer Class Counsel's explanation that extensive research
23 was required to develop the theory of the case; research the law of multiple states; and to draft the
24 complaint, preliminary and final approval papers, class notice, and other elements necessary to the
25 eventual settlement. (Dkt. 3074 at 16-17). Finally, the fact that Hagens Berman's lodestar amount
26 is nearly 3.75 times that of Bass Sox & Mercer is not unreasonable. Hagens Berman performed
27 the initial research, filing, and prosecution of the Napleton litigation, which Bass Sox & Mercer
28 did not join until several months after it was filed. (*See* Dkt. No. 2807 at 3.)

1 Subtracting “hybrid” time and reserve time, the Court determines that the proper lodestar
2 amount is as follows:

3 HB Exclusive Franchise Dealer Action Fees	\$1,166,213.00
4 BSM Exclusive Franchise Dealer Action Fees	\$311,014.50
5 Total	\$1,477,227.50

7 2. Lodestar Multiplier

8 Having determined the lodestar amount, the Court next determines whether the lodestar
9 should be adjusted upward or downward using a multiplier. *See Van Gerwen*, 214 F.3d at 1045 &
10 n.2. An upward multiplier of 2.0 is appropriate here. As an initial matter, the lower multiplier (as
11 compared to the 2.63 multiplier in the 2.0-liter fee award) reflects the nature and circumstances of
12 the Settlement, as discussed above—namely, that the Settlement flowed naturally and necessarily
13 from the 2.0-liter consumer settlement. Nevertheless, the Court recognizes that the result achieved
14 is excellent, and that Dealer Class Counsel played a role in swiftly obtaining it.

15 Two months after this Court granted preliminary approval of the 2.0-liter class settlement,
16 Dealer Class Counsel filed a motion for preliminary approval of the Dealer Class Settlement (Dkt.
17 No. 1971), which this Court subsequently approved (Dkt. No. 2807). The Settlement had multiple
18 cash and non-cash components, and—as both sides recognize (Dkt. 2886 at 7-8; Dkt. 3056-3 at
19 10.)—ultimately will provide franchise dealer class members with a recovery of nearly all of their
20 losses attributable to Volkswagen’s disclosure of its use of a defeat device.⁷ Given the size of the
21 class, the complexities of the case, and the multi-pronged settlement that was agreed to, it is
22 commendable that Dealer Class Counsel was able to reach this resolution in such a short period of
23 time.

24 Class counsel, however, “should not be ‘punished’ for efficiently litigating this action.”
25 *Bayat v. Bank of the West*, No. C-13-2376 EMC, 2015 WL 1744342, at *9 (N.D. Cal. Apr. 15,
26 2015). A positive multiplier rewards Dealer Class Counsel for its efforts in achieving a swift

27 ⁷ The Court discussed the terms of the Settlement in detail in its Order Granting Final Approval of
28 the Volkswagen Branded Franchise Dealer Class Action Settlement Agreement and Release. (*See*
Dkt. 2807 at 4-8.)

1 settlement, while recognizing that counsel’s efficiency actually reduced its lodestar. Other district
2 courts have likewise concluded that remarkable swiftness in resolving litigation warrants a
3 positive multiplier. *See id.* (holding that a positive multiplier was appropriate “given the
4 efficiency with which class counsel litigated [the] action”); *Browne v. Am. Honda Motor Co., Inc.*,
5 No. 09-cv-06750 MMM, 2010 WL 9499073, at *11 (C.D. Cal. Oct. 5, 2010) (applying a positive
6 lodestar multiplier in part because of “the rapidity with which a settlement was reached”).

7 The Court also recognizes that there were certain risks involved for Dealer Class Counsel,
8 especially before resolution of the 2.0-liter case. Litigation time, costs, and risks fell solely upon
9 Hagens Berman and Bass Sox & Mercer, as compared to the 2.0-liter case, where plaintiffs were
10 represented by the 21 law firms appointed to the PSC. (*See* Dkt. 2102 at 3.) Franchise dealers
11 also have a different relationship with Volkswagen than consumers, and Dealer Class Counsel
12 faced the risk of unique defenses and arguments against class certification.

13 The Court is convinced that these factors support the 2.0x upward multiplier here.
14 Applying the multiplier, Bass Sox & Mercer will be awarded \$622,029.00 for its work in the
15 Dealer litigation—that is, \$311,014.50 times the 2.0x multiplier—and Hagens Berman will be
16 awarded \$2,332,426.00—that is, \$1,166,213.00 times the 2.0x multiplier.⁸

17 * * *

18 In sum, Dealer Class Counsel shall be awarded \$2,954,455.00 in attorneys’ fees for work
19 performed related to the Settlement.

20 **II. Litigation Expenses**

21 Dealer Class Counsel states that it has incurred litigation expenses exceeding \$87,538 but
22 that it would “absorb these costs in its fee request.” (Dkt. No. 2886 at 22.) The Court finds that
23 the reimbursement of such expenses, which include “court fees, service, copying, postage, legal
24 research, experts and consultants, depositions, and travel” (Dkt. No. 2887 ¶ 21), is appropriate and
25 will award \$87,538 in costs to Dealer Class Counsel.

26
27 ⁸ As noted above, the Court previously awarded Hagens Berman \$1,491,036.80 in attorneys’ fees
28 as part of the 2.0-liter settlement for its “hybrid time.” (See Dkt. No. 3053 at 8 n.4.) When
multiplied by the 2.3x multiplier adopted there, Hagens Berman’s prior fees award was
\$3,429,384.64. Added to the fees awarded today, its total MDL fees award is \$5,761,810.64.

CONCLUSION

For the reasons stated above, the Court GRANTS IN PART Dealer Class Counsel's motion for attorneys' fees relating to the Settlement. Dealer Class Counsel shall be awarded \$2,954,455.00 in attorneys' fees and \$87,538 in costs.

IT IS SO ORDERED.

Dated: April 12, 2017



CHARLES R. BREYER
United States District Judge

United States District Court
Northern District of California

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