Nos. 11-1438 & 11-1857

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: VOLKSWAGEN AND AUDI WARRANTY EXTENSION LITIGATION

VOLKSWAGEN GROUP OF AMERICA, INC., *et al.*,

Defendants-Appellants,

v.

MCNULTY LAW FIRM, *et al.*,

Interested Parties-Appellees.

On Appeal from a Final Order of the
United States District Court for the District of Massachusetts

Honorable Joseph L. Tauro, United States District Judge
Case No. 1:07-md-1790-JLT

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CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for Defendants-Appellants hereby certifies that Defendant-Appellant Volkswagen AG is the sole parent corporation of Defendants-Appellants Audi AG and Volkswagen Group of America, Inc. Volkswagen AG is a public corporation traded on the Frankfurt Stock Exchange.

/s/ *Kenneth S. Geller*
Kenneth S. Geller (No. 1144658)
December 29, 2011

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JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1332(d)(2) and (d)(6). On March 24, 2011, the district court entered final orders approving a settlement among the parties (JA420) and awarding fees to class counsel (A24).[1] On April 21, 2011, defendants-appellants Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. (collectively, "Defendants") filed a motion to vacate the fee award. Dkt. 280. The following day, on April 22, 2011, Defendants filed a notice of appeal from the fee award. JA556. On July 11, 2011, the district court entered an order denying Defendants' motion to vacate (A44), from which Defendants filed a notice of appeal on July 20, 2011 (JA557). This Court's jurisdiction over both appeals rests on 28 U.S.C. § 1291.

STATEMENT CONCERNING ORAL ARGUMENT

Counsel for Defendants respectfully request oral argument. This appeal involves a number of legal issues that this Court has not previously addressed. Oral argument will enable the parties to address these issues adequately and to respond to the Court's questions and concerns.

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[1] We cite to materials appearing in the Required Addendum as "A#" and to materials appearing in the Joint Appendix as "JA#."

STATEMENT OF THE ISSUES

1. Did the district court err in applying "federal law," rather than the New Jersey Consumer Fraud Act's fee-shifting provision, to class counsel's fee application in this state-law consumer class action?

2. Did the district court err in applying the percentage-of-fund approach rather than the lodestar method, despite finding that the settlement agreement does not create a common fund and forecloses the derivation of attorneys' fees from the benefits afforded to the class?

3. Assuming the fee should have been calculated under the New Jersey fee-shifting statute, is a lodestar multiplier warranted here?

4. Assuming the district court were correct in applying the percentage-of-fund method, did it abuse its discretion by either:

a. declining to determine an actual value of the settlement or a specific percentage of that value to award; or

b. ostensibly determining the award in reference to the value of the benefits hypothetically "made available" to the class, rather than the benefits "actually claimed" by the class?

STATEMENT OF THE CASE

This is a multidistrict consumer class action involving an alleged violation of the New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56.8-1, *et seq*. On August 29, 2006, the Judicial Panel on Multidistrict Litigation

transferred, pursuant to 28 U.S.C. § 1407, four related class actions to a single, multidistrict proceeding in the District of Massachusetts. Dkt. 1. Only one of the actions, *Craig v. Volkswagen of America, Inc.* filed in the District of New Jersey, alleged a putative nationwide class. On October 15, 2007, plaintiffs filed a consolidated, nationwide class action complaint (JA1), which, as in *Craig*, alleged a single count under the New Jersey statute, together with claims for unjust enrichment, breach of implied warranty, breach of contract, and declaratory judgment.

The district court referred the matter to a special master (Dkt. 129), who oversaw settlement negotiations among the parties. The parties reached a settlement agreement on September 2, 2010 (A46) and moved for the court's approval on September 13, 2011 (Dkt. 154). The special master recommended conditional approval of the agreement. Dkt. 164. The district court adopted the special master's report and recommendation and scheduled a fairness hearing for March 11, 2011. Dkt. 166.

In the interim, class counsel moved for an award of $37.5 million in attorneys' fees and $1.12 million in costs. Dkt. 174. Defendants opposed the motion (Dkt. 203) and asked the court to defer a determination of the fee award until after expiration of the initial claims period on June 27, 2011 (Dkt. 209). Several individual class members also opposed the motion. Dkts. 193, 201, 205, 208, 226. On February 18, 2011, the special mas-

ter denied Defendants motion to defer and recommended an award of $30 million in attorneys' fees and $1,195,234.43 in costs. A2.

On March 4, 2011, Defendants timely objected to the report and recommendation. Dkt. 253. The district court held a fairness hearing on March 11, 2011. Two weeks later, on March 24, 2011, the district court issued an order granting final approval of the parties' settlement agreement (JA420) and adopting the special master's report and recommendation with respect to attorneys' fees (A24). On April 21, 2011, Defendants moved to vacate, alter, or amend the order awarding fees. Dkt. 280. On April 22, 2011, Defendants filed a timely notice of appeal (JA556), docketed as No. 11-1438. The district court denied the motion to vacate on July 11, 2011 (A44), from which Defendants filed a second timely notice of appeal on July 20, 2011 (JA557), docketed as No. 11-1857.

STATEMENT OF FACTS

A. Legal background

1. The American Rule and its exceptions

It is a "firmly entrenched" feature of "[o]ur legal system" that "each party [is] to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses." *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011). This "bedrock principle known as the American Rule" applies in all

cases "unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2157 (2010).

Statutory and contractual exceptions to the American Rule typically authorize a court to "shift" legal fees from a prevailing plaintiff to a losing defendant. Thus, for example, the New Jersey Consumer Fraud Act provides that a prevailing plaintiff (including one who reaches an enforceable settlement) is entitled to recover from the defendant "reasonable attorneys' fees" associated with bringing the suit. N.J. Stat. Ann. § 56:8-19. The "core purpose" that "underlies" statutory fee-shifting provisions is to ensure that "private parties" are not deterred by legal fees from bringing lawsuits that, although private, stand to "vindicate rights that serve some broad public good." *Spooner v. EEN, Inc.*, 644 F.3d 62, 69 (1st Cir. 2011).

Contracts likewise may include fee-shifting provisions. Parties to a contract may agree, for example, that a breaching party must reimburse the performing party's attorneys' fees incurred in a suit to enforce the contract. Thus, in *North Bergen Rex Transportation, Inc. v. Trailer Leasing Co.*, 730 A.2d 843 (N.J. 1999), the Supreme Court of New Jersey remanded for a determination of reasonable fees where the parties agreed that the losing party would "pay and discharge or promptly reimburse [the prevailing party] for … reasonable attorney's fees, which shall be incurred and expended … in enforcing" the contract. *Id.* at 846 (emphasis omitted). Con-

tractual fee-shifting provisions also may appear in settlement agreements. *See, e.g.*, *In re TJX Cos. Retail Sec. Breach Litig.*, 2007 WL 5196181, at ¶ 7.2 (D. Mass. 2008) (defendant "agreed to pay, subject to Court approval, up to the amount of $6,500,000.00 to Settlement Class Co-Lead Counsel for attorneys' fees").

2. The common fund doctrine

The so-called "common fund doctrine" provides one alternative basis for a court-ordered award of attorneys' fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-481 (1980); *In re Nineteen Appeals*, 982 F.2d 603, 606-610 (1st Cir. 1992); *see also generally*, 10 Charles A. Wright, et al., *Federal Practice & Procedure Civil* § 2675 (3d ed., 2011 update) ("*FPP*"). As its name implies, the doctrine applies in cases where "a lawyer … recovers a *common fund* for the benefit of persons other than … his client." *Boeing*, 444 U.S. at 478 (emphasis added). In *Boeing*, for example, plaintiffs' lawyers recovered $3,289,359 in class damages, which "the court ordered Boeing to deposit … into escrow at a commercial bank." *Id.* at 476. Claims then were made against the fund itself, including claims by non-plaintiffs who had no attorney-client relationship with the lawyers who litigated the case. *Id.* at 476.

There, the Supreme Court approved—in the absence of a statutory or contractual fee-shifting provision—an award of a "reasonable attorney's

fee from the fund as a whole" to compensate class counsel, noting that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478. To prevent such unfairness, "every member of the class" should be made "to share attorney's fees to the same extent that he … share[s] the recovery." *Id.* at 480. This is possible in common fund cases because "[j]urisdiction over the fund involved in the litigation allows a court to … assess[] attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* at 478; *see also Nineteen Appeals*, 982 F.2d at 606 (same).

An award of attorneys' fees under the common fund doctrine differs in four fundamental respects from an award under statutory and contractual fee-shifting provisions. *First*, authority for granting fees under the common fund doctrine arises, not from an express grant of authority by statute or contract, but from the court's equitable jurisdiction over an actual fund of money. *Boeing*, 444 U.S. at 478. Accordingly, it is the existence of a common fund itself, and not any provision of law or agreement, that permits an award of fees in the first place.

Second, the common fund doctrine is not, in fact, an exception to the American Rule; it does not *shift* attorneys' fees from prevailing plaintiffs to losing defendants, but *spreads* fees among named plaintiffs and the absent

class members who stand to benefit from the suit. *See* 7B *FPP* § 1803.1; *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1307 (11th Cir. 2001) ("common fund" or "common benefit" cases involve "not so much fee-shifting as fee-spreading"). The rationale for granting fees under the common fund approach thus follows, not from a policy to encourage private actions to vindicate public rights or to honor contracting parties' intentions, but instead from "each class member's equitable obligation to share the expenses of litigation." *Boeing*, 444 U.S. at 482.

Third, because "an attorney [who] makes a claim for fees from a common fund" seeks to reduce the benefit to the class, "his interest is 'adverse to the interest of the class'" and not of the defendant. *In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1409 (D. Wyo. 1998) (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)). Indeed, "the proportion of the fund allocated to counsel fees is of no moment to the defendant[]," who—having paid into the fund all that it owes—is ordinarily "disinterested" with respect to how the fund is allocated among the named plaintiffs, their counsel, and absent class members. *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382, 383 (W.D. Pa. 1977). Thus courts entertaining fee requests under the common fund doctrine must "assume a fiduciary role toward the individuals entitled to recovery from the fund," whose interests are otherwise unrepresented. 7B *FPP* § 1803.1 n.8.

Finally, a different methodology for calculating fees may apply in common fund cases as compared with statutory and contractual fee-shifting cases. When it comes to "fee awards under a broad array of federal fee-shifting statutes," the "gold standard for calculating" fees is "the conventional framework that courts use in fashioning [most] fee awards: the lodestar method." *Spooner*, 644 F.3d at 67 & n.3; *see also Rendine v. Pantzer*, 661 A.2d 1202, 1226 (N.J. 1995) (same under New Jersey law). In other contexts (such as fees allowed by agreement), this Court likewise has "customarily found it best to calculate fees by means of the time-and-rate method known as the lodestar." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991). The lodestar "approach requires the district court to ascertain the number of hours productively expended and multiply that time by reasonable hourly rates." *Spooner*, 644 F.3d at 68.

In contrast, a district court "determining" an attorneys' fee award in a "common fund" case "may calculate [the] award either … using a lodestar method" or "on the basis of a reasonable percentage of the fund." *United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999). The percentage-of-fund method "functions exactly as the name implies: the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." *In re Thirteen Appeals*, 56 F.3d 295, 305 (1st Cir. 1995).

B. Factual background

More than one year prior to this litigation, in August 2004, Volkswagen of America (now defendant Volkswagen Group of America) voluntarily addressed customer concerns through an extended warranty and reimbursement program affecting over 475,000 vehicles. The program provided an extended eight-year, unlimited-mileage warranty extension covering oil-sludge-related repairs to properly-maintained vehicles and an offer to reimburse expenses for such repairs incurred in the past. Payments under this ongoing voluntary program have totaled over $119 million. Dkt. 204-1, at 80.

The first cases in this litigation—which relates to the same vehicles and concerns providing the basis for the earlier, voluntary warranty extension and reimbursement program—were filed starting in January 2006. After the cases were transferred and consolidated in the court below, plaintiffs filed a master complaint modeled on the *Craig* complaint, claiming a violation of the New Jersey Consumer Fraud Act and other state law claims on behalf of a putative nationwide class of current and former Audi and Volkswagen vehicle owners. JA1.[2]

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[2] The consolidated complaint alleged a violation exclusively of New Jersey's consumer protection law. JA2, JA28. In the alternative—but only "[t]o the extent that the Court [decided] not [to] apply the New Jersey Consumer Fraud Act" uniformly to a nationwide class—the complaint al-

The parties entered settlement negotiations mediated by a court-appointed special master. Dkts. 144, 148, 152. Without admitting liability or fault, Defendants agreed to settle the class's claims. A46.

The settlement provides that class members may claim reimbursement for 100% of the cost of repairs caused by oil-sludge damage to their vehicles if their last two required oil changes are documented, and 50% if they are not. A54-60. For model years 1997 through 2000, the settlement provides for reimbursement of repair costs incurred only in the past, and set a claims deadline for six months following the date that class notice was mailed. A55. For model years 2001 through 2004, the settlement provides for reimbursement of past oil-sludge repair costs, a free one-time oil change, and a conditional, ten-year or 120,000-mile extended warranty (measured from the date each class vehicle went into service) against oil-sludge-related damage for original owners and owners of certified pre-owned class vehicles. A56-59. This warranty extension provides two years of coverage beyond the eight years voluntarily offered a year and a half prior to this litigation.

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leged violations "under the substantially similar consumer fraud statutes of [the class representatives'] respective states." JA28-29. None of the other consumer protection laws conditionally invoked in the complaint differs materially from the New Jersey law; all provide for an award of attorneys' fees to the prevailing party. *See id*. Accordingly, we treat the complaint as raising a single statutory claim under New Jersey law.

The agreement does not estimate the value of the settlement and does not require Defendants to pay any sum of money into an escrow fund. Instead, it contemplates cash reimbursements paid directly and individually to each class member who presents a valid claim to a neutral settlement administrator. A54-55, A60-61.

The settlement agreement reflects the parties' understanding that class counsel would apply for an award of attorneys' fees: "Class Counsel will submit an application to the Court for an award of reasonable attorneys' fees and expenses on or before a date to be set by the Court." A65. It provides further that any award of fees and costs would be appealable independent of the final approval of the settlement and that "Class Counsel fees and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from, benefits afforded to Settlement Class Members under this Settlement Agreement." A65. The agreement is otherwise silent with respect to the propriety, size, or legal basis for any award of fees.

C. Procedural background

Class counsel moved for an award of $37.5 million in fees and $1,121,065.74 in costs. Dkt. 175, at 9, 32-33 ("Fee Mot.").

1. The parties' contentions

a. According to class counsel, the district court's first task in assessing the fee application was "to ascertain the appropriate law to apply to Plaintiffs' fee request." Fee Mot. 2. Class counsel offered two reasons to apply federal, rather than New Jersey, substantive law. *First*, they argued that an award of fees in this case is authorized, not by the New Jersey Consumer Fraud Act's fee-shifting provision, but instead by the settlement agreement itself, which they asserted required application of "federal common law." Fee Mot. 2-3. *Second*, treating this as a common fund case, class counsel contended that that the district court "must function as a quasi-fiduciary to safeguard the corpus of the settlement fund for the benefit of the plaintiff class," and thus that the fee application implicates a "uniquely federal concern" and "warrants application of federal common law … irrespective of which law governs the underlying merits of the action." Fee Mot. 3. Class counsel did not identify any particular language in the settlement agreement that they believed either authorized an award of fees or established a "settlement fund" that the district court was charged with safeguarding.

Class counsel next urged the district court to invoke its "equitable powers" to apply a "percentage of the fund" approach, rather than the lodestar method, for calculating attorneys' fees. Fee Mot. 2, 4. According to

class counsel, a percentage-of-fund award is the "prevailing praxis" in complex class action settlements and is superior to the lodestar method because it is less likely to lead to costly fee disputes and "better approximates the workings of the marketplace." Fee Mot. 5, 11.

Although the settlement agreement does not provide for a discrete fund against which claims could be made, and instead provides simply that "Defendants pay class members [directly] in cash for all or part of their prior repairs," class counsel argued that that the agreement nevertheless "creates a common fund" that is "ma[d]e up" of "a series of recovery mechanisms for class members all of which can be easily monetized." Fee Mot. 10, 12 (emphasis omitted). Thus, class counsel presented an expert opinion estimating that the settlement agreement "create[d] a $414,900,324 benefit for the class," which they interpreted to constitute a "fund." Fee Mot. 14-15. The total figure was broken down into six elements, comprising:

- $247 million in reimbursements for costs incurred by all class vehicles in the past;
- $56 million in charges related to the extended warranty;
- $68 million for partial discounts for future repair costs;
- $3.3 million for the oil-change discount;
- $6.1 million in costs for "claims administration"; and
- $39.25 million for attorneys fees' and costs.

A12; *cf.* JA231.[3] Set against this valuation, they contended that a $37.5 million fee award was both reasonable and commensurate to the skill and time required to litigate the case. Fee Mot. 14-32.

Although class counsel argued that the lodestar method should not apply, they further asserted that a lodestar "cross-check" supported the reasonableness of their $37.5 million request. Fee Mot. 32. According to their records, class counsel and their non-attorney staff from twenty-one different firms billed a total of 23,191 hours litigating the case to settlement. *Id.* Thus class counsel sought a blended rate of more than $1,600 per hour for both lawyers and non-lawyers, which they described as "reasonable and appropriate considering the efforts put forth." *Id.*

b. Defendants took a different view. Although not disputing class counsel's entitlement to an award of fees generally, they argued that (1) attorneys' fees were authorized under the New Jersey Consumer Fraud Act's fee-shifting provision, and not the settlement agreement or federal common law; (2) the settlement agreement did not create a common fund; (3) the settlement agreement expressly prohibited the use of a "percentage of fund" fee calculation because it provided that any award of fees may not "diminish, invade, or reduce, or be derived from" the class members' indi-

[3] In a subsequent rebuttal report, class counsel's expert prepared five additional estimates of the settlement value, ranging from $198.7 to $475.6 million. JA231.

vidual recoveries; and (4) the traditional lodestar method therefore should apply to the court's fee calculation.

With respect to the lodestar approach, Defendants argued first that class counsel's billed time was excessive and should be reduced. It noted, for example, that at least one attorney recorded more than 24 billable hours in a single day on at least three occasions (Dkt. 209, at 31) ("Fee Opp."); hundreds of hours of attorney time had been spent on clerical tasks such as printing documents, making copies, connecting computer components, and making travel arrangements (Fee Opp. 32); and thousands of senior partner hours had been spent simply talking on the telephone and writing emails (Fee Opp. 36). What is more, class counsel sought fees for attorney time associated with their application for fees itself. Fee Opp. 32.

Defendants further argued that class counsel's asserted base rates of $800 per hour for partners and $240 per hour for paralegals were excessive and should be reduced, and that there were no grounds for a lodestar "multiplier." Fee Opp. 37-40.

With respect to the percentage-of-fund approach, Defendants argued in the alternative that class counsel had substantially overestimated the value of the settlement, which—according to Defendants' expert—was at most $50,093,787. Fee Opp. 7. With respect to reimbursements for costs incurred in the past, for example, Defendants' expert estimated a value of

$11 million, as compared with class counsel's expert's estimate of $247 million. Defendants further argued that overhead costs and attorneys' fees should not be included in the total settlement valuation, because such line items do not constitute a benefit for the class. Fee Opp. 27-28.

Apart from the merits, and in light of the $300 million "difference of opinion" between the experts, Defendants urged the court to defer its fee determination until "[s]hortly after June 27, 2011," once the deadline for submission of claims for previously-incurred repair costs had passed. Fee Opp. 8. Nearly two-thirds of the difference between the two experts' estimates was attributable to their disagreement over the value of such claims; thus, Defendants argued, waiting until after June 27 would provide "hard data" and "avoid unnecessary uncertainty" in the calculation of a percentage-of-fund award. Fee Opp. 8-10.

2. The special master's report and recommendation

Applying a self-styled "mix and match approach" (A18), the special master declined to defer its fee determination and recommended awarding $30 million in fees.

In evaluating class counsel's request, the special master concluded first that "federal law governs," and the New Jersey "fee-shifting statute[]" associated with the underlying cause of action "do[es] not come into play." A6. Roughly tracking class counsel's arguments, the special master offered

two independent reasons for reaching this conclusion. First, he reasoned that any "fee award" in this case was "a result of the parties' private agreement" and not the New Jersey fee-shifting statute; and "where [a] fee award is sought pursuant to an agreement between the parties in a federal class action settlement, federal law governs the decision." A5-6. Second, the special master concluded that "[i]n the context of a class action settlement," as opposed to "a judgment after trial," a district court's authority to award fees arises under "the Court's equitable powers over [the] settlement agreement[]" itself. A5-6. These two considerations together implicated, in the special master's estimation, a "sufficiently great" "federal interest" that "the proper rule of decision" should be a "federal one." A6.

The special master next concluded that this is not a common fund case: "What is presented is not a single fund of money out of which the Settlement Class Members will have entitlement to portions," and any benefits that a class member may receive "are not payable out of an established fund." A11. Instead, according to the special master, the settlement provides "a composite of benefits, each depending upon the different circumstances of the claimants." *Id.*

The special master nevertheless determined that that "either the lodestar or the [percentage-of-fund] method can be used to evaluate" class counsel's fee request. A8. In his view, either approach is appropriate in

any "complex litigation," without regard for whether the suit involves a common fund; indeed, the latter method "is the 'prevailing praxis.'" *Id.*

Applying this "mix and match approach" (A18), the special master thus ostensibly applied a percentage-of-fund analysis to an estimate of the "aggregate value of the various benefits" provided under the settlement agreement. A11; *see also* A14-19 (distinguishing *TJX Company*, in which the district court previously expressed "hesitancy" to "award[] fees by reference to the valuation of the settlement").

