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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 2672 CRB (JSC)
This Document Relates to: *United States of America v. Volkswagen AG, et al.*, Case No. 3:16-cv-00295	**UNITED STATES' NOTICE OF MOTION, MOTION, AND MEMORANDUM IN SUPPORT OF ENTRY OF PARTIAL CONSENT DECREE IN *United States of America v. Volkswagen AG, et al. Case No. 2:16-cv-10006 (E.D. Mich. 2016)***
	Hon. Charles R. Breyer Hearing (Preliminary): October 18, 2016 Time: 8:00 a.m. Ct. Rm.: 6 - 17th Floor

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 18, 2016, at 8:00 a.m., or at such other date as may be agreed upon, in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff the United States of America ("United States") will and hereby does move this Court to enter, as a final judgment in this matter, the Partial Consent Decree[1] as amended and submitted to this Court as a Proposed Order and attached to this Motion as Exhibit 1. After the United States, in consultation with the Environmental Protection Agency ("EPA"), reviewed comments submitted by the public on the proposed Consent Decree lodged with this Court on June 28, 2016 (Dkt. No. 1605-1), the United States on behalf of EPA; the People of the State of California, by and through the California Air Resources Board ("CARB") and Kamala D. Harris, Attorney General of the State of California (collectively, "California"); and Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., and Volkswagen Group of America Chattanooga Operations, LLC ("Settling Defendants") (collectively, the "Parties"), agreed to revisions in response to those comments, and the United States now moves the Court to enter the Partial Consent Decree as amended.[2] The revisions are shown in red-line format in Exhibit 2. The Parties do not believe a second public comment period is required, because the revisions, which modify certain minor aspects of the Environmental Mitigation Trust Agreement, do not alter the obligations or substance of the lodged Consent Decree.

As set forth below in the Memorandum in Support of this Motion, the Court should sign

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[1] As discussed in Section V of the United States' Memorandum in Support, the Parties have agreed on a number of minor changes to Appendix D of the proposed Decree. The complete Decree as presented by the United States for the Court's signature is attached here as Exhibit 1.

[2] California's and Settling Defendants' agreement to the changes in the proposed Decree is reflected in separate filings each of those Parties will make in support of entry of the Partial Consent Decree as amended.

and enter the proposed Partial Consent Decree as amended (hereinafter "Consent Decree" or "Decree"), because it is fair, reasonable, consistent with the goals of the Clean Air Act, and in the public interest. Settling Defendants and California have consented to entry of the Decree without further notice. Decree at ¶ 97. Accordingly, the United States now respectfully requests that the Court approve and enter the proposed Consent Decree.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

I. Introduction

By now this Court is well familiar with the key facts of this case that have led to a widespread environmental injury spanning all 50 states and implicating hundreds of thousands of vehicles. In January of this year, the United States filed its complaint in the Eastern District of Michigan alleging that Settling Defendants had installed illegal defeat devices in nearly 600,000 light duty "TDI" diesel vehicles, impairing the vehicles' emission control systems and causing emissions to exceed EPA standards. With respect to nearly 500,000 2.0 liter vehicles, the United States alleged that defeat device software detects when the car is being tested for compliance with EPA emissions standards and turns on full emissions controls only during that testing process. This results in cars that meet emissions standards in the laboratory and at the test site, but emit oxides of nitrogen ("NOx") at levels up to 40 times the EPA-compliant level during normal on-road driving.

The scope of the Clean Air Act violations alleged by the United States in this case is unprecedented. Indeed, at this Court's initial hearing convening this multidistrict litigation proceeding, the Court noted the immediate problems posed by such egregious and widespread environmental noncompliance across the entire fleet of TDI vehicles:

> THE COURT: [Y]ou have a class of people, somewhere in the neighborhood of 500- to 600,000 customers who have a vehicle that, one, is not in compliance, as the Court understands it, with federal and state law; and, two, has a questionable value in terms of whether it can be traded in or resold; and, three, is presently polluting the air. . . . Now, what does that mean? It means that you have at least a half million people who have an immediate problem as to what to do about their vehicle . . . So I think that this case has to have significant attention to immediate resolutions of these cases.

Court Tr., Dec. 22, 2015 Case Mgmt. Conf., at 5-6.

Given the pressing need for an expeditious resolution, the United States, California, and Settling Defendants have worked diligently over the last several months to craft a settlement that addresses the significant environmental harm caused by these vehicles as well as the needs of those who currently own and operate them. The proposed 2.0 liter Consent Decree marks a significant step in the overall resolution of this case – one that will achieve lasting benefits for the environment while modifying or removing from the roads of the United States the vast majority of hundreds of thousands of noncompliant vehicles in an efficient and orderly manner.

Claims Alleged in the Complaint. The United States' Complaint seeks civil penalties and injunctive relief against Volkswagen AG and several related corporate entities in connection with their manufacture and installation of defeat devices in approximately 500,000 model year ("MY") 2009-2015 light-duty diesel vehicles equipped with 2.0 liter engines and approximately 90,000 2009-2016 MY light-duty diesel vehicles equipped with 3.0 liter engines sold in the United States. The Complaint follows a Notice of Violation ("NOV") issued by EPA with respect to the 2.0 liter vehicles on September 18, 2015, and a second NOV as to the 3.0 liter vehicles issued on November 2, 2015.

