IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

EMILY DACK, et al., individually and on behalf of others similarly situated, Plaintiffs, vs. VOLKSWAGEN GROUP OF AMERICA, INC., a New Jersey corporation, a/k/a VOLKSWAGEN OF AMERICA, INC; and VOLKSWAGEN, AG, a/k/a VOLKSWAGEN GROUP, a foreign corporation, Defendants.	)	No. 4:20-cv-00615-BCW

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

After months of protracted litigation, vigorous arm's length settlement negotiations, and discovery in four cases around the country, including participation in the Western District of Missouri's Mediation and Assessment Program by joint selection of an outside, experienced, and well-respected neutral mediator from JAMS, the Parties have resolved, on a nationwide class basis, this consumer class action in which Plaintiffs alleged that deficiencies in the Settlement Class Vehicles'[1] automatic emergency braking ("AEB") systems caused them to not function properly. Settlement Class Members will receive a range of benefits including: (1) an extension of the Settlement Class Vehicles' New Vehicle Limited Warranties ("NVLW") to cover 75% of the cost of the repair or replacement of the AEB system ("Covered Repair") during an additional twelve (12) months or twelve thousand (12,000) miles (whichever occurs first) from the expiration of the Settlement Class Vehicle's original NVLW; (2) reimbursement of 75% of the cost of one past Covered Repair prior to the Notice Date and within twelve (12) months or twelve thousand (12,000) miles (whichever occurred first) after the expiration of the original NVLW (hereinafter, "Settlement"); and (3) a robust program to provide additional information/education to consumers regarding the functionality, operation, benefits, and limitations of the subject vehicles' AEB systems/features; Settlement Class Counsel respectfully submit that this Settlement is fair, reasonable, and adequate, satisfies Fed. R. Civ. P. 23 ("Rule 23") in all respects, and should be granted preliminary approval by this Court.

Plaintiffs now respectfully request that this Court grant their Unopposed Motion for Preliminary Approval of the Class Action Settlement. Granting the motion will allow the parties

[1] The capitalized terms used in this Memorandum are defined in the Settlement Agreement. The Settlement Agreement and its exhibits are attached as Exhibit 1 to the Declaration of Bonner C. Walsh.

to proceed with the Notice Plan in the Settlement Agreement, which will allow Settlement Class Members to begin responding to, and taking part in, the Settlement during the months leading up to a final fairness hearing. Thus, Plaintiffs respectfully request that the Court issue an Order, in the form attached as Exhibit 3 to the Settlement Agreement, (1) granting preliminary approval of the Settlement; (2) conditionally certifying the Settlement Class for settlement purposes only, (3) preliminarily appointing Plaintiffs Emily Dack, Kim Hensley-Hauser, Matthew May, Neeraj Sharma, Omar Oweis, Marcos Pieras, Linda Christian and Stephan Moonesar as Settlement Class Representatives, (4) preliminarily appointing the law firms of Bursor & Fisher, Walsh PLLC, Sauder Schelkopf LLC, Law Office of Adam R. Gonnelli, L.L.C., Berger Montague, PC, and Capstone Law APC as Settlement Class Counsel; (5) preliminarily appointing Rust Consulting, Inc. as the Settlement's Claim Administrator; (6) directing the dissemination of the Class Notice, in the form proposed, to the Settlement Class in accordance with the parties' Notice Plan; and (7) setting a schedule for further proceedings including the deadline to object to or request exclusion from the Settlement, further submissions by the Parties including the motion for final approval, responses to any objections or requests for exclusion, any submissions in further support of final approval, and the date, place and time of the final fairness hearing.

II. FACTUAL BACKGROUND AND HISTORY OF THE LITIGATION

This Settlement resolves this action, and three similar putative class actions previously commenced in other districts, all of which, collectively, asserted similar claims that an alleged

undisclosed defect in the AEB systems/features in the Settlement Class Vehicles[2] caused the brakes not to function as Plaintiffs' expected, and that prior instructions regarding the functionality of the AEB systems/features were inadequate. *Dack; Sharma et al. v. Volkswagen AG et al.* Case 4:20-cv-02394-JST (N.D. Cal.), *May, et al. v. Volkswagen Group of America, Inc., et al.*, Case No. 2:20-cv-09708 (MCA) (MAH) (D.N.J.), *Pieras v. Volkswagen Group of America, Inc.*, Case No. 2:20-cv-18543-MCA-MCH (D.N.J.). The actions asserted various claims *inter alia* under the Magnuson Moss Warranty Act, certain state consumer fraud and/or other statutes, breach of express and/or implied warranties, and/or unjust enrichment. As discussed *supra*, the *Pieras* action was consolidated into the *May* action, and thereafter, the *Sharma* and *May* actions were voluntarily dismissed and their named Plaintiffs have been added as Plaintiffs-putative class representatives in this action (Consolidated Amended Complaint, ECF 69-1, hereinafter "CAC").

This putative class action lawsuit (*Dack*) was originally commenced on August 4, 2020. (ECF No. 1.) It was filed after an extensive pre-suit investigation by Plaintiffs' counsel that began in approximately May 2019. This investigation included, *inter alia*, review of NHTSA documents, interviews with class members, reviewing documents provided by class members, and performing a technical analysis on the root cause of the alleged defect.

Plaintiffs Emily Dack and Kim Hensley-Hauser[3] are residents of Missouri who each purchased a 2019 VW Atlas vehicle equipped with an AEB system. (CAC, ECF No. 69-1 at ¶¶ 23,

[2] Not all Settlement Class Vehicles were involved in each individual putative class action. Some involved only VW brand Settlement Class Vehicles, some involved only Audi vehicles, and some involved both, but all of the actions asserted similar allegations. The Consolidated Amended Complaint (Doc 69-1) in this action involves all of the VW and Audi Settlement Class Vehicles.

[3] The claims of the remaining originally named plaintiffs in this action have been dismissed. (ECF No. 42.)

