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Class Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE

MYFORD TOUCH CONSUMER LITIGATION

Case No. 3:13-cv-03072-EMC

PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: November 27, 2019
Time: 1:00 p.m.
Judge: Hon. Edward M. Chen
Location: Courtroom 5, 17th floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 27, 2019, at 1:00 p.m. or as soon thereafter as the matter may be heard by the Honorable Judge Edward M. Chen of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs will and hereby do move the Court pursuant to Federal Rules of Civil Procedure 23 for entry of an Order:

a. Granting final approval of the proposed Settlement Agreement with Defendant Ford Motor Company and entering final judgment;

b. Finally determining that the Settlement is fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e);

c. Finally approving the plan of allocation and directing payments of the claims;

d. Approving Plaintiffs' previously filed motion for attorneys' fees, costs, and service awards (ECF No. 527); and

e. Dismissing this action with prejudice.

This Motion is based on this Notice of Motion and Motion, the following memorandum of points and authorities, the declarations of Steve W. Berman and Jennifer Keough filed herewith, the pleadings and the papers on file in this action, and such other matters as the Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After nearly six years of hard-fought litigation, Plaintiffs and Defendant Ford Motor Company ("Ford") now seek final approval of a proposed class action settlement (the "Settlement").[1] The Settlement was meticulously negotiated to meet the Northern District's Procedural Guidelines for Class Action Settlements ("Northern District's Guidelines");[2] is fair, reasonable, and adequate within the meaning of Fed. R. Civ. P. 23(e)(2); and represents a substantial recovery for the Settlement Classes. Ford has committed to sending a minimum of 343,000 monetary payments—representing *one guaranteed monetary payment for every single identifiable Class Vehicle*. Ford has also agreed to pay no less than $17 million directly to Settlement Class Members. This structure has provided the vast majority of Settlement Class Members with their choice of monetary compensation structure: some class members chose to fill out a simplified, prepopulated claim form while others opted to simply receive a monetary payment directly from Ford. Any remaining funds will be unilaterally distributed on a *pro rata* basis among all Settlement Class Members who submitted valid claims during the claims submission process. In no event will any of the $17 million revert to Ford. Only one objection to the Settlement has been filed, and which is, as discussed in more detail below, meritless and provides no reason to withhold approval of the Settlement. This Settlement provides the Settlement Classes significant relief and should receive final approval. (*See* ECF No. 526 at 15-18.)

As the Court is aware, the Parties reached the Settlement after weeks of extensive negotiations under the direct supervision of Magistrate Judge Sallie Kim—ultimately culminating in the Parties agreeing to Magistrate Judge Kim's Mediator's Proposal. As a product of the arm's-length negotiations between experienced and informed counsel, the Settlement was reached at a point when extensive fact and expert discovery, briefing and argument on complex motions to dismiss, briefing and argument on class certification, and briefing and argument on a motion for summary judgment had already occurred.

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[1] Unless otherwise noted, capitalized terms have the meaning ascribed to them in the Settlement Agreement (ECF No. 516-1).

[2] *See* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Procedural Guidance for Class Action Settlements* (Dec. 5, 2018), https://www.cand.uscourts.gov/ClassActionSettlementGuidance

Before the Settlement was reached, the Parties also engaged in extensive trial preparation including motions *in limine*, exhibit lists, and other pre-trial motions for a trial that was scheduled to commence on March 4, 2019.

On March 28, 2019, the Court granted preliminary approval of the proposed Settlement. *See* ECF No. 526 ("Preliminary Approval Order"). The Court determined that its previous concerns relating to the March 2018 provisional settlement were adequately addressed. *Id.* at 9-13. The Court further found that the Settlement: (1) provides reasonable relief and monetary compensation to Plaintiffs and other Settlement Class Members; (2) was entered into after serious, informed, and non-collusive arm's-length negotiations by experienced Plaintiffs' counsel; and (3) was fair, adequate, and reasonable based upon the circumstances. *Id.* at 13-21. The Court preliminarily approved the Settlement terms as fair, reasonable, and adequate, directed notices to the Settlement Classes, and scheduled a final approval hearing for November 21, 2019.[3] *Id.* at 21-27. The Court also determined that the proposed notice plan "satisfies due process" and was the "best notice practicable under the facts and circumstances of this case." *Id.* at 19, 23. Nothing warrants changing those findings now, particularly because the Settlement provides significant benefits to the Settlement Classes.

Plaintiffs respectfully submit that the Settlement should be finally approved and ask the Court to: (1) grant final approval of the Settlement and enter final judgment; (2) find that adequate notice was provided to the Settlement Class Members; (3) approve Plaintiffs' request for attorneys' fees, expenses, and service awards (*see* ECF No. 527); and (4) dismiss this action with prejudice.

II. BACKGROUND

The background of this action has been detailed at length in Plaintiffs' motion for preliminary approval ("Preliminary Approval Motion") (ECF No. 515) and motion for attorneys' fees, costs, and service awards ("Fee Motion") (ECF No. 527). Therefore, Plaintiffs set forth a summary of the case only to the extent relevant to the instant motion. Ford has denied these allegations for the duration of the case and was prepared to defend itself at trial.

[3] This hearing has since been rescheduled for November 27. ECF No. 538. Plaintiffs have posted notice of the new time on the settlement website and have informed the sole objector.

