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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN “CLEAN DIESEL”  
MARKETING, SALES PRACTICES, AND  
PRODUCTS LIABILITY LITIGATION

MDL No. 2672 CRB (JSC)

**ORDER GRANTING PLAINTIFFS’ FEES  
AND COSTS RELATING TO THE 3.0-  
LITER CONSUMER AND RESELLER  
DEALER SETTLEMENT**

\_\_\_\_\_  
This Order Relates To:  
Dkt. No. 3396  
\_\_\_\_\_

This MDL includes actions brought by consumers, dealers, investors, and government agencies against Volkswagen based on its use of a defeat device in nearly 600,000 TDI diesel engine vehicles sold in the United States from 2009 through 2015. After months of intensive negotiation, Class Counsel for owners and lessees of 3.0-liter TDI diesel engine vehicles reached a Settlement with Volkswagen on February 10, 2017 (Dkt. No. 2894), which the Court approved on May 17, 2017 (Dkt. No. 3229). The Settlement requires Volkswagen to provide Class Members with benefits conservatively valued at \$902 million.

At the time of final approval, Class Counsel had not moved for fees and costs, though they submitted a statement that they would seek no more than \$245 million in combined attorneys’ fees and out-of-pocket costs related to the Settlement. (Dkt. No. 2970 at 3.) On June 30, 2017, Class Counsel submitted its application for \$121 million in attorneys’ fees and \$4 million in costs. (Dkt. No. 3396.) If awarded, Volkswagen has agreed to pay Class Counsel’s fees and costs in addition to the benefits provided to Class Members. (Dkt. Nos. 3396 at 6, 3396-1 ¶ 8.)

Interested parties had 14 days to submit responses or objections to Class Counsel’s motion. (Dkt. No. 3229 at 47.) No responses or objections were filed. Having considered the relevant briefing, the Court GRANTS the motion. Class Counsel’s requested fees are equivalent to 13.4%

United States District Court  
Northern District of California

1 of the Settlement value and represent an appropriate fee award in this case. Class Counsel's  
2 requested costs are also reasonable.

### 3 DISCUSSION

4 Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court  
5 may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the  
6 parties' agreement." Fed. R. Civ. P. 23(h). "Attorneys' fees provisions included in proposed class  
7 action agreements are, like every other aspect of such agreements, subject to the determination  
8 whether the settlement is fundamentally fair, adequate and reasonable." *Staton v. Boeing Co.*, 327  
9 F.3d 938, 964 (9th Cir. 2003) (internal quotation marks omitted). Thus, "courts have an  
10 independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the  
11 parties have already agreed to an amount." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d  
12 935, 941 (9th Cir. 2011).

13 In "common fund cases," a court has discretion to award attorneys' fees as either a  
14 percentage of such common fund or by using the lodestar method. *See Staton*, 327 F.3d at 967-  
15 968. The Ninth Circuit's "benchmark" for attorneys' fees in common fund class actions is 25% of  
16 the common fund. *Id.* at 968. "Selection of the benchmark or any other rate must be supported by  
17 findings that take into account all of the circumstances of the case." *Vizcaino v. Microsoft Corp.*,  
18 290 F.3d 1043, 1048 (9th Cir. 2002). *Vizcaino* outlines a number of factors that courts may  
19 consider in setting an appropriate fee: (1) the results achieved; (2) the risks of litigation;  
20 (3) whether there are benefits to the class beyond the immediate generation of a cash fund;  
21 (4) whether the percentage rate is above or below the market rate; (5) the contingent nature of the  
22 representation and the opportunity cost of bringing the suit; (6) reactions from the class; and (7) a  
23 lodestar cross-check. *Id.* at 1048-52.

24 Applying the relevant factors, the Court finds that the Settlement supports Class Counsel's  
25 requested fees and costs.

