UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SOKOL GJONBALAJ, JOSEPH CAMPBELL, JESSICA COLE, KAREN WERNER, AUSTIN BARDEN, MARY GOVAN, ANTONIO CABEZAS, RICK HORNICK, and KRZYSZTOF ZIARNO, individually and on behalf of all others similarly situated, Plaintiffs, v. **VOLKSWAGEN GROUP OF AMERICA, INC.,** a New Jersey corporation, **and VOLKSWAGEN AG,** a foreign corporation, Defendants.	**CASE NO. 2:19-cv-07165-BMC**

PLAINTIFFS' UNOPPOSED MOTION FOR
FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

Plaintiffs Sokol Gjonbalaj, Joseph Campbell, Jessica Cole, Karen Werner, Austin Barden, Mary Govan, Antonio Cabezas, Rick Hornick, and Krzysztof Ziarno (collectively, "Plaintiffs" or "Class Representatives"), by and through undersigned counsel, respectfully move, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for final approval of a proposed Settlement of this action, and affirmation of the certification of the Settlement Class defined in the Settlement Agreement.

The motion is based upon the accompanying Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Final Approval of the Class Action Settlement and supporting documents, all pleadings and documents on file in this Action, and such other matters as may be presented at or before the hearing.

Dated: November 7, 2023

Respectfully submitted,

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Plaintiffs,

v.

VOLKSWAGEN GROUP OF AMERICA, INC., a New Jersey corporation, **and VOLKSWAGEN AG,** a foreign corporation,

Defendants.

CASE NO. 2:19-cv-07165-BMC

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

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Plaintiffs Sokol Gjonbalaj, Joseph Campbell, Jessica Cole, Karen Werner, Austin Barden, Mary Govan, Antonio Cabezas, Rick Hornick, and Krzysztof Ziarno (collectively, "Plaintiffs" or "Class Representatives"), by and through undersigned counsel and pursuant to Rule 23 of the Federal Rules of Civil Procedure, hereby file this Memorandum in Support of Plaintiffs' Unopposed Motion for Final Approval of the Class Action Settlement.

I. INTRODUCTION

On April 25, 2023, this Court preliminarily approved the Settlement Agreement between Plaintiffs and Defendant Volkswagen Group of America, Inc. ("Defendant" or "VWGoA") and directed that notice be sent to the Settlement Class. ECF No. 76. The settlement administrator JND Legal Administration has implemented the Court-approved notice plan and notice has reached the majority of the certified Settlement Class. The reaction from the Settlement Class has been overwhelmingly positive. Specifically, for the more than 1,000,000 direct notices mailed to Settlement Class Members, there are only 5 objections (approximately 0.0005%) pending from Settlement Class Members and 72 requests for exclusion (approximately 0.0071%).The Settlement provides exceptional relief to the Settlement Class, which includes: (1) warranty extension benefits; (2) up to 100% reimbursement of out-of-pocket expenses; (3) extension of service actions; and (4) updated maintenance recommendations and schedules for the Volkswagen Settlement Class Vehicles.

The proposed Settlement is fair, reasonable, and adequate, and resolves all of Plaintiffs' and Settlement Class Members' Claims in this action. The Settlement is the product of extensive arm's-length negotiations, that spanned approximately nine months, between experienced attorneys familiar with the legal and factual issues of this case, including a full-day mediation before Bradley A. Winters, Esq. of JAMS, who is experienced in mediating class action claims.

Moreover, the parties have litigated this action vigorously for more than three years and have ample knowledge of the legal claims and defenses, the risks presented by the case, and the value achieved by the proposed Settlement.

For these reasons, as further discussed herein, Plaintiffs and Class Counsel firmly believe the Settlement is in the best interest of the Settlement Class and satisfies the standards for final approval. Therefore, the Settlement warrants this Court's final approval.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

VWGoA is in the business of importing, marketing and distributing automobiles and motor vehicle components throughout the United States of America. This litigation alleges that the sunroofs in the following Settlement Class Vehicles are potentially prone to water leakage into the vehicles' interiors: (a) any model year 2018, 2019, 2020 and 2021 Volkswagen Atlas vehicle, (b) any model year 2020 and 2021 Volkswagen Atlas Cross Sport vehicle, (c) any model year 2015, 2016, 2017 and 2018 Volkswagen Golf and Volkswagen Golf GTI vehicle, (d) any model year 2015, 2016, 2017, 2018 and 2019 Volkswagen Golf SportWagen vehicle, (e) any model year 2017, 2018 and 2019 Volkswagen Golf Alltrack vehicle, (f) any model year 2018, 2019, 2020 and 2021 Volkswagen Tiguan vehicle, (g) any model year 2019, 2020 and 2021 Audi Q3 vehicle, (h) any model year 2019, 2020 and 2021 Audi Q8 vehicle, and (i) any model year 2019, 2020 and 2021 Audi e-tron vehicle, that were imported and distributed by VWGoA for sale or lease in the United States and Puerto Rico (the "Settlement Class Vehicles").

A. Consolidation of the Six Class Actions

Between December 2019 and May 2020, various plaintiffs filed the following putative class actions:

(1) *Sokol Gjonbalaj v. Volkswagen Group of America, Inc*., *et al*., No. 2:19-cv07165 (E.D.N.Y.), filed on December 23, 2019 and subsequently amended on March 27, 2020 (the "Gjonbalaj Action");

(2) *Jessica Cole et al., v. Volkswagen Group of America, Inc.*, *et al*., No. 3:20-cv02085 (N.D. Cal.), filed on March 25, 2020;

(3) *Krzysztof Ziarno v. Volkswagen Group of America, Inc., et al*., No. 2:20-cv03833 (D.N.J.), filed on April 8, 2020;

(4) *Dimitri Williams v. Volkswagen Group of America, Inc., et al*., No. 2:20-cv02553 (N.D. Ill.), filed on April 27, 2020;

(5) *Austin Barden v. Volkswagen Group of America, Inc., et al*., No. 5:20-cv-00973 (C.D. Cal.), filed on May 5, 2020; and

(6) *Joseph Campbell v. Volkswagen Group of America, Inc., et al*., No. 5:20-cv00518 (N.D.N.Y.), filed on May 8, 2020.

In all six actions, Plaintiffs alleged that defects in the subject vehicles' sunroofs could result in leakage and water ingress into the vehicles' interiors, potentially damaging certain vehicle systems, seat upholstery, carpets, and roof headliners. Pursuant to an agreement among the Parties, plaintiffs in the six class actions agreed to consolidate and adjudicate their claims in this Action. On August 28, 2020, Plaintiffs filed a Consolidated and Amended Class Action Complaint ("CACAC") in this Action, ECF No. 44, and the Defendants moved to dismiss the CACAC.[1] The motion to dismiss was fully briefed and submitted to the Court. ECF Nos. 48, 50, 53.

B. Settlement Negotiations

While the motion to dismiss remained pending, the Parties advised the Court that they were engaging in negotiations for a potential class settlement, and the Court deferred a decision on the motion to dismiss pending the outcome of the settlement negotiations. The Parties engaged in targeted confirmatory discovery as part of the settlement negotiations, and, in several scheduled

[1] While the motion to dismiss remained pending, Plaintiffs Lisa and Steven DelPrete and Plaintiff Dimitri Williams voluntarily dismissed their claims, ECF Nos. 49, 56, 71, and filed a Second Consolidated and Amended Class Actions Complaint ("SCACAC") removing Plaintiffs Lisa and Steven DelPrete's and Plaintiff Dimitri Williams' claims. ECF No. 70.

telephonic conferences, kept the Court apprised of the status. Following lengthy, protracted, and vigorous arm's-length negotiations, and a successful mediation before an experienced and well-respected neutral mediator from JAMS, the Parties were able to reach agreement on the material terms of the Class Settlement and memorialized those terms in a formal Settlement Agreement.