Recounting the disputes among the experts, the special master explained, however, that he would "not attempt[] to settle [the] dispute between the two experts," and instead purported to take account of both reports as "guidance" in his "overall effort to determine what a reasonable fee would be," in light of a range of "other elements." *Id.* On this basis, he determined—without any further discussion—that "the best estimate of aggregate value appears somewhere between the extremes" presented by the parties. A13. The special master offered nothing further concerning the settlement valuation and said not one word concerning an appropriate percentage of any such valuation.

Although the special master expressly declined to apply the lodestar approach (A14 & n.12), he "consider[ed] Class Counsel's lodestar presentation as a cross-check." A18. First, finding that there "may be unnecessary

hours" included in class counsel's submission, he reduced class counsel's claimed 23,191 hours by one third, to 15,468. *Id*. He then multiplied that number by a blended rate of $500/hour for both attorneys and non-attorneys, arriving at a lodestar fee of $7,734,000. A22-23. Without further explanation, the special master applied a two-fold multiplier, arriving at a "lodestar amount, with that multiplier, of [$15,468,000]." A19, A23.[4]

Next, the special master declined Defendants' request to delay the fee determination until the close of the initial claims period. In reaching this decision, he suggested that the claims data would not establish "with certainty the value of … the benefits to the class" because "the ten-year warranty will not run out until 2014." A18. And regardless, the special master reasoned, the measure of settlement value for purposes of awarding a fee should be "what benefits were made available by counsel" to the class, and not "what benefits [actually] were claimed by the class." *Id*.

Without determining the value of the settlement fund or what a reasonable percentage of the fund would be, or providing any further detail with respect to how he arrived at a particular number, the special master

[4] The special master initially used the full number of claimed hours in his calculations, generating a lodestar amount of $11,595,500, which he doubled to $23,191,000. A18. The special master corrected this error in a supplemental memorandum. A22-23.

recommended a fee award of $30 million, two times greater than the enhanced lodestar cross-check. A21.

3. The district court's decision

The district court adopted the special master's recommendation (A42), reiterating his reasoning nearly verbatim. A24-42. Only two alterations to the special master's opinion warrant mention.[5]

First, the district court acknowledged that the settlement agreement—by providing that any award of fees "shall not diminish, invade, or reduce, or be derived from, benefits afforded to Settlement Class Members" (A65)—"indicates that the value of the benefits afforded to the Class Members may not be the controlling factor in establishing the amount of fees to be awarded." A31. The court concluded nevertheless that if a "fee-shifting statute[] do[es] not apply," and authority for granting fees arises solely under a settlement agreement, a district court is *required* to employ

[5] Defendants were entitled to a "de novo" review by the district court of "all objections to conclusions of law [and of fact] made or recommended by [the] master." Fed. R. Civ. P. 53(f)(4). The de novo standard is familiar: it requires a court to undertake an entirely independent analysis of the parties' arguments and evidence and is "not deferential" to the decision or findings under review. *Global Naps, Inc. v. Verizon New Eng., Inc.*, 444 F.3d 59, 61 (1st Cir. 2006). Defendants nevertheless appear not to have had the benefit of de novo review in this case. Not only does the district court's decision repeat the special master's report almost verbatim, but the special master himself has sought payment for drafting the district court's opinion and order rejecting the objections to the master's own report and recommendation. *See* Dkt. 280-1, Exhibit D.

a "contingent fee process" by "determin[ing] a reasonable percentage of the benefit achieved by Class Counsel for the Settlement Class." *Id.* "In other words," according to the district court, in the absence of a fee-shifting statute, the percentage-of-fund method "must" apply. *Id.*

Second, rather than multiplying the lodestar cross-check by two-fold, it applied a 2.5-times multiplier, generating a $19,335,000 cross-check amount. A41.

With these alterations—but again without calculating the value of the settlement or determining a reasonable percentage of that value—the district court ordered Defendants to pay class counsel $30 million in fees.

4. Defendants' motion to vacate

Defendants moved to vacate, alter, or amend the fee award. Dkt. 280. During the pendency of the motion, the initial claims period for past-incurred engine repair costs lapsed. Defendants accordingly moved for leave to file additional declarations demonstrating—based on data provided by the neutral settlement administrator—that the total value of claims for reimbursement of past-incurred repair costs was not $247 million as class counsel first argued, or even $11 million as Defendants had asserted, but instead "in the range from $6.3 million to $10.6 million." JA531. The new data also allowed Defendants' expert to refine the assumptions underlying both experts' prior reports concerning the extended

warranty through 2014; he estimated an "overall valuation of the Settlement based on the updated information" to range "from $39,240,315 to $44,590,904." JA535. The district court denied both motions, succinctly "declin[ing] to reconsider [Defendants'] arguments." A44.

SUMMARY OF THE ARGUMENT

The district court's decision to award $30 million in attorneys' fees was wrong in virtually every respect. Most fundamentally, the court erred in not applying the lodestar method. But even under the percentage approach, the district court grossly abused its discretion.

I. The district court erred in not applying the lodestar method for two independent reasons. To begin with, both this Court and the Supreme Court have made perfectly clear that in cases like this one—where an award of attorneys' fees is a substantive element of the remedy for the underlying state-law cause of action—*state*, not federal, law governs the calculation of fees. That means that the New Jersey fee-shifting statute underlying plaintiffs' principal claim on the merits (a statute that the New Jersey courts have said requires application of the lodestar method) should have governed the fee application here. It is entirely irrelevant that the case settled prior to an adjudication of the merits.

Neither of the theories offered by the district court in support of its decision to disregard New Jersey law in favor of its own, freewheeling ver-

sion of "federal law" stands up to scrutiny. As an initial matter, the settlement agreement does not contain any of the language that might create an entitlement to fees independent of the underlying fee statute; instead, it notes only that class counsel would *apply* for fees and provides certain conditions concerning any award that might ultimately be made. What is more, the settlement assuredly does not create a common fund; in fact, by expressly requiring Defendants, and not absent class members, to pay the award of fees, it forecloses fee "spreading" of any kind, including under the common fund doctrine.

Second, even if federal law did properly govern class counsel's motion for fees in this case, the percentage method still would be inapplicable. That conclusion follows, again, from the plain terms of the settlement, which provide that the court's calculation of an amount of fees "shall not … be derived" from the value of the benefits afforded to the class. In nevertheless rejecting the plain text of the settlement, the court reasoned that it was *required* to apply the percentage approach in any case not involving a fee-shifting statute. But that is manifestly incorrect. This Court, like many others, has said that the percentage approach is merely *optional* in cases where it may be invoked. The district court therefore had no authority to override the parties' express agreement.

The district court accordingly should have calculated class counsel's fee award under the tried-and-true lodestar approach. And in doing so, it should *not* have applied a multiplier. The case thus should be remanded with instructions to award $7,734,000 in fees.

II. Even supposing that the percentage method were applicable here, the district court's decision to award $30 million was an abuse of discretion. It is fundamental in percentage-of-fund cases that the district court must, at minimum, determine the value of the fund recovered for the class and multiply that value by some specific percentage to arrive at a reasonable attorneys' fee. Yet the district court failed to do that in this case—it did not even attempt to calculate the value of the settlement or determine what a reasonable percentage of that value might have been. There accordingly is no way to know how the court arrived at $30 million. Other courts have found such unreasoned fee awards to be abuses of discretion.

And there is special reason to suspect that the unexplained award is unreasonable. According to the district court's lodestar cross-check, $30 million compensates class counsel at a blended billing rate, for both lawyers and non-lawyers, of over *$1,900 per hour*. That amount represents a 3.9-times multiplier, which not even the district court thought warranted.

Making matters worse, in deciding not to defer its fee calculation until the close of the initial claims period, the court purported to base its fee

calculation (such as it was) on the hypothetical value of the benefits "made available" to the class, rather than the benefits actually claimed and conferred. Although such an approach might have been warranted if this were a true common fund case, courts have found it inappropriate where, as here, the settlement agreement does not create an actual common fund, and the defendant's liability is instead determined on a case-by-case basis. That, too, is a basis for reversal.

STANDARD OF REVIEW

"The issue of whether a district court may use a given methodology in structuring an award of attorneys' fees is one of law, and, thus, is subject to de novo review." *Thirteen Appeals*, 56 F.3d at 304. The district court's decision to apply federal rather than state substantive law likewise is subject to de novo review. *Godin v. Schencks*, 629 F.3d 79, 85-86 (1st Cir. 2010); *see also Torre v. Brickey*, 278 F.3d 917, 919 (9th Cir. 2002) (per curiam) ("Whether state or federal law applies to a particular issue in a diversity action is a question of law which [is] review[ed] *de novo*."). "Interpretation of [a] settlement agreement presents a legal issue which [the Court] resolve[s] *de novo*." *Korman Co. v. Cumberland Farms, Inc.*, 140 F.3d 331, 333 (1st Cir. 1998). With respect to the general reasonableness of a amount of fees, this Court reviews an "award of attorneys' fees for

abuse of discretion." *Spooner*, 644 F.3d at 66 (citing *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 13 (1st Cir. 2011)).

ARGUMENT

The district court's reasoning in this case was wrong from start to finish. To begin with, it should have applied the lodestar method. That conclusion follows necessarily from the New Jersey fee-shifting statute that underlies this action, which the court was *Erie*-bound to apply; and from the plain terms of the settlement agreement, which foreclosed application of both the common fund doctrine generally and the percentage-of-fund method specifically.

Even on its own terms, the district court's decision to award $30 million was an abuse of discretion. Although purporting to apply the percentage method, the court never determined what the value of the settlement was, or what percentage of that value to award as fees. The court also purported to base its fee calculation in reference to the value of hypothetical claims that will never be made.

The upshot of these myriad errors is that the district court awarded $30 million in fees for negotiating a settlement that we know now is worth just $40 million. That decision plainly should be reversed.

I. THE DISTRICT COURT ERRED IN NOT APPLYING THE LODESTAR METHOD.

The district court's decision to apply the percentage method to class counsel's application for fees constitutes reversible error for two reasons. *First*, the New Jersey fee-shifting statute that underlies this action, which the court was obligated under *Erie* to apply to the fee motion here, mandates the lodestar approach. No other potential basis for an award of fees is available in this case; fees were authorized under neither the settlement agreement itself nor the common fund doctrine. *Second*, regardless of the source of the court's authority to award fees, it was obligated under the plain terms of the settlement agreement to apply the lodestar method.

A. New Jersey law requires application of the lodestar method to calculate a reasonable fee in this case.

1. The Erie *doctrine requires application of state law to fee requests made in diversity-based class actions involving claims under state fee-shifting statutes.*

"Under the *Erie* Doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Rodriguez v. Suzuki Motor Corp.*, 570 F.3d 402, 406 (1st Cir. 2009) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)). While in many cases "matters of substance" and "matters of procedure" can be "difficult to distinguish" (*Godin*, 629 F.3d at 86), this is not such a case. The courts of appeals universally have recognized that, "for *Erie* purposes, a party's as-

serted right to attorneys' fees is a matter of substantive state law." *Chin v. Chrysler LLC*, 538 F.3d 272, 279 (3d Cir. 2008). Thus, in cases like this one, where an award of "attorneys' fees [is] a substantive part of the state-law remedy for a state-law cause of action, the proper rule of decision governing the award" of fees is state, "rather than federal," law. *N. Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456, 475 (1st Cir. 1988). As the Fifth Circuit has put it, "[t]he award of attorneys' fees" in a federal diversity action "is governed by the law of the state whose substantive law is applied to the underlying claims." *Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214, 230 (5th Cir. 2005); *see also, e.g.*, *Northon v. Rule*, 637 F.3d 937, 938 (9th Cir. 2011) (same).

These unassailable holdings follow naturally from the Supreme Court's long-standing admonition that "when a federal court sits in a diversity case … , state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975). Indeed, that conclusion goes to the heart of *Erie* itself, which was intended to eliminate forum shopping between state and federal courts: it would be "anomalous" if state fee-shifting "polic[ies] could be thwarted" simply "by removal of the cause to the federal courts." *Id.* (quoting *People of Sioux Cnty. v. Nat'l Sur. Co.*, 276 U.S. 238, 243 (1928)). Accordingly, "a

state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts." *Id.*

Against this backdrop, there is no serious dispute that the district court erred in declining to apply New Jersey's fee-shifting law. Plaintiffs expressly invoked the New Jersey Consumer Fraud Act in primary support of their "underlying claims." *Ingalls Shipbuilding*, 410 F.3d at 230.[6] There is no doubting that New Jersey substantive law would have governed an application for attorneys' fees if plaintiffs had prevailed on dispositive motions or after trial. There is no reason to think any other law should apply now, simply because the case settled beforehand.

That is especially so because class counsel assuredly *were* entitled to fees under New Jersey law following the settlement. In this respect, the district court was wrong to think that the plaintiffs were not "prevailing parties" under the New Jersey fee-shifting law simply because Defendants

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[6] It is of no moment that the complaint "is not limited" to the New Jersey Consumer Fraud Act. *See* A29. As an initial matter, class counsel erroneously assume that they would be entitled under New Jersey law to fees for their work on the other causes of action asserted in the complaint. But even that is beside the point: plaintiffs had a single theory of the case, and their other causes of action overlap entirely with their New Jersey Consumer Fraud Act claim. *See Stoecker v. Echevarria*, 975 A.2d 975, 990-991 (N.J. App. Div. 2009) (describing the elements of the statutory claim). The presence of these other causes of action thus in no way limits class counsel's entitlement to fees under the New Jersey fee-shifting statute. *Cf. New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.*, 883 A.2d 329, 339 (N.J. 2005) ("[A] fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.").

have continued to "assert their innocence," even in the settlement agreement. A29-30. On the contrary, it is "clear" in New Jersey "that adjudication of liability under a fee-shifting statute is not a prerequisite to fee entitlement under that statute so long as the relief obtained in a settlement of the litigation is substantially that sought in the complaint, is evidenced by an enforceable judgment, and was brought about by the litigation." *Schmoll v. J.S. Hovnanian & Sons, LLC*, 927 A.2d 146, 147-148 (N.J. App. Div. 2007) (citing *Tarr v. Ciasulli*, 853 A.2d 921, 929-930 (N.J. 2004)). That describes this case exactly: plaintiffs obtained relief, enforceable under the district court's final judgment approving the settlement (JA433), which was brought about by the litigation. In short, class counsel were entitled to fees under the New Jersey statute, which the district court was *Erie*-bound to apply to class counsel's request for fees.[7]

2. No "federal interests" are sufficient to displace the New Jersey fee-shifting statute.

Of course, *Erie*'s requirement that federal courts apply state substantive law in diversity cases is not without its limits. "Where a Federal Rule … conflicts with a state law," the state law must give way unless the federal rule is invalid. *Gil de Rebollo v. Miami Heat Ass'ns*, 137 F.3d 56, 65

[7] This New Jersey test for "prevailing party" status is consistent with the federal standard. *See Hutchinson ex rel. Julien v. Patrick,* 636 F.3d 1 (1st Cir. 2011). If anything, the New Jersey standard is "more indulgent." *Mason v. City of Hoboken*, 951 A.2d 1017, 1031 (N.J. 2008).

(1st Cir. 1998). And in rejecting Defendants' contention that the New Jersey fee-shifting statute governs the fee request here, the court below—relying exclusively on a single footnote in *Mathewson Corp. v. Allied Marine Industries, Inc.*, 827 F.2d 850 (1st Cir. 1987)—reasoned that any settlement of "complex litigation" that is "already in progress in the federal courts" necessarily "implicates" some indeterminate "federal interest" that is "sufficiently great" to outweigh *Erie*. A28-29. On this theory, once a lawsuit pending in federal court on diversity grounds settles, state law apparently falls away, and an unspecified body of federal law (purportedly arising under the court's "equitable powers … over settlement agreements" (A26)) governs any residual disputes, including fees. A29.

That bewildering theory has no basis in the law. This Court has never held that fee disputes in state-law class actions pending in federal court on diversity grounds implicate a "federal interest" of *any* magnitude, much less one sufficient to overcome *Erie*. This Court's decision in *Mathewson* certainly does not stand for that proposition. There, this Court was faced with determining whether the parties had reached a settlement in the first place. Observing that *consummation* of a settlement in "a case already in progress in the federal courts implicates matters of considerable federal concern, entirely apart from the substantive merits," this Court expressed *uncertainty* concerning what "law governs the enforceability of

th[e] agreement." 827 F.2d at 853 n.3. But it elected to "leave a definitive answer [to that question] for another day" because "[t]he parties concur[red] that Massachusetts law govern[ed]" the enforceability of the settlement. *Id*. The Court therefore applied *Massachusetts*, not federal, law.

More fundamentally, *Mathewson* had nothing whatever to do with an award of attorneys' fees. The question there was whether federal law applies to a determination whether a settlement agreement has been reached *at all*, not whether federal law applies to a fee dispute in a state-law class action that settles prior to a judgment on the merits. There is no reason to think that, even supposing the enforceability of a settlement agreement in federal court were a matter of federal law, entitlement to fees following court approval of such a settlement would be as well.

The district court's contrary approach would have astounding consequences. In every diversity case that settles (and that is most of them), federal law would displace state law as the basis for awarding attorneys fees. Not only would such a rule flatly offend *Erie*, but it would put impossible burdens on federal courts to decide, under indeterminate "federal common law," whether attorneys fees should be awarded and how much.

That is not the law. Apart from invoking some undefined and ambiguous "federal interest" and "matters of considerable federal concern" (A29), neither class counsel nor the district court have identified any fed-

eral rule with which the New Jersey fee-shifting statute is alleged to conflict. And that is not surprising, because there is none. There accordingly is no basis for declining to apply New Jersey law here.[8]

3. New Jersey law requires application of the lodestar method in statutory fee-shifting cases.

The upshot of applying the New Jersey fee-shifting statute is clear: under New Jersey law, the district court should have applied the lodestar method. It is settled that the "starting point for determining the amount of a reasonable fee" under any New Jersey fee-shifting statute "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, a calculation known as the lodestar." *New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.*, 883 A.2d 329, 338 (N.J. 2005). Although courts may adjust a lodestar amount upward or downward depending on certain factors, they are not free to abandon the approach altogether. *Rendine*, 661 A.2d at 1220-1226. On the contrary, "the

[8] This Court's decision in *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991)—relied on by the district court in other respects—provides no reason for concluding otherwise. Although the Court there applied federal law to the question whether the district court had jurisdiction to entertain a fee dispute "notwithstanding that the original causes of action [alleged] in the class complaints were state-law claims premised on diversity jurisdiction," the parties again had mutually assumed the applicability of federal law, and this Court concluded simply that it was "free to accept" the "implied concession that federal law governs." *Id.* at 522 n.5.

lodestar amount is the most significant element in the award of a reasonable fee" under any one of New Jersey's "fee-shifting statutes." *Id*. at 1226.

B. Neither the common fund doctrine nor the settlement agreement permits application of the percentage-of-fund method in this case.

In nevertheless concluding that the percentage-of-fund method should apply here, the district court appears to have identified two alternative theories for awarding fees independent of the underlying New Jersey fee-shifting statute. According to the first, class counsel are entitled to an award of fees "pursuant to [the settlement] agreement between the parties" (A29); according to the second, this case involves something akin to a common fund, allowing the court to order an "equitable award" of attorneys' fees derived from the benefits recovered on behalf of the class. A27. Regardless which theory applies, in the district court's view, if "the fee shifting statute[] do[es] not apply, then th[e] court must look at the fees in issue here in a manner closely resembling a contingent fee process." A31.

These theories are wrong at every level. This case involves neither a contractual fee-shifting provision nor a common fund, and the lodestar method would be required under either theory in any event.

1. This is not a contractual fee-shifting case.

We begin with the district court's theory that an award of fees was independently authorized by the settlement agreement.[9] When construing a "contract" (including a "settlement agreement") that is "free from ambiguity," Massachusetts law directs courts to "give effect to its plain language and give terms their usual and ordinary meaning." *S. Union Co. v. Dep't of Pub. Util.*, 941 N.E.2d 633, 640 (Mass. 2011). Contract language is considered ambiguous only "where the phraseology can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken." *Bank v. Thermo Elemental Inc.*, 888 N.E.2d 897,

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[9] Although the district court thought that federal law applies to the question of fees, it did not determine what law governs the interpretation of the settlement agreement itself, which contains no choice-of-law provision. We respectfully submit that Massachusetts law should apply. *See Hartford Fire Ins. Co. v. CNA Ins. Co. (Europe)*, 633 F.3d 50, 54 n.7 (1st Cir. 2011) ("a federal court sitting in diversity" applies "the forum state's choice of law rules"); *Bushkin Assocs. v. Raytheon Co.*, 473 N.E.2d 662, 668 (Mass. 1985) (enumerating Massachusetts choice-of-law factors). With respect to fundamental contract-interpretation principles, however, it is unlikely that the law of the States will vary materially.

Having said that, one principle is clear: state, not federal, law governs interpretation of the settlement agreement in this case. *See, e.g.*, *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005) ("in a diversity case we apply the substantive law of the forum state" to the construction of "[a] settlement agreement," which "is a contract [like any other and] is interpreted according to general principles of contract law"); *cf. Great Clips, Inc. v. Hair Cuttery of Greater Boston, L.L.C.*, 591 F.3d 32, 35 (1st Cir. 2010) ("accept[ing]" the parties' assumption that "Massachusetts law governs the interpretation of the settlement agreement").

907 (Mass. 2008). Although "extrinsic evidence may be used as an interpretive guide" when a "contract is ambiguous," such evidence is not relevant to determining whether ambiguity exists in the first place. *Id.* at 908.

Measured against this standard, the language of the settlement agreement is unambiguous. It provides only that "Class Counsel will *submit an application* to the Court for an award of reasonable attorneys' fees and expenses," and that any fees awarded will not be derived from the benefits to the class. A65 (emphasis added). There is no room for any "difference of opinion as to the meaning of the[se] words." *Bank*, 888 N.E.2d at 907. A clause recognizing that class counsel will *seek* fees in the context of a lawsuit involving a fee-shifting statute cannot reasonably be interpreted as creating a legally-enforceable entitlement to *obtain* fees wholly independent of the underlying fee-shifting statute. "[G]iv[ing] effect to [this] plain language" (*S. Union Co.*, 941 N.E.2d at 640) means reading the settlement agreement as providing simply that class counsel would file a motion for fees, to be awarded under the applicable fee-shifting statute, and subject to the limitations of the agreement.