A. Plaintiffs' Allegations and Claims

As the Court is aware, this case arose out of alleged defects with Ford's MyFord Touch system ("MFT"), which Plaintiffs alleged was so inherently defective that it persistently impaired the safety, reliability, and operability of the Class Vehicles over an extended period of time. ECF Nos. 1, 47, 154, 183. Plaintiffs also alleged that Ford knew that the MFT was inherently defective throughout the class period and refused to disclose this information. *Id.*

B. The Case was Vigorously Litigated Before the Settlement was Reached

There is no denying that the Parties vigorously litigated every aspect of this complex, multi-state matter. The Parties engaged in extensive motion practice at the motion to dismiss, class certification, and summary judgment stages as well as an interlocutory appeal to the Ninth Circuit Court of Appeals, which resulted in the narrowing of claims asserted by Plaintiffs and dismissal of certain plaintiffs. ECF No. 515 at 3-4. The Parties also conducted significant discovery, including FED. R. CIV. P. 26(a) initial disclosures; production by Ford of more than 8.3 million pages of documents, all of which were reviewed and analyzed by Class Counsel; several months of review by Plaintiffs' experts of source code for the MFT software; responses to at least nine sets of written discovery requests; depositions of fourteen Ford fact witnesses and five Ford experts; depositions of twenty Plaintiffs and four Plaintiffs' experts; and inspection of Plaintiffs' vehicles. *Id.* at 4. Additionally, the Parties actively prepared for trial prior to the Settlement and had already exchanged motions *in limine*, corresponding oppositions, exhibit lists, and other pre-trial motions. *See* ECF No. 516 ¶ 10.

As noted above, the Parties reached a provisional settlement on March 29, 2018. *Id.* However, the Court raised questions and concerns regarding different aspects of the settlement agreement. *Id.* ¶ 11. After the Parties met and conferred, Plaintiffs withdrew the provisional settlement agreement. ECF No. 515 at 5. The Court then referred this litigation to Magistrate Judge Sallie Kim for continued settlement negotiations, which resulted in arm's-length negotiations during October and November 2018. *Id.* After several rounds of intense arm's-length negotiations, the Parties reached an impasse. *Id.* On November 19, 2018, Magistrate Judge Kim made a Mediator's Proposal, which the Parties accepted. *Id.* The Parties signed the Settlement Agreement ("Settlement") in February 2019, agreeing to set a claim submissions

deadline prior to the Fairness Hearing and to disseminate a second direct mail notice announcing the availability of the software update, on February 7. *Id.* at 6.

C. Preliminary Approval

Plaintiffs filed their Preliminary Approval Motion on February 7, 2019. ECF No. 515. The Court conducted a preliminary approval hearing on March 21 (ECF No. 524), granted Plaintiffs' motion for preliminary approval on March 28, and directed that notice be issued to Settlement Class Members pursuant to the Settlement. *See* ECF No. 526. The Parties faithfully followed the Court's approved notice plan, and nothing has changed since the Court granted preliminary approval to warrant reaching a different result here.

D. The Settlement's Material Terms and Notice Plan

Plaintiffs seek final approval of the Settlement on behalf of the following Classes, which are identical to the seven state classes already certified by this Court. ECF No. 279 at 47-49:

> "California Settlement Class" means all persons or entities who purchased or leased a Ford or a Lincoln vehicle in California from Ford Motor Company or through a Ford Motor Company Dealership before August 9, 2013, which vehicle was equipped with MyFord Touch or MyLincoln Touch in-vehicle information and entertainment system.
>
> "Massachusetts Settlement Class" means all persons or entities who purchased or leased a Ford or a Lincoln vehicle in Massachusetts from Ford Motor Company or through a Ford Motor Company Dealership before August 9, 2013, which vehicle was equipped with MyFord Touch or MyLincoln Touch in-vehicle information and entertainment system.
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> "New Jersey Settlement Class" means all persons or entities who purchased or leased a Ford or a Lincoln vehicle in New Jersey from Ford Motor Company or through a Ford Motor Company Dealership before August 9, 2013, which vehicle was equipped with MyFord Touch or MyLincoln Touch in-vehicle information and entertainment system.
>
> "North Carolina Settlement Class" means all persons or entities who purchased or leased a Ford or a Lincoln vehicle in North Carolina from Ford Motor Company or through a Ford Motor Company Dealership before August 9, 2013, which vehicle was equipped with MyFord Touch or MyLincoln Touch in-vehicle information and entertainment system.
>
> "Ohio Settlement Class" means all persons or entities who purchased or leased a Ford or a Lincoln vehicle in Ohio California from Ford Motor Company or through a Ford Motor Company Dealership before August 9, 2013, which vehicle was equipped with MyFord Touch or MyLincoln Touch in-vehicle information and entertainment system.
>
> "Virginia Settlement Class" means all persons or entities who purchased or leased a Ford or a Lincoln vehicle in Virginia from Ford Motor Company or through a Ford Motor Company Dealership before August 9, 2013, which vehicle was equipped with MyFord Touch or MyLincoln Touch in-vehicle information and entertainment system.

> "Washington Settlement Class" means all persons or entities who purchased or leased a Ford or a Lincoln vehicle in Washington from Ford Motor Company or through a Ford Motor Company Dealership before August 9, 2013, which vehicle was equipped with MyFord Touch or MyLincoln Touch in-vehicle information and entertainment system.

ECF No. 526 at 21-22.