C. Preliminary Approval

Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement on April 18, 2023. ECF No. 72. On April 25, 2023, this Court granted Preliminary Approval of Class Action Settlement. ECF No. 76. In the Preliminary Approval Order, the Court preliminarily certified a settlement class, as discussed below. *See infra* Section III.A. The Court also preliminarily appointed the law firms of Milberg Coleman Bryson Phillips Grossman LLC, Bryant Law Center PSC, Berger Montague PC, Ahdoot & Wolfson PC, and Simmons Hanly Conroy LLP collectively, as Class Counsel, and Plaintiffs Sokol Gjonbalaj, Joseph Campbell, Jessica Cole, Karen Werner, Austin Barden, Mary Govan, Antonio Cabezas, Rick Hornick and Krzysztof Ziarno as Settlement Class Representatives (the "Settlement Class Representatives"). ECF No. 76, ¶¶ 4-5.

The Court preliminarily approved the Settlement Agreement as "fair, reasonable and adequate under, and satisfying in all respects the requirements of, Fed. R. Civ. P. 23[.]" *Id.*, ¶ 2. The Court preliminarily found that the Settlement met the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23. *Id.*, ¶ 7. In addition, the Court preliminarily found that the Settlement Agreement "has been reached as a result of extensive, arm's-length negotiations of disputed claims by experienced class action counsel, and that the proposed Settlement is not the result of any collusion." *Id.*, ¶ 9.

The Court approved the form and content of the Notice to the Settlement Class and preliminarily appointed JND Legal Administration as the Settlement Claim Administrator. *Id.*, ¶¶

6, 10. As such, the Court approved and directed the implementation of the Notice Plan pursuant to the terms of the Settlement Agreement. *Id.*, ¶ 11.

As discussed below, pursuant to the Court's September 22, 2023 Order granting the Parties' joint request to amend the Class Notice deadline, ECF No. 90, Class Notice was issued to Settlement Class Members by September 28, 2023. Declaration of Mitchell Breit ISO of Motion, ("Breit Decl.") ¶ 31.

III. TERMS OF THE SETTLEMENT AGREEMENT

The Settlement's details which have been preliminarily approved are contained in the Settlement Agreement. ECF No. 73-1; *see also* ECF No. 80 (correcting typographical errors in the Settlement Agreement). The Parties believe that the terms of the Settlement are fair, reasonable, and adequate, and more than satisfy the legal criteria for final approval. The Settlement's key terms are discussed below.

A. The Proposed Settlement Class

For settlement purposes only, the Court preliminarily certified the following Settlement Class:

> All persons and entities who purchased or leased, in the United States or Puerto Rico, (a) any model year 2018, 2019, 2020 and 2021 Volkswagen Atlas vehicle, (b) any model year 2020 and 2021 Volkswagen Atlas Cross Sport vehicle, (c) any model year 2015, 2016, 2017 and 2018 Volkswagen Golf and Volkswagen Golf GTI vehicle, (d) any model year 2015, 2016, 2017, 2018 and 2019 Volkswagen Golf SportWagen vehicle, (e) any model year 2017, 2018 and 2019 Volkswagen Golf Alltrack vehicle, (f) any model year 2018, 2019, 2020 and 2021 Volkswagen Tiguan vehicle, (g) any model year 2019, 2020 and 2021 Audi Q3 vehicle, (h) any model year 2019, 2020 and 2021 Audi Q8 vehicle, and (i) any model year 2019, 2020 and 2021 Audi e-tron vehicle, that was/were imported and distributed by Volkswagen Group of America, Inc. for sale or lease in the United States or Puerto Rico.

(the "Settlement Class") ECF No. 76, ¶ 3. "Excluded from the Settlement Class are: (a) all Judges who have presided over the Action and their spouses; (b) all current employees, officers, directors,

agents and representatives of Defendants, and their family members; (c) any affiliate, parent or subsidiary of Defendants and any entity in which Defendants have a controlling interest; (d) anyone acting as a used car dealer; (e) anyone who 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 who acquired a Settlement Class Vehicle as a result of a total loss; (g) any insurer of a Settlement Class Vehicle; (i) issuers of extended vehicle warranties and service contracts; (i) any Settlement Class Member who, prior to the date of the Settlement Agreement, settled with and released any Defendant or Released Party from any Released Claims; and (j) any Settlement Class Member who files a timely and proper Request for Exclusion from the Settlement Class." *Id.*

B. Available Benefits Under the Settlement and the Claims Process

The Settlement makes available valuable benefits that squarely address the issues raised in the litigation. Pursuant to the terms of the Settlement Agreement, VWGoA has agreed to provide warranty extension benefits, reimbursement benefits, extension of service actions benefits, and updated maintenance recommendations and schedule benefits.

1. Warranty Extension Benefits

Under the Settlement, VWGoA has agreed to cover a percentage of the cost of Covered Repairs (parts and labor) by an authorized Volkswagen or Audi dealer, during a period of up to 7 years or 80,000 miles (whichever occurs first) from the vehicle's In-Service Date for the following Settlement Class Vehicles: (a) model year 2018, 2019, 2020 and 2021 Volkswagen Atlas and Tiguan vehicles, (b) model year 2020 and 2021 Volkswagen Atlas Cross Sport vehicles, (c) model year 2016, 2017 and 2018 Volkswagen Golf and Volkswagen Golf GTI vehicles, (d) model year 2016, 2017, 2018 and 2019 Volkswagen Golf SportWagen vehicles, (e) model year 2017, 2018

and 2019 Volkswagen Golf Alltrack vehicles, and (f) model year 2019, 2020 and 2021 Audi Q3, Q8 and e-tron vehicles (the "Warranty Extension"). ECF 73-1, Settlement Agreement, Sec. II.A. The percentage of coverage under the Warranty Extension will be determined by a "sliding scale" of coverage percentages which are based upon the age and mileage of the Class Vehicle at the time of the Covered Repair and the time/mileage durations of the particular Settlement Class Vehicle's original NVLW as detailed in Table I of the Settlement Agreement. *See* ECF No. 80 (correcting typographical error in Table I). Further, the warranty, as extended, is fully transferable to subsequent owners to the extent that its time or mileage limitations has not expired. ECF No. 73-1.

A Covered Repair is defined as a repair or replacement (parts and labor) of (a) the Sunroof of a Settlement Class Vehicle to address a diagnosed condition of leakage and liquid ingress into the vehicle's interior from the Sunroof while it was in the fully closed position with the sunroof glass not broken, cracked or otherwise damaged, and if applicable, (b) to address a diagnosed condition of liquid damage to a Settlement Class Vehicle's interior seats, carpets/floor mats, interior ceiling, and failure of electrical components, directly caused by a diagnosed condition of leakage and liquid ingress into the vehicle's interior from said vehicle's Sunroof while it was in the fully closed position with the sunroof glass not broken, cracked or otherwise damaged. *Id.* at Sec. I.K. The Warranty Extension will not apply if the need for the Covered Repair resulted from abuse; misuse; alteration or modification; a collision or crash; vandalism and/or other impact; failure to properly or fully close the Sunroof; broken, cracked or damaged Sunroof glass or other

components; improper maintenance; and/or an outside source or factor including a prior repair performed by a non-dealer. *Id.* at Sec. II.A.[2]

2. Reimbursement Benefits

The Settlement also provides reimbursement of a percentage of certain out-of-pocket expenses paid for a past Covered Repair (parts and labor) that was performed prior to the Notice Date—September 8, 2023, ECF No. 82—and within 7 years or 80,000 miles (whichever occurs first) from the Class Vehicle's In-Service Date, with the percentage of reimbursement determined by the same "sliding scale" of coverage percentages that are set forth in Table I of the Settlement Agreement. ECF No. 73-1 at Sec. II.B; *see also* ECF No. 80. The submission of a Claim for Reimbursement is simple and requires only the timely mailing to the Claim Administrator of a completed, signed, and dated Claim Form, together with the required Proof of Repair Expense documentation and any other proof as required by Section II.B of the Settlement Agreement. *Id.*[3] The Proof of Repair Expense documentation consists merely of basic documentation, standard in judicially approved automotive class settlements, demonstrating that the Settlement Class Member paid for a past Covered Repair which complies with the Settlement terms, conditions, and durational time/mileage period for a Claim for Reimbursement.

[2] If the applicable Settlement Class Vehicle was, or as a result of the settlement, is currently, subject to a previously-released Service Action identified in Section II.C. of the Settlement Agreement, then in order to be eligible for coverage under the Warranty Extension, the Settlement Class Member is required to have had the Service Action performed on said Settlement Class Vehicle prior to the occurrence of leakage or liquid ingress giving rise to the Covered Repair. ECF No. 73-1, Sec. II.A.