29.)[4] Plaintiffs Neeraj Sharma is a resident of California who leased a 2017 Audi Q7 and Audi A7 vehicle equipped with an AEB system in California. (*Id.* at ¶¶ 51.) Plaintiff Stephan Moonesar is a New Jersey resident who purchased a certified pre-owned 2018 Audi S4 in New Jersey. (*Id.* at ¶ 84.) Plaintiff Matthew May is a resident of Virginia (ECF No. 31 at ¶¶ 22) who leased a 2018 Volkswagen Tiguan equipped with an AEB system in March 2018 in Sacramento, California. (*Id*. at ¶ 36.) Plaintiff Omar Oweis is a resident of Florida who purchased a new 2018 Volkswagen Atlas equipped with an AEB system in October 2018 in Jacksonville, Florida. (*Id*. at ¶ 55) Plaintiff Marcos Pieras is a resident of Georgia who purchased a new 2018 Audi A4 vehicle equipped with an AEB system in November 2017 in Union City, Georgia. (*Id*. at ¶ 69) Plaintiff Linda Christian is a resident of Massachusetts who leased a new 2018 Tiguan equipped with an AEB System in October 2018 in Danvers, Massachusetts. (*Id*. at ¶ 86.)

Each of the Plaintiffs claims to have experienced what he/she believed to be the vehicle's AEB system/features applying and/or not applying the brakes at inappropriate or unexpected times. (*Id*. at ¶¶ 25 (Dack), 32 (Hensley-Hauer), 41-43 (May), 53 (Sharma), 60 (Oweis), 74-76 (Pieras), 84 (Moonesar); 91, 93 (Christian)). Plaintiffs claim that the AEB systems in their vehicles and the putative class vehicles were defective, that the alleged defect was known and not disclosed prior to their purchases/leases, and that instructions about the functionality of the system were inadequate (*Id*. at ¶¶ 13, 172-173). The CAC asserts, *inter alia*, individual and nationwide and statewide class claims for alleged economic loss (CAC, ECF 69-1.)

Defendants have vigorously disputed Plaintiffs' claims. Defendants maintain that the subject vehicles' AEB systems/features were properly designed, manufactured, marketed,

[4] For ease of reference, we will cite to the CAC herein regarding the named Plaintiffs, rather than to the allegations of the various original and now superseded Complaints in this and the other voluntarily-dismissed putative class actions.

distributed and sold; were not defective in any way; were reasonably safe; are extremely beneficial insofar as preventing, and/or minimizing the severity of, crashes; that the instructions and information provided to consumers were adequate and sufficient; that no warranties were breached nor any statutes, laws or rules violated; and that there was no wrongdoing with regard to the subject vehicles' AEB systems/features.

A. Procedural History

The Complaint in this action was filed on August 4, 2020 by Plaintiffs Emily Dack and Kim Hensley-Hauser (the Missouri resident plaintiffs) and Matthew Dorton, Larry Pike, Tony Carrillo, Chris Cates, Roger Doyle, Jacob Miller, Sarah Norris Barlow, Brandon Barlow, Chad Ritterbach, Johnathan Jones, Mark Pulver and Ashley Pulver (the non-resident plaintiffs) against Volkswagen Group of America, Inc., also d/b/a Volkswagen of America, Inc. ("Defendant" or "VWGoA"), and Volkswagen, AG,[5] also d/b/a Volkswagen Group (collectively, "Defendant" or "Volkswagen"). (ECF No. 1.) On November 16, 2020, Defendant filed a motion to dismiss Plaintiff's Complaint. (ECF No. 17) Plaintiffs filed their opposition brief on December 18, 2020, (ECF No. 28), and Defendant filed its reply on January 18, 2021 (ECF No. 30). On September 30, 2021, the Court issued an Order granting in part and denying in part Defendant's motion. (ECF No. 42.) The Court dismissed all claims by the non-resident plaintiffs (Matthew Dorton, Larry Pike, Tony Carrillo, Chris Cates, Roger Doyle, Jacob Miller, Sarah Norris Barlow, Brandon Barlow, Chad Ritterbach, Johnathan Jones, Mark Pulver and Ashley Pulver) for lack of personal jurisdiction,[6] as well as the breach of implied warranty claim under Missouri law and the breach

[6] The remaining Plaintiffs are Emily Dack and Kim Hensley-Hauser.

of express warranty claims. (*Id*.) The litigation was administratively stayed on March 29, 2023 (ECF No. 67) and a motion to reopen was filed on on November 17, 2023 (ECF No. 68).

As stated above, three similar putative class actions were filed in other courts: *Sharma, et al. v. Volkswagen AG, et al.*, Case No. 4:20-cv-02394-JST (N.D. Cal.), *May, et al. v. Volkswagen Group of America, Inc., et al.*, Case No. 2:20-cv-09708 (MCA) (MAH) (D.N.J.), and *Pieras v. Volkswagen Group of America, Inc.*, Case No. 2:20-cv-18543-MCA-MCH (D.N.J.). *Sharma* was filed on April 8, 2020 by Plaintiffs Neeraj Sharma and Stephan Moonesar against Defendants Volkswagen AG, Volkswagen Group of America, Inc., Audi AG, Audi of America LLC, Robert Bosch GmbH, and Robert Bosch LLC. (*Sharma* ECF No. 1). Defendants filed motions to dismiss on July 3, 2020. (*Sharma* ECF Nos. 34 and 42). The *Sharma* Plaintiffs filed an amended complaint on July 31, 2020 (*Sharma* ECF No. 47). Defendants filed motions to dismiss the first amended complaint on September 4, 2020. (*Sharma* ECF Nos. 54 and 59). The *Sharma* court granted the motions with leave to amend on March 9, 2021. (*Sharma* ECF No. 80). The *Sharma* Plaintiffs filed their Second Amended Complaint on April 8, 2021 (*Sharma* ECF No. 84). Thereafter, on June 16, 2021, the *Sharma* Plaintiffs voluntarily dismissed as defendants Robert Bosch GmbH and Robert Bosch LLC. On June 4, 2021, the Audi and Volkswagen defendants filed a motion to dismiss the Second Amended Complaint. (*Sharma* ECF No. 99). On January 21, 2022, the *Sharma* Court issued an order dismissing defendant Volkswagen AG. (*Sharma* ECF No. 119). On April 4, 2022, the Audi and Volkswagen defendants answered the Second Amended Complaint. (*Sharma* ECF Nos. 129 and 130). On April 18, 2023, the *Sharma* Plaintiffs voluntarily dismissed their claims against the remaining defendants without prejudice. (*Sharma* ECF No. 146).

