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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE CHRYSLER-DODGE-JEEP
ECODIESEL MARKETING, SALES
PRACTICES, AND PRODUCTS
LIABILITY LITIGATION.

Case No. [17-md-02777-EMC](#)

**ORDER GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

Docket Nos. 487, 491, 508

The above-referenced case is a multidistrict litigation (“MDL”). The MDL includes cases brought by Private Plaintiffs (hereinafter, “Plaintiffs”), the United States, and California. Currently pending before the Court is a motion concerning a proposed settlement of all cases brought by Plaintiffs. There are also proposed settlements with respect to the cases brought by the United States and the state of California, *see* Docket Nos. 484-86 (proposed consent decrees), but those proposed settlements are technically not pending before the Court at this time.

Plaintiffs are individuals or companies who purchased certain trucks marketed under the model names of Ram 1500 and Jeep Grand Cherokee. More specifically, these trucks (2014-2016 models) had diesel engines that were branded “EcoDiesel.” Plaintiffs have brought class action claims against (1) the manufacturers of the cars and their chief executive (the FCA Defendants); (2) the companies who manufactured the EcoDiesel engines (the VM Defendants); and (3) the companies who supplied the electronic diesel control (“EDC”) units that were used to control the emissions from the engines (the Bosch Defendants). The gist of Plaintiffs’ class action complaint is that Defendants installed “defeat devices” in the vehicles at issue – *i.e.*, devices that reduced the effectiveness of the emissions control system under conditions which may reasonably be expected

1 to be encountered in normal vehicle operation and use. According to Plaintiffs, they did not know
 2 about the defeat devices and purchased the vehicles, at least in part, based on the representation
 3 that the vehicles were environmentally friendly. Plaintiffs have brought (1) fraud-based claims
 4 (including a federal RICO claim and claims based on the laws of all fifty states, plus the District of
 5 Columbia) and (2) warranty-based claims (including a federal MMWA claim and claims based on
 6 the laws of all fifty states, plus the District of Columbia).¹

7 As indicated above, Plaintiffs' cases are not the only ones comprising the MDL. There are
 8 also parallel cases brought by the United States and California. *See United States v. Fiat Chrysler*
 9 *Autos. N.V.*, No. C-17-3446 EMC (N.D. Cal.); *People of the St. of Cal. v. Fiat Chrysler Autos.*
 10 *N.V.*, No. C-19-0151 EMC (N.D. Cal.). The United States alleges that the FCA entities violated
 11 the Clean Air Act ("CAA") by failing to disclose the defeat devices. California also alleges
 12 violations of the CAA as well as violations of provisions in the California Health & Safety Code
 13 and the California Business & Professions Code.

14 Finally, the Court takes note that, outside of the MDL, all remaining states, as well as the
 15 District of Columbia, Puerto Rico, and Guam have been meeting and discussing with the FCA
 16 entities the same alleged failures to disclose. *See, e.g.*, Docket No. 518 (letter from New York's
 17 Office of the Attorney General).

18 With respect to the cases brought by Plaintiffs, Plaintiffs and Defendants have now agreed
 19 to settle their dispute and, because the cases at issue are class actions, approval of the Court is
 20 required. *See* Fed. R. Civ. P. 23(e) (providing that the claims of "a class proposed to be certified
 21 for purposes of settlement . . . may be settled, voluntarily dismissed, or compromised only with the
 22 court's approval"). At this juncture, the parties ask for preliminary approval of their class action
 23 settlement. If the Court grants preliminary approval, then notice of the settlement will be given to
 24 the class, the class will be given an opportunity to respond, and the parties may then ask for final
 25 approval.²

26 _____
 27 ¹ RICO stands for Racketeer Influenced and Corrupt Organizations Act. MMWA stands for the
 Magnuson-Moss Warranty Act.

28 ² As noted above, the FCA entities have also reached settlements with the United States and
 California (resulting in proposed consent decrees). In addition, the FCA entities appear to have

1 Having considered the parties' briefs and accompanying submissions, as well as the oral
 2 argument of counsel, the Court hereby **GRANTS** the motion for preliminary approval. The
 3 settlement is sufficiently fair, adequate, and reasonable to move forward with class notice.

