UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JASON COUNTS, *et al.*, individually, and on behalf of THEMSELVES AND ALL OTHERS similarly situated, Plaintiffs, v. GENERAL MOTORS LLC and ROBERT BOSCH LLC, Defendants.	No. 1:16-cv-12541-TLL-PTM Honorable Thomas L. Ludington Magistrate Judge Patricia T. Morris

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT WITH DEFENDANT ROBERT BOSCH LLC AND PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS

Plaintiffs move for provisional class certification of a Settlement Class under Rule 23 on behalf of themselves and all others similarly situated, for the appointment of Counsel and Class Representatives, and preliminary approval of a Settlement Agreement with Defendant Robert Bosch LLC ("Bosch LLC"). The bases for this Motion are set forth in the attached Brief in Support, and supporting declarations and exhibits. Pursuant to Local Rule 7.1, on February 8, 2023, Plaintiffs sought concurrence in the relief sought by this Motion from Defendant Bosch LLC. Defendant concurs with the relief sought in this Motion.

Plaintiffs request entry of an Order:

1. Preliminarily approving the Settlement;
2. Provisionally certifying the Settlement Class;
3. Staying the proceedings against Bosch LLC per the terms of the Settlement Agreement;
4. Authorizing JND Legal Administration to provide notice to Settlement Class Members;
5. Appointing Class Representatives for the Settlement Class;
6. Appointing Hagens Berman Sobol Shapiro LLP; Carella, Byrne, Cecchi, Brody & Agnello, P.C.; and Seeger Weiss LLP as Class Counsel.

DATED: February 13, 2023

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM IN SUPPORT pLAINTIFFS' mOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT WITH DEFENDANT ROBERT BOSCH LLC AND PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS

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STATEMENT OF ISSUES PRESENTED

1. Should the Court preliminarily approve the class Settlement under Federal Rule of Civil Procedure 23?

2. Should the Court provisionally certify the Settlement Class under Federal Rule of Civil Procedure 23(a) and (b)(3) and approve the notice plan?

3. Should the Court appoint Plaintiffs as Class Representatives to represent the Settlement Class?

4. Should the Court appoint the firms Hagens Berman Sobol Shapiro LLP, Seeger Weiss LLP, and Carella Byrne Cecchi Brody & Agnello, P.C. as Class Counsel under Federal Rule of Civil Procedure 23(g) to represent the Settlement Class?

5. Should the Court approve the Class Notice, Notice Plan, and Schedule?

6. Should the Court appoint JND as the Notice and Claims Administrator?

Plaintiffs respectfully submit that the answer to each question is "Yes."

INTRODUCTION

Plaintiffs are pleased to present to the Court a proposed Class Settlement with Robert Bosch LLC ("Bosch LLC"), which resolves the claims and allegations against Bosch LLC. The Settlement satisfies each of the requirements for preliminary approval.[1] It achieves this litigation's central goal of providing real compensation to owners and lessees of 2014-2015 Chevrolet diesel Cruze vehicles ("Class Vehicles"). It balances the many risks of further litigation with the certainty of finality. The Settlement is well-informed by extensive discovery, experts, and experience. As shown below, the proposed Settlement with Bosch LLC is an excellent result for the Class that provides monetary relief to Plaintiffs and Class Members.

Plaintiffs and Bosch LLC reached this settlement after extensive direct and contentious negotiations. As a result of these negotiations, Plaintiffs have achieved a settlement that will provide substantial relief to the Class while proceeding with their claims against GM. If approved, the Settlement provides recovery on behalf of Class Members who submit Valid Claims of $190 per Class Vehicle, less fees, costs, service awards, and notice/administration costs. If the Court grants the attorneys' fees and costs Class Counsel will request out of this recovery (25%) and approves

[1] Importantly, no Class Members will release claims against GM, and Plaintiffs will continue to litigate their claims against GM.

the $1,300 service awards to the Class Representatives, the settlement will still provide for significant relief to Settlement Class Members.

The proposed Settlement is a favorable resolution for the Class that avoids the substantial risks and expense of continued litigation, including the risk of recovering less than the Settlement amount, or nothing at all. It will curtail costs and the expenditure of resources, eliminate the risk of uncertain litigation outcomes, and prevent further delay in remedying the harms suffered by Class Members. The Settlement includes obvious benefits to Plaintiffs and Class Members and easily meets the bar for preliminary approval.

