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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN “CLEAN DIESEL”
MARKETING, SALES PRACTICES, AND
PRODUCTS LIABILITY LITIGATION

MDL No. 2672 CRB (JSC)

CLASS ACTION

**PLAINTIFFS’ NOTICE OF
UNOPPOSED MOTION FOR
APPROVAL OF DISTRIBUTION
PLAN, AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

This Document Relates To: Securities Actions
City of St. Clair Shores, 15-1228 (E.D. Va.)
Travalio, 15-7157 (D.N.J.)
George Leon Family Trust, 15-7283 (D.N.J.)
Charter Twp. of Clinton, 15-13999 (E.D.
Mich.)
Wolfenbarger, 15-326 (E.D. Tenn.)

Judge: Hon. Charles R. Breyer
Courtroom: 6
Date: May 29, 2020
Time: 10:00 a.m.

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1 **NOTICE OF UNOPPOSED MOTION FOR APPROVAL OF DISTRIBUTION PLAN**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on May 29, 2020, or as soon as counsel may be heard
4 before the Honorable Charles R. Breyer, United States Senior District Judge, at the United States
5 District Court for the Northern District of California, Phillip Burton Federal Building & U.S.
6 Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Lead Plaintiff Arkansas State
7 Highway Employees' Retirement System ("ASHERS") and named Plaintiff Miami Police Relief
8 and Pension Fund ("Miami Police," and together with ASHERS, "Plaintiffs") will and do hereby
9 move for entry of the accompanying [Proposed] Order Approving Distribution Plan (the "Class
10 Distribution Order").

11 The Court would, upon entry of the Class Distribution Order: (i) approve the
12 administrative determinations of the Court-approved Claims Administrator, Epiq Class Action
13 and Claims Solutions, Inc. ("Epiq"), accepting and rejecting Claims submitted in connection
14 with the Settlement reached in the above-captioned Action as stated in the Declaration of
15 Alexander Villanova in Support of Plaintiffs' Motion for Approval of Distribution Plan (the
16 "Villanova Declaration");¹ (ii) direct the distribution of the Net Settlement Fund to Claimants
17 whose Claims are accepted by Epiq as valid and approved by the Court ("Authorized
18 Claimants"), while maintaining a Reserve for any tax liability and claims administration-related
19 contingencies that may arise; (iii) direct that distribution checks state that the check must be
20 cashed within 90 days after the issue date; (iv) direct that Authorized Claimants will forfeit all
21 recovery from the Settlement if they fail to cash their distribution checks in a timely manner; (v)
22 approve the recommended plan for any funds remaining after the distribution; (vi) approve
23 Epiq's unpaid fees and expenses incurred and estimated to be incurred in the administration of
24

25 _____
26 ¹All terms with initial capitalization not otherwise defined herein shall have the meanings
27 ascribed to them in the Villanova Declaration or the Stipulation and Agreement of Settlement
dated August 27, 2018 (ECF No. 5267-1) (the "Stipulation").

1 the Settlement; (vii) release claims related to the administration process; and (viii) authorize the
2 destruction of Claim Forms and supporting documents at an appropriate time.

3 This motion is based on the following Memorandum of Points and Authorities, the
4 accompanying Villanova Declaration submitted on behalf of Epiq, the previous filings and
5 orders in this case, and such other and further representations as may be made by Counsel at any
6 hearing on this matter.

7 Pursuant to the Stipulation, Defendants have no role in or responsibility for the
8 administration of the Settlement Fund or processing of Claims, including determinations as to the
9 validity of Claims or the distribution of the Net Settlement Fund. *See* Stipulation ¶¶ 19, 25.
10 Accordingly, they have no interest in the relief requested in this motion.

11 Defendants have no interest in the outcome of this Motion and there are no disputed
12 Claims by any Settlement Class Member requiring Court review. As such, the motion is
13 unopposed and ready for resolution.

14 **STATEMENT OF ISSUES TO BE DECIDED**

15 1. Whether the Court should approve the Claims Administrator’s administrative
16 determinations to accept or reject Claims submitted herein; and

17 2. Whether the Court should authorize the distribution of the Net Settlement Fund to
18 Class Members whose Claims have been accepted as valid and approved by the Court, pursuant
19 to the distribution plan proposed by the Claims Administrator.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 Plaintiffs ASHERS and Miami Police, on behalf of themselves and the Settlement Class,
22 respectfully submit this memorandum in support of their motion for approval of the proposed
23 Distribution Plan, which is included in the accompanying Villanova Declaration.

