UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

OMAR VARGAS, et al.,

Plaintiffs,

v.

FORD MOTOR COMPANY,

Defendant.

Case No. CV-12-08388 AB (FFMx)

**ORDER GRANTING RENEWED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Before the Court is Plaintiffs' unopposed Renewed Motion for Final Approval of Class Action Settlement ("Motion," Dkt. No. 297). The Motion was heard on February 28, 2020. For the following reasons, the Motion is **GRANTED**.

## I. BACKGROUND

### A. Factual and Procedural Background

In this class action, Plaintiffs allege that Ford Motor Company ("Ford") manufactured, marketed, and sold them vehicles equipped with an alleged undisclosed defect in the DPS6 or dual clutch PowerShift automatic transmission ("Transmission") that caused the vehicles slip, buck, jerk, and suffer sudden or delayed acceleration and delays in downshifts. *See* Compl. Plaintiffs alleged that nearly 1.5 million vehicles were equipped with the allegedly defective Transmission, and there are nearly 2 million class members. Following the consolidation of similar

cases with *Vargas—Klipfel v. Ford Motor Co.*, No. 2:15-cv-02140-AB (C.D. Cal.), *Cusick v. Ford Motor Company*, Case No. 2:15-cv-08831-AB (C.D. Cal.), and *Anderson v. Ford Motor Co.*, No. 1:16-cv-01632 (N.D. Ill.)—the First Amended Complaint in *Cusick* was deemed the operative complaint. *See* First Amended Complaint ("FAC," Dkt. No. 118). The FAC asserted 18 claims under various states' consumer protection laws[1]; claims for breach of express and implied warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, ("MMWA"), and under state warranty law; and fraud and related claims. The FAC sought damages and injunctive relief. *See generally* FAC.

Plaintiffs extensively investigated their claims, consulted with automotive experts, and propounded discovery on Ford that yielded 1.5 million documents and on Ford's third-party vendors that yielded tens of thousands of documents. *See* Wu Decl. (Dkt. No. 279-1) ¶¶ 9, 10. Plaintiffs also deposed key witnesses from Ford and third-party vendor Getrag. Paul Decl. (Dkt. No. 279-2) ¶¶ 7-11. Plaintiffs also fielded contacts from tens of thousands of class members to report problems with their vehicles and seek relief, incorporating these complaints into their plans for litigation and settlement. Wu Decl. ¶ 9.

Beginning in August 2015, the parties worked with Professor Eric D. Green of Resolutions LLC over the course of four mediation sessions to negotiate a settlement. Dr. Green is considered one of the top mediators in the automotive defects field. The terms of relief for the class were negotiated in the first three sessions, and only after those terms were confirmed did the parties participate in a fourth mediation session with Dr. Green focused solely on the issues of attorneys' fees, costs, and service awards. Wu Decl. ¶¶15-16. Thereafter, the Court granted a motion for preliminary approval, preliminarily certifying the class under Fed. R. Civ. P. ("Rule") 23(b)(3),

[1] Claims were filed under the laws of Arizona, California, Colorado, Illinois, New Jersey, New York, Oregon, Pennsylvania, and Washington.

finding that the class settlement's terms were fair, reasonable and adequate such that preliminary approval was warranted, approving the proposed form and plan of notice, and appointing Capstone Law APC, Berger & Montague, P.C., and Zimmerman Law Offices, P.C., as Class Counsel and designating Capstone as Lead Class Counsel. (Dkt. No. 133.) Thereafter, the approved class notice plan was executed. *See* Wyatt Decl. (Dkt. No. 279-4) ¶¶ 3-16. As of the opt-out deadline, about 10,350 class members validly opted out, and fifteen members timely objected. Wu Decl. ¶¶ 22, 23.

Plaintiffs then moved for final approval of the settlement, and for attorneys' fees, costs, and service awards. *See* Dkt. Nos. 150, 146. After a several-hour hearing, the Court issued an Order granting final approval, overruling the objections, awarding Plaintiffs their fees, costs, and incentive awards, and entered judgment. *See* Orders at Dkt. Nos. 192, 193, 196. The Lott Objectors and objector Jason DeBolt appealed. The Ninth Circuit found that the Order approving the settlement omitted certain elements of the necessary analysis, and vacated it and remanded for further proceedings.

Following the Ninth Circuit decision, Plaintiffs, Ford, the Lott Objectors, and objector DeBolt engaged in further mediation with the assistance of Dr. Green and agreed to significant additional class benefits that address the objections. The instant Renewed Motion for Final Approval of the Amended Settlement Agreement (Dkt. No. 279), as did Notices from the Lott Objectors and objector DeBolt withdrawing their objections. *See* Notices Withdrawing Objections (Dkt. Nos. 285, 287.)