In sum, the Settlement before the Court provides real relief for consumers and exceeds all applicable requirements of the law, including Rule 23(e)(2) and constitutional due process. The Settlement notice will apprise Class Members of the pendency of the action, the terms of the Settlement, and their rights to opt out of, or object to, the Settlement. For all these reasons, Plaintiffs respectfully request that the Court: (1) grant preliminary approval; (2) provisionally certify the Settlement Class; and (3) appoint Plaintiffs Bassam Hirmiz, Jason Silveus, John Miskelly, Thomas Hayduk, Joshua Rodriguez, and Derek Long as Class Representatives for the Settlement Class; (4) appoint Hagens Berman Sobol Shapiro LLP, Seeger Weiss LLP, and Carella Byrne Cecchi Brody & Agnello, P.C. as Class Counsel; (5) direct notice to the Settlement Class; and (6) schedule a fairness hearing.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs filed this lawsuit on July 7, 2016, against General Motors LLC in the United States District Court for the Eastern District of Michigan on behalf of a nationwide putative class of current and former owners and lessees of Class Vehicles. The complaint was amended on June 11, 2018, to add Robert Bosch GmbH ("Bosch GmbH") and Bosch LLC as defendants. *See* First Amended Class Action Complaint, ECF No. 95 (June 11, 2018). Plaintiffs dismissed Bosch GmbH from the Action on February 25, 2020. *See* ECF No. 317.

Bosch LLC denies the material factual allegations and legal claims asserted by the Plaintiffs and Class Members in the Action, including, but not limited to, all charges of wrongdoing or liability, or allegations of defect, arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Action.

After extensive litigation and settlement efforts, Plaintiffs and Bosch LLC have reached this agreement to resolve Class Members' claims against Bosch LLC related to the Class Vehicles.

II. SUMMARY OF SETTLEMENT TERMS

A. The Settlement Class Definition

The Settlement Class includes all current and former owners or lessees of Class Vehicles in the United States, including territories of the United States.

B. The Settlement Provides Substantial Benefits to the Class

All told, the monetary benefits of the Settlement could reach $2,375,000, with each Class Member submitting a valid claim receiving up to $190 per Class Vehicle, less fees, costs, service awards, and notice/administration costs. While a complete fairness analysis will take place at the Final Approval Hearing, the substantial benefits of this Settlement support preliminary approval.

C. Class Counsel Fees and Service Awards

The proposed settlement contemplates that Class Counsel, on behalf of all plaintiffs' counsel, will apply for an award of Attorneys' Fees and Expenses in the Actions of 25% of the $190 per vehicle recovery for Class Members (*i.e.*, attorneys' fees and expenses of $47.50 per Class Vehicle VIN). To date, Class Counsel have incurred more than the maximum total monetary benefits of the Settlement in litigation expenses alone and millions more in accrued fees. These amounts vastly exceed the costs and fees Class Counsel seek from the Settlement with Bosch LLC.[2]

Class Counsel will also seek a service award of up to $1,300 for each of the Class Representatives.[3] As will be demonstrated before final approval of the

[2] Class Counsel does not intend to waive any claim for any fees or expenses in the event of settlement with or judgment against General Motors.

[3] Such awards are justified as an incentive and reward for the efforts that lead plaintiffs expend on behalf of the class. *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1000 (N.D. Ohio 2016) (noting "the Sixth Circuit has endorsed the use of incentive awards"), *appeal dismissed*, 2016 WL 6599570 (6th Cir. 2016).

Settlement, each of the Class Representatives has expended significant time and energy in pursuing this litigation on behalf of the proposed Class for over five years, including responding to interrogatories and requests for production and sitting for deposition. And each Class Representative will continue to fulfill their duties to the Class in pursuit of recovery from the remaining Defendant, GM. As such, a service award of $1,300 per Class Representative, amounting to approximately 6.8 times the gross per-vehicle recovery, is reasonable and justified. Bosch LLC has agreed not to oppose an application for these amounts. Plaintiffs will submit these requests along with evidence supporting the claims for costs, fees, and service awards before the deadline for objections from Class Members. Thus, any attorneys' fees or service awards will be available for public review and subject to Court approval.

III. THE CLASS SETTLEMENT MERITS PRELIMINARY APPROVAL

Federal courts favor and encourage settlements as a matter of public policy, particularly in class actions, where the costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to claim. *See UAW v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (noting "the federal policy favoring settlement of class actions"); *see also* 4 William B. Rubenstein, Albert Conte & Herbert Newberg, *Newberg on Class Actions* § 13:44 (5th ed. 2020) (noting that the law favors settlement "particularly in class actions" and collecting cases).

Rule 23(e) of the Federal Rules of Civil Procedure requires a preliminary evaluation of a proposed class action settlement, the "first step" in a three-stage process. *In re Flint Water Cases*, 499 F. Supp. 3d 399, 410 (E.D. Mich. 2021). At this stage, the Court must first determine whether it "will likely be able to" (1) approve the settlement as fair, reasonable, and adequate; and (2) "certify the class for purposes of judgment on the proposal." FED. R. CIV. P. 23(e)(1)(B). Then the Court must hold a hearing to consider whether to approve the Settlement and certify the Settlement Class after the class is given notice and an opportunity to object. *See* 4 William B. Rubenstein, Albert Conte & Herbert Newberg, *Newberg on Class Actions* §§ 13:39 *et seq.* (5th ed. 2020).

