UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SUNIL AMIN, TRUSHAR PATEL, MANAN BHATT, MARY BLASCO, NICHOLAS BIASE, ROSA GRUE, JOHN DUDASIK, TODD BASLER, and GAIL MAHONEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MERCEDES-BENZ USA, LLC, and DAIMLER AG,

Defendants.

Case No. 1:17-cv-01701-AT

MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

The Honorable Amy Totenberg

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 9, 2020, at 10:30 a.m., Class Counsel, on behalf of a proposed Settlement Class of certain owners and lessees of Mercedes-Benz vehicles defined in the proposed Settlement Agreement, will and hereby do move the Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an Order:

1. Granting final approval of the proposed Settlement;
2. Certifying the Settlement Class;
3. Finding that Notice to the Class was directed in a reasonable manner;
4. Granting Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards to the Class Representatives, Dkt. 80;
5. Reserving jurisdiction with respect to implementation and enforcement of the terms of the Settlement; and
6. Appointing Plaintiffs as Class Representatives and Lieff Cabraser Heimann and Bernstein LLP and Corpus Law Patel, LLC as Class Counsel.

This motion is based on the supporting memorandum; the declarations submitted herewith and referenced below; the pleadings and papers on file in this action, including those submitted by Plaintiffs in support of Plaintiffs' Motion for Preliminary Approval, Dkt. 63, and any further papers filed in support of this

motion, as well as arguments of counsel and all records on file in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, by and through Interim Class Counsel, respectfully request the Court enter an order granting final approval of their proposed class action settlement (the "Settlement") with Defendants Mercedes-Benz USA, LLC, and Daimler AG (jointly "Mercedes") to resolve claims that Class Members' vehicles suffer from an alleged defect in the HVAC system that results in mold, mildew, and foul odors. The Settlement provides both relief for past costs—in the form of cash reimbursements to Class Members who filed claims for past out-of-pocket expenses to address the problem— and covers future costs—by establishing an enhanced forward-looking warranty to cover these issues if and as they arise in the future. Critically, Class Counsel's attorneys' fees and costs will not reduce any of these benefits: they are to be paid by Mercedes on top of, not out of, Class Members' recoveries.

The notice campaign was robust. Direct notice was mailed to 3,825,514 potential Class Members on May 11, 2019. *See* Declaration of Jennifer M. Keough, Dkt. 111, ¶ 7. JND, the settlement administrator, fielded over 39,000 calls and 3,700 emails and over 130,000 individuals visited the Settlement website. *Id.* at ¶¶ 15, 17, 19. To date, the Settlement's straightforward claim process resulted in

16,013 claim forms from 14,143 Class Vehicles for reimbursement of a total of 19,566 repairs. *Id.* at ¶ 23. Class Members do not have to file a claim to receive the forward-looking warranty, the total value of which Plaintiffs' expert economist values between $30.8 and $97.5 million, as detailed below.

Class Member reaction to the Settlement is overwhelmingly positive. While 16,013 timely claims for reimbursement were filed for 19,566 repairs on 14,143 Class Vehicles—and some 3.8 million Class Members who own or lease 2.5 million Class Vehicles benefit from the protections of the extended and enhanced warranty, only 186 Class Members submitted timely and potentially valid opt-outs,[1] and only five Class Members objected to the Settlement. *Id.* at ¶¶ 20-21. As detailed below, while well-meaning, none of the five objections raises serious concerns about the fundamental fairness of the Settlement or warrant the Court not approving it. No Class Member objected to the attorneys' fees and costs request or requested Class Representative stipends.

Plaintiffs and Class Counsel submit that this Settlement is fair, reasonable, and adequate, and an outstanding result for the Class. Plaintiffs respectfully request that the Court certify the class for settlement purposes, overrule the objections,

[1] Opt-out forms were required to be postmarked by July 25, 2020. Accordingly, opt-outs may still be in transit to JND. Class Counsel will update the Court once a final figure is determined.

grant final approval, and enter judgment so Class Members can obtain relief expeditiously.