[3] As delineated in the Settlement Agreement and Class Notice, reimbursement is subject to certain limitations and conditions, including but not limited to having had any applicable previously-released Service Action performed or attesting that you were not notified of the Service Action prior to the Covered Repair and VWGoA's records do not show otherwise, and first attempting to have the Covered Repair performed by an authorized Volkswagen or Audi dealer before having had such repair performed by a non-dealer.

The Claim Administrator will review all timely claims submitted by Settlement Class Members. The Parties retain the right to audit and review the Claims handling by the Claim Administrator, and the Claim Administrator shall report to both Parties jointly. In addition, the Settlement provides that Claimants whose claims are incomplete/deficient with respect to the Claim Form and/or supporting documentation will receive a letter or notice of same from the Claim Administrator, and an opportunity to cure the incompleteness/deficiency(ies) within 30 days after the date of that letter or notice. As an additional benefit, while the Claim Administrator's denial of any Claim, in whole or in part, will be binding and non-appealable, Class Counsel and Defense Counsel may meet and confer to attempt to resolve any disputed claim denials in good faith, and the Claimant will be afforded 15 days from the date of the Claim Administrator's denial letter to request an "attorney review" of that denial. *Id.* at Sec. III.B.

3. Extension of Service Actions Benefits

In addition to the Settlement benefits discussed above, the Settlement provides a further benefit that, effective on the Notice Date, VWGoA extended the following previously released Service Actions in the United States relating to certain free specified Sunroof related services, by authorized Volkswagen dealers, for current owners and lessees of certain Settlement Class Vehicles as specified below:

- Service Action 60E2 (Front Sunroof Drain Cleaning & Modification), applicable to some model year 2018 and 2019 Volkswagen Atlas and Atlas Cross Sport vehicles, will be extended for a period of six (6) months from the Notice Date; and

- Service Action 60E5 (Front Sunroof Drain Cleaning & Modification), applicable to some model year 2015, 2016, 2017, 2018 and 2019 Volkswagen Golf SportWagon vehicles, some model year 2016, 2017, 2018 and 2019 Volkswagen Golf Alltrack vehicles, and some model year 2018 and 2019 Volkswagen Tiguan vehicles, will be extended for a period of six (6) months from the Notice Date.

Id. at Sec. II.C.

4. Updated Maintenance Recommendations and Schedule Benefits

Finally, the Settlement also provides an updated sunroof maintenance recommendation and schedule, also effective on the Notice Date, for certain Volkswagen Settlement Class Vehicles, as follows:

Involved Settlement Class Vehicles:

Model Year 2018 and 2019 Volkswagen Atlas

Model Year 2015, 2016, 2017 and 2018 Volkswagen Golf and Volkswagen Golf GTI

Model Year 2015, 2016, 2017, 2018 and 2019 Volkswagen Golf SportWagen

Model Year 2017, 2018 and 2019 Volkswagen Golf Alltrack

Model Year 2018 and 2019 Volkswagen Tiguan

Updated Maintenance Recommendation and Schedule:

Every 2 years or 20,000 miles (whichever comes first) – Check sunroof function, clean guide rails and lubricate with grease (if equipped), check water drainage (if equipped).

Id. at Sec. II.D. Settlement Class Members are notified of these updates in the Class Notice.

C. Released Claims

In exchange for the foregoing relief, the Settlement Class Members who do not opt out of the Settlement will release the Defendants of claims relating to existing, potential or alleged sunroof leakage and that were alleged or could have been alleged in the Action, exempting, of course, claims for personal injury or property damage other than to a Class Vehicle itself. The release of claims is fair and appropriate with respect to the claims and issues in this Action. *Id.* at Sec. I.T.

D. Attorneys' Fees and Costs and Service Awards

Plaintiffs have filed a Motion for Fee and Expense Award and Incentive Payment. ECF 83. As further discussed in the Memorandum In Support of Plaintiffs' Unopposed Motion for Fee and Expense Award and Incentive Payment, ECF No. 83-1, Plaintiffs have respectfully requested that this Court award Class Counsel $2,850,000 in attorneys' fees, costs, and expenses, and award payments of $5,000 to each of the Class Representatives Sokol Gjonbalaj, Joseph Campbell, Jessica Cole, Karen Werner, Austin Barden, Mary Govan, Antonio Cabezas, Rick Hornick, and Krzysztof Ziarno (for a total of $45,000 in incentive award payments). VWGoA does not object to this motion.

Class Counsel's fee petition explains why the requested fee and expense award is reasonable. *Id.* Class Counsel has neither been paid for their extensive efforts nor reimbursed for litigation costs incurred. The requested fee award will serve to compensate Class Counsel for their time, risk, and expense incurred in this litigation. Importantly, the enforceability of the Settlement Agreement is not contingent on the amount of attorneys' fees or costs or service awards to Plaintiffs that may be approved by the Court.

IV. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 23(e), approval of a class action settlement generally occurs in two stages. At the preliminary approval stage, the Court makes an initial evaluation of the settlement's fairness before ordering notice to class members. At the final approval stage, class members and the parties are given an opportunity to be heard before the Court approves the settlement. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019). "[I]n determining whether to grant a motion for final approval, 'the Court must determine whether the Proposed Settlement is fair, reasonable, and adequate.'"

Hall v. ProSource Techs., LLC, No. 14-CV-2502 (SIL), 2016 WL 1555128, at *4 (E.D.N.Y. Apr. 11, 2016) (quoting *Henry v. Little Mint, Inc.*, No. 12 Civ. 3996, 2014 WL 2199427, at *6 (S.D.N.Y. May 23, 2014)).

Importantly, "[t]he law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (internal quotation marks and citation omitted). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11–CV–5669, 2012 WL 5874655, at *2 (E.D.N.Y. Nov. 20, 2012). Thus, the procedural and substantive fairness of a settlement should be examined "in light of the strong judicial policy in favor of settlement of class action suits." *Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 Civ. 4825 (JLC), 2013 WL 1364147, at *2 (S.D.N.Y. Apr. 2, 2013) (internal quotation marks omitted).

The Second Circuit's settlement approval analysis generally relies on two overlapping multi-factor tests. Federal Rule of Civil Procedure 23(e)(2) supplies the first test, which requires the Court, in evaluating the fairness, reasonableness, and adequacy of a settlement, to consider whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

i. the costs, risks, and delay of trial and appeal;

ii. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

iii. the terms of any proposed award of attorney's fees, including timing of payment; and

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

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

Fed. R. Civ. P. 23(e)(2).

To determine substantive fairness, courts in the Second Circuit supplement the 23(e)(2) analysis with the *Grinnell* factors, which include: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Wal-Mart Stores, Inc.*, 396 F.3d at 117 (citing *Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974)).

V. ARGUMENT

The Settlement, which is the result of good faith, informed, arm's-length negotiation between competent counsel, satisfies each factor for final approval under Rule 23(e), as well as the *Grinnell* factors. In addition, the Notice Plan satisfies Rule 23, due process, and provides the best notice practicable under the circumstances.

A. Notice to the Class Satisfied the Requirements of Rule 23 and Due Process.

Before final approval can be granted, due process and Rule 23 require that the notice provided to the Settlement Class is "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). "Such notice to class members need only be reasonably calculated under the circumstances to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *12 (S.D.N.Y. Dec. 23, 2009). Notice must clearly state essential information regarding the settlement, including the nature of the action, terms of the settlement, and class members' options. *See* Fed. R. Civ. P. 23(c)(2)(B). At its core, notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc.*, 396 F.3d at 114. "It is clear that for due process to be satisfied, not every class member need receive actual notice, as long as counsel 'acted reasonably in selecting means likely to inform persons affected.'" *In re Adelphia Commc'ns Corp. Sec. & Derivative Litigs.*, 271 F. App'x 41, 44 (2d Cir. 2008) (quoting *Weigner v. City of N.Y.*, 852 F.2d 646, 649 (2d Cir. 1988)).