#### 26 I. Attorneys' Fees

##### 27 A. Results Achieved

28 Class Counsel achieved extraordinary results for Class Members and for the public as a

1 whole. Class Members who own or lease a Generation One 3.0-liter vehicle will receive  
 2 restitution plus their choice of either: (1) Buyback / Lease Termination; (2) Trade-In; or (3) if  
 3 approved by EPA and CARB, a Reduced Emissions Modification.<sup>1</sup> (*See* Dkt. No. 3229 at 7-10.)  
 4 Owners electing the Buyback will receive compensation ranging from \$24,755 to \$57,157, and  
 5 those electing the Reduced Emissions Modification will receive restitution of at least \$6,000. (*Id.*  
 6 at 8-9.) The formulas used to calculate benefits will result in owners receiving between 119.08%  
 7 and 133.08% of their vehicle’s retail value as of September 2015—the month the emissions  
 8 scandal was publicly disclosed. (*Id.* at 24.) Former lessees and former owners are also entitled to  
 9 restitution. (Dkt. No. 3229 at 8.)

10 The benefits available to Class Members who own or lease a Generation Two vehicle will  
 11 depend on whether Volkswagen can timely make available an Emissions Compliant Repair, which  
 12 would bring Generation Two vehicles into compliance with their original emissions certification  
 13 requirements. (*Id.* at 11-12.) If an Emissions Compliant Repair is approved, Generation Two  
 14 owners and lessees will receive that repair plus a Repair Payment that ranges from \$7,039 to  
 15 \$16,144 for owners and is \$2,000 for lessees. (*Id.* at 12.) The Repair Payment formula results in  
 16 an average owner Repair Payment that is equal to approximately 13.5% of the original  
 17 Manufacturer’s Suggested Retail Price (“MSRP”), and likely exceeds the “TDI premium” that  
 18 Class Members paid to purchase a vehicle with clean diesel technology. (Dkt. No. 2088-1 ¶ 58.)  
 19 If an Emissions Compliant Repair is not timely approved for any category of Generation Two  
 20 vehicles, Class Members who own or lease those vehicles will have all the rights and options  
 21 available to Generation One Class Members. (Dkt. No. 3229 at 12.)

22 Together these benefits will make Class Members nearly whole. And when considered  
 23 along with the benefits Class Counsel obtained for 3.0-liter Class Members in the settlement with  
 24 Robert Bosch GmbH and Robert Bosch, LLC (the “Bosch Settlement”), Class Members will be  
 25 made entirely whole for the harm they suffered from the defeat device scandal. (*See* FTC  
 26

27 \_\_\_\_\_  
 28 <sup>1</sup> Capitalized terms not otherwise defined in this Order are defined in the Settlement Agreement.  
 (Dkt. No. 2894.)

1 Response in Support of Settlement, Dkt. No. 3184 at 2.)<sup>2</sup>

2 As for the general public, the United States' Second Partial Consent Decree requires  
3 Volkswagen to pay an additional \$225 million to mitigate the environmental effects of excess  
4 nitrous oxide (NOx) emissions. (Dkt. No. 3228 at 4.) While the Consent Decree is not itself part  
5 of the Settlement, the Court has recognized that the consumer settlements and the settlements with  
6 government entities are highly interrelated—that is, “part and parcel of an overall settlement.”  
7 (Oct. 18, 2016 Hr’g Tr., Dkt. No. 2079 at 53:14-15.)

8 The Settlement not only provides Class Members with significant value, but Class Counsel  
9 obtained the Settlement swiftly. The Court approved the Settlement less than 18 months after the  
10 Court appointed Lead Counsel, and less than 7 months after the Court approved the 2.0-liter  
11 settlement, which set the stage for 3.0-liter settlement negotiations. Further, although the 2.0-liter  
12 settlement advanced 3.0-liter settlement negotiations in certain respects, the 3.0-liter negotiations  
13 presented their own unique challenges, especially given the potential for a complete emissions  
14 repair for the Generation Two 3.0-liter vehicles. As former Settlement Master Robert S. Mueller  
15 III noted in his declaration submitted in connection with the Settlement, the settlement process  
16 involved “extensive preparation,” “attention to detail,” and “focused attention and energy toward  
17 the resolution of the problems presented in the case.” (Dkt. No. 3089 ¶ 8.)