24 **I. BACKGROUND**

25 The Court has approved the settlement terms reflected in the Stipulation entered into by
26 Plaintiffs, on behalf of themselves and the other Settlement Class Members, and the Defendants
27 in the Action. The Stipulation sets forth the terms of the settlement (the “Settlement”), which

1 represents a complete resolution of this Action in return for a payment of \$48,000,000 in cash,
2 which Defendants will pay or cause to be paid for the benefit of Settlement Class Members.

3 In accordance with the Order Granting Motion for Preliminary Approval of Settlement
4 (ECF No. 5593) (the “Preliminary Approval Order”) entered by the Court, Epiq has mailed the
5 Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement Hearing; and
6 (III) Motion for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses (the
7 “Notice”) and the Proof of Claim and Release Form (the “Proof of Claim Form” or “Claim
8 Form” and, together with the Notice, the “Notice Packet”) to potential Settlement Class
9 Members, brokers, and other nominees. Villanova Decl. ¶ 2. As stated in the Villanova
10 Declaration, Epiq has disseminated 217,592 Notice Packets to potential Settlement Class
11 Members and nominees. *Id.* ¶ 4. The Notice informed Settlement Class Members that if they
12 wished to be eligible to participate in the distribution of the Net Settlement Fund, they were
13 required to submit a properly executed Claim Form received or postmarked no later than April
14 18, 2019. *Id.* ¶ 7.

15 On May 10, 2019, the Court entered its Order Granting (I) Motion for Final Approval of
16 Settlement and (II) Motion for Attorneys’ Fees and Expenses (ECF No. 6285) and Judgment
17 Approving Class Action Settlement (ECF No. 6287). The Effective Date of the Settlement has
18 occurred. Accordingly, the Net Settlement Fund may be distributed to Authorized Claimants. In
19 accordance with paragraph 28 of the Stipulation, Plaintiffs respectfully ask the Court to enter the
20 Class Distribution Order approving the Distribution Plan.²

21 **II. CLAIMS ADMINISTRATION**

22 As detailed in the accompanying Villanova Declaration, through April 3, 2020, Epiq
23 received and processed 70,631 Claims. Villanova Decl. ¶ 7. All Claims received through April 3,
24 2020, have been fully processed in accordance with the Stipulation and the Court-approved Plan

25 _____
26 ²The Court retained continuing and exclusive jurisdiction over, among other things,
27 implementing the Settlement, including the disposition of the Settlement Fund and any motion to
28 approve the Class Distribution Order. *See* Judgment ¶ 13.

1 of Allocation included in the Notice (*id.*), and Epiq has worked with Claimants to help them
2 perfect their Claims (*see id.* ¶¶ 19-26).

3 As discussed in the Villanova Declaration, many of the Claims submitted in the
4 Settlement were initially deficient or ineligible for one or more reasons, including being
5 incomplete, not signed, not properly documented, or otherwise deficient, which required
6 substantial follow-up work by Epiq. *Id.* ¶¶ 19, 22.

7 If Epiq determined a Claim to be defective or ineligible, a letter (if the Claimant filed a
8 paper Claim) (the “Deficiency Letter”) or an email (if the Claimant filed an electronic Claim)
9 (the “Status Email” and “Transaction Report,” and together with a Deficiency Letter the
10 “Deficiency Notices”) was sent by Epiq to the Claimant or filer, as applicable, describing the
11 defect(s) or condition(s) of ineligibility in the Claim and what was necessary to cure any curable
12 defect(s) in the Claim. *Id.* ¶¶ 20, 23. The Deficiency Notices advised the Claimant or filer that
13 the appropriate information or documentary evidence to complete the Claim had to be sent
14 within 20 days from the date of the Deficiency Letter or Status Email or Epiq would recommend
15 the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.*
16 ¶¶ *Id.* An example of the Deficiency Letter is attached as Exhibit A to the Villanova Declaration
17 and samples of a Status Email and Transaction Report are attached thereto as Exhibit B and
18 Exhibit C, respectively.