4 **I. FACTUAL & PROCEDURAL BACKGROUND**

5 A. Factual Allegations

6 As alleged in the operative pleading, on January 12, 2017, the Environmental Protection
 7 Agency ("EPA") and California Air Resources Board ("CARB") issued notices of violation
 8 ("NOVs") to the two FCA entities alleging that the vehicles at issue were equipped with eight
 9 undisclosed auxiliary emissions control devices ("AECs") and that the AECs were potentially
 10 defeat devices. According to Plaintiffs, the AECs were, in fact, defeat devices and Defendants
 11 concealed such from both government regulators and consumers; moreover, the FCA Defendants
 12 marketed the vehicles as being environmentally friendly even though they were not.

13 B. Procedural History

14 Following the issuance of the NOVs, lawsuits began to be filed against Defendants. In
 15 April 2017, the Judicial Panel on Multidistrict Litigation ("JPML") created this MDL and
 16 transferred cases to this Court for coordinated or consolidated pretrial proceedings. *See* Docket
 17 No. 1 (JPML transfer order). As noted above, cases that comprise this MDL include cases filed by
 18 Plaintiffs as well as cases filed by the United States and California.

19 With respect to the cases filed by Plaintiffs, the Court appointed Lead Counsel and a
 20 Steering Committee (collectively, the "PSC"). *See* Docket No. 173 (order). The Court also
 21 appointed Kenneth Feinberg as Settlement Master for all cases comprising the MDL. *See* Docket
 22 No. 184 (order). The PSC thereafter filed a consolidated class action complaint which Defendants
 23 challenged through 12(b)(6) motions to dismiss. *See* Docket No. 225 (complaint); Docket Nos.
 24 231-32 (motions). In March 2018, the Court granted in part and denied in part Defendants'
 25 motions and gave Plaintiffs leave to amend. *See* Docket No. 290 (order). Plaintiffs filed an
 26 amended complaint, which Defendants again contested through 12(b)(6) motions to dismiss. *See*

27 _____
 28 reached settlements with the remaining states, the District of Columbia, Puerto Rico, and Guam.
See Docket No. 518 (letter from New York's Office of the Attorney General).

1 Docket No. 310 (complaint); Docket Nos. 314-15 (motions). While the motions were pending,
2 Plaintiffs filed a motion for class certification; extensive briefing on class certification followed
3 thereafter, and multiple motions related to class certification were also filed. Hearings on the
4 motions to dismiss were held in August and October 2018. *See* Docket No. 356, 454 (minutes).
5 Before the Court ruled on the motions to dismiss and before the hearing on Plaintiffs’ class
6 certification motion (and related motions) could be held, Plaintiffs and Defendants informed the
7 Court that they had settled their dispute with the assistance of Mr. Feinberg.

8 **II. SETTLEMENT TERMS**

9 Currently the Court is being asked to address the fairness of the proposed settlement
10 between Plaintiffs and Defendants only. However, as all parties have conceded, the proposed
11 settlement is part of a global settlement that Defendants (more specifically, the FCA entities) have
12 reached with, *e.g.*, the federal and state governments. Indeed, the parties have emphasized that the
13 proposed settlement between Plaintiffs and Defendants work in tandem with the proposed consent
14 decrees between the FCA entities and the United States and California. Under the proposed
15 consent decrees, the FCA entities will pay a civil penalty and provide certain injunctive relief,
16 including a repair for the vehicles at issue (also known as the “AEM” or approved emissions
17 modification) and an extended warranty related thereto. As described below, the proposed
18 settlement between Plaintiffs and Defendants provides additional relief for affected consumers – in
19 particular, a cash payment as well as a repair to the emissions system (for current owners and
20 lessees) as set forth in the proposed consent decree with the United States and California. The
21 discussion below focuses on the settlement terms between Plaintiffs and Defendants.

22 **A. Settlement Class**

23 In the operative complaint filed by Plaintiffs, Plaintiffs asserted both a nationwide RICO
24 class as well as a California class and a multistate class. *See* SAC ¶ 134. The definitions of the
25 classes are similar. For example, the nationwide RICO class is defined as follows: “All persons
26 or entities in the United States who owned or leased an ‘Affected Vehicle.’” SAC ¶ 134.

27 The Court notes that the definition of the settlement class differs from the definition of the
28 class as pled in the operative complaint. The latter definition is simpler than the former.