1. The Settlement Offers Significant Benefits to Settlement Class Members.[4]

Under the Settlement, Ford will pay all valid claims submitted. There is no cap on the total amount of money Ford will pay in response to Settlement Class Members' valid claims. FSA § II. The Settlement has a guaranteed minimum total payment by Ford of $17 million. FSA § II.B.3. In no event will any of the $17 million revert to Ford. *Id.* If the Total Payment Amount is less than $17 million, the remaining funds will be distributed on a *pro rata* basis to those Class Members who have submitted valid claims through the claims submission process. *Id.*

To ensure that all eligible Settlement Class Members as a group receive a guaranteed measure of recovery, monetary compensation has been allocated through a two-stage process. The first stage consists of a four-month period, where Settlement Class Members are encouraged to submit simplified claims forms that are pre-populated to the fullest extent possible. FSA § II.D. The second stage consists of Ford sending unilateral payments to those original owners and lessees of identifiable Class Vehicles for which no claim was submitted, but for whom the Settlement Administrator has records of ownership. FSA § II.B.2.

2. The Notice Plan Has Been Implemented and the Response Has Been Positive.

The Settlement includes a notice plan using the same notice administrator and communication methods that were previously approved by the Court in the 2017 Litigation Class Notice campaign. FSA § I.C. The Settlement notice plan provides for a state-of-the-art notice and claims process, including direct individual notice to Settlement Class Members from the information collected in the 2017 Litigation Class Notice campaign. *Id.* For the 2019 Notice, the Settlement Administrator (JND)

[4] The specific terms of the Settlement are more fully set forth in detail in Plaintiffs' Preliminary Approval Motion. *See* ECF No. 515 at 7-13.

updated the information of Settlement Class Members, where necessary, from the National Change of Address database. FSA § III.C. Using this information, JND mailed via U.S. mail the Short Form Class Notice to all Settlement Class Members and used email to send Email Notice to all Settlement Class Members whose email addresses are known. Decl. of Jennifer Keough ("JND Decl.") ¶¶ 7-9. For any Short Form Class Notice forms that were returned as undeliverable, JND performed a reasonable search for more current names and/or addresses to enable it to resend the notice. *Id.* ¶ 8. In total, direct notice via U.S. mail was successful to 373,596 potential Settlement Class Members and email notice was successful to 142,186 potential Settlement Class Members. *Id.* ¶¶ 8-9. In accordance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, Ford also provided notice of the Settlement and related materials to the Attorneys General of the relevant states on February 14, 2019. To date, Ford has not received any comment from any Attorney General.

JND established a notice settlement website, www.myfordtouchclassaction.com, shortly after the Court's Preliminary Approval Order granting preliminary approval. *Id.* ¶ 10; Decl. of Steve W. Berman in Supp. of Pls.' Mot. for Final Approval of Settlement ("Berman Decl.") ¶ 3. The website contains the Long Form Class Notice, relevant case documentation, answers to frequently asked questions, provides contact information, and allows Settlement Class Members to submit simplified, prepopulated Claim Forms designed to make the claims process as easy as possible. JND Decl. ¶ 10-11. Additionally, JND established a toll-free telephone line where Settlement Class Members can call to obtain information about the Settlement. *Id.* ¶ 14. The settlement website traffic has been substantial, tracking 44,845 unique users and 262,833 page views. *Id.* ¶ 12. Phone activity has also been substantial with 3,718 calls. *Id.* ¶ 15.

Counsel for Plaintiffs additionally took a number of steps to increase awareness and exposure of the Settlement to Settlement Class Members, including:

- Responding to inquiries from class members and working with the Settlement Administrator to help facilitate the filing of claims;
- Publishing the settlement on their firms' websites
- Coordinating with the Settlement Administrator to ensure that the Settlement Website was accurate and current;
- Issuing a press release publicizing the Settlement and encouraging visits to the Settlement Website;
- Using paid advertising through Facebook as well as text and email to target all of the consumers from the class states who had previously contacted them about the case;
- Published regular announcements about the Settlement on Twitter and LinkedIn; and
- Publishing the settlement on topclassactions.com, which is a popular website that provides information about class action settlements.

Berman Decl. ¶ 4. Plaintiffs' Counsel also agreed to send a second notice to class members announcing the availability of the software upgrade soon after the Effective Date of Settlement. *See* Berman Decl. ¶¶ 5-6 and Ex. A thereto.

In sum, the parties have adhered to the Court's approved notice plan, and the notice campaign has been a success. Further, the Court has already determined that the notice plan "satisfies due process" and constitutes the "best notice practicable under the facts and circumstances of this case." ECF No. 526 at 19, 23.

III. ARGUMENT

A. Certification of the Settlement Classes Is Appropriate.

Plaintiffs respectfully submit that the Court can and should definitively certify the Settlement Classes for settlement purposes. The general standards for litigation class certification also apply to settlement class certification, except that the court need not consider potential trial management problems. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A class action is maintainable if it

meets the four Rule 23(a) prerequisites (i.e. numerosity, commonality, typicality, and adequacy). FED. R. CIV. P. 23(a); *Mendoza v. Hyundai Motor Co.*, No. 15-cv-01685-BLF, 2017 WL 342059, at *4 (N.D. Cal. Jan. 23, 2017). In addition to the prerequisites, the settling parties must show that the action is maintainable under either Rule 23(b)(1), (2), or (3). *See, e.g.*, *Mendoza*, 2017 WL 342059, at *4. In their Preliminary Approval Motion, Plaintiffs explained, in detail, why Rule 23(a)'s and Rule 23(b)(3)'s requirements are readily met here for settlement purposes. ECF No. 515 at 23-25. However, Plaintiffs will briefly address each of these elements here.