II. SETTLEMENT TERMS

A. The Class Definition.

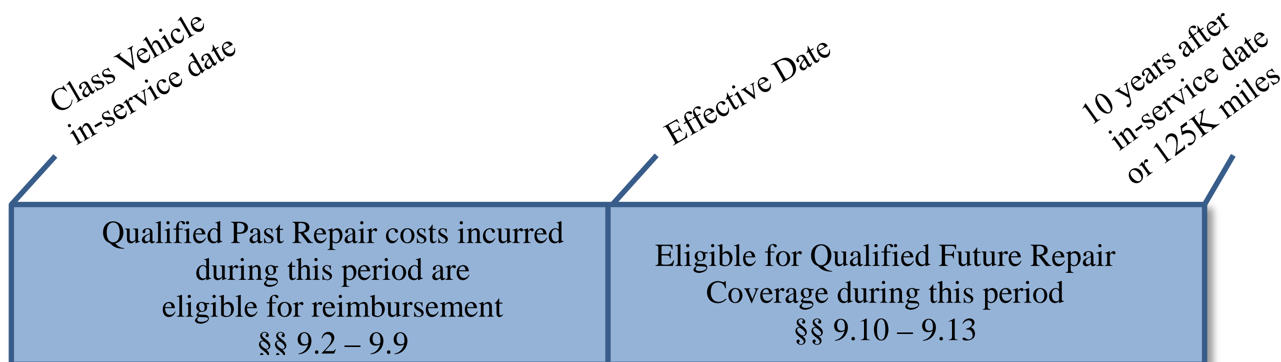
The proposed Settlement Class is defined as a nationwide class of all current and former owners and lessees of Mercedes-Benz 2008-19 C-Class, 2010-15 GLK-Class, 2012-17 CLS-Class, 2010-19 E-Class, 2015-19 GLA-Class, 2013-16 GL-Class, 2016-19 GLE-Class, 2017-19 GLS-Class, 2012-15 M-Class, and 2016-19 GLC-Class who purchased or leased their Vehicles in the United States.

B. The Settlement's Benefits to Class Members.

The Settlement provides two types of benefits to Class members: (1) cash reimbursement for qualified past repairs and (2) an enhanced warranty to cover qualified future repairs through Authorized Service Centers.

The Settlement covers qualified repairs that occur during the first 10 years or 125,000 miles of a Class Vehicle's life. Dkt. 63-1, Class Action Settlement Agreement and Release ("Agmt.") § 4. Repairs occurring before the Effective Date are eligible for reimbursement as past repairs; repairs after the Effective Date are eligible for coverage as future repairs. *Id.* This structure ensures that every Class Vehicle is covered for the same amount of time or mileage, regardless of where

that vehicle currently is in its life cycle.



The percentage of reimbursement or coverage available for a particular repair is determined by a sliding scale based on Vehicle age/mileage, as follows:

Vehicle Age Time Period	Reimbursement/ Coverage Amount
Warranty Coverage Period (e.g. the earlier of 4 years from in-service date or 50,000 miles, under standard warranty)	100%
From end of Warranty Coverage Period to the earlier of 8 years from in-service date or 100,000 miles	70%
From end of prior Period to the earlier of 10 years from in-service date or 125,000 miles	50%

Critically, there is no limit to the number of claims or amount of total money that Mercedes will pay to reimburse qualified past repairs.[2] *Id.* § 5.1. Through the opt-out deadline of July 25, 2020, the 19,566 repairs have an average reimbursement amount between $250 and $300 which are likely to result in total

[2] There is a per claim cap, however, on repairs done by an Independent Service Provider (as opposed to an Authorized Service Provider). The reimbursable repair cost of a single repair done by an Independent Service Provider shall not exceed $300 and the total reimbursement for Independent repairs shall not exceed $900 per Vehicle. *Id.* § 9.3.

reimbursements of $4.89 million to $5.86 million if each claim is deemed valid.[3] Keough Decl. ¶ 23.

