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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VANCOUVER ALUMNI ASSET HOLDINGS INC., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. DAIMLER AG, DIETER ZETSCHE, BODO UEBBER, and THOMAS WEBER, Defendants.	Master File No. 16-cv-02942-DSF-KS Judge: Hon. Dale S. Fischer **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION**
MARIA MUNRO, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. DAIMLER AG, DIETER ZETSCHE, BODO UEBBER, and THOMAS WEBER, Defendants.	Case No. 16-cv-03412-DSF-KS Hearing: Date: December 14, 2020 Time: 1:30 p.m. Place: Courtroom 7D Judge: Hon. Dale S. Fischer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Lead Plaintiff, the Public School Retirement System of the School District of Kansas City, Missouri ("Lead Plaintiff" or "Kansas City"), by its counsel Labaton Sucharow LLP ("Lead Counsel"), respectfully submits this memorandum of points and authorities in support of its motion, pursuant to Federal Rule of Civil Procedure 23(e), requesting: (i) final approval of the proposed Settlement of this class action (the "Action"); (ii) approval of the proposed plan of allocation for the proceeds of the Settlement (the "Plan of Allocation"); and (iii) final certification of the Settlement Class.[1]

PRELIMINARY STATEMENT

Subject to Court approval, Lead Plaintiff has agreed to settle all claims in the Action, and related claims, in exchange for a payment of $19,000,000. Lead Plaintiff, on behalf of itself and all others similarly situated, entered into the Settlement with all of the defendants in the Action: Daimler AG ("Daimler" or the "Company"), and Dieter Zetsche ("Zetsche"), Bodo Uebber ("Uebber"), and Thomas Weber ("Weber") (collectively, the "Individual Defendants" and, with Daimler, the "Defendants"). Lead Plaintiff respectfully submits that the proposed Settlement is a very good result for the Settlement Class and easily satisfies the standards for final approval under Rule 23(e)(2) of the Federal Rules of Civil Procedure.

At the time the agreement to settle was reached, Lead Plaintiff and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the Action. Before the Settlement was agreed to, Lead Counsel had: (i) conducted an extensive investigation into the alleged fraud; (ii) drafted and filed a detailed amended complaint based on Lead Counsel's investigation; (iii) engaged in

[1] All capitalized terms used herein are defined in the Stipulation and Agreement of Settlement, dated April 20, 2020 (the "Stipulation," ECF No. 310-3), amended by the Agreement Regarding Amendments to the Stipulation and Agreement of Settlement, dated September 14, 2020 ("Agreement Regarding Amendments," ECF No. 324-1), and have the same meanings as set forth therein.

extensive briefing on Defendants' motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(2), as well as a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6); (iv) engaged in extensive briefing and oral arguments related to a contentious and lengthy sealed discovery dispute; (v) prepared briefing on Defendants' appeal of Magistrate Judge Stevenson's Order regarding the sealed discovery dispute; (vi) worked closely with multiple experts in the fields of diesel emissions, automotive emissions regulations, data privacy, and loss causation and damages issues; and (vii) engaged in extensive arm's-length settlement negotiations, including a formal mediation session before the Honorable Daniel Weinstein of JAMS (the "Mediator"), with assistance from Ambassador (ret.) David Carden. *See generally* Declaration of James W. Johnson in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses (the "Johnson Declaration" or "Johnson Decl."), filed herewith.[2]

While Lead Plaintiff and Lead Counsel continue to believe that the claims asserted against Defendants are strong, they recognize that the Action presented a number of substantial risks that could negatively impact Lead Plaintiff's ability to establish the liability of Defendants, including challenges in establishing the falsity of Defendants' statements and whether they were made with requisite intent to deceive investors and commit securities fraud. Even if Lead Plaintiff

[2] The Johnson Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation, among other things. Citations to "¶" in this memorandum refer to paragraphs in the Johnson Declaration.

All exhibits herein are annexed to the Johnson Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Declaration and the second reference is to the exhibit designation within the exhibit itself.

were able to establish liability, it would have faced significant hurdles in proving loss causation and damages if Defendants' arguments were credited by the Court or a jury and certain alleged disclosures were excluded as a consequence. Defendants would also likely argue that, even if the alleged disclosures were corrective and caused statistically significant price declines, there were credible arguments and evidence showing that a significant portion of the price declines resulted from forces unrelated to the alleged fraud (*i.e.* "disaggregation" of non-fraud related information would be required). Finally, damages could be reduced significantly if Defendants succeeded in arguing that investors' acquisitions of certain of the securities at issue—in particular, Daimler Global Registered Shares ("GRS"), which are global shares of a foreign issuer not sold on any U.S. exchange and which are connected to the U.S. only by their trading on the U.S. over-the-counter ("OTC") market—do not qualify as domestic transactions subject to the Exchange Act under *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010).