1. The Rule 23(a) Prerequisites Are Satisfied.

The Court has already determined that the seven state classes, identical to the Settlement Classes, satisfy the Rule 23(a) prerequisites. ECF No. 279 at 47-49.

a. Rule 23(a)(1): Numerosity

For certification of a class to be appropriate, its members must be so numerous that joinder would be "impracticable." FED. R. CIV. P. 23(a)(1). It is undisputed that the classes in this case consist of hundreds of thousands of Class Members across seven states. ECF No. 279 at 14. Therefore, numerosity is established.

b. Rule 23(a)(2): Commonality

The second requirement of Rule 23 is the existence of common questions of law or fact. FED. R. CIV. P. 23(a)(2). The Court has already found that Plaintiffs have raised common questions that generate common answers apt to drive the resolution of the litigation and that "[p]laintiffs have made a sufficient showing that in the main the defects were common for purposes of Rule 23." ECF No. 279 at 14-15, 31. The commonality element is therefore met.

c. Rule 23(a)(3): Typicality

"Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The Court has already found that "[a]t base, all Plaintiffs claim that they paid money expecting MFT to work, and that it did not work" and that the "[n]amed Plaintiffs thus 'have the same or similar injury' as other members of the class: they paid money for a substantially defective product." ECF No. 279 at 16-17. Thus, typicality is established.

d. Rule 23(a)(4): Adequacy

The final requirement of Rule 23(a) is that the representative plaintiffs will fairly and adequately represent the interests of the class. This requires only that a class member does not have interests that are antagonistic to or in conflict with the interests of the class. *Hanlon*, 150 F.3d at 1020. Here, the Court found no conflict with new and used purchasers, and determined that the class representatives were adequate. ECF No. 279 at 20-21; *see also* ECF No. 526 at 14.

2. The Rule 23(b) Prerequisites Are Satisfied.

a. Common Questions of Law and Fact Predominate.

Once the prerequisites of FED. R. CIV. P. 23(a) are satisfied, the Court must determine if one of the subparts of Rule 23(b) is also satisfied. The predominance analysis "focuses on the relationship between the common and individual issues in the case, and tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Ebret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 894-95 (N.D. Cal. 2015) (quoting *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 964 (9th Cir. 2013)).

The Court conducted an extensive predominance analysis at class certification, finding that common questions of fact or law predominate, when granting certification for the claims identified in the certified seven state classes. ECF No. 279 at 21-47. Nothing has changed since the Court conducted its analysis and, therefore, issues common to the Classes predominate.

b. A Class Action Is a Superior Means of Resolving These Claims.

A class action is superior under Rule 23(b)(3) because it represents the only realistic method for owners and lessees of vehicle equipped with MFT to obtain relief. *See, e.g.*, *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (holding that a class action may be superior where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation"). Settlement Class Members lack the incentive to bring their own cases against Ford given the small potential recovery for each owner or lessee of a vehicle equipped with the MFT system. "Cases, such as this, 'where litigation costs dwarf potential recovery' are paradigmatic examples of those well-suited for classwide prosecution." *Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS, 2016 WL 1535057, at *8 (N.D. Cal. Apr. 15, 2016) (quoting *Hanlon*, 150 F.3d at

1023). Therefore, the Court should definitively certify the Settlement Classes for purposes of final approval.

B. Notice to Settlement Class Members Was Reasonable and Adequate.

"A binding settlement must provide notice to the class in a 'reasonable manner' and otherwise be 'fair, reasonable, and adequate.'" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 567 (9th Cir. 2019); *see also Mendoza*, 2017 WL 342059, at *5 ("The class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice.") (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982)). Actual notice is not required, but the notice must "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mendoza*, 2017 WL 342059, at *5 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Here, the notice plan implemented after preliminary approval satisfies both Rule 23 and due process. The Court has already determined that the previously approved notice plan, also used in the 2017 Litigation Class Notice campaign, "satisfies due process" and constitutes the "best notice practicable under the facts and circumstances of this case." ECF No. 526 at 19, 23. The Parties and JND have followed the approved notice procedures. The Parties implemented the Court's suggested changes to the content of the Notices to ensure that they were in compliance with the requirements of Rule(c)(2)(B) and this district's Procedural Guidance for Class Action Settlements. *See* ECF Nos. 523 and 526 at 19. The Long Form Notice thus includes all information required by Rule 23(c)(2)(B) because it provides detailed information concerning: (1) the rights of Settlement Class Members, including how and by when they must lodge objections or opt out; (2) the nature of the litigation and the claims at issue; (3) the proposed Settlement; (4) the recovery options available to Settlement Class Members; (5) the process for filing a proof of claim; (6) the fees and expenses to be sought by Plaintiffs' counsel; and (7) the date of the fairness hearing. Plaintiffs' counsel have also agreed to send a second notice to class members announcing the availability of the software upgrade soon after the Effective Date of Settlement. *See* Berman Decl. ¶¶ 5-6 and Ex. A thereto. Ford also sent the required CAFA notice, and the Settlement Administrator established the Settlement Website and set-up a toll-free

number that individuals may call to obtain information about the Settlement. JND Decl. ¶¶ 10-15. As of November 7, 2019, the Settlement Website has tracked 44,845 unique users. *Id.* ¶ 12.