19 **A. No Disputed Claims**

20 Epiq carefully reviewed Claimants’ and filers’ responses to the Deficiency Notices and
21 worked with them to resolve deficiencies where possible. Villanova Decl. ¶¶ 21, 26. Consistent
22 with paragraph 26(e) of the Stipulation, the Deficiency Notices specifically advised the Claimant
23 or filer of the right, within 20 days after the mailing or e-mailing of the Deficiency Notice, to
24 contest the rejection of the Claim and request Court review of Epiq’s administrative
25 determination of the Claim. Villanova Decl. ¶¶ 20, 23 and Exhibits A and B.

26 With respect to the fully processed Claims, Epiq received 24 requests for a review by the
27 Court of its administrative determinations. *Id.* ¶ 28. To resolve the disputes without necessitating

1 the Court’s intervention, Epiq contacted all persons requesting Court review and attempted to
 2 answer all questions, fully explain Epiq’s determination of the Claim’s status, and facilitate the
 3 submission of missing information or documentation where applicable. *Id.* As a result of these
 4 efforts, all Claims for which Court review had been requested have either been cured or the
 5 Claimant withdrew the request for Court review. *Id.* There are no disputed Claims requiring
 6 Court review by any Settlement Class Member.

7 **B. Timely Submitted and Valid Claims.**

8 As shown in the Villanova Declaration, of the 70,631 Claims that are the subject of this
 9 motion. Epiq has determined that 15,176 are acceptable in whole or in part and that 55,455 are
 10 ineligible for payment from the Net Settlement Fund. *Id.* ¶¶ 33-36. Of the 15,176 acceptable
 11 Claims, 15,078 were timely filed. *Id.* Plaintiffs respectfully request that the Court approve Epiq’s
 12 administrative determinations accepting and rejecting Claims as stated in the Villanova
 13 Declaration.

14 **C. Late Claims – and Final Cut-Off Date**

15 The 70,631 Claims received through April 3, 2020, include 1,511 that were postmarked
 16 or received after the Court-approved Claim submission deadline of April 18, 2019, but that were
 17 received before April 3, 2020. *Id.* ¶¶ 29, 35. Those late Claims have been fully processed, and 98
 18 of them are, but for their late submission, otherwise eligible to participate in the Settlement. *Id.*
 19 Although these 98 Claims were late, they were received while the processing of timely Claims
 20 was ongoing. Due to the amount of time needed to process the timely Claims received, the
 21 processing of these late Claims did not delay the completion of the Claims administration
 22 process or the distribution of the Net Settlement Fund. The Court has discretion to accept Claims
 23 received after the submission deadline.³ Plaintiffs respectfully submit that, when the equities are
 24 balanced, it would be unfair to prevent an otherwise eligible Claim from participating in the

25 _____
 26 ³See Notice ¶ 49 (“Unless the Court otherwise orders, any Settlement Class Member who fails to
 27 submit a Claim Form postmarked on or before April 18, 2019 shall be fully and forever barred
 28 from receiving payment pursuant to the Settlement....”) (emphasis added).

1 distribution of the Net Settlement Fund solely because it was received after the Court-approved
2 Claim submission deadline, if it was submitted while timely Claims were still being processed.

3 To facilitate the efficient distribution of the Net Settlement Fund, however, there must be
4 a final cut-off date after which no other Claims may be accepted. Accordingly, Plaintiffs
5 respectfully request that this Court order that any new Claims and any adjustments to previously
6 filed Claims that would result in an increased Recognized Claim amount received after April 3,
7 2020, be barred, subject to the provisions of paragraph 39(f) of the Villanova Declaration.⁴
8 Paragraph 39(f) applies to any Claims received or modified after April 3, 2020, that would have
9 been eligible for payment or additional payment under the Court-approved Plan of Allocation if
10 timely received. At the time when Lead Counsel, in consultation with Epiq, determines that a
11 further distribution is not cost-effective as provided in paragraph 39(e) of the Villanova
12 Declaration, the post-April 3, 2020 Claimants (after payment of fees and expenses as provided in
13 paragraph 39(f) of the Villanova Declaration, at the discretion of Lead Counsel, and to the
14 extent possible) may be paid the distribution amounts or additional distribution amounts on a *pro*
15 *rata* basis that would bring them into parity with other Authorized Claimants who have cashed
16 all their prior distribution checks.