Given these risks, a recovery of $19 million represents a very favorable result for the Settlement Class, and avoids the risks and delays associated with pursuing the Action through class certification, summary judgment, trial, and appeals, a process that could take years. In light of these considerations, Lead Plaintiff and Lead Counsel respectfully submit that the Settlement is fair, reasonable, and adequate and warrants final approval by the Court.

Additionally, Lead Plaintiff requests that the Court approve the proposed Plan of Allocation, which was set forth in the Notice mailed to potential Settlement Class Members. The Plan of Allocation, which was developed by Lead Plaintiff's damages expert in consultation with Lead Counsel, provides a reasonable method for allocating the Net Settlement Fund among Settlement Class Members who submit claims.

PRELIMINARY APPROVAL AND THE NOTICE PROGRAM

On September 22, 2020, the Court entered an order preliminarily approving the Settlement and approving the proposed forms and methods of providing notice to the Settlement Class (the "Preliminary Approval Order", ECF No. 325). Pursuant to and in compliance with the Preliminary Approval Order, through records maintained by Daimler and information provided by brokerage firms and other nominees, beginning on October 6, 2020, the Court-appointed Claims Administrator A.B. Data, Ltd. ("A.B. Data"), caused, among other things, the Notice and Claim Form (together, the "Notice Packet") to be mailed by first-class mail to potential Settlement Class Members. *See* Declaration of Adam D. Walter Regarding: (A) Mailing of the Notice; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion and Objections, dated November 5, 2020. Ex. 2 at ¶¶2-7. A total of 158,139 Notice Packets have been mailed as of November 5, 2020. *Id*. at ¶7. On October 19, 2020, the Summary Notice was published in *The Wall Street Journal* and was disseminated over the internet using *PR Newswire*. *Id*. at ¶8 and Exhibits B & C attached thereto. The Notice and Claim Form were also posted, for review and easy downloading, on the website established by A.B. Data for purposes of this Settlement, as well as Labaton Sucharow's website. *Id*. at ¶10; Johnson Decl. ¶50.

The Notice described, *inter alia*, the claims asserted in the Action, the contentions of the Parties, the course of the litigation, the terms of the Settlement, the maximum amounts that would be sought in attorneys' fees and expenses, the Plan of Allocation, the right to object to the Settlement, and the right to seek to be excluded from the Settlement Class. *See generally* Ex. 2-A. The Notice also gave the deadlines for objecting, seeking exclusion, submitting claims, and advised potential Settlement Class Members of the scheduled Settlement Hearing before this Court. *Id*. To date, the Settlement Class's reaction to the proposed Settlement has been positive. While the deadline (November 23, 2020) for

requesting exclusion or objecting to the Settlement has not yet passed, to date there has been only one request for exclusion, no objections to the proposed Settlement, and no objections to the Plan of Allocation.[3]

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED

A. Standards for Final Approval of the Settlement

The Ninth Circuit has recognized that there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).[4] It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Serv. Comm'r*, 688 F.2d 615, 625 (9th Cir. 1982). Settlements of complex cases, such as this one, greatly contribute to the efficient utilization of scarce judicial resources and achieve the speedy resolution of claims. *See, e.g.*, *Garner v. State Farm Mut. Auto Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *10 (N.D. Cal. Apr. 22, 2010) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain and substantial recovery for the Plaintiff class.").

Federal Rule of Civil Procedure 23(e) requires court approval of any class action settlement. The standard for determining whether to grant final approval to a class action settlement is whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Under the Federal Rules, which were

[3] One request for exclusion has been received but it is not valid as it does not provide any transactional information establishing membership in the Settlement Class. Should any objections or additional requests for exclusion be received, Lead Plaintiff will address them in its reply papers, which are due to be filed with the Court on December 7, 2020.

[4] All internal quotations and citations are omitted unless otherwise stated.

amended, in pertinent part, in December 2018, a court reviews a settlement using four main factors. *Id.* They are whether:

> (A) class representatives and 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, 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) an agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

These standards largely overlap with the pre-amendment factors considered within the Ninth Circuit: (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 of the proposed settlement. *See Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004). *Accord, Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672

CRB (JSC), 2019 WL 2077847, at *1 (N.D. Cal. May 10, 2019) (approving settlement after considering both the "Rule 23(e)(2) factors, which became effective on December 1, 2018, and the factors identified in" Ninth Circuit case law). "[T]o the extent possible the Court would apply the factors listed in Rule 23(e)(2) through the lens of the Ninth Circuit's factors and existing relevant precedent." *Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW(FFMX), 2019 WL 5173771, at *4 (C.D. Cal. Oct. 10, 2019).