The Notice here is the best notice practicable under the circumstances for reaching the Settlement Class. The substance of the Notice includes a comprehensive explanation of the Settlement in simple, layman's terms, while also informing Settlement Class Members of their rights, including their ability to request exclusion from or object to the proposed Settlement, and of the relevant deadlines, requirements, and procedures for doing so and/or for mailing a Claim for Reimbursement. Breit Decl. ¶ 26. The Court's Preliminary Approval Order has already

determined that the Notice and Notice Plan "satisfies Rule 23, due process, and constitutes the best notice practicable under the circumstances." ECF No. 76, ¶ 10. Additionally, the Court found the Notice Plan to be "reasonably calculated to apprise the Settlement Class of the pendency of the Action, the certification of the Settlement Class for settlement purposes only, the terms of the Settlement, its benefits and the Release of Claims, the Settlement Class Members' rights including the right to, and the deadlines and procedures for, requesting exclusion from the Settlement or objecting to the Settlement, the deadline, procedures and requirements for submitting a Claim for Reimbursement pursuant to the Settlement terms, Class Counsel's request for reasonable attorneys' fees and expenses and Settlement Class Representative service awards, the time, place, and right to appear at the Final Fairness hearing, and other pertinent information about the Settlement and the Settlement Class Members' rights." *Id.*

In accordance with the Preliminary Approval Order, JND Legal Administration mailed 986,879 Notices on August 22, 2023. Breit Decl. ¶ 27. Additionally, pursuant to the Court's August 18, 2023 Order granting the Parties' joint request to amend the Class Notice deadline, ECF No. 82, Class Notice was mailed to an additional 23,501 late-identified Settlement Class Members on September 8, 2023. *Id*. ¶ 29. However, due to an inadvertent administrative error by the Claim Administrator, those September 8, 2023 Class Notices, while properly reflecting/directed to the correct names of these additional identified Settlement Class Members, were not mailed to their correct addresses but, instead, were inadvertently mailed to addresses of other Settlement Class Members. *Id.* ¶ 30. After the Claim Administrator advised the Parties that it corrected the error, the Parties submitted a joint letter to the Court requesting an additional brief extension of the Notice deadline, until September 28, 2023. *Id.* Pursuant to the Court's September 22, 2023 Order

granting the Parties' request for an additional brief extension, Class Notice was mailed to corrected addresses of the 23,501 late-identified Settlement Class Members. *Id.* ¶ 31.

Notice was also published on a dedicated settlement website which contains, *inter alia*, copies of important documents including the Settlement Agreement, Claim Forms, Class Notices, relevant Court orders and motions, information on the Settlement terms, Important Dates, responses to Frequently Asked Questions and the method to contact the Claims Administrator for more information. *Id*. ¶ 32.

The mailed Notice constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Mailed Notice was sent to 1,010,380 Settlement Class Members. *Id*. ¶ 33. Of the 1,010,380 mailed Notices, 20,548 were returned as undeliverable where an updated address could not be found, resulting in Notice being delivered to 989,832 Settlement Class Members (97.97%). *Id.* Further, the Settlement Website has had 104,687 page events. *Id*. ¶ 34. Given the broad reach of the Notice, and the comprehensive information provided to the Settlement Class, the requirements of due process and Rule 23 are easily met.

Finally, the requirements under the Class Action Fairness Act of 2005 have been satisfied. JND Legal Administration mailed CAFA Notice to 56 officials, including the Attorneys General of each of the fifty states, the District of Columbia and the United States Territories, as well as the Attorney General of the United States. Neither the parties nor JND Legal Administration has received any objections or responses. *Id*. ¶ 35.

B. The Proposed Settlement Is Fair, Reasonable, and Adequate and Warrants Final Approval.

Final approval of the Settlement is appropriate here because the Settlement is procedurally and substantively fair, adequate, and reasonable. See Fed. R. Civ. P. 23(e)(2). To determine whether to approve a settlement, "[c]ourts examine procedural and substantive fairness in light of

the 'strong judicial policy in favor of settlement' of class action suits." *Tiro v. Public House Invs., LLC*, 2013 WL 4830949, at *5 (S.D.N.Y. Sept. 10, 2013).

1. The Proposed Settlement Is Procedurally Fair.

To find a settlement procedurally fair, the Court must pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations and that Plaintiffs' Counsel possessed the experience and ability and engaged in the discovery necessary for effective representation of the Class's interests. *See In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013). The Settlement here is the product of extensive, arm's-length negotiations conducted by experienced counsel for all parties, over a 9-month period, and with the assistance of Bradley A. Winters, Esq., an experienced and well-respected neutral mediator from JAMS. The use of a mediator in settlement negotiations further supports the presumption of fairness and the conclusion that the Settlement achieved was free of collusion. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure").

Further, Class Counsel have considerable experience in handling consumer class actions and are capable of assessing the strengths and weaknesses of their respective positions. Milberg Coleman Bryson Phillips Grossman PLLC ("Milberg"), Berger Montague PC, Bryant Law Center PSC, Ahdoot & Wolfson PC, and Simmons Hanly Conroy have extensive experience in consumer class actions that are similar in size, scope, and complexity to this case. *See* ECF No. 72-4 (Class Counsel's Firm Résumés). The experience of the firms and attorneys involved demonstrate that the Settlement Class Members were well-represented at the bargaining table. The involvement of "experienced, capable counsel" gives the resulting agreement a "presumption of correctness." *In*

re Telik, Inc. Sec. Litig., 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (internal quotation marks omitted).

2. The Proposed Settlement Is Substantively Fair.

In addition to being procedurally fair, the Settlement is also substantively fair, reasonable, and adequate. "Courts in the Second Circuit evaluate the substantive fairness, adequacy, and reasonableness of a settlement according to the factors set out in *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974)." *In re Vitamin C Antitrust Litig*., No. 06-MD-1738, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012) (Cogan, J.). However, in reviewing and approving a settlement, "a court need not conclude that all of the *Grinnell* factors weigh in favor of a settlement"; rather courts "should consider the totality of these factors in light of the particular circumstances." *Id*. Here, the *Grinnell* factors weigh in favor of final approval.

a. Litigation Through Trial Would Be Complex, Costly, and Long (*Grinnell* Factor 1).

The Settlement provides significant benefits to the Settlement Class while avoiding the significant expenses, delays, and risk associated with litigation. Indeed, "[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). Settlement is favored when the alternative—litigating the case—will be long, complex, and expensive. *See, e.g.*, *In re MetLife Demutualization Litig*., 689 F. Supp. 2d 297, 331-33 (E.D.N.Y. 2010).

While Plaintiffs are confident in their claims, they also understand that proceeding to trial is a risky and labor-intensive undertaking. Plaintiffs anticipate that the Defendants would continue to contest the matter at every opportunity and on all fronts. Indeed, the Defendants deny all allegations of liability, strenuously contending that the subject sunroofs are not defective, that no

fraudulent misrepresentation or omission has occurred and that the express and implied warranties were not breached, and that Plaintiffs would not prevail through summary judgment and/or trial. Continued litigation would last for an extended period before a class might be certified or a final judgment might be entered in favor of the Class (if any). Any trial would likely last at least several weeks, and involve numerous fact witnesses, experts, and the introduction of voluminous documentary evidence. Moreover, any judgment favorable to the Class would be the subject of post-trial motions and appeals, which could significantly prolong the lifespan of this Action. *See, e.g., City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014) (finding that "[e]ven if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years"). Through the Settlement, Plaintiffs avoid the expenditure of resources and risk associated with trial, and they guarantee a recovery, in a quicker time frame, for the Class. Because the risks of proceeding to trial are substantial, the Settlement warrants final approval.

b. The Reaction of the Class Is Overwhelmingly Positive (*Grinnell* Factor 2).

With the second *Grinnell* factor, the Court judges "the reaction of the class to the settlement." *In re Vitamin C Antitrust Litig*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). "It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d at 333 (internal quotation marks omitted). This "significant" factor weighs heavily in favor of final approval here.