The Court will determine whether the proposed settlement is "fair, adequate, and reasonable" at the final approval stage – *i.e.* after notice is disseminated and a fairness hearing is held. At this preliminary stage, the Court need only make an initial evaluation that the proposed settlement falls "within the range of possible approval, appear[s] to be fair, and [is] free of obvious deficiencies." *In re Flint*, 499 F. Supp. at 410. In determining whether a proposed settlement initially appears fair, reasonable, and adequate, the Court considers whether (1) the proposed Class Representatives and Class Counsel have adequately represented the class; (2) the Settlement was negotiated at arm's length; (3) the relief provided is adequate; and

(4) the Settlement treats class members equitably relative to each other. FED. R. CIV. P. 23(e)(2).

In amending Rule 23, the Advisory Committee recognized that the various Circuits had independently generated their own lists of factors to consider in determining whether a settlement is fair, reasonable, and adequate. FED. R. CIV. P. 23(e)(2) advisory committee's note to the 2018 amendment. Because the Sixth Circuit factors are similar, the caselaw in this Circuit applying those factors remains instructive here. The Court is not required at the preliminary approval stage to determine whether it will grant final approval of the proposed settlement, only that it is likely that it would. *Garner Prop. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 626 (E.D. Mich. 2020). Here, initial consideration of the final approval factors supports preliminary approval of the settlement.

That said, following the instructions of the Advisory Committee, Plaintiff will "present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *Id.* As shown below, the Settlement is both substantively and procedurally fair. Thus, it warrants preliminary approval and dissemination of notice to the Class.

A. There is a Strong Basis to Conclude that the Settlement Is Fair, Reasonable, and Adequate and that the Rule 23(e)(2) Standards for Approval Will Be Met

1. The proposed Settlement was reached after substantial litigation, including thorough discovery and motion practice, and the benefits of the proposed Settlement far outweigh the risks of continued litigation.

Rule 23(e)(2) first asks whether "the class representatives and class counsel have adequately represented the class." FED. R. CIV. P. 23(e)(2)(A). Relevant considerations include the information available to counsel negotiating the settlement, the stage of the litigation, and the amount of discovery taken. FED. R. CIV. P. 23(e)(2) advisory committee's note to the 2018 amendment. The parties need not unearth every last fact of a case before they can settle it. Instead, they must learn as much as necessary to ensure that claims are not settled prematurely. *See N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 237 (E.D. Mich. 2016) (class settlement appropriate when the parties "had sufficient information to evaluate the strengths and weaknesses of the case and the merits of the Settlement.").

As this Court knows, this Settlement comes after more than five years of spirited litigation. Class Counsel vigorously investigated the facts and allegations underlying this matter, reviewed comprehensive discovery, took numerous depositions, retained and worked closely with multiple experts, and submitted extensive briefs on many issues. *See N.Y. State Teachers' Ret. Sys.*, 315 F.R.D. at 237 (class settlement appropriate where counsel drafted a detailed complaint,

prepared extensive briefing in response to a motion to dismiss, reviewed large volumes of documents, and consulted relevant experts). Class Counsel clearly understands the strengths and weaknesses of the Class's claims and damages approaches. As a result, the Parties are sufficiently well informed as to the factual and legal issues relevant to this action, the scope of the claims and issues, and the diligent work of the Court. *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *11 (E.D. Mich. Feb. 22, 2011) (quoting *Sheick*, 2010 WL 4136958, at *18); *Ford v. Fed.-Mogul Corp.*, No. 2:09-cv-14448, 2015 WL 110340, at *9 (E.D. Mich. Jan. 7, 2015). "In the absence of evidence of collusion (there is none here), this Court 'should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs.'" *Date v. Sony Elec., Inc.*, No. 07-15474, 2013 WL 3945981, at *9 (E.D. Mich. July 31, 2013) (quoting *Vukovich*, 720 F.2d at 922-23).

"[T]he prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery." *Id.* at 523. This is particularly true for inherently complex class actions. 4 William B. Rubenstein, *Newberg on Class Actions* § 13:44 (5th ed. 2020) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals."); *Olden v. Gardner*, 294 F. App'x 210, 217 (6th Cir. 2008) (finding this factor supported settlement in a case in which trial "most likely would

have been a lengthy proceeding involving complex scientific proof"). Nor has a litigation class been certified. Were the Court to certify one, Defendants would no doubt pursue a Rule 23(f) petition to the Sixth Circuit for immediate review. The risk of maintaining class action status through trial is real. Moreover, if Plaintiffs prevailed at trial, a long appeal period would result. The litigation road has been arduous and promises to be harder absent settlement. All these considerations allow counsel to recommend the Settlement for the Court's approval unhesitatingly. Separately, the Settlement bears none of the traditional signs of collusion. *See N.Y. State Teachers' Ret. Sys.*, 315 F.R.D. at 236 ("[C]ourts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary." (quoting *Sheick v. Auto. Component Carrier LLC*, 2010 WL 4136958, at *19 (E.D. Mich. Oct. 18, 2010))). This factor likewise supports approval.