The United States' claims arise under Title II of the Clean Air Act. Under Title II, EPA administers a certification program to ensure that every vehicle introduced into United States commerce satisfies applicable emissions standards. EPA issues certificates of conformity ("COCs") for categories of vehicles – known as test groups – and thereby approves the introduction of the vehicles covered by the COC into United States commerce. To obtain a COC, a light-duty vehicle manufacturer must perform testing of a prototype vehicle for each test group. The manufacturer then submits a COC application to EPA for each test group of vehicles that it intends to enter into United States commerce, demonstrating that the test vehicle meets emissions standards. 40 C.F.R. § 86.1843-01. If the COC is issued, "vehicles are covered by a certificate of conformity only if they are in all material respects as described in the

manufacturer's application for certification . . . ." 40 C.F.R. § 86.1848-10(c)(6).

In this case, Settling Defendants manufactured and installed software in the subject vehicles with functions and/or calibrations that render the vehicles' emission controls inoperable unless the vehicles are undergoing prescribed emissions testing. These software functions and calibrations were neither described nor justified in the Settling Defendants' applicable COC applications, and cause the vehicles to not conform in all material respects to the specifications described in the COC applications. The undisclosed software functions and/or calibrations constitute defeat devices, resulting in excess emissions and numerous violations of the Clean Air Act ("CAA").

The United States' Complaint alleges violations under multiple subparagraphs of Section 203 of the CAA, 42 U.S.C. §7522; namely, 1) importing and selling uncertified vehicles in violation of 42 U.S.C. § 7522(a)(1); 2) manufacturing, selling or installing a defeat device in violation of 42 U.S.C. § 7522(a)(3)(B); 3) tampering by rendering inoperative the certified pollution control system in violation of 42 U.S.C. § 7522(a)(3)(A); and 4) failing to report information required by EPA to determine whether Defendants acted in compliance with motor vehicle emissions standards in violation of 42 U.S.C. § 7522 (a)(2)(A).

Terms of the Partial Settlement. The proposed 2.0 liter partial settlement partially resolves the United States' claims for injunctive relief with respect to the nearly 500,000 vehicles equipped with 2.0 liter engines. The Decree also partially resolves the 2.0 liter vehicle claims for injunctive relief asserted by California under its environmental and unfair competition laws, recognizing CARB's unique status under the Clean Air Act as a co-regulator that sets and enforces its own standards for mobile emission sources. *See* CAA § 209, 42 U.S.C. § 7543. Under this Decree, Settling Defendants[3] are required to achieve a recall of at least 85 percent of

[3] Defendants Dr. Ing. h.c. F. Porsche AG and Porsche Cars North America, Inc., while named in the United States' Complaint, are not among the Settling Defendants, as the proposed Decree does not resolve any claims relating to these Defendants.

the affected 2.0 liter vehicles by June 30, 2019 (both nationally and in California), either by removing the vehicles from the roads of the United States or modifying them in accordance with the terms of the Decree. To accomplish this recall, Settling Defendants must offer every owner and lessee of an operable affected vehicle the option of a buyback or lease termination. Additionally, if Settling Defendants submit a proposal for modifying the vehicles to improve emissions performance in accordance with the required performance and design requirements, and EPA and CARB approve the modification, Settling Defendants must offer owners and lessees the option of an emissions modification. The choice between a buyback or an approved modification is entirely up to the affected owner or lessee. If Settling Defendants do not achieve the 85 percent recall rate, Settling Defendants must make additional contributions into the environmental mitigation trust described below.

In addition to the recall, Settling Defendants will pay $2.7 billion over three years to fully remediate the excess NOx emissions from the affected 2.0 liter vehicles. These payments will be used to establish a mitigation trust that will be administered by a mitigation trustee, with allocations to specific state, territorial, and tribal government beneficiaries to use for specific NOx mitigation actions. Lastly, the proposed Decree will require Settling Defendants to invest an additional $2 billion to promote the use of zero emission vehicles ("ZEVs") and ZEV technology.

As a partial settlement of the United States' claims, the Consent Decree does not resolve any claims with respect to the defendants' 3.0 liter subject vehicles, or with respect to civil penalties or injunctive relief measures to prevent future violations of this kind.

II. Legal Standard

Approval of a proposed consent decree is within the informed discretion of the district court. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). The court reviews the decree to determine whether it is fair, reasonable, and consistent with the objectives of the statute at issue. *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 743 (9th Cir. 1995). A court may

not modify a proposed consent decree before entry; it must either approve or reject the settlement agreed upon by the parties. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 630 (9th Cir. 1982).

The court's review is informed by the "overriding public interest in settling and quieting litigation." *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977); *see also Speed Shore Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979) ("Settlement agreements conserve judicial time and limit expensive litigation."). In reviewing a consent decree, the court "need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties." *Citizens for Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (internal citation omitted). Especially when reviewing a consent decree involving a federal agency, as is the case here, a district court "must refrain from second-guessing the Executive Branch." *Montrose Chem. Corp.*, 50 F.3d at 746 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)). The court's "deference is particularly strong where the decree has been negotiated by the Department of Justice on behalf of an agency like EPA which is an expert in its field." *United States v. Chevron U.S.A. Inc.*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005) (citing *United States v. Azko Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991)).

III. Description of the Public Comment Process

Comments Received by the Department on the Decree. The Department of Justice must hold a 30-day comment period on certain proposed consent decrees and must withdraw from the proposed decree if the comments disclose facts or considerations which indicate that it is inappropriate, improper or inadequate. 28 C.F.R. § 50.7. The Department must file the comments with the court, *id*., to help the court ensure that the settlement is in the public interest. Here, the Department held the required 30-day public comment period from July 6, 2016 through August 5, 2016, allowing citizens an adequate opportunity to present their views. 81 Fed. Reg.

44051 (July 6, 2016).