1 Nevertheless, as explained below, the definition of the settlement class is fair, reasonable, and
2 adequate.³

3 The definition of the settlement class is as follows:

4 [A]ll Persons (this includes individuals who are United States
5 citizens, residents, or United States military, or diplomatic personnel
6 that are living or stationed overseas, as well as entities) who (1) on
7 January 12, 2017 owned or leased a Ram 1500 or Jeep Grand
8 Cherokee 3.0-liter diesel vehicle in the United States or its territories
9 (an “Eligible Vehicle,” defined more fully in Section 2.35); or who
10 (2) between January 12, 2017 and the Claim Submission Deadline
11 for Eligible Owners and Eligible Lessees become the owner or
12 lessee of an Eligible Vehicle in the United States or its territories; or
13 who (3) own or lease an Eligible Vehicle in the United States or its
14 territories at the time of participation in the Repair Program. The
15 Class does not include Authorized Dealers, but does include
16 automobile dealers who are not Authorized Dealers and who
17 otherwise meet the definition of the Class.

18 Am. Sett. Agmt. ¶ 2.19 (available at Docket No. 508).

19 There are several exclusions from the class, including the following:

20 (a) Owners or lessees who acquired an Eligible Vehicle after
21 January 12, 2017, and transferred ownership or terminated their
22 lease before the Opt-Out Deadline;

23 (b) Owners or lessees who acquired an Eligible Vehicle after
24 January 12, 2017, and transferred ownership or terminated their
25 lease after the Opt-Out Deadline, as a result of a total loss, but
26 before the Claim Submission Deadline for Eligible Owners and
27 Eligible Lessees;

28 (c) Owners who acquired an Eligible Vehicle on or before January
12, 2017, and transferred ownership after January 10, 2019, but
before the Opt-Out Deadline, unless ownership was transferred as a
result of a total loss;

(d) Lessees who leased their Eligible Vehicles on or before January
12, 2017, acquire ownership after January 10, 2019, and transfer
ownership before the AEM [approved emissions modification] is
performed on the Eligible Vehicle.

Am. Sett. Agmt. ¶ 2.19. The exclusions above concern former owners or lessees. At the hearing,
the parties represented that the number of people who would fall within an exclusion is likely

³ See Proc. Guidance for Class Action Sett. ¶ 1.a (“If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.”).

1 small because 75% of the vehicles at issue have only a single owner or lessee (*i.e.*, there are no
2 former owners or lessees).

3 As explained by the parties, the exclusions are intended in part “to limit the number of
4 claims on a particular vehicle” so that “sufficient compensation remains available for the current
5 owners and current lessees whose participation in the Repair Program is essential to the goal of
6 managing any future environmental harm.” Docket No. 507 (Supp. Br. at 2-3). Also, the
7 exclusions give notice to class members of the consequences of certain actions (*e.g.*, transferring
8 ownership). Those excluded from the class do not, of course, release any claims against
9 Defendants. Importantly, all current owners and lessees of an Eligible Vehicle who can obtain the
10 AEM are included in the class.

11 B. Consumer Remedies

12 A class member who does not exclude herself from the settlement is entitled to one or
13 more of the following remedies: (1) a repair of the vehicle through an emissions modification
14 approved by EPA and CARB (“AEM” or approved emissions modification), (2) an extended
15 warranty for the parts and systems affected by the emissions modification, and (3) a cash payment.

16 The first two remedies are generally available for current owners or lessees of the vehicles
17 but not former owners or lessees (as they no longer have possession). The last remedy is available
18 to both current owners or lessees and former owners or lessees. Current owners or lessees must
19 get their vehicles repaired before receiving cash payment. Current owners are paid either \$3,075
20 or \$2,460 (the lesser amount applies if there is a former owner or lessee who submits a claim).
21 Current lessees, former owners, and former lessees – *i.e.*, those who no longer possess the vehicle
22 and thus cannot obtain the AEM – are paid \$990.

23 There are approximately 100,000 vehicles at issue in this MDL. Thus, if all class members
24 participate in the settlement and submit claims, then the maximum amount that Defendants will
25 pay to the class is approximately \$307,500,000 (*i.e.*, \$3,075 x 100,000 vehicles). (This excludes
26 the cost of the repairs to the vehicles and the cost of the extended warranty.)