2. The Settlement negotiations occurred at arm's length.

Rule 23(e)(2) next asks whether the settlement "was negotiated at arm's length." FED. R. CIV. P. 23(e)(2)(B). To ensure negotiations were conducted at arm's length, courts look to the "conduct of the negotiations," recognizing that "the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." FED. R. CIV. P. 23(e)(2) advisory committee's note to the 2018 amendment.

The negotiations that led to the Settlement were at all times conducted at arm's length and, while not under the supervision of a mediator, were informed by settlement negotiations with the same Defendant in other diesel emissions lawsuits that did include independent mediators. Armed with that knowledge and experience, Class Counsel reached a compromise after assessing the risks, expense, and delay of further litigation. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003) (quoting *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983)), *appeal dismissed*, 391 F.3d 812 (6th Cir. 2004). The result speaks for itself. It is Class Counsel's reasoned opinion that, given the alternative of long and complex litigation, and the risks involved in such litigation, including a class certification battle, trial on the merits, and appeals, the availability of robust relief under the Settlement weighs heavily in favor of preliminary approval. *See, e.g.*, *Dick v. Sprint Commc'ns Co.*, 297 F.R.D. 283, 296 (W.D. Ky. 2014) ("Giving substantial weight to the recommendations of experienced attorneys, who have engaged in arms-length settlement negotiations, is appropriate. . . ." (quoting *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08–MD–01998, 2010 WL 3341200, at *4 (W.D. Ky. Aug. 23, 2010))); *accord In re Se. Milk Antitrust Litig.*, No. 2:07-CV-208, 2013 WL 2155379, at *5 (E.D. Tenn. May 17, 2013); *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 341 (E.D. Pa. 2007).

3. The Settlement yields robust benefits to the Class.

The next factor under Rule 23(e)(2) asks whether "the relief provided for the class is adequate." FED. R. CIV. P. 23(e)(2)(C). Here, the relief provided to the Class under the Settlement is outstanding, especially considering "the costs, risks, and delay of trial and appeal";[4] and "the terms of any proposed award of attorney's fees." *See* FED. R. CIV. P. 23(e)(2)(C)(i), (iii).

As detailed above, the Settlement provides significant monetary benefits to the Settlement Class and is an excellent result following an extremely hard-fought litigation. The Settlement falls within the range of reasonableness compared to the risks posed by trial and issues in dispute. *In re Mercedes-Benz Emissions Litig.*, No. 2:16-cv-881 (KM)(ESK), 2021 WL 7833193, at *2–3 (D.N.J. Aug. 2, 2021) (approving settlement with Bosch Defendants paying up to $300 per vehicle – inclusive of fees, costs, etc. – for claims in case involving Notice of Violation against the OEM).

The Settlement, providing for $190 per Class Vehicle in compensation, is a reasonable compromise in light of the relief that could be obtained through a jury verdict against Bosch LLC for the Class. According to the Plaintiffs' damages expert, Mr. Stockton, the maximum recovery on behalf of the Class would range

[4] Sixth Circuit factors likewise include the complexity, expense, and likely duration of the litigation and the likelihood of success on the merits. *See*, 497 F.3d at 631.

from approximately $2,535 to $3,728 per Class Vehicle (against both Defendants). However, a recovery in those ranges would require not only a *complete* victory on behalf of the Class on liability issues as against Bosch LLC but also a jury to accept that one or more of the damage theories presented fairly calculates the damages suffered by the Class.[5] Considering the substantial hurdles still facing Plaintiffs' claims and the significant risk that the Class would not obtain *any* recovery if the matter were to continue to be litigated, Class Counsel believes that the $190 per vehicle recovery, constituting approximately 5% to 7.5% of the maximum possible recovery, is a fair and adequate settlement of the Class's claims against Bosch LLC. Class Counsel, who have collectively served as class counsel in hundreds of actions, fully endorse the Settlement as fair, reasonable, and adequate based on their intimate knowledge of the evidence, claims, and defenses here as well as their experience in other emissions cases.

4. The Sixth Circuit's additional factors favor settlement approval.

Along with the factors set out in Rule 23(e)(2), Sixth Circuit courts have historically considered other factors, including the opinions of class counsel, class representatives, and asked whether the settlement supports the public interest. *See UAW*, 497 F.3d at 631.