The Department received a total of 1,195 comments during the public comment period from private citizens, state and local government offices and agencies, businesses, and institutions and associations. An index of all comments is attached to this motion as Exhibit 3. The comments are also grouped into eight batches and are included in their entirety in Exhibits 4a through 4h[4]. The Department of Justice, in consultation with EPA, prepared a "Response to Comments" that groups the comments into general topics, provides a description of the major issues raised by commenters, and gives a narrative response for each topic. *See* Exhibit 5. Additionally, the broad themes that are raised by the comments as a whole are addressed in Part VI of this memorandum.

The largest number of comments received by the Department (549) were submitted on behalf of or in connection with IdleAir, a company that provides truck stop electrification ("TSE") services to long-haul truck drivers and allows drivers to operate the electric components of their vehicle (heating, air conditioning, radio, etc.) without having to idle the engine. These commenters advocated for TSE to be expressly included as an available mitigation project under the Environmental Mitigation Trust.[5] Another large group of comments (463) came from affected Volkswagen and Audi vehicle owners and lessees who offered their comments on the buyback, lease termination, and emissions modification aspects of the proposed settlement. These comments were diverse in the topics addressed, but the majority were centered on the dollar amount and calculation of the consumer compensation packages provided in the related proposed settlements filed by the Federal Trade Commission ("FTC" and "FTC Settlement") and the Plaintiff Steering Committee on behalf of consumer claimants ("PSC" and "Class Action

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[4] Comments received from private individuals have had personally identifying information redacted in compliance with Fed. R. Civ. P. 5.2.

[5] The United States has responded to these comments collectively in Comment Response No. 19 of the Response to Comments document. *See* Exhibit 5 at 20.

Settlement") (collectively, the "Related Settlements").[6] The remaining comments received by the Department came from individuals and various public, private, non-profit, and for-profit entities and offices and addressed multiple aspects of the proposed decree -- focusing primarily on the Environmental Mitigation Trust and ZEV Investment components, but also commenting on the buyback, lease termination, and emissions modification elements as well.

Comments Received by the Court. In addition to the comments submitted directly to the Department via the formal public comment process, the Department also reviewed 674 comments that were submitted directly to the Court and distributed by the Court to all parties. As the Court is already familiar with these comments, they are not included in the attached index and collection of comments. Although these comments submitted to the Court were not directly submitted to the Department of Justice as official public comments on the Consent Decree, the attached Response to Comments document addresses the issues raised by comments submitted to the Court to the extent those comments overlap with similar comments submitted directly to the Department.

IV. The Partial Settlement Provides a Robust and Timely Environmental Remedy for Nearly 500,000 Vehicles that are Currently On the Road and Do Not Meet Certified Emissions Standards.

A. The Settlement is Fair.

In assessing the propriety of a proposed consent decree, courts typically first examine procedural fairness, and make a determination as to whether the negotiation process was "fair and full of adversarial vigor." *Chevron*, 380 F. Supp. 2d at 1111 (citation omitted). Procedural fairness calls for consideration of the "candor, openness, and bargaining balance" of the negotiations. *United States v. Wallace*, 893 F. Supp. 627, 632 (N.D. Tex. 1995).

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[6] The United States has responded to these comments collectively in Comment Responses No. 1 through 9 of the Response to Comments document. *See* Exhibit 5 at 1-8.

1. The Settlement is the Product of a Court-Ordered Settlement Process Conducted by the Settlement Master.

A settlement is procedurally fair if the negotiations were open and conducted at arms-length. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86-87 (1st Cir. 1990). *See also Chevron*, 380 F. Supp. 2d at 1111 ("If the decree was the product of 'good faith, arms-length negotiations,' it is 'presumptively valid and [an] objecting party has a heavy burden of demonstrating the decree is unreasonable.'" (citing *United States v. Oregon*, 913 F.2d at 581)). Here, the proposed settlement was achieved as part of the coordinated efforts of all parties under the direction of the Court's appointed Settlement Master, former FBI Director Robert S. Mueller III [Dkt. No. 797]. As the Court noted with regard to the proposed Class Action Settlement, the Settlement Master's extensive involvement in these negotiations and guidance to the parties ". . . suggests the parties reached the Settlement after serious, informed, non-collusive negotiations." (Am. Order Granting Prelim. Approval of Settlement, Dkt. No. 1698, July 29, 2106 at 22, citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011)).

Indeed, the United States, California, and the Settling Defendants began intensive settlement discussions almost as soon as the United States filed its initial complaint in January. Attorneys from the U.S. Department of Justice and the California Attorney General's Office, as well as attorneys and technical experts from EPA and CARB, worked with Settling Defendants to identify issues and address many complex and technical concerns on various aspects of the settlement. The regulating agencies drew on their considerable expertise in their relevant fields, both with regard to the engineering challenges posed by the modification of the vehicles and the environmental concerns to be addressed by the mitigation and ZEV components of the settlement. Where necessary, the Parties consulted outside experts with knowledge and experience in the relevant subject matter to inform the Parties' negotiating positions.

The Parties met frequently and regularly in Washington, D.C.; El Monte, California; and Ann Arbor, Michigan to conduct bilateral settlement discussions. In addition, the Parties met in larger sessions arranged by Settlement Master Mueller with the Federal Trade Commission and

members of the Plaintiff Steering Committee to discuss issues of mutual concern. Over the course of many weeks and many lengthy settlement negotiations, the Parties worked toward a comprehensive settlement that addresses the technical aspects of fixing the affected vehicles, consumer issues involving how to get the in-use vehicles modified or removed from the road, and environmental concerns surrounding the harm caused by the vehicles and the required environmental remediation.