The Settlement also provides coverage for qualified future repairs, which functions like an extended warranty that covers each Vehicle up to 10 years or 125,000 miles. Agmt. § 4.5. Class Members need not submit a claim or other paperwork to receive a qualified future repair. *Id.* § 9.10. Instead, Class Members can simply bring their Vehicle to an Authorized Service Center, which will determine eligibility and perform the repairs. *Id.* Plaintiffs' economist estimated the value of the future-repairs component of the Settlement between $30.8 and $97.5 million. *See* Declaration of Lucy P. Allen, NERA Economic Consulting, Dkt. 80-2, ¶ 29.

C. Attorneys' Fees will be Paid in Addition to the Settlement Amount After Final Approval.

Mercedes agreed to pay all attorneys' fees and expenses separately from and in addition to the benefits paid to Class Members. Agmt. § 5.3. Class Member recoveries will not be reduced to pay for attorneys' fees or costs. On April 13, 2020, Class Counsel applied for an award of attorneys' fees of $5,200,000, expenses of $200,000, and an aggregate service award of $40,000 to be distributed

[3] Claim validation is ongoing and the Settlement Administrator is reaching out to claimants with deficient claims. Keough Decl. ¶ 23.

among the nine Class Representatives. Dkt. 80. Class Members had the opportunity to review and comment on or object to the fee petition as provided for in Fed. R. Civ. P. 23(h) and ***not one objected to or opposed Class Counsel's motion***.

D. Notice to the Class.

On May 11, 2020, JND mailed 3,825,514 postcard notices in the manner and form ordered by the Court. Keough Decl. ¶ 7. Further, JND set up a website, http://mercedesHVACsettlement.com/, in Spanish and English, for Class Members, that allowed Class Members to file claims, provided information about key dates, contained links to important documents, contained a Facts and Questions section that contained plain language answers to common Class Member questions, and contained the short- and long-form notices. *Id.* at ¶¶ 12-15.

On August 4, 2020, pursuant to the Settlement Agreement, JND filed a final report setting forth its due diligence and identifying individuals who submitted a valid and timely request to opt out. *See* Dkt. 111. That final report stated that, as of August 4, 2020, JND received over 39,000 phone calls, 3,700 emails, and 130,000 unique visitors to the Settlement Website. *Id.* at ¶¶ 15, 17, 19. Class Counsel also received hundreds of emails and phone calls. *See* Declaration of Annika K. Martin at ¶¶ 2-3. JND received 186 potentially valid opt-outs. Keough Decl. ¶ 21, Ex. B.

III. ARGUMENT

To grant final approval of a class action settlement, the Court must determine that the settlement agreement is "fair, reasonable, and adequate" under Rule 23(e)(2). The 2018 amendments to Rule 23 make clear that the Court should focus "on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *See* Fed. R. Civ. P. 23(e)(2), 2018 Adv. Cmt. Notes. Accordingly, Plaintiffs analyze the new Rule 23(e)(2) and rely on case law interpreting the Eleventh Circuit's *Bennett* factors, which are substantially similar.[4] *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *10 (N.D. Ga. Mar. 17, 2020) ("many [*Bennett*] considerations overlap those found in Rule 23(e)(2)").

Regardless of the factors the Court employs, final approval here is appropriate. As the Court recognized at preliminary approval, the Settlement Class meets Rule 23(a) and (b)(3)'s requirements and should be certified. Dkt. 75 at 4.

[4] The *Bennett* factors include: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *See Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011).

A. <u>The Settlement is Fair, Reasonable, and Adequate.</u>

1. <u>Rule 23(e)(2)(A): The Class Representatives and Class Counsel Vigorously Represented the Class.</u>

Rule 23(e)(2)(A) requires a Court to consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). Courts consider "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases," which "may indicate whether counsel negotiating on behalf of the class had an adequate information base." Adv. Cmt. Note R. 23. Here, the same facts and considerations are present that led the Court to "find[] that it will likely be able to approve, under Rule 23(e)(2), the proposed Settlement Class as defined above." Dkt. 75, at 4.

Class Counsel and the Class Representatives prosecuted this action on behalf of the Class with vigor and dedication for over four years, beginning in the *Bhatt* Action. Counsel briefed and defeated five dispositive motions across two cases. *See* Declaration of Jonathan Selbin ("Selbin Decl."), Dkt. 63-4, ¶¶ 29, 33, 40, 42. Counsel spent an extraordinary amount of time and resources serving Daimler. *Id.* at ¶¶ 36-39. Plaintiffs were informed about the strengths (and weaknesses) of their case via discovery and expert consultation. *Id.* at ¶¶ 47-59.