27 It is, of course, unlikely that the claims rate will be 100%. However, under the proposed
28 consent decrees with the United States and California, the FCA entities have a strong incentive to

1 get a high claims rate because “any money [they] could potentially save by not compensating
2 Class Members would be lost, in the form of penalties of more than \$6,000 per vehicle, for failing
3 [to] achieve the 85% participation rate required by the Consent Decree [with the United
4 States/California].” Mot. at 22; *see also* Sett. Agmt. ¶ 4.12 (stating that the “Settlement is
5 specifically designed, in conjunction with the US-CA Consent Decree, to incentivize and to
6 facilitate the achievement of a minimum claims rate of 85%, and the parties are committed to
7 achieving the highest claims rate possible in connection with this Class Action Settlement”).⁴ The
8 incremental cost to FCA of the AEM is relatively small since it consists largely of a software
9 update.

10 C. Release of Claims

11 In exchange for obtaining the consumer remedies above, class members release, in effect,
12 claims that were asserted in the operative complaint or that could have been asserted based on the
13 underlying facts.⁵ *See* Am. Sett. Agmt. ¶ 9.3 (titled “Class Release”). In addition, “[e]ach Class
14 Member who receives a Class Member Payment shall be required to execute an Individual Release
15 . . . as a precondition to receiving such payment.” Am. Sett. Agmt. ¶ 9.7. The Individual Release
16 is coextensive with the Class Release and “remain[s] effective even if the Final Approval Order is
17 reversed and/or vacated on appeal, or if [the] Class Action [Settlement] Agreement is abrogated or
18 otherwise voided in whole or in part.” Am. Sett. Agmt. ¶ 9.7. The reason for the latter provision

19 _____
20 ⁴ The proposed consent decree with the United States/California provides that “the Recall Program
21 [*i.e.*, the program to get the vehicles repaired] shall have the goal of implementing the Approved
22 Emissions Modification on at least 85 percent of all Subject Vehicles, both in the United States
and in the State of California, by no later than the 2-year anniversary of the Effective Date (‘Recall
Target Deadline’).” Prop. Consent Decree ¶ 37.

23 If, by the Recall Target Deadline, Defendants have not performed the fix on at least 85% of
24 the Subject Vehicles, then Defendants have to make certain payments:

- 25 • “For failure to reach the National Recall Target [85%], Defendants shall make a payment
of \$5,500,000 for each 1% that the National Recall Rate falls short of the National Recall
Target.” Prop. Consent Decree ¶ 41.a.i.
- 26 • “For failure to reach the California Recall Target [85%], Defendants shall make a payment
of \$825,000 for each 1% that the California Recall Rate falls short of the California Recall
Target.” Prop. Consent Decree ¶ 41.a.ii.

27 ⁵ *See* Proc. Guidance for Class Action Sett. ¶ 1.c (“If a litigation class has not been certified, any
28 differences between the claims to be released and the claims in the operative complaint and an
explanation as to why the differences are appropriate in the instant case.”).

1 is that the settlement “provides immediate relief upon final approval by [the] Court” – *i.e.*,

2 Class Members do not have to wait for the appellate process to run
 3 its course before receiving the Approved Emissions Modification,
 4 Extended Warranty, or cash compensation. [Also,] because the
 5 Class Release does not become final until any appeals have
 concluded, Class Members who obtain cash compensation must
 execute an Individual Release to prevent them from maintaining or
 asserting claims after receiving that consideration.

6 Docket No. 507 (Supp. Br. at 6) (adding that a similar process was used in the Volkswagen MDL).

7 **III. LEGAL STANDARD**

8
 9 “[T]here is a strong judicial policy that favors settlements,
 particularly where complex class action litigation is concerned.”
 10 *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (quoting *In re*
Syncor ERISA Litig., 516 F.3d 1095, 1101 (9th Cir. 2008)).
 11 Nevertheless, Federal Rule of Civil Procedure 23(e) requires courts
 to approve any class action settlement. “[S]ettlement class actions
 present unique due process concerns for absent class members.”
 12 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). As
 such, “the district court has a fiduciary duty to look after the
 13 interests of those absent class members.” *Allen*, 787 F.3d at 1223
 (collecting cases).

14 *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB
 15 (JSC), 2017 U.S. Dist. LEXIS 22775, at *735-36 (N.D. Cal. Feb. 16, 2017).