The United States, California, and Settling Defendants announced their initial agreement in principle at the Court's April 21 hearing, and subsequently continued their intensive negotiations to reduce the agreement in principle to the terms of the proposed Decree filed with the Court on June 28. Throughout the negotiations, settlement discussions were conducted in good faith and at arm's length by experienced counsel on all sides. The proposed Consent Decree reflects the strength of the Parties' negotiating positions and the efforts of all Parties to reach a just and equitable resolution with regard to the 2.0 liter vehicles. The proposed settlement is not the "product of collusion." *Chevron*, 380 F. Supp. 2d at 1111; *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991).

2. The Settlement Takes into Account but is Separate from the Related Settlements with the Federal Trade Commission and Plaintiff Steering Committee.

One unique aspect of the proposed Consent Decree is its overlap with and relation to two other significant settlements in the multidistrict litigation – those Related Settlements by the FTC, the federal agency that enforces the nation's consumer protection laws, and by the PSC, representing individual vehicle owners and lessees bringing private civil actions in this MDL. The United States' and California's Consent Decree is separate from these Related Settlements and can be entered by this Court as a standalone agreement or simultaneously with the Related Settlements. *See* Discussion at Section VI.A, *infra*. Both of the Related Settlements provide consumer relief for car owners and lessees who were injured by Settling Defendants' marketing, sale, and lease of the affected vehicles. The proposed Consent Decree acknowledges that

Settling Defendants may fulfill the buyback and lease termination requirements of the Decree by carrying out detailed obligations in the Related Settlements. The FTC and PSC agreements contain robust measures that ensure Settling Defendants will administer a fair, transparent, and effective consumer program, under Court oversight, to remove the offending vehicles from the roads of the United States. The FTC in particular, as a partner federal agency fulfilling its mandate to protect consumers, has drawn on its considerable expertise to ensure that the consumer remedies provided by the Related Settlements are fair and robust, and will represent full compensation for the many consumers injured by Settling Defendants' conduct.

Although the three settlements are separate, and each settlement resolves a different set of claims, the settlements are intended to be complementary of one another and to collectively provide comprehensive environmental and consumer relief. Settling Defendants' obligations under the three settlements ensure that any modification made to the subject vehicles is done with the approval of the appropriate regulators, EPA and CARB. In addition, any consumer compensation that is paid to affected vehicle owners and lessees is done in accordance with terms agreed to by the FTC (the federal agency with a statutory mandate to serve the cause of consumer protection) and by the PSC (representing the interests of those vehicle owners and lessees who were directly affected by Settling Defendants' conduct), thus ensuring that any payments made to vehicle owners in satisfaction of the Consent Decree buyback requirement are fair and appropriate. Ultimately, the substantial payments Settling Defendants will make to the Environmental Mitigation Trust, combined with the Consent Decree requirement that 85% of all vehicles be modified or removed from the road if Settling Defendants are to avoid substantial supplemental mitigation payments, works to ensure that all three agreements achieve an effective and lasting solution to the environmental problems posed by these vehicles.

B. The Settlement is Reasonable and Advances the Purposes of the Clean Air Act.

As discussed above, the central objective of the proposed Consent Decree is to modify or remove from the roads of the United States the nearly 500,000 2.0 liter subject vehicles that

currently do not meet emissions standards and that emit substantial amounts of NOx in excess of allowable limits. To achieve this objective, the Decree sets an aggressive requirement of removing from operation at least 85% of 487,532 vehicles nationally (and 85% of all 70,814 vehicles in California) by no later than June 30, 2019, with additional mitigation payments triggered if Settling Defendants fail to reach these recall rates. Decree App. A at Sec. VI. These substantial mitigation payments ($85 million for every percentage point short of the national 85% recall rate, and $13.5 million for every percentage point short of the California 85% recall rate) operate as a strong incentive for Settling Defendants to work quickly and diligently to address the problem of excess emissions caused by the subject vehicles. *Id*. As described below, Settling Defendants can receive credit toward the 85% capture requirement in two ways: by offering to vehicle owners and lessees and performing an approved emissions modification that will substantially reduce the NOx emissions of the affected vehicles; or by executing a buyback or lease termination for the affected vehicles and removing the vehicles from the road entirely unless and until the vehicles receive an EPA/CARB-approved emissions modification.

1. The Emissions Modification Recall Remedy Provides a Feasible Technical Solution to the Problem of Excess Emissions in a Reasonable Timeframe.

Appendix B of the proposed Consent Decree sets forth the technical requirements that Settling Defendants must meet to receive approval from EPA and CARB to offer an emissions modification to affected vehicle owners and lessees. The requirements are extremely detailed and technical in nature, and include specified emission limits, onboard diagnostic system requirements, application process requirements and deadlines, and provisions that govern the means by which EPA and CARB will review submissions from the Settling Defendants and monitor and enforce compliance. Decree App. B at Sec. III. All defeat devices must be removed from the vehicles as part of the emissions modification. App. B. at ¶ 3.1.3. Any emissions modification approved by EPA and CARB will require extensive testing by Settling Defendants (both before and after the submission of any proposal) and may include both software changes and new hardware. If approved, EPA and CARB estimate that an emissions modification will

reduce NOx emissions from the vast majority of vehicles by approximately 80 to 90 percent compared to their original condition. U.S. EPA, *Volkswagen Clean Air Act Partial Settlement* (2016), *available at* https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement. Settling Defendants must provide consumers with an emissions modification disclosure that has been approved by EPA and CARB and that contains a clear and accurate description regarding all impacts of the emissions modification on the vehicle, including emissions levels as compared with the limits to which the vehicles were originally certified, and any impacts on fuel economy or vehicle maintenance. App. A at ¶ 3.2; App. B at ¶ 4.3.8. Settling Defendants must also provide an extended warranty covering the emissions control system and engine long block for any modified vehicle. App. B. at ¶ 3.9.