Further, as discussed above in Section II.D.2, *supra*, the Settlement Administrator provided direct initial notice via U.S. mail to 373,596 potential Settlement Class Members. The Settlement Administrator also provided successful email notice to 142,186 potential Settlement Class Members, with only 23,911 email notices being undeliverable. JND Decl. ¶ 9. There has been only one objection, which, as discussed *infra* on pages 19-20, is meritless.

Plaintiffs' Counsel also took a number of steps to further increase awareness and reach of the Settlement to Settlement Class Members, including the publication of the Settlement on the popular website topclassactions.com over the course of several weeks.[5] Berman Decl. ¶ 4. Under the circumstances, the Settlement here reasonably and adequately provided notice to Settlement Class Members. *See, e.g.*, *Wahl v. Yahoo! Inc.*, No. 17-cv-02745-BLF, 2018 WL 6002323, at *3 (N.D. Cal. Nov. 15, 2018) (concluding that a notice plan calling for direct email notice, followed by mailed notice to individuals to whom emails "bounced," constituted "the best notice practicable under the circumstances"); *Walsh v. CorePower Yoga LLC*, No. 16-cv-05610-MEJ, 2017 WL 589199, at *12 (N.D. Cal. Feb. 14, 2017) (approved notice plan provided for a combination of mail and email using the most recent contact information available).

C. The Settlement Is Fair, Reasonable, and Adequate, and Should Be Finally Approved.

The Ninth Circuit favors compromise and settlement of complex class actions. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practice & Prods. Liab. Litig.*, 229 F. Supp. 3d 1052, 1061 (N.D. Cal. 2017) (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015)). Accordingly, courts are to give:

> proper deference to the private consensual decision of the parties. . . . [T]he 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.

[5] Topclaassactions.com posted news of the Settlement on its website for several weeks in August and September 2019. Topclassactions.com has an estimated 1.5 million monthly visitors. News of the settlement was also included in the topclassactions.com newsletter, which has over 750,000 subscribers.

Hanlon, 150 F.3d at 1027 (citation and internal quotations omitted).

A court may approve the parties' settlement only after it determines that it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e). In making this determination, courts in this Circuit balance the following factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026-27. The recent amendments to Rule 23(e) direct the Court to consider a similar list of factors, including whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2). The Advisory Committee's notes clarify that this list of factors does not "displace" the *Hanlon* factors, "but instead aim to focus the court and attorneys on 'the core concerns of procedure and substance that should guide the decision whether to approve the proposal.'" *Extreme Networks*, 2019 WL 3290770, at *6 (quoting FED. R. CIV. P. 23(e)(2) advisory committee's note to 2018 amendment). An evaluation of these factors here confirms that both the procedure used in negotiating the Settlement and the substance of the resulting Settlement are fair, reasonable, and adequate. *See generally* ECF No. 515 at 17-23.

1. The Settlement Resulted from Informed, Arm's-Length Negotiations.

Under Rule 23(e)(2)(A)-(B), the Court considers whether Plaintiffs and Class Counsel adequately represented the class and whether the proposed settlement was negotiated at arm's length. "These considerations overlap with certain *Hanlon* factors, such as the non-collusive nature of negotiations, the extent of discovery completed, and the stage of proceedings." *Extreme Networks*, 2019 WL 3290770, at *7; *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992) (quoting *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985)) ("[T]he district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties.").[6] Fairness is presumed when the settlement resulted from arm's-length negotiations. *See, e.g.*, *Mendez v. C-Two Grp., Inc.*, No. 13-cv-05914-HSG, 2017 WL 1133371, at *4 (N.D. Cal. Mar. 27, 2017); *Bower v. Cycle Gear, Inc.*, No. 14-cv-02712-HSG, 2016 WL 4439875, at *5 (N.D. Cal. Aug. 23, 2016) ("An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining.") (citation omitted). The presumption is confirmed here.

The Parties engaged in extensive motion practice including motions to dismiss, a motion for class certification, and a motion for summary judgment. The Parties also concluded fact and expert discovery which permitted the Parties a full opportunity to assess the strengths and weaknesses of the claims and make an informed decision about settlement. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citation omitted) (holding that, regardless of form, the parties need only "sufficient information to make an informed decision about settlement"); *In re Mego Fin v. Support.com, Inc.*, No. 12-cv-0609 JSC, 2013 WL 1283325, at *7 (N.D. Cal. Mar. 26, 2013) (holding that parties were sufficiently informed where they "did engage in some motion practice that . . . provided the parties with a better understanding of the information available to the opposing side").

As noted above, the settlement was reached after Magistrate Judge Kim worked extensively with the Parties and made a Mediator's Proposal, a fact which also supports approval. *See* FED. R. CIV. P. 23(e)(2) advisory committee's note to 2018 amendment (advising that "the involvement of a neutral . . .

[6] As discussed above and in Plaintiffs' Fee Motion, Plaintiffs and Class Counsel have adequately represented the class and vigorously prosecuted this case. *See* Section II.B, *supra*; ECF No. 527 at 10-13; ECF Nos. 528-531 (Pls.' Decls.).

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. Ins. Co. v. Caldera Med., Inc.*, No. 2:15-cv-00393-SVW-PJW, 2016 WL 5921245, at *5 (C.D. Cal. Jan. 25, 2016) (citation omitted) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive"); *Free Range Content, Inc. v. Google, LLC*, No. 14-cv-02329-BLF, 2019 WL 1299504, at *6 (N.D. Cal. Mar. 21, 2019) (holding the presence of mediator weighs in favor of applying a presumption of correctness).