**B. Material Terms of the Settlement Agreement**

The Settlement Agreement ("Settlement" or "Settlement Agreement") consists of the original Settlement Agreement and the Amendment thereto. *See* Wu Decl. ¶¶ 2, 3; Exs. 1, 2 (original Settlement Agreement ("Sett. Agmt.") and Amendment), Suppl. Wu Decl. (Dkt. No. 281) Ex. 6 (fully-executed Amendment). The primary benefits of the Settlement are Cash Payments and a Repurchase/Arbitration program. The

material terms and features of the Settlement are as follows[2]:

***Cash Payments for service visits guaranteed at $30 million.*** The Settlement provides cash payments to Class Members who have had three or more qualifying Service Visits to authorized Ford dealers. The purpose of this benefit is to compensate Class Members for the inconvenience associated with having to get their vehicles repeatedly serviced due to Transmissions problems. There are three subcategories of the cash payment benefit. First, Class Members who have made three or more visits to authorized Ford dealers ("Service Visits") to replace certain Transmission components ("Transmission Hardware Replacements") are entitled to either a cash payment or a discount certificate, valued at twice the amount of the cash payment, toward the purchase or lease of a new Ford vehicle. (Sett. Agmt. ¶ II.C.) Payments start with $200 for the third Service Visit, an additional $275 for the next Service Visit, and an additional $350 after that, and so on, up to a cumulative $2,325 after the eighth Visit. Second, Class Members who do not qualify for Transmission Hardware Replacement payments may qualify to receive compensation for multiple updates of the Transmission Control Module ("Software Flashes), starting with the third, which entitles them to cash payments of $50 for each, up to $600, performed within the same 7 year/100,000 mile limitation. (Sett. Agmt. ¶ II.B.) Third, Class Members who complained about Transmission problems but were denied repairs by a Ford Dealer may receive $20 cash by attesting to those facts under penalty of perjury. (Amendment ¶ 8.) This will provide relief to Class Members who have reported being denied repairs by a Ford Dealer. For these payments, Ford has guaranteed a minimum net payout of $30 million. (Amendment ¶ 9.) The last date to submit claims is October 21, 2024. If the total payout after that is less than $30 million, Ford will distribute the entire residue, on a per capita basis, to all Class Members who have received cash payments or benefits following a notice of intent to arbitrate, and thereafter any

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[2] This summary is adapted from the memorandum filed in support of the motion.

unclaimed residue will be distributed to a cy pres beneficiary to ensure that nothing reverts to Ford.

***Repurchases Through the Arbitration Program.*** Class Members may obtain a Repurchase of their Class Vehicles if they qualify under their state's lemon law or under a Settlement-created fall back standard. (Sett. Agmt. ¶ II.N.) For Claimants who prevail, Ford refunds the actual amount that the Class Member paid for the vehicle including finance charges, less a reasonable allowance for use. For leased vehicles, Ford refunds the payments made, less a reasonable allowance for use. The Repurchase remedy is awarded through an Arbitration Program that enhances Class Members' rights in several ways. First, the Program resolves Class Members' lemon law claims within two or three months of submission, rather than the year or more for state court lemon law suits. Second, the Program extends the applicable statute of limitations, preserving claims for six years from the date of original sale or six months of the Effective Date of the Settlement, whichever is later for both current and former owner/lessees. (*Id.* ¶ II.N.1.d.; Amendment ¶ 12.)

Claims for Repurchase will be governed either by the state lemon law applicable to each Class Member or, if the claims do not qualify under state lemon law, by the Settlement's consumer-friendly fallback standard under which the Arbitrator may award a repurchase if 4 or more Transmission Hardware Replacements were performed within 5 years/60,000 miles, and the vehicle continues to malfunction. (Sett. Agmt. ¶ II.N.1.e.) This is more generous to consumers than most state lemon laws. Ford will pay a maximum of $6,000 in attorneys' fees to each Class Member who prevails on his or her claim in arbitration. (*Id.* ¶ II.N.1.h.) And, Class Members can appeal an adverse decision to a JAMS arbitrator, while Ford has no right to appeal except for an award of civil penalties. (*Id.* ¶ II.N.1.g.)

The Amendment removes several prior limitations on Repurchases. First, it eliminated the original Settlement's requirement allowing Ford to perform one final repair attempt after receiving a notice of intent to arbitrate from a Claimant with three

or fewer repair attempts. (Amendment ¶ 10.) Second, it permits Class Members to recover civil penalties not to exceed the amount of the Repurchase award, if (a) their state's law authorizes civil penalties, (b) Ford knew of its obligation under state law or the Settlement Agreement, as amended, to repurchase the vehicle, and (c) prior to the arbitrator's award, Ford declined to repurchase after being provided with the Claimant's notice of intent to proceed to arbitration under the Settlement Agreement. (*Id*. ¶ 15.) Third, the identical statute of limitations period extension for current owners/lessees will be extended to former owners/lessees. (*Id*. ¶ 12.) Fourth, a former owner/lessee may obtain a Repurchase award if they meet the Settlement's fallback standard, even if her state's lemon law does not allow repurchase for former owners/lessees. (*Id*. ¶ 11.)

Due to the Settlement's consumer-friendly rules and speed of resolution, most Class Members would do better under the Arbitration Program rather than in court. As of the end of 2019, Ford had paid $47.4 million to Class Members to repurchase approximately 2,666 vehicles under the Settlement's Repurchase remedy. *See* Barron Decl. (Dkt. No. 279-3) ¶ 3.

