IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JEREMY RAYMO, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. FCA US LLC, a Delaware corporation, and CUMMINS INC., an Indiana corporation, Defendants.	Case No. 2:17-cv-12168 Hon. Terrence G. Berg Mag. Judge Stephanie Dawkins Davis

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs' settlement with FCA US LLC ("FCA US") and Cummins Inc. ("Cummins"), embodied in the Settlement Agreement (attached as Exhibit 1), is fair, reasonable, and adequate, was negotiated in good faith in arm's-length negotiations, and should be preliminarily approved in light of federal judicial policy favoring settlement of class actions?

Suggested Answer: **Yes.**

2. Whether the Court should provisionally certify the Settlement Class as it is defined herein under Federal Rules of Civil Procedure 23(a) and 23(b)(3)?

Suggested Answer: **Yes.**

3. Whether the Court should appoint Hagens Berman Sobol Shapiro LLP; Carella, Byrne, Cecchi, Brody & Agnello, P.C.; Seeger Weiss LLP; and The Miller Law Firm, P.C. as Class Counsel where they have extensive experience in similar class action litigation and resources to ensure the matter is resolved efficiently and effectively?

Suggested Answer: **Yes.**

4. Whether the Court should approve the Settlement Parties' proposed notices to Class Members where they fairly and fully apprise the prospective Members of the Class of the terms proposed in the settlement, the reasons for the settlement, the legal effect of the settlement, and provide Class Members with an opportunity to lodge

objections and/or opt out, and authorize Class Counsel to retain JND Legal Administration as Settlement Administrator?

Suggested Answer: **Yes.**

5. Whether the Court should enter the proposed schedule and set a date for a fairness hearing to consider any objections to the proposed settlement no earlier than 125 days after Preliminary Approval is granted?

Suggested Answer: **Yes.**

STATEMENT OF CONTROLLING OR MOST IMPORTANT AUTHORITY

- Federal Rule of Civil Procedure 23
- *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)
- *Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160 (E.D. Mich. 2006)
- *Beattie v. CenturyTel, Inc.*, 511 F.3d 554 (6th Cir. 2007)
- *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003)
- *Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006)
- *IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583 (E.D. Mich. 2006)
- *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188 (E.D. Mich. Dec. 13, 2011)
- *In re Rio Hair Naturalizer Prods. Liab. Litig.*, 1996 WL 780512 (E.D. Mich. Dec. 20, 1996)
- *Senter v. Gen. Motors Corp.*, 532 F.2d 511 (6th Cir.)
- *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985 (S.D. Ohio 2001)
- *UAW v. Gen. Motors Corp.*, 497 F.3d 615 (6th Cir. 2007)
- *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013)

Plaintiffs Jeremy Raymo, Forrest Poulson, Gary Gaster, Brendon Goldstein, Manuel Pena, John Reyes, Dennis Kogler, Clarence "Todd" Johnson, Stephen Zimmerer, Justin Sylva, Ian Hacker, Jason Gindele, James Blount, Luke Wyatt, Chris Wendel, Darin Ginther, and Matt Baffunno ("Plaintiffs")[2] respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Class Action Settlement. Plaintiffs seek preliminary approval of the proposed Class Action Settlement ("Settlement" or "Settlement Agreement") with FCA US LLC ("FCA US") and Cummins Inc. ("Cummins").

I. INTRODUCTION

Plaintiffs, FCA US, and Cummins (collectively, the "Parties") have reached a proposed Settlement resolving Plaintiffs' claims concerning model year 2013 to 2017 Dodge Ram 2500 and 3500 trucks with a Cummins 6.7-liter diesel engine ("Trucks"). The Settlement provides real and meaningful compensation to Class Members, with payments totaling $6 million and Class Members receiving checks for an estimated $100.40 without the need to file claims or surmount administrative barriers.

Plaintiffs alleged that Defendants defrauded consumers by developing, marketing, and selling the Trucks with an emissions system that did not perform as advertised, and failed to disclose material defects in the Trucks, namely a "washcoat

[2] Plaintiff Jeremy Batey is neither a signatory to the Agreement nor is he proposed as a Class Representative, but he is eligible for settlement benefits as a Class Member. Mr. Batey has been and remains incarcerated and unable to satisfy the duties of a class representative.

defect" and "flash defect" as described in the First Amended Class Action Complaint ("FAC"). ECF No. 17, PageID.2469. The proposed Settlement would resolve all of the claims asserted by Plaintiffs against Cummins and FCA US in this action.