If the parties had intended to create an independent entitlement to fees under the settlement, they certainly could have drafted the agreement to say so. They could have written the agreement to provide that Defendants would, for example, "pay and discharge or promptly reimburse

[plaintiffs] for … reasonable attorney's fees" (*N. Bergen Rex Transp.*, 730 A.2d at 846 (emphasis omitted)) or that it would "pay, subject to Court approval, up to [a certain amount] to Settlement Class Co-Lead Counsel for attorneys' fees" (*TJX*, 2007 WL 5196181, at ¶ 7.2); *cf. Catullo v. Metzner*, 834 F.2d 1075, 1080 (1st Cir. 1987) ("the settlement agreement expressly provides for attorney's fees to be paid" by one of the parties). But the agreement here contains no such language; it does not provide that plaintiffs are "entitled to recover" fees, or that Defendants must "pay" or "reimburse" plaintiffs for their fees.

The district court nevertheless determined that Defendants had entered into a "knowing agreement to pay [attorneys' fees] so long as the amount does not exceed $37,500,000." A42.[10] In so holding, the court relied on a provision in the *class notice*, and not the settlement agreement itself. A26. That is simply wrong.

True enough, the parties informed the class in the separate class notice that "Class Counsel will ask the Court for up to $37.5 Million for attorneys' fees," and that Defendants "do not dispute Class Counsel's entitlement to an appropriate fee," although it "may oppose the amounts re-

[10] The $37.5 million figure appearing in the class notice has no independent significance; it was simply the amount that class counsel informed Defendants they would seek. Defendants never endorsed that amount and expressly reserved its right to "oppose the amounts requested by Class Counsel." JA417.

quested by Class Counsel." JA417. But the class notice—which certainly is not itself a contract between the parties—was *not* a part of the settlement and thus is irrelevant to an interpretation of the plain language of that document. *Bank*, 888 N.E.2d at 907.

In any event, the notice (like the settlement) observes only that plaintiffs will "ask" for fees, and adverts to potential grounds for "dispute" concerning entitlement to fees, which Defendants separately agreed not to pursue. The notice thus evidences, not an independent authorization for an award of fees (in which case there would be no grounds for dispute), but simply an agreement by Defendants not to contest class counsel's entitlement to fees under the New Jersey fee-shifting statute. In short, there is no reason to think the class notice makes this a case in which fees are "authorized by … the parties' agreement." Fed. R. Civ. P. 23(h).

2. This is not a common fund case.

a. Nor is this a case in which fees could be awarded under the common fund doctrine. The first indispensable element of a claim for attorneys' fees under the common fund doctrine is, as the name suggests, the presence of a *common fund*. This common-sense conclusion follows from the doctrine's jurisdictional underpinnings. As we explained above (*supra*, at 7-8), authority for granting fees under the common fund theory arises from the court's equitable power over an ascertainable fund of money. *Boe-*

ing, 444 U.S. at 478 ("Jurisdiction over the fund involved in the litigation allows a court to … assess[] attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."). Without such a fund, the court lacks authority to assess fees in the first place.

This Court previously has recognized as much: without an actual settlement fund, "there is no satisfactory basis on which a court can compel [an award] of lawyers' fees" under the common fund approach; thus "the absence of any true common fund renders the percentage approach inapposite." *Weinberger*, 925 F.2d at 523, 526 n.10. Other courts agree. The Court of Federal Claims, for example, has concluded that, "[i]f no such fund exists, the common fund approach lacks its anchor and is foreclosed." *Applegate v. United States*, 52 Fed. Cl. 751, 760 (Fed. Cl. 2002) (citing *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993)), *aff'd per curiam,* 70 F. App'x 582 (Fed. Cir. 2003). *Cf. Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 852 (5th Cir. 1998) (no abuse of discretion where the district court declined to apply the percentage-of-fund approach in "the absence of [a] fund" following settlement).

That, of itself, should be an end to the argument. It is beyond dispute that this case does *not* involve a common fund. Common fund cases entail a "lump sum judgment" assessed against the defendant, who typically "deposit[s] the amount of the judgment into escrow." *Strong*, 137 F.3d

at 852; *see also, e.g.*, *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 120, 129 (2d Cir. 2010) (per curiam) (Kaplan, J., concurring) (common fund cases involve a "lump sum" "awarded to the class as a whole," typically "placed in an escrow account"). In *Boeing*, for example, the Supreme Court approved application of the common fund doctrine where the plaintiffs had "established … [a] total amount of damages," which were paid as "a lump-sum judgment" "into escrow," creating a "determinate fund" against which "individual claims" subsequently were made. 444 U.S. at 479, 481.

None of these hallmark features of a common-fund case is present here. The settlement "neither established nor even estimated [Defendants'] total liability" (*Strong*, 137 F.3d at 852), and, for its part, the district court did not even attempt to determine a "total amount of damages" (*Boeing*, 444 U.S. at 479), much less did it order any such amount paid as a "lump sum" (*id.*) into escrow. Instead, the settlement agreement provides for a third-party administrator to determine the value of—and requires Defendants to pay from its own coffers—each class member's claim on a case-by-case basis. Even the district court recognized as much, observing that this case involves—like virtually every settlement in any consumer class action—"not a single fund of money set aside" for the payment of claims, but "a composite of benefits," the final value of which "depend[s] upon the different circumstances of the claimants." A34.

The common fund doctrine is simply inapplicable in circumstances like these. When a "settlement" does not require "money [to be] paid into escrow or any other account," and when "the value of the settlement [is] contingent on" uncertainties such as "class members' … eligibility for the [benefits]" provided under the settlement agreement, then "no fund [is] established" and the common fund approach is inapplicable. *Strong*, 137 F.3d at 852. That describes this case exactly.

b. Having said that, we acknowledge that some courts have approved a hybrid approach: the so-called "common benefits" theory, according to which the litigation "produces not a common fund but a common benefit" that "enriches the class even though the emolument is not paid into a central kitty." *Weinberger*, 925 F.2d at 522 n.6. The Third Circuit, for example, has suggested that "the percentage of recovery method" may apply in cases where the settlement does "not actually generate a common fund" but the class's benefits and attorneys' fees nevertheless are derived "from the same source." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) ("*GM Trucks*"). Like the common fund approach, "the common benefit doctrine" is intended to avoid unjust enrichment by "spread[ing] [fees] proportionately among" the ab-

sent beneficiaries of the litigation by reducing each class member's individual award. *In re Diet Drugs*, 582 F.3d 524, 546 & n.44 (3d Cir. 2009).[11]

Common-benefit cases come in two forms. In the first—exemplified by *Diet Drugs*—the court, in the absence of a fund, "lev[ies] assessments against" each individual class member's "recover[y]" to "ensure that the [fees] are proportionately spread among that class." 582 F.3d at 546. In the second—exemplified by *GM Trucks*—class counsel and defendants simultaneously settle both the underlying merits of the action and class counsels' claim for fees. Because "a defendant is interested only in disposing of the total claim asserted against it" without regard for the distribution of the proceeds among lawyers and class members, such simultaneous settlements implicate a "conflict between the class and its counsel" over a fixed sum of money and thus, in "economic reality," emulate a "common fund situation." 55 F.3d at 819-820.

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[11] This Court arguably has rejected the common benefits doctrine. *See Weinberger*, 925 F.3d at 523 ("Where there is no common fund, and class action plaintiffs seek attorneys' fees directly from defendants, in addition to damages or other relief due to the class, th[e] equitable principle" underlying a fee-spreading theory "does not literally apply."). At least, it has never expressly adopted it, and with good reason: the theory has its genesis in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), which was repudiated in *Alyeska Pipeline*. *See* 10 *FPP* § 2675 (explaining that the "extension" in *Mills* of the "common-fund doctrine … into more general common-benefits situations" was "seriously curtailed" in *Alyeska Pipeline* and recommending caution "in referring to earlier decisions supporting awards under the common-benefit rationale").

Neither situation describes this case. To begin with, there was no simultaneous settlement here. To the contrary, class counsel seek an award of fees entirely separate from the terms of the merits settlement, and it is *Defendants*, not the class, who are directly adverse to class counsel's exorbitant fees request.[12] Thus as this Court already has recognized in dismissing a parellel appeal by an objecting class member here, this is not a case in which "class counsel [could have] sold the class short as part of a collusive fee agreement." Judgment at 1, *Birkeland v. McNulty Law Firm* (1st Cir. No. 11-1414) (10/12/2011). In short, nothing about this case resembles a "common fund situation." *GM Trucks*, 55 F.3d at 821.[13]

Just as surely, any award of fees in this case did not involve an assessment against each class member's recovery. That much is clear from the settlement agreement itself, which provides that "Class Counsel fees

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[12] The district court accordingly was wrong to think that it was obligated to "function as a quasi-fiduciary to safeguard the corpus of the settlement fund for the benefit of the plaintiff class." A32.

[13] *GM Truck* is of little value for other reasons, as well. For one, the Third Circuit openly acknowledged that its fee analysis in that case was non-binding dictum. *See* 55 F.3d at 819 (observing that the court's rejection of the settlement in that case "obviates the need for a review of the fee award at this stage" but nevertheless "highlight[ing] some of the primary issues" with respect to fees for the "district court [to consider] on remand"). Apart from that, the court there was asked to determine whether the fee amount in the settlement was reasonable (*id.*); it was not asked to determine, independently, what a reasonable fee would be. Those questions implicate fundamentally different considerations.

and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from, benefits afforded to Settlement Class Members." A65; *see also* A31. In other words, the settlement requires fee *shifting* and expressly forecloses fee *spreading*. Plaintiffs have acknowledged as much (*see* Status Report at 5, *Birkeland v. McNulty Law Firm* (1st Cir. No. 11-141) (7/26/2011) ("The award of attorney fees will in no way affect class members' benefits under the settlement.")), as has this Court in dismissing, for lack of standing, the objecting class member's appeal (*see* Judgment at 1, *Birkeland v. McNulty Law Firm* (1st Cir. No. 11-1414) (10/12/2011) ("Appellant has suffered no redressable injury from the fee award.")).

This independently rules out both the common-fund and common-benefit theories. As we explained above (at 8), it is precisely the point in fee-spreading cases that "class counsel's reasonable fees" are "charged *to the beneficiaries*" of the suit (*Weinberger*, 925 F.2d at 522 n.6 (emphasis added)) to ensure that "each class member[]" meets his "equitable obligation to share the expenses of litigation." *Boeing*, 444 U.S. at 482. Conversely, it is fundamental that such theories do "not impose additional liability on the losing defendant." *Knight v. United States*, 982 F.2d 1573, 1579 (Fed. Cir. 1993); *see also Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1008 (9th Cir. 2002) (same). Thus, as this Court explained in

Weinberger, "[w]here there is no common fund, and class action plaintiffs seek attorneys' fees directly from defendants, in addition to damages or other relief due to the class, this equitable principle" underlying fee-spreading theories of attorneys' fees "does not literally apply." 925 F.3d at 523. Just so here.

3. The settlement agreement expressly forecloses a percentage-of-fund approach.

Even if all that we have said so far were wrong—even if the district court's authority to award fees in this case arose, not from the underlying New Jersey fee-shifting statute, but from either the settlement agreement itself or the common fund doctrine—the district court still would have erred in applying the percentage-of-fund method here. That conclusion follows, once again, from the plain language of the settlement.

a. The agreement provides, in particular, that the fee award in this case "*shall not … be derived from*" the "benefits afforded to Settlement Class Members." A65 (emphasis added). According to its ordinary usage, to "derive" means to "infer" or "deduce," which means in turn to "conclude" by inference "from premises or evidence," or to "have as a logical consequence." *Webster's New College Dictionary* 305, 567 (1999). Thus, the meaning of the clause is unambiguous: it prohibits not just fee-spreading, by any determination of an amount of fees by *inference* from the value of the benefits afforded to the class. It prohibits, in other words, the percent-

age-of-fund method. Even the district court understood as much, acknowledging that the plain terms of the settlement provide that "the value of the benefits afforded to the Class Members may not be the controlling factor in establishing the amount of fees to be awarded." A31.

In nevertheless overriding the plain text of the settlement, the district court reasoned that, outside the statutory fee-shifting context, courts "*must*" apply the percentage-of-fund method. A31 (emphasis added). It thus seemed to think that, when authority for awarding fees arises under a contract or the common fund doctrine, a settlement term selecting the lodestar rather than percentage method is effectively, and categorically, unenforceable.

This startling conclusion is flatly incorrect. Even in true common fund cases, where the percentage-of-fund method is properly invoked, its application remains merely optional. Thus, a district court may "calculate counsel fees *either* on a percentage of the fund basis *or* by fashioning a lodestar." *Thirteen Appeals*, 56 F.3d at 307 (emphasis added). And there is little doubt that a district court would err in concluding that it had no choice but to apply a calculation method squarely inconsistent with the express terms of a reasonable, court-approved settlement agreement.

b. That the district court was wrong to determine that the percentage method was required in this case is made all the more apparent by the

parties' vigorously-litigated dispute concerning the value of the settlement. In their initial motion for fees, class counsel somewhat puzzlingly suggested that applying the percentage method in this case would be "less burdensome" and would "enhance[] judicial efficiency" by avoiding "collateral disputes." Fee Mot. 5-6. The district court agreed, suggesting that "administration" of the percentage method would be "less burdensome" than the lodestar method. A28.

True enough, judicial efficiency is one of "the distinct advantages" identified in support of the percentage approach in common fund cases. *Thirteen Appeals*, 56 F.3d at 307. But the percentage method plainly does not achieve any such efficiencies when it is applied (as here) *outside* the common fund context. Instead, it guarantees precisely the kind of "collateral dispute" that class counsel claimed it would avoid: litigation over the value of the settlement in this case involved two rounds of expert reports and three rounds of briefing before two different decision-makers. Recognizing that such protracted litigation is avoidable (particularly when it comes on top of a lodestar cross-check), the Third Circuit suggested in *GM Trucks* that even in common-benefit cases, "the lodestar rationale has appeal where," as in this case, "the nature of the settlement evades the precise evaluation needed for the percentage of recovery method." 55 F.3d at 821; *see also id*. at 822 (suggesting that the percentage approach should

not apply when a settlement has "too speculative a value on which to base a fee award").

The Fifth Circuit has agreed. According to that court, even if the percentage approach were applicable in common-benefit cases without a *Boeing*-like common fund, "the lodestar method" still would be preferable to "the percentage of fund method precisely in the situation where the value of the settlement is difficult to ascertain, [given] that there is a strong presumption that the lodestar is a reasonable fee." *Strong*, 137 F.3d at 852 n.5 (citing *GM Trucks* and *Weinberger*). In *Strong*, that court approved the district court's refusal to apply the percentage method in a case virtually indistinguishable from this one.

The district court thus erred in disregarding the plain terms of the settlement agreement. There is no ground in law or fact for thinking that it was *required* to apply the percentage-of-fund method in this case. In fact, the case law uniformly supports using the lodestar approach here. And the district court's decision to apply the percentage approach suffers from more than inconsistency with long-settled case law and the express terms of the settlement agreement. It also ignores the policy rationales underlying the common fund doctrine: it prevented neither the unjust enrichment of absent class members nor drawn-out collateral litigation. In short, the decision to apply the percentage method was reversible error.

II. A LODESTAR MULTIPLIER IS NOT WARRANTED HERE.

The district court's erroneous decision to use the percentage-of-fund method does not require this Court to throw out the district court's fee decision altogether. That is because the district court conducted an independent lodestar cross-check, which can and should serve as the basis for an award of fees on remand. Having said that, the 2.5-times lodestar multiplier should not be applied to the statutory lodestar calculation.

When it comes to statutory fee-shifting, "a district court's primary concern is" to calculate a fee that reflects the actual "market value of counsel's services." *United States v. One Star Class Sloop Sailboat*, 546 F.3d 26, 40 (1st Cir. 2008). Because enhancements represent a break from a straightforward market calculation and are not "required" by New Jersey "fee-shifting statutes," courts applying New Jersey law "should not enhance fee awards as a matter of course." *New Jerseyans*, 883 A.2d at 340-341. Instead, only "unusual circumstances," such as the "achieve[ment of] an excellent result" in the face of an unusually high "risk of failure," may "justify an upward adjustment of the lodestar." *Id.* Even then, "[t]he enhancement ordinarily should range *between five and fifty-percent of the lodestar fee*." *Id.* at 341 (emphasis added).

That conclusion holds equally true under federal law. Thus, a lodestar enhancement is "justif[ied]" in federal statutory fee-shifting cases only

in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been 'adequate to attract competent counsel.'" *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1674 (2010) (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

Under these standards, the district court's unexplained, results-driven multiplier should be rejected. The district court made no attempt to consider the factors that might justify a multiplier here, instead enhancing the lodestar, as part of its cross-check, as a matter of course.[14] Such cursory treatment of the enhancement is especially problematic here, given that class counsel have offered not one iota of evidence to suggest that, without the promise of a lodestar multiplier, no competent counsel would have litigated this case. Nor have they offered any basis to think that their handling of the class's garden-variety product-defect suit—which did not make it even to the class certification stage—involved any particular inno-

[14] When "employ[ing] the lodestar calculation only as a cross check" against a percentage-of-fund fee, courts more willingly approve the use of multipliers. *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 340-341 (3d Cir. 1998). Even then, however, a "court must take care to explain how the application of a multiplier is justified by the facts of a particular case." *Id.* Thus if "the [lower] court offers little explanation as to why a multiplier was necessary or appropriate," and appears to adopt a multiplier "merely to [ensure that the cross-check] correspond[s] with the total [percentage-based] fee award," the multiplier should be rejected. *Id.* at 341. The district court appears to have done just that in this case; there accordingly is good reason to think the 2.5-times multiplier should be thrown out even under the percentage approach.

vation or extraordinary effort. Indeed, as a follow-on to the prior voluntary warranty extension—which accounted for great majority of all reimbursements ($119 million under the voluntary extension, versus less than $11 million under the settlement)—it assuredly did not. This Court accordingly should remand with instructions not to apply any enhancement to the statutory lodestar calculation.[15]

III. EVEN ASSUMING THE PERCENTAGE-OF-FUND METHOD WERE APPLICABLE HERE, THE $30 MILLION FEE AWARD WAS AN ABUSE OF DISCRETION.

For all the myriad reasons we have discussed, the district court erred in not applying the lodestar method, which was required as a matter of both New Jersey law and the plain language of the settlement agreement. But even on its own terms—even supposing that the percentage method were properly applicable here—the district court's decision to award $30 million in fees was an abuse of discretion.

A. The district court abused its discretion by declining to determine the value of the settlement or a percentage of the fund to be awarded.

It is fundamental in percentage-of-fund cases that the district court must "determine[]" the value of "the fund recovered for those benefitted by the litigation" and multiply that value by "a reasonable percentage" to ar-

[15] In the event the Court remands for full reconsideration of the lodestar calculation, Defendants reserve their right to contest not only the multiplier, but also the district court's hours and hourly-rate determinations.

rive at a reasonable attorneys' fee. *Thirteen Appeals*, 56 F.3d at 305. Thus, as the Third Circuit has explained, a district court applying the percentage method in a case like this must "[a]t the very least … make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees." *GM Trucks*, 55 F.3d at 822; *see also Dikeman v. Progressive Express Ins. Co.*, 312 F. App'x 168, 172 (11th Cir. 2008) (per curiam) (if "the parties vigorously dispute[] … the monetary value, if any, of the settlement," a court must "determine[] the monetary value of the settlement before applying the [percentage-of-]-fund method to the attorneys' fees award").

Remarkably, the district court failed to do that in this case; like the special master before it, the court did not even attempt to "settle [the] dispute between the two experts" (A12; *see also* A35) concerning the value of the settlement.[16] Instead, it purported to take the competing valuations into account as "just a part of the court's overall effort to determine what a

[16] The district court suggested that the special master had "determined … an aggregate value of [the settlement] of $222,932,831." A36. But that is incorrect. Picking-and-choosing at random among *six* different estimates of the value of the various elements of the settlement from class counsel's expert's rebuttal report (JA231), the special master merely described $222,932,831 as the "aggregate[]" value of the *expert's* estimate, and not as his own finding. A12 & n.10. Again, he explained that he would "not attempt[] to settle [the] dispute between the two experts." A12-13. In any event, the district court did not adopt the $222,932,831 valuation and merely "t[ook] note" of it. A36.

reasonable fee would be, considering the potential value of the benefits to the Settlement Class Members only as one, among many other, elements." A36. And having declined to make a definitive determination of the value of the settlement, the court necessarily also declined to decide what a reasonable percentage of that value might have been. There accordingly is no way to be certain how exactly the court arrived at $30 million.

Other courts have found such unreasoned, freewheeling fee decisions to be abuses of discretion. In *Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011), for example, the Ninth Circuit found that it "ha[d] no choice but to [reverse and] remand" where the district court had failed to "make the necessary calculations [or] provide the necessary explanations" to permit an informed review of its decision to award $850,000 in fees. *Id*. at 945. Likewise, in *GM Trucks*, the Third Circuit found itself "constrained to reject" the district court's percentage-based fees calculation where the district court had "summarily asserted … it could not value the settlement precisely." 55 F.3d at 822.

In "the absence of explicit calculation or explanation of the district court's result" (*Bluetooth*, 654 F.3d at 943), this Court similarly must reject the district court's fee calculation. For example, if the district court agreed with class counsel's expert that the value of the settlement was as high as a whopping $475 million (JA231), then the $30 million fee award

represents a reasonable-sounding 6.3% award. By contrast, if it believed the value of the settlement was closer to $40 million, as Defendants' expert contended (JA535), then the award seems wholly disproportionate, amounting to 75% of the class's recovery. But there is no way to know where between these two extremes the district court's decision lies. Of course, it is true that courts need not "conduct[] an audit of plaintiffs' fee petition and then issue a telephone book of minute findings" (A41)—but something more than *nothing* is required. *See One Star*, 546 F.3d at 42 (explaining that a fee determination "need not be precise to the point of pedantry," but "must be reasonably clear").