The reaction of the Class Members to the Settlement has been overwhelmingly positive. Notice has been sent to more than 1,000,000 Settlement Class Members in accordance with the

Notice Plan. Breit Decl. ¶ 33. In response, only 5 Settlement Class Members have submitted objections to the Settlement (approximately 0.0005%), and only 72 have submitted opt-out requests (approximately 0.0071%). *Id.* ¶ 34. [4]

This low percentage of objections to the Settlement indicates that Settlement Class Members view the Settlement overwhelmingly favorably, which supports final approval and further supports the "presumption of fairness." *See Wright v. Stern,* 553 F.Supp.2d 337, 344–45 (S.D.N.Y. 2008) (approving settlement where 13 out of 3,500 class members objected and 3 opted out and noting "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness). Consequently, the second *Grinnell* factor weighs in favor of final approval of the Settlement.

c. The Proceedings Have Advanced Far Enough to Allow the Parties to Responsibly Resolve the Case (Grinnell Factor 3).

Under this factor, "[t]he pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating." *See Torres v. Gristede's Operating Corp*., 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010) (internal quotation omitted).

Plaintiffs and Class Counsel's knowledge of the merits, including the strengths and weaknesses of their claims, is certainly adequate to support the Settlement. This knowledge is based, in part, on the extensive investigation and analyses undertaken by Class Counsel in preparing the initial complaint in addition to subsequent complaints filed in other districts, including consultation with an expert. As a result of the extensive investigation, analyses, and the exchange of information with VWGoA prior to and during the settlement process, including warranty data and information, vehicle population data, and vehicle technical information,

[4] In accordance with the Preliminary Approval Order (ECF No. 76), and the contemporaneously filed letter motion, the Parties will address the objections and opt-out requests by November 17, 2023.

Plaintiffs and Class Counsel were in a position to adequately weigh the strengths and weaknesses of their case, of the defenses that were raised and/or are available, and to engage in effective settlement discussions with VWGoA. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims."); *In re Advanced Battery Techs.*, Inc. Sec. Litig., 298 F.R.D. 171, 177 (S.D.N.Y. 2014) (finding that even where "no merits discovery occurred in this case to date," lead counsel was "knowledgeable with respect to possible outcomes and risks in this matter and, thus, able to recommend the Settlement"). Additionally, the Parties engaged in extensive briefing related to VWGoA's motion to dismiss. *See* ECF Nos. 48, 50, 53.

Indeed, the Parties thoroughly discussed and vetted the facts and law, and Bradley A. Winters, Esq., an experienced neutral JAMS mediator, engaged in a critical analysis of the Parties' positions. This factor weighs in favor of final approval of the Settlement.

d. The Continued Litigation Risks Related to Establishing Liability, Damages, and Maintaining a Class Action Through Trial Support the Settlement (*Grinnell* Factors 4, 5, and 6).

"The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks"—that is, the risks of establishing liability, damages, and maintaining the class action through trial. *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *5.

As the pending motion to dismiss indicates, significant defenses to the various claims in this Action have been asserted which could prevent or significantly reduce any potential recovery. *See* ECF No. 48 (raising defenses such as the expiration of the statute of limitations; lack of standing; the inapplicability of the express warranties to Plaintiffs' claims; Plaintiffs' failure to provide the required notice under the applicable warranties; failure to adequately identify fraudulent misrepresentations or omissions with the requisite particularity; the inability to establish

Defendant's pre-sale knowledge of any purported defect; failure to establish reliance, causation, or injury; failure of all equitable claims due to the existence of an adequate remedy at law; and various additional defenses specific to the laws of the individual states at issue).

Plaintiffs also faced risks in establishing damages. Plaintiffs would have been forced to undertake a fact-intensive economic inquiry to show the damages claimed would compensate consumers for the value they would have received absent the alleged defect, and the Defendants would have likely vigorously contested the validity and reliability of Plaintiffs' damage model and its ability to be calculated with proof common to the class, as opposed to the myriad of individualized damage-related issues of each putative class member. As with contested liability, issues relating to damages would have likely come down to an unpredictable and hotly disputed "battle of the experts" and potentially required individualized fact inquiries regarding each putative class member. Further, Plaintiffs' case was particularly susceptible to a danger inherent in reliance on expert witness testimony; indeed, Defendants would almost certainly raise *Daubert* challenges to Plaintiffs' experts, the results of which would be uncertain. If the Court were to determine that even one of Plaintiffs' experts should be excluded either at the class certification stage or at trial, Plaintiffs' case would become much more difficult to prove.

In addition to the risks associated with establishing liability and damages, the prospects of achieving class certification in a litigation context—as opposed to a settlement context—are also uncertain for many reasons including but not limited to the fact that that different environmental, maintenance, usage, and other factors can cause a sunroof leak to manifest; that some vehicles never experienced or will not experience a sunroof leak; that the putative class vehicles have different sunroof designs, models, and configurations with varying drainage systems; that Plaintiffs may not be found to be typical of the putative class; and that differing laws and

burdens/requirements among the various states preclude certification of a nationwide class. Such issues could preclude class certification in a litigation context although they would not preclude it in a settlement context since potentially intractable manageability issues do not occur in a settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."); *Rodriguez v. CPI Aerostructures, Inc.*, No. 20-cv-982, 2023 WL 2184496, at *7 (E.D.N.Y. Feb. 16, 2023) (same).

If any of these arguments prevailed at class certification, summary judgment, or trial, Settlement Class Members could have recovered significantly less or, quite possibly, nothing. The Settlement avoids the risks inherent in protracted litigation and provides a prompt and favorable resolution to the Class. Accordingly, the fourth, fifth, and sixth *Grinnell* factors weigh in favor of final approval.

e. The Ability of Defendant to Withstand a Greater Judgment (*Grinnell* Factor 7).

The seventh *Grinnell* factor considers whether a defendant could withstand a judgment substantially higher than the proposed settlement amount if the case were to proceed to trial. *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 338 (S.D.N.Y. 2005). While VWGoA is able to withstand a greater judgment, courts generally do not find this to be an impediment to settlement when the other factors favor the settlement. *See In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *6 (acknowledging that "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and . . . this fact alone does not undermine the reasonableness of the instant settlement"). This factor is typically relevant only when a settlement is less than what it might otherwise be but for the fact that the defendant's

financial circumstances do not permit a greater settlement. *In re Namenda Direct Purchaser Antitrust Litig*., 462 F. Supp. 3d 307, 314 (S.D.N.Y. 2020). In cases such as this one where that situation is not present, courts generally do not give much consideration to this factor—and it does not weigh against the Settlement here.

f. The Settlement Amount is Reasonable in Light of the Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9).

Courts typically analyze the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. In so doing, courts "consider[] and weigh[] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *In re Flag Telecom Holdings, Ltd. Sec. Litig*., No. 02-CV-3400, 2010 WL 4537550, at *20 (S.D.N.Y. Nov. 8, 2010) (quoting *Grinnell*, 495 F.2d at 462). The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (internal quotation marks omitted). "Instead, 'there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id*. (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972)). Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. As the Second Circuit stated in *Grinnell*, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455 n.2.

The benefits offered through the proposed Settlement are generous and meaningful: they include a Warranty Extension to allow for repair or replacement services, as well as monetary reimbursement for out-of-pocket costs associated with a Covered Repair. In addition, the Settlement provides for an updated sunroof maintenance recommendation and schedule, as well as an extension of previously released Service Actions applicable to certain Settlement Class Vehicles' sunroofs. Given the attendant risks of continued litigation and the immediate and meaningful relief Settlement Class Members will receive now (rather than a speculative and uncertain relief at some point in the future), the Settlement is an excellent result for the Settlement Class Members.

Thus, the final elements of the *Grinnell* test weigh heavily in favor of final approval.

VI. CONCLUSION

For the reasons set forth above, and in their previously filed Unopposed Motion for Preliminary Approval of the Class Action Settlement, ECF No. 72-1, Plaintiffs respectfully request that the Court grant their Motion for Final Approval of the Class Action Settlement and enter the Final Approval Order in the form to be submitted together with the submissions addressing objections and opt-out requests.