The proposed settlement comes after many months of arm's-length negotiations. The negotiations included direct settlement discussions, the exchange of settlement discovery materials, formal mediation sessions with Judge Morton Denlow (Ret.) in 2022, and with mediator Thomas McNeill in 2024, and numerous email and telephonic discussions. As a result of these negotiations, Plaintiffs have achieved a settlement that will provide substantial relief to the Class. The benefits the Class Members will receive through the Proposed Settlement are fair, reasonable, and adequate in light of the substantial risks of continued litigation.

Under the terms of the Settlement, Defendants will provide a total payment of $6 million for the benefit of the Class. After deducting estimated notice and settlement administration costs, litigation costs, and allowable fees and incentive awards, counsel estimates that this settlement will result in a *pro rata* payment of approximately $100.40 per Class Truck, in the form of a check mailed directly to Class Members using FCA US records, without the need to submit a claim form. This is an exceptional result for the Class, with direct payments and no administrative burden.

The proposed Settlement Class also satisfies the requirements of Fed. R. Civ. P. 23. The Class, with over 33,000 members, easily satisfies numerosity. And because

the claims asserted are based on a common course of conduct relating to substantially identical vehicles, the requirements of commonality and typicality are met. Further, he proposed Class has and will continue to receive adequate representation by experienced counsel in this case. The Court should grant certification under Rule 23(b)(3) because common issues of law and fact predominate, and class action is a superior method of adjudication.

Accordingly, the Settlement satisfies all the prerequisites for preliminary approval. Therefore, Plaintiffs respectfully request that the Court grant preliminary approval and enter the proposed Preliminary Approval Order.

II. PROCEDURAL HISTORY

Plaintiffs filed a Class Action Complaint on July 3, 2017 (ECF No. 1, PageID.1), and the First Amended Class Action Complaint ("FAC") on October 4, 2018 (ECF No. 17, PageID.2469). On July 30, 2020, the Court entered an Order Granting in Part and Denying in Part Defendants' Motions to Dismiss ("MTD Order," ECF No. 50, PageID.6322), granting in part and denying in part Cummins and FCA's motions to dismiss the FAC, in which the Court dismissed without prejudice (1) Plaintiffs' claims against FCA and Cummins for violations of the RICO and MMWA statutes, (2) Plaintiffs' state law claims for breach of contract in all states, (3) Plaintiffs' claims for unjust enrichment asserted under the laws of California and

Texas, (4) Plaintiffs' claims for fraudulent omission in all states, and (5) Plaintiffs' claims for violations of state consumer protection statutes in all states. *Id.*

The Court preserved claims for unjust enrichment under Alabama, Colorado, Florida, Georgia, Idaho, Kentucky, Michigan, Mississippi, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Utah, Virginia, and Washington state law, and preserved Plaintiffs' state law claims against FCA US and Cummins for affirmative representations to the extent they do not rest on alleged misrepresentations found by the Court in its MTD Order to be non-actionable.

After engaging in direct settlement discussions and exchanging settlement discovery, the Parties engaged in formal mediation with Judge Morton Denlow (Ret.), including numerous follow-up negotiations via email and by telephone. As a result of these efforts, on October 3, 2022, Plaintiffs filed a motion seeking preliminary approval of a partial settlement between Plaintiffs and Cummins. ECF No. 72, PageID.7168. Defendant FCA opposed the settlement (ECF No. 74, PageID.7456), and after further briefing and oral argument, the Court issued an Order granting preliminary approval on September 30, 2023. ECF No. 97, PageID.8072. The Court's Order referred to representations made by Plaintiffs' counsel that the class comprised 17,705 members. *See, e.g.*, *id.* at PageID.8082.

Before notice was issued to the Class, the Parties discovered that the original list of Class Vehicles provided by FCA was generated in error, and the true number of

class vehicles was not 17,705 as previously reported, but 33,918 vehicles. The Parties informed the Court of this error on December 4, 2023, at which time the Court instructed the Parties to engage in further settlement negotiations.

In accordance with this instruction, the Parties engaged a mediator, Tom McNeill, and engaged in extensive arms-length negotiations including a day-long mediation session on February 27, 2024, and numerous emails, video calls, and telephone calls with the mediator that ultimately resulted in the global settlement agreement presented for preliminary approval in this motion.

III. FACTUAL BACKGROUND

Plaintiffs have alleged that the Class Vehicles contain a washcoat defect, which, in simple terms, degraded the performance of the vehicles' emissions controls, leading to emissions in excess of federal standards, and forcing vehicles into "limp mode," creating safety risks and out of pocket expenses. Plaintiffs also allege a flash defect, which involved a "flash" update to the vehicles' computer systems that caused a significant reduction in fuel economy. Plaintiffs allege that despite knowledge of the defects, Defendants continued to market and sell the vehicles as low emissions trucks that met the relevant federal emissions standards. Defendants deny that these defects exist, that Plaintiffs and Class Members suffered cognizable damage, or that Defendants are liable to Plaintiffs and Class Members.

IV. THE SETTLEMENT AGREEMENT AND TERMS

A. The Settling Classes

Plaintiffs seek to certify the following Class for Settlement purposes only:

> All persons and entities who purchased or leased a new 2013, 2014, or 2015 Dodge Ram 2500 or 3500 truck with Cummins Diesel between November 26, 2014 and July 13, 2016 in the following states: Alabama, California, Colorado, Florida, Georgia, Idaho, Kentucky, Michigan, Mississippi, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Utah, Virginia, and Washington.[3]

See Ex. 1, Settlement Agreement, § II.A.5. According to FCA US records, 33,918 vehicles were sold in the relevant states during the November 26, 2015 to July 13, 2016 Class Period. *See* Ex. 4, Berman Decl., ¶ 3.

B. The Relief and Settlement Consideration

The Settlement provides substantial relief to the Settlement Class in the form of payments totaling $6,000,000.00 from Cummins and FCA US into a Qualified Settlement Fund. *See* Ex. 1, Settlement Agreement, § III.A–C, F. Class Members, who reside in every state with surviving claims, will be entitled to a *pro rata* share of the Net Settlement Fund for each Class Vehicle purchased, with no claim forms required. Checks will be mailed to Class Members using purchase records provided by FCA US

[3] Excluded from the Settlement Class are: Cummins and FCA US; any affiliate, parent, or subsidiary of Cummins or FCA US; any entity in which Cummins or FCA US has a controlling interest; any officer, director, or employee of Cummins or FCA US; any successor or assign of Cummins or FCA US; and any judge to whom this Action is assigned, and his or her spouse; individuals and/or entities who validly and timely opt out of the settlement; Class Members who previously released their claims in an individual settlement with respect to the issues raised in the Action. *Id*

(after using available tools to update addresses and locate Class Members who have moved). *Id.*, § III.G. Plaintiffs' Counsel estimates that after deducting any court-approved litigation expenses, incentive awards, attorney fees, and Settlement Administration costs, the recovery per Class Vehicle will likely be approximately $100.40.[4]

The Settlement distribution process is designed to be efficient and easy for Class members. After the Final Effective Date of the Settlement, Settlement Checks reflecting the *pro rata* share of the Net Settlement Fund (estimated to be about $100.40 per vehicle) will be mailed to all Class Members in the same manner as the Short Form Notice within 15 days of Settlement Fund availability. *Id.*, § III.G. – H. Approximately ninety (90) days after the issuance date of a check, the Settlement Administrator will mail a reminder notice to Class Members who have not cashed their checks. *Id.*, § III.H.1. – 2. Any Settlement Checks that are not cashed after 115 days from the date of mailing will be void, and the funds will revert to the Net

[4] *See* Ex. 4, Berman Decl., ¶ 4. The per-vehicle recovery estimate assumes solely for purposes of preliminary approval that the Court will approve $5,000 incentive payments for the Proposed Class Representatives, award 30% of the Net Settlement Fund as attorney's fees as permitted by the Settlement Agreement, and approve the Settlement Administrator's estimated costs for providing notice and distributing payments. Plaintiffs' Counsel has also conservatively estimated its litigation expenses, and that estimate is reflected in the per-vehicle recovery estimate. Plaintiffs' Counsel will include an accounting of all claimed costs and make a specific fee request in the anticipated motion for attorney's fees, costs, and incentive awards, and the final per-vehicle recovery will be calculated reflecting such amounts as the Court may approve in an Order granting final approval to the Settlement. *Id.*

Settlement Fund. *Id.*, § III.H.3. After all checks have either been cashed or expired, the Settlement Administrator will distribute the remaining Net Settlement Fund on a *pro rata* basis to Class Members who cashed their original checks if economically feasible in the same manner as the original distribution. *Id.*

C. Class Notice Program

The Notice Program is designed to be highly effective at providing actual notice to members of the Class. The Settlement includes direct notice by U.S. Mail of the Short Form Notice[5] to all Class Members, using appropriately updated contact information drawn from FCA US sales records. *Id.*, § V.C. The Class Notice Program will also include publishing a Settlement Website, a Long Form Notice[6] (available via the website or upon request), a toll-free telephone number to provide settlement information to members of the Class, and notice to State and Federal officials under the Class Action Fairness Act, 28 U.S.C. § 1715. *See* Ex. 1, Settlement Agreement, § V.B.–G.

Because the Class comprises people who purchased or leased *new* Ram 2500 and 3500 trucks, the Parties believe that FCA US's databases will contain a highly accurate list of the original purchaser or lessor Class Members, including addresses at the time of purchase. These addresses will be updated using tools available to the

[5] *See* Ex. 2, Short Form Notice (Settlement Agreement Ex. 2).

[6] *See* Ex. 3, Long Form Notice (Settlement Agreement Ex. 1).

Settlement Administrator, and copies of the Short Form Notice will be mailed to every Class Member at their most recent available address. *Id.*, § V.C., H.

D. Release of Claims

As set forth in the Settlement Agreement, Section VIII, in exchange for the above relief, Plaintiffs and the Settlement Class will release FCA US and Cummins from liability for all claims arising out of this litigation. *Id*. § VIII(B). However, the Settlement Agreement does not release claims relating to a separate litigation, *Biederman et al. v. FCA US LLC et al.*, No. 1:23-cv-06640 (N.D. Cal.), which are specifically exempted from the Release. *Id*. § VIII(I).

E. Class Member Requests for Exclusion or Objections

Any Class Member may make a request for exclusion by submitting a request in writing stating that the Class Member wishes to be excluded from the Class. *Id*., § VI; *see also* Ex. 2, Short Form Notice, at p. 3 ("Can I Exclude Myself From The Class?"); Ex. 3, Long Form Notice, at p. 9 (Question 13 "Can I Exclude Myself From The Class?"). The deadline for submitting an opt-out request will be specified in the Court's preliminary approval order – Plaintiffs' Proposed Schedule would require requests to be postmarked within 75 days of Preliminary Approval. *Id*., § VI.A.

Likewise, the Settlement Agreement states that any member of the Class may object to the Settlement. Ex. 1, Settlement Agreement, § VII. Objections must be postmarked by the date specified in the Preliminary Approval Order, and indicate "the

specific reason(s), if any, for the objection, including any legal support the Class Member wishes to bring to the Court's attention, any evidence or other information the Class Member wishes to introduce in support of the objections, a statement of whether the Class Member intends to appear and argue at the Fairness Hearing, and the Class Member(s) to which the objection applies." *Id.*, § VII.A. The Notices clearly state these requirements for Class Members. *See* Ex. 2, Short Form Notice, at p. 3 ("How Do I Object to the Settlement"); Ex. 3, Long Form Notice, at p. 11 (Question 17 "How Do I Object To The Settlement?"). Plaintiffs' Proposed Schedule would require any Objections to be postmarked within 75 days of Preliminary Approval.[7]

The Settlement Administrator will promptly report any requests for exclusion, objections, and/or related correspondence to the Settlement Parties, and the Settlement Administrator shall file with the Court a document detailing the scope, method, and results of the notice program along with a list of those persons who have opted out or excluded themselves from the Settlement not less than thirty days prior to the Final Approval Hearing.[8] *See* Ex. 1, Settlement Agreement, § V.H.

[7] Plaintiffs' Proposed Schedule would require the Notice Program to begin 15 days after Preliminary Approval ad be completed within 30 days of Preliminary Approval. This provides a period of between approximately 45 and 59 days for Class Members to submit Exclusion Requests or Objections.

[8] Plaintiffs' Proposed Schedule sets this deadline at 95 days after Preliminary Approval, 30 days before the Fairness Hearing.

F. Class Counsel Fees and Expenses, Plaintiffs' Service Awards, and Class Notice and Administration Expenses

1. Attorney's Fees, Litigation Expenses, and Service Awards

Counsel will file a motion for attorneys' fees and expenses prior to the fairness hearing, seeking attorneys' fees not to exceed 30% of the Settlement Fund. *Id.*, § IV.B. Class Counsel may also seek an award of out-of-pocket expenses incurred in prosecuting this case and estimated expenses through the final implementation of the Settlement Agreement. *Id.* Further, the Parties have agreed that Class Counsel may request Class Representative Service Awards of $5,000.00. *Id.*, § IV.A.

2. Class Notice and Administration Expenses

All administration expenses, including notice to the Class Members of the proposed Settlement, will be paid from the Settlement Fund. The costs of Settlement Administration as shown in JND Legal Administration's proposal (Ex. 4, Berman Decl., ¶ 9, Ex. E) are estimated to be $229,000, which includes the costs of 1) preparing the required Class Action Fairness Act ("CAFA") notice; 2) setting up and administering the Qualified Settlement Fund; 3) mailing copies of the Proposed Short Form Notice to class members; 4) processing Class opt-outs and objection; 5) setting up and managing telephone and website information portals and responding the Class Member emails; and 6) distributing payment checks to Class Members. *See id.* Plaintiffs' Counsel obtained competitive bids for providing Class settlement

administration services, and in their experience and judgment these estimated costs are reasonable and justified considering the size of the class. Ex. 4, Berman Decl., ¶ 9.

V. THE PROPOSED SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

Federal Rule of Civil Procedure 23(e) governs the settlement of class actions. *See* Fed. R. Civ. P. 23(e); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Under Rule 23(e), a class settlement must be "fair, reasonable, and adequate." *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) (citing *Granada Inv., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983). The Sixth Circuit has recognized that "the law generally favors and encourages the settlement of class actions." *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981); *UAW*, 497 F.3d at 632 ("[W]e must consider—the federal policy favoring settlement of class actions[.]"); *Griffin v. Flagstar Bancorp, Inc.*, 2013 WL 6511860, at *2 (E.D. Mich. Dec. 12, 2013) ("The Sixth Circuit and courts in this district have recognized that the law favors the settlement of class action lawsuits.").

The Sixth Circuit relies on seven factors in evaluating class action settlements: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *UAW*, 497 F.3d at 626; *see also Williams*, 720 F.2d at 922-23. In considering these factors, courts apply

a "strong presumption" in favor of finding a settlement to be fair. *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1008 (S.D. Ohio 2001) ("Being a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement."); *see also Bautista v. Twin Lakes Farms, Inc.*, 2007 WL 329162, at *5 (W.D. Mich. Jan. 31, 2007). The seven-factors support approval of the Agreement.

A. There is No Fraud or Collusion

The Parties were represented by experienced counsel. Class Counsel have significant experience litigating numerous consumer class actions, including automotive defect cases. *See* Ex.4, Berman Dec. Exs. A-D. The Settlement Agreement was achieved through arm's-length and good faith negotiations between the Parties with Judge Morton Denlow (Ret.), and further extensive negotiations with mediator Tom McNeill. There is no indication of fraud or collusion. *In re Telectronics Pacing*, 137 F. Supp. 2d at 1018 ("Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.") (citing NEWBERG ON CLASS ACTIONS § 11.51 (3d ed. 1992)).

B. The Complexity, Expense, and Likely Duration of the Litigation Favor Approval

The Settlement in this action comes at an appropriate time. If the litigation continues, there will be substantial additional expense to the Settlement Parties associated with necessary expert discovery, dispositive motion practice, and pre-trial preparations. The Parties have negotiated at arm's-length to reach a fair and

reasonable settlement, preventing the need for a drawn-out litigation consuming thousands of hours in attorney time, millions of dollars in litigation expenses for all Parties, and delayed (or non-existent) relief to the Class. If litigation continues, for example, the Settlement Parties will engage in extensive fact and expert discovery, including depositions, review of thousands of documents, and future briefing on motions to dismiss, class certification, and summary judgment. Moreover, a trial in this action would be complex given the relevant factual and legal issues involved.

Even if Plaintiffs prevailed at trial, it could be years before any Settlement Class member received any benefit in light of likely post-trial motions and appeals. In contrast, the Settlement provides substantial relief to Class members promptly and efficiently. "Whatever the relative merits of the parties' positions, there is no such thing as risk-free, expense-free litigation." *IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 596 (E.D. Mich. 2006).

C. The Amount of Discovery Engaged in by the Parties Favors Approval

Even though Settlement negotiations began prior to the formal commencement of discovery, Plaintiffs have consulted extensively with their experts and engaged in settlement discovery relating to the alleged defects with Defendants. This allowed Class Counsel to make informed decisions regarding the terms of the Settlement and sufficiently assess whether they are fair, reasonable, and adequate.

D. The Likelihood of Success on the Merits Favors Approval

When evaluating the reasonableness of a class action settlement, courts consider "the risks, expense, and delay Plaintiffs would face if they continued to prosecute this complex litigation through trial and appeal and weighs those factors against the amount of recovery provided to the Class in the Proposed Settlement." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003). A settlement is generally viewed favorably because it "avoids the costs, delays, and multitudes of other problems associated with them." *See In re Telectronics Pacing*, 137 F. Supp. 2d at 1013 (quotation marks and citation omitted).

Here, but for the Settlement, the litigation would continue to be contested, and counsel for all Parties were committed to litigate this case through trial and beyond. Accordingly, there are substantial risks and costs if this action were to proceed. While Class Counsel believes that the Plaintiffs and putative Class may ultimately prevail at trial, Class Counsel recognizes that ultimate success is not assured and believes that, when considering the risks of proving both liability and recoverable damages—and surviving appeal—the Settlement is unquestionably fair, adequate, and reasonable. *See, e.g.*, *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *11 (E.D. Mich. Dec. 13, 2011) (while plaintiffs may "remain optimistic about their ultimate chance of success[,] … there is always a risk that Defendants could prevail with respect [to] certain legal or factual issues," which weighs in favor of approval of settlement).

Avoiding unnecessary expense of time and resources clearly benefits all parties and the Court. *See UAW v. Ford Motor Co.*, 2006 WL 1984363, at *24 (E.D. Mich. July 13, 2006) ("The costs and uncertainty of lengthy and complex litigation weigh in favor of settlement.").

Furthermore, since Class Counsel initially sought Preliminary Approval of the partial settlement with Cummins in October 2022, developments in the case law in the Sixth Circuit and in this District have significantly increased the risks to Plaintiffs and the Class of continuing litigation. Specifically, in April 2023, the Sixth Circuit issued its opinion in *In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig.*, 65 F.4th 851 (6th Cir. 2023), holding that state-law fraud and consumer protection claims were impliedly preempted by the Energy Policy and Conservation Act. In June 2023, a court in this District issued Orders dismissing two cases asserting similar state-law claims against vehicle manufacturers relating to alleged excessive diesel vehicle emissions. *See In re Duramax Diesel Litig.*, 681 F. Supp. 3d 767 (E.D. Mich. 2023); *Counts v. Gen. Motors, LLC*, 606 F. Supp. 3d 678 (E.D. Mich. 2023). In those cases, Judge Ludington extended the holding in *Ford* and found that the plaintiffs' state-law claims were similarly preempted by the Clean Air Act ("CAA"). And in January 2024, this Court similarly found that state-law claims against FCA US and Cummins relating to alleged excessive diesel emissions were impliedly preempted by the CAA. *See Bledsoe v. FCA US LLC*, 2024 WL 445334 (E.D. Mich. Jan. 26,

2024). Although Plaintiffs' Counsel does not concede that *Ford*, or the reasoning reflected in the *Duramax*, *Counts*, or *Bledsoe* decisions, applies to the claims asserted here, the similarity of the facts and claims presents a significant increase in the risk that continuing litigation could result in the dismissal of the claims in this case, which would eliminate any compensation for Class Members.

E. Experienced Class Counsel's Opinions Favor Approval

In considering approval of a proposed settlement, "[t]he Court should also consider the judgment of counsel and the presence of good faith bargaining between the contending parties." *Rankin v. Rots*, 2006 WL 1876538, at *3 (E.D. Mich. June 27, 2006). Class Counsel here have extensive experience in handling class action cases, including automotive defect cases like at issue here. Class Counsel have thoroughly investigated and analyzed the claims alleged in this action and made informed judgments regarding the Settlement and believe it is fair, reasonable, and adequate. Class Counsel also engaged in good-faith bargaining overseen by experienced mediators, further weighing in favor of preliminary approval.

F. The Settlement Is Fair to Absent Class Members

This factor evaluates whether the settlement "appears to be the result of arm's-length negotiations between the parties and fairly resolves all claims which were … asserted." *In re Rio Hair Naturalizer Prods. Liab. Litig.*, 1996 WL 780512, at *14 (E.D. Mich. Dec. 20, 1996) (internal citation omitted). As set forth above, the

Settlement Agreement was reached only after multiple arm's-length mediations and extensive settlement discussions spanning over two years. The resulting Settlement provides fair terms to all Class Members. Moreover, the release in this case extends only to claims that were asserted in this case, minimizing the risk of unfairness to absent class members.

G. The Settlement Is Consistent with the Public Interest

Finally, the Court considers whether the settlement is consistent with the public interest. "[T]here 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." *In re Cardizem CD*, 218 F.R.D. at 530 (quoting *Granada*, 962 F.2d at 1205). Here, it is clearly in the public interest to approve this Settlement. The Settlement provides direct payments to Class Members estimated to be over $100 per vehicle. It further resolves the claims of the Class, eliminates the risk of non-recovery on behalf of the Class, provides certainty to the Defendants, and eases the burden on the Court's resources.

VI. THE SETTLEMENT CLASS SHOULD BE PRELIMINARILY CERTIFIED

A proposed settlement class must satisfy the requirements of Rule 23. *UAW*, 497 F.3d at 625. To be entitled to class certification, a plaintiff must satisfy each of Rule 23(a)'s four prerequisites to class certification: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. *See* Fed. R. Civ. P. 23(a). In

addition, the proposed class must meet one of the three requirements of Rule 23(b). *See id.* That the Settlement Parties have reached a settlement in this matter is a relevant consideration in the class-certification analysis. *See Amchem*, 521 U.S. at 619. Indeed, "courts should give weight to the parties' consensual decision to settle class action cases, because that law favors settlement in class action suits." *Daoust v. Maru Rest., LLC*, 2019 WL 1055231, at *1 (E.D. Mich. Feb. 2, 2019) (granting preliminary approval of class action settlement); *see also Amchem*, 521 U.S. at 620 (when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial").

A. The Settlement Class Satisfies the Requirements of Rule 23(a)

The proposed Settlement Class meets Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation. *See Senter v. Gen. Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *UAW*, 497 F.3d at 626. The Class, consisting of the current and former owners and lessees of 33,918 Class Vehicles, is "so numerous that joinder of all members is impracticable." *See* Fed. R. Civ. P. 23(a)(1).

Common issues of fact and law are present because the causes of action flow from the same common defects. *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (affirming finding of commonality based on an alleged uniform design

defect in vehicles). These common issues include whether the washcoat defect and/or the flash defect exists in the Trucks, and whether Defendants were aware of the defects. Typicality is similarly satisfied because the Class's claims all arise from the same course of conduct and the common defects. *See Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160, 169 (E.D. Mich. 2006) (finding typicality to be satisfied where the plaintiffs' claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members") (citation omitted).

Finally, Plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Plaintiffs have common interests with other Class Members and have vigorously prosecuted the interests of the Class through qualified counsel. *Rutherford v. City of Cleveland*, 137 F.3d 905 (6th Cir. 1998). There is no conflict between Plaintiffs and any member of the Settlement Class. Rather, Plaintiffs should be applauded for their efforts in obtaining a successful resolution of this case.

B. The Settlement Class May Be Properly Certified Under Rule 23(b)(3)

In addition to the requirements of Rule 23(a), a proposed class must satisfy one of the three alternatives of Rule 23(b). Plaintiffs here seek certification under Rule 23(b)(3).

1. This Action May Be Certified Under Rule 23(b)(3)

Certification under Rule 23(b)(3) is appropriate here. Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any

questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These requirements were added "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3) advisory committee's notes to 1966 Amendment). Both of these requirements are satisfied here.

a. Common issues of fact and law predominate.

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) (quoting *Amchem*, 521 U.S. at 632). A plaintiff "must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, … predominate over those issues that are subject only to individualized proof.'" *Id.* (citation omitted).

Here, Defendants' common course of conduct with respect to the defects gives rise to the basis for the claims at bar and demonstrates that common proof, not dependent on any individual Class Member's circumstances, overwhelmingly predominates in this case and weighs determinatively in favor of certification.