***Ford Must Perform Repairs or Reimburse Class Members Through the Arbitration Program***. Class Members who have incurred out-of-pocket expenses for repairs they believe should have been covered by Ford's New Vehicle Limited Warranty ("Warranty") or who believe that a Ford dealer improperly denied Warranty repairs are eligible to pursue their claims in a qualified version of the Program ("Warranty Arbitration"). (Sett. Agmt. ¶ II.N.2.) Ford will pay the costs of each Warranty Arbitration, and the Arbitrator is authorized to award reimbursement, a free repair, an extension of warranty by Ford, or any combination thereof.

***Reimbursements for Clutch Replacement.*** Class Members who own or lease a Class Vehicle manufactured after June 5, 2013, and who had two clutches replaced during the 5-year/60,000-mile Powertrain Warranty, are entitled to reimbursement for out-of-pocket costs for a third clutch replacement made within 7 years/100,000 miles

from delivery to the first retail customer. (Sett. Agmt. ¶ II.G.) The replacement clutch will also be covered by a two-year warranty. Ford's Customer Satisfaction Program 19N08, issued in August 2019, improves on this provision. Under Program 19N08 and the previously issued Program 14M01, the clutches on most if not all Class Vehicles are covered by an extended warranty of 7 years/100,000 miles.

***Ongoing Claims Process Open to Class Members for Years***. The Settlement requires Class Members to submit documentation typically required to substantiate such claims. (Sett. Agmt. ¶ II.E.) Except for the sworn declaration payment, Class Members need only provide (either electronically through the Claims Administrator's website portal or by mail) a receipt, repair order, or other invoice containing standard information, (*e.g.*, repair date, a description of the vehicle, the dealership or facility where the work was performed, the vehicle' mileage at the time of repair, an itemized list of parts and labor), along with proof of ownership and a sworn written statement attesting to the authenticity of the documents provided. (*Id*.) Subsequent claims for cash payments will have a reduced standard for proof, as the Claims Administrator will retain previous submissions. (*Id*. ¶ II.E.4.) For those who were denied repairs and therefore cannot document Service Visits, the Amended Settlement provides a cash payment of $20, if the Class Member attests to those facts. (Amendment ¶ 8.)

Claims can be submitted through the Settlement website. A portal will walk Class Members through a series of prompts and fields in which to provide the information required. The site provides clear instructions, and the portal permits Class Members to upload scanned documents supporting their claims.

Ford will pay the Claims Administrator to process Class Members' claims expeditiously following the Effective Date. (Sett. Agmt. ¶ II.O.) Class Members who are entitled to a cash payment or Certificate will be paid promptly following the claim submission or after the Effective Date, whichever is later. (*Id*.) The Claims Administrator's duties will continue for many years due to the ongoing claims process. So long as a Service Visit for a Transmission Hardware Replacement or

Software Flash is made within the 7 year/100,000 mile period of eligibility, the Class Member may continue to submit claims for qualifying Service Visits made after the Effective Date. Class Members will have up to 180 days from the qualifying visit to submit such claims. Some Class Members may have up to October 2024 to submit a claim for cash payments.

The Program is also streamlined. A Class Member initiates the process by calling a dedicated phone number or by submitting a form through the Settlement website or by mail, indicating directly to Ford his or her intent to submit a claim for repurchase or breach of warranty. (Sett. Agmt. ¶ II.N.1.) Ford will then have ten days to resolve the matter informally with the Class Member. (*Id*.) After that, the Class Member may proceed directly to arbitration.

***The Limited Release*.** The Settlement specifically excludes from the Settlement Class consumers with suits related to the Transmission pending as of July 14, 2017, while giving them the choice to opt-in to the Settlement. (Sett. Agmt. ¶¶ I.L.) In addition, while Class Members do not release personal injury and property claims under the Settlement, they will release claims that were or could have been asserted by them in connection with the Alleged Transmission Defect. (*Id*. ¶ I.CC.)

***Ford's Payment of Claims Administration Costs, Attorneys' Fees and Costs, and Service Payments***. Ford will pay the Claims Administration costs, including the Arbitration Administrator's costs, attorneys' fees and costs, and service awards to the Class Representatives. (Sett. Agmt. ¶¶ II.N., II.P, III.C.)

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 23 provides that "the claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). "The primary concern of [Rule 23(e) ] is the protection of th[e] class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103

S.Ct. 1219, 75 L.Ed.2d 456 (1983). Whether to approve a class action settlement is "committed to the sound discretion of the trial judge[,]" *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333 (1992), who must examine the settlement for "overall fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Neither district courts nor appellate courts "have the ability to delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety." *Id.* (internal quotation marks and citation omitted).

A court deciding whether to approve a class action settlement must conduct a four-step inquiry. First, the court must assess whether defendants have met the notice requirements under the Class Action Fairness Act ("CAFA"). *See* 28 U.S.C. § 1715(b), (d). Second, the court must determine whether the notice requirements of Rule 23(c)(2)(B) have been satisfied. Third, the court must determine whether the class satisfies Rule 23. And where, as here, the parties reached a settlement before any class was certified, the court must pay " 'undiluted, even heightened, attention' " to class certification requirements that protect absent class members. *Hanlon*, 150 F.3d at 1019 (*citing Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997) ("*Amchem*"). Finally, the court must conduct a hearing to determine whether the settlement agreement is "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (discussing the Rule 23(e)(2) standard).