Although the proposed Consent Decree sets aggressive deadlines that Settling Defendants must meet in order to complete the required testing and submit an application for an approved emissions modification, the availability of such a modification to consumers is not guaranteed. Only a modification that meets the demanding requirements of Appendix B will be approved. If such a modification is approved, Settling Defendants must offer it to all affected vehicle owners and lessees, free of charge and in perpetuity. That is, an approved emissions modification is a form of vehicle recall that will always be available to any affected consumer, regardless of when he or she obtained the vehicle or elects to receive the modification, and regardless of whether the affected consumer is a member of any private class action settlement. App. A at ¶¶ 5.1 – 5.2. Additionally, once an emissions modification is approved, the modification serves as a limitation on Settling Defendants' ability to export, sell, or lease any affected vehicle. No affected vehicle may be exported, sold, or leased by Settling Defendants unless and until it has received an approved emissions modification. App. A at ¶ 7.2. In the event that no modification is approved for a given class of vehicles, Settling Defendants are prohibited from selling, leasing, or exporting the vehicles entirely.

Appendix B's requirements for an approved emissions modification also intersect with

certain consumer compensation elements of the Related Settlements. Under those settlements, if EPA and CARB approve an emissions modification, certain eligible consumers are entitled to monetary compensation if they receive the modification within a defined timeframe (i.e., before December 30, 2018). The precise compensation amount for each vehicle owner or lessee is determined by the Related Settlements; the Consent Decree does not by its terms require any consumer compensation to be paid in connection with the emissions modification. Ultimately, these consumer payments will help compensate affected owners and lessees for non-environmental injuries, but will also assist in driving participation toward the 85% recall rate. But the ultimate decision on whether an emissions modification is approvable and can be offered to consumers rests with EPA and CARB in accordance with the terms of the Consent Decree as enforced by the Court.

Importantly, the terms of Appendix B do not mandate that the affected vehicles be made to operate in accordance with the emission standard to which Settling Defendants claimed they were certified. The settlement is a recognition of the engineering limitations faced by all parties – that a fully-compliant "fix" that brings these vehicles to their certified standard and has no detrimental impacts on vehicle performance is not achievable within a realistic timeframe. Rather, Appendix B provides, in the context of the overall settlement, an environmentally responsible solution for consumers who will continue driving their vehicles, and it avoids the adverse environmental consequences that would result from scrapping nearly half a million noncompliant cars. The settlement thus acknowledges the significant engineering constraints faced by the parties and the need for a feasible, expeditious resolution that provides concrete options to consumers. *See Cannons Eng'g Corp.*, 899 F.2d at 90 (noting that a settlement that nets less than full recovery nonetheless can be reasonable compared to the alternative of litigation that can be complex, lengthy, expensive, and uncertain). Placed in the proper context of the substantial environmental remediation components of the settlement as a whole (i.e., the NOx mitigation trust and the ZEV investment commitments discussed *infra*), the emissions

modification defined by this settlement achieves a significant reduction in emissions that has lasting and substantial environmental benefits and furthers the objectives of the Clean Air Act. *See United States v. Montrose Chem. Corp.*, 50 F.3d 741, 743 (9th Cir. 1995); *United States v. City of Miami, Fla.*, 664 F.2d 435, 441 (5th Cir. 1981) (noting, in the context of assessing a consent decree, "the court must also consider the nature of the litigation and the purposes to be served by the decree. If the suit seeks to enforce a statute, the decree must be consistent with the public objectives sought to be attained by Congress.").

2. The Buyback Recall is an Appropriate Remedy for Vehicles that Cannot be Made to Meet their Certified Emissions Standard in a Reasonable Timeframe.

The emissions modification element of the proposed Decree offers an environmentally responsible solution for vehicle owners and lessees who will continue to drive their vehicles. However in light of the reality that the vehicles cannot be made emissions compliant, the proposed settlement's buyback and lease termination requirements are a vital element that creates a mechanism for getting noncompliant vehicles off the road in a timely manner. The proposed Decree requires Settling Defendants to offer to buy back or terminate active leases for every operable Eligible Vehicle, at a projected cost of up to $10.033 billion. Appendix A of the Decree establishes a framework for the buyback and lease termination components of the settlement and sets a minimum level of monetary compensation that Settling Defendants must offer to consumers in exchange for their vehicle. The minimum compensation is defined in Appendix A of the proposed Decree as the "Retail Replacement Value," which for a given vehicle, is "the cost of retail purchase of a comparable replacement vehicle of a similar value, condition, and mileage as of September 17, 2015." App. A at ¶ 2.13. That is, the Retail Replacement Value ensures that vehicle owners are given a fair price for their vehicle should they choose the buyback option. *See* Court's Order Granting Preliminary Approval to Class Settlement (noting "the full purchase price of Eligible Vehicles is unlikely to represent the maximum recovery," and a reasonable settlement can "take[] into account [depreciation caused

by owners'] use of their Eligible Vehicles." (Am. Order Granting Prelim. Approval of Settlement, Dkt. No. 1698, July 29, 2016 at 27). Appendix A also contains requirements that govern the length of the buyback and lease termination program, notices and disclosures that must be issued to affected consumers, and reports that must be submitted by the Settling Defendants. App. A at Sec. III, IV. But the Retail Replacement Value provided for in Appendix A is not intended to go beyond what a buyback recall under the Clean Air Act would require, and is therefore not intended to compensate consumers for economic damages or fraud. Related claims for damages such as taxes and title fees, extended warranty payments, or after-market vehicle accessories are not included in the definition of Retail Replacement Value.