For the reasons discussed herein and in the Johnson Declaration, the proposed Settlement meets all the criteria for final approval.

B. Lead Plaintiff and Lead Counsel Have Adequately Represented the Class and the Settlement Was Negotiated at Arm's-Length

In determining whether to approve a class action settlement, the Court should consider "whether the class representatives and class counsel have adequately represented the class" (Fed. R. Civ. P. 23(e)(2)(A)) and "whether the proposal was negotiated at arm's length (Fed. R. Civ. P. 23(e)(2)(B)). "These considerations overlap with certain Ninth Circuit factors, such as the non-collusive nature of negotiations, the extent of discovery completed, and the stage of proceedings." *In re Extreme Networks*, No. 15-cv-04883, 2019 WL 3290770, at *7 (N.D. Cal. June 22, 2019) (citing *Hanlon*, 150 F.3d at 1026).

1. Lead Plaintiff and Lead Counsel Have Adequately Represented the Settlement Class

Lead Plaintiff Kansas City is a sophisticated institutional investor and has been involved throughout the litigation and supports approval of the Settlement. *See* Ex. 1. Throughout the Action, Lead Plaintiff benefited from the advice of knowledgeable counsel well-versed in shareholder class action litigation and securities fraud cases. Labaton Sucharow LLP is among the most experienced and skilled firms in the securities litigation field, and has a long and successful track record in such cases. *See* Ex. 3-D. Lead Counsel has served as lead counsel

in a number of high profile and influential cases, including taking three cases to trial after the enactment of the PSLRA. *Id.*

Lead Plaintiff, through Lead Counsel, has vigorously litigated the Action since its inception four years ago. Lead Counsel, among other things: (i) conducted a thorough investigation that included the review of publicly available information issued by or concerning the Company and the events and facts underlying the claims, including European and domestic emissions regulations, regulatory submissions by Daimler and other auto manufacturers, investigative reports regarding diesel emissions and defeat devices, and engineering analyses, as well as and interviews with more than 30 potential witnesses; (ii) prepared and filed a detailed Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint"); (iii) researched and drafted oppositions to Defendants' two motions to dismiss; (iv) engaged in contentious and extensive briefing and oral arguments related to a sealed discovery dispute with Defendants; (v) prepared briefing on Defendants' appeal of the Order regarding the sealed discovery dispute; (vi) worked closely with multiple experts to analyze diesel emissions, regulatory, data privacy, loss causation, and damages issues; and (vii) engaged in extensive mediated settlement discussions, which included additional due diligence prior to executing the Stipulation. *See generally* Johnson Decl. at §§ III - V.

Accordingly, prior to, and over the course of the litigation, Lead Plaintiff and Counsel explored the strengths and weaknesses of the claims and defenses and developed a deep understanding of the merits of the claims. They had a firm understanding of the likelihood of success and the potential for recovery at trial at the time the Settlement was entered into. *See, e.g., Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-cv-09405-CAS-FFMx, 2014 WL 439006, at *4 (C.D. Cal. Jan. 30, 2014) (approving settlement where record established that "all counsel had ample information and opportunity to assess the strengths and weaknesses of their claims

and defenses"); *Redwen v. Sino Clean Energy, Inc.*, No. 11-3936, 2013 WL 12303367, at *7 (C.D. Cal. July 9, 2013) (settlement approved when, as here, "the parties have spent a significant amount of time considering the issues and facts in this case and are in a position to determine whether settlement is a viable alternative"); *Destefano v. Zynga Inc.*, No. 12-04007-JSC, 2016 WL 537946, at *12 (N.D. Cal. Feb. 11, 2016) (noting that the extent of discovery completed and stage of proceedings supports final approval of settlement where plaintiffs engaged in a pre-filing investigation, opposed defendants' motions to dismiss and a motion for reconsideration, worked with consultants, propounded and responded to some discovery, and prepared and participated in mediation session).