**A. CAFA Notice Requirements are Satisfied.**

CAFA requires "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official." 28 U.S.C. § 1715(b). Here, on April 3, 2017, 10 days after the filing of Plaintiffs' Motion for Preliminary Approval, the Claims Administrator Kurtzman Carson Consultants

("KCC") timely and properly sent notices to the Attorney General of the United States and the attorneys general of all 50 states and the relevant U.S. territories and districts, informing them of the proposed Settlement. (Wyatt Decl. ¶ 3.) No governmental authority has objected to the Settlement. *See In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) ( "CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures."). This requirement is satisfied.

**B. Rule 23(c) Notice Requirements Are Satisfied.**

Class actions brought under Rule 23(b)(3) must satisfy the notice provisions of Rule 23(c)(2), and upon settlement of a class action, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Rule 23(c)(2) prescribes the "best notice that is practicable under the circumstances, including individual notice" of particular information. Fed. R. Civ. P. 23(c)(2)(B) (enumerating notice requirements for classes certified under Rule 23(b)(3)).

The Settlement proposed a notice procedure and forms, *see* Sett. Agmt. III.C., which the Court preliminarily approved as satisfying Rule 23(c). In brief, Ford was to pay for KCC to mail a court-approved Short-Form Class Notice to all class members. KCC was also to establish and maintain a website where the approved Long-Form Notice was to be posted, and arrange for publication notice in *USA Today*.

Project manager Kathleen Wyatt submitted a declaration detailing KCC's efforts to implement this notice plan. *See* Wyatt Decl. ¶¶ 4-16. KCC mailed over 2.15 million Short Form Notices, 129,996 were returned as undeliverable, and after running additional searches KCC re-mailed 87,342 class notices. *Id.* ¶16. In addition, the website providing additional notice and information, and serving as the primary claims portal, was established. In light of the unchallenged representations in the Wyatt Declaration, the Court finds that the court-approved notice plan was effectively implemented and that it satisfies Rule 23(c).

Because the Amendment to the Settlement Agreement only increases the benefits available to the class, with no reduction in benefits, no new notice to the Class is required. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 810ML02151JVSFMOX, 2013 WL 12327929, at *12 n.15 (C.D. Cal. July 24, 2013) ("Where the benefit to the class is increased by changes to proposed class action settlements, courts have held that supplemental direct notice to the class is not required. … This is so because an increase to a class member's recovery is not the type of change that would cause a class member to request exclusion from the class settlement."). Nevertheless, the parties agreed to mail within 14 days of the effective date of the Settlement an additional postcard notice to class members to inform them that the Settlement has been amended with improvements, and directing them to further information on the website. The Court will order the parties to undertake this step.

**C. Class Certification Requirements are Met.**

A class may be certified if it satisfies all of the prerequisites of Rule 23(a) and is one of the types of class actions defined in Rule 23(b). Plaintiffs seek to certify the following class under Rule 23(b)(3):

> All current residents of the United States (including territories of the United States) who, prior to the Preliminary Approval Order, purchased or leased new or used Class Vehicles that (1) were originally sold in the United States (including territories of the United States) and (2) were equipped with the PowerShift Transmission.

Sett. Agmt. I(L) (defining the class, subject to routine exceptions). The Court finds that this class satisfies Rules 23(a) and (b)(3) for settlement purposes only.

First the Rule 23(a) prerequisites of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation are plainly met in this case. Numerosity is satisfied because there are over 1 million members in the class, so their joinder is impracticable. Commonality is satisfied because all class members took possession of

a class vehicle that had the undisclosed alleged defect. The derivative factual and legal questions—for example, whether the transmission is defective, when and whether Ford knew of the alleged defect, what Ford's legal obligations were—are also common to all class members. Typicality is also satisfied because the Plaintiffs' and absent class members' claims all arise from the same alleged conduct on Ford's part: its manufacture and sale of a defective product. As such, the Plaintiffs' and the absent class members' claims are sufficiently co-extensive to satisfy the typicality requirement. *See Hanlon*, 150 F.3d at 1020 ("[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical."). Finally, adequacy of representation is established here as the named Plaintiffs do not have interests that are antagonistic to or in conflict with the interests of the class.

The Court also finds that this class merits certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Even if just one common question predominates, "the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately." *Tyson Foods, Inc. v. Bouaphakeo*, ––– U.S. ––––, 136 S. Ct. 1036, 1045, 194 L.Ed.2d 124 (2016) (quoting 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778 pp. 123-124 (3d ed. 2005)).

Rule 23(b)(3) lists four non-exclusive factors "pertinent" to a predominance finding: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

Predominance is plainly satisfied in this case. First, the Supreme Court has observed that predominance is "readily met" in cases alleging consumer fraud. *Amchem*, 521 U.S. at 625. The crux of all of the claims in issue here is that Ford sold or leased the Class Members vehicles equipped with transmissions Ford knew were defective. Variations in the applicable state law and the remedies available under them do not thwart the predominance of common issues because they are simply "local variations of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and 'lemon laws'." *Hanlon*, 150 F.3d at 1022–23 (affirming certification under Rule 23(b)(3) because "the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims."). Resolution via a class action is also superior method of adjudicating this controversy because it provides an efficient and certain means of resolution, in contrast to the inefficiency, delay, and uncertainty that would inhere in tens of thousands of individual lawsuits.