In addition to Plaintiffs' pre-suit investigation, the Parties fully completed fact discovery and expert discovery, including FED. R. CIV. P. 26(a) initial disclosures; production by Ford of more than 8.3 million pages of documents, all of which were reviewed and analyzed by Class Counsel; several months of review by Plaintiffs' experts of source code for the MFT software; responses to at least nine sets of written discovery requests; depositions of fourteen Ford fact witnesses and five Ford experts; depositions of twenty Plaintiffs and four Plaintiffs' experts; and inspection of over a dozen Plaintiffs' vehicles. *See* ECF No. 516 ¶ 4; *see also Sheikh v. Tesla, Inc.*, No. 17-cv-02193-BLF, 2018 WL 5794532, at *5 (N.D. Cal. Nov. 2, 2018) (finding the presumption of correctness applied where even pre-suit investigation and informal discovery was conducted); *LaGarde*, 2013 WL 1283325, at *7 (noting presence of discovery supports conclusions that the plaintiffs were sufficiently informed during negotiations); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming final approval where "Class Counsel conducted significant investigation, discovery and research" and "had worked with damages and accounting experts throughout the litigation"). Thus, Plaintiffs have fully investigated and tested the factual and legal strengths of their claims prior to reaching the Settlement such that negotiations were informed and at arm's length.

Lastly, there is no indicia of collusion here. Although there is a clear sailing provision in the Settlement (*see* FSA § II.E), Class Counsel have requested a fee representing a negative lodestar multiplier of 0.28 and within the range ordinarily granted in this Circuit. *See Scott v. ZST Digital Networks, Inc.*, No. CV 11-3521 GAF (JCx), 2013 WL 12126744, at *8 (C.D. Cal. Aug. 5, 2013) (finding negative lodestar multiplier of 0.26 weighed in favor of granting benchmark award to Class counsel); *see also Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *23 (E.D. Cal. June 11, 2012) (holding negative lodestar multiplier strongly supports reasonableness of fee request); *Chun-Hoon v.*

McKee Foods Corp., 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (finding negative lodestar of 0.59 weighed in favor of final approval of class action settlement). Class Counsel is requesting the same fee proposed by Magistrate Sallie Kim in her Mediator's Proposal; this fee is reasonable given the length and extensive nature of the litigation that occurred in this case. *See, e.g.*, *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 259 (N.D. Cal. 2015) (holding that even where there was a clear sailing provision there was no evidence of collusion where "after litigating several rounds of motions to dismiss, the parties engaged in settlement talks overseen by a neutral mediator for several weeks before agreeing on this settlement"); *Shvager v. ViaSat, Inc.*, No. CV 12-10180 MMM (PJWx), 2014 WL 12585790, at * 14 (C.D. Cal. Mar. 10, 2014) (holding clear sailing provision did not warrant inference of collusion warranting invalidation of settlement where "the class stands to receive a monetary award greater than it might have received had the case proceeded to trial"). Thus, the Settlement "is not the product of collusion or fraud, but rather is the result of a successful arm's-length negotiation." *Bower*, 2016 WL 4439875, at *5; *see also Hyundai & Kia*, 926 F.3d at 569.

2. The Relief under the Settlement Is Adequate and Balances the Risks and Expense of Trial.

The substantial relief that Class Counsel obtained for Settlement Class Members also weighs in favor of final approval. The Settlement provides substantial, immediate relief for Settlement Class Members that represents a significant result, especially when balanced against the significant risks of proceeding to trial. *See* ECF No. 526 at 17-18.

a. The Strength of Plaintiffs' Case Balanced Against the Risk of Presenting the Case at Trial Weighs in Favor of Approval.

Under Rule 23(e)(2)(C)(i), courts in the "Ninth Circuit evaluate 'the strength of the plaintiff's case; complexity, and likely duration of further litigation; [and] the risk of maintaining class action status throughout the trial.'" *Extreme Networks*, 2019 WL 3290770, at *8 (quoting *Hanlon*, 150 F.3d at 1026). The Northern District has recognized that "[a]pproval of a class settlement is appropriate when 'there are significant barriers plaintiffs must overcome in making their case.'" *Mendoza*, 2017 WL 342059, at *6 (citation omitted).

In this case, Ford has vigorously defended itself and denied all liability from the outset. *See Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 326 (C.D. Cal. 2016) ("The settlement the parties have reached is

even more compelling given the substantial litigation risks in this case."). The Settlement represents a reasonable compromise in light of the risks relating to both liability and damages that Plaintiffs face in proceeding to trial.

First, Plaintiffs' fraud claims were not certified by the Court, which forced Plaintiffs to proceed under their more difficult to prove implied warranty claims. Plaintiffs were thus required to prove that all versions of MFT software up to and including version 3.6 are inherently defective. As the Court recognized, however, there is a "substantial risk that a jury could find that versions 3.5 and 3.6 had mitigated the alleged MFT defects to a sufficient degree that they no longer persistently impaired the safety, reliability, or operability of the Class Vehicles"—especially if Ford's pending motions *in limine* were granted. ECF No. 526 at 15-16.

Second, Plaintiffs' damages models also posed material risk if they were presented to a jury. Thus, even if Plaintiffs were able to prove liability, their theory of damages may have been significantly limited. Specifically, there was a risk that Ford could convince a jury that Plaintiffs' experts' calculations did not properly account for any residual utility of the MFT system, after the defects were taken into account. As the Court noted, "Plaintiffs may not succeed in their theory of damages even if they are able to establish liability." ECF No. 526 at 16.