[5] Obviously, obtaining such a recovery would also require that the Court certify a Class for trial on the remaining claims, which Defendant GM continues to dispute.

As discussed above, Class Counsel thoroughly investigated and analyzed the claims, made informed judgments about the proposed Settlement, and believe it is fair, reasonable, and adequate. *UAW v. Ford Motor Co.*, No. 07-cv-14845, 2008 WL 4104329, at *26 (E.D. Mich. Aug. 29, 2008) ("The endorsement of the parties' counsel is entitled to significant weight, and supports the fairness of the class settlement."). And Bosch LLC is similarly represented by reputable and highly experienced counsel who support the settlement.

Finally, the Settlement is in the public interest. "There is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources.'" *Does 1-2 v. Deja Vu Servs., Inc.*, 925 F.3d 886, 899 (6th Cir. 2019) (quoting *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003)). Plaintiffs submit there is no basis for not adhering to that policy here as there is no countervailing public interest that provides a reason to disapprove the proposed settlement. The public interest is also best served by providing such relief to the Settlement Class as expeditiously as possible. *See Garner Prop. & Mgmt., LLC v. City of Inkster*, No. 17-cv-13960, 2020 WL 4726938, at *10 (E.D. Mich. Aug. 14, 2020) (concluding settlement was in the public interest where "allowing settlement in this matter will promote the fair and expeditious resolution of the matter"). Thus, this factor also supports approval.

IV. THE COURT SHOULD PROVISIONALLY CERTIFY THE PROPOSED CLASS FOR SETTLEMENT PURPOSES

Plaintiffs request, under Rule 23(e)(1)(B)(ii), that the Court preliminarily certify a Settlement Class and direct dissemination of notice about the action and the Settlement. Bosch LLC does not object to certification of the Settlement Class for settlement purposes only, and the Supreme Court has long acknowledged the propriety of certifying a class solely for settlement purposes. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997). A class may be certified for settlement purposes. *See, e.g.*, *In re Auto. Parts Antitrust Litig. (In re Wire Harness Cases)*, No. 12-md-02311, 2017 WL 469734, at *1 (E.D. Mich. Jan. 4, 2017) (granting preliminary approval upon preliminary determinations that the settlement was approvable and a settlement class could be certified). Indeed, the fact that the parties have reached a settlement weighs in favor of class certification for settlement purposes. *Daoust v. Maru Rest., LLC*, No. 17-cv-13879, 2019 WL 1055231, at *1 (E.D. Mich. Feb. 2, 2019).

A. The Rule 23(a) Requirements Are Satisfied.

To be certified under Rule 23, Plaintiffs must satisfy the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a). *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) (quoting FED. R. CIV. P. 23(a)). In addition, the proposed class must meet the requirements of one of the three subsections of Rule 23(b). *Id*. at 850-51 (quoting

FED. R. CIV. P. 23(b)(3)). As shown below, the proposed Settlement Class satisfies each requirement.

1. Rule 23(a)(1) – Numerosity is present.

Rule 23(a)(1) requires that the class be "so numerous that the joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Courts generally find numerosity is satisfied with a class of forty or more members. *Garner*, 333 F.R.D. at 622 (citing *Davidson v. Henkel*, 302 F.R.D. 427, 436 (E.D. Mich. 2014)). The Settlement Class is sufficiently numerous, as it consists of more than ten thousand Class Vehicles and thousands of Class Members, making the joinder impracticable. *See Avio, Inc. v. Alfoccino, Inc.*, 311 F.R.D. 434, 443 (E.D. Mich. 2015) ("sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)" (quoting *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004))); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (recognizing that "while there is no strict numerical test, 'substantial' numbers usually satisfy the numerosity requirement"). So the numerosity test is easily met here.

2. Rule 23(a)(2) – There are issues common to all Class Members.

Rule 23(a)(2) requires that there be "questions of law *or* fact common to the class" and that the class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 369 (2011) (citation omitted and emphasis added).

The claims of the Settlement Class are sufficiently common as they depend on "questions of law [and] fact common to the class[.]" *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013). The commonality "standard is not that demanding[.]" *Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160, 168 (E.D. Mich. 2006), *aff'd in part, remanded on other grounds*, 511 F.3d 554 (6th Cir. 2007) (alteration omitted). Indeed, the Supreme Court has held "'[e]ven a single [common] question' will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). This is because "[w]hat matters to class certification . . . is not the raising of common questions – even in droves – but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution. In other words, the class's claims must "depend upon a common contention ... capable of class-wide resolution." *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 137 (E.D. Pa. 2011) (citing *Wal-Mart*, 564 U.S. at 350). "A contention is capable of class-wide resolution if the determination of its truth or falsity will resolve an issue that is central to the validity of the claims 'in one stroke.'" *Id.* (quoting *Wal-Mart*, 564 U.S. at 350).