That is especially so in this case, given that the lodestar cross-check suggests that $30 million is *not* a reasonable fee. A lodestar cross-check ensures that "the precise percentage awarded does not create an unreasonable hourly fee." *GM Trucks*, 55 F.3d at 822. Yet, again, the district court did not make the necessary calculation. If it had, it would have determined that—in light of its finding that counsel from twenty-one different firms spent 15,468 hours litigating the case to settlement (A18)—the $30 million award compensates class counsel at a blended billing rate, for both lawyers and non-lawyers, of over *$1,900 per hour*. That amount represents a 3.9-times multiplier over the district court's unenhanced lodestar rate of $500. *See* A41.

Tellingly, not even the district court believed a 3.9-times multiplier was warranted in this case. *See* A41. And that is enough by itself to require reversal: where "[t]he lodestar cross-check" indicates that "the [implied] multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005)) (approving a $365 blended base rate enhanced by a 1.4-times multiplier to $511 per hour in a case involving a $140 million settlement). The district court abused its discretion in declining to do so here.

B. The district court erred by predicating the fee award on the hypothetical value of the settlement rather than the value of the claims actually made.

The district court's $30 million fee award was an abuse of discretion for a second, independent reason. In declining to defer the fee determination until after the initial claims period, the district court figured that a percentage calculation should not be made in reference to the benefits actually claimed and conferred on the class, but instead to the hypothetical value of the "benefits … made available by counsel." A41. In a case like this one, that is simply incorrect as a matter of law.

Two lines of cases have developed with respect to this issue. According to the first—in true common fund cases where defendants must actu-

ally pay a lump sum into an escrow account—courts have held that common fund fees should be based on a percentage of the "entire Fund created by the efforts of counsel" and not the value of the "the claims made against the Fund." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436-437 (2d Cir. 2007). But according to the second line—in cases where the settlement does not require "money [to be] paid into escrow or any other account" and "neither establishe[s] nor even estimate[s] … total liability"—courts have found it more appropriate to "consider[] the actual claims awarded," rather than an "illusory" "valu[ation] of the settlement." *Strong*, 137 F.3d at 852-853.

This fee dispute plainly falls within the second line of cases. Because the value of the settlement here was initially uncertain and subject to manipulation, and because Defendants will only ever have to pay claims that are actually filed, basing a percentage award on hypothetical class members who will never appear, and "illusory" claims that will never be filed, would ensure a windfall to class counsel. To conclude otherwise would perversely encourage plaintiffs' counsel to bring dubious class action suits, seeking percentage-of-fund fees based on meaningless, imaginary values of settlements that confer no practical benefits on anyone.

This case demonstrates why that is not the law. Data provided by the neutral settlement administrator following the conclusion of the initial

claims period—data relating to the lion's share of the parties' disagreement concerning the settlement value—indicate that the total value of claims for reimbursement of past-incurred repair costs in this case was "in the range from $6.3 million to $10.6 million." JA531. That is less than even *Defendants* initially estimated, and a miniscule fraction of the $250 million that class counsel claimed. JA231. The new data also suggest that the "overall valuation of the Settlement based on the updated information" will range "from $39,240,315 to $44,590,904." JA535. Against this backdrop, permitting class counsel to walk away with a $30 million fee, which would compensate them at the equivalent of a *three-fourths* contingent fee and *$1,900 per hour* for both attorney and staff time, would be manifestly unreasonable.[17]

CONCLUSION

If the Court concludes that the lodestar method must apply, the order awarding fees should be vacated and the case remanded with instructions to award fees in the unenhanced amount of $7,734,000. If the Court

[17] Because the benefits available to class members here are so substantial (typically more than one thousand dollars), it is unlikely that anyone entitled to make a claim would have chosen not to. Given that actual claims amounted to less than $11 million (JA531), it therefore would be impossible to credit anything close to class counsel's $250 million estimate for previously-incurred damages claims (JA231). Waiting until the claims period ended accordingly would have been critically helpful to estimating the value of the settlement, even supposing the district court were correct that it could award fees based on hypothetical claims never actually made.

concludes instead that the district court did not err in applying the percentage method, the order awarding fees still should be vacated, and the case remanded with instructions to determine the value of benefits actually paid to the class, and a precise percentage of such value to be awarded as reasonable fees.[18]

[18] In the event this Court remands for reconsideration of the fee award, it should order the case assigned to a different judge in light of the improper anomalies concerning the special master's participation in the "de novo" review of his own recommendation. *See supra*, n.5; *cf. White v. Fessenden School*, 358 Fed. App'x 208 (1st Cir. 2009) (with respect to prior proceedings in which the district court (Tauro, J.) rubber-stamped a proposed order without analysis, remanding with instructions to assign the case to a different judge); D. Mass. Local R. 40.1(K)(2).

Respectfully submitted.

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Dated: December 29, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,986 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

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December 29, 2011

REQUIRED ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CLASS ACTION MASTER
FILE NO. 1:07-md-1790-JLT
(Relating to All Cases)

IN RE VOLKSWAGEN and AUDI
WARRANTY EXTENSION LITIGATION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE SPECIAL MASTER RELATING TO CLASS PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

This matter came before the Special Master[1] on February 14, 2011, on Class Plaintiffs' "Motion for Attorneys' Fees and Costs," (the "Fees Motion"), [Doc. No. 174], all pursuant to Fed. R. Civ. P. 23(h), 52(a) and 54(d)(2)(D).

PROCEDURAL HISTORY

For the procedural history leading to these Findings, Conclusions and Recommendations, attention is directed to the Special Master's Findings of Fact, Conclusions of Law and Recommendations of the Special Master Relating to the Conditional Approval of the Class Settlement, issued on September 22, 2010, [Doc. No. 164].

On December 20, 2010, the Fees Motion was filed, followed by the Defendants' Opposition thereto, along with oppositions and comments by other counsel and individuals. Among other things, particularly the opposition by certain counsel, the Special Master, on January 26, 2011, issued a Supplemental Memorandum and Process for the Attorneys' Fees and Costs Hearing, [Doc. No. 211]. As a part of that Supplemental Memorandum, the process to be

[1] In these Findings, Conclusions and Recommendations, the "Court" refers to U.S. District Judge Joseph L. Tauro, and the "Special Master" refers to Hon. Allan van Gestel, (Ret.), duly appointed by the Court.

followed, and which was followed, at the proceeding on the Fees Motion was:

> "At the hearing on February 14, 2011, the Special Master will hear, by way of oral argument only, the positions of those in attendance who, by their prior filings are duly qualified to speak, in favor of or in opposition to Class Counsels' Motion for Attorneys' Fees and Costs, Doc. No. 174. The order of speaking will be: for Class Counsel to go first, in support of their motion; then Defendants' counsel may speak next, either in opposition, modification or support of the motion; Defendants' counsel will be followed by those qualified to speak who are in favor of the motion; and finally those qualified to speak who oppose the motion will be heard. It is not anticipated that a second round of speaking will be required."

All parties also were advised that at the hearing there would be no presentation of testimony or cross-examination from or of evidentiary witnesses. This was not a mini-trial.

Notice has been duly served on over 1.6 million Settlement Class Members. Included in that Notice is advice that an Informational Website has been established where Class Members can obtain an extensive amount of detail about these consolidated cases and the proposed settlement. That website may be found at www.OilSludgeSettlement.com. As reviewed by the Special Master, there is included in the Informational Website a section entitled "How will the lawyers get paid?" The answer provided reads, in material part:

> "Class Counsel will ask the Court for up to $37.5 Million for attorney's fees and up to approximately $1.75 Million for reimbursement of costs and expenses incurred in the prosecution of these actions. The Defendants do not dispute Class Counsels' entitlement to an appropriate fee and reimbursement for costs and expenses, but may oppose the amount requested by Class Counsel. The Defendants will pay whatever attorneys' fee and cost and expenses that the Court awards without reducing or limiting any of the benefits available to Settlement Class Members."

This notification comes very close to what is often referred to as a "clear sailing agreement," although it appears more like a "ceiling clause." It includes Class Counsels' promise not to seek a fee above an agreed-upon ceiling, rather than an agreement by the Defendants not to contest a fee application up to the amount of that ceiling. The Special Master

and the Court should carefully scrutinize the effect of such a clause or agreement to insure that in order to secure it, counsel have not bargained away something of value to the Settlement Class. *Weinberger* v. *Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). Having done so, however, the Special Master in no way finds or suspects Class Counsel of any collusion or other untoward behavior in the negotiation of the Agreement of Settlement. On the contrary, their efforts on behalf of the Settlement Class are to be praised.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Special Master is of the belief that it will better assist the Court in reviewing the findings of fact in support of the recommendations that follow if the legal propositions that control and apply to this fees hearing are set forth first.[2]

Conclusions of Law

In any assessment of a request for attorneys' fees in the District Court, the starting point should be the "American Rule." Generally, under that rule each of the parties to a civil action is required to pay his, her or its own attorneys' fees and costs in the absence of some statutory

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[2] Before addressing either the conclusions of law or the findings of fact, the Special Master speaks briefly in this footnote about an issue that arose in the final days leading up to the February 14, 2011, hearing. Among the last-minute flurry of filings, there was attached to Plaintiffs' final Reply Brief, as Exhibit 3, an Affidavit of Prof. Arthur R. Miller in support. Defendants' counsel immediately moved to strike that affidavit, [Doc. No. 240], primarily arguing that it was nothing more than an unauthorized legal brief.

The Special Master understands that it is his duty to decide what the law is that applies in this proceeding and then make his recommendations to the Court. "In our legal system, purely legal questions . . . [are] exclusively the domain of the judge." *Nieva-Villanueva* v. *Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997). See also *Gomez* v. *Rivera Rodriguez*, 344 F.3d 104, 114 (1st Cir. 2003). Thus, the Special Master has not relied upon Prof. Miller's presentation of his view of the applicable law as contained in his affidavit. Formally striking the affidavit, however, is not deemed necessary.

provision imposing a fee-shifting requirement. *Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240, 245 (1975).[3] In the context of a class action settlement in the First Circuit, however, fees may be awarded, as part of the Court's equitable powers over such settlement agreements, from a fund created to benefit the class. "A common fund award 'is an equitable award made at the discretion of the district court.' " *United States* v. *8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999).

The requests in issue in the Fees Motion must be assayed pursuant to the Agreement of Settlement that will be considered by the Court at the March 11, 2011, Fairness Hearing. Two aspects of the Agreement of Settlement are pertinent for these purposes.

First, Section VI. A. 2. provides: "It is expressly understood and confirmed that the parties have not agreed to any choice, selection or waiver of state or federal law to be applied to any aspect of the construction, preliminary or final approval, or application of any provision of this Agreement of Settlement, including but not limited to attorney fees and costs."

Thus, as is the case here, in the absence of an express choice of law clause, where a fee award is a result of the parties' private agreement, federal law governs the decision. *Dewey* v. *Volkswagen of Am.*, 728 F. Supp. 2d 546, 588-89 (D. N.J. 2010). The Special Master is fully aware that the Plaintiffs' Second Amended Class Action Complaint, [Doc. No. 57], in Count 1, relies upon the New Jersey Consumer Fraud Act, N.J.S.A. § 56.8 - 1 *et seq.*, along with other similar state consumer fraud laws which contain fee-shifting provisions.[4]

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[3] For a detailed history of the application of the American Rule in the federal courts, see *Alyeska, id.* at 247-271.

[4] This MDL consists of seven consolidated federal actions that originally were filed in New Jersey, Florida, California, Massachusetts, Pennsylvania, Ohio and Illinois.

What is now before the Special Master and the Court, however, is an Agreement of Settlement, not a judgment after trial of the underlying cases. Consequently, the state law fee-shifting statutes do not come into play. It is clear in the First Circuit that where the fee award is sought pursuant to an agreement between the parties in a federal class action settlement, federal law governs the decision. *Weinberger, supra*, 925 F.2d at 522 n.5. See also *In re TJX Cos. Retail Security Breach Litigation*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008). "Settlement of a case already in progress in the federal courts implicates matters of considerable federal concern, entirely apart from the substantive merits." *Mathewson Corp.* v. *Allied Marine Indus., Inc.*, 827 F.2d 850, 853 n.3 (1st Cir. 1987). "[T]he federal interest is sufficiently great that the proper rule of decision may well be a uniquely federal one." *Id.*

Fed. R. Civ. P. 23(h) provides that, in a certified class action, "the court may award reasonable attorney's fees and nontaxable costs that are authorized . . . by the parties' agreement."

Section VI. C. of the Agreement of Settlement deals with attorneys' fees and costs. Pertinent for these purposes are portions of subsections (1), (2) and (3).

Subsection (1) permits "Class Counsel . . . [to] submit an application to the Court for an award of reasonable attorneys' fees and expenses. . . ." Also, "[e]ach Settling Party reserves all rights to appeal from a Class Counsel fees and expenses award. . . ." Further, the "Class Counsel fees and expenses award and the Final Judicial Approval shall be separate so that the appeal of one shall not constitute an appeal from the other."

Subsection (2) mandates that "Class Counsel fees and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from, benefits

afforded to Settlement Class Members under this Settlement Agreement."

Subsection (3), among other things, recites that "[a]ll matters pertaining to an award of Class Counsel fees and expenses, including, but not limited to, any dispute amongst class/plaintiffs' counsel as to their respective attorney's fees and expenses, have been referred to the Honorable Allan van Gestel, Special Master. Judge van Gestel's recommendation with respect to Class Counsel fees and expenses shall be made to the Court."

In making fee awards, the Court must function "as a quasi-fiduciary to safeguard the corpus of the [settlement] fund for the benefit of the plaintiff class." *In re Fidelity/Micron Securities Litigation*, 167 F.3d 735, 736 (1st Cir. 1999); see also *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478-482 (1980).

There are two methods applied in the assessment of attorneys' fee applications: the lodestar method, see *Lindy Bros. Builders, Inc. of Phila.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-168 (3d Cir. 1973), and the percentage-of-the fund ("POF") methodology. See *8.0 Acres of Land, supra*, 197 F.3d at 33.

Under the lodestar method, each attorney's reasonable hourly rate is multiplied by the number of hours reasonably expended on the litigation. This method often is used in the application of statutory fee-shifting provisions to "reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." *In re Rite Aid Securities Litigation,* 396 F.3d 294, 300 (3d Cir. 2005).

The POF method is very much like a contingent fee approach. It "awards counsel a variable percentage of the amount recovered for the class." *In re General Motors Corp. Pick-Up*

Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 786 (3d Cir. 1995). The POF method produces an "equitable award made at the discretion of the district court." *8.0 Acres of Land, supra*, 197 F.3d at 33. Under the POF method the Court has "extremely broad" discretion in determining an appropriate fee. *Mann & Co. PC* v. *C-Tech Industries, Inc.*, No. 08-11312-RGS, 2010 WL 457572 (D. Mass. 2010). The Court must shape the fee "based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 306 (1st Cir. 1995).

In the First Circuit, either the lodestar or the POF method can be used to evaluate fee petitions in complex litigation. In *In re Thirteen Appeals, supra,* 56 F.3d at 307, it is said that the POF method is the "prevailing praxis," due in part to the fact that it is less burdensome in its administration.

In applying the POF method, there should be "use of the triangular construct of *Mathews* v. *Eldridge*, 424 U.S. 319 . . . (1976), to determine whether the [Special Master afforded all counsel] 'the opportunity to be heard "at a meaningful time and in a meaningful manner." ' *Id.* at 333." *Thirteen Appeals, supra,* 56 F.3d at 301.

Also, the Special Master

> "is not obligated to convene an evidentiary hearing as a means of resolving every attorneys' fee dispute. . . . [F]lexibility is the watchword. . . . [F]lexibility implies substantial discretion. Therefore, when the [Special Master] chooses among the available options, [he] *can mix and match.*"

(Emphasis added.) *Id.* at 301-302.

The hearing, held on February 14, 2011, was only a part of the process for the Court in

assessing and considering the approval of a multi-district class action settlement dictated by Fed. R. Civ. P. Rule 23 and the many cases that apply thereto. See, e.g., *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 620-622 (1997).

"The difficulty for both fee-setting and fee-reviewing courts, in a field so susceptible to arbitrariness, is the achievement of decision making that is fair to the parties and understandable to the community at large yet not unnecessarily burdensome to the courts themselves." *Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945, 950 (1st Cir. 1984).

At the Final Fairness Hearing, scheduled for March 11, 2011, the Court must undertake a detailed assessment of the terms of the proposed settlement, the interests of the Settlement Class Members as well as any third parties that might be affected by the settlement, and the circumstances of the litigation. *Duhaime* v. *John Hancock Mut. Life Ins. Co.*, 183 F. 3d 1, 2, 7 (1st Cir. 1999).

This is the legal framework in which the Special Master will set forth the facts, discuss the situation and make his recommendations on attorneys' fees and costs.

Findings of Fact and Discussion

The Special Master is "cognizant not only of [his] responsibility to the class but also to the public to ensure that the fees awarded here are reasonable." *In re TJX Cos.*, *supra*, 584 F. Supp. 2d at 399. See also *Duhaime* v. *John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 379 (D. Mass. 1997).

The Fees Motion and the papers and arguments supporting it, as presented by Class Counsel, seek attorneys' fees in the amount of $37.5 million plus costs and expenses of $1,195,234.43, as of February 15, 2011. See Doc. No. 246.

Class Counsel assert that they have created a "fund" benefitting the Settlement Class Members and seek an equitable approach to their fees, utilizing the POF methodology. The Defendants argue that no fund has been created and press for something closer to a lodestar methodology. Others just claim that $37.5 million is too much.[5] And then there are a few attorneys who are not Class Counsel but did represent some class members in some parts of these cases, who, while mouthing words of opposition, seem primarily concerned that any award be large enough such that there will be money available for a good payday for them when Class Counsel make their allocations in later proceedings *if* the Agreement of Settlement is approved by the Court.[6]

To determine whether there is a "fund" of the kind usually found in the POF methodology, the Special Master first needs to consider what it is that the Settlement Class Members will have available to them if the settlement is approved.

The Agreement of Settlement provides for four specifically described benefits: (1) certain required warranty reimbursement payments; (2) a ten-year warranty extension; (3) a reduction of owners' future repair costs; and (4) a $25 oil change discount. Additionally, of course, the Agreement of Settlement provides for claims administration by the Oil Sludge Settlement

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[5] In this group are four *pro se* parties (Dwight E. Nolt [Doc. No. 226], Mark Powell [Doc. No. 208], Chris Pavlou [Doc. No. 199] and Paul R. Worsham [Doc. No. 200]), and one "professional and generally unsuccessful objector," see *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 (D. Md. 2006), the latter also called a "repeat objector," see *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL 1361, 2003 WL 22417252, at *2 n.3 (D. Me., Oct. 7, 2003), John J. Pentz [Doc. No. 205].

[6] It was telling to the Special Master that not a single attorney or class member appeared at the February 14, 2011, hearing and spoke against the Fees Motion. Only Class Counsel and the Defendants' attorneys took the opportunity to address the issues. The "triangular construct" of *Mathews, supra*, 424 U.S. at 333, was clearly met.

Administrator and payment of Plaintiffs' Counsels' fees and costs by the Defendants.

What is presented is not a single fund of money out of which the Settlement Class Members will have entitlement to portions, depending upon their presentation of appropriate claim forms. Rather, there is a composite of benefits, each depending upon the different circumstances of the claimants. Of the group of benefits, really only the single $25 discount for an oil change can be seen as a definitely measurable fund, although even it is not an amount of money set aside for the purpose. The other three benefits are valuable; however, they are not payable out of an established fund. Rather, they fit more into what is sometimes phrased as a "common benefit." See, e.g., *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 393-394 (1970).

Class Counsel has presented expert evidence in an attempt to place a value on these settlement benefits. The Defendants, while readily conceding that there is real value to each of the benefits,[7] challenge what the value of those benefits amounts to. Class Counsel, relying upon their expert's November 30, 2010, report, suggested an aggregate value of the various benefits of $420.986,855. With similar reliance upon their own expert, on January 21, 2011, the Defendants pegged the aggregate value at $50,093,787. This spread was about $370,000,000.

In the foregoing is included an amount of $39,250,000, which Class Counsel suggests should be considered, and Defendants' counsel wholly opposes. The $39,250,000 represents Class Counsels' claim for costs and fees. Without this amount in the mix, the differences between the parties initially were $381,736,955 for the Class and $45,424,181 for the Defendants, or about $336,000,000.

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[7] Indeed, the Defendants could not do otherwise while, at the same time, urging upon the Court that this is a valuable settlement for the Class which deserves approval.

Broken down by benefit or element, the following chart shows those differences.[8]

	Kleckner Estimates	Ordover Estimates
Required warranty reimbursement payments	$247,122,692	$10,944,237
Ten-year warranty extension	$56,615,996	$12,012,438
Reduction of owner future repair costs	$68,535,301	$18,719,788
Oil change discount	$3,362,263	$3,362,263
Claims administration	$6,100,703	$385,455
Professional costs	$39,250,000	$4,669,606

Following Ordover's critique of Kleckner's first estimates of value, Kleckner, on February 4, 2011, submitted a Rebuttal Report. In his Rebuttal, Kleckner revised his opinions in five different ways. The Special Master focused primarily on those ways that produced lower estimates of value, and did not include the $39,250,000 for fees and costs. This aggregates a value amount at $222,933,131.[9] [10]

Ordover was permitted by the Special Master to file his own response to Kleckner's Rebuttal, and he did so on February 8, 2011. In that final response Ordover offered nothing new

[8] "Kleckner" is the Class Counsels' expert, and "Ordover" is the Defendants' expert.