The Class Representatives were likewise actively engaged—providing Class Counsel with information about their Vehicles, submitting to Vehicle inspections,

and providing records about their Vehicle ownership, service, and maintenance.[5] Accordingly, the Settlement satisfies Rule 23(e)(2)(A).

2. <u>Rule 23(e)(2)(B): The Settlement Resulted from Informed Arm's-Length Negotiations.</u>

Under Rule 23(e)(2)(B), the Court considers whether the Settlement was "negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). "[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Adv. Cmt. Note R. 23. Additionally, the Court may consider "the treatment of any award of attorneys' fees, with respect to both the manner of negotiating the fee award and its terms." *Id.*

Here, the close participation of Judge Edward A. Infante (Ret.) in numerous mediation sessions underscores the procedural fairness of the Settlement. *See Wilson v. EverBank*, 2016 WL 457011, at *6 (S.D. Fla. Feb. 3, 2016) ("The very fact of [mediator's] involvement—let alone his sworn declaration—weights in favor of approval."); Dkt. 63-3 (Declaration of Edward A. Infante).

Further, the parties negotiated attorneys' fees for Class Counsel only after reaching agreement on the terms of relief. Dkt. 63-3 at ¶ 7. This is also indicative

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[5] *See* Dkts. 63-7 to 63-15, Declarations of Class Representatives.

of a fair and arm's-length process. *See Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (settlement not collusive where "the fee was negotiated separately from the rest of the settlement, and only after substantial components of the class settlement had been resolved"); *In re Progressive Ins. Corp. Underwriting & Rating Practices Litig.*, 2008 WL 11348505, at *2 (N.D. Fla. Oct. 1, 2008). On this basis, the Court stated that the "proposed Settlement appears to be the product of intensive, thorough, serious, informed, and non-collusive mediation overseen by the Honorable Edward Infante of JAMS." Dkt. 75, at 3. This remains true. Accordingly, the Settlement satisfies Rule 23(e)(2)(B).

3. <u>Rule 23(e)(2)(C): The Relief under the Settlement is Outstanding.</u>

Rule 23(e)(2)(C) requires courts to consider whether the relief provided for the class is adequate by considering the "costs, risk, and delay of trial and appeal"; "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims"; "the terms of any proposed award of attorney's fees, including timing of payment"; and "any agreements to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(i)-(iv). Each substantive consideration is satisfied. The Settlement provides substantial relief to Class Members, delivered through a clear claims process for cash reimbursement, and the Settlement amount is not reduced by attorneys' fees

or costs.

a. <u>Rule 23(e)(2)(C)(i): The Relief Provided for the Class is Substantial, Particularly in Light of the Costs, Risks, and Delay of Trial and Appeal.</u>

Under Rule 23(e)(2)(C)(i), the Court must consider the "costs, risk, and delay of trial and appeal." Plaintiffs believe their case is strong, but recognize that litigation is uncertain, making compromise of claims in exchange for the Settlement's certain, immediate, and substantial benefits, including long-term extended warranties, an unquestionably reasonable choice.

Here, from the outset, Mercedes chose to fight on every front. After successfully litigating five dispositive motions, Plaintiffs would still have needed to certify their class and faced risks that Mercedes would successfully challenge their damages theories. Even if a class were certified, they faced the risk, expense, and delay of trial and a potential appellate process that could have delayed recovery for years. The immediate value of the Settlement is particularly appropriate here, where, upon the Settlement's Effective Date, Class Members will receive coverage for past and future repairs according to a sliding scale based on the age and mileage of their vehicles. The Settlement therefore meets the considerations of Rule 23(e)(2)(C)(i).

b. Rule 23(e)(2)(C)(ii): The Settlement Claims Process was effective.