The claims of all Class Members involve the same vehicles, emissions control technology and software, and alleged defeat device, conduct that focuses on Defendants, and so on. These issues are at the heart of the case and are enough to satisfy the Rule 23(a)(2) commonality element.

3. Rule 23(a)(3) – Typicality is satisfied.

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. *Garner*, 333 F.R.D. at 623 (quoting *Beattie*, 511 F.3d at 561). The typicality test is "not onerous," and "factual distinctions between named and unnamed class members do not preclude typicality." *Cates v. Cooper Tire & Rubber Co.*, 253 F.R.D. 422, 429 (N.D. Ohio 2008); *accord Griffin*, 2013 WL 6511860, at *6 (quoting *Ford*, 2006 WL 1984363, at *19); *Date*, 2013 WL 3945981, at *3.

Under the permissive standards of this rule, representative claims are "typical" if they are reasonably coextensive with those of absent class members, and they need not be identical. *Daffin*, 458 F.3d at 533. Plaintiffs allege that Bosch LLC violated consumer protection laws, not informing consumers of the alleged defeat devices or the excessive emissions; and making omissions about the vehicles' performance, fuel efficiency, and emissions and whether the vehicles were environmentally friendly and met emissions limits under everyday driving conditions. Plaintiffs allege that their vehicles have the same alleged defeat devices as all other Class Vehicles and that they purchased or leased vehicles that emit excessive pollutants without knowing the truth about the vehicles' "real world" emissions. *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 618 (6th Cir. 2007) (finding typicality satisfied where class representatives' claims "arise[] from the same event

or practice or course of conduct that gives rise to the claims of other class members," and were "based on the same legal theor[ies]" as other class members' claims (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996))); *see also Barry*, 79 F. Supp. 3d at 732 ("The Sixth Circuit has concluded a proposed class representative's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." (internal quotation marks and citation omitted)). These claims are typical of the claims of every member of the Class. *UAW v. Gen. Motors Corp.*, No. 05-cv-73991-DT, 2006 WL 891151, at *10 (E.D. Mich. Mar. 31, 2006) (typicality satisfied where the defendant allegedly violated its "uniform obligation" to the class members). Accordingly, the Settlement Class satisfies the typicality requirement.

4. Rule 23(a)(4) – Adequacy is satisfied.

The final requirement of Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Courts ask two questions to determine whether a proposed class representative will adequately represent the class: (1) whether the proposed class representative shares common interests with unnamed class members; and (2) whether the proposed class representative will prosecute the action vigorously on behalf of the class through qualified counsel. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th

Cir. 2012). The core analysis for the first prong is whether Plaintiffs have interests antagonistic to those of absent members of the Settlement Class. The second prong analyzes the capabilities and performance of Class Counsel based on factors set forth in Rule 23(g). Plaintiffs satisfy both prongs.

First, the proposed Class Representatives' interests "are entirely aligned [with those of the proposed Class] in their interest in proving that [Defendants] misled them and share the common goal of obtaining redress for their injuries." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, No. 2672 CRB, 2016 WL 4010049, at *11 (N.D. Cal. July 26, 2016); *see also In re Chrysler-Dodge Ecodiesel Mktg., Sales Practices & Prods. Liab. Litig.*, No. 17-md-02777-EMC, 2019 WL 536661, at *6 (N.D. Cal. Feb. 11, 2019) (same). The Class Representatives have had every incentive to vigorously prosecute this litigation against Bosch LLC because, as discussed above, their claims are typical of the absent Class Members. *E.g.*, *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008) ("The fact that plaintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class."); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 387 (D. Kan. 1998) ("[a]n overlap exists in the typicality and adequacy of representation requirements because if typicality is not present, the class representatives do not have an incentive to vigorously

prosecute class claims"). The Class Representatives also understand their duties: they have all kept abreast of the litigation and aided in discovery, and many have submitted to depositions. There can be no reasoned argument that any of the Class Representatives have conflicts antagonistic to the Class. The Court should conclude that they will—and have—adequately represented the Class.

Likewise, the Plaintiffs' choice of counsel also underscores their adequacy. In retaining these three firms, Plaintiffs have employed counsel who are qualified and experienced in complex class litigation and who have the resources, zeal, and successful record in class cases. *See* ECF No. 446 at 46-47 (summarizing comprehensive work performed by Plaintiffs' counsel). There can be no genuine question that adequacy is well satisfied.

B. As Required by Rule 23(b)(3), Common Issues Predominate, and Class Treatment is Superior to a Multiplicity of Individual Lawsuits.