[9] Much of this came from a request by Class Counsel, which produced numbers even lower than Kleckner himself feels are justified.

[10] The five amounts that make up this figure are: $87,056,149 for required warranty reimbursements; $73,938,851 for ten-year warranty extension; $56,249,605 for reduction of future repair costs; $3,362,263 for the oil change discount; and $2,325,963 for claims administration. See Kleckner's Rebuttal Report at pp. 4-6.

by way of his own estimates of value, preferring to stand on his January 21, 2011, proffer. Rather, Odover's response continued with his theme that Kleckner calculated his values using incorrect assumptions.

The Special Master has examined, in detail, all of the two experts' reports. In doing so, like any other fact finder facing a battle of experts, each of whom, as here, is well qualified for the task, the best estimate of aggregate value appears somewhere between the extremes. Each estimate, for each element, has been considered solely as a guide in this assessment of the reasonableness of the fees and costs that are recommended. After all, on the Fees Motion the Special Master is not making a decision as to what the value of each benefit should be; nor is he valuing the settlement. And, of course, he is not attempting to settle a dispute between the two experts. Rather, the Special Master is taking guidance from those experts in his overall effort to determine what a reasonable fee would be, considering the potential value of the benefits to the Settlement Class Members only as one among many other elements.

It is not just the value of the benefits provided by the Agreement of Settlement that must be considered by the Special Master on the Fees Motion. There are several other important and significant elements that have received consideration in the assessment of the fairness of the attorneys' fees sought here. Included among that mix are: the time and labor required; the novelty and difficulty of the questions and issues involved; the skill requisite to perform the legal services; customary rates for the services; the amounts involved and the results obtained; the experience, reputation, and ability of the attorneys; and awards in similar cases.[11] See Haig,

[11] To the extent not specifically recited in these Findings of Fact, attention is directed to the Special Master's September 22, 2010, Recommendations regarding the class settlement itself, [Doc. No.164], which is incorporated herein by reference.

Business and Commercial Litigation in Federal Courts, (Second Edition), § 48:37, pp. 950-952.

The Special Master observes, in passing, the statement in the Defendants' expert's first report, in Section F at pp. 21-22, that Class Counsels' fees and costs claims of $39,250,000 "represent[] 10.28% of the other five components of the valuation ($381,736,955)." Further, as noted above, the Special Master, using Kleckner's more recent lower estimates aggregating $222,933,131, observes that the $39,2500,000 fees and costs application amounts to about 18% thereof. "Those courts that have applied the percentage method have awarded counsel, on average, 20%-30% of the common fund." Haig, *supra*, § 16:79, p. 437; *In re Relefen*, 231 F.R.D. 52, 81 (D. Mass. 2005). Were this a lodestar approach,[12] there might be an added multiplier. See, e.g., *In re Tyco Int'l Multidistrict Litig.*, 535 F. Supp. 2d 249, 271 (D. N.H. 2007) (multiplier of 2.697); *In re Relafen, supra*, 231 F.R.D. at 82 (multiplier of 2.02).

No assessment of an application for attorneys' fees in a case like this in the District of Massachusetts can avoid addressing Judge Young's "institutional" concerns expressed in *In re TJX Cos., supra,* 584 F. Supp. 2d at 406. Judge Young, bluntly, states that "[s]imply put, the class action vehicle is broken." *Id.* Despite his extensive discourse in *In re TJX Cos.*, however, Judge Young went on to award counsel there the full amount of attorneys' fees applied for. *Id.* at 408.

Before delving into the major concerns expressed in *In re TJX Cos.*, the Special Master observes that Judge Young took the opportunity to advise readers that because class action counsel "will adjust their methods and mindset to cope with the new fee regime" that he advocates, *id.* at 408, "in the future . . . plaintiffs' counsel can expect that [Judge Young, at least] . . . will award attorneys' fees *by reference to benefits actually put in the hands of the class*

[12] Which it is not.

members." (Emphasis in text.) *Id.* at 410. Judge Young did not do so in *In re TJX Cos.*, however, because the views stated in his decision "did not give class counsel any indication prior to the Fairness Hearing that [the Court's] award of attorneys' fees might be made with reference" to the amount of value actually transferred to class members, rather than what was available to them, but not claimed. *Id.* at 409. To do otherwise "would be unfair to act – in this case – on [the Court's] institutional concerns to class counsel's detriment." *Id.*

The decision in *In re TJX Cos.* was issued on November 3, 2008. The cases under consideration here were commenced in early 2006, almost three years before Judge Young's warnings about the methodology he would apply in the future in class action fee applications. It would be equally unfair in this case to apply, retroactively, the concepts advocated in *In re TJX Cos.* to counsels' fee application in this matter. That said, it seems worthwhile to set forth the major concerns expressed in *In re TJX Cos.* and to explain why they do not exist here. In doing so, the Special Master observes that the benefits in *In re TJX Cos.* were, in material ways and effects, similar to the benefits here in that they did not create a fund out of which they were to be paid; rather, they were obligations of the defendant to be complied with that had value. See *id.* at 400-401.

Relatively early in Judge Young's opinion, he notes the red flag that "to grant the petition [for fees] would . . . put more money in the pockets of the attorneys than in those of the wronged clients in whose name the suit was brought." *Id.* at 402. That, however, is not the situation in the request before the Special Master, even when the Defendants' much lower original estimate of value of $45,424,181 is used as a guide. Here, even the Defendants acknowledge "Class Counsels' entitlement to an appropriate fee and reimbursement for costs and expenses." See

answer on Informational Website to question "How will the lawyers get paid?" quoted above on p. 2.

Another concern of Judge Young is that counsel may not design a settlement in a way that sufficiently reaches the Settlement Class Members and gives them incentive to participate in it. That, too, is not the case here. The Notice to the class conditionally certified here was unusually well designed to reach the Class Members. It was not just a fine-print publication in the back pages of a newspaper. Rather, it included first-class mail to each Class Member's home,[13] whose names and addresses were taken with the use of the respective Volkswagen and Audi automobiles' Vehicle Identification Numbers ("VIN") on record in each Registry of Motor Vehicles throughout the class area, the entire United States. In addition, the notification is extremely detailed in its explanation of the benefits available to the Class and how they may be obtained, including, as mentioned above, the Informational Website.

Further, what the Class Members here are entitled to, among other things, is either 100% or 50% of the costs of a full automobile engine repair if sludge damage occurs, or had occurred in the past and been denied. Each of these repairs alone has values in the hundreds, perhaps thousands, of dollars range for any engine so damaged.[14] The latter is vastly more attractive to a Class Member than the "three years of credit monitoring" made available to qualifying customers in the *TJX Cos.* settlement or the $10 gift card mentioned in the Bed, Bath & Beyond case cited by Judge Young in footnote 15 of *In re TJX Cos.*

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[13] On December 20, 2010, the Oil Sludge Administrator, ("OSA"), mailed out 1,603,013 Notice packages to identified Class members. As of February 6, 2011, the OSA had received only 20 requests for exclusion from the Class and only 6 objection requests. See Doc. No. 244-1.

[14] At the February 14, 2011, hearing the amount was suggested to be $2,147 per claim.

Still further, there are no complicated barriers to relief for Settlement Class Members here. They either can prove their last two oil changes were proper and receive a 100% reimbursement for a sludge-damaged engine or, without any proof, still receive a 50% reimbursement. Both the needs of the Settlement Class and their incentive to participate are well attended to.

The time within which a Settlement Class Member here must make a claim, or the claim procedure in order to recover, is not narrow or burdensome either. Additionally, there is the sophisticated Oil Sludge Settlement Administrator in place to assist in the process, a kind of service that Judge Young found appropriate when considering the assessment of the value of settlement benefits in *In re TJX Co.* See *id.* at 402, n.13.

Again, unlike the fear alluded to in *id.* at 405, there is no evidence here of any efforts by Class Counsel pushing for high payout caps or fund amounts in order to expand the basis for their fee petition. The benefits here are, for the most part, without caps and were all negotiated, and the Agreement of Settlement was signed, *before* discussions of the attorneys' fees even began.

Class Counsel in this case have been observed closely by the Special Master in their interaction with Defendants' counsel. On almost every issue, this has been a very hard-fought case, by very well-qualified counsel, on both sides. There is no evidence whatsoever of Class Counsel "placing their interests before those of the [Settlement Class] or . . . failing to give adequate thought to matters such as how the [Class Members] may best be reached or what benefits may most be appreciated." See *id.* at 406.

Nor has this Special Master complacently abided "an institution that fails efficiently and effectively to deliver relief into the hands of those in whose name it was established – the class." *Id.*

Indeed, that there is significant value to Settlement Class Members is poignantly set out in a recent conditional objection to the settlement by a man who feels that he should have been included in the Class. See Objection to Settlement as Currently Set Forth, by Daniel M. Gregory, of Lexington, SC, dated January 27, 2011, [Doc. No. 216].

> "No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute, and that there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation."

Cherner v. *Transitron Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963).

Thus, although the Special Master has applied a "mix and match" approach towards assessing whether the fees and costs applied for are fair and reasonable under the circumstances, see *Thirteen Appeals, supra,* 56 F.3d at 301, he also has had the opportunity to consider Class Counsels' lodestar presentation as a cross-check. See, *In re Tyco, supra*, 535 F. Supp. 2d at 270; *In re Relefen, supra*, 231 F.R.D. at 79, 81. A lodestar is "a presumptively reasonable fee." See, e.g., *Lipsett* v. *Blanco*, 975 F.2d 934, 937 (1st Cir. 1992). Class Counsel say they spent a total of 23,191 attorney and staff hours in the prosecution of these cases. Making a 1/3 reduction for what may be unnecessary hours, thereby reducing the number to 15,468 hours, then multiplying those hours by $500 per hour, produces a lodestar, before any multiplier, of $11,595,500. "In this Circuit, a Court reviewing a fee petition under the lodestar method is not required to wade through every billed hour, every claimed service, and charged expense, effectively conducting an audit of

plaintiffs' fee petition and then issue a telephone book of minute findings." Defendants' Memorandum of Points and Authorities, [Doc. No. 206], at p. 29. See also, *Foley* v. *City of Lowell*, 948 F.2d 10, 20 (1st Cir. 1991) (affirming a blanket 1/3 reduction of plaintiffs' counsel's lodestar).

Assuming a multiplier of 2.00, see, e.g., *In re Tyco supra*, 535 F. Supp. 2d at 271 (multiplier of 2.697); *In re Relafen, supra,* 231 F.R.D. at 82 (multiplier of 2.02), the Special Master observes a lodestar amount, with that multiplier, of $23,191,000. See also, *In re TJX Cos., supra*, 584 F. Supp. 2d at 408.

Defendants' attorneys ask the Special Master to defer ruling on the Fees Motion until June 27, 2011, the date they say is when it can be known with certainty how many claims there are and, therefore, know with certainty the value of that segment of the benefits to the class. This seems inaccurate because the ten-year warranty will not run out until 2014. Further, as observed above, the measurement should not be what benefits were claimed by the class but rather what benefits were made available by counsel to be claimed. See, e.g., *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007). The decision on fees should not be delayed.

One final comment on the process. The motion under consideration was filed by Class Counsel pursuant to the Agreement of Settlement. Attorneys' services were rendered, fees were generated and costs were incurred, however, by more that just Class Counsel. Some of the Settlement Class Representatives[15] had counsel of their own who participated, in part at least, in

[15] The "Settlement Class Representatives" are defined in the Agreement of Settlement. They are: James Craig, Laura Cole-Breit, Scott Ryder, Eric Emanueson and Margaret Moreau, Matthew Leonetti and Stacy Leonetti, David and Carrie Marks, Marie Montag, Carol Carter, Judith Yarkony, Megan Shero, Eugenia Diveroli, and Ken Winokur. See Definition #23 on p. 7.

elements of what are, or became, part of the Plaintiffs' side of the cases. Still further, counsel other than those who may have represented Settlement Class Representatives, such as local counsel, also have played roles. Consequently, the fees and costs awarded ultimately will need to be allocated by Class Counsel to any such other attorneys, based upon their respective contributions to the litigation or any agreements or arrangements made among them. Thus, if the settlement is approved, fees are awarded, and all appellate rights are exhausted, the Special Master will, if necessary, then establish a process to address those allocations similar to that followed by Judge Young in *In re Indigo Securities Litigation*, 995 F. Supp. 233, 235 (D. Mass. 1998). All parties have been alerted to this possibility by the Special Master. See Doc. No. 211, pp. 7-8. Additionally, in any such follow-on process, the Special Master will consider prompt partial payments, where appropriate, so as to not hold up the entire award if it is not necessary to do so.

RECOMMENDATIONS

The Special Master, pursuant to the Court's prior Order of Reference dated October 23, 2008, [Doc. No. 129] – and after review of: the Fees Motion, [Doc. No. 174]; Plaintiffs' Brief in Support of Motion for Attorneys' Fees and Costs, [Doc. No. 175]; the Certification of Peter J. McNulty, Kirk D. Tresemer, and Russell D. Henkin in Support of Plaintiffs'/Class Counsels' Petition for Fees and Costs; the detailed Valuation of Class Member Benefits of Kirk D. Kleckner, dated December 22, 2010 and his Rebuttal; the Declaration of Opposition to Plaintiffs' Application for Attorney Fees and Expenses, [Doc. No. 204]; the Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs, [Doc. No. 206]; the Declaration in Opposition to Plaintiffs' Application for Attorney Fees and Costs, including the attached Expert Report of Janusz A. Ordover and his rebuttal; and the various other

documents submitted in support of or in opposition to the Fees Motion – on February 14, 2011, conducted a pre-approval hearing with Class Counsel and Defendants' counsel. No other counsel or individuals qualified to object chose to appear. Thereafter, the Special Master considered all of the arguments and submissions related to the Fees Motion, the circumstances leading to the execution of the Agreement of Settlement and the Fees Motion itself, all of which he is otherwise fully knowledgeable about because of his personal participation therein.

For all of the foregoing reasons the Special Master recommends that an award be made on the Motion for Attorneys' Fees and Costs, [Doc. No. 174], of $30,000,000 for attorneys' fees and $1,195,234.43 for costs and expenses, all aggregating $31,195,234.43.

Additionally, the Special Master recommends that the Court issue an Order to the effect that any funds to be paid by the Defendants as attorneys' fees or costs be held, subject to a specific Order by the Special Master, either after the conclusion of any process established by him as referred to above and in Doc. No. 211, or for such partial payments as may be deemed by him to be appropriate.

The Defendants' request to defer the determination of attorneys' fees and costs should be denied.

Finally, the Special Master recommends that all other objections to the fees and costs application be denied, consistent with the recommendations urged herein.

Hon. Allan van Gestel, (Ret.)
Special Master

DATED: February 18, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CLASS ACTION MASTER
FILE NO. 1:07-md-1790-JLT
(Relating to All Cases)

IN RE VOLKSWAGEN and AUDI
WARRANTY EXTENSION LITIGATION

SUPPLEMENTAL MEMORANDUM ON FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE SPECIAL MASTER RELATING TO CLASS PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

On February 18, 2011, the Special Master submitted his "Findings of Fact, Conclusions of Law and Recommendations . . . Relating to Class Plaintiffs' Motion for Attorneys' Fees and Costs." [Doc. No. 248]. Class Counsel has brought to the Special Master's attention one typographical error, and two arithmetic errors in Doc. No. 248. They are acknowledged and corrected hereafter in this Supplemental Memorandum.

The typographical error appears in Doc. No. 248 at page 13, line 6. There what is stated to be $39,2500,000 has an obvious extra digit. The number is, and should have been stated as, $39,250,000.

The first arithmetic error appears on page 11, three lines from the bottom, where there appears the amount $222,933,131. That amount is, and should have been, $222,932,831. Footnote 10 on the same page states, correctly, the five items that make up the $222,932,131 amount. The Special Master's addition of those five items was overstated by $300.

The second arithmetic error appears on page 17, three lines from the bottom where there appear the amount $11,595,500. This is actually arithmetically correct. What is in error is that the Special Master multiplied the $500 assumed hourly rate against the attorneys' stated number

of hours of 23,191, rather than against the reduced number of hours of 15,468. Thus the amount on the third line from the bottom on page 17 is, and should have been, $7,734,000. This adjustment would then change the amount of $23,191,00 appearing on page 18, at line 7, to $15,468,000.

After making the three foregoing corrections, the Special Master read over, with care, Doc. No. 248 and concludes that his ultimate recommendations need not be revised and should remain unchanged.

/s/ Allanvan Gestel
Hon. Allan van Gestel, (Ret.)
Special Master

DATED: March 4, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CLASS ACTION MASTER
FILE NO. 1:07-md-01790-JLT
(Relating to All Cases)

IN RE VOLKSWAGEN and AUDI
WARRANTY EXTENSION LITIGATION

MEMORANDUM
March 24, 2011

This matter came before the court on March 11, 2011 on Class Plaintiffs' Motion for Attorneys' Fees and Costs (the "Fees Motion") [#174], all pursuant to Fed. R. Civ. P. 23(h), 52(a) and 54(d)(2)(D).

PROCEDURAL HISTORY

For the procedural history leading to these Findings, Conclusions and Order attention is directed to the Memorandum and Order Approving Class Action Settlement issued on March 24, 2011.

On December 20, 2010, the Fees Motion was filed, followed by Defendants' Opposition thereto, along with oppositions and comments by other counsel and individuals. A hearing on the Fees Motion was held before the duly appointed Special Master[1] on February 14, 2011. At that hearing, the Special Master considered, by way of oral argument, the positions of Class Counsel and of counsel for Defendants and, thereafter, submitted his recommendations to the court.[2]

[1] See Orders [##120 and 120-1].

[2] See Findings of Fact, Conclusions of Law & Recommendations of the Special Master [#248].

The Special Master reported to this court in his findings and recommendations that not a single attorney or class member appeared at the February 14, 2011 hearing to speak against the Fees Motion. Only Class Counsel and Defendants' attorneys addressed the issues at that time. Similarly, at the March 11, 2011 hearing before this court, only one attorney, aside from Class Counsel and the attorneys for Defendants, appeared and spoke, briefly, in opposition. Consequently, the "triangular construct" of Mathews v. Eldridge[3] to determine whether this court and the Special Master afforded all counsel "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" was clearly met.[4]

Notice of the class action settlement and the fee application was sent by first class mail to 1,603,031 Settlement Class Members and publication thereof appeared twice in the National Edition of USA Today, on December 27, 2010 and on January 25, 2011. Included in that Notice is advice that an informational website has been established where Class Members can obtain extensive detail about these consolidated cases, the proposed settlement and instructions as to how a claim should be presented. That website may be found at https://www.vwoilsludge settlement.com. There is included in the informational website a section entitled "How will the lawyers get paid?" The answer provided reads, in material part:

> Class Counsel will ask the Court for up to $37.5 Million for attorney's fees and up to approximately $1.75 Million for reimbursement of costs and expenses incurred in the prosecution of these actions. The Defendants do not dispute Class Counsels' entitlement to an appropriate fee and reimbursement for costs and expenses, but may oppose the amount requested by Class Counsel. The Defendants will pay whatever attorneys' fee and cost and expenses that the Court awards without reducing or limiting any of the benefits

[3] 424 U.S. 319, 333 (1976).

[4] See id.; see also In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 301 (1st Cir. 1995) [hereinafter Thirteen Appeals].

available to Settlement Class Members.

This notification is not a "clear sailing agreement," but rather a "ceiling clause." It includes Class Counsels' promise not to seek a fee above an agreed-upon ceiling, instead of being an agreement by Defendants not to contest a fee application up to the amount of that ceiling. This court has carefully scrutinized the effect of that clause to insure that in securing it, counsel have not bargained away anything of value to the Settlement Class.[5] Having done so the court in no way finds or suspects Class Counsel of any collusion or other untoward behavior in the negotiation of the Agreement of Settlement, including the fees ceiling clause. On the contrary, Class Counsel's efforts on behalf of the Settlement Class are to be commended.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court takes as its starting point the "American Rule" regarding attorneys' fees. Under that rule, each of the parties to a civil action is required to pay his, her or its own attorney fees and costs in the absence of some statutory provision imposing a fee-shifting requirement.[6] In the context of a class action settlement in the First Circuit, however, fees may be awarded, as part of the court's equitable powers over such settlement agreements, from a fund created to benefit the class. "A common fund award 'is an equitable award made at the discretion of the district court.'"[7]

There are two methods applied in the assessment of attorneys' fee applications: the

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[5] See Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 525 (1st Cir. 1991).

[6] Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 245 (1975). For a detailed history of the application of the American Rule in the federal courts, see id. at 247–71.

[7] United States v. 8.0 Acres of Land, 197 F.3d 24, 33 (1st Cir. 1999) (citing Kargman v. Sullivan, 589 F.2d 63, 69 (1st Cir. 1978)).

lodestar method[8] and the percentage-of-the fund ("POF") method.[9]

Under the lodestar method, each attorney's reasonable hourly rate is multiplied by the number of hours reasonably expended on the litigation. This method often is used in the application of statutory fee-shifting provisions to "reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation."[10]

The POF method is in many respects the same as a contingent-fee approach. It "awards counsel a variable percentage of the amount recovered for the class."[11] The POF method produces an "equitable award made at the discretion of the district court."[12] Under the POF method, the court has "extremely broad" discretion in determining an appropriate fee.[13] A court must shape the fee "based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation."[14]

In the First Circuit, either the lodestar or the POF method can be used to evaluate fee

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[8] See Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167–68 (3d Cir. 1973).

[9] See 8.0 Acres of Land, 197 F.3d at 33.

[10] In re Rite Aid Securities Litig., 396 F.3d 294, 300 (3d Cir. 2005).

[11] In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 294, 300 (3d Cir. 2005).

[12] 8.0 Acres of Land, 197 F.3d at 33.