16
 17 Where a court is presented with a motion for preliminary approval of a class action
 settlement, it must first evaluate whether certification of a settlement class is appropriate under
 18 Federal Rule of Civil Procedure 23(a) and (b). The court must then determine whether the
 19 settlement is fundamentally fair, adequate, and reasonable. *See id.* at *736-37; Fed. R. Civ. P.
 20 23(e)(2) (providing that, if a “proposal would bind class members, the court may approve it only
 21 after a hearing and only on finding that it is fair, reasonable, and adequate after considering
 22 various factors).

23 **IV. RULE 23(A) AND (B) CONSIDERATIONS**

24 **A. Rule 23(a)**

25 Rule 23(a) provides that a class action is proper only if four requirements are met: (1)
 26 numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See Fed. R. Civ.*
 27 *P. 23(a)(1)-(4)*. In the instant case, there is a sufficient showing that all four requirements have
 28

1 been satisfied for purposes of preliminary approval.

2 1. Numerosity

3 “Rule 23(a)(1) requires the class to be ‘so numerous that joinder of all parties is
4 impracticable.’” *Volkswagen*, 2017 U.S. Dist. LEXIS 22775, at *737 (quoting Rule 23(a)(1)). In
5 the instant case, there are approximately 100,000 vehicles that were sold or leased to consumers in
6 the United States. Therefore, the number of owners or lessees (current and former) is likely in the
7 thousands. The numerosity requirement has thus been met. *See id.* (reaching the same conclusion
8 in the Volkswagen MDL where there were over 500,000 vehicles at issue).

9 2. Commonality

10 Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed.
11 R. Civ. P. 23(a)(2). The common question “must be of such a nature that it is capable of classwide
12 resolution – which means that determination of its truth or falsity will resolve an issue that is
13 central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*,
14 564 U.S. 338, 350 (2011). In the case at bar, the commonality requirement is satisfied because
15 Plaintiffs’ claims “arise from [FCA’s] and Bosch’s common course of conduct.” *Volkswagen*,
16 2017 U.S. Dist. LEXIS 22775, at *738.

17 3. Typicality

18 Under Rule 23(a)(3), the claims of the representative parties must be “typical of the claims
19 . . . of the class.” Fed. R. Civ. P. 23(a)(3). “Typicality ‘assure[s] that the interest of the named
20 representative aligns with the interests of the class.’” *Volkswagen*, 2017 U.S. Dist. LEXIS 22775,
21 at *739. Here, Plaintiffs meet the typicality requirement because their claims “are based on the
22 same pattern of [FCA’s] and Bosch’s wrongdoing as those brought on behalf of Class Members.”
23 *Id.* at *740. Plaintiffs and the class were subject to the same misconduct and suffered the same
24 injury. *See id.*

25 4. Adequacy

26 Finally, Rule 23(a)(4) requires that the named plaintiffs, who seek to be class
27 representatives, “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
28 23(a)(4).

1 “This requirement is rooted in due-process concerns – ‘absent class
2 members must be afforded adequate representation before entry of a
3 judgment which binds them.’” Courts engage in a dual inquiry to
4 determine adequate representation and ask: “(1) do the named
5 plaintiffs and their counsel have any conflicts of interest with other
6 class members and (2) will the named plaintiffs and their counsel
7 prosecute the action vigorously on behalf of the class?”

8 *Volkswagen*, 2017 U.S. Dist. LEXIS 22775, at *740-41.

9 In the instant case, there is nothing in the record suggesting that there is a conflict or that
10 Plaintiffs and the PSC have not or will not prosecute the action vigorously. The PSC was selected
11 after a vigorous and careful selection process. Indeed, on the latter, the Court notes that this
12 litigation has been hard fought as demonstrated by the briefing on the motions to dismiss as well
13 as the briefing on the motion for class certification and related motions. Thus, the adequacy
14 requirement has been met.

15 B. Rule 23(b)

16 The parties ask for certification of a settlement class pursuant to Rule 23(b)(3). Rule 23(b)
17 requires that (1) “the questions of law or fact common to class members predominate over any
18 questions affecting only individual members” and that (2) “a class action [be] superior to any other
19 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.
20 23(b)(3).

21 1. Predominance

22 “‘Rule 23(b)(3)’s predominance criterion is even more demanding” than Rule 23(a)(2)’s
23 commonality requirement. *Volkswagen*, 2017 U.S. Dist. LEXIS 22775, at *743 (adding that
24 commonality alone does not establish predominance under Rule 23(b)(3)).