The Court also finds that none of the four potentially-relevant factors stated in Rule 23(b)(3) weigh against certification. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023. As for other litigation, there is presently an MDL ongoing in this district, and after about two years, only two cases out of about 1,000 have been brought to trial, with complex post-trial motions still pending, and appeals sure to follow. The Court is also aware of consolidated proceedings in California state court (involving several hundred cases), and a larger proceeding in Michigan state courts, but nothing about those proceedings counsels against approving the settlement here. The question of whether consolidating the cases in this forum is desirable and manageability concerns are not pertinent here, as the premise of the settlement is that the matter will not be further litigated. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir.

2019) (en banc) ("manageability is not a concern in certifying a settlement class where, by definition, there will be no trial."). In sum, " 'common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,' " so the Court finds that "there is clear justification for handling the dispute on a representative rather than on an individual basis' " under Rule 23(b)(3). *Hanlon*, 150 F.3d at 1022 (quoting Wright & Miller, § 1778).

**D. The Settlement is Fair, Adequate, and Reasonable.**

**1. Legal Standard**

To determine whether a settlement agreement is fair, adequate, and reasonable, the court must weigh some or all of the following factors: "[1] the strength of the plaintiff's case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members of the proposed settlement." *See Hanlon*, 150 F.3d at 1026 ("*Hanlon* factors").

The recent amendments to Rule 23 direct the Court to consider a similar list of factors, including 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). The Advisory Committee's notes clarify that this list of factors does not "displace" the *Hanlon* factors, "but instead aim to focus the court and attorneys on 'the core concerns of procedure and substance that should guide the decision whether

to approve the proposal.'" *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-04883, 2019 WL 3290770, at *6 (N.D. Cal. July 22, 2019) (quoting Rule 23(e)(2) advisory committee's note to 2018 amendment).

In addition, when, "a settlement agreement is negotiated prior to formal class certification, consideration of these [] . . . . factors alone is not enough to survive appellate review." *In re Bluetooth Headset Prod. Liab. Litig. ("Bluetooth")*, 654 F.3d 935, 946 (9th Cir. 2011) (emphasis in original). This is because "[p]rior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement." *Id.* Therefore, district courts must also determine "that the settlement is not the product of collusion among the negotiating parties." *Id.* at 947 (internal quotation and alteration marks omitted).

To make that determination, courts should look for signs of collusion, including "(1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded[;]" "(2) when the parties negotiate a clear sailing arrangement providing for the payment of attorneys' fees separate and apart from class funds[;]" and "(3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund[.]" *Id.* at 947 (internal quotation marks, citations omitted) ("*Bluetooth* factors").

**2. The *Hanlon* / Rule 23(e)(2) Factors Are Satisfied.**

The Court has considered all of the applicable factors set forth in *Hanlon* and the related factors set forth in Rule 23(e)(2), and finds that they strongly favor final approval of the settlement.

**a. The Class Was Adequately Represented And The Settlement Was Negotiated At Arm's Length.**

***First***, the Court finds that the class representatives and class counsel have adequately represented the class, and that the proposal was negotiated at arm's length, satisfying Rule 23(e)(2)(A) and (B). Counsel—Plaintiffs' counsel and the former objectors' counsel included—have ably and vigorously represented their clients

through years of litigation, securing the original Settlement and obtaining additional benefits in the Amendment through further negotiations with the assistance of the objectors. There is no evidence or suggestion of any conflict between class counsel and representatives on one hand, and the class members on the other. Both the original Settlement and the Amended Settlement were the products of arm's-length negotiations presided by renowned mediator Eric Green, through multiple contentious in-person sessions over a year and a half, and then again after the Ninth Circuit mandate. Wu Decl. ¶¶ 14-16, 26. The former objectors' counsel likewise adequately represented their clients and secured additional benefits for the class. Following the Amendment, the former objectors now agree that the Settlement is a fair, reasonable and adequate resolution of the claims here. The adequacy of representation and the arms-length negotiations presided over by an experienced mediator tend to support that the settlement warrants approval.

**b. The Settlement Affords Significant Relief To The Class.**

***Second***, the Settlement affords significant relief to the Class, satisfying Rule 23(e)(2)(C) and the first 3 *Hanlon* factors. Rule 23(e)(2)(C) requires the Court to examine "the relief to the Class in light of the costs, risks, and delay of trial and appeal, the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, the terms of any proposed award of attorney's fees, including timing of payment; and any agreement required to be identified." Similarly, the first three *Hanlon* factors consider the strength of the plaintiff's case balanced against the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class certification through trial, and the amount of settlement. In assessing the settlement's value, courts are instructed to take into account that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624 (citations omitted).