Settling Defendants may fulfill their obligation under the Consent Decree to offer a buyback at Retail Replacement Value by implementing the terms of the Related Settlements. Those agreements offer substantial compensation to consumers, both for the buyback of the relevant vehicles, and for a host of economic (non-environmental) damages. As noted by the Court, the proposed PSC buyback framework offers consumers compensation for their vehicle that is based on the September 2015 value – before the vehicles' noncompliance was known to the public. And the FTC, the government agency with the relevant expertise in issues of consumer compensation, has agreed that the buyback commitments made by Settling Defendants represent "full and fair compensation, not only for the lost or diminished value of [the subject vehicles], but also for the other harms" inflicted on affected consumers. Chairwoman Edith Ramirez, Fed. Trade Comm'n, *Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* (June 28, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating. Moreover, as the PSC has noted in its motion for final approval of the proposed Class Action Settlement, the agreed buyback valuation methodology results in payments to consumers that are "equal to a minimum of 112.6% of the subject vehicles' retail values as of September 2015." Pls.' Mem. In Supp. Of Final Approval of 2.0

Liter TDI Settlement, Decl. of Edward M. Stockton, Dkt. No. 1784-1, Aug. 26, 2016 at 15. Thus, the Related Settlements make clear that the buyback commitments undertaken by Settling Defendants meet or exceed the threshold requirement of a Retail Replacement Value contained in the Consent Decree. Because the payments to consumers under the Related Settlements exceed this threshold, the Consent Decree allows Settling Defendants to satisfy their Clean Air Act buyback obligation by complying with the Related Settlements. App. A at ¶ 4.1.

3. The Environmental Mitigation Trust Provides for Mitigation of Past and Future Excess NOx Emissions.

The proposed Consent Decree requires Settling Defendants to establish a NOx Mitigation Trust and fund it with three annual payments of $900 million, for a total amount of $2.7 billion. Decree at ¶ 14. The first payment is due within 30 days of this Court's entry of the Decree. *Id.* Funds placed in the mitigation trust will be used for projects that reduce NOx – the major excess pollutant from these vehicles and a significant public health concern. The form of the Trust is set forth in Appendix D, though the operative Trust Agreement will not be finalized until a Trustee is formally selected and approved by the Court upon motion by the United States. Decree at ¶ 17. The United States will accept Trustee recommendations from states, Puerto Rico, the District of Columbia and Indian tribes, in a process that is set forth in Section IV.D of the proposed Consent Decree.

Once the Trust is established, those same governmental entities may apply to become beneficiaries of the Trust by making certain certifications to the Court, including a waiver of injunctive claims for mitigation arising from the 2.0 liter vehicles. App. D at ¶ 4.2 and Attachment D-3. Beneficiaries will perform mitigation projects in accordance with the requirements set forth in the Trust Agreement. Appendix D includes an initial allocation of funds among all potential beneficiaries, App D at Attachment D-1, which will be adjusted by the Trustee upon determination of which potential beneficiaries participate in the program. App. D at ¶ 5.0. The allocation is based primarily on the number of 2.0 liter vehicles registered in each jurisdiction, with a minimum funding allocation of $7.5 million for each beneficiary and certain

allowances for a Tribal account and administrative costs. The Trust Agreement provides for transparency of funding requests and financial reporting by the Trustee and the beneficiaries, App. D at ¶ 5.2 and 5.3, and for the Court's ongoing jurisdiction over disputes. App. D at ¶ 6.1. Beneficiaries can select from a list of approved mitigation projects that are cost effective and have a nexus to the excess NOx emissions caused by the violations. Eligible mitigation actions can include projects to reduce NOx from heavy duty diesel sources near population centers, such as large trucks that make deliveries and service ports, school and transit buses, and freight switching railroad locomotives. App. D at Attachment 2. Actions may also include, subject to certain limitations, charging infrastructure for light duty zero emission passenger vehicles. *Id.* Under the terms of the Trust, beneficiaries have the flexibility to choose which projects on the list of eligible mitigation actions are the best options for their jurisdictions.

As mentioned above, if Settling Defendants fail to achieve a recall rate of 85% by June 30, 2019 between both the buyback and any emissions modification, Settling Defendants must augment the mitigation fund by $85 million for each 1% that the vehicle recapture rate falls short of the mandated goal nationally and $13.5 million for each 1% that the rate falls short in California. EPA expects that the amount that Settling Defendants are required to initially contribute to the trust fund is sufficient to fund projects to fully mitigate the total, lifetime excess NOx emissions from the 2.0 liter vehicles. By requiring Settling Defendants to commit a minimum of $2.7 billion over three years to the mitigation trust, the proposed Consent Decree ensures that Settling Defendants appropriately mitigate all past and future excess NOx pollution caused by the 2.0 liter vehicles that do not meet emissions standards.

4. The ZEV Investment Commitments Address the Environmental Injury Caused by Improper Marketing and Sale of "Clean Diesel" Vehicles.

Appendix C of the proposed Consent Decree, entitled "The ZEV Investment Commitment," requires Settling Defendants to invest $2 billion over a 10-year period to support the increased use of zero emission vehicle ("ZEV") technology in the United States, including the development and maintenance of ZEV charging infrastructure. Decree App. C at Parts II, III.