Dated: November 7, 2023

Respectfully submitted,

s/Mitchell M. Breit
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SOKOL GJONBALAJ, JOSEPH CAMPBELL, JESSICA COLE, KAREN WERNER, AUSTIN BARDEN, MARY GOVAN, ANTONIO CABEZAS, RICK HORNICK, and **KRZYSZTOF ZIARNO,** individually and on behalf of all others similarly situated, Plaintiffs, v. **VOLKSWAGEN GROUP OF AMERICA, INC.,** a New Jersey corporation, **and VOLKSWAGEN AG,** a foreign corporation, Defendants.	**CASE NO. 2:19-cv-07165-BMC**

DECLARATION OF MITCHELL BREIT IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Mitchell Breit, herby declare as follows:

1. I am counsel for Plaintiffs in this action. I am admitted to this Court and I am a member of good standing of the bar of the state of New York. I make this Declaration in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement (the "Motion"). I have actively participated in the conduct of this litigation, have personal knowledge of the matters set forth herein, and if called to testify, could and would testify competently thereto.

CLASS COUNSEL

2. My firm, Milberg Coleman Bryson Phillips Grossman, PLLC ("Milberg"), along with Berger Montague PC, Bryant Law Center PSC, Ahdoot & Wolfson, PC, and Simmons Hanly Conroy LLP (collectively, "Class Counsel") have litigated this case, have extensive experience in

litigating complex class actions across the country, including extensive experiences in litigating consumer fraud and defective product cases. *See* ECF No. 72-4 (Class Counsel's Firm Résumés). This experience, along with Class Counsel's history of litigating the instant case, provides Class Counsel with a nuanced understanding of the legal and factual issues involved and informs our conclusion that the Settlement constitutes the best possible outcome for the Settlement Class.

Milberg

3. I have a legal career spanning more than 40 years, with extensive experience in consumer and environmental protection, litigating class actions and mass torts of national scope that have brought relief to victims of corporate wrongdoing.

4. My legal experience includes litigating the BP Gulf Oil Spill and Toyota Unintended Acceleration cases; settling a large overdraft fee class action against Bank of America; acting as lead counsel in the settlements of environmental claims involving Honeywell, Inc. and ConocoPhillips, Inc.; and serving on the Plaintiffs' Executive Committee in the ReNu MoistureLoc litigation. I was also appointed as Liaison Counsel in the New York State consolidated Bextra-Celebrex litigation and was co-counsel in cases that ultimately achieved major public health victories against the tobacco industry.

5. I frequently speak at national litigation conferences involving toxic and mass torts, class actions, and groundwater contamination, including Mealey's, Harris Martin, Practicing Law Institute, and bar association conferences. I have been named to New York Metro Super Lawyers and to the Best Lawyers in America for multiple years. I have been an Adjunct Professor of Law at Brooklyn Law School, am a Board Member of Public Justice, and am a member of the American Association for Justice.

6. My colleague, Gregory F. Coleman, is a Senior Partner at Milberg with over 30 years of experience. He has been named one of the Top 100 Trial Lawyers by the American Trial Lawyers Association, among other awards. He served as co-lead counsel in a defective products case against Electrolux where he successfully obtained a settlement on behalf of a class of more than one million members regarding defectively manufactured dryers. He also served as lead trial counsel in an ERISA class action against AK Steel Corporation where he successfully obtained a settlement on behalf of a class of over 3,000 retirees of AK Steels Butler Works Plant in Pennsylvania in 2011.

7. Milberg has decades of experience handling complex class actions involving consumer protection and privacy cases. The firm's lawyers have been regularly recognized as leaders in the plaintiffs' bar by the National Law Journal, Legal 500, Chambers USA, and Super Lawyers, and have held – and currently hold – leadership positions across the country, including but not limited to, *Clark v. Lumber Liquidators*, Case No. 1:15-cv-00748 (N.D. Ga.); *Floyd v. Honda Motor Co., Inc.,* Case No. 18-55957 (C.D. Cal; 9th Cir. Court of Appeals); *Anderson v. Ford Motor Co.*, Case No. 6:2017-cv-03244 (W.D. Mo.); *Berman v. General Motors*, Case No. 18-cv-14371 (M.D. Fla.); *In re: Blackbaud, Inc., Consumer Data Breach Litigation*, Case No. 3:20-mn-02972-JMC, MDL No. 2972 (D.S.C.); *In re Allergan Biocell Textured Breast Implant Prods. Liab. Litig.*, 2:19-md-02921-BRM-ESK (D.N.J.); *In re Elmiron Products Liability Litigation*, MDL No. 2973 (D.N.J.); *Glenn v. Hyundai Motors America*, Case No. 8:15-cv-02052 (C.D. Cal.); *Hungerman v. Fluidmaster, Inc.,* Case No. 1:14-cv-10257 (W.D. Penn.); and *O'Keefe v. Pick Five Imports, Inc.*, Case No. 8:18-cv-01496 (M.D. Fla.).

Berger Montague

8. Russell Paul graduated from the Columbia University School of Law in 1989. He is a shareholder in the Consumer Protection Department of Berger Montague and is head of its Automobile Defect Practice. Mr. Paul is currently representing millions of consumers in automotive defect class actions around the country against Fiat Chrysler, Ford, General Motors, Honda, Kia Hyundai, Mitsubishi, Nissan, Mercedes-Benz, Subaru, Toyota, and Volkswagen. Within the past several years, he has been appointed to leadership positions in many automotive defect class actions, including *Francis v. General Motors, LLC*, No. 2:19-cv-11044-DML-DRG (E.D. Mich.), ECF No. 40 (Plaintiffs' Steering Committee); *Weston v. Subaru of America, Inc.*, No. 1:20-cv-05876 (D.N.J.), ECF No. 49 (Interim Co-Lead Counsel); *Miller v. Ford Motor Co.*, No. 2:20-cv-01796 (E.D. Cal.) ECF No. 60 (Interim Class Counsel Executive Committee); *Powell v. Subaru of America, Inc.*, No. 1:19-cv-19114 (D.N.J.), ECF No. 26 (Interim Co-Lead Counsel); and *Wood, et al., v. FCA US LLC*, 5:20-cv-11054-JEL-APP (E.D. Mich.) (appointed as member of Plaintiffs' Steering Committee).

9. While adjusting its rates to track market increases, Berger Montague's rates have steadily remained reasonable and competitive, and have been consistently approved by many federal and state courts over the past several years. *See, e.g., Weiss v. SunPower Corporation*, No. 21-cv-384151 (Santa Clara County Superior Court July 9, 2021), granted Apr. 4, 2022; *Stringer v. Nissan of North America, Inc.*, No. 3:21-cv-00099 (M.D. Tenn. Feb. 5, 2021), granted Mar. 23, 2022, Dkt. 126; *In re Woodbridge Invs. Litig.*, No. 18-cv-103 (C.D. Cal. Jan. 4, 2018), granted Dec. 17, 2021, Dkt. 207; *Patrick v. Volkswagen Group of America, Inc.*, No. 8:19-cv-01908 (C.D. Cal. Oct. 4, 2019) granted Sept. 28, 2021, Dkt. 72; *Tomaszewski v. Trevena, Inc.*, No. 2:18-cv-4378 (E.D. Pa. Oct. 10, 2018), granted Aug. 2, 2021, Dkt. 125; *NECA-IBEW Pension Trust Fund v.*

Precision Castparts Corp., No. 3:16-CV-01756 (D. Or. Sept. 2, 2016), granted May 7, 2021, Dkt. 169; *Howell Family Trust DTD 01/27/2004 v. Hollis Greenlaw*, No. 3:18-cv-02864 (N.D. Tex. July 3, 2018), granted April 7, 2021, Dkt. 100; *Bentley v. LG Electronics U.S.A., Inc*., No. 2:19-cv-13554 (D.N.J. June 7, 2019), granted Dec. 18, 2020, Dkt. 67; *Contant v. Bank of America Corp*., Case No. 1:17-cv-03139 (S.D.N.Y. Apr. 28, 2017), granted Nov. 20, 2020, Dkts. 462 and 463; *Norman* (originally *Weckwerth*) *v. Nissan of North America, Inc*., No. 3:18-cv-00588 (M.D. Tenn. June 26, 2018), granted Mar. 10, 2020, Dkt. No. 181; *Norman* (originally *Madrid*) *v. Nissan of North America, Inc*., No. 3:18-cv-00534 (M.D. Tenn. June 8, 2018) granted Mar. 10, 2020, Dkt. No. 123; *Cohen v. Accordia Life and Annuity Co.*, No. 4:18-cv-00458 (S.D. Iowa Nov. 30, 2018), granted Oct. 27, 2020, Dkt. 62; *In re Patriot National, Inc. Sec. Litig.*, No. 1:17-cv-01866 (S.D.N.Y. Mar. 14, 2017), granted Nov. 6, 2019, Dkt. 151; *Cole v. NIBCO, Inc.*, No. 13-cv-7871 (D.N.J. Dec. 27, 2013), granted Apr. 12, 2019, Dkt. 230; *Alaska Electrical Pension Fund v. Bank of America Corp.*, No. 1:14-cv-07126 (S.D.N.Y. Sept. 4, 2014), granted Nov. 30, 2018, Dkt. 742; and *In re: Domestic Drywall Antitrust Litig.*, No. 2:13-md-02437 (E.D. Pa. Apr. 8, 2013), granted July 17, 2018, Dkt. 768.