Lastly, there is inherent risk of presenting complex class claims for express warranty, implied warranty, and negligence under the laws of seven states, in addition to 21 individual Plaintiffs' claims under the laws of 12 states. This inherent risk was "particularly pronounced given the significant hurdles Plaintiffs face to prevailing on their claims at trial." ECF No. 526 at 16. The risk, expense, complexity, and likely duration of further litigation "justify a reduction in the percentage of [Plaintiffs'] settlement recovery." *Id.*; *see Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). Accordingly, even though Class Counsel felt strongly about the ability to prove their case, Class Counsel recognized the inherent risk of presenting such a complex matter to a jury at trial. *See Linney*, 151 F.3d at 1242 (settlement amounting to a fraction of the potential total recovery was reasonable given the significant risks of going to trial).

b. The Settlement Amount Constitutes a Substantial, Immediate Recovery for the Class and Weighs in Favor of Approval.

Given the risks that could have jeopardized Plaintiffs' recovery at trial, the approximately 6% recovery rate this Court previously found (*see* ECF No. 526 at 17) represents a substantial, immediate recovery for Settlement Class Members. Further, the approximately 6% recovery rate does not take into account any benefits that Settlement Class Members will receive from the free dealer-installed upgrades to MFT version 3.10. Courts have approved similar recovery rates when the risk of proceeding to trial presents a substantial chance of recovering nothing. *See* ECF No. 526 at 18; *see also Mego*, 213 F.3d at 459 (9th Cir. 2000) ("difficulties in proving the case" favored settlement approval); *Linney*, 151 F.3d at 1242 (settlement amounting to a fraction of the potential total recovery was reasonable given the significant risks of going to trial); *Aguirre v. DirecTV, LLC*, No. CV 16-06836 SJO (JPRx), 2017 WL 6888493, at *15 (C.D. Cal. Oct. 6, 2017) (risk posed by summary judgment and continued litigation supported approval); *Hendricks v. StarKist Co.*, No. 13-CV-00729-HSG, 2015 WL 4498083, at *7 (N.D. Cal. July 23, 2015) (settlement representing "only a single-digit percentage of the maximum potential exposure" was reasonable given the defenses and potential weaknesses in the plaintiffs' case). Thus, given the "substantial obstacles" Plaintiffs faced in proceeding to trial, the settlement amount is reasonable and adequate. ECF No. 526 at 18.

c. The Experienced View of Counsel and Response of Settlement Class Members Weigh in Favor of Approval.

Courts within the Ninth Circuit also give weight to the view of experienced counsel and the response of class members. *See, e.g.*, *Nobles v. MBNA Corp.*, No. 06-cv-3723 CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (citation omitted). As noted in Plaintiffs' Fee Motion (ECF No. 227 at 11-12), Class Counsel has extensive experience representing plaintiffs and classes in complex litigation, and Class Counsel unanimously support this Settlement. "Class counsel's views that the settlement is a good one is entitled to significant weight." *Free Range Content*, 2019 WL 1299504, at *22 (citing *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008)); *see, e.g.*, *Hanlon*, 150 F.3d at 1026; *Mendoza*, 2017 WL 342059, at *7 (holding that the recommendation of experienced counsel in consumer class actions is entitled to a presumption of reasonableness).

The lone objection from class member Queen Searles does not warrant disapproval of the Settlement. Ms. Searles' objection does not appear to take issue with the structure of the Settlement, or the requests made pursuant to Class Counsel's fee petition. Rather, she appears to object to the amount of monetary relief provided to her as a class member under the Settlement, arguing that her individualized circumstances should afford her a greater amount of recovery. In her objection, Ms. Searles' references two Ford vehicles: a 2013 Ford Edge (which is a Class Vehicle) and a 2015 Ford Fusion (which is not). *See* ECF No. 536. Ms. Searles' letter refers to "tolerat[ing] a glitch in the [2013] Edge" but, significantly, she has also submitted a timely claim form for this Class Vehicle. *See* JND Decl. ¶ 16. Therefore, she will be eligible for a $100 payment from Ford related to that Class Vehicle should the settlement received final approval.

Ms. Searles further states that her 2015 Ford Fusion suffered from electrical system malfunctions that caused the doors and windows to be inoperative, which are not defects associated with the MFT system. And because she is not releasing any claims related to the non-Class Vehicle, she lacks standing to object to the settlement by virtue of leasing a 2015 Fusion. *See Moore v. Verizon Commc'ns., Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *9 (N.D. Cal. Aug. 28, 2013) (holding that "because these individuals are not part of the class, . . . their objections are OVERRULED."); *Elkins v. Equitable Life Ins. Co.*, No. 96-296-CIV-T-17B, 1998 WL 133741, at *29 (M.D. Fla. Jan. 27, 1998) (The objection of *Patrick A. Staloch* concerns a policy purchased in 1981, *before* the Class Period. Therefore, because Mr. Staloch is not a Class Member with respect to this policy, he does not have standing to object.") (emphasis in original).