Appendix C commits Settling Defendants to two separate planning processes: one governing $1.2 billion in nationwide ZEV Investments, excluding California, that will be overseen by EPA; and the other governing ZEV Investments totaling $800 million that will be implemented in the State of California and overseen by CARB. Settling Defendants are required to solicit input from State, local, and Tribal governments for suggestions on the development of a national investment plan. Thereafter, Settling Defendants will prepare separate National and California ZEV investment plans for EPA and CARB approval. In connection with the National investment plan, Settling Defendants can make three types of creditable investments: installing and maintaining charging infrastructure, programs or actions to increase public exposure and access to ZEVs, and brand-neutral education and public outreach. App. C ¶ 2.1. The California plan contains similar requirements for a defined list of allowable investments and ensures that the California investments are developed and implemented with appropriate input from CARB. The California plan also allows for development of investments relating to heavy-duty ZEV charging infrastructure, vehicle scrap and replace programs, and the development of a California "Green City" initiative. App. C ¶¶ 1.10, 3.1.

To establish what investment costs can be credited against the $2 billion obligation, Settling Defendants must prepare a National and a California Creditable Cost Guidance in accordance with the definitions and cost principles set forth in Consent Decree Attachment C-1, subject to EPA and CARB approval, respectively. App. C ¶¶ 2.2, 3.2. A certified public accountant retained by Settling Defendants, subject to the United States' approval, must review and attest to the accuracy and consistency of the costs with the approved guidances before EPA or CARB will credit the claimed costs against Settling Defendants' total obligations. App. C ¶ 2.7. To ensure transparency, the Settling Defendants are required to submit annual reports of the investments to EPA and CARB, and post the non-confidential part of the reports on a public website. The annual reports will detail the progress of the ZEV projects and include Settling Defendants' costs for which they are seeking credit against the total obligation. App. C ¶¶ 2.9,

3.6.

The ZEV Investment Commitment in Appendix C of the proposed Consent Decree is a form of injunctive relief that appropriately addresses part of the environmental injury caused by Settling Defendants' deceptive marketing of the subject vehicles as "green." Although the Environmental Mitigation Trust provides sufficient remediation for the excess tons of NOx pollution in the air attributable to Settling Defendants' conduct, the ZEV Investment Commitment targets the broader environmental injury caused by consumers' unwitting purchase of vehicles that were thought to provide a host of environmental benefits, but instead did not. By requiring Settling Defendants to invest $1.2 billion nationally outside of California, and $800 million in California over the next ten years, the proposed Consent Decree ensures that Settling Defendants will take appropriate steps to promote truly environmentally-friendly vehicle technologies to remedy the harm caused by Settling Defendants' conduct.

V. Having Reviewed the Public Comments, the United States Supports, and the Parties Have Agreed to, a Number of Minor Changes to the Proposed Consent Decree as Reflected in the Attached Partial Consent Decree as Amended.

The United States carefully reviewed the comments it received on the proposed Consent Decree. Based on that review, the United States recommends (and the other parties to the Consent Decree have also agreed to) a discrete number of changes to Appendices D and D-2 to the Consent Decree. The changes are presented in redline strikeout form in Exhibit 2, and are discussed in further detail in Section III of the Summary of Public Comments filed herewith. In summary, the agreed changes include:

- The addition at subparagraph 2.1.1.2 of Appendix D of a default methodology for distributing technical assistance funds to tribal beneficiaries.
- An extension of time at subparagraph 4.1 of Appendix D, from 30 to 90 days, for non-tribal beneficiaries to submit their Beneficiary Mitigation Plans.
- A clarification at subparagraph 4.2.6 of Appendix D and the related Paragraph 6 of Appendix D-3 to make the waiver of claims by tribal beneficiaries effective only upon receipt of funds.
- New language in subparagraph 5.2.15 to clarify the difference between a "match"

as used in the Diesel Emissions Reduction Act, and a "cost share."

- Certain expansions and clarifications to the list of Eligible Mitigation Actions and related definitions at Appendix D-2.

After reviewing the relevant public comments, the United States, in consultation with EPA and CARB, are proposing these agreed changes to the mitigation trust with the agreement of the other Parties to better further the objectives of the trust and the Consent Decree as a whole. Nothing in these edits alters the fundamental structure of the trust, which is still fair, reasonable, and furthers the objectives of the Clean Air Act. *Montrose Chem. Corp.*, 50 F.3d at 743.

VI. None of the Comments Received During the Period for Public Comment Warrant Disapproval of the Proposed Consent Decree.

The United States received nearly 1,200 comments on the Consent Decree during the 30-day public comment period. In Exhibit 5 to this motion (Response to Comments), the comments are summarized and presented with narrative responses that address the particular issues raised. The Response to Comments groups the comments into 33 broad categories that are each addressed in detail and are organized following the general structure of the Consent Decree appendices, responding to comments on buyback and emissions modification related issues (Appendices A and B), the ZEV Investment Commitment (Appendix C), the Environmental Mitigation Trust (Appendix D), and a fourth section that addresses miscellaneous comments.

A. Settling Defendants' Obligations Under the Proposed Consent Decree are Independent of the Related Settlements; Objections and Opt-Outs to the Class Action Settlement Do Not Justify Rejecting the Consent Decree.

As discussed above, the proposed Consent Decree contains four key elements that are addressed in four separate appendices to the Decree: 1) a buyback and lease termination program to remove the subject vehicles from the roads of the United States; 2) standards for a potential emissions modification that, if undertaken by Settling Defendants and approved by EPA and CARB, will be offered to vehicle owners and lessees and will allow owners and lessees to keep their car while substantially reducing emissions; 3) a plan for Settling Defendants to invest $2 billion nationwide and in California in ZEV technologies; and 4) provisions for a $2.7

billion environmental mitigation trust that will fund a series of projects to offset the excess NOx emissions attributable to the subject vehicles. None of these elements is dependent on the Related Settlements being implemented or approved by this Court.