As a result of this process, Lead Counsel and Lead Plaintiff concluded that the proposed Settlement was fair and reasonable. As the Ninth Circuit observed in *Rodriguez v. West Publishing Corporation*, Lead Counsel's informed opinion supports approval as "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action. *Rodriguez*, 563 F.3d 948, 965 (9th Cir. 2009); *see also Nat'l Rural Telecomm. Coop. v. DirectTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("'[g]reat weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *In re NVIDIA Corp. Derivative Litig.*, No. 06-cv-06110-SBA (JCS), 2008 WL 5382544, at *4 (N.D. Cal. Dec. 22, 2008) ("[S]ignificant weight should be attributed to counsel's belief that settlement is in the best interest of those affected by the settlement."). Accordingly, it is respectfully submitted that Lead Plaintiff and Lead Counsel have adequately represented the Settlement Class.

2. The Settlement Was Negotiated at Arm's-Length

Courts have long recognized that there is an initial presumption that a proposed settlement is fair and reasonable when it is the product of arms-length negotiations. *See Roberti v. OSI Sys., Inc.*, No. CV 13-09174MWFMRW, 2015

WL 8329916, at *3 (C.D. Cal. Dec. 8, 2015) ("The arms-length nature of the negotiation resulting in the proposed Settlement supports final approval."); *In re Netflix Privacy Litig.*, No. 5:11cv-00379, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) ("Courts have afforded a presumption of fairness and reasonableness of a settlement agreement where that agreement was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel"); *cf Jiangchen*, 2019 WL 5173771, at *6 (finding that the settlement was the product of "serious, informed, non-collusive negotiations performed at arms-length" where it involved a mediator and vigorousness litigation).

Here, Lead Plaintiff and Lead Counsel agreed to settle after rigorous litigation efforts and a through mediation process overseen by a highly regarded and experienced mediator, the Honorable Daniel Weinstein of JAMS, with assistance from Ambassador (ret.) David Carden. ¶¶42-44. The mediation, held on December 19, 2019, involved an extended effort to settle the claims and was preceded by the submission of mediation statements to the Mediator, addressing issues of both liability and damages. *Id.* The Parties reached an agreement-in-principle to settle the Action that day, subject to the negotiation of a mutually acceptable term sheet and long form stipulation of settlement, as well as the completion of additional due diligence to confirm the reasonableness of the Settlement. The Settlement Term Sheet was executed by the Parties on February 20, 2020. Prior to the Parties execution of the Stipulation on April 20, 2020, Lead Counsel conducted additional due diligence and reviewed more than 2,600 documents produced by Defendants, in both English and German.

It is respectfully submitted that this factor supports approval of the Settlement.

C. The Relief Provided by the Settlement Is Adequate

In determining whether a class-action settlement is "fair, reasonable, and adequate," the Court must also consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," as well as other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). This factor under Rule 23(e)(2)(C) essentially encompasses four of the seven factors of the traditional Ninth Circuit analysis: (1) the amount offered in settlement; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class-action status throughout the trial; and (4) the strength of plaintiffs' case. *See Hanlon*, 150 F.3d at 1026.

Here, the $19 million Settlement Amount presents a very favorable recovery for the Settlement Class. As noted in the Johnson Declaration, it is estimated that if liability were established with respect to all of the claims, maximum aggregate damages based on the full stock price declines on the alleged disclosure dates would be approximately $150 million (this assumes Lead Plaintiff does not need to disaggregate, or parse out, confounding non-fraud related information). ¶69. Accordingly, the Settlement recovers approximately 13% of maximum damages. *Id*. Courts regularly approve securities settlements that recover a similar percentage of damages, and even far smaller percentages than the percentage recovered here. *See, e.g., In re Biolase, Inc. Sec. Litig.*, No. 13-1300, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (settlement recovery of 8% of estimated damages "equals or surpasses the recovery in many other securities class actions"); *McPhail v. First Command Fin. Planning, Inc.*, No. 05-cv-179-IEG-JMA, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding a $12 million settlement recovering 7% of estimated damages was fair and adequate); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor

losses recovered in recent shareholder class action settlements"); *IBEW Local* 697 *Pension Fund v. Int'l Game Tech*., Inc. No. 3:09–cv–00419–MMD–WGC, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving $12.5 million settlement representing "about 3.5% of the maximum damages that Plaintiffs believe[d] could be recovered at trial" and finding it "within the median recovery in securities class actions settled in the last few years").

The $19 million recovery is also well above the median securities case settlement amount of $12.4 million for 2019, as reported by NERA Economic Consulting. *See* Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* (NERA 2020), Ex. 7 at 1.

Although Lead Plaintiff believes that the case against Defendants is strong, that confidence must be tempered by the fact that the Settlement is certain and that every case involves significant risk of no recovery, particularly in a complex securities case such as this one.