25 “[T]he ‘predominance inquiry tests whether proposed classes are
26 sufficiently cohesive to warrant adjudication by representation’” and
27 requires “courts to give careful scrutiny to the relation between
28 common and individual questions in a case.” Predominance is
found “[w]hen common questions present a significant aspect of the
case and they can be resolved for all members of the class in a single
adjudication[.]”

Volkswagen, 2017 U.S. Dist. LEXIS 22775, at *743.

In the case at bar, the predominance requirement is satisfied as “Bosch and [FCA]

1 perpetrated the same fraud in the same manner against all Class Members.” *Id.* at *744.

2 “Plaintiffs also allege a common and unifying injury, as their and other Class Members’ injuries
3 arise solely from Bosch’s and [FCA’s] use of the defeat device[s].” *Id.*

4 The panel decision in *In re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th
5 Cir. 2018), which addresses predominance in a settlement context, is not binding on this Court
6 because that decision is currently under en banc review. Moreover, as noted by Plaintiffs, the
7 instant case is distinguishable from *Hyundai* in that it involves a federal RICO claim, not just
8 claims pursuant to the laws of multiple states. Finally, while there are some variations in state
9 law, Plaintiffs have made at least a fair argument (in their class certification briefing) that such
10 variations are not so extensive or complicated that they defeat predominance. *Cf. In re*
11 *Volkswagen “Clean Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.*, 895 F.3d 597, 609 n.17
12 (9th Cir. 2018) (holding that district court “provided a thorough predominance analysis under Rule
13 23(b)(3), sufficient under *In re Hyundai*”). Moreover, the Court, in adjudicating the first motion
14 to dismiss, carefully examined and analyzed salient aspects of the law of each of the states
15 involved. Because there are common patterns on the certain key elements among the various state
16 laws, predominance is satisfied.

17 2. Superiority

18 The superiority requirement focuses on “whether maintenance of [the] litigation as a class
19 action is efficient and whether it is fair.” *Volkswagen*, 2017 U.S. Dist. LEXIS 22775, at *744.

20 The instant case meets the superiority requirement because,

21 [i]f Class Members were to bring individual lawsuits against
22 [Defendants], each Member would be required to prove the same
23 wrongful conduct to establish liability and thus would offer the same
24 evidence. Given that Class Members number in the . . . thousands,
25 there is the potential for just as many lawsuits with the possibility of
26 inconsistent rulings and results. Thus, classwide resolution of their
27 claims is clearly favored over other means of adjudication, and the
28 proposed Settlement resolves Class Members’ claims at once. As
such, class action treatment is superior to other methods and will
efficiently and fairly resolve the controversy.

27 *Id.* at *744-45. The Court also notes that manageability of a class action for purposes of Rule
28 23(b)(3) is not an issue in the settlement context because the case will not be tried. *See Amchem*

1 *Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a request for settlement-only class
 2 certification, a district court need not inquire whether the case, if tried, would present intractable
 3 management problems, for the proposal is that there be no trial.”); *Sullivan v. DB Invs., Inc.*, 667
 4 F.3d 273, 335 (3d Cir. 2011) (“A key question in a litigation class action is manageability – how
 5 the case will or can be tried, and whether there are questions of fact or law that are capable of
 6 common proof. But the settlement class presents no management problems because the case will
 7 not be tried.”). Moreover, having examined the relevant state laws, the Court believes that
 8 management and trial of a class action would be manageable, at least for most if not all claims.

9 **V. PRELIMINARY FAIRNESS DETERMINATION**

10 Rule 23(e) (2) provides as follows:

11 If the proposal would bind class members, the court may approve it
 12 only after a hearing and only on finding that it is fair, reasonable,
 and adequate after considering whether:

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

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

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

17 (i) the costs, risks, and delay of trial and appeal;

18 (ii) the effectiveness of any proposed method of distributing
 relief to the class, including the method of processing class-member
 19 claims;

20 (iii) the terms of any proposed award of attorney’s fees,
 including timing of payment; and

21 (iv) any agreement required to be identified under Rule
 22 23(e)(3); and

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

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

25 The Ninth Circuit has also identified certain factors that should be considered when a court
 26 evaluates a settlement is fair, reasonable, and adequate:

27 (1) the strength of the plaintiff’s case; (2) the risk, expense,
 28 complexity, and likely duration of further litigation; (3) the risk of
 maintaining class action status throughout the trial; (4) the amount

1 offered in settlement; (5) the extent of discovery completed and the
 2 stage of the proceedings; (6) the experience and views of counsel;
 3 (7) the presence of a governmental participant; and (8) the reaction
 4 of the class members of the proposed settlement.