Finally, Ms. Searles' request that "the Court…increase my settlement amount to $9,000 and/or…that Ford Credit Company be required to minimally remove the $3,158 derogatory unfair amount that they have reported to the Credit Reporting Agencies...," is irrelevant to the issues before the Court and provides no basis to reject the Settlement.[7] Had Ms. Searles wanted to pursue these greater amounts for her 2013 Class Vehicle, the proper procedure would have been for her to opt-out. *See In re*

[7] Ms. Searles presumably picked the $9,000 figure because that is the amount being sought as service payments on behalf of the named Plaintiffs. However, Ms. Searles did not serve as a class representative in this case, nor undertake any of the litigation work described by these Plaintiffs. *See* ECF No. 532.

Oil Spill, 295 F.R.D. 112, 156 (E.D. La. 2013) ("Those objectors who are unhappy with their anticipated settlement compensation could have opted out and pursued additional remedies through individual litigation."); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 229 F. Supp. 3d 1052, 1069 (N.D. Cal. 2017) *(*"This objection is simply an attempt by Speedcraft VW to secure more money under the Settlement. The Court overrules the objection for the same reasons as above."); *In re TD Ameritrade Account Holder Litig.*, No. C 07-2852 SBA; C 07-4903 SBA, 2011 WL 4079226, at *14 (N.D. Cal. Sept. 13, 2011) (overruling objection where "to the extent that any class member did not feel adequately compensated, he or she could have opted out of the Settlement and pursued his or her own action").

In sum, the thrust of Ms. Searles' arguments do not appear to be related to the MFT system or her Class Vehicle. As such they are not relevant to the Settlement and, therefore, do not warrant the Court disapproving the Settlement.

d. The Claims Process Is Convenient and Effective, and the Requested Attorney's Fees Are Reasonable.

Rule 23(e)(2)(c)(ii) asks whether the methods of distribution and claims processing are effective. Settlement Class Members have received direct notice of the Settlement benefits through the Court-approved notice program. *See* ECF No. 526 at 18-24. To obtain the benefits of the Settlement, Settlement Class Members submitted a pre-populated, simplified claim form that was designed for the process to be as easy as possible for them. As set forth above, the methods of distribution are convenient and effective. Further, those that do not wish to make a claim are eligible to receive unilateral cash payment directly from Ford without submitting a claim. Thus, the Settlement's method for processing claims and distributing relief is fair and reasonable.

Under Rule 23(e)(2)(C)(ii), the court must also consider whether the terms of the attorneys' fees requested are reasonable. Class Counsel is requesting $16 million, which includes both fees and costs. This is the same amount recommended by Magistrate Judge Kim in her Mediator's Proposal. Notably, no one – not a class member, and not a CAFA notice recipient - has objected to the fees, costs, or service awards requested by Class Counsel. As discussed more fully in Plaintiffs' Motion for Fees, Expenses, and Incentive Awards, Plaintiffs respectfully submit that the requested fees (a negative

lodestar proposed by the mediator,) and incentive awards are reasonable given the result achieved in this complex case when taking into account the substantial risks of proceeding to trial. *See generally* ECF No. 527.[8]

3. The Settlement Treats All Settlement Class Members Equitably.

Rule 23(e)(2)(D) requires that the Court consider whether "the proposal treats class members equitably relative to each other." The crux of the inquiry is whether the agreement "improperly grant[s] preferential treatment to class representatives or segments of the class." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citation omitted). Beyond the requested incentive awards, which are well within the range generally awarded in this District[9], *See* ECF No. 527 at 18-20, the settlement does not grant the class representatives any preferential treatment.

Nor does the Settlement grant preferential treatment to any other segment of the Settlement Classes. Rather, the Settlement was structured to deliver the most complete relief to those Settlement Class Members that experienced persistent defects—which is a requirement of a breach of warranty claim. *See In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable."). Settlement Class Members who sought more repairs of their MFT system receive a greater recovery because the number of repairs is representative of the seriousness of their MFT defects. This is an objective and logical explanation for the variations in monetary recovery. As such all class members are entitled to receive monetary compensation and are placed on an equal footing. The Settlement, therefore, does not favor any segment of class members over any other, which supports final approval.

[8] With respect to Rule 23(e)(2)(C)(iv), there are no agreements, other than the Settlement, required to be identified under Rule 23(e)(3).

[9] As part of Plaintiffs' Motion for Fees, Expenses, and Incentive Awards, the Class Representatives and Individual Plaintiffs have each submitted Declarations explaining in detail the work they undertook as part of their service to this litigation, including hours estimates. (ECF No. 532.) Class Counsel is requesting the same service award for both the individual Plaintiffs and the Class Representative as both groups undertook the same amount of work. It was only after discovery closed, and a substantial amount of that work completed, that this Court declined to certify the classes for which the individual Plaintiffs sought certification. *See* ECF No. 527 at 18-20.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed Final Order and Judgment and, thereby:

- Finally approving the proposed settlement and entering final judgment;
- Appointing Plaintiffs as Class Representatives;
- Appointing Steve W. Berman Esq., Craig Spiegel Esq., Catherine Y.N. Gannon Esq., Roland Tellis Esq., Mark Pifko Esq., Adam J. Levitt Esq., John E. Tangren Esq., Nicholas E. Chimicles Esq., Benjamin F. Johns Esq., and the law firms Hagens Berman Sobol Shapiro LLP, Baron & Budd, P.C., DiCello Levitt Gutzler LLC, and Chimicles Schwartz Kriner & Donaldson- Smith LLP as Class Counsel;
- Finally approving the plan of allocation and directing payment of claims; and
- Dismissing this action with prejudice.

Dated: November 7, 2019

Respectfully Submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

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