[13] Mann & Co. PC v. C-Tech Indus., Inc., No. 08-11312, 2010 U.S. Dist. LEXIS 99222, at *3 (D. Mass. Feb. 5, 2010) (quoting Thirteen Appeals, 56 F.3d at 309).

[14] Thirteen Appeals, 56 F.3d at 305 (citing Camden I Condo Ass'n, Inc. v. Dunkle, 946 F.2d 768, 771 (11th Cir. 1991)).

petitions in complex litigation. In Thirteen Appeals, however, the First Circuit said that the POF method is the "prevailing praxis," partly because it is less burdensome on courts in its administration.[15]

Also, neither the Special Master nor the court "is . . . obligated to convene an evidentiary hearing as a means of resolving every attorneys' fee dispute. . . . [F]lexibility is the watchword.. . . [F]lexibility implies substantial discretion."[16]

Federal Rule of Civil Procedure 23(h) is the governing rule for the purposes of this Fees Motion. Rule 23(h) provides that, in a certified class action, "the court may award reasonable attorney's fees and nontaxable costs that are authorized . . . by the parties' agreement."[17]

The Parties' agreement in this matter is the Agreement of Settlement considered by this court at its March 11, 2011 Fairness Hearing. Two aspects of the Agreement of Settlement are pertinent for these purposes. First, Section VI.A.2 provides:

> It is expressly understood and confirmed that the parties have not agreed to any choice, selection or waiver of state or federal law to be applied to any aspect of the construction, preliminary or final approval, or application of any provision of this Agreement of Settlement, including but not limited to attorney fees and costs.[18]

For that reason, in the absence of an express choice-of-law clause, where, as here, a fee award is a result of the parties' private agreement, federal law governs the decision.[19] This court is fully

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[15] Id. at 307.

[16] Id. at 301–02 (citations omitted).

[17] Fed. R. Civ. P. 23(h) (emphasis added.)

[18] Agreement of Settlement ¶ VI.A.2 [#160] (emphasis added).

[19] See, e.g., Dewey v. Volkswagen of Am., 728 F. Supp. 2d 546, 588–89 (D.N.J. 2010). Many aspects of the Dewey case are strikingly similar to those before this court.

aware that Count I of the Plaintiffs' Second Amended Class Action Complaint [#57] relies upon the New Jersey Consumer Fraud Act[20] along with other similar state consumer fraud laws that contain fee-shifting provisions.[21] That Complaint, however, is not limited to the various state consumer fraud laws, including counts and claims for breach of contract (Count II), breach of implied warranty (Count III), unjust enrichment (Count IV), and declaratory judgment (Count VII).[22]

What is now before this court is an Agreement of Settlement, not a consent decree or a judgment after trial of the underlying cases. Plaintiffs have no judgment in their favor, either on a dispositive motion or after trial. Indeed, Defendants steadfastly assert their innocence of any tortious or contractual wrongdoing or harm to any Class Member. Consequently, the state law fee-shifting statutes do not apply. It is clear in the First Circuit that if a fee award is sought pursuant to an agreement between the parties in a federal class action settlement, federal law governs the decision.[23] Indeed, "[s]ettlement of a case already in progress in the federal courts implicates matters of considerable federal concern, entirely apart from the substantive merits. In such situations the federal interest is sufficiently great that the proper rule of decision may well be

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[20] N.J.S.A. § 56.8 - 1 et seq.

[21] This MDL consists of seven consolidated federal actions that originally were filed in New Jersey, Florida, California, Massachusetts, Pennsylvania, Ohio and Illinois.

[22] See Pls.' 2d Am. Class Action Compl. [#57].

[23] See Weinberger, 925 F.2d at 522 n.5; see also In re Diet Drugs, (Phentermine/ Fenfluramine/Dexfenfluramine) Prod. Liab. Litig., 582 F.3d 524, 540 (3d Cir. 2009); In re TJX Cos. Retail Sec. Breach Litig., 584 F. Supp. 2d 295, 299 (D. Mass. 2008) [hereinafter In re TJX Cos.].

a uniquely federal one."[24]

Nor are Plaintiffs here "prevailing parties" under any of the state consumer fraud statutes and for that reason as well, those statutes' fee-shifting provisions do not apply to the Fees Motion.[25]

Section VI.C of the Agreement of Settlement itself deals specifically with attorney fees and costs. Pertinent for these purposes are portions of subsections (1), (2) and (3). Subsection (1) permits "Class Counsel . . . [to] submit an application to the Court for an award of reasonable attorneys' fees and expenses."[26] Also, "[e]ach Settling Party reserves all rights to appeal from a Class Counsel fees and expenses award.."[27] Further, the "Class Counsel fees and expenses award and the Final Judicial Approval shall be separate so that the appeal of one shall not constitute an appeal from the other."[28]

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[24] Mathewson Corp. v. Allied Marine Indus., Inc., 827 F.2d 850, 853 n.3 (1st Cir. 1987) (citing Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112, 115 (4th Cir. 1983).

[25] See, e.g., Dewey, 728 F. Supp. 2d at 589 n.62; see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603–04 (2001); Aronov v. Napolitano, 562 F.3d 84, 88–91 (1st Cir. 2009); Smith v. Fitchburg Pub. Schs., 401 F.3d 16, 21–23 (1st Cir. 2005); Doe v. Boston Pub. Schs., 358 F.3d 20, 24–25 (1st Cir. 2004). In Buckhannon, the Supreme Court affirmed the Fourth Circuit's holding that "[a] person may not be a 'prevailing party' . . . except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought." 532 U.S. at 602 (quoting S-1 & S-2 v. State Bd. of Ed. of N.C., 21 F.3d 49, 51 (1994)). What was at issue in Buckhannon—and rejected by the Supreme Court—was an argument to the effect that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. See id.

[26] Agreement of Settlement ¶ VI.C.1 [#160].

[27] Agreement of Settlement ¶ VI.C.1 [#160].

[28] Agreement of Settlement ¶ VI.C.1 [#160].

Subsection (2) mandates that "Class Counsel fees and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from benefits afforded to Settlement Class Members under this Settlement Agreement."[29] To perhaps a significant degree, this Section indicates that the value of the benefits afforded to the Class Members may not be the controlling factor in establishing the amount of fees to be awarded. If, however, the fee-shifting statutes do not apply, then this court must look at the fees in issue here in a manner closely resembling a contingent fee process. In other words, this court must determine a reasonable percentage of the benefit achieved by Class Counsel for the Settlement Class.

Subsection (3), among other things, recites that

> [a]ll matters pertaining to an award of Class Counsel fees and expenses, including, but not limited to, any dispute amongst class/plaintiffs' counsel as to their respective attorney's fees and expenses, have been referred to the Honorable Allan van Gestel, Special Master. Judge van Gestel's recommendation with respect to Class Counsel fees and expenses shall be made to the Court.[30]

It is significant that the Fees Motion under consideration was filed by Class Counsel pursuant to the Agreement of Settlement. Attorneys' services were rendered, but fees were generated and costs were incurred by more that just Class Counsel. Some of the Settlement Class Representatives[31] had counsel of their own who participated, at least in part, in elements of what

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[29] Agreement of Settlement ¶ VI.C.2 [#160]. Consistent with the language chosen, this court reads the phrase "diminish, invade, or reduce, or be derived from" as meaning essentially "paid out of."

[30] Agreement of Settlement ¶ VI.C.3 [#160].

[31] The "Settlement Class Representatives" are defined in the Agreement of Settlement. They are: James Craig, Laura Cole-Breit, Scott Ryder, Eric Emanuelson and Margaret Moreau, Matthew Leonetti and Stacy Leonetti, David and Carrie Marks, Marie Montag, Carol Carter,

are, or became, part of Plaintiffs' side of the cases. Still further, counsel other than those who represented Settlement Class Representatives, such as local counsel, also played roles. Consequently, the fees and costs ultimately awarded must be allocated by Class Counsel to any such other attorneys, based upon their respective contributions to the litigation or any agreements or arrangements made among them. With the settlement now approved and fees by this Order awarded, therefore, after all appellate rights are either exhausted or not pursued, the Special Master will, if necessary, establish a process to address those further fee allocations.[32]

This complexity presents yet another reason why the lodestar method is not useable here. The only lodestar information presented to this court is that of Class Counsel. The lodestar elements—indeed even the full identity—of such additional counsel who may be entitled to some degree of compensation is not now before this court.

In making fee awards, a court must function "as a quasi-fiduciary to safeguard the corpus of the [settlement] fund for the benefit of the plaintiff class."[33] "The difficulty for both fee-setting and fee-reviewing courts, in a field so susceptible to arbitrariness, is the achievement of decision-making that is fair to the parties and understandable to the community at large yet not

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Judith Yarkony, Megan Shero, Eugenia Diveroli, and Ken Winokur. See Agreement of Settlement ¶ I.23 [#160].

[32] In this regard the Special Master has already advised all parties that he intends to follow an approach similar to that of Judge Young in In re Indigo Securities Litigation, 995 F. Supp. 233, 235 (D. Mass. 1998). See Supplemental Mem. Process Att'ys' Fees & Costs Hr'g, 7–8.

[33] Weisburgh v. Fid. Magellan Fund (In re Fid./Micron Sec. Litig.), 167 F.3d 735, 736 (1st Cir. 1999) (citing Cook v. Niedert, 142 F.3d 1004, 1011 (7th Cir. 1998)); see also Boeing Co. v. Van Gemert, 444 U.S. 472, 478–82 (1980).

unnecessarily burdensome to the courts themselves."[34]

At the Final Fairness Hearing, this court undertook a detailed assessment of the terms of the proposed settlement, the interests of the Settlement Class Members and any third parties that might be affected by the settlement, and the circumstances of the litigation.[35] In addition, this court is "cognizant not only of its responsibility to the class but also to the public to ensure that the fees awarded here are reasonable."[36]

The Fees Motion and the papers and arguments supporting it, as presented by Class Counsel, seek attorney fees in the amount of $37.5 million plus costs and expenses of $1,195,234.43.[37] The Special Master, after his hearing and assessment, recommended $30 million in fees and costs of $1,195,234.43, for an aggregate amount of fees and costs of $31,195,234.43.

Class Counsel assert that they have created a "fund" benefitting the Settlement Class Members and seek an equitable approach to their fees, utilizing the POF method. Defendants argue that no fund has been created and they thus press for a lodestar method. Others, in written submissions, just claim that $37.5 million is too much.[38] And then there are a few attorneys, who

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[34] Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984).

[35] See Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1, 2, 7 (1st Cir. 1999).

[36] In re TJX Cos., 584 F. Supp. 2d at 399 (citing Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375, 379 (D. Mass. 1997)).

[37] See Class Counsels' Updated Statement Costs & Expenses [#246].

[38] In this group are four pro se parties (Dwight E. Nolt [#226], Mark Powell [#208], Chris Pavlou [#119] and Paul R. Worsham [#200]) and one "professional and generally unsuccessful objector," see In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 386 (D. Md. 2006), the latter also called a "repeat objector," see In re Compact Disc Minimum Advertised Price Antitrust Litig., MDL 1361, 2003 U.S. Dist. LEXIS 25788, at *6 n.3 (D. Me. Oct. 7, 2003), Attorney John J. Pentz [#205].

are not Class Counsel but did represent some class members in some parts of these cases, who, while expressing words of opposition, seem primarily concerned that any award be large enough that there will be money available for them when Class Counsel make their allocations in later proceedings.

To determine whether there is a "fund" of the kind usually found in the POF method, this court first considers what will be available to the Settlement Class Members as a result of the now-approved settlement. The Agreement of Settlement provides for four specifically described benefits: (1) certain required warranty reimbursement payments; (2) a ten-year warranty extension; (3) a reduction of owners' future repair costs; and (4) a $25 oil change discount. Additionally, of course, the Agreement of Settlement provides for administration of the claims by the Oil Sludge Settlement Administrator and payment of Plaintiffs' Counsels' fees and costs by Defendants.

What is presented is not a single fund of money set aside out of which the Settlement Class Members will have entitlement to portions depending upon their presentation of appropriate claim forms. Rather, there is a composite of benefits, each depending upon the different circumstances of the claimants. Of the group of benefits, really only the one-time $25 discount for an oil change can be seen as coming close to an arithmetically measurable fund, although even it is not an amount of money set aside for that purpose. The other three benefits have significant value, but they are not payable out of an established fund. Rather, they fit more into what is sometimes called a "common benefit."[39]

Class Counsel has presented expert evidence in an attempt to value these settlement

[39] See, e.g., Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 393–94 (1970).

benefits. Defendants, while readily conceding that there is real value to each of the benefits, challenge what the total value of those benefits is. Class Counsel, relying upon their expert's November 30, 2010 report, initially suggested an aggregate value of the various benefits of $420,986,855. With similar reliance upon their own expert, on January 21, 2011, Defendants pegged the aggregate value at $50,093,787. These estimates resulted in a spread of about $370,000,000.

In the initial valuation, Class Counsels' expert included an amount of $39,250,000, which he suggested should have been considered as part of the value to the class. Defendants' counsel wholly opposed this amount. The $39,250,000 represents Class Counsels' claim for fees and costs. Without this amount in the mix, the difference between the parties initially was $381,736,955 for the Class and $45,424,181 for Defendants, or about $336,000,000.

Broken down by benefit or element, the following chart shows those differences.[40]

	Kleckner Estimates	Ordover Estimates
Required warranty reimbursement payments	$247,122,692	$10,944,237
Ten-year warranty extension	$56,615,996	$12,012,438
Reduction of owner future repair costs	$68,535,301	$18,719,788
Oil change discount	$3,362,263	$3,362,263
Claims administration	$6,100,703	$385,455
Professional costs	$39,250,000	$4,669,606

[40] "Kleckner" is the Class Counsels' expert, and "Ordover" is Defendants' expert.

Following Ordover's critique of Kleckner's first estimates of value, Kleckner, on February 4, 2011, submitted a Rebuttal Report to the Special Master. In his Rebuttal, Kleckner revised his opinions in five ways. The Special Master focused primarily on those ways that produced lower estimates of value and did not include the $39,250,000 for fees and costs. The Special Master then determined, for the purposes of his assessment of the reasonableness of the fee request, an aggregate value of $222,932,831.[41]

Ordover was permitted by the Special Master to file his own response to Kleckner's Rebuttal. He did so on February 8, 2011. In that final response, Ordover offered nothing new by way of his own estimates of value, preferring to stand on his January 21, 2011 proffer. Ordover's response continued with his theme that Kleckner calculated his values using incorrect assumptions.

This court takes note of the Special Master's views in making its own assessment of the reasonableness of the fee request. It must be remembered, however, that this valuation is just a part of the court's overall effort to determine what a reasonable fee would be, considering the potential value of the benefits to the Settlement Class Members only as one, among many other, elements. It is not just the value of the benefits provided by the Agreement of Settlement that must be considered on the Fees Motion. This court has considered several other important factors in determining the fairness of the attorney fees sought. They include: the time and labor required; the novelty and difficulty of the questions and issues involved; the skill requisite to perform the legal

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[41] Much of this came from a request by Class Counsel, which produced numbers even lower than Kleckner himself feels are justified.

The five amounts that make up this figure are: $87,056,149 for required warranty reimbursements; $73,938,851 for ten-year warranty extension; $56,249,605 for reduction of future repair costs; $3,362,263 for the oil change discount; and $2,325,963 for claims administration. See Kleckner's Rebuttal Report at 4–6.

services; customary rates for the services; the amounts involved and the results obtained; the experience, reputation, and ability of the attorneys; and awards in similar cases.[42]

This court observes, in passing, the statement in Defendants' expert's first report, in Section F at 21–22, that Class Counsel's fees and costs claims of $39,250,000 "represent[] 10.28% of the other five components of the valuation ($381,736,955)." Further, as noted above, the Special Master, using the Kleckner Rebuttal's lower estimates aggregating $222,932,831, observed that the $39,250,000 fees and costs application amounts to about 13.45% thereof.

"Those courts that have applied the percentage method have awarded counsel, on average, 20%-30% of the common fund."[43] Were this a lodestar approach, there might be an added multiplier.[44] In addition,

> [n]o one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute, and that there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are

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[42] See Haig, Business and Commercial Litigation in Federal Courts § 48:37, 950–52 (2d ed.). To the extent not specifically recited in this Memorandum, attention is directed to this court's Memorandum approving the class settlement itself, which is incorporated herein by reference.

[43] Id. § 16.79; see also In re Relefen, 231 F.R.D. 52, 81 (D. Mass. 2005); 4 Newberg on Class Actions § 14.6, p. 558 (4th ed. 2002).

[44] See, e.g., In re Tyco Int'l Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 271 (D.N.H. 2007) (multiplier of 2.697); In re Relafen, 231 F.R.D. at 82 (multiplier of 2.02); New Eng. Carpenters Health Benefits Fund v. 1st Databank, Inc., No. 05-11148, 2009 U.S. Dist. LEXIS 68419 (D. Mass. August 3, 2009) (multiplier of 8.3).

seeking compensation.[45]

No assessment of an application for attorneys' fees in a case like this in this district should avoid addressing Judge Young's "institutional" concerns expressed in In re TJX Companies.[46] Judge Young bluntly states that "[s]imply put, the class action vehicle is broken."[47] Despite his extensive discourse in In re TJX Companies, however, Judge Young awarded counsel there the full amount of the attorney fees applied for.[48]

Relatively early in the opinion, Judge Young notes that "to grant the petition [for fees] would . . . put more money in the pockets of the attorneys than in those of the wronged clients in whose name the suit was brought."[49] That, however, is not the situation in the request before this court, even if Defendants' much lower original estimate of value of $45,424,181 is used as a guide. Here, even Defendants acknowledge "Class Counsels' entitlement to an appropriate fee and reimbursement for costs and expenses."[50]

Another concern of Judge Young is that counsel may not design a settlement in a way that sufficiently reaches the Settlement Class Members and gives them incentive to participate in it. Such limitations do not exist here. The Notice to the class certified here was unusually well

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[45] Cherner v. Transitron Elec. Corp., 221 F. Supp. 55, 61 (D. Mass. 1963).

[46] 584 F. Supp. 2d at 406.

[47] Id.

[48] Id. at 408.

[49] Id. at 402.

[50] See Welcome to the Information Website for the Oil Sludge Settlement, Docket No. 1:07-md-01790 https://wwwvwoilsludgesettlement.com (last visited March 21, 2011) (answering the question, "How will the lawyers be paid?").

designed to reach the Class Members. It was not just a fine-print publication in the back pages of a newspaper. Rather, it included first-class mail to each Class Member's home,[51] whose names and addresses were determined by the use of the respective Volkswagen and Audi automobiles' Vehicle Identification Numbers ("VIN") on record in each Registry of Motor Vehicles throughout the class area, the entire United States. In addition, the Notice is extremely detailed in its explanation of the benefits available to the Class and how they may be obtained, including, as mentioned above, the informational website.

Further, what the Class Members here are entitled to, among other things, is either 100% or 50% of the costs of a full automobile engine repair if sludge damage occurs, or had occurred in the past and been denied. Each of these repairs alone has a value in the hundreds, perhaps thousands, of dollars range for any engine so damaged. It was reported at the March 11, 2011 hearing that the amount was about $2,147 per claim for an oil sludge repair. That award is vastly more attractive to a Class Member than the "three years of credit monitoring" made available to qualifying customers in the In re TJX Companies settlement or the $10 gift card mentioned in the Bed, Bath & Beyond case cited by Judge Young in In re TJX Companies.[52]

Still further, there are no complicated barriers to relief for Settlement Class Members here. They either can prove their last two oil changes were proper and receive a 100% reimbursement for a sludge-damaged engine or, without any proof, still receive a 50% reimbursement. Both the

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[51] On December 20, 2010, the Oil Sludge Administrator ("OSA"), mailed out 1,603,013 Notice packages to identified Class members. As of February 6, 2011, the OSA had received twenty requests for exclusion from the Class and six objections. See Doc. Pls.' Notice Filing Oil Sludge Settlement Administrator's Report Regard Reqs. Exclusion, Ex. 1 [#244].

[52] See 584 F. Supp. 2d at 405 n.15.

needs of the Settlement Class and their incentive to participate are well attended to.

Neither the time within which a Settlement Class Member here must make a claim nor the claim procedure to recover is narrow or burdensome. Additionally, there is already in place the sophisticated Oil Sludge Settlement Administrator who is assisting in the process. This is a kind of service that Judge Young found appropriate when assessing the value of settlement benefits in In re TJX Companies.[53]

Again, unlike the fear alluded to in In re TJX Companies,[54] there is no evidence in this matter of any efforts by Class Counsel pushing for high payout caps or fund amounts to expand the basis for their fee petition. The benefits here are essentially without caps and were all negotiated, and the Agreement of Settlement was signed, before discussions of attorney fees even began.

Class Counsel in this case were observed closely by the Special Master in their interaction with Defendants' counsel. He reports to this court that

> [o]n almost every issue, this has been a very hard-fought case, by very well-qualified counsel, on both sides. There is no evidence whatsoever of Class Counsel "placing their interests before those of the [Settlement Class] or . . . failing to give adequate thought to matters such as how the [Class Members] may best be reached or what benefits may most be appreciated."[55]

In addition to utilizing the POF method, this court has considered Class Counsels' lodestar presentation as a cross-check.[56] A lodestar is "a presumptively reasonable fee."[57] Class Counsel

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[53] See id. at 402 n.13.

[54] See id. at 405.

[55] Findings of Fact, Conclusions of Law & Recommendation Special Master Relating Class Pls.' Mot. Atty's Fees & Costs [#248] (quoting In re TJX Cos., 584 F. Supp. 2d at 406).

[56] See, e.g., In re Tyco., 535 F. Supp. 2d at 270; In re Relefen, 231 F.R.D. at 79, 81.