1. Risks in Proving Falsity

The operative complaint in the Action, the Complaint, asserts violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the SEC, 17 C.F.R. §240.10b-5, by Daimler and the Individual Defendants. To succeed on a Rule 10b-5 claim, based on an untrue statement or omission of a material fact, a plaintiff must establish (1) a false statement or omission of material fact; (2) made with scienter; (3) upon which the plaintiff justifiably relied; and (4) that proximately caused the plaintiff's injury.

Here, if the case were to proceed, Defendants likely would continue to argue that with respect to the element of falsity, the statements they made before the U.S. Environmental Protection Agency issued a Notice of Violation ("NOV") to VW for using illegal emissions "defeat devices" were mere corporate optimism,

or puffery, which are immaterial as a matter of law. ¶60. Defendants likely would have maintained their arguments that statements regarding, for example, Daimler's compliance with "the strictest emissions standards," were not false because its diesel vehicles met the applicable regulatory standards that were in place at the time. Regarding the alleged misstatements denying that Daimler used defeat devices after the VW NOV, Defendants would likely continue to contend that they were not false and misleading because, *inter alia*, Lead Plaintiff would not be able to establish Daimler's use of any impermissible defeat device like the ones used by VW. Additionally, falsity would have been difficult to establish given the lack of clear regulatory guidance and competing interpretations as to whether or not an emissions control system that shuts off to protect the vehicle's engine (such as the BlueTEC emissions control system) were permissible under the applicable regulations. ¶61.

Defendants also likely would have argued that their statements denying the use of a defeat device were made in direct response to the revelation of VW's use of a specific type of defeat device software that detected if the vehicle was in a testing environment and otherwise shut off. Defendants likely would have argued that Daimler's emissions control systems did not use the same type of software as VW. Accordingly, Lead Plaintiff faced challenges in establishing that Defendants' denials of using a "defeat device" were false given that such statements were made in the context of responding to questions resulting from the VW defeat device revelations. ¶62.

Overall, there was significant uncertainty concerning Lead Plaintiff's ability to establish the element of falsity as the case proceeded through expert discovery, summary judgment challenges, trial, and inevitable appeals.

2. Risks in Proving Scienter

Lead Plaintiff would also need to prove that Defendants made the allegedly false and misleading statements with the intent to mislead investors or with

deliberate recklessness. As courts have recognized, a defendant's state of mind in a securities case "is the most difficult element of proof and one that is rarely supported by direct evidence." *See In re Amgen Inc. Sec. Litig.*, No. 07 cv-2536, 2016 WL 10571773, at *3 (C.D. Cal. Oct. 25, 2016); *see also In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (noting that scienter is a "complex and difficult [element] to establish at trial").

In this regard, Defendants likely would have continued to argue, *inter alia*, that none of the Individual Defendants could have been aware of any improper defeat device given that they were not responsible for developing any of the complex and vehicle-specific emissions software at issue, nor would such responsibility be expected given their high-level management positions. ¶63. Defendants would also likely argue that Lead Plaintiff could not put forth sufficient evidence to prove that any of the Individual Defendants, or anyone else whose knowledge could be imputed to Daimler and who participated in making the challenged statements, knew that Daimler's emissions systems were non-compliant with the applicable regulatory standards because, *inter alia*, the regulatory landscape is complex, not well-defined, and subject to numerous competing interpretations. ¶64.

Accordingly, there was a serious risk that Lead Plaintiff would be unable to prove scienter.

3. Risks Concerning Class Certification

As detailed in the Johnson Declaration, Lead Plaintiff also faced the risk of a complex and heavily contested motion for class certification, and of retaining certification through summary judgment and trial. In this regard, Lead Plaintiff would have had to counter, and the Court would be called to rule on, complex loss causation and *Morrison* arguments, and the motion would have led to a difficult contested "battle of the experts."

Most notably, Defendants likely would have argued that purchases of the Daimler Securities at issue here—particularly the Daimler GRSs, which are connected to the U.S. only by their trading on the U.S. OTC market—did not qualify as domestic transactions under *Morrison* and the guidance set forth in *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 937 n.1 (9th Cir. 2018). Thus, Lead Plaintiff would have faced novel and complex challenges in establishing that purchases of Daimler GRS on the U.S. OTC market were domestic transactions under *Morrison* and appropriate for class certification. ¶56.

Additionally, there was a risk that Defendants would have succeeded in arguing that one or both of the alleged corrective disclosures did not have price impact on the Daimler Securities for purposes of rebutting the *Basic v. Levinson*, 485 U.S. 224, 241-42 (1988), presumption of reliance, which also would have posed a significant risk to achieving and maintaining class certification. ¶57.