18 In short, Class Members have benefited and will benefit as a result of Class Counsel’s  
19 work in this litigation. This factor supports Class Counsel’s fee request.

20 **B. Litigation Risk**

21 While Volkswagen did not contest liability, this case was nevertheless complex and  
22 additional litigation posed a risk of delayed payment to Class Members and, by extension, Class  
23 Counsel. If Class Counsel had proceeded to litigate Plaintiffs’ claims to conclusion, any recovery  
24 would likely have come years in the future and at far greater expense. In comparison, the  
25 Settlement requires Volkswagen to move quickly to repair vehicles, or otherwise remove them  
26 from the road. (Dkt. No. 3229 at 22.) Thus, while Plaintiffs would have likely prevailed on their  
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28 <sup>2</sup> The Bosch Settlement provides 3.0-liter vehicle owners with an additional \$1,500, and 3.0-liter  
vehicle lessees with an additional \$1,200. (Dkt. No. 2838 at 15.)

1 claims, the Settlement provides benefits much sooner than if litigation were to continue—  
 2 compensating Class Members now and limiting additional environmental damage. This factor  
 3 supports Class Counsel’s requested fee amount.

4 **C. Non-Monetary Relief**

5 As noted above, the Settlement provides significant non-monetary relief. If approved by  
 6 EPA and CARB, Class Members who own or lease a Generation One vehicle will have the option  
 7 to obtain a Reduced Emissions Modification, and Class Members who own or lease a Generation  
 8 Two vehicle will receive an Emissions Compliant Repair. These modifications and repairs will  
 9 allow Class Members to keep and drive the vehicles that they originally intended to purchase,  
 10 which provides the added benefit of minimizing the potential waste associated with Volkswagen  
 11 scrapping vehicles that can continue to be used. This factor supports Class Counsel’s requested  
 12 fee.

13 **D. Percentage Rate Relative to Market Rate**

14 A conservative estimate of the Settlement benefits is \$902 million, which measures the  
 15 value of benefits provided to Class Members but subtracts the aggregate value of vehicles returned  
 16 to Volkswagen by Class Members. (Dkt. No. 3396-2 ¶ 21.) The requested \$121 million in fees  
 17 amounts to approximately 13.4% of this total, which is well below the Ninth Circuit’s 25%  
 18 benchmark for common fund cases. *See Vizcaino*, 290 F.3d at 1047.<sup>3</sup> As set forth in the  
 19 declaration of Professor William B. Rubenstein, this percentage is also in line with Court-  
 20 approved fee awards in cases with similarly sized settlements. (Dkt. No. 3396-2 ¶¶ 17-21.) In  
 21 addition, the requested fees will not be deducted from the monetary benefits made available to  
 22 Class Members. That is, Volkswagen has agreed to pay these fees in addition to Class benefits.  
 23 (Dkt. No. 3396-1 ¶ 8.) This factor weighs in favor of the fee request.

24 **E. Contingent Nature of Representation and Opportunity Cost**

25 Class Counsel brought this case on a purely contingent basis, agreeing to advance all

26 \_\_\_\_\_  
 27 <sup>3</sup> If no Emissions Compliant Repairs are timely approved, and the Buyback option is instead made  
 28 available for Class Members who own or lease Generation Two vehicles, the value of the  
 Settlement will increase to more than \$4 billion, and the fees requested will be the equivalent of  
 only 3% of the monetary benefits available to the Class. (Dkt. No. 3396 at 5 n.1.)