[57] E.g., Lipsett v. Blanco, 975 F.2d 934, 937 (1st Cir. 1992).

say they spent a total of 23,191 attorney and staff hours in the prosecution of these consolidated cases. In a process approved by this court, the Special Master made an across-the-board one-third reduction for what may be unnecessary hours, thereby reducing the number to 15,468. He then multiplied those hours by $500 per hour to produce a lodestar, before any multiplier, of $7,734,000. "In this Circuit, a Court reviewing a fee petition under the lodestar method is not required to wade through every billed hour, every claimed service, and charged expense, effectively conducting an audit of plaintiffs' fee petition and then issue a telephone book of minute findings."[58]

Assuming a multiplier of 2.50,[59] this court observes a lodestar amount of $19,335,000.[60] Defendants' attorneys ask the court to defer ruling on the Fees Motion until June 27, 2011, which is the date when they say it can be known with certainty how many claims there are and, therefore, the value of that segment of the benefits to the class. This reasoning seems inaccurate because the ten-year warranty will not expire until 2014. More importantly, the measurement should not be what benefits are claimed by the class but rather what benefits are made available by counsel to be claimed.[61] Consequently, the decision on fees should not be delayed.

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[58] Mem. Points & Authorities Supp. Mot Final Approval Settlement Opp'n Pls.' Mot. Att'y Fees & Costs & Supp. Appl. Defer Ruling Pls.' Mot. Att'y Fees & Costs Until After June 27, 2011, 209 [#206]; see also Foley v. City of Lowell, 948 F.2d 10, 20 (1st Cir. 1991) (affirming a blanket one-third reduction of plaintiffs' counsel's lodestar hours).

[59] See, e.g., In re Tyco., 535 F. Supp. 2d at 271 (multiplier of 2.697); In re Relafen, 231 F.R.D. at 82 (multiplier of 2.02); New Eng. Carpenters, 2009 U.S. Dist. LEXIS 68419, at *10 (multiplier of 8.3).

[60] See In re TJX Cos., 584 F. Supp. 2d at 408.

[61] See, e.g., Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436–37 (2d Cir. 2007); Waters v. Int'l Precision Metals Corp., 190 F.3d 1291, 1294–95 (11th Cir. 1999);

Understandably, what Defendants seek is the lowest possible fee, because they are the ones who agreed to pay it. That, however, is not the measure. It is not the obligation of this court to set the fee at the lowest amount possible but rather to determine whether the fees sought are "reasonable." Here the fees are not coming out of the Class Members' benefits. Rather, the fees come from Defendants' knowing agreement to pay so long as the amount does not exceed $37,500,000 and this court determines that the amount is reasonable. This process—deciding if the fees sought and awarded are reasonable—is what is mandated by Rule 23(h).

ORDER

For the foregoing reasons, this court ADOPTS the Special Master's recommendation that an award be made on the Motion for Attorneys' Fees and Costs [#174] of $30,000,000 for attorney fees and $1,195,234.43 for costs and expenses, aggregating $31,195,234.43.

Additionally, this court orders that any funds to be paid by Defendants as attorney fees or costs be held, subject to a specific Order of the Special Master, either until after the conclusion of any process established by him as referred to above and in #211, or for such partial payments as may be deemed by him to be appropriate.

Defendants' request to defer the determination of attorney fees and costs is DENIED.

Finally, all other objections to the fees and costs application are DENIED, consistent with the determinations contained herein.

IT IS SO ORDERED.

/s/ Joseph L. Tauro

Williams v. MGM-PATHE Commc'ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997).

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE VOLKSWAGEN and AUDI WARRANTY EXTENSION LITIGATION	* * * *	Civil Action No. 07-md-01790-JLT

ORDER

July 11, 2011

TAURO, J.

After reviewing the Parties' submissions, this court hereby orders that:

1. Defendants' Motion Pursuant to Fed. R. Civ. P. 52(b), 59(e) and 60(b) to Vacate, Alter or Amend the Court's Memorandum Order on Attorneys' Fees (Docket No. 272) [#280] is DENIED. To the extent that Defendants are repeating the same arguments that they made to the Special Master and to this court, this court declines to reconsider those arguments. To the extent that Defendants raise new arguments, those arguments are waived because Defendants did not timely make such arguments at either the February 14, 2011 hearing or the March 11, 2011 hearing.

2. Defendants' Motion Pursuant to Fed. R. Civ. P. 59(e) to Correct or Amend Judgment Approving Settlement (Docket No. 273) to Expressly Provide for Continuing Jurisdiction of This Court Pursuant to Agreement of Settlement [#282] is DENIED. The Settlement Agreement provides that the parties may apply to this court for relief if the Settlement Agreement is breached or if a legal issue arises.

3. Plaintiffs' Motion to Strike Evidence Submitted After the Record Was Closed [#292] is ALLOWED.

4. Defendants' Motion for Leave to File Reply Memorandum in Further Support of Their Motion to Vacate, Alter or Amend the Court's Memorandum Order on Attorneys' Fees (Docket No. 272) [#294] is DENIED AS MOOT.

5. Defendants' Motion for Leave to Submit Supplemental Declaration of David A. Barry in Further Support of Defendants' Opposition to Plaintiffs' Motion to Strike Evidence [#299] is DENIED AS MOOT.

6. Class Plaintiffs' Motion Pursuant to Fed. R. App. 7 of the Federal Rules of Appellate Procedure for an Order Requiring that the Objector and Appellant Post a Bond [#303] is ALLOWED.

7. Defendants' Motion for Leave to Submit Additional Supplemental Declaration of David A. Barry in Further Support of Defendants' Opposition to Plaintiffs' Motion to Strike Evidence [#308] is DENIED AS MOOT.

8. Defendants' Motion for Leave to File Supplemental Materials in Further Support of Defendants' Motion Pursuant to Fed. R. Civ. P. 52(b), 59(e) and 60(b) to Vacate, Alter or Amend the Court's Memorandum Order on Attorneys' Fees [#312] is DENIED AS MOOT.

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re Volkswagen and Audi Warranty Extension Litigation	:	**Docket No. 1:07-md-01790**
This Document Relates to All Cases	:	

AGREEMENT OF SETTLEMENT

Dated: September 2, 2010

TABLE OF CONTENTS

TABLE OF EXHIBITS

WHEREAS, Volkswagen Group of America, Inc., formerly known as Volkswagen of America, Inc. ("VWGoA"), Volkswagen AG, and Audi AG (collectively, "Defendants") and the undersigned representatives of Plaintiffs and the proposed Settlement Class defined herein (the "Settlement Class Representatives") (together, the "Parties") hereby agree to propose a nationwide Class Action Settlement which would resolve, on the terms set forth in this Settlement Agreement, "Settled Claims" against Defendants and other "Released Parties" based on allegations of Sludge-related engine problems in model year 1997-2004 Audi A4 vehicles equipped with the 1.8-liter turbo engine and model year 1998-2004 Volkswagen Passat vehicles equipped with the 1.8-liter turbo engine pending in various courts, which have been transferred for coordinated or consolidated pretrial proceedings to the United States District Court for the District of Massachusetts, Boston Division, under Docket No. MDL 1790 (collectively, the "Action"); and

WHEREAS, this Settlement Agreement shall not be construed as evidence of or as an admission by Defendants of any liability or wrongdoing whatsoever or as an admission by the Settlement Class Representatives or members of the Settlement Class as defined herein ("Class Members" or "Settlement Class Members") of any lack of merit in their Claims.

WHEREAS, in August 2004 VWGoA issued an eight year warranty extension covering certain "oil sludge" related repairs for certain Volkswagen and Audi vehicles, copies of which extensions are annexed hereto as Exhibit 3 and incorporated herein by reference (collectively, the "Eight Year Extended Warranty").

NOW THEREFORE, Defendants and the Settlement Class Representatives hereby agree, subject to Final Judicial Approval, compliance with applicable legal requirements, and other conditions, all as set forth below, that the Settled Claims against Defendants and the other Released Parties, as defined herein, will be settled, compromised, and released, in accordance with the following terms.

I. DEFINITIONS

For purposes of this Settlement Agreement, the following terms (designated by initial capitalization throughout this Settlement Agreement) shall have the meanings set forth in this Section. Terms used in the singular shall be deemed to include the plural and vice versa.

1. "Business Day" shall mean any day other than Saturday, Sunday, or New Year's Day, Birthday of Martin Luther King, Jr., Presidents Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States.

2. "Claim for Reimbursement" or "Claim for Settlement Benefits" shall mean the submission of a form in which a Class Member seeks to claim reimbursement available to Settlement Class Members pursuant to this Settlement Agreement.

3. "Class Counsel" shall mean those attorneys executing this Settlement Agreement on behalf of the Plaintiffs and Settlement Class Representatives, or such other attorneys as shall be approved by the Court as counsel to the Settlement Class.

4. "Class Notice" shall have the meaning provided in Section VI.B.

5. "Conditional Certification" shall mean the Federal District Court's conditional certification of the Settlement Class pursuant to applicable provisions of Rule 23, Fed.R.Civ.P., and entry of an order or orders providing for issuance of notice to the Settlement Class.

6. "Conditional Certification Date" shall mean the date on which conditional approval by the Federal District Court occurs.

7. "Court" and/or "Trial Court" and/or "Federal District Court" shall mean the United States District Court for the District of Massachusetts, Boston Division, presiding over *In re Volkswagen and Audi Warranty Extension Litigation*, Case No. 1:07-MD-01790.

8. "Eight Year Extended Warranty" shall mean the warranties issued by VWGoA as set forth in Exhibit 3.

9. "Engine Repair(s)" or "Sludge Related Engine Repair(s)" shall mean repair(s) set forth in Exhibit 4 of this Settlement Agreement required to be made because of impaired engine lubrication caused by Sludge.

10. "Engine Replacement(s)" or "Sludge Related Engine Replacement(s)" shall mean replacement(s) set forth in Exhibit 4 of this Settlement Agreement required to be made because of impaired engine lubrication caused by Sludge.

11. "Enhanced Oil Sludge Warranty Extension" shall mean the benefits, terms and limitations as specified in Section III.B.1-4 of this Settlement Agreement.

12. "Final Judicial Approval" shall mean the approval of this Settlement Agreement as a whole by the Federal District Court and such approval becoming final by the exhaustion of all appeals, if any, without substantial modification of the order or orders granting such approval. Final Judicial Approval shall be deemed not to have been obtained in the event that Trial Court Approval is denied, and the period for appealing such denial has expired without any such appeal having been taken.

13. "Final Judicial Approval Date" means the date on which Final Judicial Approval occurs.

14. "Oil Change Discount" shall have the meaning provided in Section III.B.4.

15. "Oil Sludge Settlement Administrator" shall mean any person or persons, to be engaged by Defendants and subject to approval of the Special Master (Honorable Allan van Gestel or his duly appointed successor), to disseminate Class Notice and administer Claims for Reimbursement pursuant to this Settlement Agreement.

16. "Opt-Out Period" shall mean the period to be established by the Court during which Class Members may exercise the Opt-Out right described in Section V.

17. "Plaintiffs' Counsel" shall mean Class Counsel.

18. a. "Proof" of payment for Engine Repairs and/or Engine Replacements and/or Reasonable Associated Expenses shall mean copies of cancelled checks, credit or debit card receipts, and/or repair invoices or repair orders, which documents, singly or cumulatively, show that Sludge-Related Engine Repairs and/or Sludge Related Engine Replacements and/or Reasonable Associated Expenses were made and paid for by the Settlement Class Member, including the date of repair and/or replacement, facility where the repair and/or replacement was performed and cost of parts and labor.

b. "Proof" of oil changes and/or maintenance shall mean copies of cancelled checks, credit or debit card receipts, oil maintenance receipts from oil change facilities and written confirmations or verifications from oil change facilities which documents, singly or cumulatively, show that the oil change was actually performed using the required oil. For those Class Members who did their own oil changes, Proof of the oil changes and/or maintenance shall consist of receipts, cancelled checks or credit or debit card receipts for the purchase of oil and an affidavit, which documents, singly or cumulatively, show the date and mileage of the oil change and proof of purchase of the required oil. Where VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00 oil is required for any relief set forth in this Settlement Agreement, the Proof shall also show such oil was used.

19. "Reasonable Associated Expenses" shall mean (a) towing costs and (b) rental car costs not to exceed a combined total of $250.00 reasonably incurred by the Settlement Class Member in connection with an Engine Repair or Engine Replacement which is eligible for reimbursement under the terms of this Settlement Agreement in addition to the costs or expenses of such Engine Repair or Engine Replacement. Reasonable Associated Expenses does not include items such as, but not limited to: (a) bodily injury claims; (b) claims for property damage other than claims of Settlement Class Members for Sludge Related Engine Repairs or Engine Replacements; or (c) claims for lost time, lost earnings, lost revenue or profit, loss of use of the vehicle or other consequential damages.

20. "Released Claims" or "Settled Claims" shall mean any and all claims, including assigned claims, whether known or unknown, asserted or unasserted, regardless of the legal theory, existing now or arising in the future by Plaintiffs and any or all

members of the Settlement Class arising out of or relating to Sludge-related engine problems in Settlement Class Vehicles, and/or any and all claims that were or could have been asserted in the Action. These "Released Claims" include, without limitation and by way of example, all claims for damages or remedies of whatever kind or character, known or unknown, that are now recognized by law or that may be created or recognized in the future by statute, regulation, judicial decision, or in any other manner.

21. "Released Parties" shall mean Defendants, all manufacturers and assemblers of Settlement Class Vehicles, and each of their component parts, the companies supplying the aforementioned companies with components, their parent companies, subsidiary companies, affiliated companies, divisions and suppliers, any and all authorized Volkswagen and Audi dealers and distributors, and the past, present and future officers, directors, shareholders, employees, predecessors, affiliates, parents, subsidiaries, divisions, administrators, agents, servants, successors, trustees, vendors, representatives, heirs, executors, and assigns of all of the foregoing Parties and entities.

22. "Settlement Class Member" shall mean all current and former owners and lessees of model year 1997-2004 Audi A4 vehicles or model year 1998-2004 Volkswagen Passat vehicles equipped with the 1.8 liter turbo engine ("Settlement Class Vehicles") imported or distributed for sale or lease in the United States by VWGoA. Settlement Class Vehicles include a total of 479,768 vehicles, as identified in Section II.B. Settlement Class Vehicles, however, do not include vehicles for which motor oil meeting VW specification 502 00 was required as part of scheduled maintenance (2004 model year Audi A4 vehicles with VIN numbers of or above WAULC68E44A152304 and 2004 model year Audi A4 Cabriolet vehicles with VIN numbers of or above WAUAC48H04K014467). There are 11,962 model year 2004 Audi A4 vehicles which are not within the Settlement Class. Subject to the confidentiality provision of Section VI.E below, defendants will provide Class Counsel with a list of the vehicle identification numbers of the Settlement Class Vehicles and of the 2004 Audi A4 vehicles which are not within the Settlement Class. Excluded from the Settlement Class are (a) all federal court judges who have presided over this case and their spouses, (b) all persons and entities who elect to exclude themselves from the Settlement Class, and (c) Defendants' current employees, officers, directors, agents, and representatives.

23. "Settlement Class Representatives" shall mean James Craig, Laura Cole-Breit, Scott Ryder, Eric Emanuelson and Margaret Moreau, Matthew Leonetti and Stacy Leonetti, David and Carrie Marks, Marie Montag, Carol Carter, Judith Yarkony, Megan Shero, Eugenia Diveroli, and Ken Winokur.

24. "Sludge" shall mean the deposits, including coking, which can form in the 1.8 liter turbo engine due to excessive degradation of engine oil and which impairs the lubrication of the engine.

25. "Trial Court Approval" shall mean the granting, by order, of the approval of this Settlement Agreement by the Federal District Court.

26. "Trial Court Approval Date" shall mean the date upon which Trial Court Approval occurs.

27. "Unpaid Claims" shall mean reimbursement by Defendants of less than one hundred percent (100%) for Sludge Related Engine Repairs and/or Sludge Related Engine Replacements and Reasonable Associated Expenses including claims for Sludge Related Engine Repairs and/or Sludge Related Engine Replacements and Reasonable Associated Expenses not previously submitted to Defendants for reimbursement under the Eight Year Extended Warranty.

II. SCOPE OF THE SETTLEMENT CLASS

A. The Parties shall seek certification by the Federal District Court of the Settlement Class solely for Settlement purposes.

B. This Settlement Class will consist of:

All current and former owners and lessees of model year 1997-2004 Audi A4 vehicles or model year 1998-2004 Volkswagen Passat vehicles equipped with the 1.8 liter turbo engine (collectively, "Settlement Class Vehicles") imported or distributed for sale or lease in the United States by VWGoA. Settlement Class Vehicles include a total of 479,768 vehicles imported or distributed for sale or lease in the United States by VWGoA. The breakdown of Settlement Class Vehicle population by model year, make and model is as follows:

SETTLEMENT CLASS VEHICLES			
Model Year	**Make**	**Model**	**Vehicle Population**
1997	Audi	A4	8,375
1998	Audi	A4	9,950
1999	Audi	A4	17,122
2000	Audi	A4	13,862
2001	Audi	A4	24,944
2002	Audi	A4	24,373
2003	Audi	A4	30,190
2003	Audi	A4 Cabriolet	2,461
2004	Audi	A4	16,011
2004	Audi	A4 Cabriolet	2,767
1998	Volkswagen	Passat	22,682
1999	Volkswagen	Passat	52,525
2000	Volkswagen	Passat	36,157
2001	Volkswagen	Passat	41,217

2002	Volkswagen	Passat	57,898
2003	Volkswagen	Passat	67,592
2004	Volkswagen	Passat	51,642

TOTAL = 479,768

Settlement Class Vehicles, however, do not include vehicles for which motor oil meeting VW specification 502 00 was required as part of the scheduled maintenance (2004 model year Audi A4 vehicles with VIN numbers of or above WAULC68E44A152304 and 2004 model year Audi A4 Cabriolet vehicles with VIN numbers of or above WAUAC48H04K014467). Excluded from the Settlement Class are (a) all federal court judges who have presided over this case and their spouses, (b) all persons and entities who elect to exclude themselves from the Settlement Class, and (c) Defendants' current employees, officers, directors, agents, and representatives.

III. CLASS MEMBER RIGHTS AND BENEFITS

A. ENTIRE SETTLEMENT CLASS

1. Unpaid Claims: All Unpaid Claims by Settlement Class Members under the existing Eight Year Extended Warranty may be submitted for examination. In order to receive such examination, Settlement Class Members may submit or resubmit their Unpaid Claims to the Oil Sludge Settlement Administrator. Payment for Unpaid Claims will be made as follows:

   (a) *100% Payment of Repair Costs*: The Settlement Class Member shall be compensated one hundred percent (100%) for Engine Repair and/or Engine Replacement and Reasonable Associated Expenses provided the Settlement Class Member submits Proof that the last two required oil changes prior to the Sludge-related problem or engine failure were performed within the recommended time and mileage intervals, with a permissible variance of twenty percent (20%) of the time and mileage intervals.

   (b) *50% Payment of Repair Costs*: The Settlement Class Member shall be compensated fifty percent (50%) for Engine Repair and/or Engine Replacement and Reasonable Associated Expenses where the Settlement Class Member cannot submit Proof that the last two required oil changes prior to the Sludge-related problem or engine failure were performed within the recommended time and mileage intervals, with a permissible variance of twenty percent (20%) of the time and mileage intervals.

(c) To qualify for reimbursement under (a) and (b) above, the Settlement Class Member shall be required to submit a Claim form, signed under penalty of perjury (in form annexed hereto to Class Notices, Exhibits 9, 13, 17 and 21) and Proof of a Sludge Related Engine Repair or Sludge Related Engine Replacement and Reasonable Associated Expenses. To qualify for reimbursement under (a) above, the Settlement Class Member shall also be required to submit Proof of the last two oil and filter changes required by the maintenance schedule applicable to the Settlement Class Vehicle prior to the Engine Repair and/or Engine Replacement, in accordance with the maintenance schedule applicable to the Settlement Class Vehicle, with a permissible variance of twenty percent (20%) of the time and mileage intervals, if 100% reimbursement is claimed.

(d) Any Unpaid Claims referred to in Section III-A-(a)-(c) must be submitted to the Oil Sludge Settlement Administrator no later than six (6) months after the date that Class Notice is mailed. Subject to a Settlement Class Member's verification that they did not receive mailed notice, the Settlement Class Member shall have an additional two (2) months to submit a claim for reimbursement.

2. Education/Information Program: Defendants will prepare as part of the Class Notice acceptable education/information containing relevant information concerning Sludge and customer measures, including the use of VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00, along with appropriate user behavior which may help to control and/or ameliorate Sludge formation. An owner's manual supplement, along with an engine compartment sticker with instructions for affixation by the Settlement Class Member, regarding the use of VW specification 502 00 oil or synthetic oil certified as complying with VW specification 502 00, will also be provided in this education/information program. The education/information program shall be implemented as follows:

(a) a customer letter, owner's manual supplement and engine compartment sticker, in form as attached hereto as Exhibits 10, 14, 18, 22, 11, 15, 19, 23 and 2, will be included with the Class Notice provided to current owners or lessees of Settlement Class Vehicles;

(b) a list of oils which are certified as complying with VW specification 502 00 will be included with the Engine Oil Supplement provided to current owners and lessees of Settlement Class Vehicles; and

(c) information as to the available engine oils which are certified as complying with VW specification 502 00 will be maintained and updated from time to time on the Settlement website.

B. MODEL YEAR 2001-2004 SETTLEMENT CLASS VEHICLES

1. Enhanced Oil Sludge Warranty Extension

VWGoA will offer an Enhanced Oil Sludge Warranty to ten (10) years or 120,000 miles, whichever comes first, after the date the Settlement Class Vehicle enters service in the hands of the first retail purchaser or lessee or as a company car. To maintain the Enhanced Oil Sludge Warranty the Settlement Class Members will be required to perform all scheduled oil maintenance following receipt of Class Notice at currently specified intervals using only VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00. Accordingly, to qualify for Engine Repair or Engine Replacement under the Enhanced Oil Sludge Warranty, the Settlement Class Member must provide Proof that the Settlement Class Member has used only VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00 for all oil changes required thirty (30) days after the date that Class Notice is mailed.