The relief secured to the class is substantial. As of the filing of the renewed

motion for final approval, Ford has paid out over $47.4 million in payments for repurchases of 2,666 vehicles.[3] Counsel represented at oral argument that this amount is certain to increase significantly as because many Class Members are waiting to participate until the Settlement is finally approved. In addition, the Amended Settlement provides for cash payments of up to $2,325 for multiple service visits (which were generally under warranty and for which Class Members generally had no out of pocket costs) and the guaranteed payout will be at least $30 million. Thus, the settlement guarantees at least $77.4 million in payments to Class Members. By comparison, the *MyFord Touch* settlement, recently approved by District Judge Edward Chen, primarily provides cash payments of up to $445 for multiple warranty repairs (on a part that the plaintiffs claim to cause a safety problem) and a minimum guaranteed payout of $17 million, and does not offer a repurchase remedy but instead releases all such claims that could arise under lemon law and related claims. *See In re MyFord Touch Consumer Litg.*, No. 13-03072-EMC, 2019 WL 1411510 (N.D. Cal. Mar. 28, 2019) (order granting preliminary approval). The terms of the present settlement strike the Court as significantly more advantageous to Class Members.

Furthermore, non-monetary features of the Arbitration Program (through which Class Members may seek a Repurchase) are advantageous to Class Members. For example, it extends the statute of limitations to six years from date of sale or six months after the approval date (whichever is later), whereas many state lemon laws require claims to be brought within one and a half to three years of purchase. *See* Motion 28:4-8, fn.. 23 (listing states whose lemon laws have statutes of limitations of up to three years). In addition, where a Class Member cannot meet the requirements of

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[3] Because the Settlement Agreement would not take effect until all appeals are exhausted, in order to meet Class Member demand for the proffered remedies, the parties instituted a voluntary arbitration program that operates in the same way as he Arbitration Program under the Agreement. Given the relationship of the voluntary arbitration program to the Settlement Agreement, the payments made under the voluntary program are plainly a benefit of the Settlement Agreement.

their state's lemon law, the Arbitration Program provides a fall-back standard where the arbitrator can award a buyback for a vehicle that had 4 or more Transmission Hardware Replacements performed within 5 years/60,000 miles, and the vehicle continues to malfunction. (Sett. Agmt. ¶ II(N)(1)(e).) Finally, under the Arbitration Program, claims will be resolved within three months, whereas lemon law suits in state court can take far longer. This much quicker route to relief supports approving the settlement. *See Browne v. Am. Honda Motor Co.*, No. CV 09-06750 MMM DTBX, 2010 WL 9499072, at *13 (C.D. Cal. July 29, 2010) (finding that, despite the fact that class members may not be fully compensated by the proposed reimbursement program, immediate relief conferred by settlement supports final approval); *see also In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement that provides immediate relief constituting one-sixth of the potential recovery in light of the difficulties of continued litigation).

Rule 23(e)(2)(C)(ii) requires the Court to go beyond the benefits offered and review of the method of distribution of the benefits. The method of distribution of the primary benefits here is reasonable and not onerous. For example, the Repurchase benefit is provided through a streamlined arbitration process that a Class Member can start simply by providing a Notice of Intent to Arbitrate. Claims for cash payments for service visits can be submitted by a claim form that is pre-populated with certain information. While Class Members must submit documentation for service visits, this requirement is reasonable and standard. *See Keegan, v. Am. Honda Motor Co.*, No. 10-09508-MMM, 2014 WL 12551213, *15 (C.D. Cal. Jan. 21, 2014) ("Courts frequently approve settlements that require class members to submit receipts or other documentation."). This requirement should be easy to comply with because most states have record-retention laws, and "dealerships and service centers routinely maintain such records; thus, to the extent that class members do not have an invoice in their possession, it is likely that they would be able to secure such documentation." *Asghari v. Volkswagen Grp. of Am.*, No. 13-02529-MMM, 2015 WL 12732462, at

*29 (C.D. Cal. May 29, 2015) (overruling objection that requiring claimants to submit proof of compliance with scheduled oil changes in warranty maintenance manual is unfair and overly burdensome). The Amendment permits those who attempted to make repairs, but were turned away by a Ford Dealer, to submit claims for $20 without any documentation other than an attestation under oath. (Amendment ¶ 8.) Finally, any residue left from the guaranteed minimum $30 million in cash payments benefit will be distributed on a pro rata basis to members who submitted a valid claim for cash payment or who received a payment through the Repurchase process. These are appropriate methods of distributing the Settlement benefits.

On the other side of the ledger, under Rule 23(e)(2)(C)(ii), are significant risks associated with continuing to litigate this factually and legally complicated case. To prevail at trial, Plaintiffs would have to prove that the problems experienced by Class Members can be traced to a transmission design defect, that the defected persisted in multiple versions of the Transmission and multiple engine/transmission combinations, that Ford had pre-sale knowledge of the Alleged Defect, that it acted on that knowledge, and that Class Members were damaged. Plaintiffs would have to overcome Ford's affirmative defenses, which include, among others, that no Transmission defect exists, or that, even if the Alleged Defect existed, Plaintiffs would not be able to show that it constitutes a safety concern. In addition, Plaintiffs would have to maintain class certification through trial, which is not a given in light of all of the variables at play. For example, as a result of changes in the manufacturing process, design, and software, there are multiple versions of the Transmission, potentially precluding the likelihood that one common defect exists, which further calls into question whether common questions predominate. Furthermore, in member cases of the parallel MDL proceeding, this Court rejected certain factual theories underlying comparable fraud claims, and also found that the plaintiff could not establish damages stemming from the fraud claim. *See Pedante v. Ford Motor Co.*, No. 18-ML-2814-AB (C.D. Cal. Oct. 29, 2019), ECF No. 605., at 5-14. Thus, the