5 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). The Ninth Circuit
 6 has also instructed that, where a settlement is reached before a class is certified, the settlement
 7 “must withstand an even higher level of scrutiny,” *i.e.*, to ensure there is “no collusion or other
 8 conflicts of interest.” *Id.*

9 Here, the considerations identified above, even under the higher level of scrutiny, weigh in
 10 favor of preliminary approval. First, the procedural indicators confirm adequacy. The settlement
 11 was vigorously negotiated at arm’s length and with the assistance of one of the country’s
 12 preeminent settlement masters, Mr. Feinberg. Also, although the settlement is formally between
 13 Plaintiffs and Defendants alone, it was negotiated alongside and in conjunction with government
 14 entities, including the United States and California (as well as other states). Indeed, the settlement
 15 between the parties works in tandem with the proposed consent decrees with the United States and
 16 California. Furthermore, even though the settlement is a claims-made settlement, it does not
 17 appear to be illusory in nature because, as noted above, Defendants have a strong incentive to
 18 ensure that there is a high participation/claims rate (*i.e.*, because of the terms of the consent
 19 decrees). The proposed consent decrees set an 85% target rate with substantial penalties if that
 20 target is not met within two (2) years. And the benefits to individual class members are
 21 substantial and likely to gain their attention. The Court notes a similarly structured settlement in
 22 the Volkswagen MDL yielded a very high participation rate.⁶

23 Second, the risks that Plaintiffs would face should the cases continue to be litigated were
 24 not insignificant.⁷ Difficult issues were raised, *e.g.*, on Plaintiffs’ RICO claim, as evidenced in the
 25 briefing on the motions to dismiss. As the Court noted in earlier hearings, the standing issue was
 26 far from clear. Moreover, class certification (and continued certification) was not guaranteed,

27 ⁶ See Proc. Guidance for Class Action Sett. ¶ 1.g-h (asking for “an estimate of the number and/or
 28 percentage of class members who are expected to submit a claim” and expressing disfavor for
 29 reversionary settlements).

30 ⁷ See Proc. Guidance for Class Action Sett. ¶ 1.e (asking for “an explanation of the factors bearing
 31 on the amount of the compromise”).

1 particularly given the number of state law claims being brought and the pendency of en banc
 2 review in *Hyundai*. Damages were potentially problematic in light of Defendants’ position that
 3 there was an easy repair for the vehicles at issue. Given these risks, a compromise was not
 4 unreasonable, particularly where, in exchange for the release, class members will obtain not
 5 insignificant remedies, including a substantial cash payment. In this regard, the Court takes note
 6 that, as stated above, if all class members were to participate and submit claims, then the
 7 maximum amount that Defendants will pay to the class is approximately \$307,500,000 (*i.e.*,
 8 \$3,075 x 100,000 vehicles) – excluding attorney’s fees and costs and settlement administration
 9 fees and costs. This is not an insignificant figure taking into account the litigation risks and the
 10 amount that Plaintiffs theoretically could obtain if they were to fully prevail at trial. *See* Docket
 11 No. 327-4 (Weir Expert Report ¶¶ 8, 60, 63) (Plaintiffs’ expert estimating more than \$223 million
 12 in overpayment damages for Jeep trucks and more than \$707 million for RAM trucks;
 13 alternatively, estimating more than \$115 million in premium damages for Jeep trucks and more
 14 than \$356 million for RAM trucks).⁸

15 Third, the settlement reasonably differentiates among class members (*e.g.*, providing more
 16 of an incentive for current owners to bring their vehicles in for repair while providing some
 17 compensation for former owners).

18 Fourth, the parties’ agreement on attorneys’ fees and costs – \$59 million and \$7 million,
 19 respectively – is not, on its face, unreasonable. *See* Docket No. 523 (notice). If Defendants pay
 20 out the maximum of \$307,500,000, then the attorneys’ fees of \$59 million will represent
 21 approximately 19% of that amount. This is less than the 25% benchmark approved by the Ninth
 22 Circuit, although the Court acknowledges that, in “megafund” situations, smaller percentages have
 23 been awarded and the lodestar cross-check assumes particular importance. *See In re Bluetooth*
 24 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (noting that “where awarding 25%
 25 of a ‘mega-fund’ would yield windfall profits for class counsel in light of the hours spent on the
 26 case, courts should adjust the bench-mark percentage or employ the lodestar method instead”); *see*

27
 28 ⁸ *See* Proc. Guidance for Class Action Sett. ¶ 1.e (asking for “the potential class recovery if plaintiffs had fully prevailed on each of their claims”).

1 *also Alexander v. FedEx Ground Package Sys.*, No. 05-cv-00038-EMC, 2016 U.S. Dist. LEXIS
2 78087, at *5-6 (N.D. Cal. June 15, 2016) (discussing megafund cases).

3 Fifth, Plaintiffs' request for an incentive award is reasonable.⁹ Plaintiffs ask for an
4 incentive award of \$5,000 for each of the 60 class representatives (a total of \$300,000). *See*
5 *Cabraser Decl.* ¶ 15. The request of \$5,000 is reasonable as that amount is the presumptive
6 incentive award in this District. Although there is a large number of class representatives, that is
7 largely a reflection of the scope of the lawsuit – covering all the states, plus the District of
8 Columbia. Moreover, Defendants will be paying for the incentive awards, in addition to the class
9 payments. *See Mot.* at 13.

10 Accordingly, the Court concludes that the proposed settlement between the parties is
11 sufficiently fair, adequate, and reasonable to warrant preliminary approval. There is a sufficient
12 “record supporting the conclusion that the proposed settlement will likely earn final approval after
13 notice and an opportunity to object.” Fed. R. Civ. P. 23(e)(1), 2018 advisory committee notes.

14 **VI. PROCEDURAL GUIDANCE FOR CLASS ACTION SETTLEMENTS**

15 Finally, the Court notes that it has reviewed the proposed settlement in light of the
16 District's updated Procedural Guidance for Class Action Settlements. The Court finds that the
17 parties have sufficiently followed the Procedural Guidance and that the proposed settlement
18 sufficiently meets the standards articulated therein.

19 For example, the parties have provided the necessary information about the settlement for
20 the Court to evaluate it for fairness, reasonableness, and adequacy and, as discussed above, the
21 Court finds the terms sufficiently fair, reasonable, and adequate. *See Proc. Guidance for Class*
22 *Action Sett.* ¶ 1.

23 Also, the parties went through a sufficiently rigorous selection process to select a
24 settlement administrator. *See Proc. Guidance for Class Action Sett.* ¶ 2; *see also Cabraser Decl.*
25 ¶¶ 9-10. While the settlement administration costs are significant – an estimated \$1.5 million –
26 they are adequately justified given the size of the class and the relief being provided.

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⁹ *See Proc. Guidance for Class Action Sett.* ¶ 7.

United States District Court
Northern District of California

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In addition, the Court finds that the language of the class notices (short and long-form) is appropriate and that the means of notice – which includes mail notice, electronic notice, publication notice, and social media “marketing” – is the “best notice . . . practicable under the circumstances.” Fed. R. Civ. P. 23(c)(2)(B); *see also* Proc. Guidance for Class Action Sett. ¶¶ 3-5, 9 (addressing class notice, opt-outs, and objections). The Court notes that the means of notice has changed somewhat, as explained in the Supplemental Weisbrot Declaration filed on February 8, 2019, so that notice will be more targeted and effective. *See generally* Docket No. 525 (Supp. Weisbrot Decl.) (addressing, *inter alia*, press release to be distributed via national newswire service, digital and social media marketing designed to enhance notice, and “reminder” first-class mail notice when AEM becomes available).

Finally, the parties have noted that the proposed settlement bears similarity to the settlement in the Volkswagen MDL. *See* Proc. Guidance for Class Action Sett. ¶ 11.


VII. CONCLUSION

For the foregoing reasons, the Court grants the motion for preliminary approval and authorizes issuance of the class notice. The parties have satisfied the requisites of Rule 23(e) as well as this District’s Procedural Guidance for Class Action Settlements. The Court shall also enter, forthwith, the proposed order submitted by the parties on preliminary approval.

This order disposes of Docket Nos. 487, 491, and 508.

IT IS SO ORDERED.

Dated: February 11, 2019



EDWARD M. CHEN
United States District Judge