With respect to Sludge Related Engine Repairs or Sludge Related Engine Replacements required after the date of Class Notice, eligibility for coverage under the Enhanced Oil Sludge Warranty Extension will be as follows:

(1) *Payment of Repair Costs After Class Notice (Two or More Required Oil Changes Using VW 502 00)*: The Settlement Class Member shall be provided with Engine Repair and/or Engine Replacement at 100% parts and labor if, at the time of such Engine Repair or Engine Replacement, two or more oil and filter changes have been required by the maintenance schedule applicable to the Settlement Class Vehicle since the date of Class Notice and the Settlement Class Member submits Proof of all such oil changes after receipt of Class Notice using VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00.

(2) *Payment of Repair Costs After Class Notice (One Required Oil Change Using VW 502 00)*: (a) The Settlement Class Member shall be provided with Engine Repair and/or Engine Replacement at 100% parts and labor if, at the time

of such Engine Repair/Engine Replacement, only one oil and filter change has been required by the maintenance schedule applicable to the Settlement Class Vehicle since the date of the Class Notice and the Settlement Class Member submits (i) Proof of one oil and filter change after receipt of Class Notice using VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00 and (ii) Proof of the last oil and filter change required by the maintenance schedule applicable to the Settlement Class Vehicle prior to the date of the Class Notice with oil quality as originally specified in the owner's manual applicable to the Settlement Class Vehicle.

(b) If Proof that one oil and filter change using VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00 is submitted, but Proof of the last oil and filter change required by the maintenance schedule applicable to the Settlement Class Vehicle prior to the date of the Class Notice with oil quality as originally specified in the owner's manual applicable to the Settlement Class Vehicle is not submitted, then the Settlement Class Member shall be compensated fifty percent (50%) for the Engine Repair and/or Engine Replacement.

(3) *Payment of Repair Costs After Class Notice (No Required Oil Change Using VW 502 00)*: (a) The Settlement Class Member shall be provided with Engine Repair and/or Engine Replacement at 100% parts and labor if, at the time of such Engine Repair/Engine Replacement, no oil and filter change has been required by the maintenance schedule applicable to the Settlement Class Vehicle since the date of Class Notice and the Settlement Class Member submits Proof of the last two oil and filter changes required by the maintenance schedule applicable to the Settlement Class Vehicle prior to receiving the Class Notice with oil quality as originally specified by the owner's manual applicable to the Settlement Class Vehicle.

(b) If Proof of the last two oil and filter changes required by the maintenance schedule applicable to the Settlement Class Vehicle prior to receiving the Class Notice with oil quality as originally specified by the owner's manual applicable to the Settlement Class Vehicle is not submitted, the Settlement Class Member shall be compensated fifty

percent (50%) for the Engine Repair and/or the Engine Replacement.

(4) *Payment of Repair Costs Before the Date of Class Notice and After Expiration of the Eight Year Extended Engine Warranty*: (a) The Settlement Class Member shall be reimbursed 100% for Engine Repair and/or Engine Replacement and Reasonable Associated Expenses if the Settlement Class Member submits Proof of the last two oil and filter changes required by the maintenance schedule applicable to the Settlement Class Vehicle prior to the Engine Repair and/or Engine Replacement, in accordance with the maintenance schedule applicable to the Settlement Class Vehicle, with a permissible variance of twenty percent (20%) of the time and mileage intervals.

(b) If Proof of the last two oil and filter changes required by the maintenance schedule applicable to the Settlement Class Vehicle prior to the Engine Repair and/or Engine Replacement, in accordance with the maintenance schedule applicable to the Settlement Class Vehicle with a permissible variance of twenty percent (20%) of the time and mileage intervals, is not submitted, the Settlement Class Member shall be compensated fifty percent (50%) for the Engine Repair and/or Engine Replacement.

(c) To qualify for reimbursement under this provision, the Settlement Class Member shall be required to submit a Claim form, signed under penalty of perjury (in form annexed hereto at Exhibits 9, 13, 17 or 21) and Proof of all Reasonable Associated Expenses plus Proof of the last two oil and filter changes required by the maintenance schedule applicable to the Settlement Class Vehicle prior to the Engine Repair and/or Engine Replacement, in accordance with the maintenance schedule applicable to the Settlement Class Vehicle. Any claims for this reimbursement must be made within six (6) months after the date that Class Notice is mailed.

2. The Settlement Class Member is allowed to change his own oil and may submit Proof as defined above in Definition Section 18, of purchase of the oil and filter.

3. Settlement Class Vehicles sold as "certified pre-owned" will also receive the Enhanced Oil Sludge Warranty Extension conditioned upon the use of VW specification 502 00 oil or a synthetic oil certified as complying with

VW specification 502 00 for all oil changes required after the date of Class Notice.

4. Oil Change Discount

VWGoA will provide a one-time $25 oil change discount for each model year 2001-2004 Settlement Class Vehicle, redeemable within one (1) year after the Final Judicial Approval Date, for a $25 reduction in the price of an oil and filter change using VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00 at any authorized Volkswagen/Audi dealership. This benefit shall be described in the Class Notice and implemented by all Volkswagen/Audi dealers as part of a mandatory notification program instituted at all such dealers designed to capture all eligible Settlement Class Vehicles that enter the dealership for an oil/filter change.

C. VEHICLES NOT ELIGIBLE FOR ENHANCED OIL SLUDGE WARRANTY EXTENSION

1. Model Year 1997-2000 Settlement Class Vehicles

Model year 1997-2000 Settlement Class Vehicles are not eligible for the 10 year/120,000 mile Oil Sludge Warranty Extension. The Eight Year Extended Warranty (unlimited mileage) remains in force for these vehicles. Oil meeting recommendations in the original owner's manual will continue to be sufficient for coverage under the Eight Year Extended Warranty. Any Unpaid Claim for Sludge Related Repairs or Engine Replacement may be submitted pursuant to the Eight Year Extended Warranty (unlimited mileage), unless the sludge problem occurred after the Eight Year Extended Warranty (unlimited mileage) period has expired. The Class Notice shall inform all Settlement Class Members that they may submit any Unpaid Claim and how to submit the Claim. The Class Notice shall inform all Settlement Class Members that the Settlement Agreement provides for re-examination of Unpaid Claims.

2. Model Year 2001-2004 Settlement Class Vehicles

Model year 2001-2004 Settlement Class Vehicles are not eligible for the 10 year/120,000 mile Oil Sludge Warranty Extension unless the vehicle is maintained with VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00. If the Settlement Class Member chooses to continue maintaining his vehicle with the oil recommended in the owner's manual, then the Eight Year Extended Warranty (unlimited mileage) will apply. Any Unpaid Claim for Sludge related Repairs or Engine Replacements may be submitted pursuant to the Eight Year Extended Warranty (unlimited mileage), unless the sludge

problem occurred after the Eight Year Extended Warranty (unlimited mileage) period has expired.

IV. CLAIMS ADMINISTRATION

A. THE OIL SLUDGE SETTLEMENT ADMINISTRATOR

An impartial Oil Sludge Settlement Administrator, to be paid by Defendants, shall be engaged by Defendants, subject to approval by the Special Master (Honorable Allan van Gestel or his duly appointed successor). The parties have agreed that Defendants' counsel will retain Rust Consulting, Inc. ("Rust") as the impartial Oil Sludge Settlement Administrator. The Oil Sludge Settlement Administrator will serve until discharged by order of the Court.

B. CLAIMS PROCESSING PROCEDURES

1. Upon the Court's Preliminary Approval of this Settlement, the parties agree to use their best efforts to agree upon fair, transparent and just claims procedures with the input of the Oil Sludge Settlement Administrator, Rust. In the event of a disagreement, the Special Master shall determine what procedure is most appropriate, fair and consistent with the terms and conditions of the subject Settlement Agreement.

2. The Oil Sludge Settlement Administrator is required to record every inquiry and Claim for reimbursement regarding Sludge-related problems. The Oil Sludge Settlement Administrator shall maintain a database which shall contain the full name, complete address, telephone number, and email address for each person who makes a Claim or inquiry. The database shall identify the year, make, model, VIN, and mileage of the Settlement Class Vehicle, the nature of the Claim, the monetary value of the Claim, the resolution/disposition of the Claim, and the amount of payment. Class Counsel shall have reasonable access to database information, subject to the confidentiality agreement set forth in paragraph VI.E below. Class Counsel and Defendants' counsel will monitor the Claims reporting and payment process.

3. If a Claim for reimbursement is denied in whole or in part, the Oil Sludge Settlement Administrator shall specifically describe the factual basis and/or reasons for the denial or partial denial. If Class Counsel and/or Defendants' counsel determine that the Oil Sludge Settlement Administrator Claims practices are improper or unfair, Class Counsel and/or defense counsel may seek appropriate relief from the Court.

4. The Settlement Class Members may submit any Claim for reimbursement denied in whole or in part (or Claim not previously submitted) to the Oil Sludge Settlement Administrator for review. The decision of the Oil Sludge

Settlement Administrator is final. The Oil Sludge Settlement Administrator serves at the expense of Defendants. Any additional information or documentation required by the Oil Sludge Settlement Administrator may be submitted by the Class Member by mail, fax, or email attachment. The Oil Sludge Settlement Administrator shall document the factual basis and reasons for the payment, partial payment, or denial, or other action taken by the Oil Sludge Settlement Administrator. The Oil Sludge Settlement Administrator's decision shall then be sent to the Settlement Class Member by mail, fax, or email attachment, as requested by the Settlement Class Member. The Oil Sludge Settlement Administrator's decision and all supporting documentation shall also be posted to the database referenced in section IV.B.2. above. Under no circumstances shall the Class Member be required to refund any payment previously received.

5. The Oil Sludge Settlement Administrator shall decide within sixty (60) days after the Settlement Class Member submits the necessary documentation whether the Claim will be paid, paid in part, or denied. The Oil Sludge Settlement Administrator shall promptly mail, fax, or email the written decision to the Settlement Class Member.

V. OPT-OUT AND WALKAWAY RIGHTS/RELEASE OF CLAIMS

A. The Parties agree that all Settlement Class Members shall have the right to be excluded (opt-out) from the Settlement Agreement. Defendants shall have the right to withdraw from the Settlement Agreement and render it null and void if more than twenty-five thousand (25,000) Settlement Class Members exclude themselves from this Settlement Agreement.

B. Upon Final Judicial Approval, every Settled Claim of each Class Member shall be settled and released. Each such Class Member shall be barred from asserting any Settled Claim against Defendants, unless the person making the Claim has timely exercised his opt-out rights.

VI. SETTLEMENT IMPLEMENTATION

A. JURISDICTION AND GOVERNING LAW

1. The Final Order and Judgment shall reserve to the Court exclusive and continuing jurisdiction over this action, the Parties, the Settlement Class Members, the Special Master, the Oil Sludge Settlement Administrator, and this Settlement Agreement for purposes of administering, supervising, construing, and enforcing this Settlement Agreement.

2. It is expressly understood and confirmed that the parties have not agreed to any choice, selection or waiver of state or federal law to be applied to any aspect of the construction, preliminary or final approval, or

application of any provision of this Agreement of Settlement, including but not limited to attorney fees and costs.

B. NOTICE PROVISIONS

1. Class Notice shall be provided to all Settlement Class Members by means of first class mail, one time publication of summary notice in a form annexed hereto as Exhibit 1, which shall appear in the first section of the National Edition of USA Today, and website, all at Defendants' expense. Defendants shall submit the proposed Class Notice to Class Counsel for review and approval prior to distribution to Settlement Class Members.

2. The Class Notice shall describe the certification and fairness hearing and this Settlement Agreement. The Class Notice shall provide the Settlement Class Members with information concerning the benefits they are entitled to claim for Engine Replacement costs, Engine Repair costs, reimbursement for past Engine Replacement or Engine Repair, and other Reasonable Associated Expenses.

3. The Class Notice shall advise Settlement Class Members to make a Claim if they believe they have suffered Sludge-related damages. The Class Notice shall inform Settlement Class Members of their right to challenge denial or partial denial of their Claims for reimbursement, and to object or opt out of the Settlement. In accordance with the provisions of Section III.A.2 of this Settlement Agreement, the Class Notice shall, to the extent applicable, contain education/information with relevant information concerning Sludge and customer measures, including the use of VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00 along with appropriate user behavior, which may help to control and/or ameliorate Sludge formation. The Class Notice for the Settlement Class Vehicles that require VW specification 502 00 or a synthetic oil certified as complying with VW specification 502 00 as a condition to qualify for the Enhanced Oil Sludge Warranty Extension (model years 2001 through 2004) shall plainly state this requirement and warn that failure to use VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00 will void the Enhanced Oil Sludge Warranty Extension. The Class Notice for Settlement Class Vehicles which do not qualify for the Enhanced Oil Sludge Warranty Extension (model years 1997 through 2000) shall strongly recommend the exclusive use of VW specification 502 00 oil or a synthetic oil certified as complying with VW specification 502 00.

4. The Oil Sludge Settlement Administrator shall be responsible for dissemination of the Class Notice. Moreover, as a condition of its retention, the Oil Sludge Settlement Administrator must agree that (a) it will fulfill all responsibilities and duties assigned to the Oil Sludge

Settlement Administrator under the terms of this Settlement Agreement, and (b) the Representative Plaintiffs, Class Counsel, Defendants and the Released Parties reserve all claims and rights, if any, for any failure by the Oil Sludge Settlement Administrator to fulfill its responsibilities and duties under the terms of this Settlement Agreement.

5. The Oil Sludge Settlement Administrator, along with Class Counsel and Defendants, shall be responsible for arranging for the mailing and publication of Class Notice pursuant to this Settlement Agreement. The Oil Sludge Settlement Administrator shall be responsible for responding to requests for or regarding the Class Notice and administration of Claims.

6. The Oil Sludge Settlement Administrator (and any third party retained by the Oil Sludge Settlement Administrator) shall sign a confidentiality agreement which shall provide that the names, addresses, and other information about specific Settlement Class Members provided by either Defendants, Class Counsel or by individual Settlement Class Members shall all be treated as confidential and shall be used by the Oil Sludge Settlement Administrator only as required by this Settlement Agreement. The form and content of such confidentiality agreement shall be mutually agreed to by Class Counsel and Defendants' counsel. The Oil Sludge Settlement Administrator will be provided name and/or mail address data obtained by Defendants, Class Counsel, and R.L. Polk of all known present and former owners and lessees of a Settlement Class Vehicle. The name and address data shall be processed by the Oil Sludge Settlement Administrator through the National Change of Address database for the purpose of updating the addresses. The Oil Sludge Settlement Administrator shall also provide a copy of the Class Notice and claim form to any Settlement Class Member who requests the Class Notice and/or claim form, promptly upon such request. The Oil Sludge Settlement Administrator shall provide declarations to the Court, with a copy to Class Counsel and Defendants' Counsel, attesting to the measures undertaken to provide Class Notice and claim forms to the Settlement Class Members.

7. Subject to the confidentiality agreement set forth in paragraph VI.E below, thirty (30) days prior to mailing, the Oil Sludge Settlement Administrator shall provide to Defendants' counsel and to Class Counsel the list of all current and former owners and lessees and a certification confirming the method by which the Settlement Class Member mailing list was compiled and the accuracy of the information therein. The mailing list may be supplemented by Class Counsel at any time prior to the date for mailing Class Notice.

Defendants shall utilize current and historic registration data from R.L. Polk to obtain information as to current and former owners and lessees.

Upon reasonable request, Defendants shall provide Class Counsel and the Oil Sludge Settlement Administrator with information provided to and/or received from R.L. Polk, subject to the confidentiality agreement set forth in paragraph VI.E below, to verify that Class Notice pursuant to this Settlement Agreement has been provided to Settlement Class Members.

8. The Oil Sludge Settlement Administrator or persons under the control and supervision of the Oil Sludge Settlement Administrator shall mail the Class Notice and the Claim form, by first-class postage prepaid United States mail, to all original and subsequent owners and lessees of Settlement Class Vehicles pursuant to the procedures set forth in this Settlement Agreement. All current owners and lessees of Settlement Class Vehicles shall also receive with the Class Notice and Claim form, the applicable customer letter, owner's manual supplement and engine compartment sticker.

9. The Oil Sludge Settlement Administrator shall also provide a copy of the Class Notice and/or Claim form to any Settlement Class Member who requests the Class Notice and/or Claim form, promptly upon such request.

10. The Oil Sludge Settlement Administrator shall establish and maintain a website, which shall make available: (a) an electronic version of the mailed Class Notice; and (b) upon entry of a Vehicle Identification Number validly identifying a Settlement Class Vehicle and the requesting party's name, an electronic copy of the Claim form that a Settlement Class Member may print out and submit to the Oil Sludge Settlement Administrator. Copies of this Settlement Agreement and other pertinent Settlement documents and information as shall be agreed by Class Counsel and Defendants' counsel shall also be posted and/or available for download on such website. The website will be maintained by the Oil Sludge Settlement Administrator until 12/31/2015.

11. The Oil Sludge Settlement Administrator shall provide declarations to the Court, with a copy to Class Counsel and Defendants, attesting to the measures undertaken to provide Class Notice and Claim forms to the Settlement Class. The Oil Sludge Settlement Administrator, upon request, shall provide to Class Counsel, subject to the confidentiality agreement set forth in paragraph VI.E below, and Defendants' counsel information and data concerning the claims made, the amount of each claim and related claims information, such that Class Counsel and Defendants' counsel may inspect and monitor the claims process.

12. Defendants shall pay all Class Notice and claims administration expenses, subject to the terms of this Settlement Agreement.

C. ATTORNEY FEES AND COSTS

1. Class Counsel will submit an application to the Court for an award of reasonable attorneys' fees and expenses on or before a date to be set by the Court ("Fee Application"). Each Settling Party reserves all rights to appeal from a Class Counsel fees and expenses award if that Party files a timely and proper objection with the Court. The Class Counsel fees and expenses award and Final Judicial Approval shall be separate so that the appeal of one shall not constitute an appeal from the other.

2. Subject to Section VI.A.2 above, Class Counsel fees and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from, benefits afforded to Settlement Class Members under this Settlement Agreement.

3. Any Class Counsel fees and expenses awarded shall be paid by Defendants to Class Counsel within thirty (30) days of the entry of a final judgment or order by the Court with respect to Class Counsel fees and expenses, except in the event of an appeal, which shall be governed by applicable provisions of the Federal Rules of Appellate Procedure including but not limited to Rule 8. Within fifteen (15) days after the final resolution of appellate proceedings and related Court proceedings with regard to the Class Counsel fees and expense award, the amount finally awarded by the Court shall be paid to Class Counsel. All matters pertaining to an award of Class Counsel fees and expenses including, but not limited to, any dispute amongst class/plaintiffs' counsel as to their respective attorneys fees and expenses, have been referred to the Honorable Allan van Gestel, Special Master. Judge van Gestel's recommendation with respect to Class Counsel fees and expenses shall be made to the Court.

D. INCENTIVE AWARDS

1. Subject to the Court's determination, Defendants shall pay incentive awards to the following Settlement Class Representatives: James Craig, Laura Cole-Breit, Scott Ryder, Eric Emanuelson and Margaret Moreau, Matthew Leonetti and Stacy Leonetti, David Marks and Carrie Marks, Marie Montag, Carol Carter, Judith Yarkony, Megan Shero, Eugenia Diveroli, and Ken Winokur.

2. All Settlement Class Members shall have standing to object to or support the incentive awards for Class Representatives.

E. RETURN OR DESTRUCTION OF CONFIDENTIAL DOCUMENTS OF DEFENDANTS

Within thirty (30) days after Final Judicial Approval of settlement or thirty (30) days after final resolution of all appellate proceedings and related court proceedings with regard to Class Counsel fees and expenses, whichever comes later, Class Counsel shall return to Defendants or destroy all copies of confidential documents and information of Defendants produced in discovery (which term includes those stored on disks and/or electronically stored). Thereafter, Class Counsel shall not copy or distribute confidential documents of Defendants (paper documents, discs, or electronically stored documents) to any person and shall not allow any person to read the confidential documents without the prior agreement of Defendants' counsel or court approval. Class Counsel may, however, retain an original of confidential documents of Defendants in their files to the extent and for the period of time required to be maintained by the law of the state in which their office is located. After said period expires, Class Counsel shall return or destroy the original Confidential Documents and information and shall take all reasonable technological steps to ensure that all electronically stored confidential documents and information has been completely erased and overwritten in a manner which ensures that it no longer exists or can be retrieved from any computer.

Class Counsel shall maintain the confidentiality of all documents and data provided to or by the Oil Sludge Settlement Administrator and/or R.L. Polk in the same manner as the Confidential documents and data produced by Defendants in discovery. The retention, return and/or destruction of such documents and data shall be governed by this section.

Class Counsel shall return all unredacted documents produced pursuant to Judge van Gestel's 11/25/08 Order. Class Counsel shall return the following: 12/3/08 DVD; 12/3/08 CD; 7/20/09 CD; and 9/21/09 CD. Class Counsel shall destroy all paper copies of the unredacted documents and erase and overwrite all electronic copies from Class Counsel's computer system.

Counsel for Defendants will maintain custody of the returned unredacted documents for seven (7) years. During the seven (7) year retention period, upon Class Counsel's written request which states a reasonable, legitimate need, Counsel for Defendants shall return the documents to Class Counsel in their unredacted form or make appropriate application to the Court. Said unredacted documents, once no longer needed, shall be returned to defense counsel, who shall continue to maintain them as provided herein.

IN WITNESS WHEREOF, the Parties have duly executed this Settlement Agreement, by their respective counsel, as set forth below, this 2nd day of September, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 29, 2011, the foregoing Opening Brief and Required Addendum were served electronically upon all counsel of record via CM/ECF. Two hardcopies of the Opening Brief and Required Addendum also were served by third-party courier for delivery within three days upon:

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December 29, 2011