Under Rule 23(b)(3), a class should be certified when the court finds that common questions of law or fact predominate over individual issues and a class action would be superior to other methods of resolving the controversy. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008); *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 566 (E.D. Mich. 2009). The proposed Class satisfies both Rule 23(b) elements, as shown below.

1. Rule 23(b)(3) – Predominance is satisfied.

The predominance element "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623. At its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7the Cir. 2012).

The predominance inquiry focuses on liability issues. The common questions discussed above related to the Rule 23(a)(2) commonality element are overarching and thus tower over issues relating to individual Class Members. The salient evidence necessary to prove Plaintiffs' claims is common to both the Class Representatives and all Class Members—all would seek to prove that the Class Vehicles have an emissions defeat device, that Defendants misled regulators and consumers by concealing the emissions defeat device, and that Defendants' conduct was wrongful. Moreover, the necessary proof would be generalized; it changes little, if at all, whether there are dozens or half a million Class Members. In either instance, Plaintiffs would present the same evidence of alleged wrongdoing. *See Volkswagen*, 2016 WL 4010049, at *12; *see also In re Chrysler-Dodge Ecodiesel Mktg., Sales Practices & Prods. Liab. Litig.*, 2019 WL 536661, at *7. In other words, the Class's claims depend on the same factual circumstances and "the claims present common operative facts and common questions of law that predominate" over any factual variations. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)

("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'"). The Settlement Class satisfies the predominance test.

2. Rule 23(b)(3) – Superiority is satisfied.

Second, class certification under Rule 23 is "superior to other available methods for the fair and efficient adjudication of the controversy." FED. R CIV. P. 23(b)(3). The Settlement affords benefits to Class Members who, absent a class settlement, may not have been aware of their legal rights or had too little an incentive to pursue an individual suit involving emissions defeat devices in their vehicles. The presence of the alleged defeat device was never disclosed and is still contested by Bosch LLC. The high cost of marshaling the evidence (expert, sophisticated electronic discovery, discovery in foreign languages, and so on) necessary to pursue the claims at issue dwarfs any individual consumer's potential recovery and the disparity in resources between individuals and well-funded, litigation-savvy defendant like Bosch LLC.

Because the value of the claims is too low to encourage many Class Members to litigate their claims individually, the consideration weighs in favor of concentrating the claims in a single forum. *In re Whirlpool Corp. Front-Loading*

Washer Prods. Liab. Litig., 722 F.3d 838, 861 (6th Cir. 2013). The Supreme Court has recognized that the existence of so-called "negative value" claims—*i.e.*, the cost to litigate exceeding the potential recovery—is typically "*the* most compelling rationale for finding superiority" of class treatment. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 675 n.7 (2010).

Indeed, Class Counsel have already devoted significant time and resources to this litigation, including multiple rounds of motions to dismiss, discovery briefing, depositions, document review, retaining experts, and engaging in other significant efforts on many other issues. It is unlikely that an individual vehicle owner pursuing a purely a single economic loss case could or would invest the same resources. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[O]nly a lunatic or a fanatic sues for $30."). Certification also serves the interest of judicial economy by avoiding multiple similar lawsuits and resolving claims in one proceeding. Even a few duplicative individual suits would needlessly burden the courts. *Avio, Inc. v. Alfoccino, Inc.*, 311 F.R.D. 434, 446 (E.D. Mich. 2015).

Thus, class action treatment is far superior to individual adjudication. Moreover, because this is a class certified only for settlement purposes, manageability concerns associated with a litigation class are irrelevant. *Amchem Prods., Inc.*, 521 U.S. at 620. That said, were this a proposal for certification of a litigation class, there would be no serious manageability problems that would make

thousands of individual actions a better alternative. *See In re Chrysler-Dodge Ecodiesel Mktg., Sales Practices & Prods. Liab. Litig.*, 2019 WL 536661, at *6 (superiority satisfied for settlement purposes in another diesel emissions defeat device case). The Rule 23(b)(3) superiority component is met here.

C. Proposed Class Counsel Satisfy Rule 23(g).

Rule 23(g) focuses on the qualifications of class counsel, complementing the requirement of Rule 23(a)(4) that the representative parties adequately represent the interests of the class members. *Mishra v. Cognizant Tech. Sols. U.S. Corp.*, No. 17-cv-01785-TLN-EFB, 2020 WL 2836739, at *10 (E.D. Cal. June 1, 2020) (citing FED. R. CIV. P. 23). Although a court may consider any factor concerning the proposed class counsel's ability to "fairly and adequately represent the interest of the class," Rule 23(g) specifically instructs a court to consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

FED. R. CIV. P. 23(g)(1)(A).

The experience in class actions in general, and diesel emission cases in particular, combined with the extensive efforts and in-depth knowledge of the work in this case weighs strongly in favor of finding Class Counsel adequate here.