17 **III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR**

18 In accordance with Epiq's agreement with Lead Counsel to act as the Claims
19 Administrator for the Settlement, Epiq was responsible for, among other things, disseminating
20 notice of the Settlement to the Settlement Class, creating and maintaining a website and toll-free
21 telephone helpline, processing Claims, and allocating and distributing the Net Settlement Fund to
22 Authorized Claimants. Villanova Decl. ¶ 2. As stated in the accompanying Villanova
23 Declaration, Epiq's fees and expenses for its work performed on behalf of the Settlement Class
24 as well as an estimate for the costs that will be incurred in connection with the initial distribution

25
26 ⁴Should an adjustment be received that results in a lower Recognized Claim amount, that
27 adjustment will be made, and the Recognized Claim amount will be reduced accordingly prior to
28 a distribution to that Claimant. Villanova Decl. ¶ 30.

1 of the Net Settlement Fund are \$705,650.15.⁵ *Id.* ¶ 38. The majority of this amount —
 2 \$403,941.21 — represents out-of-pocket expenses incurred by the Claims Administrator for
 3 printing, postage and reimbursements to nominees for their time and expenses, to mail 217,592
 4 copies of the Notice and Claim Form to Settlement Class Members. *Id.* To date, Epiq has not
 5 received payment for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of
 6 \$705,650.15 payable to Epiq, which amount includes the estimated fees and expenses to be
 7 incurred by Epiq in connection with the initial distribution. *Id.* Lead Counsel reviewed Epiq’s
 8 invoices and respectfully requests on behalf of Plaintiffs that the Court approve all of Epiq’s
 9 unpaid fees and expenses.

10 **IV. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND**

11 The Net Settlement Fund is ready to be distributed. Plaintiffs respectfully move the Court
 12 for entry of an order approving Epiq’s determinations concerning acceptance and rejection of the
 13 Claims that are included in the present motion and approving the proposed Distribution Plan as
 14 stated in the Villanova Declaration.

15 **A. Distribution of the Net Settlement Fund**

16 Under the proposed Distribution Plan, Epiq will distribute approximately 95% of the Net
 17 Settlement Fund, after deducting all payments previously allowed and the payments approved by
 18 the Court on this motion, and after deducting payment of any estimated taxes, the costs of
 19 preparing appropriate tax returns, and any escrow fees (the “Initial Distribution”). In the Initial
 20 Distribution, Epiq will calculate award amounts for all Authorized Claimants as if the entire Net
 21 Settlement Fund were to be distributed now. Epiq will first determine each Authorized
 22 Claimant’s *pro rata* share of the total Net Settlement Fund based on the Claimant’s Recognized
 23 Claim in comparison to the total Recognized Claims of all Authorized Claimants. *See Villanova*
 24

25 ⁵Should the estimate of fees and expenses to conduct the initial distribution of the Net Settlement
 26 Fund exceed the actual cost to conduct the distribution, the excess will be returned to the Net
 27 Settlement Fund and will be available for subsequent distribution to Authorized Claimants.
 Villanova Decl. ¶ 38 n.3.

1 Decl. ¶ 39(a)(1). In accordance with the Court-approved Plan of Allocation, Epiq will eliminate
2 from the Initial Distribution any Authorized Claimant whose *pro rata* share calculates to less
3 than \$10.00, as these Claimants will not receive any payment from the Net Settlement Fund and
4 will be so notified by Epiq. *Id.* ¶ 39(a)(2). Epiq will then recalculate the *pro rata* share of the Net
5 Settlement Fund for Authorized Claimants who would have received \$10.00 or more (the
6 “Distribution Amount”). *Id.* ¶ 39(a)(3). 95% of the remaining balance of the Net Settlement Fund
7 will be distributed *pro rata* to Authorized Claimants whose Distribution Amount calculates to
8 \$10.00 or more under subparagraph 39(a)(3) of the Villanova Declaration. *Id.* ¶ 39(a)(4). The
9 remaining 5% of the Net Settlement Fund will be held in reserve (the “Reserve”) to address any
10 tax liability or claims administration-related contingencies that may arise. *Id.* To the extent the
11 Reserve is not depleted, the remainder will be distributed in the “Second Distribution” described
12 in subparagraph 39(d) of the Villanova Declaration. *Id.*

13 In order to encourage Authorized Claimants to cash their checks promptly, Plaintiffs
14 propose that the distribution checks bear the notation, “CASH PROMPTLY. VOID AND
15 SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [DATE 90 DAYS AFTER ISSUE
16 DATE].” *Id.* ¶ 39(b). Authorized Claimants who do not cash their checks within the time allotted
17 or on the conditions stated in paragraph 39(b) footnote 4 of the Villanova Declaration will
18 irrevocably forfeit all recovery from the Settlement, and the funds allocated to these stale-dated
19 checks will be available to be redistributed to other Authorized Claimants in any subsequent
20 distribution, as described below. *Id.* ¶ 39(c).