Discovery in the *Sharma* matter commenced in August of 2020. The *Sharma* Plaintiffs served Requests for Production seeking information concerning: (1) class vehicle safety feature

data, (3) information concerning the various radar models used in Class Vehicles, (4) all information concerning false activations, (5) all warranty or replacement claims, or complaints related to false activations, and (6) documents concerning Technical Tips or Technical Service Bulletins related to false activations, among others. In response, VW produced approximately 41,553 pages, which, pursuant to agreement, were reviewed by counsel in this action. The *Sharma* Plaintiffs also responded to discovery propounded by VW in June of 2022.

May was filed on July 30, 2020 by Plaintiffs Matthew May and Linda Christian against Defendants Volkswagen Group of America, Inc. and Volkswagen AG.[7] (*May* ECF No. 1) Defendant Volkswagen Group of America filed a motion to dismiss on October 19, 2020 (*May* ECF No. 18). An Amended Complaint was filed on October 30, 2020 naming Linda Christian, Matthew May, and Omar Oweis as Plaintiffs (*May* ECF No. 19). *Pieras* was filed on December 08, 2020 by Plaintiff Marcos Pieras against Volkswagen Group of America, Inc., Audi AG, and Volkswagen AG. (*Pieras* ECF No. 1). On January 13, 2021, a Consent Order was issued directing the Clerk to consolidate the *Pierras* case with *May*. (*Pieras* ECF No. 12), and on January 15, 2021, Plaintiffs Matthew May, Omar Oweis, Marco Pieras, and Linda Christian (the "*May* Plaintiffs") filed a Consolidated Class Action Complaint consolidating the cases (*May* ECF No. 31).

On February 15, 2021, Defendant Volkswagen Group of America, Inc. filed a motion to dismiss the consolidated complaint. (*May* ECF No. 32). The *May* Plaintiffs filed their brief in opposition on March 17, 2021 (*May* ECF No. 36) and Defendant filed its reply on April 21, 2021 (*May* ECF No. 39). On November 3, 2023, all claims brought by the *May* Plaintiffs were voluntarily dismissed without prejudice. (*May* ECF No. 63).

[7] Volkswagen AG was not served.

In addition to the discovery listed above in *Sharma*, the *Dack* matter included additional written discovery as well as review of assembled materials regarding the AEB systems. In *Dack* almost 29,000 pages of discovery were reviewed.

As noted above, Plaintiffs' counsel also dissected and analyzed the AEB systems independently. In addition, Plaintiffs' counsel interviewed multiple non-party witnesses and responded to inquiries from putative class members.

B. Settlement Negotiations

Counsel for the parties in the aforementioned actions jointly discussed the possibility of resolving this litigation on a nationwide class basis shortly after [insert]. This eventually resulted in lengthy and vigorous arm's length negotiations which included many meetings among counsel, participation in the Western District of Missouri's Mediation and Assessment Program before outside mediator Bradley A. Winters, Esq. on December 29, 2022, and numerous meetings thereafter, ultimately resulting in a nationwide class settlement. The terms of this Settlement have since been memorialized in the Settlement Agreement. All of the terms of the Settlement Agreement are the result of extensive, adversarial, and arm's-length negotiations between experienced counsel for both sides. Significantly, before the Settlement Agreement was executed, Plaintiffs' counsel received confirmatory discovery from Defendant to confirm that the proposed settlement class relief is fair, reasonable, and adequate.

i. Terms of the Settlement Agreement

If approved, the settlement will provide the following substantial benefits to the following Settlement Class[8]:

[8] Excluded from all three classes are: (a) all Judges who have presided over the Actions and their spouses; (b) all current employees, officers, directors, agents and representatives of Defendant, and their family members; (c) any affiliate, parent or subsidiary of Defendant and any entity in which Defendant has a controlling interest; (d) anyone acting as a used car dealer; (e) anyone who

> All persons and entities who purchased or leased a Settlement Class Vehicle, as defined in Section I.X. of [the Settlement] Agreement, in the United States of America and Puerto Rico.

Settlement Class Vehicles encompass vehicles that were imported and distributed by VWGoA for sale or lease in the United States or Puerto Rico and equipped with AEB systems that include certain model year 2019-2023 Volkswagen Arteon; model year 2018-2023 Volkswagen Atlas; model year 2020-2023 Volkswagen Atlas Cross Sport; model year 2016-2017 Volkswagen CC; model year 2016-2021 Volkswagen Golf; model year 2016-2019 and model year 2022-2023 Volkswagen Golf R; model year 2016-2019 Volkswagen Golf Sportwagen; model year 2016-2023 Volkswagen GTI; model year 2016-2019 Volkswagen e-Golf; model year 2021-2023 Volkswagen ID.4; model year 2016-2023 Volkswagen Jetta; model year 2016-2022 Volkswagen Passat; model year 2022-2023 Volkswagen Taos; model year 2018-2023 Volkswagen Tiguan; model year 2015-2017 Volkswagen Touareg; model year 2015-2020 and 2022-2023 Audi A3; model year 2019-2023 Audi Q3; model year 2013-2023 Audi A4; model year 2013-2023 Audi A5; model year 2013-2023 Audi Q5; model year 2012-2023 Audi A6; model year 2012-2023 Audi A7; model year 2011-2023 Audi A8; model year 2017-2023 Audi Q7; model year 2019-2023 Audi Q8; model year 2019-2023 Audi e-tron; model year 2022-2023 Audi e-tron GT; and model year 2022-2023 Audi Q4 e-tron; enumerated in a VIN list attached as Exhibit 4[9] to the Settlement Agreement.