Bryant Law Center

10. Mark Bryant has over 50 years of experience in litigation and 20 years of class action and Mass Tort experience. The following are representative cases in which Mr. Bryant has played a leadership role:

- *Sigman v. CSX Corp, et al.* (United States District Court, Southern District of West Virginia 3:15-cv-13328) (case resolved in 2018 by United States District Judge Robert Maxwell in mediation);
- *Tipton et al v. CSX Transportation and Union Tank Car Company* (United States District Court, Eastern District of Tennessee, Northern Division 3:15-cv-00311-TAV-CCS) (member of trial team; favorable jury verdict for plaintiffs);

- *Smith v. Paducah and Louisville Railroad (CSX)* (United States District Court, Western District of Kentucky 3:12-cv-00818-CRS *Smith v. Paducah and Louisville Railroad (CSX)* (multimillion-dollar settlement for plaintiffs);

- *Kirk Petska v. Canadian National/ Illinois Central Railroad (*Circuit Court Perry County, Illinois 2004- L-27) (multiple appeals resulting in undisclosed settlement for plaintiffs);

- *Mayo v. Wal-Mart Stores, Inc. and Sam's East, Inc*. 5:06-cv-00093-TBR (Western District of Kentucky) (mediation resulting in national class settlement);

- *In Re: Matter of Bayer Corporation* (Franklin, Kentucky Circuit Court 07-CI-00148) (counsel for the Attorney General of Kentucky, case settled in December 2019);

- *Wiggins et al v. Daymar College, LLC* (United States District Court, Western District of Kentucky (5:11-cv-00036); (*Dixon et al v. Daymar College, LLC* (McCracken County Circuit Court 10-CI-00132) (Kentucky Supreme Court rules contract unconscionable which led to mediation resulting in resolution of all claims);

- *In re Google Cookie Placements Cons. Priv. Litig.*, MDL No. 2358 (D. Del.) (Plaintiffs' Steering Committee); and

- *In re Facebook, Inc. Internet Tracking Litig.*, 12-md-02314 (N.D. Cal.) (Plaintiffs' Steering Committee).

Ahdoot & Wolfson

11. Tina Wolfson graduated Harvard Law School *cum laude* in 1994. Since co-founding Ahdoot Wolfson in 1998, Ms. Wolfson has led many class actions to successful results, including numerous automotive defect cases. *See, e.g.*, *Berman v. General Motors, LLC*, No. 2:18-cv-14371-RLR (S D. Fla.) (Hon. Robin L. Rosenberg) ($40 million settlement for alleged oil consumption defect); *Mercado v. Audi of America, Inc.*, No. 5:18-cv-02388-JWH-SPS (C.D. Cal.) (Hon. John W. Holcomb) (uncapped settlement for warranty extension and repair reimbursement for alleged brake defect); *Boehm v. BMW of North America, LLC*, No. 2:17-cv-12827-MCA-LDW (D.N.J.) (Hon. Madeline Cox Arleo) (uncapped settlement for warranty extension and repair reimbursement for alleged fuel pump defect). Ms. Wolfson and her firm currently serve in leadership roles on numerous automotive defect cases, including *Clark v. American Honda Motor*

Co., No. 2:20-cv-03147-AB-MRW (C.D. Cal.) (Hon. André Birotte Jr.) (co-lead counsel in class action alleging unintended and uncontrolled deceleration in certain Acura vehicles), and *In re ZF-TRW Airbag Control Units Products Liability Litigation*, No. 2:19-ml-02905-JAK-FFM (C.D. Cal.) (Hon. John A. Kronstadt) (executive committee in class action alleged airbag defect in over 15 million vehicles from various automakers). Ms. Wolfson is a member of the California, New York, and District of Columbia Bars. She currently serves as a Ninth Circuit Lawyer Representative for the Central District of California, as Vice President of the Federal Litigation Section of the Federal Bar Association, as a member of the American Business Trial Lawyer Association, as a participant at the Duke Law School Conferences and the Institute for the Advancement of the American Legal System, and on the Board of Public Justice. Recognized for her deep class action experience, Ms. Wolfson frequently lectures on numerous class action topics across the country. She is a guest lecturer on class actions at the University of California at Irvine Law School.

Simmons Hanly Conroy

12. Simmons Hanly Conroy, LLC attorneys Jay Barnes and An Truong have significant experience litigating complex class action lawsuits. Mr. Barnes is a shareholder at SHC and oversees the firm's class action practice. Mr. Barnes has nearly two decades of experience in complex litigation and has served in various leadership roles in national class actions and MDLs. *See In re Google Cookie Placements Cons. Priv. Litig.*, MDL No. 2358 (D. Del.) (Plaintiffs' Steering Committee Member); *In re Nickelodeon Cons. Priv. Litig.*, MDL No. 2443 (D.N.J.) (Co-lead Counsel); *In re Facebook, Inc. Internet Tracking Litig.*, 12-md-02314 (N.D. Cal.) (Chairman of Plaintiffs' Executive Committee and Class Counsel); *In re Meta Pixel Healthcare Litig.*, 22-cv-03580 (N.D. Cal.) (Co-lead Counsel); *In re Google RTB Cons. Priv. Litig.*, 21-cv-02155 (N.D.

Cal.) (Plaintiffs' Executive Committee Member); *Calhoun v. Google, LLC*, 22-cv-05146 (N.D. Cal.) (Co-lead Counsel). Ms. Truong is a shareholder located in SHC's New York Office and has over ten years of experience. She currently serves on the Law & Briefing Committee in the national MDL *In re: Allergan Biocell Textured Breast Implant Products Liability Litig.*, MDL No. 2921 (D.N.J.), and is a member of the litigation teams in a number of national class action lawsuits where she spearheads briefings, depositions, and discovery matters. *See In re Google RTB Privacy Litig.*, 20-cv-02155 (N.D. Cal.), *In re Meta Pixel Healthcare Litig.*, 20-cv-05146 (N.D. Cal.), *In re Google Medical Priv. Litig.*, 23-cv-02431 (N.D. Cal.). Mr. Barnes and Ms. Truong's hourly rates reasonably reflect their experience and skill, which have been approved by courts in other litigation. *See In re Facebook Internet Tracking Litig.*, 12-md-02314 (N.D. Cal.), Dkt. 289; *Doe v. Partners Healthcare System, Inc.*, No. 19-1651 (Suffolk Cnty., MA); *Cody Meek v. Skywest, Inc. and Skywest Airlines, Inc.*, 17-cv-1012 (N.D. Cal.), Dkts. 198-1, 204.

BACKGROUND AND RELEVANT PROCEDURAL HISTORY

13. Between December 2019 and May 2020, various Plaintiffs filed the following putative class actions against Volkswagen Group of America, Inc. ("Defendant" or "VWGoA") and Volkswagen AG: (1) *Sokol Gjonbalaj v. Volkswagen Group of America, Inc., et al.*, No. 2:19-cv-07165 (E.D.N.Y.), filed on December 23, 2019 and subsequently amended on March 27, 2020 (the "*Gjonbalaj* Action"); (2) *Jessica Cole et al., v. Volkswagen Group of America, Inc., et al.*, No. 3:20-cv-02085 (N.D. Cal.), filed on March 25, 2020; (3) *Krzysztof Ziarno v. Volkswagen Group of America, Inc., et al.*, No. 2:20-cv-03833 (D.N.J.), filed on April 8, 2020; (4) *Dimitri Williams v. Volkswagen Group of America, Inc., et al.*, No. 2:20-cv-02553 (N.D. Ill.), filed on April 27, 2020; (5) *Austin Barden v. Volkswagen Group of America, Inc., et al.*, No. 5:20-cv-00973 (C.D.