The proposed Consent Decree acknowledges that Settling Defendants may satisfy their obligation to perform a buyback recall by implementing the buyback terms of the Related Settlements. But even if either or both of those settlements were to be rejected by this Court, Settling Defendants would still be in a position to satisfy their obligations under the Consent Decree. That is, Settling Defendants would still have the capacity to modify or remove from the roads of the United States at least 85% of the subject vehicles (or make required mitigation payments for failing to do so). By the terms of the Decree, Defendants would be under the supervision of this Court to ensure that vehicle owners were offered a fair and reasonable price for their vehicle, i.e. – the Retail Replacement Value. Consequently, and notwithstanding the fate of the Related Settlements, the buyback provisions of the proposed Decree are still fair, reasonable, and consistent with the objectives of the Clean Air Act for all the reasons stated here. *See United States v. Montrose Chem. Corp.*, 50 F.3d 741, 743 (9th Cir. 1995).[7]

Claims for economic damages, consumer damages, or damages associated with fraud or deceptive advertising are not germane to this Clean Air Act vehicle recall – whether those claims are resolved via the Related Settlements or remain to be litigated, Settling Defendants are still capable of carrying out their obligations under the proposed Consent Decree. The Consent Decree is a Clean Air Act settlement that provides injunctive relief intended to make the environment whole. By instituting a buyback and lease termination program, a program to modify vehicles in accordance with appropriate standards, and programs to perform sufficient

[7] The United States fully supports entry of the FTC Settlement and the Class Action Settlement because both settlements represent a reasonable method for Settling Defendants to satisfy part of their obligations under the Consent Decree, and both settlements provide a fair and reasonable resolution of the claims asserted in those cases. This Court should enter the Related Settlements simultaneously with the Consent Decree.

environmental remediation, the proposed Decree is an appropriate and fair resolution of this portion of the United States' and California's claims, and demonstrates that the regulating agencies have considered all the relevant evidence and acted in the public interest. *See United States v. Azko Coatings of Am. Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 90 (citing *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1340 (S.D. Ind. 1982) (urgency of abating danger to public must be considered)).

B. The NOx Mitigation and ZEV Investment Components of the Proposed Consent Decree Appropriately Remedy the Environmental Harm Caused by Settling Defendants' Conduct.

Many commenters wrote to offer proposed changes or objections to various terms in the ZEV Investment and Mitigation Trust components of the proposed Decree. These comments are summarized and addressed at length in the Response to Comments. As a general matter, commenters argued that the ZEV Investments should be targeted in various prescribed ways (either directly in furtherance of one particular technology or environmental program, or away from a competing technology or program that commenters argued should not be encouraged). Commenters on the mitigation trust similarly argued for or against different types of mitigation projects, and some took issue with different aspects of the structure of the trust itself.

As is shown in the attached Response to Comments, none of the comments received demonstrates that the settlement as a whole is unfair, unreasonable, or inconsistent with the objectives on the Clean Air Act. Although the precise details of any environmental injunctive relief plan or mitigation strategy can be debated on the merits, the ZEV investment and mitigation trust components of this settlement show that the EPA and CARB have struck a reasonable balance that is consistent with the objectives of the Clean Air Act and California law. The Decree represents a "reasonable factual and legal determination" for what is necessary to address the environmental harm caused by the 2.0 liter vehicles at issue in this case. *See Chevron*, 380 F. Supp. 2d at 1111 (quoting *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990)).

C. The Proposed Consent Decree Does Not Resolve Issues Relating to Either the 3.0 Liter Vehicles or Civil Penalty.

The proposed Consent Decree resolves the United States' and California's claims for injunctive relief – other than injunctive relief measures to prevent future violations – relating to nearly half a million 2.0 liter vehicles. While the Decree addresses the largest and most immediate environmental problems posed by Settling Defendants' approximately 500,000 2.0 liter vehicles, the Decree does not address the nearly 90,000 3.0 liter vehicles that remain on the roads of the United States while emitting substantial amounts of NOx in violation of relevant standards. It does not address structural injunctive relief measures to ensure that Settling Defendants do not repeat these types of Clean Air Act violations in the future. Nor does the Decree fully hold Settling Defendants accountable for noncompliance through the imposition of a substantial civil penalty.

As the United States has represented to this Court, the 3.0 liter vehicles have been a high priority for the technical teams at EPA and CARB ever since the issues relating to these cars were uncovered nearly a year ago. A technical solution that reduces the emissions of these vehicles poses unique challenges that the regulators continue to study and work to resolve.

In addition to seeking environmental injunctive relief for the 2.0 liter and 3.0 liter vehicles, the United States will continue to vigorously pursue its claims for civil penalties to fully hold all Defendants accountable in connection with the claims alleged in the United States' Complaint.

VII. Conclusion

The proposed Consent Decree is the product of vigorous, arms-length negotiations that have produced an aggressive plan to: 1) timely remove nearly half a million noncompliant vehicles from the roads of the United States; 2) modify in an environmentally responsible manner those vehicles that will remain in use or return to the road, and 3) adequately fund a NOx mitigation trust and undertake ZEV investments that will remediate the environmental harm caused by Settling Defendants' conduct. For all the reasons presented in this motion, the

proposed Decree represents a reasonable, fair and equitable partial resolution of the United States' and California's claims for injunctive relief relating to the 2.0 liter subject vehicles that is consistent with the objectives of the Clean Air Act. This Court should approve the proposed Consent Decree.

Respectfully submitted,

Dated: September 30, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2016, I electronically filed a copy of the foregoing using the CM/ECF system, which sent a notification of such filing to all counsel of record.

s/*Nigel Cooney*
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