Rule 23(e)(2)(C)(ii) asks whether the methods of distribution and claims processing are effective. Class Members received direct notice of the Settlement claims process and benefits through the Court-approved notice program. Keough Decl. ¶ 7. The Settlement claims process was designed to allow Class Members to receive cash reimbursement for past out-of-pocket repairs.[6] The claims process' success is evidenced by the significant number of claims, and the large number of interactions Class Members had with JND. *Id.* ¶¶ 15, 17, 19. Therefore, the Settlement meets the considerations of Rule 23(e)(2)(C)(ii).

c. Rule 23(e)(2)(C)(iii): The Terms of the Proposed Award of Attorney's Fees puts Class Members first.

Under Rule 23(e)(2)(c)(iii), the Court must consider whether "the terms of any proposed awards of attorney's fees, including timing of payment" are reasonable. Here, Mercedes will pay Class Counsel's attorneys' fees and expenses separately, without reducing the amounts Class Members can recover.

Mercedes agreed to pay, subject to Court approval, attorneys' fees up to $5.2 million. Agmt. § 5.3. On April 14, 2020, Class Counsel moved for an award of attorneys' fees, expenses, and service awards. Dkt. 80. Class Members were given

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[6] Critically, Class Members are not required to submit any claims for forward-looking repairs. Rather, those costs are covered as part of the Settlement.

the opportunity to review and comment on or object to Class Counsel's motion for attorneys' fees, as provided by Federal Rule of Civil Procedure 23(h). *Id*. ***Not one objected or opposed***.

Attorneys' fees may be paid following the Court's Final Approval Order and prior to the Settlement's Effective Date, conditioned on Plaintiffs' Counsel stipulated undertaking that they will remit all attorneys' fees if Final Approval or the fees award is modified or vacated. Agmt. § 5.6-5.7, Ex. A. This procedure has been routinely approved. *See, e.g.*, *Pelzer v. Vassalle*, 655 Fed. App'x 352, 365 (6th Cir. 2016) (attorneys "must repay that amount if the settlement agreement is rejected"). Class Counsel filed separate papers in support of their fee and cost request. Dkt. 80.

d. Rule 23(e)(2)(C)(iv): There are no undisclosed side agreements.

Under Rule 23(e)(2)(C)(iv), the Court must consider any agreements identified under Rule 23(e)(3) which requires the parties seeking approval of a class action settlement to "file a statement identifying any agreement made in connection with the proposal." There are no agreements to disclose under Rule 23(e)(3) and the Settlement meets the considerations of Rule 23(e)(2)(C)(iv).

4. Rule 23(e)(2)(D): The Settlement treats Class Members Equitably Relative to Each Other.

Rule 23(e)(2)(D) requires the Court to consider whether "the proposal treats class members equitably relative to each other." This ensures there is no "inequitable treatment of some class members vis-à-vis others." Adv. Cmt. Note R. 23. As the Court noted in granting preliminary approval, the Settlement "does not improperly grant preferential treatment to the Class Representatives or segments of the Class." Dkt. 75, at 3.

That remains so because the Settlement provides the same durational period of coverage for every Vehicle (10 years or 125,000 miles) and the same sliding scale of reimbursement or coverage percentage based on the Vehicle's age/mileage. Courts have approved similarly structured settlements concerning automobile defects. *See, e.g.*, *Sadowska v. Volkswagen Grp. of Am., Inc.*, 2013 WL 9600948, at *6 (C.D. Cal. Sept. 25, 2013) (approving settlement with different eligibility requirements for an extended warranty depending on age of car); *Alin v. Honda Motor Co., Ltd.*, 2012 WL 8751045, at *3 (D.N.J. Apr. 13, 2012) (approving settlement with different coverage for air condition defect depending on time period/mileage of vehicle).

B. The Settlement Class Should Be Certified.

In its Preliminary Approval Order, the Court found that it would likely be

able to certify the Settlement Class. Dkt. 75 at 4. Nothing has changed to call that conclusion into question. Plaintiffs briefly address the Rule 23(a) and (b) elements below.