fraud claim was disposed of before trial. Although these decisions will be appealed, they nevertheless reflect the sorts of obstacles Plaintiffs here would encounter in pursuing their fraud claims. *See In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (recognizing that "inherent risks of proceeding to . . . trial and appeal also support the settlement"). Finally, to continue to litigate this case, Plaintiffs' counsel would have to take extraordinary risk by advancing the costs and other expenses associated with litigation, for an uncertain outcome, over a long period of protracted litigation. In light of all of these challenges inherent in continued complex litigation, the substantial benefits afforded by the Settlement are particularly attractive. *Eisen v. Porsche Cars North American, Inc.*, No. 11-09405-CAS, 2014 WL 439006, at *3 (C.D. Cal. Jan. 30, 2014) ("unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."). These considerations favor approval.

Rule 23(e)(2)(C)(iii) and (iv) require the Court to look at the terms and timing of an attorneys' fee award, and any other agreement referenced in Rule 23(e)(3). The Settlement here does include fee awards for Plaintiffs' counsel and former objectors' counsel that Ford will not oppose, but the parties negotiated these fees only after they negotiated the relief afforded to Plaintiffs. Plaintiffs' counsel and attorneys for the former objectors have filed fee applications for the Court's scrutiny, and fee payments will be made within 14 days of the Effective Date. Finally, regarding "other agreements," Counsel have fee-sharing agreements with both Class Counsel Berger & Montague and Class Counsel Zimmerman Law Offices P.C. ("Zimmerman"), each of which has been consented to by each firm's respective clients. These agreements were previously disclosed (Dkt. No. 167), and the parties aver that there are no other agreements. In sum, nothing about the substance or timing of the attorneys' fees requests here, or other agreements, detracts from the value, fairness, or significance of the benefits the Settlement offers to Class Members.

Having considered the first three *Hanlon* factors and Rule 23(e)(2)(C), the

Court therefore finds that the relief provided to the class is adequate

**c. The Settlement Treats Class Members Equitably.**

***Third***, the Settlement treats class members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(D). The Settlement does not give preferential treatment to any subset of the class. For example, former owners/lessees and current owners/lessees are subject to the same requirements and may secure the same benefits. And while the Settlement was structured to deliver the most complete relief to those Class Members that experienced persistent defects (*e.g.*, those with more service visits will receive a greater cash payment), this is an objective and logical explanation for the variations in monetary recovery. *See In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable."). The Court finds that the Settlement treats all Class Members equitably and satisfies Rule 23(e)(2)(D).

**d. The Last Four *Hanlon* Factors Favor Approval**

***Finally***, the four remaining *Hanlon* factors favor approval. As described above, the Settlement was achieved after extensive discovery, and accordingly, Plaintiffs had ample information and opportunity to assess their claims and take appropriate negotiating positions. *Eisen*, 2014 WL 439006, at *13 (finding that counsel had "ample information and opportunity to assess the strengths and weaknesses of their claims" despite "discovery [being] limited because the parties decided to pursue settlement discussions early on."). Counsel, including Plaintiffs' counsel, Ford's counsel, and counsel representing the former objectors, are highly experienced and respected litigators, and they all favor approval. Notably, the Lott Group former objectors were represented in part by Michael Kirkpatrick, who litigates on behalf of Public Citizen, a highly regarded public interest organization that regularly advocates on behalf of consumers and employees before the U.S. Supreme Court. (*See* Amendment.) That his clients have withdrawn their objections and that he now favors

the Settlement speaks to its fairness, reasonableness, and adequacy. There are no governmental participants here, so this factor is not relevant.

Finally, the reaction of Class Members favors approval. Approximately 10,350 of the 1.9 million Class Members, or under 1 percent of the Class, have opted out. (Wu Decl. ¶ 22; ECF No. 240, Ex. A.) This small percentage of exclusions demonstrate that Class Members have reacted favorably to the Settlement, supporting final approval. *See, e.g., Churchill Vill. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming final approval where "only 45" of the approximately 90,000 class members objected and 500 opted out).

Furthermore, there were only 15 timely objections from Class Members, and none of them warrants rejecting the Settlement. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (the district court "must give a reasoned response to all non-frivolous objections") (citations and quotation marks omitted). As stated above, the six objectors who appealed (the Lott Group and Mr. DeBolt) have withdrawn their objections and now support final approval. The Court has reviewed the former objectors' explanations for why they are now satisfied with the Settlement, have withdrawn their objections, and support final approval, and they are persuasive. The other nine timely objections were from *pro se* class members. *See* Suppl. Memo (Dkt. No. 170) p. 39-41, and Exhibits referenced therein. These *pro se* objections boil down to arguing that the settlement should provide additional forms of relief, *e.g.*, canceling leases or compensation for diminution in value, or more relief, *e.g.*, higher cash payments. But simply wanting a more favorable settlement is not a sufficient basis for an objection to a class action settlement that is otherwise fair, adequate, and reasonable. *See Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[I]t is well settled that a proposed settlement may be acceptable even though it may amount to a fraction of the potential recovery that might be available to class members at trial.").The timely *pro se* objections are therefore overruled.

The Court has since received two more putative objections: from Class Member

Ayanna Maharry (Dkt. No. 277) and from Robert Earl Case (Dkt. No. 296). The Court strikes these objections as untimely. The deadline for objecting was September 7, 2017, and both objected more than two years later: Ms. Maharry in October 2019 and Mr. Case in February 2020. Their papers reflect no good cause for this delay. Although Ms. Maharry briefly describes "serious life situations" concerning family matters, this is not sufficient cause to accept an objection more than 2 years late. And Mr. Case provides no cogent explanation for his delay. In the alternative, the objections are without merit. Ms. Maharry is actually seeking to opt-out, but it is too late to opt-out. In addition, Ms. Marharry's objection that Ford offered her only a buy-back and that she could not seek civil penalties (under the original settlement) is essentially a complaint that the settlement could have been better. This is not a valid ground for disapproving a settlement. Furthermore, under the Amended Settlement, Class Members may now obtain a civil penalty under specified circumstances. Mr. Case's objection is hard to understand. He is an attorney who represented a class member in a lemon law suit in Florida and to whom that client later assigned a putative small claims lawsuit relating to her vehicle. It recounts, at length, arbitration proceedings in which his client was ultimately awarded a buyback, and his attempt to pursue some unspecified remaining claims in small claims court. But the lengthy submission does not object to anything specific about this settlement. The objection is overruled.

For the foregoing reasons, the last four *Hanlon* factors favor final approval.

**3. The Settlement Satisfies the *Bluetooth* Factors.**

Pre-certification settlements require further inquiry for "more subtle signs" of potential collusion between class counsel and defendant. *In re Bluetooth*, 654 F.3d at 946-47. None of the three factors identified in *Bluetooth* are indicative of collusion here.

The first factor asks whether counsel will receive a disproportionate distribution of the settlement, or whether class will receive no monetary distribution but class

counsel are amply rewarded. The answer to both questions is no. Plaintiffs' counsel are seeking fees and costs of $8.85 million, which is less than 12% of the $77.4 million minimum class payout. This is decidedly not disproportionate to Class's benefits. In addition, the class members have already received—and will continue to receive—substantial cash payouts. This factor does not suggest collusion in this case.

The second *Bluetooth* factor asks whether there is a clear-sailing provision, such that the defendant will not object to the plaintiffs' counsel's fee request, and whether this payment is separate from the class fund. However, clear-sailing provisions are not inherently problematic: if a fee is not disproportionate to the class award, is negotiated separately from the class benefits, and particularly with the help of a mediator, the mere existence of a clear-sailing provision is not indicative of collusion. *See, e.g.*, *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 687 (N.D. Cal. 2016) (clear-sailing provision does not signal collusion when the agreed-upon fees are reasonable and the relief negotiated for the class is favorable). Here, there is a clear-sailing provision but it is not problematic: the fee is not disproportionate to the class benefits, and was negotiated separately from the relief for the class and with the assistance of an experienced mediator. And, as set forth in Plaintiffs' renewed fee application, the requested fees represent a negative multiplier on Class Counsel's $10,541,276.65 lodestar. "[C]ourts view self-reduced fees" representing a negative multiplier on the lodestar "favorably." *MyFord Touch*, 2019 WL 1411510, at *7 (quoting *Schuchardt*, 314 F.R.D. at 690). Furthermore, the settlement entitles the class to substantial relief. Accordingly, there are no signs of collusion relative to Plaintiffs' attorneys' fees.

The Court also expressly finds that none of the *Bluetooth* factors are evident in the participation of the Lott Group's or DeBolt's counsel in this case. The Lott Group's counsel will seek fees and costs of about $350,000, and DeBolt's counsel will seek fees and costs of about $98,000. First, these fees are not disproportionate to the class benefits. It is difficult to quantify the value of the service the objectors rendered

to the class, but the Court is confident that it is substantial: because the objectors appealed the original final approval order, pressed their objections, and engaged in negotiations, they were able to secure for the class the additional benefits reflected in the Amendment. The Court has little difficulty concluding that the fees they are seeking are not disproportionate to the value they added to the settlement. Second, while Ford has agreed to not object to their fee request, this clear sailing provision is not problematic for the reasons discussed above: the fee is not disproportionate, and was negotiated separately from the relief for the class and with the assistance of Professor Green.

Finally, the third *Bluetooth* factor is absent, as no class benefits will revert to Ford.

In sum, none of the *Bluetooth* indicia of collusion are present in this case to undermine the fairness, reasonableness, and adequacy of the settlement.

## III. CONCLUSION

Having carefully considered all of the factors reflected in Rule 23 and the case law, the Court finds that the Settlement is fair, reasonable, and adequate, and warrants final approval. The Court hereby **GRANTS** the Motion and finally approves the Settlement. Concurrently with this Order, the Court will also adopt Plaintiffs' proposed Order granting the Motion, and will enter their proposed Judgment.

**IT IS SO ORDERED.**

DATED: March 5, 2020

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE