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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALFRED SALAS and GLORIA ORTEGA, individually, and on behalf of a class of similarly situated individuals,

Plaintiffs,

vs.

TOYOTA MOTOR SALES, U.S.A., INC., a California corporation,

Defendant.

Case No.: 15-cv-08629-HDV-E

Judge: Hon. Hernán D. Vera

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APROVAL

Date: December 12, 2024
Time: 10:00 a.m.
Place: Courtroom 10B

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I. INTRODUCTION

Plaintiffs Alfred Salas and Gloria Ortega submit this supplemental brief in response to the Court's questions at the Final Fairness Hearing on October 30, 2024, and as set out in the Court's Minute Order (ECF No. 285). At the Final Fairness Hearing, the Court sought the Parties' briefing as to: (1) whether the Settlement comports with *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021) ("*Briseño*"); (2) why the expected claims rate is acceptable under Rule 23(e); and (3) why this settlement is analogous to other settlements that have been approved. This supplemental brief addresses each question in turn and demonstrates why both the Final Approval and Fee motions should be granted in full.

II. DISCUSSION

A. *Briseño* does not present an obstacle to final approval.

This Court first asks whether *Briseño* presents an obstacle to final approval. It does not. The concerns animating *Briseño* are not present here, and other Ninth Circuit precedents applicable to this action support final approval.

1. The settlement is non-collusive, as it comes after years of tenacious litigation and was guided by a court-appointed special master on the eve of trial.

In *Briseño*, the Ninth Circuit had to consider a settlement which provided for no direct notice to the class, a reversion, and injunctive relief already addressed by the defendant in correcting its product's labeling. In reviewing that settlement, and in ultimately rejecting it, the panel in *Briseño* established that the Ninth Circuit test for evaluating potential collusion applies to post class certification settlements. *Briseño*, 998 F.3d at 1022-28. In so holding, the *Briseño* panel first observed that Federal Rule of Civil Procedure 23(e) had been amended in 2018 to specify factors for evaluation by the district court, including the distribution of class benefits and the attorneys' fees. *Id.* at 1023. This amendment gave the *Briseño* panel room to change the law. Prior to *Briseño*, courts were required to apply the so-called "*Bluetooth* factors"—which evaluated the settlement for "subtle signs" of collusion—only in pre-certification settlements, as those were seen to be susceptible to collusive arrangements between a defendant and class counsel. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941, 947 (9th Cir. 2011) ("*Bluetooth*"). In extending the *Bluetooth* evaluation to post-certification settlements, the *Briseño* panel stated that the parties' incentives

for collusion remain intact following certification, thus erasing the previously seen stark dividing line between pre- and post-certification settlements. *Briseño*, 998 F.3d at 1024-25.

But whatever the stage, the *Bluetooth* factors "in the end are just guideposts." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018) ("*Volkswagen 'Clean Diesel'*"). The Ninth Circuit has stated that in evaluating "all of these factors, considerations, 'subtle signs,' and red flags," the court must look to "the underlying question….: Is the settlement fair?" *Id*. Indeed, the *Briseño* panel emphasized that examining the settlement for collusion does not mean that the court "should unnecessarily meddle in class settlements negotiated by the parties or that courts have a duty to maximize the settlement fund for class members. Far from it." *Briseño*, 998 F.3d at 1027. This is because *Bluetooth* does not erect a bright-line test, and it does not "seek to make any of the identified signs of collusion an independent basis for withholding settlement approval." *Id*.

As discussed in *Briseño* and *Volkswagen* "*Clean Diesel*," settlement evaluation is primarily facts driven, and the bottom line is simply whether the settlement is fair. Here, the salient issues—the settlement terms, the history of contentious litigation, and the two-stage mediation process—all show that the proposed Settlement is non-collusive and should be approved.

This action is a model of adversarial litigation and could not have yielded a collusive settlement. As discussed in the Motion for Final Approval, this was an exceptionally hard-fought case, with Plaintiffs taking a certified class all the way to days before trial. Dkt. No. 274-1, at 2:6-3:22. At every stage of the litigation, Toyota mounted a tenacious defense, filing multiple dispositive motions and appealing an adverse decision. Significantly, as Toyota struggled to extinguish this Action, it defeated plaintiffs in several other class actions asserting the exact same defect, harm, and theories as Plaintiffs here. *See Cardenas v. Toyota Motor Corp*., No. 18-cv-22798 (S.D. Fla.); *Stockinger v. Toyota Motor Corp.*, No. 2:17-cv-00035-VAP-KSx (C.D. Cal.), Dkt. No. 265 (denying motion to certify class for the same alleged HVAC defect); *Bettles v. Toyota Motor Corp.*, 645 F. Supp. 3d 978 (C.D. Cal. 2022) (granting motion to dismiss class action complaint for same alleged HVAC defect). This underscores the potential weaknesses of Plaintiffs' case—weaknesses highlighted by Toyota in its Response to the Motion for Final Approval. *See* Dkt. No. 275, at 10:1-12:21.

Though their claims were exceptionally vulnerable to dismissal, Plaintiffs and their counsel did not yield and accept a paltry settlement.[1] Instead, Plaintiffs' counsel pushed forward, lending considerable attorneys' hours and over $400,000 in out-of-pocket expenses to the Class while bearing a high risk of no recovery. As the action moved past the certification stage, Plaintiffs also retained experienced trial counsel, Kiesel Law LLP, to work with experienced class counsel, Capstone Law APC, to prepare for trial. The Parties finally settled on the eve of trial. That Plaintiffs were prepared to take this Action all the way to trial shows that they were obviously not in cahoots with Toyota. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (explaining that "counsel 'that is not prepared to try a case'… is, almost by definition, inadequate because an inability or unwillingness to try a case means the class loses all of the benefits of adversarial litigation."). *Briseño* also acknowledged this distinction: "By devoting substantial time and resources to the case, class counsel has skin in the game, guaranteeing his or her interest in maximizing the size of the settlement fund." *Briseño*, 998 F.3d at 1025.

Briseño also voiced specific concerns regarding counsel's potential for self-dealing post-certification—namely, that counsel still had an incentive to divide the pie between the class and attorneys' fees in its favor even if the pie grew larger through counsel's aggressive litigation efforts. *Briseño*, 998 F.3d at 1025. But the potential problems identified in *Briseño*'s are entirely absent here.[2] This is because the mediation process, bifurcating the negotiations for class relief and fees, precludes counsel from allocating moneys between themselves and the Class. That is, before attorneys' fees were even discussed, the Parties first resolved class relief. Guided by Court-appointed Settlement Special Master Patrick A. Juneau (Dkt. Nos. 260, 266), the Parties first focused solely on relief to the Class. Declaration of Patrick A. Juneau ("Juneau Decl."), ¶ 7-8. During the mediation sessions, Special Master Juneau identified specific risks to both sides, but particularly Plaintiffs, in going to trial. *Id*. Ultimately, through these arm's-length negotiations, the Parties bridged their differences by agreeing to the class relief offered in the Settlement. *Id*.. This relief reflects a compromise between Plaintiffs and Toyota, who had different views and

[1] Plaintiffs mediated with Toyota in 2016, prior to certification, and did not settle in that mediation.

[2] The facts in *Briseño* also differ from the present case because the *Briseño* settlement provided no direct notice to the class at all, whereas the Direct Notice Plan implemented in the present Action overwhelmingly reached the vast majority of Class Members. *Briseño*, 998 F.3d at 1026.

expectations regarding the strength of their case and the manner of relief to the Class. *See Hanlon*, 150 F.3d at 1027 (finding that courts should give "proper deference to the private consensual decision of the parties").

Only after reaching agreement on the terms of class relief did the parties begin the process of negotiating fees, costs, and service awards. Juneau Decl. ¶ 9. With the guidance of Special Master Juneau, the Parties separately resolved those issues and worked to finalize all terms. *Id*. This two-step procedure, where class relief is negotiated first and is untethered from attorneys' fees and service awards, is the very hallmark of non-collusiveness. Indeed, this two-stage procedure was explicitly endorsed by the Ninth Circuit en banc court in this Circuit's leading case on class action settlements. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019) (en banc) ("*Hyundai*") (approving multi-stage mediation process where settlement benefits were negotiated before attorneys' fees); *see also Hanlon*, 150 F.3d at 1029 (finding that arm's-length negotiation, including two-stage mediation process, provided "independent confirmation that the fee was not the result of collusion or a sacrifice of the interests of the class"); *Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-CV-09405-CAS, 2014 WL 439006, at *10 (C.D. Cal. Jan. 30, 2014) ("[T]he Court notes that fee discussions took place after several months of negotiations over class settlement benefits, in a separate mediation session before a qualified and highly experienced mediator… These factors weigh in favor of approving the Settlement Agreement.").

The class relief itself also reasonable. In evaluating the Settlement's value, "the relief provided to the class cannot be assessed in a vacuum." *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1123 (9th Cir. 2020). Rather, the Ninth Circuit emphasized that "the settlement's benefits must be considered by comparison to what the class actually gave up by settling." *Id*. In *Campbell v. Facebook*, the parties negotiated a settlement that provided injunctive relief, much of which Facebook was already doing prior to settlement and the primary new item being a disclosure in the Help Center section of Facebook's website. *Id*. at 1114-15. An objector complained that the injunctive relief was "worthless." *Id*. at 1123. The Ninth Circuit rejected that argument, even though it acknowledged the relatively weak relief. Importantly, the court in *Campbell* emphasized that "the class did not need to receive much for the settlement to be fair because the class gave up very little." *Id*. This is because, as the district court found, "class members' claims were weak enough that the class was fairly likely to end up receiving nothing at all had this litigation proceeded further." *Id.*

Here, as in *Campbell*, Plaintiffs' case faced numerous challenges that could very well end in defeat, with nothing for the Class. Unlike the vast majority of automotive class actions and settlements, this Action does not involve an alleged defect that implicates a safety concern. This Action involves allegations of a foul odor released into the cabin due to a faulty HVAC design.[3] For its part, Toyota vigorously denies liability and has already defeated several other class actions alleging the same problem. Because Toyota has tenaciously defended this suit for years, the Class Vehicles are now older, making it more urgent for Plaintiffs to deliver benefits before the vehicles age into obsolescence. Had Plaintiffs and Class Counsel walked away from eve-of-trial mediation, not only would they risk losing at trial or in a pre-trial dispositive motion, but even if Plaintiffs were to prevail at trial, Plaintiffs would face an inevitable appeal and potentially several more years before realizing any benefits to the Class. Those benefits would likely not exceed $303 per Class Vehicle, the amount that Plaintiffs' expert attested would be the damages to the Class to remediate the problem. Dkt. No. 274-1, at 11:28-12:2. By that time, after trial and likely appeals, most Class Vehicles may be off the road and whatever benefits could not be adequately delivered to the Class.

Moreover, *Campbell* instructed courts to "consider whether class members were required to release claims that were more meritorious than the theories Plaintiffs pursued in this litigation." Here, the symptom is a foul odor emitted from the car's HVAC. Although this unusual claim makes this Action more challenging to litigate, the flipside is that Class Members lose nothing through the class release. That is, unlike class actions alleging transmission or other major defects, a "smelly HVAC" claim is unlikely to be pursued by any consumer on an individual basis. This means that Class Members are not trading away any valuable individual claims, such as rights under California's lemon laws, through a class-wide release. *See, e.g., Vargas v. Lott*, 787 F. App'x 372, 374 (9th Cir. 2019). Class Members only benefit from the Settlement.

The nature of the alleged defect also makes alternative relief challenging. The proposed relief—a refund of any money paid for a charcoal filter and/or evaporator flush before the Initial Notice Date or up to $100 to replace and install a charcoal filter going forward—is specifically designed to remediate the cabin

[3] Under California consumer law, an allegation of an undisclosed defect that implicates safety issues is much more likely to survive pleadings challenge. *See, e.g., Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 970 (N.D. Cal. 2008), aff'd, 322 F. App'x 489 (9th Cir. 2009); *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 836 (2006). The Parties have disputed whether a safety concern was implicated.

odor issue. Other types of remedies, such as a common fund, would not directly address the alleged defect. And given each Party's negotiating posture, had Plaintiffs held out for other forms of relief, the Parties very likely would not have reached any settlement. Given the strong policy favoring settlement, the potential for a "prettier, smarter, or snazzier" settlement is not a basis for denying approval. *Hanlon*, 150 F.3d at 1027.

As for the attorneys' fees, they are based on Plaintiffs' lodestar, which was generated in response to Toyota's spirited defense over the many years this case was litigated. The lodestar reflects a reasonable rate for the hours of work performed by Class Counsel in working up the case for over eight years up to days before trial. As explained in the Motion for Attorneys' Fees, Costs, and Class Representative Service Awards, Plaintiffs' counsel seeks $350,000 in costs which is a reduction of over $50,000 in actual costs incurred, and a modest 1.06 multiplier for attorney's fees. Dkt. No. 276 at 1. Moreover, any reduction in the attorneys' fees award would not affect the class relief. That is also significant. In a relatively recent order approving an automotive defect settlement, the Honorable Stanley Blumenfeld, Jr. of the Central District of California observed that collusive factors were not present partly because "[a]ttorneys' fees and costs are to be paid separately from any benefit Class Members receive." *Zakikhani v. Hyundai Motor Co.*, No. 8:20-CV-01584-SB, 2023 WL 4544774, at *7 (C.D. Cal. May 5, 2023) (approving class action settlement and awarding counsel $8.7 million in attorneys' fees with 2.04 multiplier).[4] This further supports a finding of non-collusiveness.

Based on the foregoing, it is no surprise that no Class Member has objected and only two opted out. Dkt. 279-1, ¶ 24. This is an unusual reaction to a class action settlement with over 200,000 class vehicles and well beyond what courts typically find to be acceptable. *See Churchill Vill. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming final approval where "only 45" of approximately 90,000 class members objected and 500 opted out); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (granting final approval where opt-out rate is 4.86% of class); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. 810ML02151-JVS, 2013 WL 12327929, at *18 (C.D. Cal. July 24, 2013) ("The absence of a large number of objections to a proposed class action settlement

[4] *See also In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2016 WL 6248426, *23 (N.D. Cal. Oct. 25, 2016) ("Importantly, Class Counsels' attorneys' fees will not diminish the benefits awarded to Class Members under the Settlement.").

raises a strong presumption that the terms of the settlement are favorable to the class members.").

But beyond the raw statistics, the complete dearth of complaints from Class Members, tens of thousands of whom visited the settlement website, shows that the benefits are not insufficient or inadequate. *See, e.g., In re Nexus 6P Prod. Liab. Litig.*, No. 17-CV-02185-BLF, 2019 WL 6622842, at *10 (N.D. Cal. Nov. 12, 2019) (finding that positive class response, including zero objections, "confirms that the settlement is fair and reasonable"). After all, a Class Member who experienced pronounced harm or was particularly irritated by the HVAC odor would be expected to object if they were dissatisfied with the proposed relief. Indeed, objections are common and raised in the vast majority of settlements involving automotive defects.[5] That no Class Member has objected here strongly supports the finding that the Settlement is fair, reasonable, and adequate in light of the claims alleged and the risks of further litigation.

2. The *Bluetooth* factors support final approval of the settlement and attorneys' fees.

Based on the facts and circumstances of this Action, the Parties achieved a settlement untainted by collusion. This is confirmed by the Court's application of the *Bluetooth* factors. Indeed, as *Briseño* recognized, even if each of the *Bluetooth* factors were found in a settlement, that would not compel denial of final approval, as "[d]isproportionate fee awards, clear sailing agreements, and kicker clauses all may be elements of a good deal." *Briseño*, 998 F.3d at 1027.

The first *Bluetooth* factor is whether class counsel "receive[s] a disproportionate distribution of the settlement." *Hyundai*, 926 F.3d at 569 (quoting *Bluetooth*, 654 F.3d at 947). At the outset, *Campbell* held

[5] *See, e.g., Eisen*, 2014 WL 439006, *5 ("Although 235,152 class notices were sent, 243 class members have asked to be excluded, and only 53 have filed objections to the settlement."); *Milligan v. Toyota Motor Sales, U.S.A.*, No. 09-05418-RS, 2012 WL 10277179, *7-8 (N.D. Cal. Jan. 6, 2012) (finding favorable reaction where 364 individuals opted out [0.06%] and 67 filed objections [0.01%] following a mailing of 613,960 notices); *Browne v. Am. Honda Motor Co.*, No. 09-06750-MMM, 2010 U.S. Dist. LEXIS 14575, *49 (C.D. Cal. July 29, 2010) (finding favorable class reaction where, following a mailing of 740,000 class notices, 480 (0.65%) opted out and 11.7 (0.16%) objected); *Yaeger v. Subaru of America*, No. 14-4490-JBS, 2016 WL 4541861, at *14 (D.N.J. Aug. 31, 2016) (finding favorable class reaction where 28 class members objected out of 665,730 class notices or 0.005% and 2,328 individuals (or 0.35%) opted out); *Skeen v. BMW of North America*, No. 13-1531-WHW, 2016 WL 4033969, at *8 (D.N.J. July 26, 2016) (finding favorable class reaction when 123 out of 186,031 recipients of class notices opted out, and 23 submitted objections); *Henderson v. Volvo Cars of N. Am.*, LLC, No. 09-4146-CCC, 2013 WL 1192479, at *6 (D.N.J. Mar. 22, 2013) (finding favorable class reaction where 47 out of 94,992 potential class notice recipients opted outed and 12 objected).

that "[i]n situations like this one, where 'the benefit to the class' is not 'easily quantified,' district courts have discretion to award fees based on how much time counsel spent and the value of that time (a lodestar calculation) without needing to 'perform a 'crosscheck' in which they attempt to estimate how this compares to the recovery for the class." *Campbell*, 951 F.3d at 1126. Accordingly, where monetary relief is at best a rough estimate, *Campbell* relieves courts from engaging in a strict proportionality analysis when considering the first *Bluetooth* factor.

To be sure, the Settlement provides monetary relief, both for reimbursement for out-of-pocket costs incurred to ameliorate the odor (by purchasing a charcoal filter or through an evaporator flush) *prior* to the Notice Date of May 31, 2024 and reimbursement of up to $100 for a charcoal filter replacement for expenses incurred *after* the Notice Date. Dkt. No. 264-2, at 11-13 (¶ III.A.3-4). For the former, the claims process extends for one year from the Notice Date while claims for the latter provision can be filed for up to two years from the Initial Notice Date. *Id.*

The benefits of the Settlement are not disproportional to the fees. As designed, the reimbursement of out-of-pocket costs incurred after the Initial Notice Date is effectively a two-year warranty extension. Like a warranty extension, the Settlement will cover out-of-pocket expenses for a charcoal replacement for an extended period—here, two years—functioning as insurance against future manifestation of the defect. As a federal court explained: "Warranties cost a manufacturer nothing unless repairs are claimed, but from a consumer's perspective, a warranty against repair has value even when no repairs are claimed during the period of coverage. The fact of coverage is its own benefit; for a price, a consumer can purchase certainty as to what repairs will cost if they are needed." *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 169 (D. Mass. 2015). In other words, the extended warranty has a benefit "the consumer derives benefit from the fact of coverage even when nothing goes wrong." *Id.*

In *In re Volkswagen,* the district court valued an extended warranty settlement benefit at approximately $74 million, based on the entire Class purchasing an extended warranty in the marketplace out-of-pocket. *Id.* Here, there is no comparable extended warranty coverage for only cabin air filters, so a market comparison cannot be made. However, insurance providers provide a basic rule of thumb that an

extended warranty should not exceed 30% of the total purchase price.[6] Based on that rule of thumb, the value of the extended warranty-like benefit is 30% of $100, or $30. In a class of 368,000 Class Members, the benefit conferred by this provision alone is $11,040,000. At a more conservative estimate of 20%, or $20, the value of the extended warranty would be $7,360,000. This Settlement additionally provides reimbursement for out-of-pocket costs incurred before the Initial Notice Date for the costs of replacing and installing charcoal air filters or having a Class Vehicle's evaporator flushed. This additional benefit of the Settlement has no limit to the quantity of reimbursements a Class Member can receive if a Class Member did indeed pay out-of-pocket for either service before the Initial Notice Date.

Alternatively, given the lengthy claims period, the Court may simply evaluate the the value of the benefit based on what it ***makes available*** to Class Members. *See Williams v. MGM-Pathe Commc'ns Co*., 129 F.3d 1026, 1027 (9th Cir. 1997) (reversing a district court for calculating a reversionary fund based on amount claimed). For this method, *Asghari v. Volkswagen Grp. of Am., Inc*., No. 13-02529-MMM, 2015 WL 12732462, at *31 (C.D. Cal. May 29, 2015), provides helpful guidance. In *Asghari*, because "predictions about the defendants' future liability under the settlement are admittedly uncertain," the Central District Court examined multiple scenarios to determine whether the value of the settlement is disproportional to the fees sought under the first *Bluetooth* factor. *Id.* It determined that, if 100% of the class sought benefits from the warranty, the value was $23.67 million. The *Asghari* court then performed calculations and concluded that, if 50% of the Class ultimately took advantage of the "Service Adjustment" benefit, the value conferred for that benefit alone is $11.84 million. *Id.* The court then determined that the relief made available, even discounted, was not disproportional to the fees. Other courts have used a similar method of calculation when the benefits are not easily ascertainable.[7]

[6] https://sourcetable.com/calculate/how-to-calculate-extended-warranty-cost

[7] *See also In re Toyota Motor Corp*., No. 8:10ML-02151-JVS, 2013 U.S. Dist. LEXIS 94485, at *211 (C.D. Cal. June 17, 2013) (valuing relief involving the installation of brake override system at $400 million); *Trew v. Volvo Cars of N. Am., LLC*, No. S-05-1379-RRB, 2007 U.S. Dist. LEXIS 55305, at *15 (S.D. Cal. July 31, 2007) (valuing settlement benefit of replacing throttle module at $24 million based on part replacement costs and applying percentage method to determine fees); *Alin v. Honda Motor Co*., No. 08-4825, 2012 WL 8751045, at *19 (D.N.J. Apr. 13, 2012) (valuing settlement benefit at over $38 million based on replacement costs of item for all class vehicles covered by warranty); *O'Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 305-307 (E.D. Pa. 2003) (valuing extended warranty coverage at approximately $20 million and applying percentage method to determine fees).

Under the same method of calculation, because of the ongoing claims, even assuming a modest 20% claims rate, the value of the reimbursement relief would be $7,360,000. Notably, the *Asghari* method would not account for the value of the warranty-like protection offered by the Settlement, which has independent value. There is also an additional educational benefit to the Notice as Class Members now can trace the foul odor in their cars to a specific cause. Separately, the cost of administration, including the delivery of the Class Notice, is properly considered a benefit to the Class. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015) (finding district court properly included administrative costs and notice costs in valuing overall benefit to the class). Here, the administrative costs are approximately $290,049.43 to date. Second Supplemental Declaration of Cameron R. Azari, ¶ 10 ("Second Azari Decl.").

Taken together, whether one uses the extended warranty figures or a projection of 20% of the funds made available, the class relief exceeds $7.6 million, which is not disproportionate to Class Counsel's fee request of $4.1 million. Indeed, under either calculation, the fees represent approximately 33% of the "constructive common fund."[8] Moreover, as discussed above, Plaintiffs are seeking fees under the lodestar method, and *Campbell* rejected any benchmark figure for determining proportionality in that instance. *Campbell*, 951 F.3d at 1126. And it is entirely unlike *Bluetooth*, where "the settlement paid the class 'zero dollars' and contained a 'clear sailing' provision in which "defendants agreed not to object" to an award of attorney's fees totaling eight times the *cy pres* award." *Hyundai*, 926 F.3d at 569. The other *Bluetooth* factors have been extensively covered in the Motion for Final Approval (Dkt. No. 274-1, 17:21-19:12), and Plaintiffs will not repeat the same arguments in this brief.

Finally, even if all three *Bluetooth* factors are present, which is not the case here, a settlement may still be a "good deal," according to *Briseño*. And settlement approval must be evaluated against the alternative. If the Settlement is denied, "the parties could return to the bargaining table but that was no guarantee that the class would receive a better deal." *Hanlon*, 150 F.3d at 1027. The Parties reached settlement, despite a wide chasm regarding their views of the case's merits, partly due to the pressure of

[8] The "constructive common fund" under these calculations would be approximately $12.1 million, with the fees of $4.1 million representing approximately 1/3 of that amount. *See Evans v. Linden Rsch., Inc.,* No. C-11-01078 DMR, 2014 WL 1724891, at *6 (N.D. Cal. Apr. 29, 2014) (noting that, in calculating the constructive common fund, one must include the class relief, attorneys' fees, expenses, and service awards, and administrative costs).

impending trial. It is unlikely that returning to the bargaining table would get the Class an appreciably better deal, and the delay in doing so, including a re-notice to the Class of new settlement terms, would prevent benefits from being distributed for at least another six months, if not longer. And if the Parties cannot agree, "litigation of complex automotive issues is often lengthy… and even a successful recovery following trial and appeal could be years away." *Chess v. Volkswagen Grp. of Am., Inc*., No. 17-CV-07287-HSG, 2022 WL 4133300, at *4 (N.D. Cal. Sept. 12, 2022). Denying approval would necessarily cause further delay, which would only harm Class Members, with no guarantee or even likelihood of a better payoff. By contrast, by submitting a settlement where no Class Member has objected, there is no possibility of an appeal, thereby eliminating any chance of a lengthy delay.

As the Ninth Circuit emphasized in *Hanlon*, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027 (citation omitted). There is no evidence of any collusion here, and the Settlement, taken as a whole, is fair and reasonable. Accordingly, there is no basis for this Court to overturn this consensual agreement between the Parties.

B. The expected claims rate is acceptable under rule 23(e).

As discussed above, the Settlement provides what is functionally a two-year extended warranty on the purchase and installation of a cabin air filter to remediate the symptoms of the alleged defect. An extended warranty operates as an insurance policy against future harm and has independent value in the marketplace. Moreover, the settlement must be evaluated against the value of the claims surrendered by the class through the release. Thus, it would be error to view the Settlement relief entirely through the claimed amount. *See Campbell*, 951 F.3d at 1123. The allegations also present another challenge: it affects those with greater sensitivity to smell or stronger olfactory nerves than others. That very fact alone would cause a variation in the claims rate. Unlike a palpable transmission or brake problem, even if the odor problem manifests, some Class Members may simply not be bothered by the smell.

Currently, 270 claims have been submitted. Second Azari Decl. ¶ 8. With the deadline being one-and-half years away, and based on the claim administrator's experience, the claims rate may increase as the

deadline approaches. *Id.* All that said, even if the expected claims rate is low that should not present an obstacle to final approval. In *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015), a wage and hour settlement, the Ninth Circuit declined to find a claims-made settlement to be unfair or inadequate where the objector highlighted that only 7% of the class notice recipients submitted a claim. The district court finally approved the class action settlement on remand. *See Allen v. Lab. Ready Sw., Inc.*, No. 09-04266-DDP, 2016 WL 9024598, at *3 (C.D. Cal. Sept. 30, 2016). *Allen* was approved even though it was a wage-and-hour case where a "claims made" settlement is uncommon partly because employees are more easily located but also because individual employment claims, at least in California, are valuable and may be asserted in court, arbitration or before the Labor Commissioner. And notably, the settling parties in *Allen* did not face the same challenges of this action, where Class Members may not detect the odor issue (or that it did not manifest in their car). Here, unlike in *Allen*, where over 90% of employees released their individual wage claims through the class settlement despite receiving no settlement check, the extended warranty-like protections, which functions as insurance, benefit all Class Members even if not everyone submits a claim.

Experienced judges in this District have routinely approved automotive settlements with comparable claims rates. In one automotive defect case, the Honorable Philip Gutierrez remarked that out of 120,000 class members "more than 1,400 individuals…have filed Class claim. This highly positive response to the settlement strongly suggests that the Class finds the settlement to be fair, reasonable, and adequate." *Aarons v. BMW of N. Am., LLC*, No. 11-7667 PSG, 2014 WL 4090564, at *14 (C.D. Cal. Apr. 29, 2014). In *Aarons*, a claims rate of under 2% was considered a "highly positive response" from Class Members. In *Eisen v. Porsche Cars N. Am., Inc.*, No. 09405-CAS, 2014 WL 439006, at *5 (C.D. Cal. Jan. 30, 2014), the Honorable Christina Snyder approved a class action settlement involving an automotive defect after noting that 3,200 claims had been submitted where 235,152 class notices were sent. That constituted a claims rate close to 0.1% of the class. And in *Browne v. Am. Honda Motor Co.*, No. 09-06750-MMM, 2010 WL 9499072, at *7 (C.D. Cal. July 29, 2010), the Honorable Margaret Morrow granted final approval in the action involving alleged defective brake pads where 39,000 claims were submitted after 743,559 class notices were sent out, a 5% claims rate.

Even a claims rate under 1% would not violate Rule 23(e). Courts around the country have approved settlements where the claims rate was less than one percent. *See, e.g.*, *Poertner v. Gillette Co.*, 618 F. App'x

624, 625-26 (11th Cir. 2015) (approving settlement involving more than seven million class members where claims rate was roughly 0.75%); *LaGarde v. Support.com, Inc.*, Case No. 13-609, 2013 U.S. Dist. LEXIS 42725, 2013 WL 1283325, at *2-10 (N.D. Cal. Mar. 26, 2013) (approving class action settlement with claims rate of 0.17% and noting 92% of class members received notice via email); *In re Apple iPhone 4 Prods. Liab. Litig.*, Case No. 10-2188, 2012 U.S. Dist. LEXIS 113876, 2012 WL 3283432, at *1-3 (N.D. Cal. Aug. 10, 2012) (approving class action settlement with claims rate between 0.16% and 0.28%); *Trombley v. Bank of Am. Corp.*, Case No. 08-CV-456, 2012 U.S. Dist. LEXIS 63072, 2012 WL 1599041, at *2 (D. R.I. May 4, 2012) (approving class action settlement that garnered 0.9% claims rate); *In re Packaged Ice Antitrust Litig.*, Case No. 08-MDL-1952, 2011 U.S. Dist. LEXIS 150427, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011) (approving class action settlement with claims rate of less than 1%).

Depending on the facts of the case, many courts have not taken issue with claims rates well under 5%. In automotive class actions, where the symptoms may not manifest in all—or even most cars—a low claims rate does not present a problem because the settlement benefits are typically designed to accrue to affected class members. A large number of Class Members may not even have experienced the symptoms here, and so a claims rate under 5% does not indicate a deficiency with the Settlement scheme; rather the benefits are being claimed by those who need the benefits the most—the Class Members most affected by the symptoms of the alleged defect.

C. Analogous class action settlements support final approval.

It is not unusual for a class action settlement to offer benefits that must be claimed. It reflects terms reached after contentious litigation on the eve of trial, with an experienced mediator bridging a gaping divide in the respective party's perception of the strength of the case. As the Ninth Circuit has held, "the proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

The most instructive case is *Campbell*. In that case, the parties litigated for years, including numerous certification and decertification motions and several mediations, before the parties settled for minor injunctive relief. *See Campbell*, 951 F.3d at 1111-1115. The district court approved the settlement

and awarded counsel's fee request of $3.89 million. *Id*. at 1115. In so holding, the district court emphasized that the plaintiffs had weak claims, and the relief, while fairly insubstantial, was fair, reasonable, and adequate in light of the risks of the class losing the case. *Id*. The Ninth Circuit affirmed the settlement approval, emphasizing in its opinion that the class relief must be measured against what the class is giving up, which, in *Campbell*'s case, is very little. *Id*. at 1123. As *Campbell* instructed, this Court must consider what the class is relinquishing through the release in evaluating the value of the Settlement and whether it is fair, reasonable, and adequate.

Compared to *Campbell,* where the court heavily weighed the advanced stage of litigation, this Action is even further along, settling on the eve of trial. And as in *Campbell*, there is no question that the negotiations were arm's-length. Moreover, Plaintiffs here have secured more substantive relief—monetary benefits for all affected Class Members—than in *Campbell*, despite facing a similarly high risk had the Action continued to trial. *Campbell*'s reasoning strongly supports granting final approval.

Another analogous case is *Victorino v. FCA US, LLC*, No. 16-1617-GPC, 2023 WL 3296155 (S.D. Cal. May 5, 2023), which involved allegations of a defective clutch in the class vehicles. That case, litigated by Class Counsel Capstone Law and Kiesel Law, was similarly "hard-fought," with the plaintiffs successfully certifying a California-only class and engaging in extensive motion practice and appeals before settling on the eve of trial. *Id*. at **1-2. The court approved a settlement that provided for a 12-month extended warranty and reimbursement of out-of-pocket costs on a claims-made basis. *Id.* at *2. In *Victorino*, the court did not seek to monetize the settlement relief in evaluating the first *Bluetooth* factor and instead examined the fee request based on the reasonableness of the lodestar. *Id*. at *8. While *Victorino* involved a potentially stronger claim involving a defective clutch, the class relief provided by settlement is comparable, particularly since, like this case, counsel sought to deliver relief before the class vehicles age into obsolescence, which would be the likely result if there is an appeal after trial. the Honorable Gonzalo Curiel's reasoning in approving the settlement in *Victorino* also provides strong guidance here.

Regarding the class relief, the Settlement is comparable to many other automotive settlements approved by the California federal District courts over the last ten years:

- *Warner v. Toyota Motor Sales, U.S.A*., No. 15-02171-FMO (C.D. Cal. May 21, 2017), Dkt. No. 140: Inspection and replacement of corroding truck frames, use of loaner vehicle during replacement, extended warranty coverage of replaced frames, and reimbursement for out-of-pocket costs in exchange for full release from class members;

- *Zakskorn v. Am. Honda Motor Co.*, No. 11-02610-KJM, 2015 WL 3522990 (E.D. Cal. June 9, 2015): Full or partial reimbursement of out-of-pocket costs to replace prematurely worn brake pads, based on mileage schedule in exchange for a full release;

- *Corson v. Toyota Motor Sales USA*, No. 12-8499-JSB, 2016 WL 1375838 (C.D. Cal. Apr. 4, 2016): Reimbursement of out-of-pocket costs for class members who retuned the electronic control unit ("ECU"), vouchers to those who previously complained about the ECU, and re-tuning ECU at half-price for all other class members in exchange for a full release;

- *Seifi v. Mercedes-Benz USA*, No. 12-05493-THE, 2015 WL 12964340 (N.D. Cal. Aug. 18, 2015): Extended warranty for repairs on balance shafts and full or partial reimbursement of out-of-pocket costs to replace prematurely worn brake pads, based on mileage schedule, in exchange for a full release;

- *Klee v. Nissan N. Am.*, No. 12-08238-AWT, 2015 U.S. Dist. Lexis 88270 (C.D. Cal. July 7, 2015): Extended warranty on the lithium-ion battery in electric vehicle, replacement of batteries with diminished capacity, and three months of free access to charging stations (or $50) in exchange for full release;

- *Asghari v. Volkswagen*: Reimbursement of out-of-pocket costs for service adjustment to correct excessive fuel consumption, a service adjustment to class members if claimed within 18 months, and an extended warranty covering the service adjustment, in exchange for a full release;

- *Eisen v. Porsche*: Full or partial reimbursement for out-of-pocket costs for an engine shaft repair or replacement, including up to $200 for towing and rentals, and extended warranty for any damage cause by that engine shaft in exchange for a full release;

- *Keegan v. Am. Honda Motor Co.*, No. 10-09508-MMM, 2014 WL 12551213 (C.D. Cal. Jan. 21, 2014): Replacement of a control arm on the suspension upon documented proof of premature tire wear and partial reimbursement of out-of-pocket cost for parts on the control arm or tires due to premature tire wear, in exchange for a full release;

- *Sadowska v. Volkswagen Group of Am.*, No. 11-00665-BRO, 2013 WL 9500948 (C.D. Cal. Sep. 25, 2013): Full or partial reimbursement for CVT repairs/replacement, depending on mileage; reimbursement for class members who sold or traded-in vehicles at a loss after diagnosed need for CVT replacement; and an extended warranty on CVT transmissions part, in exchange for a full release;

- *Kearney v. Hyundai Motor. Am.*, No. 09-1298-JST, 0213 WL 3287996 (C.D. Cal. June 28, 2013): Providing a consumer education campaign and free calibration of the alleged defective air bag system and good faith effort by Hyundai to resolve consumer complaints, including potentially a repurchase or BBB arbitration if the parties cannot resolve dispute, in exchange for a full release; and

- *Milligan v. Toyota Motor Sales USA*, No. 09-05418-RS, 2012 WL 10277179 (N.D. Cal. 2012): Reimbursement for repairs to former owners and warranty extension, along with a claims appeal process (overlapping with a settlement with a state governmental agency that extends warranty and reimbursement to current owner), in exchange for a full release.

Each and every one of these settlements is a "claims made" settlement, often centering on a reimbursement of out-of-pocket costs to address symptoms of the alleged defect. Settlements approved by

district courts in other states have similar structures and class benefits.[9]

The relief offered by this Settlement reflects that Plaintiffs' claims are, in a sense, weaker. But the Court should also take into consideration that Class Members are not surrendering valuable individual claims in the class-wide release. Thus, on balance, the Settlement is similar to other settlements approved by federal courts in California and other states and should be approved.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Final Approval and Motion for Attorneys' Fees, Costs, and Class Representative Service Awards.

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Respectfully submitted,

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[9] *See*, *e.g.*, *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 7-9 (1st Cir. 2012) (affirming approval of settlement extending warranty, reimbursement for engine repair or replacement, and $25 discount for oil change based on allegations that engine was prone to creating "oil sludge" in exchange for full release); *Yaeger*, 2016 WL 4541861 (providing extended warranty for oil consumption problems, providing free repairs and reimbursement for additional oil and towing and rental costs in exchange for full release); *Skeen v. BMW of N. Am.*, No. 13-1531-WHW, 2016 WL 4033969 (D.N.J. July 26, 2016) (providing extended warranty on allegedly defective timing chain, reimbursement for out-of-pocket costs for timing belt or engine repairs, and capped compensation for those who sold or traded in vehicle at a loss due to documented issue with timing chain issue in exchange for full release); *In re Nissan Radiator/Transmission Cooler Trans. Cooler Litig.,* No. 10-7493-VB, 2013 WL 4080946 (S.D.N.Y. May 30, 2013) (providing extended warranty and partial reimbursement of out-of-pocket costs based on mileage in exchange for a full release); *Henderson*, 2013 WL 1192479 (providing extended warranty and reimbursement of either 50% for original owners and lessees, or 25% for all other class members, for out-of-pocket costs for allegedly defective automatic transmissions in exchange for full release); *Alin v. Honda Motor Co.*, No. 08-4825-KSH, 2012 WL 8751045 (D.N.J. Apr. 13, 2012) (providing partial reimbursement for out-of-pocket costs to remedy air conditioning defect in exchange for full release).