4. Risks in Proving Loss Causation and Damages

Another principal challenge in continuing the litigation is the difficulty of proving loss causation and damages. To succeed at trial in a securities fraud case, "a plaintiff [must] prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005). Here, loss causation and damages would have been hotly contested by Defendants, particularly at class certification and summary judgment, and would continue to be challenged in *Daubert* motions, at trial, in post-trial proceedings and appeals.

As discussed above, it is estimated that if liability were established with respect to all of the claims, including for all the alleged corrective disclosures, the most reasonable estimate of maximum aggregate damages recoverable at trial was approximately $150 million, without "parsing out" or disaggregating the impact of non-fraud related information from the alleged stock price declines. However, Defendants likely would have continued to argue that the two alleged corrective

disclosures (on September 21, 2015 and on April 21, 2016) were not corrective. Regarding the September 21, 2015 article concerning VW and emissions data, Defendants would likely argue that it was not corrective because it did not reveal any defeat device issues with *Daimler's* vehicles. Defendants would also have likely argued that loss causation was not established for this first alleged disclosure date because the article was issued during trading hours on September 21, 2015, but there was no statistically significant stock price decline on that day. ¶¶66-67. With respect to the April 21, 2016 disclosure date, Defendants would likely continue to argue that the announcement of an internal investigation and other such expressions of concern about Daimler's emissions controls did not qualify as a "corrective" disclosure sufficient to establish loss causation because they did not reveal the alleged fraudulent practices to the market. ¶68.

There was also substantial uncertainty surrounding Lead Plaintiff's expert's ability to isolate the proportion of the stock price declines on the disclosure dates attributable specifically to the alleged fraud. Defendants likely would assert that disaggregating information only related to the alleged fraud from the price declines would necessarily show no damages resulting from Lead Plaintiff's theory of the case. Because of these challenges, Lead Plaintiff's proposed damages methodology would have come under sustained attack by Defendants, and issues relating to damages would likely have come down to an unpredictable and hotly disputed "battle of the experts." As Courts have long recognized, the uncertainty as to which side's expert's view might be credited by the jury presents a substantial litigation risk in securities actions. *See, e.g.*, *Nguyen v. Radient Pharms. Corp.*, No. SACV 11-00406 DOC (MLGx), 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (approving settlement in securities case where "[p]roving and calculating damages required a complex analysis, requiring the jury to parse divergent positions of expert witnesses in a complex area of the law" and "[t]he outcome of that analysis is inherently difficult to predict and risky"); *In re Celera*

Corp. Sec. Litig., No. 5:10-CV-02604-EJD, 2015 WL 7351449, at *6 (N.D. Cal. Nov. 20, 2015) (finding that risks related to the "battle of experts" weighed in favor of settlement approval).

5. The Expense, Complexity, and Likely Duration of Further Litigation

Final approval of the Settlement is also supported by the complexity, expense, and likely duration of continued litigation. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) ("the cost, complexity and time of fully litigating the case all suggest that this settlement was fair"). All the above-noted risks aside, fact and expert discovery would have been protracted. Defendants would likely have sought summary judgment with respect to several elements of Lead Plaintiff's claims and there was no guarantee that the proposed class would prevail in Defendants' continuous challenges and, even if they did, how the Court's rulings would affect damages or how the case would be presented to a jury.

A trial of Lead Plaintiff's claims would inevitably be long and complex, and even a favorable verdict would undoubtedly spur a lengthy post-trial and appellate process. *See, e.g., Torrisi*, 8 F.3d at 1376 ("the cost, complexity and time of fully litigating the case all suggest that this settlement was fair"). "Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015).

In contrast, the Settlement provides the Settlement Class with a prompt and substantial tangible recovery, without the considerable risk, expense, and delay of litigating to completion.

6. The Effective Process for Distributing Relief

The Settlement is also fair, reasonable, and adequate in light of the effective process for distributing the relief.

As set forth in the Stipulation, as amended, and the Preliminary Approval Order, the proceeds of the Settlement will be distributed to eligible claimants with the assistance of an experienced claims administrator. *See* Stipulation at ¶¶22-31; Preliminary Approval Order ¶13. The Claims Administrator will employ a well-established protocol for the processing of claims in a securities class action. Potential class members will submit, either by mail or online using the Settlement website, the Court-approved Claim Form. Based on trading information provided by claimants, the Claims Administrator will determine each claimant's eligibility to participate and calculate their respective "Recognized Claims" based on the Court-approved Plan of Allocation. Lead Plaintiff's claims will be reviewed in the same manner. Claimants will be notified of any defects or conditions of ineligibility and be given the chance to contest rejection. Any claim disputes that cannot be resolved will be presented to the Court for a determination.