1. **<u>The Class Meets the Requirements of Rule 23(a).</u>**

Rule 23(a) requires: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. *See* Fed. R. Civ. P. 23(a)(1)-(4).

a. **<u>The Class is Sufficiently Numerous.</u>**

Rule 23(a)(1) is satisfied where, as here, "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). In granting preliminary approval, the Court stated that the fact that the Class contains over 2.5 million Class Vehicles "likely meets the numerosity requirement of Rule 23(a)(1)." Dkt. 75, at 4. This satisfies numerosity. *See, e.g.*, *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

b. **<u>There are Common Questions of Both Law and Fact.</u>**

Rule 23(a)(2) conditions certification upon a showing that "questions of law or fact are common to the entire class." *Melanie K. v. Horton*, 2015 WL 1308368, at *4 (N.D. Ga. Mar. 23, 2015). It requires there be "at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1354 (11th Cir. 2009) (internal

citation omitted).

Commonality is “generally satisfied when a plaintiff alleges that Defendants have engaged in a standardized course of conduct that affects all class members.” *In re Checking Account Overdraft Litig.*, 307 F.R.D. 656, 668 (S.D. Fla. 2015) (internal quotations omitted). Here, the Class’s claims are rooted in common questions of fact as to Class Vehicles’ alleged common defect and Mercedes’s alleged omissions regarding their HVAC systems and the alleged design defect. *See* Dkt. 79, Am. Compl. ¶¶ 139-69. These common questions will, in turn, generate common answers “apt to drive the resolution of the litigation” for the Class as a whole. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

c. The Class Representatives’ Claims are Typical.

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality is satisfied where the named plaintiffs’ claims “arise[] from the same event or practice or course of conduct that gives rise to the claims of the other class members, and his or her claims are based on the same legal theory.” *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 690 (N.D. Ga. 2003). The same alleged course of conduct giving rise to the Class Representatives’ claims also gave rise to the other Class Members’ claims. That is, each purchased or leased their Class

Vehicles and expected their Class Vehicles not to emit foul odors. Am. Compl. ¶¶ 13-101. Thus, typicality is satisfied.

d. <u>The Class Representatives and Class Counsel will Fairly and Adequately protect the Class' interests.</u>

Rule 23(a)(4) requires that the Class Representatives and Class Counsel "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Both readily satisfy the adequacy requirement.

The Class Representatives demonstrated their familiarity with the case's facts and that they understand their duties and fiduciary obligations. *See* Dkts. 63-7 to 63-15, ¶ 5. There are no conflicts between the Class Representatives and the Class.

Class Counsel are qualified to act as serve as Class Counsel under Federal Rule 23(g)(1) given their experience in litigating class action and vehicle defect actions and their work, effort, and expense in bringing and litigating these cases. Accordingly, Rule 23(a)(4) is satisfied, and, for the same reasons, Class Counsel respectfully request that the Court appoint them as Class Counsel pursuant to Fed. R. Civ. P. 23(g)(1).

2. <u>The Class Meets the Requirements of Rule 23(b)(3).</u>

After Rule 23(a) is satisfied, the Court must determine if the Settlement satisfies one of Rule 23(b)'s subparts. Under Rule 23(b)(3), the Court must

determine if (i) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. <u>Common Issues of Law and Fact Predominate.</u>

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). The predominance requirement is satisfied if common issues have a "direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016) (citation omitted). As the Court held in granting preliminary approval, "the Settlement Class likely meets the… predominance requirement[] of … [Rule 23](b)(3)." Dkt. 75, at 4.

The Eleventh Circuit favors class treatment of omission and fraud claims stemming from a "common course" of conduct. *In re Checking Account Overdraft Litig.*, 307 F.R.D. 630, 645 (S.D. Fla. 2015). "Predominance is 'a test readily met in certain cases alleging consumer fraud,' particularly where…uniform practices

and misrepresentations give rise to the controversy." *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). Here, questions of law and fact common to the claims of Class Members predominate over any questions affecting only individual members. Specifically, Plaintiffs contend that discovery tended to show that (1) the Class Vehicles' HVAC systems are defective; (2) that defect is common across Class Vehicles; (3) Mercedes knew this; and (4) Mercedes's omission of material fact about the defect was likely to deceive a reasonable consumer. Dkt. 63-4, Selbin Decl., ¶ 54. Plaintiffs also contend that their expert testing showed that the alleged design defect exists in all Class Vehicles and that discovery has shown statistically significant numbers of customer complaints for each vehicle. *Id.* Further, Plaintiffs contend that internal documents show Mercedes's knowledge and its failure to inform customers of the alleged defect. *Id.* Predominance is satisfied.