21 **B. Additional Distribution(s) of the Net Settlement Fund**

22 After Epiq has made reasonable and diligent efforts to have Authorized Claimants cash
23 their Initial Distribution checks, but not earlier than nine (9) months after the Initial Distribution,
24 Epiq will, in consultation with Lead Counsel, conduct a second distribution of the Net Settlement
25 Fund (the “Second Distribution”). In the Second Distribution, any amounts remaining in the Net
26 Settlement Fund after the Initial Distribution (including from the Reserve and the funds allocated
27 to all void stale-dated checks), after deducting Epiq’s fees and expenses incurred in connection
28

1 with administering the Settlement for which it has not yet been paid (including the estimated
2 costs of the Second Distribution), and after deducting payment of any estimated taxes, the costs
3 of preparing appropriate tax returns, and any escrow fees, will be distributed to all Authorized
4 Claimants in the Initial Distribution who cashed their Initial Distribution checks and would
5 receive at least \$10.00 from the Second Distribution based on their *pro rata* share of the
6 remaining funds. Villanova Decl. ¶ 39(d). If any funds remain in the Net Settlement Fund after
7 the Second Distribution because of uncashed checks or otherwise, then, after Epiq has made
8 reasonable and diligent efforts to have Authorized Claimants cash their distribution checks,
9 subsequent distributions of the funds remaining in the Net Settlement Fund will take place at six-
10 month intervals thereafter, if cost-effective and after deduction of costs and expenses as
11 described above and subject to the same conditions. *Id.* When Lead Counsel, in consultation with
12 Epiq, determines that further distribution is not cost-effective, if sufficient funds remain to
13 warrant the processing of Claims received after April 3, 2020, Epiq will process those Claims.
14 Any of these Claims that are otherwise valid, as well as any earlier received Claims for which an
15 adjustment was received after April 3, 2020, which resulted in an increased Recognized Claim,
16 may be paid in accordance with paragraph 39(f) of the Villanova Declaration. Villanova Decl. ¶
17 39(e). If any funds remain in the Net Settlement Fund after payment of these late or late-
18 adjusted Claims, the remaining balance of the Net Settlement Fund, after payment of any unpaid
19 fees or expenses incurred in administering the Net Settlement Fund and after the payment of any
20 estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be
21 contributed to the Investor Protection Trust. *Id.*

22 **V. RELEASE OF CLAIMS**

23 In order to allow the full and final distribution of the Net Settlement Fund, it is necessary
24 to bar any further claims against the Net Settlement Fund beyond the amounts allocated to
25 Authorized Claimants and to provide that all persons involved in the review, verification,
26 calculation, tabulation, or any other aspect of the processing of the Claims submitted in
27 connection with the Settlement, or who are otherwise involved in the administration or taxation

1 of the Settlement Fund or the Net Settlement Fund, be released and discharged from all claims
2 arising out of that involvement. Accordingly, Plaintiffs respectfully request that the Court release
3 and discharge all persons involved in the review, verification, calculation, tabulation, or any
4 other aspect of the processing of the Claims submitted in connection with the Settlement, or who
5 are otherwise involved in the administration or taxation of the Settlement Fund or the Net
6 Settlement Fund from all claims arising out of that involvement, and bar all Settlement Class
7 Members and other Claimants, whether or not they receive payment from the Net Settlement
8 Fund, from making any further claims against the Net Settlement Fund, Plaintiffs, Lead Counsel,
9 the Claims Administrator, the Escrow Agent or any other agent retained by Plaintiffs or Lead
10 Counsel in connection with the administration or taxation of the Settlement Fund or the Net
11 Settlement Fund or any other person released under the Settlement beyond the amounts allocated
12 to Authorized Claimants.

1 **VI. CONCLUSION**

2 For the reasons stated in this memorandum and in the Villanova Declaration, Plaintiffs
3 respectfully submit that Plaintiffs' Motion for Approval of Distribution Plan should be granted,
4 and the [Proposed] Order Approving Distribution Plan should be entered.

5
6 Dated: April 22, 2020

Respectfully Submitted,

7
8 **BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**

9
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