After the Settlement reaches its Effective Date (Stipulation at ¶39) and the passing of all applicable deadlines, Authorized Claimants will be issued payments. After an initial distribution of the Net Settlement Fund, if there is any balance remaining (whether by reason of tax refunds, uncashed checks or otherwise) after at least six (6) months from the date of initial distribution of the Net Settlement Fund, the Claims Administrator will, if feasible and economical after payment of Notice and Administration Expenses, Taxes, and attorneys' fees and expenses, if any, redistribute the balance among Authorized Claimants who have cashed their checks in an equitable and economic fashion. *See* Ex. 2 - A ¶61. Once Lead Counsel, in consultation with the Claims Administrator, believes it is no longer feasible or economical to make further distributions of the Net Settlement Fund to Authorized Claimants, and has sought Court approval to cease making distributions if required to do so as explained below, the balance that still remains in the Net Settlement Fund after such re-distribution(s) and after payment of outstanding Notice and Administration Expenses, Taxes, and attorneys' fees and

expenses, if any, will be contributed, in equal shares, to The Council of Institutional Investors and Consumer Federation of America, or such other non profit and non-sectarian organization(s) approved by the Court. If the unclaimed balance is $20,000 or more, Lead Counsel must seek Court approval before ceasing to make distributions and making the *cy pres* donation. *See* Agreement Regarding Amendments ¶2; Ex. 2-A at ¶61.

7. The Attorney's Fees and Expense Requests Are Reasonable

As set forth in the accompanying motion, Lead Counsel is requesting attorneys' fees of 25% of the Settlement Fund and litigation expenses of $150,686.35. A fee request of 25% is the "benchmark" within the Ninth Circuit and is consistent with numerous settlements approved in the Ninth Circuit. *See, e.g., Torrisi,* 8 F.3d at 1376-77 (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same); *see also Zynga,* 2016 WL 537946, at *16 ("In common fund cases in the Ninth Circuit, the 'benchmark' percentage award is 25 percent of the recovery obtained, with 20 to 30 percent as the usual range.") (citing *Vizcaino*, 290 F.3d at 1047). The Settlement is not contingent upon any particular award to Lead Counsel, which is within the discretion of the Court.

8. The Relief Provided Is Adequate Taking Into Account All Agreements Related to the Settlement

The relief provided to the Settlement Class is also adequate under Rule 23(e)(2)(C)(iv) given that all the agreements under Rule 23(e)(3) treat the Settlement Class fairly.

On February 20, 2020, the Parties executed the Settlement Term Sheet. On April 20, 2020, the Parties formally memorialized the Settlement in the Stipulation. Also as of April 20, 2020, they entered into a confidential Supplemental Agreement Regarding Requests for Exclusion ("Supplemental Agreement"), which was submitted to the Court under seal. The Supplemental

Agreement sets forth the conditions under which Defendants have the discretion to terminate the Settlement if requests for exclusion from the Settlement Class exceed a certain agreed-upon threshold. As is standard in securities settlements, the Supplemental Agreement has been kept confidential in order to avoid incentivizing the formation of a group of opt-outs for the sole purpose of leveraging a larger individual settlement.

On September 14, 2020, the Parties amended Paragraphs 21 and 26 of the Stipulation through the Agreement Regarding Amendments. The Settlement Term Sheet, Stipulation, Supplemental Agreement, and the Agreement Regarding Amendments, are the only agreements concerning the Settlement entered into by the Parties. All the agreements treat the Settlement Class fairly and support a finding that the relief provided by the Settlement is adequate.

D. Settlement Class Members Are Treated Equitably Relative to One Another and the Proposed Plan of Allocation Should Be Approved

The Plan of Allocation, drafted with the assistance of Lead Plaintiff's damages expert, is a fair, reasonable, and adequate method for allocating the proceeds of the Settlement among eligible claimants and treats all Settlement Class Members equitably, as required by Rule 23(e)(2)(D). Each Authorized Claimant, including Lead Plaintiff, will receive a distribution pursuant to the Plan, and Lead Plaintiff will be subject to the same formula for distribution of the Settlement as other class members. *See Ciuffitelli v. Deloitte & Touche LLP*, No. 16CV00580, 2019 WL 1441634, at *18 (D. Or. Mar. 19, 2019) ("[t]he Proposed Settlement does not provide preferential treatment to Plaintiffs or segments of the class" where "the proposed Plan of Allocation compensates all Class Members and Class Representatives equally in that they will receive a pro rata distribution based [sic] of the Settlement Fund based on their net losses").