b. <u>Class Treatment is Superior.</u>

Rule 23(b)(3) requires that a class be "superior to other available methods for fairly and efficiently adjudicating the controversy." Here, the Eleventh Circuit's non-exhaustive superiority factors are satisfied. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004). First, there is no indication of class members seeking to individually control the prosecution of separate actions.

Second, the only other lawsuit concerning the alleged defect—*Arakelian v. Mercedes-Benz USA LLC*, 2:17-cv-6240 (C.D. Cal.)—is stayed pending litigation brought by Class Counsel in the Central District of California (the "*Bhatt* Action"). The *Bhatt* Action will be dismissed upon the Settlement's Effective Date. Agmt. § 12.9.[7] Third, the Court has ably handled this litigation and is fully capable of handling actions involving defendants based in this District. Finally, the final factor, manageability, is inapplicable when the certification motion relates to Settlement. *See Amchem Prods.*, 521 U.S. at 620.

Moreover, class resolution is superior from an efficiency and resource perspective. *See Mohamed v. Am. Motor Co., LLC*, 320 F.R.D. 301, 317 (S.D. Fla. 2017) ("issues involved in Plaintiff's claim and the allegations he uses to support same would be, for all intents and purposes, identical to those raised in individual suits brought by any of the members of the modified class."). Superiority is met. Because Rule 23's requirements are satisfied, certification under Rule 23(b)(3) is appropriate.

[7] The *Bhatt* Action is stayed pending this case's settlement approval process. *See* Dkt. 74-1.

C. Plaintiffs Complied with All Additional Approval Factors.

1. Plaintiffs Provided Adequate Notice under Rule 23(b)(3) and Rule 23(c)(2)(B).

Rule 23(b)(3) class actions must satisfy the Rule 23(c)(2)'s notice provisions, and upon settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal[.]" The Notice and notice program confirmed to the mandates of Rule 23 and due process. Rule 23(c)(2) prescribes the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). "The ultimate goal of giving notice is to enable Class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or make claims." Adv. Cmt. Note R. 23.

Here, Plaintiffs implemented the notice plan that the Court stated was "the best notice practicable under the circumstances and satisfies all requirements provided in Rule 23(c)(2)(B) and due process." Dkt. 75 at 4; *see generally* Keough Decl. Further, the Parties implemented the Court's "substantial revisions" to the postcard notice, *see* Dkt. 75 at 4 n.1; *see also* Dkt. 72. The Notices included the information required under Rule 23(c)(2)(B): they informed Class Members of the nature of the action, the class definition, the class claims, that a Class Member

could enter an appearance through an attorney, that the Court will grant timely exclusion requests, the time and manner for requesting exclusion and submitting objections, and the claims being released upon final approval.

The notice campaign was also substantively successful. JND received vehicle identification numbers from Mercedes and implemented a direct notice campaign via mail. Notice was mailed to 3,825,514 potential Class Members. Keough Decl. ¶ 7. Class Members were very responsive to the notice. Through August 4, 2020, JND received 39,296 calls, 3,702 emails, and 656,597 page views of the Settlement Website across 130,873 unique users. *Id.* ¶¶ 15, 17, 19. Hence, the notice process was adequate under Rule 23(c)(2).

2. Only five Class Members Objected to the Settlement.

Objections to proposed class settlements are governed by the procedures set forth in Fed. R. Civ. P. 23(e)(5). Out of some 3.8 million potential Class Members, only five objected.[8] *See* Dkts. 88, 106-09. While well-meaning, the objections are meritless and do not warrant denying approval.

Each objection discusses "health issues" that each objector attributes to the

[8] A sixth objection was filed and then withdrawn. *See* Dkts. 86 & 87. Further, Mr. Richard Kozlovsky mailed a letter to the Clerk that did not object to the Settlement, but described his experience with his Class Vehicle's odors and a "statement" he will "try [his] best to appear at hearing." *See* Dkt. 85. The Kozlovsky letter does not appear to be an objection, as it takes no issue with the Settlement, but says that his experience is "not [what he] expected from Mercedes." *Id.* at 1.

Class Vehicles. *Id.*[9] The Settlement does not release any claims for personal injury, meaning Class Members' claims related to "various health issues" are expressly preserved. *See* Dkt. 103-1, Amendment to Class Action Settlement Agreement and Release, § 6; *see also* Dkt. 63-1, § 6.

Two objections, by Mr. Kavanagh, Dkt. 88, and Ms. Gebell, Dkt. 108, demand different settlement terms. Mr. Kavanagh seeks a "replacement of the 'HVAC' unit and or pipes with a unit that does not have such a detrimental defect." Dkt. 88, at 1. Ms. Gebell prefers that the Settlement provide backward-looking relief, in the form of full reimbursement for the purchase price of Class Vehicles, to customers who had their HVAC repairs covered under warranty. Dkt. 108 at 1.[10] That result, which would be difficult if not impossible to obtain in a successful verdict litigated to judgment and upheld on appeal, is the sort of "'wish list' which would be impossible to grant and is hardly in the best interests of the class." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D. Ga. 1993); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is not

[9] Ms. Urrutia's objection attached a March 2016 safety recall notice related to an airbag issue unrelated to the alleged HVAC defect at issue in this case. Dkt. 107, at 2.

[10] Ms. Gebell's objection attaches two claims she filled out stating the total amount she paid for each Class Vehicle under "Amount paid for repair/service." Dkt. 108 at 2, 4. Based on her objection, Ms. Gebell "was covered under warranty for both of my vehicles." *Id.* at 1.

whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.").

A third objection by Mr. Cosentino, Dkt. 109, stated: "I truly do not believe that this is a settlement of any value to the owners of these vehicles." Dkt. 109, at 2. Mr. Cosentino's request that Class Counsel work with him to publicize his claim on a local television show is outside of the parameters of this Settlement. *Id.* at 3. Mr. Cosentino is entitled to reimbursement for qualified past repairs and will be covered for future repairs. The Settlement is fair, reasonable, and adequate and provides strong relief that addresses Mr. Cosentino's non-personal injury claims.

Respectfully, each objection should be overruled.

3. **The Positive Response of Class Members to the Settlement Favors Final Approval.**

The "miniscule number of objectors in comparison to the class size is entitled to significant weight in the final approval analysis." *In re Equifax*, 2020 WL 256132, at *10 (388 objections in 147 million person class); s*ee also In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, 2016 WL 6902351, at *4 (N.D. Ga. Aug. 23, 2016) (five timely objections out of tens of millions of class members supports approval).

Further, thousands of Class Members made claims, contacted the Settlement Administrator, visited the Settlement website, and are aware of their right to

reimbursement going forward. This positive reaction confirms the strength of the Settlement and is entitled to significant weight.

IV. CONCLUSION

Plaintiffs respectfully request that the Court: (1) overrule the objections and grant final approval of the proposed Settlement; (2) certify the Settlement Class; (3) find that Notice to the Class was directed in a reasonable manner; (4) grant Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards to the Class Representatives, Dkt. 80; (5) reserve jurisdiction with respect to implementation and enforcement of the terms of the Settlement; and (6) appoint Plaintiffs as Class Representatives and Lieff Cabraser Heimann and Bernstein LLP and Corpus Law Patel, LLC as Class Counsel.

Dated: August 5, 2020

Respectfully submitted,

By: /s/ Ketan A. Patel
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 5.1C, I hereby certify that this brief was prepared using 14 point Times New Roman font with a top margin of not less than 1.5 inches and a left margin of not less than 1 inch.

Dated: August 5, 2020 Respectfully submitted.

By: /s/ *Annika K. Martin*
Annika K. Martin

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2020, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record.

By: /s/ *Annika K. Martin*
Annika K. Martin