The common questions applicable to every Class Member include whether there are defects, whether Defendants were aware of the existence of the defects, whether Defendants concealed the existence of the defects or made misrepresentations or material omissions regarding such defects, and whether Class Members sustained damages. Courts have routinely found that similar common issues predominate in automotive defect cases. *See, e.g.*, *Daffin*, 458 F.3d at 554; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (common issues predominate such as whether Land Rover was aware of and had a duty to disclose the defect); *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 532-34 (C.D. Cal. 2012) (predominance found based on common evidence of the nature of the defect, Honda's knowledge, and what Honda disclosed to consumers). Given the uniformity of the defects and Defendants' conduct, resolution of the Settlement Class's claims is susceptible to adjudication on a collective basis pursuant to Rule 23(b)(3).

b. A class action is a superior method of adjudication.

Rule 23(b)(3) also requires that Plaintiffs demonstrate that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Class-wide resolution of this action is the superior method of adjudication.

First, the value of the claims is too low to incentivize many Class Members to litigate their claims individually and 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). This is especially true here, where Settlement Class Members would likely be unable or unwilling to individually shoulder the expense of litigating the claims against well-funded defendants like Cummins and FCA US, given the potential limited monetary awards for those Class Members.

In addition, because the central issues here are common to all Class Members, resolution on a class-wide basis is the most efficient method of resolving the claims. *See* 2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS, § 4.74 (5th ed. 2020) (noting that "a finding of predominance is typically … coupled with a finding that a class is manageable"). Indeed, proceeding as a class action will "achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'" *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 130 (2d Cir. 2013) (quoting Fed. R. Civ. P. 23(b)(3) advisory committee's notes to 1946 Amendment); *see also Bobbit v. Acad. of Court Reporting, Inc.*, 252 F.R.D. 327, 345 (E.D. Mich. 2008).

VII. THE FORM AND MANNER OF NOTICE ARE PROPER

The manner in which the Class Notice is disseminated, as well as its content, must satisfy Rule 23(e)(1) (governing settlement notice) and due process. *See Daoust*, 2019 WL 1055231, at *2. Plaintiffs adequately satisfy these requirements. Rule 23(e) requires that notice of a proposed settlement be provided to class members. Fed. R. Civ. P. 23. 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." *Daoust*, 2019 WL 1055231, at *2.

As described in detail in Section IV.C. above, the proposed notice plan satisfies all of Rule 23's requirements. Moreover, the language of the Class Notice was drafted and agreed to by the Parties and is written in plain, simple terminology, including: (1) a description of the Settlement Class; (2) a description of the claims asserted in the action; (3) a description of the Settlement and release of claims; (4) the deadlines for requesting exclusion; (5) the identity of Class Counsel for the Settlement Class; (6) the Final Approval Hearing date; (7) an explanation of eligibility for appearing at the Final Approval Hearing; (8) the deadline for objecting to the Settlement; and (9) the maximum amount of Attorneys' Fees and Expenses and Case Contribution Awards that may be sought. *See* Ex. 2, Short Form Notice; Ex. 3, Long Form Notice. The Class Notice thus allows Settlement Class Members to make an informed and intelligent decision on whether to exclude themselves or object to the Settlement.

The dissemination of the Class Notice likewise satisfies all requirements. The Settlement Administrator will mail the Short Form Notice to the last known address of each potential member of the Settlement Class, which will be checked and updated appropriately. *See* Ex. 1, Settlement Agreement, § V.H.1. If any Class Notice

is returned as undeliverable, the Settlement Administrator shall perform a reasonable search for a more current address and re-send the Class Notice. *Id*.

Accordingly, the proposed Class Notice complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the Settlement as fair, reasonable, and adequate, and in the best interest of the Class Members; (2) preliminarily certify the proposed Settlement Class for settlement purposes only; (3) preliminarily appoint Hagens Berman Sobol Shapiro, LLP; Carella, Byrne, Cecchi, Brody & Agnello, P.C.; Seeger Weiss LLP; and The Miller Law Firm, P.C. as Class Counsel; (4) approve the form and content of, and direct the distribution of, the proposed Class Notice and accompanying Claim Form, and authorize and direct the Parties to retain JND Legal Administration as Settlement Administrator; and (5) adopt Plaintiffs' proposed schedule for settlement-related deadlines, and schedule a Final Approval Hearing not earlier than one hundred and twenty-five (125) days after Preliminary Approval is granted.

DATED: May 22, 2024

Respectfully submitted,

By: */s/ Steve W. Berman*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2024, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

By: */s/ Steve W. Berman*
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