The standard for approval of a plan of allocation in a class action under Rule 23 of the Federal Rules of Civil Procedure is the same as the standard

applicable to the settlement as a whole – the plan must be fair, reasonable, and adequate. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992); *Omnivision*, 559 F. Supp. 2d at 1045. An allocation formula need only have a reasonable basis, particularly if recommended by experienced class counsel. *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005). "[A] plan of allocation . . . fairly treats class members by awarding a pro rata share to every Authorized Claimant, even as it sensibly makes interclass distinctions based upon, inter alia, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue." *Redwen*, 2013 WL 12303367, at *8.

Here, Lead Plaintiff's consulting damages expert prepared the Plan of Allocation after careful consideration of Lead Plaintiff's theories of liability and damages under the Exchange Act. The Plan provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on "Recognized Loss" formulas tied to liability and damages. These formulas consider the amount of alleged artificial inflation in the price changes in Daimler American Depository Receipts and/or Global Registered Shares in the United States, as quantified by the consulting damages expert.

Individual claimants' recoveries will depend upon when during the Class Period they purchased and/or acquired a Daimler Security. Claimants' Recognized Losses will be calculated according to the Plan of Allocation using the transactional information provided by claimants in their claim forms. Authorized Claimants will recover their proportional "*pro rata*" amount of the Net Settlement Fund based on their total Recognized Losses. Accordingly, the Plan of Allocation will result in a fair distribution of the available proceeds among Settlement Class Members who submit valid claims. The Plan of Allocation was fully described in the Notice and, to date, there has been no objection to the proposed plan. *See* Ex. 2-A at 8-14.

E. Reaction of the Settlement Class to Date

As described above, pursuant to this Court's Preliminary Approval Order, 158,139 copies of the Notice and Claim Form were mailed to potential Settlement Class Members who could be identified with reasonable effort. *See* Ex. 2 at ¶¶2-7. The Summary Notice was published in *The Wall Street Journal* and transmitted over the internet using *PRNewswire* on October 19, 2020. *Id*. at ¶8. Additionally, the Stipulation, Agreement Regarding Amendments, Notice, Claim Form, and Preliminary Approval Order were posted to the website dedicated to the Settlement (*id*. at ¶10), as well as Lead Counsel's website.

The Notice advised the Settlement Class of, among other things, the terms of the Settlement, the Plan of Allocation, and the maximum amount of Lead Counsel's request for an award of attorneys' fees and expenses, as well as the procedures and deadlines for filing objections and requesting exclusion from the Settlement Class by November 23, 2020. *See generally* Ex. 2-A.

The Ninth Circuit has held that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1351 (9th Cir. 1980). The Ninth Circuit has also ruled that the objection deadline should fall after motions in support of approval and attorneys' fees and expenses have been filed. *See, e.g., In re Mercury Interactive Corp. Sec. Litig*., 618 F.3d 988 (9th Cir. 2010) (requiring that fee motion be made available to the class before the deadline for objecting to the fee). Lead Plaintiff respectfully submits that the notice program utilized here readily meets these standards.

While the objection/exclusion deadline – November 23, 2020 – has not yet passed, to date, no objections and only one invalid exclusion request has been received. ¶51; Ex. 2 at ¶¶11-12. The reaction to date supports approval of the

Settlement and the proposed Plan of Allocation. Lead Plaintiff will address objections and additional requests for exclusion, if any, in its reply submission.

II. FINAL CERTIFICATION OF THE SETTLEMENT CLASS

The Court previously granted preliminary certification to the Settlement Class under Rules 23(a) and (b)(3). *See* ECF No. 325. Because nothing has occurred since then to cast doubt on the propriety of class certification for settlement purposes, and no objections to certification have been received to date, the Court should grant final class certification.

CONCLUSION

For all the foregoing reasons, Lead Plaintiff respectfully requests that the Court: (i) grant final approval of the Settlement; (ii) finally certify the Settlement Class, for settlement purposes only; and (iii) approve the proposed Plan of Allocation as fair, reasonable, and adequate. Proposed orders, including the Judgment negotiated by the Parties as part of the Settlement, are filed herewith.

Dated: November 9, 2020

LABATON SUCHAROW LLP

By: */s/ James W. Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List via ECF to all registered participants.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 9, 2020

/s/ *James W. Johnson*
James W. Johnson

Mailing Information for a Case 2:16-cv-02942-DSF-KS Vancouver Alumni Asset Holdings, Inc. v. Daimler AG et al
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