1 necessary expenses and knowing that they would receive a fee only if there was a recovery. It is  
 2 an established practice to reward attorneys who assume representation on a contingent basis with  
 3 an enhanced fee to compensate them for the risk that they might be paid nothing at all. *See In re*  
 4 *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). Such a practice  
 5 encourages the legal profession to assume such a risk and promotes competent representation for  
 6 plaintiffs who could not otherwise hire an attorney. *Id.* Moreover, Class Counsel had to turn  
 7 down opportunities to work on other cases to devote the appropriate amount of time, resources,  
 8 and energy necessary to handle this complex case. This factor supports Class Counsel’s requested  
 9 fee amount.

10 **F. Reactions from the Class**

11 There are approximately 88,500 3.0-liter Class Members. (Dkt. No. 3329 at 27.) Only  
 12 0.67% of the Class opted out of the Settlement (*id.*), only 0.036% of the Class objected to any  
 13 aspect of the Settlement (*id.*), and no Class Members have objected to the proposed fee award.  
 14 The Court considers this a strong, positive response from the Class, supporting Class Counsel’s  
 15 requested fees.

16 **G. Lodestar Cross-Check**

17 A lodestar cross-check also supports the reasonableness of Class Counsel’s requested fees.  
 18 Class Counsel expended 120,418 hours while litigating and settling claims on behalf of the 3.0-  
 19 liter Class Members and implementing the Settlement. (Dkt. No. 3396-1 ¶ 14.) As of the filing of  
 20 the instant fee application on June 30, 2017, Class Counsel also reserved an additional 9,676 hours  
 21 to “(1) guide the nearly 90,000 Class Members through the remaining 30 months of the Settlement  
 22 Claims Period; (2) assist in the implementation and supervision of the Settlement, including by  
 23 participating in the Claims Review Committee . . . ; and, if necessary, (3) take further action on  
 24 behalf of class members with Generation Two vehicles in the event that [EPA] and [CARB] do  
 25 not timely approve an Emissions Compliant Repair . . . .” (*Id.* ¶ 15.)

26 The blended average hourly billing rate is \$462 per hour for all work performed and  
 27 projected, with billing rates ranging from \$250 to \$1,650 for partners, \$185 to \$850 for associates,  
 28 and \$65 to \$390 for paralegals. (*Id.* ¶ 17.) Using the above hours and average billing rate, the

1 lodestar amounts to approximately \$60 million, and the resulting lodestar multiplier is 2.02. This  
 2 lodestar multiplier is more than reasonable given the complexities of this case, the skill and  
 3 diligence of Class Counsel, and the extraordinary results achieved for the Class. *See, e.g., Van*  
 4 *Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) (“Multipliers in the 3-4  
 5 range are common in lodestar awards for lengthy and complex class action litigation.”). The  
 6 estimate for future expenses is also reasonable given that Class Counsel will continue to devote  
 7 resources to this litigation for an estimated two-and-a-half years to ensure that Class Members  
 8 have the resources and assistance they need to take advantage of the Settlement’s benefits.  
 9 Because the Emissions Compliant Repairs for Generation Two vehicles have not yet been  
 10 approved, Class Counsel will also need to expend additional resources to evaluate those proposals.

## 11 **II. Litigation Expenses**

12 Class Counsel seeks reimbursement of \$4 million in reimbursable expenses, consisting of  
 13 \$3.4 million in costs already incurred and \$0.6 million in anticipated future costs associated with  
 14 implementing the Settlement over the next two-and-a-half years. The Court finds that these  
 15 expenses are reasonable and that the reimbursement of such expenses is appropriate.

## 16 **CONCLUSION**

17 For the reasons stated above, the Court GRANTS Class Counsel’s motion for attorneys’  
 18 fees and costs relating to the 3.0-liter Settlement. Class Counsel shall be awarded \$121 million in  
 19 attorneys’ fees and \$4 million in costs, to be allocated by Plaintiffs’ Lead Counsel among the PSC  
 20 firms and additional counsel performing common-benefit work pursuant to the terms of Pretrial  
 21 Order Nos. 7 and 11.

22 **IT IS SO ORDERED.**

23 Dated: July 21, 2017

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 25 

26 CHARLES R. BREYER  
 27 United States District Judge  
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