Cal.), filed on May 5, 2020; and (6) *Joseph Campbell v. Volkswagen Group of America, Inc., et al.*, No. 5:20-cv-00518 (N.D.N.Y.), filed on May 8, 2020.

14. In all six actions, Plaintiffs alleged defects in the sunroofs in the following Settlement Class Vehicles which could potentially result in leakage and water ingress into the vehicles' interiors, sometimes potentially damaging certain aspects of the vehicle: (a) any model year 2018, 2019, 2020 and 2021 Volkswagen Atlas vehicle, (b) any model year 2020 and 2021 Volkswagen Atlas Cross Sport vehicle, (c) any model year 2015, 2016, 2017 and 2018 Volkswagen Golf and Volkswagen Golf GTI vehicle, (d) any model year 2015, 2016, 2017, 2018 and 2019 Volkswagen Golf SportWagen vehicle, (e) any model year 2017, 2018 and 2019 Volkswagen Golf Alltrack vehicle, (f) any model year 2018, 2019, 2020 and 2021 Volkswagen Tiguan vehicle, (g) any model year 2019, 2020 and 2021 Audi Q3 vehicle, (h) any model year 2019, 2020 and 2021 Audi Q8 vehicle, and (i) any model year 2019, 2020 and 2021 Audi e-tron vehicle, that were imported and distributed by VWGoA for sale or lease in the United States and Puerto Rico (hereinafter, the "Settlement Class Vehicles").

15. Pursuant to an agreement among the Parties, Plaintiffs in the six above-listed actions agreed to consolidate and adjudicate their claims in the *Gjonbalaj* Action. Accordingly, each of the lawsuits, except the *Gjonbalaj* Action, were voluntarily dismissed by Plaintiffs without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).

16. On August 28, 2020, Plaintiffs filed a Consolidated and Amended Class Action Complaint ("CACAC") in the *Gjonbalaj* Action (hereinafter, the "Action"). ECF No. 44. VWGoA moved to dismiss the CACAC, which was fully brief. ECF Nos. 48, 50, 53.

17. Plaintiffs filed a Second Consolidated and Amended Class Actions Complaint ("SCACAC") removing Plaintiffs Lisa and Steven DelPrete's and Plaintiff Dimitri Williams'

claims. ECF No. 70. The SCACAC asserts the following claims: breach of express warranties (count I); breach of implied warranties (count II); breach of express and implied warranties under the California Song-Beverly Consumer Warranty Act, Cal Civ. Code § 1790, *et seq.* (counts III & IV); violation of New York General Business Law §§ 349 and 350 (counts V & VI); violation of California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (count VII); violation of California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* (count VIII); violation of the Maryland Consumer Protection Act, Md. Code Ann. Law, Com. Law §§ 13-101, *et seq.* (count IX); violation of the New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-2 (count X); Fraud by Omission and/or Fraudulent Concealment (count XII); and, Unjust Enrichment (count XI).

18. While the motion to dismiss remained pending, the Parties advised the Court that they were engaging in negotiations for a potential class settlement, and the Court deferred a decision on the motion to dismiss pending the outcome of the settlement negotiations.

19. VWGoA denies Plaintiffs' allegations and claims and maintains that the subject vehicles' sunroofs are not defective, were properly designed, manufactured, marketed and sold, that no warranties were breached, that no applicable statutes or laws were violated, and no wrongdoing occurred with respect to the Settlement Class Vehicles and their sunroofs.

CLASS COUNSEL'S EFFORTS

20. The Settlement Agreement is the product of hard-fought litigation and a fully informed decision by Plaintiffs' Counsel after engaging in motion practice, the exchange of important, relevant information pursuant to Federal Rule of Evidence 408, in-depth factual investigation, a comprehensive evaluation of factual and legal issues underlying Plaintiffs' claims, and a detailed litigation strategy aimed at obtaining significant relief for the Settlement Class while also taking into account the potential significant risks and delays of continued litigation.

21. The Parties engaged in extensive arms-length negotiations over the course of approximately 9 months, including numerous exchanges of information and settlement proposals, and a full-day mediation session with Bradley A. Winters, Esq., an experienced and well-respected neutral mediator from JAMS.

22. Plaintiffs entered into these settlement negotiations with substantial information about the nature and extent of the challenged practices, and the merits of the legal claims and factual allegations. Plaintiffs' knowledge was obtained, in part, through extensive investigation prior to filing multiple class action complaints, responding to letter briefs regarding proposed motions to dismiss and opposing VWGoA's motion to dismiss, and vehicle inspections that were conducted by experts from both Parties. Plaintiffs also had the ability to analyze discovery from VWGoA produced pursuant to Federal Rule of Evidence 408 during the pendency of the settlement negotiations.

23. Only after the Class benefits were negotiated did the Parties discuss attorneys' fees/expenses and a Class Representative Service Award, and all were negotiated with the assistance of the mediator.

24. Plaintiffs filed their Unopposed Motion for Preliminary Approval of Class Action Settlement on April 18, 2023. ECF No. 72.

25. On April 25, 2023, this Honorable Court granted Plaintiffs' motion for preliminary approval, entering the Preliminary Approval Order and directing that notice be sent to the Settlement Class. ECF No. 76.

26. The substance of the Notice includes a comprehensive explanation of the Settlement in simple, layman's terms, while also informing Settlement Class Members of their rights, including their ability to request exclusion from or object to the proposed Settlement, and

of the relevant deadlines, requirements, and procedures for doing so and/or for mailing a Claim for Reimbursement.

27. Pursuant to the Preliminary Approval Order, JND Legal Administration mailed 986,879 Notices on August 22, 2023.

28. On August 18, 2023, the Parties submitted a joint letter to the Court requesting a brief extension, until September 8, 2023, of the date for mailing Notice to additional late-identified Settlement Class Members. ECF No. 81.

29. Pursuant to the Court's August 18, 2023 Order granting the Parties' joint request to amend the Class Notice deadline, ECF No. 82, Class Notice was mailed to an additional 23,501 late-identified Settlement Class Members by September 8, 2023.

30. After being advised of an inadvertent administrative error by the Claim Administrator regarding the mailing addresses of the late-identified Settlement Class Members, the Parties submitted a joint letter to the Court on September 21, 2023 requesting an additional brief extension, until September 28, 2023, of the date for mailing Notice to the corrected addresses of these Settlement Class Members. ECF No. 88.

31. Pursuant to the Court's September 22, 2023 Order granting the Parties' joint request to amend the Class Notice deadline, ECF No. 90, Class Notice was mailed to 23,501 corrected addresses of late-identified Settlement Class Members by September 28, 2023.

32. Notice was also published on a dedicated settlement website which contains, *inter alia*, copies of important documents including the Settlement Agreement, Claim Forms, Class Notices, relevant Court orders and motions, information on the Settlement terms, Important Dates, responses to Frequently Asked Questions and the method to contact the Claims Administrator for more information.

33. Mailed Notice was sent to 1,010,380 Settlement Class Members. Of the 1,010,380 mailed Notices, 20,548 were returned as undeliverable where an updated address could not be found, resulting in Notice being delivered to 989,832 Settlement Class Members (97.97%).

34. The Settlement Website has had 104,687 page events. Additionally, 5 Settlement Class Members have submitted objections to the Settlement (0.0005%,) and 72 have submitted an opt-out request (0.0071%).

35. The requirements under the Class Action Fairness Act of 2005 have been satisfied. JND Legal Administration mailed CAFA Notice to 56 officials, including the Attorneys General of each of the fifty states, the District of Columbia and the United States Territories, as well as the Attorney General of the United States. Neither the parties nor JND Legal Administration has received any objections or responses.

36. In Class Counsel's opinion, based on our substantial experience as outlined above, the settlement in this case warrants the Court's final approval. The settlement terms are fair, reasonable, and adequate, and provide concrete and certain results to class members.

* * *

I declare under the penalty of perjury under the laws of the United States of America and the state of New York that the foregoing is true and correct.

Executed this 7th day of November, 2023

/s/ Mitchell Breit

Mitchell Breit
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