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purchased a Settlement Class Vehicle for the purpose of commercial resale; (f) anyone who purchased a Settlement Class Vehicle with salvaged title and/or any insurance company that acquired a Settlement Class Vehicle as a result of a total loss; (g) any insurer of a Settlement Class Vehicle; (h) issuers of extended vehicle warranties and service contracts; (i) any Settlement Class Member who, prior to the date of the Agreement, settled with and released Defendant or any Released Parties from any Released Claims, and (j) any Settlement Class Member who files a timely and proper Request for Exclusion from the Settlement Class.

[9] Class members will be able to confirm whether a vehicle is a Settlement Class Vehicle by either checking the list which will be available on the settlement website, or by entering their VIN on the settlement webpage.

Settlement Class Members will receive: (1) an extension of the vehicles' New Vehicle Limited Warranties ("NVLWs") applicable to the Settlement Class Vehicles' AEB systems; and (2) reimbursement for past Covered Repairs performed prior to the Notice Date and within twelve (12) months or twelve thousand (12,000) miles (whichever occurred first) after the expiration of the Settlement Class Vehicle's original NVLW period; and (3) additional information and education regarding the AEB system in Settlement Class vehicles.

The additional information and education for Settlement Class Members will be made available on the VW and Audi web pages, owner mobile apps, and via dealerships, in several different forms, and is addressed more fully and descriptively in Exhibit "__" to the Settlement Agreement. The additional information and education will contain more details and information about the functions and limitations of the various AEB systems installed in the VW and Audi Settlement Class Vehicles, including when and why certain braking may occur in certain circumstances. The Warranty Extension for the Settlement Class Vehicles' AEB systems will extend their existing NVLWs by an additional twelve (12) months or twelve thousand (12,000) miles (whichever occurs first), from the expiration of said vehicle's NVLWs, to cover 75% of a Covered Repair by an authorized VW or Audi dealership. A Covered Repair is a repair or replacement (parts and labor) of a diagnosed and confirmed malfunction or failure of a Settlement Class Vehicle's AEB system that resulted from failure or malfunction of the AEB system's control unit, camera(s), radar, LIDAR, and/or sensors which enable automatic emergency braking functionality in Settlement Cass Vehicles. If a Settlement Class Vehicle's NVLW has already expired as of the date of the class notice mailing (the Notice Date), then the Warranty Extension for that particular vehicle shall be until six (6) months after the Notice Date.

Finally, the Settlement also provides that if a Settlement Class Member has incurred expenses for a past Covered Repair of a Settlement Class Vehicle that occurred prior to the Notice Date and within twelve (12) months or twelve thousand (12,000) miles (whichever occurred first) after the expiration of the vehicle's NVLW, they are eligible for reimbursement of 75% of those expenses limited to one (1) Covered Repair. In this regard, the parties have, subject to the Court's approval, retained Rust Consulting, Inc. as the Settlement Claim Administrator. Rust Consulting has substantial experience, and has been repeatedly approved by Courts, regarding claim administration in automotive class settlements of this type. In addition, the Settlement provides for a reasonable claim process in which, although the Claim Administrator's ultimate decisions on the claims are binding, a Settlement Class Member whose claim is deficient or incomplete will be mailed a written letter or notice of the deficiency(ies) and afforded 30-days to cure it/them, and he/she can also seek an Attorney Review of a full or partial denial of a claim within 14 days of the Claim Administrator's letter or notice of denial.

ii. Notice to the Settlement Class

The Settlement Agreement contains a comprehensive Notice Plan, to be paid for and administered by VWGoA. Class Notice will be mailed to Settlement Class Members via first class mail, after the names and addresses of Settlement Class Members are located based on the Settlement Class Vehicles' VINs (vehicle identification numbers) and using the services of IHS/Polk and/or Experian which obtains vehicle ownership histories through state DMV title and registration records. The Claims Administrator will then check the provided addresses against current U.S. Postal Service software and/or the National Change of Address Database. In addition, after the Class Notice is mailed, for any individual mailed Notice that is returned as undeliverable, the Claim Administrator will re-mail to any provided forwarding address, and for any undeliverable notice packets where no forwarding address is provided, the Claim Administrator

will perform an advanced address search (e.g., a skip trace) and re-mail any undeliverable Class Notice packets to any new and current addresses located.

In addition to the mailing, the Claim Administrator will establish a dedicated Settlement website that will include details regarding the lawsuit, the Settlement and its benefits, and the Settlement Class Members' legal rights and options including objecting to or requesting to be excluded from the Settlement and/or not doing anything; instructions on how and when to submit a claim for reimbursement; instructions on how to contact the Claim Administrator by e-mail, mail or (toll-free) telephone; copies of the Class Notice, Claim Form, Settlement Agreement, Motions and Orders relating to the Preliminary and Final Approval processes and determinations, and important submissions and documents relating thereto; important dates pertaining to the Settlement including the procedures and deadlines to opt-out of or object to the Settlement, the procedure and deadline to submit a claim for reimbursement, and the date, place and time of the Final Fairness Hearing; and answers to Frequently Asked Questions (FAQs).

The Class Notice (Ex. 2 to Settlement Agreement) is detailed and complies with Rule 23(c)(2)(B). It clearly and concisely states in plain, easily understood language the nature of the action; the Settlement Class definition; the class claims, issues and/or Defendant's positions; the Settlement terms and benefits available under the Settlement; Class Counsel's requested fee/expense award, and/or the Plaintiffs' requested service awards; the claim submission process including details and instructions regarding how and when to submit a Claim for reimbursement and the required proof/documentation for a Claim; the release of claims under the Settlement; the manner of and deadline by which Settlement Class Members may object to the Settlement; the manner of and deadline by which a Settlement Class Member may request to be excluded from the Settlement; the binding effect of the Settlement and release upon Settlement Class Members that

do not timely and properly exclude themselves from the Settlement; the procedure by which Settlement Class Members may, if they so wish, appear at the final fairness hearing individually and/or through counsel; the settlement website address; how to contact the Claim Administrator (through the dedicated toll-free number, email or by mail) with any questions about the settlement or requests for assistance, the identities of and contact information for Class Counsel; and other important information about the Settlement and the Settlement Class Members' rights.

Pursuant to 28 U.S.C. § 1715, the Class Action Fairness Act of 2005, the Claim Administrator will also provide timely notice to the U.S. Attorney General and the applicable State Attorneys General ("CAFA Notice") so that they may review the proposed Settlement and raise any comments or concerns to the Court's attention prior to final approval.

III. ARGUMENT

A. The Settlement Should Be Preliminarily Approved

Before a settlement of a class action can receive final approval, the Court must determine that it is "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2). The Court must also "direct notice in a reasonable manner to all class members who would be bound by the proposal." *See* Fed. R. Civ. P. 23(e)(1).

In addition to Federal Rule of Civil Procedure 23, Courts in the Eighth Circuit also consider factors commonly known as the "Van Horn factors" from the Eighth Circuit opinion, *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). *See Rogowski v. State Farm Life Ins. Co., et. al*, No. 4:22-cv-00203-RK, 2022 WL 19263357, at *1 (W.D. Mo. 2022) (citing *Van Horn*); *Holt v. Community America Credit Union*, No. 4:19-CV-00629-FJG, 2020 WL 12604383, at *2 (W.D. Mo. Sept. 4, 2020) (citing *Van Horn*); *Murphy v. Harpstead,* No. CV 16-2623 (DWF/LIB), 2023

WL 4034515, at *4 (D. Minn. June 15, 2023) (holding "the Court finds it appropriate to consider the Rule 23(e)(2) factors along with additional factors laid out in *Van Horn*."); *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2019 WL 7160380, at *1 (W.D. Mo. Nov. 18, 2019).

The four *Van Horn* factors are: (1) the merits of the plaintiffs' case weighed against the terms of the settlement; (2) the defendants' financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Van Horn*, 840 F.2d at 607. "No one factor is determinative, but the 'most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement.'" *Holt*, 2020 WL 12604383, at *2 (quoting *Van Horn*, 840 F.3d at 607).

The 2018 amendments to the Rule 23(e)(2) of the Federal Rules of Civil Procedure added two additional factors for the Court to consider: adequate representation and arm's-length negotiation. *Swinton v. SquareTrade, Inc.*, No. 418CV00144SMRSBJ, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019). The Advisory Committee Notes state that the "goal of this amendment is not to displace any factor [developed by federal courts], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id.* Thus, the above factors are considered in addition to the factors enumerated in *Van Horn*. *Id.*

As set forth below, the proposed Settlement in this case falls well within the range of possible approval, because it meets each of the requirements of substantive and procedural fairness. As such, there are no grounds to doubt the reasonableness of the Settlement for purposes of preliminarily approving it and directing class notice pursuant to the parties' Notice Plan.

i. The Settlement is fair, reasonable, and adequate.

In assessing the merits of a plaintiff's case (and the defendant's defenses) against the terms of the settlement, district courts frequently consider whether the outcome in litigation "would be far from certain." *In re Wireless Tele. Fed. Cost Recovery*, 396 F.3d 922, 933 (8th Cir. 2005). Where the uncertainty of relief in litigation is outweighed by the more immediate benefit of the proposed settlement, it is a strong indication that the settlement is fair, reasonable, and adequate. *Id.*

Here, a review of the Settlement Agreement reveals the fairness, reasonableness, and adequacy of its terms. The Settlement Class will receive the benefits of a robust notice program, reimbursements for certain past repairs, a warranty extension, and additional information and education about the AEB systems, their functionality and limitations. The result is well within the reasonable standard, especially considering the difficulty and risks presented by pursuing further litigation, and clearly merits preliminary approval of the Settlement.

Specifically, although Class Counsel are confident in the merits of Plaintiffs' claims, the certification of a consumer class action is difficult and heavily contested both throughout the country and within the Eighth Circuit. Furthermore, Defendant vigorously disputes the merits of Plaintiffs' allegations and claims in this matter, as well as the appropriateness of class certification in the litigation context where, unlike in a class settlement, the many potentially predominating individualized issues regarding liability and damages, and the manageability problems of a trial, could well preclude class certification, especially on a nationwide basis. Thus, Plaintiffs in this case face significant risks if they proceed with litigation, including the looming possibility of not obtaining class certification in the litigation context, of Defendant obtaining summary judgement in whole or in part, and/or of a fiercely contested trial and appeals – all of which would take a substantial period of time. The risks of establishing liability and proving damages, both of which

require experts and extensive *Daubert* briefing, and the potential substantial delays of litigating these matters to their final conclusion, weigh strongly in favor of the proposed Settlement. In contrast to the uncertain outcome, risks, and delays of litigation, the Settlement Agreement provides substantial and prompt benefits to the Settlement Class that are eminently fair, reasonable, and adequate.

ii. Defendant's financial condition supports settlement.

The second factor, the defendant's financial condition, supports preliminary approval since Defendant VWGoA is clearly capable of issuing the robust notice and compensating Settlement Class members in accordance with the terms of the Settlement Agreement. *In re Wireless*, 393 F.3d at 933 (finding that "there is no indication that [the defendant's] financial condition would prevent it from raising the settlement amount").

iii. The Risk of continued litigation supports settlement.

Where, in comparison to the proposed Settlement, proceeding with litigation would require a substantial amount of time to yield a benefit to the Class and would result in a large increase in Class Counsel's fees and costs, it is an indication that the proposed settlement is fair, reasonable, and adequate. *In re Wireless*, 393 F.3d at 933 ("[B]arring settlement, this case would 'likely drag on for years, require the expenditure of millions of dollars, all the while class members would receive nothing.'").

Here, the complexity and expense of proceeding with litigation is clearly outweighed by the efficiency and financial benefits presented by the Settlement Agreement. Litigating the class action claims in this action would require a substantial amount of time, and thus delaying any relief to the Settlement Class for years. Specifically, proceeding with litigation would require the parties to complete substantial formal discovery, brief class certification, the submission of expert reports and *Daubert* motions, dispositive motion practice, and to the extent claims survive, preparation for

and participation in trial (including the presentation of percipient and expert witnesses at trial), and potential appeals of the denial or grant of class certification and of any trial determination. By contrast, the Settlement yields prompt, certain, and substantial benefits for the Class. Accordingly, the proposed Settlement will benefit the parties and the court system.

iv. The Settlement is the result of adequate representation and arm's-length negotiation between the parties.

It is well established that, in determining whether a proposed settlement should be preliminarily approved, courts may consider whether "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations." *In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. La. Oct. 20, 1993) (quoting Manual for Complex Litigation, Second §30.44). Courts give considerable weight to the experience of the attorneys who litigated the case and participated in settlement negotiations. *See*, *e.g.*, *Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiation at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."); *In re Rent-Way Sec. Litig*., 305 F. Supp. 2d 491, 509 (W.D. Pa. Dec. 22, 2003) ("[S]ettlement negotiations took place at arm's length between highly experience[d] and competent counsel. Their assessment of the settlement as fair and reasonable is entitled to considerable weight.").

In this case, the proposed Settlement was reached after discovery, mediation and extensive and vigorous arm's-length negotiations among highly qualified and experienced class action counsel for the parties who were eminently capable of assessing the potential strengths and weaknesses of their respective claims and defenses, and of the potential risks versus benefits of continued litigation. In particular, Class Counsel extensively investigated the applicable law as applied to the relevant facts discovered in this action, separate from the formal and informal discovery conducted, and the potential defenses thereto prior to the mediation. This investigation

included hundreds of interviews with Class Members, and the exchange of key documents and analysis with VWGoA. The Settlement Agreement is based on an extensive review of the facts and law.

In reaching the proposed Settlement, Class Counsel relied on their substantial litigation experience in similar product defect class actions in conjunction with a thorough analysis of the legal and factual issues presented in this case. The mediation was conducted by Bradley A. Winters of JAMS, an experienced and well-respected neutral mediator. In summary, the proposed Settlement Agreement was the product of careful factual and legal research and vigorous and non-collusive arm's-length negotiations between the parties.

Regarding adequacy of representation, Class Counsel are experienced and respected class action litigators. *See* Declaration of Bonner C. Walsh. Based on Class Counsel's knowledge and expertise in this area of law, Class Counsel believe this Settlement will provide a substantial benefit to the Settlement Class.

Finally, the issue of reasonable class counsel fees and expenses and class representative service awards was not addressed until after the parties had, through vigorous arm's length negotiations, reached an agreement on the material terms of the Settlement. Though the settlement does contain a "clear sailing" agreement, in that Defendants will not challenge fees, that is not an impediment to approval here. As noted by Judge Kays, a clear sailing provision is cause for concern in two ways: when there is a reversionary common fund, and because there is "prima facia evidence of simultaneous negotiations of merit relief and fees." *Stewart v. USA Tank Sales & Erection Co.*, No. 12-05136-CV-SW-DGK, 2014 WL 836212, at *6 (W.D. Mo. Mar. 4, 2014). There is no common fund here, nor were fees addressed until after the class relief was agreed upon. Instead, the parties used an experienced and respected JAMS mediator and only addressed fees

after resolving all class relief. *See* Comment to the December 2018 Amendment to Fed. R. Civ. P. 23(e) ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Vill. Bank v. Caribou Coffee Co., Inc.,* No. 19-CV-1640 (JNE/HB), 2020 WL 13558808, at *2 (D. Minn. July 24, 2020) (finding that "[t]he assistance of a retired United States Magistrate Judge as a mediator in the settlement process supports the conclusion that the Settlement was non-collusive and fairly negotiated at arm's length"); *Kelly v. Phiten USA, Inc*., 277 F.R.D. 564, 570 (S.D. Iowa 2011) (finding the proposed settlement's fairness was supported by the fact that it was reached "after significant investigation and extensive arm's-length negotiations"). Class Counsel will provide a thorough analysis regarding the reasonableness of requested fees in their motion for attorney fee and expense award. Importantly, the Parties' agreement is not conditioned on the approval of the fee award (see the Settlement at VIII. C. 3.) and thus attorney fees should not be an issue for preliminary approval.

v. The amount of opposition should be considered at the final fairness hearing.

This factor is premature at preliminary approval, where Class Notice has not yet been disseminated, but is ultimately a factor for consideration at the final approval hearing.

vi. There is no agreement required to be identified under Rule 23(e)(3)[10]

Under Rule 23(e)(3), "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." The only agreement between the parties is that contained in the Settlement Agreement itself. Accordingly, this factor is not relevant to whether the Settlement is likely to be approved.

B. Certification for Purposes of Settlement is Appropriate

[10] Fed. R. Civ. P. 23(e)(2)(C)(iv).

The Supreme Court and various circuit courts have recognized that the benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998). As such, Plaintiffs seek the conditional certification of the Settlement Class set forth above and in the Settlement Agreement.

Preliminary approval of a class action settlement is "a preliminary, pre-notification determination as to whether the proposed settlement is 'within the range of possible approval.'" *Komoroski v. Util. Serv. Partners Private Label, Inc.*, No. 4:16-CV-00294-DGK, at *2-3 (W.D. Mo. July 31, 2017) (quoting W. Rubenstein, *Newberg on Class Actions* (5th ed. 2007) §13:12). "Preliminary approval does not require the court to decide the ultimate question whether a proposed settlement is fair, reasonable, and adequate. At this stage, the issue is whether the proposed settlement falls within the range of fairness so that notice of the proposed settlement should be given to class members and a hearing scheduled to consider final approval." *Id*. "Put another way, preliminary class certification contemplates that formal class certification will be combined with the fairness hearing, and exists to permit class action plaintiffs to determine whether the court sees any obvious impediments to class certification before they proceed with noticing the hearing on settlement approval. Thus, the Court sees no reason why, if the standard for preliminary approval of a settlement's terms is lower than that for final approval, the standard for preliminary certification of settlement classes should not also be more relaxed." *Schoenbaum v. E.I. DuPont De Nemours Co.*, No. 4:05CV01108 ERW, at *7-9 (E.D. Mo. Dec. 8, 2009).

In order to grant certification of a settlement class under Rule 23(a), the proposed class must satisfy the requirements of "numerosity, commonality, typicality, and fair and adequate

representation." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013). The proposed class must meet at least one of the three requirements of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Each of the Rule 23 factors is satisfied and is discussed below.

i. Numerosity under Rule 23(a)(1)

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The Eighth Circuit does not have a rule regarding the necessary size of classes, *Swinton*, 2019 WL 617791, at *10 (citing *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559–60 (8th Cir. 1982)), but classes with fewer than twenty members have been affirmed. *See*, *e.g.*, *Ark. Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763 (8th Cir. 1971). Here, there is little question that numerosity is satisfied as there are approximately 3,328,395 Settlement Class Vehicles.

ii. Commonality under Rule 23(a)(2)

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982)). Commonality is satisfied when a legal question linking the class members is substantially related to the resolution of the litigation." *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 206 (W.D. Mo. 2017) (internal quotations and citation omitted). The Supreme Court has held that for purposes of commonality, "[e]ven a single [common] question' will do." *Dukes*, 564 U.S. at 359.

In this case, there are common questions of law and fact, such as whether the Settlement Class Vehicles' AEB systems suffer from a uniform design defect; whether Defendant had a duty to disclose this alleged defect to consumers; and whether Plaintiffs have actionable liability and damages claims. Commonality is, therefore, satisfied for purposes of a settlement class. *Pollard*, 320 F.R.D. at 206 (finding commonality satisfied because "each class member shares a claim that

his/her firearm, which was manufactured by Defendants, is defective, and his/her firearm's value and utility is decreased due to the alleged defectiveness of the firearms").

iii. Typicality under Rule 23(a)(3)

Rule 23(a)(3) requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The typicality requirement is 'fairly easily met so long as the other class members have claims similar to the named plaintiff.'" *Pollard*, 320 F.R.D. at 206 (quoting *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). When analyzing the typicality requirement, "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996).

Here, all of Plaintiffs' claims arise out of the same alleged conduct related to the design, manufacture and distribution of vehicles with their subject AEB systems, as well as Defendant's alleged failure to disclose the claimed defect. *See Pollard*, 320 F.R.D. at 206 ("The named plaintiffs' claims are typical to the class members' claims because they all maintain Defendants manufactured defective firearms, and as a result, they are entitled to an economic recovery."). Typicality is thus established for purposes of a settlement class.

iv. Adequacy under Rule 23(a)(4)

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy centers on "whether (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562-63.

Here, the named Plaintiffs are adequate representatives for the Settlement Classes because they each purchased or leased a Settlement Class Vehicle subject to the Settlement Agreement and each claim to have been damaged based on the same alleged AEB system defect. The named Plaintiffs have also actively participated in the litigation of this case and have been in regular communication with their attorneys regarding these proceedings. As such, the named Plaintiffs are adequate representatives for members of the Settlement Class. *See Swinton*, 2019 WL 617791, at *11 ("Here, Plaintiff alleges he suffered the same injuries as the rest of the class, and there is no indication that his interests somehow conflict with those of other class members. Notably, Plaintiff and other class members share the same objectives, and their claims arise from the same general factual position."); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *4 (D. Minn. Feb. 27, 2013) (finding "the class representatives' interests are identical to those of absent class members, they seek the same form of relief, and they have demonstrated their commitment through their diligent litigation of this matter").

The Settlement Agreement designates Bursor & Fisher, Walsh PLLC, Sauder Schelkopf, Law Office of Adam R. Gonnelli, L.L.C., Berger Montague, PC, and Capstone Law APC as Class Counsel. With respect to the adequacy of these lawyers, they have invested considerable time and resources into the prosecution of this action. Class Counsel have a wealth of experience in litigating complex class action lawsuits and were able to negotiate an outstanding settlement for the Settlement Class. Based on the results achieved here, the Court should appoint these attorneys as Class Counsel for the Settlement Class and determine that Rule 23(a)'s adequacy requirement is satisfied.

v. Predominance and Superiority under Rule 23(b)(3)

Plaintiffs seek to certify the Class under Rule 23(b)(3), which has two components: predominance and superiority. When a class is being certified for settlement, the Court need only

analyze the predominance of common questions of law and the superiority of class action for fairly and effectively resolving the controversy; it need not examine Rule 23(b)(3)(A)-(D) manageability issues, because it will not be managing a class action trial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

First, to determine whether common issues of law and fact predominate, the Court analyzes whether "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. "When assessing predominance under Rule 23(b)(3), courts must determine whether the common issues in the case are 'more prevalent or important' than the individual issues." *Swinton*, 2019 WL 617791, at *12 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016)). "[T]he court must look only so far as to determine whether, given the factual setting of the case, if the plaintiffs['] general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

Here, the common questions of law and fact discussed above predominate over any questions that may affect individual members of the Settlement Classes. For example, were this case to proceed, the primary issue would be whether Defendant is liable for the distribution of vehicles with the same alleged AEB system defect. This is an issue both subject to generalized proof and common to all class members. *See Pollard*, 320 F.R.D. at 207–08 (finding that the proposed classes were sufficiently cohesive and Rule 23(b)(3)'s predominance requirement was satisfied in a case involving allegedly defective firearms).

Second, the superiority requirement "asks whether the class action is the best available method for resolving the controversy." *Cullan & Cullan LLC v. M-Qube, Inc.*, No. 8:13CV172, 2016 WL 5394684, at *6 (D. Neb. Sept. 27, 2016). The Court "must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the

judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1779, 159–61 (3d ed. 2005).

The Settlement Agreement provides members of the Settlement Classes with prompt and substantial benefits without the significant risks and delays of further litigation, and contains well-defined administrative procedures to ensure due process. This includes the right of any members of the Settlement Classes who are dissatisfied with the Settlement to object to it or to exclude themselves. The Settlement also would relieve the substantial judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against Defendant. "[T]he settlement of the class members' claims avoids duplicative litigation, saving Plaintiffs and Defendants from expending resources to adjudicate common legal and factual issues." *Pollard*, 320 F.R.D. at 208.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, preliminary certification of the proposed Settlement Class, for settlement purposes only, is appropriate.

C. The Court Should Approve the Notice Plan

Under Federal Rule of Civil Procedure 23(e), class members who would be bound by a settlement are entitled to reasonable notice before the settlement is approved. *See* Fed. Jud. Ctr., *Manual for Complex Litig.* Fourth, § 30.212 (2004). And because Plaintiffs here seek certification of the Settlement Class under Rule 23(b)(3), "the Court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." *See In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-md-01998, 2009 WL 5184352, at *12 (W.D. Ky. Dec. 22, 2009) (citing Fed. R. Civ. P. 23(c)(2)(B)). In order to satisfy these standards and "comport with the requirements

of due process, notice must be 'reasonably calculated to reach interested parties.'" *Id.* at *43 (quoting *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008)); *DeBoer v. Mellon Mortgage Co.,* 64 F.3d 1171, 1176 (8th Cir. 1995) ("Notice of a settlement proposal need only be as directed by the district court . . . and reasonable enough to satisfy due process.").

The notice plan described above and set forth in the Settlement Agreement provides the best notice practicable under the circumstances and comports in all respects with Rule 23 and due process. As explained in Section II.B.*ii*. *supra*, Settlement Class Members will be located using established services of IHS/Polk or Experian which obtain vehicle ownership histories, and the provided addresses will then be checked against current U.S. Postal Service software and/or the National Change of Address Database. In addition, for any undeliverable Notice, the Claim Administrator will re-mail to any provided forwarding address, and for any undeliverable notice packets where no forwarding address is provided, the Claim Administrator will perform an advanced address search (e.g., a skip trace) and re-mail any undeliverable Class Notice packets to any new and current addresses located. A dedicated Settlement website will also be established that will provide notice regarding the details of the lawsuit, the Settlement and its benefits, the Settlement Class Members' legal rights and options, and instructions for participating in the Settlement's benefits and objecting to or requesting to be excluded from the Settlement.

As also explained in Section II.B.*ii*. *supra*, the content and substance of the proposed notice, attached as Exhibit 2 to the Settlement Agreement, will include all necessary legal requirements and provide a comprehensive explanation of the Settlement in simple, non-legalistic terms. *See* Fed. R. Civ. P. 23(c)(2)(B). Accordingly, the Parties respectfully request that the Court approve the notice plan.

i. The Court Should Set a Schedule for Final Approval

Event	**Date**

Notice To Be Mailed in Accordance with the Notice Plan	110 days after the Court enters a Preliminary Approval Order
Class Counsel's Fee and Expense Application and Request for Service Awards for Plaintiffs-Settlement Class Representatives	[10-days after the Notice Date]
Deadline for Objections to the Settlement, Class Counsel's Fee and Expense Application, and/or Request for Settlement Class Representative Service Awards	30 days after the Notice Date
Deadline for Requests for Exclusion from the Settlement	30 days after the Notice Date
Plaintiffs' Motion for Final Approval of Settlement	[40-days after the Notice Date]
Deadline for Claim Administrator to Submit Declaration to the Court (i) reporting the names of all persons and entities that submitted timely and proper Requests for Exclusion; and (ii) attesting that Notice was disseminated in accordance with the Settlement Agreement and Preliminary Approval Order	[40-days after the Notice Date]
Responses of Any Party to Timely Filed Objections to the Settlement and/or Fee and Expense	[60-days after the Notice Date]

Application, and any Requests for Exclusion	
Any Submissions by Defendant Concerning Final Approval of Settlement	[60-days after the Notice Date]
Final Fairness Hearing	At a date convenient for the Court, not less than 75-days after the Notice Date

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order in the form attached as Exhibit 2 to the Settlement Agreement, (1) granting preliminary approval of the Settlement; (2) conditionally certifying the Settlement Class for settlement purposes only, (3) preliminarily appointing Plaintiffs Emily Dack, Kim Hensley-Hauser, Matthew May, Neeraj Sharma, Omar Oweis, Marcos Pieras, Linda Christian and Stephan Moonesar as Settlement Class Representatives, (4) preliminarily appointing the law firms of Bursor & Fisher, Walsh PLLC, Sauder Schelkopf LLC, Law Office of Adam R. Gonnelli, L.L.C., Berger Montague, PC, and Capstone Law APC as Settlement Class Counsel; (5) preliminarily appointing Rust Consulting, Inc. as the Settlement's Claim Administrator; (6) directing the dissemination of the Class Notice, in the form proposed, to the Settlement Class in accordance with the parties' Notice Plan; and (7) setting a schedule for further proceedings including the deadline to object to or request exclusion from the Settlement, further submissions by the Parties including the motion for final approval, responses to any objections or requests for exclusion, any submissions in further support of final approval, and the date, place and time of the final fairness hearing.

Dated: December 7, 2023

Respectfully Submitted,

/s/ Bonner C. Walsh

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Proposed Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this date, December 7, 2023, the foregoing document was filed electronically. Notice of the filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Bonner C. Walsh
Bonner C. Walsh