V. THE PROPOSED NOTICE TO THE CLASS SHOULD BE APPROVED

Should the Court grant preliminary approval, it must also "direct notice in a reasonable manner to all class members who would be bound by the proposal…." FED. R. CIV. P. 23(e)(1)(B). Notice should be the best notice practicable under the circumstances. FED. R. CIV. P. 23(c)(2)(B).

The manner in which the Class Notice is shared, as well as its content, must satisfy Rule 23(c)(2) (governing class certification notice), Rule 23(e)(1) (governing settlement notice), and due process. *See Daoust*, 2019 WL 1055231, at *2. These requirements are adequately satisfied here. Rule 23(e) requires that notice of a proposed settlement be provided to class members. Notice satisfies the Rule when it adequately puts Settlement Class Members on notice of the proposed settlement and "describes the terms of the settlement, informs the classes about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing." *Id*.

The proposed Class Notice and dissemination plan satisfy all Rule 23 and due process requirements. Each form of notice presents all required categories of information in plain English. *See* Ex. 2, Declaration of Jennifer M. Keough Regarding Proposed Notice Program ("Keough Decl."). The proposed Notice Program also provides the best notice practicable under the circumstances. The dissemination plan was designed to reach the greatest practicable number of Class

Members. Direct mail notice by U.S. mail and email notice (where available) will be the main methods of notice, providing Class Members with an opportunity to read, review, and understand their rights and options in this Class Action Settlement. The Settlement Administrator will send individualized Class Notices and Claims Forms to Settlement Class Members by first-class mail. Mail Notice will be sent to the last known address reflected in state DMV registration records for each Class Member. Additionally, before the mailing of the Class Notice, an address search through the National Change of Address database will be conducted. The Settlement Administrator will re-mail the Class Notice where a forwarding address has been provided for any mailed notice returned as undeliverable. For any remaining undeliverable notice packets, the Settlement Administrator will perform an advanced address search (*e.g.*, a skip trace) and re-mail any undeliverable Class Notices if any new and current addresses are found. Notice will also be emailed to all Class Members for whom a valid email address is obtained. *See id.* at ¶ 17. In addition, a dedicated website, toll-free number, email account, and post office box have been (or will soon be) established so that Class Members can readily direct any questions, obtain additional copies of materials sent by the Settlement Administrator, and find instructions on how to submit a Claim. *See id.* at ¶¶ 25-31.

The proposed Notice Program also complies with the standards of fairness, completeness, and neutrality required of a settlement class notice distributed under

the authority of the Court. The Parties respectfully ask that the Court approve the retention of JND Legal Administration as the Settlement Administrator to oversee notice and claims administration for this Settlement. JND Legal Administration has successfully administered numerous complex class action settlements and has been retained on competitive and favorable terms.

VI. THE COURT SHOULD SET SETTLEMENT DEADLINES AND SCHEDULE A FAIRNESS HEARING

The last step in the approval process is the final approval hearing, at which point the Court may hear any evidence and argument necessary to evaluate the Settlement. At that hearing, proponents of the Settlement may explain and describe its terms and conditions and offer argument in support of settlement approval, and Settlement Class members, or their counsel, may be heard in support of or in opposition to the Settlement.

If it preliminarily approves the proposed Settlement, Plaintiffs ask the Court to set the following schedule, and Bosch LLC agrees. The proposed schedule will provide ample time and opportunity for Class Members to decide whether to request exclusion or object. The schedule provided in the proposed Preliminary Approval order is driven by the date on which preliminary approval of the Settlement is granted and the date selected for the final approval hearing. Specifically, it provides the following:

Event	Proposed Date
Class Notice Program and Claims Period begins	Within 15 business days after the entry of the Preliminary Approval Order
Motion for Attorneys' Fees and Expenses Application filed	30 after the Notice Date
Objection and Opt-Out Deadline	60 after the Notice Date
Motion for Final Approval filed	100 days after the Notice Date
Fairness Hearing	150 days after Preliminary Approval

To allow adequate time to obtain necessary information from the state DMVs and for mailing notices, Plaintiffs request that the Court promptly enter the proposed Preliminary Approval Order. If the Court enters the Preliminary Approval Order this week, Plaintiffs respectfully submit that the Fairness Hearing can be scheduled at a date and time convenient to the Court within 150 days, or as soon after that as suitable for the Court after Class Notice. The parties will inform the Court of the calendar date that should be considered the Notice Date as soon as it becomes known.

CONCLUSION

For all these reasons, the Court should grant the requested relief and enter the accompanying proposed Preliminary Approval Order.

DATED: February 13, 2023

Respectfully submitted,

/s/ Steve W. Berman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 13, 2023, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

Dated: February 13, 2023

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman