No. 18-

IN THE

Supreme Court of the United States

IN RE VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION.

NAGEL RICE, LLP, *et al.*,

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRUCE H. NAGEL
Counsel of Record
DIANE E. SAMMONS
NAGEL RICE, LLP
103 Eisenhower Parkway
Roseland, NJ 07068
(973) 618-0400
bnagel@nagelrice.com

Counsel for Petitioners

288798

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This Court has never addressed two important questions in class action litigation. First, whether non-class counsel is entitled to an award of counsel fees and costs pursuant to Fed. R. Civ. P. 23(h) for work performed prior to the appointment of lead counsel where that work is identical to the pre-appointment work performed by appointed counsel. Second, whether a class action settlement agreement which only provided fees and costs to class counsel for pre-appointment work creates two unequal plaintiff classes.

After a public announcement that Volkswagen companies used emissions defeat devices, 451 class actions were filed in approximately sixty districts around the country. Within months of the filings, the MDL court appointed lead counsel and 22 firms to serve on the plaintiffs' steering committee ("class counsel") and five months later, a $10 billion dollar settlement was reached that ultimately resulted in the payment of $175 million in attorneys' fees and costs to only the leadership structure. The District Court approved a multiplier of 2.63 to the total lodestar of the select firms for both pre and post-appointment work performed deeming the work to be valuable to the class. Months later the District Court denied every single fee application from non-class counsel for identical pre-appointment work. Because the motion for attorneys' fees and costs by non-class counsel was decided after final approval, class members represented by non-class counsel could not exercise their rights to object to the settlement. The Ninth Circuit Court of Appeals affirmance has raised issues for review:

A. Does denying fees and costs to non-class counsel for pre-appointment work while awarding fees

and costs to class counsel for identical work create a conflict among the Circuits warranting this Court's review based upon Gottlieb v. Barry, 43 F.3d 474, 489 (10th Cir. 1994) and In re Cendant Corp. Securities Litigation, 404 F.3d 173, 179 (3rd Cir. 2005)?

B. Does the award of attorneys' fees and costs only to class counsel for pre-appointment work run afoul of this court's decision in Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) and Amchem Products Inc. v. Windsor, 521 U.S. 591, 627 (1997) by creating two unequal plaintiff classes: one whose recovery is reduced by attorneys' fees and costs and another, represented by select counsel, who get the full benefit of the recovery with no reduction for fees and costs?

C. Does this decision create a conflict of interest for class counsel resulting in a constitutional infirmity as articulated in Amchem, 521 U.S. at 626, n.20 and Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999) by denying non-class counsels' clients their due process right to adequate representation?

D. Does the denial of a fee award and costs to non-class counsel where the court fails to articulate an objective basis for its denial run afoul of this Court's decision in Perdue v. Kenny A. ex rel. Winn., 559 U.S. 542, 558 (2010)?

LIST OF PARTIES

The following list provides the names of all the parties to the proceedings below:

Petitioner Nagel Rice, LLP was counsel for the plaintiffs Ari Levin, et als. in the District Court proceedings below and plaintiffs in the motion for legal fees and costs in the court proceeding below and Objector-Appellant in the Court of Appeals proceedings.

Petitioner Hyde & Swigart was counsel for the plaintiffs Charles Hise, et als. in the District Court proceedings below and plaintiff in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioner, Paul S. Rothstein, Esq. was counsel for plaintiff Scott Siewert in the District Court proceedings below and plaintiff in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioner, The Driscoll Firm, P.C. was counsel for the plaintiffs Aaron Fries, et als. in the District Court proceedings below and plaintiff in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioner, Law Offices of Maloney & Campolo was counsel for the plaintiffs John Adams, et als. in the District Court proceedings below and movants in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioners, Law Office of Samuel W. Bearman; Sellers, Skievaski Kuder, LLP and Artice L. McGraw, PA were counsel for the plaintiffs/movants Jeremy Adams, et als. in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioner, Strong Law Offices was counsel for the class members Harry Andrianos, et als. in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioners, Habush & Rottier, S.C. and Hawks Quindel, S.C. were counsel for the plaintiffs LaBudda, et als. in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioner, Makarem & Associates was counsel for the plaintiffs Jujila Gelazis, et als. in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Petitioner, Holton Law Firm was counsel for the plaintiffs Patricia Epperson, et als. in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceedings.

Respondents, Jason Hill, Ray Preciado, Susan Tarrence, Steven R. Thornton, Anne Duncan Argento, Simon W. Beaven, Juliet Brodie, Sarah Burt, Aimee

Epstein, George Farquar, Mark Houle, Rebecca Kaplan, Helen Koisk-Westly, Raymond Krein, Stephen Verner, Leo Winternitz, Marcus Alexander Doege, Leslie Maclise-Kane, Timothy Watson, Farrah P. Bell, Jerry Lawhon, Michael R. Cruise, John C. Dufurrena, Scott Bahr, Karl Fry, Cesar Olmos, Britney Lynne Schnathorst, Carla Berg, Aaron Joy, Eric Davidson White, Floyd Beck Warren, Thomas J. Buchberger, Russell Evans, Carmel Rubin, Daniel Sullivan, Matthew Cure, Denise DeFiesta, Mark Rovner, Wolfgang Steudel, Anne Mahle, David McCarthy; Scott Moen, Ryan Joseph Schuette, Megan Walawender, Joseph Morrey, Michael Lorenz, Nancy L. Stirek, Rebecca Perlmutter, Addison Minott, Richard Grogan, Alan Bandics, Melani Buchanan Farmer, Kevin Bedard, Elizabeth Bedard, Cynthia R. Kirtland, Michael Charles Krimmelbein, Will Harlan, Heather Greenfield, Thomas W. Ayala, Herbert Yussim, Nicholas Bond, Brian J. Bialecki, Katherine Mehls, Whitney Powers, Roy McNeal, Brett Alters, Kelly R. King, Rachel Otto,William Andrew Wilson, David Ebenstein, Mark Schumacher, Chad Dial, Joseph Herr, Kurt Mallery, Marion B. Moore, Laura Swenson and Brian Nicholas Mills were representative plaintiffs in the District Court proceedings below and opponents in the motion for legal fees and costs below and Plaintiffs-Appellees in the Court of Appeals proceedings Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083; 17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

Respondent, Bishop, Heenan & Davies, was counsel for plaintiff class members in the District Court proceedings below and Objector-Appellant in the Court of Appeals proceedings No. 17-16020.

Respondent, James Ben Feinman and Ronald Clark Fleshman, Jr. were counsel for plaintiff class members in the District Court proceedings below and Objector-Appellants in the Court of Appeals proceeding No. 17-16067.

Respondent, Lemberg Law, LLC was counsel for Michael E. Curth, et. als in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceeding No. 17-16068.

Respondent, Viles and Beckman, LLC was counsel for Tamie Smith, et. als in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceeding No. 17-16099.

Respondent, Harrell & Nowak, LLC was counsel for Charles Kert LeBlanc et. als in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceeding No. 17-16132.

Respondent, Egolf Ferlic Harwood, LLC was counsel for Rannae Ross, et.als in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceeding No. 17-16156.

Respondent, Ryder Law Firm, P.C. was counsel for Larry Walls, et. als in the District Court proceedings below and plaintiffs in the motion for legal fees and costs below and Objector-Appellant in the Court of Appeals proceeding No. 17-16158.

Respondent, Volkswagen Group of America, Inc. was a defendant in the District Court proceedings below and opponents in the motion for legal fees and costs below and Plaintiffs-Appellees in the Court of Appeals proceedings in Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083; 17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

Respondent, Volkswagen, A.G. was a defendant in the District Court proceedings below and Plaintiffs-Appellees in the Court Appeal Proceedings Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083; 17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

Respondent, Audi, A.G. was a defendant in the District Court proceedings below and Plaintiffs-Appellees in the Court Appeal proceedings Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083; 17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

Respondent, Audi of America, LLC was a defendant in the District Court proceedings below and Plaintiffs-Appellees in the Court Appeal proceedings Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083; 17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

Respondent, Porsche Cars North America, Inc. was a defendant in the District Court proceedings below and Plaintiffs-Appellees in the Court Appeal proceedings Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083;

17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

Respondent, Robert Bosch GMBH was a defendant in the District Court proceedings below and Plaintiffs-Appellees in the Court Appeal proceedings Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083; 17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

Respondent, Robert Bosch, LLC was a defendant in the District Court proceedings below and Plaintiffs-Appellees in the Court Appeal proceedings Nos. 17-16020; 17-16065; 17-16067; 17-16068; 17-16082; 17-16083; 17-16089; 17-16092; 17-16099; 17-16123; 17-16124; 17-16130; 17-16132; 17-16156; 17-16158; 17-16172; and 17-16180.

As to Rule 29.6 compliance, none of petitioners have parent corporations, nor does any holding company that is publicly traded own 10 per cent or more of petitioners' stock.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

CONSTITUTION, RULES AND STATUTES

OTHER AUTHORITIES

Cited Authorities

Page

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit, denying Petitioners' *en banc* petition is reproduced at App. 81a-83a. The opinion of the United States Court of Appeals for the Ninth Circuit, In re Volkswagen "Clean Diesel" Marketing, Sales Practice, and Products Liability Litigation, Lead Case No. 17-16020, is reported at 914 F.3d 623 (9th Cir. 2019) and is reproduced at App. 1a-59a. The opinion of the District Court in In re Volkswagen "Clean Diesel" Marketing, Sales Practice, and Products Liability Litigation, Docket No. MDL No. 2672, denying Petitioners' motion for attorneys' fees and costs is unreported is reproduced at App. 60a-72a. The order of the District Court allowing non-class counsel to file motions for attorneys' fees and costs is reproduced at App. 73a-80a.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was rendered on January 22, 2019. The Petition for rehearing *en banc* was denied on February 28, 2019. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service

> in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS OR PROCEDURAL RULES INVOLVED

Paragraph h of Rule 23 of Federal Rules of Civil Procedure provides:

> **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

> **(1)** A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> **(2)** A class member, or a party from whom payment is sought, may object to the motion.
>
> **(3)** The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
>
> **(4)** The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

STATEMENT OF CASE

Petitioners Nagel Rice, LLP and other law firms ("Nagel Rice Petitioners") seek review of a portion of the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the ruling of the District Court denying petitioners' motion for pre-appointment legal fees and costs under Federal Rules of Civil Procedure 23(h). Starting on or about September 21, 2015, consumers around the country commenced actions alleging fraud and other claims against Volkswagen Group of America, Inc., Volkswagen, AG, and AUDI AG ("VW") for their utilization of "defeat devices" in certain diesel vehicles. Nagel Rice Petitioners, representing hundreds of class members, spearheaded early efforts to litigate the case. For four months, preceding the appointment

of lead counsel and class counsel (collectively, "class counsel") Nagel Rice Petitioners and other non-class counsel were deeply involved in defining legal theories, drafting and filing complaints, appearing before the Judicial Panel on Multidistrict Litigation to argue venue; creating a massive offensive across the country resulting in upwards of 451 possible related filings in some sixty districts; participating in attorneys' continuing education conferences to weigh and collaborate with other attorneys to construct the most successful legal theories; interviewing and advising clients who were immediately impacted by VW's actions as they unfolded; initiating and creating media opportunities for clients to reveal their individual experiences of deception and harm to the public; engaging in motion practice to preserve evidence; working with other attorneys to promote lead attorneys skilled in class action litigation to best represent the interests of the class as a whole; moving to consolidate the cases before one court to promote efficiency in an effort to move towards a prompt and early resolution; researching possible international jurisdictional experts; and competing, via written submissions and oral argument, with hundreds of attorneys from around the country to be appointed by the court for a leadership position in the case. On January 21, 2015, the court appointed class counsel and provided for an order (PTO 7) elaborating that pretrial proceedings would be conducted "by and through the PSC." [ER 000164-167]. Shortly, thereafter, the Court entered a second order (PTO 11) on February 25, 2015, which outlined a protocol for receiving fees and costs and limiting fees and costs to "Participating Counsel" who were approved by the court "prior to incurring any such cost or expense." [ER 000115-116] (emphasis added).

The 2.0 liter portion of the case received final approval on October 25, 2016. The settlement established a funding pool of slightly more than $10 billion. After class counsel submitted an application for fees and costs, on March 17, 2017, the District Court granted class counsels' application for $175 million in fees and costs. [ER 000011-19]. This application was granted absent any submission of back up time records for lead counsel's fee award and the absence of any rationale for an award of a multiple of 2.63 of class counsel's lodestar with associate attorneys with limited class experience receiving as much as $2,077 per hour and paralegals receiving as much as $1,288 per hour. On November 22, 2016, the District Court, upon receipt of notice of the filing of attorney fee liens and upon the filing of attorneys' fee motions, by non-class counsel entered an Order enjoining state court proceedings relative to asserted attorneys' liens, but also created a mechanism and procedure for non-class counsel to collect attorneys' fees and costs. App 73a-80a. The District Court acknowledged in that Order that "some attorneys may have provided Class Members with compensable services." App. 60a-72a. Despite the receipt of over 244 motions from non-class counsel with over 13,000 pages of documentation, on April 24, 2017, the District Court rendered a blanket order denying all the fee applications submitted by non-class counsel. App. 80a. As to pre-appointment time, the District Court, absent any reference to the tens of thousands of pages of supportive billing, concluded that there "was little to any pretrial activity in the cases filed by Non-class Counsel, and the filings alone did not materially drive the settlement negotiations with Volkswagen." App. 67a. The District Court concluded that the filing of individual and class complaints in the three month period between the public disclosure and consolidation in the MDL "did not benefit the class." App.

65a, 67a. The District Court further dismissed non-class counsels' diligent early efforts finding that these efforts, at most, benefitted "individual class members, not the class as a whole." App. 68a. Between May 23, 2017 and June 6, 2017, Nagel Rice Petitioners and others filed notices of appeal and on January 22, 2019, the Ninth Circuit agreed with the District Court, noting that it was appellants who were required, under In re Cendant, 404 F.3d 173 (3rd Cir. 2005), to establish their work benefited the class, as opposed to their individual clients, and that one "cannot manufacture fees" by filing a complaint, but rather, attorneys "who alone discover grounds for a suit based upon their own investigation rather than on public reports legitimately create a benefit for the class" even if they are not chosen to represent the class. App. 47a-48a, citing In re Cendant, 404 F.3d at 196-97. In support of the District Court's ruling, the Ninth Circuit agreed there was "no indication, either in the voluminous record they provided or in their briefs, that this work contributed to the negotiations or crafting of the Settlement or otherwise benefited the class in any meaningful way." App. 48a. The Ninth Circuit noted the appellants failed to show "they engaged in serious settlement efforts, much less that any such efforts contributed to the class settlement framework that was ultimately reached, approved, and successfully implemented." App. 48a, citing Appellee Br.[1]

1. The District Court and the Appellate Court further supported the denial of fees and costs, noting the Appellants had failed to abide by the Court's procedural requirement as evinced by Pretrial Order No. 11 [ER 000115-126] (entered at the time of appointment of class counsel on January 21, 2017), which required pre-authorization by Lead Counsel prior to the performance of any legal service. [ER 000115-16]. By its very terms, however, PTO-11 only related to post-appointment fees and costs as there was no mechanism or order to secure time that had already been incurred at the time of appointment of class counsel.

On February 5, 2019, Nagel Rice Petitioners timely moved for rehearing *en banc*. That request was denied on February 28, 2019. App. 81a-83a.

REASONS FOR GRANTING THE PETITION

First, by finding the identical efforts of non-class counsel valueless, this Court can address the conflict this Ninth Circuit decision creates with the Tenth Circuit case of Gottlieb, 43 F.3d at 489 ("we fail to see why the work of counsel later designated as class counsel should be fully compensated while other work of counsel who were not later designated class counsel. . . should be wholly uncompensated.") and the Third Circuit case of In re Cendant, 404 F.3d at 197 (creating the expectation that Lead Counsel who make use of earlier attorneys' legal or investigative work will "request compensation for such attorneys," and warned against the appropriation of such work without compensation).

Second, the decision presents the Court with the opportunity to determine whether a decision to treat non-class counsel differently by denying fees and costs for the identical work of class counsel has the consequence of violating Boeing, 444 U.S. at 478 and Amchem, 521 U.S. at 627 by creating two distinct unequal classes of plaintiffs: those whose fees and costs are fully covered by the settlement and those whose fees and costs are not covered avoiding due process protections.

Third, similarly, the decision warrants review where it runs afoul of due process protections by placing class counsel in a conflict of interest position as prohibited by Amchem, 621 U.S. at 626, n.20 and Ortiz, 527 U.S at 819 by favoring some class members over others, an objection that could not be voiced by class members as the denial

of fees and costs did not come until after the settlement approval process was complete.

Finally, this Court should grant *certiorari* to address the District Court's obligations to articulate an objective and reviewable basis for rendering attorneys' fees and costs awards. Moreover, this Court has already articulated the standards to be applied when awarding reasonable attorneys' fees and costs under a fee-shifting statute, Perdue, 559 U.S. at 558, and should ensure uniformity by applying the same standards in all class action cases.

I. REVIEW IS WARRANTED WHERE FAILURE TO AWARD PRE-APPOINTMENT FEES AND COSTS TO NON-CLASS COUNSEL CREATES A CONFLICT AMONG CIRCUIT COURTS OF APPEAL.

Rule 23(h) allows a court to award reasonable attorneys' fees and non-taxable costs that are authorized by law. Fed. R. Civ. P. 23(h). This is true even if the applicant seeking fees and costs is not designated class counsel. See Committee Note to subsection (h); Gottlieb, 43 F.3d at 489 ("we fail to see why the work of counsel later designated as class counsel should be fully compensated while the work of counsel who were not later designated class counsel . . . should be wholly uncompensated."); M. Kaufman, Issues with Non-lead Counsel, 26A Sec. Lit. Damages § 25:4.40 (2018) ("Work completed by non-lead counsel before the court appoints a lead attorney can confer substantial benefits on the class, and thus non-lead counsel should be reasonably compensated."); In re Cendant, 404 F.3d at 179 (creating the expectation that Lead Counsel who makes use of earlier attorneys' legal or investigative work will "request compensation for such

attorneys," and warned against the appropriation of such work without compensation). See e.g. Stetson v. Grissom, 821 F.3d 1157, 1163-65 (9th Cir. 2016) (stating that even an objector can be entitled to attorneys' fees in a class action).

Neither class counsel nor the panel specifically dispute the nature of the work performed by non-class counsel prior to the appointment of class counsel on January 21, 2016:

- Filing some 451 potentially related cases across the nation in some sixty federal districts before the first NOV and the advent of the MDL;

- Filing of motions, including at least four to preserve evidence and at least three for interim lead counsel;

- Conducting preliminary discovery;

- Conducting early settlement efforts prior to consolidation;

- Presenting at least eight conferences for attorneys across the country to analyze, discuss, and refine approaches to bringing the cases;

- Securing the appointment of two mediators in several New Jersey actions prior to consolidation;

- Researching potential causes of action;

- Fielding and vetting hundreds of phone calls from prospective clients;

- Communicating and coordinating with other attorneys filing similar cases;

- Communicating with prospective German legal counsel regarding potential jurisdictional issues and possible efforts to secure key evidence from a foreign country;

- Filing documents and appearing in New Orleans with a group of other local law firms to argue in support of the transfer and consolidation of all the cases to the State of New Jersey, where VW is incorporated and where it maintains key management offices; and

- Filing papers and appearing in the Northern District of California District Court to be selected as Lead Counsel or as a counsel on Plaintiffs' Steering Committee.

App. 45a-47a.

In addition to the above, Nagel Rice Petitioners' efforts further included:

- Amending complaints;

- Fielding press and media questions and appearing on multiple news sources both domestically and abroad, as part of a strategy to bring VW to the table; and

[ER 000271].

The District Court and Ninth Circuit never addressed the glaring paradox in determining that only the selected firms would be awarded fees and costs for pre-appointment work. Hence, how could the drafting and filing of 19 class counsels' complaints (including lead counsel's complaint), all filed after the Nagel Rice's Complaint, be deemed worthy of a huge multiplier and, at the same time, be deemed worthless if filed by a firm not selected to be in a leadership role? It is this stark anomaly that lies at the heart of this case and stands in conflict with the decisions of two other Circuits in Gottlieb, 43 F.3d 474 and In re Cendent, 404 F.3d 173 both of which hold that the work of non-class counsel should not be deemed valueless merely because it was not done by class counsel. The efforts of non-class counsel in the pre-appointment stage of the case had the exact same benefit for the class as the efforts and work product of those firms that were later appointed to lead the litigation.

II. REVIEW SHOULD BE GRANTED WHERE THE DECISION ACTS TO CREATE TWO UNEQUAL CLASSES OF PLAINTIFFS IN VIOLATION OF THIS COURT'S PRECEDENT.

In affirming the District Court, the Ninth Circuit's decision stands in direct contradiction to the decisions of the Tenth and Third Circuits, by creating two classes of plaintiffs: those whose settlement awards are subject to reduction by non-class counsel's fees and costs and those represented by selected counsel whose recoveries are not subject to the payment of their attorneys' fees and costs. Preferring one group of class plaintiffs over another relative to the payment of fees and costs is precisely the predicament this Court has sought to prevent in assessing attorneys' fees and costs against a fund. Boeing, 444 U.S.

at 478 (Courts prevent inequity in fund cases, where one might benefit from a successful litigation at the expense of the efforts of a successful litigant, by spreading fees proportionately among all those who benefit); see also In re Dry Max Pampers Litigation, 724 F.3d 713, 718 (6th Cir. 2013) (vacating class action settlement approval that resulted in unnamed plaintiffs receiving more favorable treatment than other class members who received "nearly worthless" injunctive relief); Larson v. AT&T Mobility LLC, 687 F.3d 109, 133 (3d Cir. 2012) (treating class of similarly-situated claimants differently in a settlement class required remand). Due process requires that "structural assurance[s] of fair and adequate representation for diverse groups and individuals" within the class exist. Amchem, 521 U.S. at 591. The method of creating subclasses is designed to ensure that similarly-situated claims are treated equally. See, e.g. In re Motor Fuel Temperature Sales Practices Litigation, 271 F.R.D. 263, 284 (D. Kan. 2010) (holding that variations of state law suggest that parties restrict proposed settlement to include subclasses for representation in various states).

Allowing this decision to stand violates fundamental due process and fairness to the plaintiffs represented by non-class counsel and this petition should be granted to address this issue of paramount importance in class action jurisprudence.

III. THE RESULT OF THE NINTH CIRCUIT'S DECISION, WHICH LIMITS PAYMENT OF FEES AND COSTS TO ONLY CLASS COUNSEL, CREATES A GROSS CONFLICT OF INTEREST IN VIOLATION OF AMCHEM AND ORTIZ.

Allowing two differing results for plaintiffs in the class creates a legal conflict for lead counsel and class counsel,

who cannot, in a settlement, prefer their own clients over non-class counsels' clients. Because the motions for attorneys' fees and costs by non-class counsel did not occur prior to final approval of the class, class members represented by non-class counsel could not assert their rights to object to the settlement. The constitutional infirmity in denying non-class counsel pre-appointment fees and costs for the identical work of class counsel is patently obvious; it deprives those members of the class who did not have their counsel selected as class counsel their due process right to adequate representation. This Court has repeatedly affirmed that adequacy of representation is a basic element of due process. Cf. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members" (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940)); see also Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 388 (1996) ("adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members.") (Ginsburg, J., concurring). This Court emphasized the importance of the adequacy of representation requirement in a case that sought to settle the claims of both present and future asbestos victims. Amchem, 521 U.S. at 625 (1997). In Amchem, this court recognized the adequacy of representation inquiry "also factors in competency and conflicts of class counsel." Amchem, 521 U.S. at 626, n.20 (citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157, n.13 (1962)). In Ortiz, 527 U.S. at 856, this Court again, connected due process rights arising from the adequacy of representation issue (when certifying a class) as a means "to eliminate conflicting interests of counsel." (citing cf. 5 J. Moore, T. Chorvat, D. Feinberg, R. Marmer & J. Solovy, Moore's Federal Practice § 23.25[5][e], p. 23-149 (3d ed. 1998) (an

attorney who represents another class against the same defendant may not serve as class counsel); see also, Ortiz, 527 U.S. at 856, n. 31 ("In Amchem, we concentrated on the adequacy of named plaintiff but recognized that the adequacy of representation inquiry is also concerned 'with competency and conflicts of class counsel'.") (citing, Amchem, 521 U.S. at 626, n. 20)

Allowing two different results for class members, as a result of a decision rendered after approval and after the time to object to the settlement had run, created a legal conflict for class counsel who cannot prefer their own clients over those represented by non-class counsel. See Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1167 (9th Cir. 2013) (explaining counsel in nationwide class action has fiduciary duty to all class members); Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1328 (9th Cir. 2000), cert. denied, 529 U.S. 1066 (2000) (class counsel is fiduciary to the class).

Class representation is inadequate if plaintiff representatives fail to prosecute the action vigorously on behalf of the entire class or have an insurmountable conflict of interest with other class members. Hesse v. Sprint Corp., 598 F.3d 581, 589 (9th Cir. 2000), cert. denied, 562 U.S. 1003 (2010). "The interests of clients 'actually conflict' for purposes of [California Professional Ethics] Rule 3-310 'whenever a lawyer's representation of one of two clients is rendered less effective because of his representation of the other.'" See Rodriguez v. Disner, 688 F.3d 645, 656 (9th Cir. 2012) (citing Gilbert v. Nat'l Corp. for Hous. Partnerships, 71 Cal. App. 4th 1240, 1253 (Cal. Ct. App. 1999)).

Review is intended to address this glaring conflict of interest of class counsel and the due process violations to class members who are represented by non-class counsel.

IV. THE DECISION BELOW FAILS TO OBJECTIVELY EXPLAIN THE BASIS FOR THE DENIAL OF APPLICATIONS BY NON-CLASS COUNSEL FOR AN AWARD OF FEES AND COSTS.

As one esteemed jurist wrote in Loughney v. Hickey, 635 F.2d 1063, 1068 (3d Cir. 1980) (Aldisert, J., concurring):

> In all cases of institutional or precedential consequence, the courts have a duty of reasoned elaboration...

Similarly, in United States v. Fisher, 55 F.3d 481, 487 (10th Cir. 1995), the appellate tribunal criticized the lower court for its failure to elaborate on the reasons for a decision:

> In failing to state his reasons, the judge has, once again, left us in an unwelcome zone of speculation. Judicial action is not an exercise in *ipse dixit* -- the bare assertion of any individual resting not on expressed reason, but merely on the authority vested in an office. According, when a judge takes action, it is fundamental that a basis grounded in law is articulated.

See also, N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966, 972 (5th Cir. 1970) (an articulated discussion of factors which lead court to one rather

than to another result gives strength to the system and reduces, if not eliminates, easy temptation or tendency to ill-considered or even arbitrary action by those having awesome power of almost final review; rule permitting disposition without opinion must be used sparingly and must never be used to avoid difficult or troublesome decision or to conceal divisive or disturbing issues).

In the context of fee awards under a fee-shifting statute, this Court explained that reliance on subjective rather than objective factors "place[s] unlimited discretion in trial judges and [can] produce[] disparate results." Perdue, 559 U.S. at 542, 551 (reversing fee award). As such, district courts awarding fees and costs under a fee shifting statute must provide objective factual and legal bases on which the award was granted or risk widely disparate results and the potential or appearance of bias:

> It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. Unless such an explanation is given, adequate appellate review is not feasible, and without such review, widely disparate awards may be made, and awards may be influenced (or at least, may appear to be influenced) by a judge's subjective opinion regarding particular attorneys or the importance of the case.

Perdue, 559 U.S. at 558.

Such a requirement of providing of objective factual and legal bases for an award of attorneys' fees and costs should extend equally absent a fee shifting statute. Protecting against disparate results and an appearance

of bias is particularly crucial here, where the District Court entered a fee award to class counsel that included a multiplier to counsel's lodestar while denying any fee award for the identical pre- appointment work product of non-class counsel.[2] See Perdue, 559 U.S. at 558 ("But when a trial judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method - providing an objective and reviewable basis for fees - is undermined.") (internal citations omitted).

Here, the Ninth Circuit affirmed the denial of a fee award and costs to non-class counsel based on the District Court's conclusory statements -- absent any reference to the tens of thousands of supportive documents -- that as to pre-appointment time: (1) there "was little to any pretrial activity in the cases filed by non-class counsel, and the filings alone did not materially drive the settlement negotiations with Volkswagen" [App. 67a]; (2) the filing of individual and class complaints in the three month period between the public disclosure and consolidation in the MDL "did not benefit the class" [App. 65a, 67a]; and (3) these efforts, at most, benefitted "individual class members, not the class as a whole." [App. 68a]. Such unsupported conclusions are insufficient bases to award fees and costs under a fee-shifting statute, especially when the award considers a possible lodestar multiplier. Perdue, 559 U.S. at 551-57. More incongruent is the District Court's fee and costs award to class counsel for the identical pre-appointment efforts of non-class counsel. On its face, the District Court's fee and cost denial cannot withstand a "reasonableness" test. Hence, the subjective

2. More unsettling still was the failure of class counsel to provide even time sheets as back up for their fee application while non-class counsel provided some 13,000 pages of back up for their combined 244 fee applications.

statements without more, should provide a basis to reverse any denial of attorneys' fees and costs in a class action. The same analysis should apply regarding reasonableness of fees and costs to non-class counsel as applied to class counsel.

Indeed, because the Ninth Circuit affirmed the District Court's denial of non-class counsel's fees and costs absent any reference to the contemporaneous time records of non-class counsel, such action evinces the absence of an objective basis for the denial of an award by the District Court.

As such, this Court should grant *certiorari* to determine whether the standards recently set forth in Perdue apply: (a) in a non-fee shifting class action; and (b) when there is a denial of fees and costs to non-class counsel when the work of class counsel and non-class counsel is identical.

CONCLUSION

Nagel Rice Petitioners respectfully request that this Court grant their Petition for a Writ of *Certiorari.*

Respectfully submitted,

BRUCE H. NAGEL
Counsel of Record
DIANE E. SAMMONS
NAGEL RICE, LLP
103 Eisenhower Parkway
Roseland, NJ 07068
(973) 618-0400
bnagel@nagelrice.com

Counsel for Petitioners

NAGEL RICE, LLP
HYDE & SWIGART
ATTORNEY PAUL S. ROTHSTEIN
THE DRISCOLL LAW FIRM PC
LAW OFFICES OF MALONEY & CAMPOLO
LAW OFFICES OF SAMUEL W. BEARMAN
SELLERS, SKIEVASKI KUDER, LLP
ARTICE L. MCGRAW, PA
STRONG LAW OFFICES
HABUSH HABUSH & ROTTIER S.C.
HAWKS QUINDEL, S.C.
MAKAREM & ASSOCIATES
HOLTON LAW FIRM

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16020
D.C. No. 3:15-md-02672-CRB

IN RE VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION,

---

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN

Appendix A

JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

BISHOP, HEENAN &DAVIES,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

Appendix A

No. 17-16065
D.C. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS

Appendix A

W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

LAW OFFICE OF MALONEY & CAMPOLO, LLP,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16067
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE;

REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

Appendix A

JAMES BEN FEINMAN; RONALD CLARK FLESHMAN, JR.,

Objectors-Appellants,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16068
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK

ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

LEMBERG LAW, LLC,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

Appendix A

No. 17-16082
D.C. No. 3:15-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS

Appendix A

BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

NAGEL RICE, LLP,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16083
D.C. No. 3:15-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY;

RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

Appendix A

STRONG LAW OFFICES,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16089
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK

ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

HYDE & SWIGART,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

Appendix A

No. 17-16092
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS

Appendix A

W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

THE DRISCOLL FIRM, P.C.,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16099
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE;

REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

Appendix A

VILES AND BECKMAN, LLC,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16123
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE;

Appendix A

DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

HOLTON LAW FIRM, PLLC,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

Appendix A

No. 17-16124
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS

Appendix A

W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

MAKAREM & ASSOCIATES, APLC,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16130
D.C. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE;

REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

Appendix A

LAW OFFICE OF SAMUEL W. BEARMAN, LLC; SELLERS SKIEVASKI KUDER LLP; ARTICE MCGRAW, PA,

Objectors-Appellants,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16132
D.C. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK

WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

HARRELL & NOWAK, LLC,

Objector-Appellant,

v.

Appendix A

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16156
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON

Appendix A

MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

EGOLF FERLIC HARWOOD, LLC,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

Appendix A

No. 17-16158
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS

Appendix A

W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

RYDER LAW FIRM, P.C.,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16172
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE

EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

Appendix A

PAUL S. ROTHSTEIN,

Objector-Appellant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

No. 17-16180
D.C. No. 3:15-md-02672-CRB

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL

EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

HAWKS QUINDEL, S.C.; HABUSH HABUSH & ROTTIER, S.C.,

Objectors-Appellants,

v.

Appendix A

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California.
Charles R. Breyer, District Judge, Presiding.

December 19, 2018, Argued and Submitted
San Francisco, California
January 22, 2019, Filed

Before: MILAN D. SMITH, JR. and JACQUELINE H. NGUYEN, Circuit Judges, and JANE A. RESTANI,* Judge.

Opinion by M. SMITH, JR.

***

OPINION

M. SMITH, Circuit Judge:

Appellants are lawyers and law firms that represented class members in an underlying class action that secured a settlement of more than $10 billion and an additional award

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

of $175 million in fees for class counsel. Non-class counsel filed 244 motions for attorneys' fees. In a single order, the district court denied all of the motions, determining that the lawyers neither performed common benefit work nor followed the proper procedures for compensation. We affirm.[1]

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

On September 18, 2015, the Environmental Protection Agency (EPA) issued a Notice of Violation (NOV) in which it alleged that Defendants-Appellees Volkswagen Group of America, Inc., Volkswagen, AG, and Audi, AG (collectively, Volkswagen) used "defeat devices" in 500,000 Volkswagen- and Audi-branded TDI "clean diesel" vehicles. As the district court later explained,

> [T]he defeat device produces regulation-compliant results when it senses the vehicle is undergoing testing, but operates a less effective

1. Various appellants filed eighteen separate notices of appeal from the district court's order, seventeen of which are consolidated here. (The eighteenth appeal—*Autoport, LLC v. Volkswagen Group of America, Inc.*, No. 17-16066—was later severed from the consolidation and is addressed in a concurrently filed memorandum disposition.) The law firms represented in fifteen of the seventeen consolidated appeals signed on to the brief prepared by Appellants Nagel Rice, LLP and Hyde & Swigart, while Appellants James Ben Feinman and Ronald Clark Fleshman, Jr. submitted their own, separate brief. Appellant Bishop, Heenan & Davies LLC did not sign either of these briefs, and did not submit its own.

> emissions control system when the vehicle is driven under normal circumstances. It was only by using the defeat device that Volkswagen was able to obtain Certificates of Conformity from EPA and Executive Orders from [the California Air Resources Board] for its TDI diesel engine vehicles. In reality, these vehicles emit nitrogen oxides ("NOx") at a factor of up to 40 times over the permitted limit.

Two months later, the EPA issued a second NOV to Volkswagen and Defendant-Appellee Porsche Cars of North America, Inc., which implicated the companies' 3.0-liter diesel engine vehicles.

II. Procedural Background

A. Commencement of Lawsuits

Soon after the issuance of the NOVs, consumers nationwide commenced hundreds of lawsuits. One such action was spearheaded by Appellant Nagel Rice, LLP (Nagel Rice), an illustrative law firm that represented forty-three Volkswagen owners from various states. Nagel Rice filed a complaint in New Jersey federal court on September 21, 2015—three days after the issuance of the first NOV and two months before the eventual consolidation of all related cases. During this early representation, Nagel Rice asserts that it performed various activities related to the litigation, including conducting research, fielding calls from prospective clients and the media, and communicating with German legal counsel regarding potential jurisdictional and evidentiary issues.

Eventually, on December 8, 2015, the Judicial Panel on Multidistrict Litigation consolidated the various lawsuits and transferred them to the U.S. District Court for the Northern District of California. Ultimately, the district court received more than one thousand Volkswagen cases as part of this multidistrict litigation (MDL), titled *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, MDL 2672.

B. Pretrial Orders

On December 9, 2015—the day after the consolidation and transfer—the district court issued its first pretrial order (PTO), in which it announced its intent "to appoint a Plaintiffs' Steering Committee(s) to conduct and coordinate the pretrial stage of this litigation with the defendants' representatives or committee." Nagel Rice was one of the firms that submitted papers to be selected either as Lead Counsel or as a member of the Plaintiffs' Steering Committee (PSC).

The district court selected a twenty-one-member PSC following the application process, and appointed it and Lead Counsel (together, Class Counsel) in its seventh PTO (PTO No. 7). This PTO asserted that "as to all matters common to the coordinated cases, and to the fullest extent consistent with the independent fiduciary obligations owed by any and all plaintiffs' counsel to their clients and any putative class, [] pretrial proceedings shall [be] conducted by and through the PSC."

In its eleventh PTO (PTO No. 11), filed on February 25, 2016, the district court outlined its protocol for common benefit work and expenses. The court explained that "[t]he recovery of common benefit attorneys' fees and cost reimbursements will be limited to 'Participating Counsel,'" which it defined as

> Lead Counsel and members of the Plaintiffs' Steering Committee (along with members and staff of their respective firms), any other counsel authorized by Lead Counsel to perform work that may be considered for common benefit compensation, and/or counsel who have been specifically approved by this Court as Participating Counsel prior to incurring any such cost or expense.

It further elaborated that "Participating Counsel shall be eligible to receive common benefit attorneys' fees and reimbursement of costs and expenses only if the time expended, costs incurred, and activity in question were (a) for the common benefit of Plaintiffs; (b) timely submitted; and (c) reasonable." As to the first requirement—"for the common benefit of Plaintiffs"—the district court explained that

> [o]nly Court-appointed Counsel and those attorneys working on assignments therefrom that require them to review, analyze, or summarize those filings or Orders in connection with their assignments are doing so for the common benefit. *All other counsel are reviewing*

> *those filings and Orders for their own benefit and that of their respective clients and such review will not be considered Common Benefit Work.*

(emphasis added). Class Counsel later reported that "Lead Counsel took advantage of the authority granted in PTO 7 to enlist and authorize nearly 100 additional firms to perform the necessary common benefit work, which was then tracked pursuant to the protocol set forth in PTO 11."[2]

The PTOs' guidance notwithstanding, Nagel Rice claims that, although it was not selected to be Lead Counsel or a member of the PSC, it "appeared telephonically in almost every court appearance relative to the case and provided continual updates to clients via email," and "fielded scores of telephone calls from clients and other class members seeking information relative to the settlement and the process for submitting objections and claims." Similarly, another lawyer, Appellant James Ben Feinman, extensively litigated on behalf of 403 individual clients in Virginia state and federal courts, in addition to monitoring the MDL. There is no indication in the record

2. For example, PSC chair Elizabeth Cabraser attested that "prior to the filing of the Consolidated Consumer Class Action Complaint, [she] requested all firms who had submitted leadership applications and other interested firms to submit information on plaintiffs interested in serving as proposed class representatives. Information on [] nearly 600 plaintiffs was submitted by dozens of firms. All of these firms were asked to submit their time for this effort under PTO 11." (citation omitted).

that Nagel Rice, Feinman, or any other Appellants fully complied with the PTOs in performing these efforts.

C. Settlement Process

Class Counsel, along with ninety-seven additional plaintiffs' firms that Lead Counsel enlisted pursuant to PTO No. 11, embarked on an aggressive settlement process that, in the words of Settlement Master Robert S. Mueller III, "involved at least 40 meetings and in-person conferences at various locations, including San Francisco, New York City, and Washington, DC, over a five-month period. A number of these sessions lasted many hours, both early and late, and weekends were not excluded." The efforts undertaken by this group included drafting a 719-page consolidated class action complaint, selecting class representatives, requesting and reviewing more than 12 million pages of Volkswagen documents, and conducting settlement negotiations.

The district court preliminarily approved the resulting Consolidated Consumer Class Action Settlement (the Settlement) on July 29, 2016. In their motion for preliminary approval, the class action's plaintiffs (Plaintiffs) asserted that "[n]one of the settlement benefits for Class Members will be reduced to pay attorneys' fees or to reimburse expenses of Class Counsel. Volkswagen will pay attorneys' fees and costs separately and in addition to the Settlement benefits to Class Members."

The court filed its final approval of the Settlement on October 25, 2016. As of November 2017—one year before

the end of the claims period—the claims of more than 300,000 class members had been submitted and finalized, resulting in payments of nearly $7 billion.

D. Recovery of Attorneys' Fees

Notably, for purposes of these appeals, section 11.1 of the Settlement read in part as follows:

> Volkswagen agrees to pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as the work performed by other attorneys designated by Class Counsel to perform work in connection with the Action in an amount to be negotiated by the Parties and that must be approved by the Court. . . . If the Parties reach an agreement about the amount of attorneys' fees and costs, Class Counsel will submit the negotiated amount to the Court for approval. . . . The Parties shall have the right to appeal the Court's determination as to the amount of attorneys' fees and costs.

Volkswagen and Class Counsel eventually agreed to an award of $175 million in attorneys' fees and costs, which the district court granted on March 17, 2017.

In November 2016, Volkswagen informed the district court that it had begun receiving "notices of representation from [attorneys] purporting to assert attorneys' fee liens on payments made to certain class

members under" the Settlement. The district court also began to receive motions for attorneys' fees and costs. In response, the court issued an order regarding attorneys' liens (the Lien Order) on November 22, 2016. It noted that a purpose of the Settlement was to "ensure[] Class Members who participate in a Buyback have sufficient cash to purchase a comparable replacement vehicle and thus facilitate[] removal of the polluting vehicles from the road." The court continued,

> An attorneys' lien on a Class Member's recovery frustrates this goal. By diverting a portion of Class Members' compensation to private counsel, a lien reduces Class Members' compensation and places them in a position where they must purchase another vehicle but lack the funds to do so. Put another way, attorneys—notably, attorneys who did not have a hand in negotiating the Settlement—stand to profit while their clients are left with inadequate compensation.

Accordingly, pursuant to its power under the All Writs Act, the district court "enjoin[ed] any state court proceeding relating to an attorneys' lien on any Class Member's recovery under the Settlement."

However, acknowledging that "some attorneys may have provided Class Members with compensable services," the court also established a procedure for recovery of attorneys' fees, requiring "a separate application for each Class Member" that would include "the amount sought; the

specific legal service(s) provided, including time records; and the terms of the fee agreement that require such an award." The court ultimately received 244 applications, including one from Nagel Rice.

Feinman, the Virginia lawyer who continued his litigation activities even after consolidation and appointment of Class Counsel, filed an objection to the Lien Order injunction and requested more time to comply with the procedure for fee applications. In his objection, he explained the propriety of his attorney's lien in Virginia, and called into question the district court's federal question jurisdiction over the claims of his clients. He concluded that "this Honorable Court has no right, authority or power to annul or repeal Virginia law in regard to statutorily-created liens for attorneys' fees. To do so violates the property rights of Mr. Feinman without due process of law, and violates the Full Faith and Credit Clause of the United States."

After reviewing the 244 fee applications, the district court issued an order (the Fee Order) in which it determined that "Volkswagen did not agree to pay these fees and costs as part of the Settlement, and [] Non-Class Counsel have not offered evidence that their services benefited the *class*, as opposed to their individual clients," and consequently denied the motions. The court concluded that "Non-Class Counsel's filing of individual and class complaints prior to the MDL did not benefit the class" because, due to the short time between the first NOV and consolidation of the MDL, little pretrial activity occurred that might have driven settlement negotiations.

It also noted that although "Non-Class Counsel offer[ed] evidence that . . . they fielded hundreds of phone calls from prospective and actual clients," these efforts "at most benefited individual class members, not the class as a whole." As for work undertaken after appointment of Class Counsel, the court determined that, due to its PTOs, "Non-Class Counsel [] were on notice that they would not receive common benefit compensation for these efforts," and had also been informed of the required compensation procedure outlined in PTO No. 11. Finally, the district court concluded that "the time Non-Class Counsel spent advising class members on the terms of the Settlement" was "duplicative of that undertaken by Class counsel, and therefore did not 'confer[] a benefit *beyond* that conferred by lead counsel.'" (alteration in original) (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 191 (3d Cir. 2005)). Consequently, the court denied the 244 fee applications.

In denying the applications, the district court also recognized that "[w]hile Non-Class Counsel are not entitled to fees from Volkswagen as part of this class action, Non-Class Counsel may be entitled to payment of certain fees and costs pursuant to attorney-client fee agreements." Accordingly, the court vacated the Lien Order and its accompanying injunction on state court actions to facilitate such recovery.

These appeals followed.

Appendix A

STANDARD OF REVIEW AND JURISDICTION

An order denying attorneys' fees is reviewed for abuse of discretion. *Lane v. Residential Funding Corp.*, 323 F.3d 739, 742 (9th Cir. 2003). "Findings of fact are reviewed for clear error; conclusions of law are reviewed *de novo*." *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016). We have jurisdiction pursuant to 28 U.S.C. § 1291.

ANALYSIS

Nagel Rice and the other Appellants that signed its brief (collectively, Nagel Appellants) suggest that "[t]his appeal presents an issue of first impression in the Ninth Circuit: whether Independent Counsel who performed services and incurred costs in a multi-district litigation prior to the appointment of Lead Counsel are entitled to an award of fees and costs, or are only the firms appointed to leadership roles entitled to a fee award for services performed prior to their appointment." In truth, however, the central issue before us is narrower: whether the district court abused its discretion when it denied Appellants' motions for attorneys' fees. Appellants' challenges to the Fee Order raise various legal issues, which we will address in turn.

I. Standing

As a threshold matter, Volkswagen argues that Appellants lack standing to appeal. It premises this contention on our previous determination that "the right to seek attorney's fees [is vested] in the prevailing party,

not her attorney, and [] attorneys therefore lack standing to pursue them." *Pony v. County of Los Angeles*, 433 F.3d 1138, 1142 (9th Cir. 2006). Because Appellants are law firms and lawyers that appeal in their own names (with the exception of Appellant Ronald Clark Fleshman, Jr., who is one of Feinman's clients and joins his attorney's appeal), Volkswagen contends that Appellants lack standing to vindicate a right that is properly vested with their clients, the underlying class members.

We disagree. Nagel Appellants correctly observe that the cases on which Volkswagen relies, *Pony* included, concerned *statutory* attorneys' fees provisions. *See Pony*, 433 F.3d at 1142 (discussing fees authorized pursuant to 42 U.S.C. § 1988). Here, by contrast, Appellants did not seek fees pursuant to statute, and so we cannot base our conclusion on *Pony* or other similar cases.

Instead, we conclude that, as a matter of first principles, Appellants have the most compelling case for standing because they suffered an injury (deprivation of attorneys' fees) that was caused by the conduct complained of (the Fee Order) and would be redressed by judicial relief. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *cf. Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1088-89 (9th Cir. 2011) (concluding that class plaintiffs in a non-common fund case lacked standing to appeal an attorneys' fee award to class counsel because it did not affect class plaintiffs' recovery and so they were not "'aggrieved' by the fee award" (quoting *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994))).

Here, Appellants were aggrieved by the district court's denial of their motions for attorneys' fees. Therefore, we conclude that Appellants properly have standing to challenge the Fee Order.[3]

II. The Fee Order

Federal Rule of Civil Procedure 23 permits a court to "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

---

3. We note that Nagel Appellants premise their standing argument on cases involving common settlement funds, from which both the Supreme Court and this court have acknowledged that litigants *and* lawyers have a right to recover fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980); *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). However, as the district court correctly noted, "[t]he Settlement's Funding Pool is not a traditional common fund from which settlement proceeds are to be paid . . . . Volkswagen agreed to pay Plaintiffs' fees and costs in addition to the payments to the Class rather than from the fund created for payments to the Class." *Cf.* 5 William B. Rubenstein, *Newberg on Class Actions* § 15:53 (5th ed. 2018) ("[I]n common fund cases the prevailing litigants [pay] their own attorney's fees . . . . [T]he common fund doctrine allows a court to distribute attorney's fees *from the common fund that is created for the satisfaction of class members' claims* . . ." (emphasis added)). Although Nagel Appellants invoked the common fund doctrine in their brief, their counsel at oral argument clearly stated that they sought fees not from the $10 billion-plus class settlement, but instead from the separate $175 million fee recovery that Volkswagen paid Class Counsel. Absent a traditional common fund from which both class members *and* Class Counsel drew money, this is not a traditional common fund case, and so Nagel Appellants cannot rely on common fund precedent as controlling when different considerations apply to standing in non-common fund cases.

Fed. R. Civ. P. 23(h). Various courts, including our own, have determined that even non-class counsel can be entitled to attorneys' fees. *See, e.g., Stetson*, 821 F.3d at 1163-65 (9th Cir. 2016) (indicating that an objector can be entitled to attorneys' fees in a class action); *In re Cendant*, 404 F.3d at 195 (concluding that an attorney who "creates a substantial benefit for the class" can be "entitled to compensation whether or not chosen as lead counsel").

Although Rule 23 permits an award of fees when authorized by law or the parties' agreement, courts

> have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount. The reasonableness of any fee award must be considered against the backdrop of the "American Rule," which provides that courts generally are without discretion to award attorneys' fees to a prevailing plaintiff unless (1) fee-shifting is expressly authorized by the governing statute; (2) the opponents acted in bad faith or willfully violated a court order; or (3) "the successful litigants have created a common fund for recovery or *extended a substantial benefit to a class*."

In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011) (emphasis added) (citations omitted) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 275, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) (Marshall, J., dissenting)). Here, there is no dispute that

neither the first nor the second scenario is applicable. Therefore, Appellants would be entitled to attorneys' fees only if they contributed to the creation of a common fund or otherwise benefited the class. Because the underlying class action did not feature a traditional common fund from which attorneys' fees were procured,[4] Appellants could only have collected fees if they provided a substantial benefit to the class, as the district court correctly recognized. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051-52 (9th Cir. 2002) ("Because objectors did not . . . substantially benefit the class members, they were not entitled to fees." (citing *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 847 P.2d 440, 449-50 (Wash. 1993))).

This is the central issue across the consolidated appeals: whether Appellants' efforts meaningfully benefited the class, and whether the district court abused its discretion when it concluded that they did not and denied their fee motions on that basis.

A. Common Benefit Work

We ultimately conclude that the district court did not abuse its discretion when it determined that the efforts of non-Class Counsel for which they sought fees did not benefit the class such that they would be entitled to compensation.

In their reply brief, Nagel Appellants summarize the efforts for which they sought reimbursement:

---

4. *See supra* note 3.

- Commencing hundreds of lawsuits nationwide after public disclosure of the first NOV and before the advent of the MDL;

- Filing motions, including "at least four motions to preserve evidence" and "at least three motions for interim lead counsel positions";

- Conducting early settlement efforts prior to consolidation;

- Conducting preliminary discovery;

- Presenting "at least eight conferences for attorneys across the country to analyze, discuss, and refine approaches to bringing the cases";

- Securing the appointment of two mediators in several New Jersey actions prior to consolidation;

- Researching potential causes of action;

- "Fielding and vetting [] hundreds of phone calls from prospective clients," as well as press inquiries;

- Communicating and coordinating with other attorneys;

- "Communicating with prospective German legal counsel regarding potential jurisdiction issues and possible efforts to secure key evidence from a foreign country";

- "[A]ppearing in New Orleans with a group of other local law firms to argue in support of the transfer and consolidation of all the cases to the State of New Jersey, where [Volkswagen] is incorporated and where it maintains key management offices";

- Appearing telephonically in court appearances and providing updates to clients after the appointment of Class Counsel.

Our analysis will first consider those efforts undertaken prior to the appointment of Class Counsel, before addressing work performed subsequently.

i. Work Before Appointment of Class Counsel

As Plaintiffs correctly note, "[E]ven assuming these activities are all attributable to the Appellants, [they] fail to establish how, precisely, these activities benefitted the Class. This shortcoming is fatal to Appellants' appeals." In *In re Cendant*, a case on which Nagel Appellants frequently rely, the court distinguished between work that benefits a class and other, non-compensable work:

> [W]e do not think that attorneys can simply manufacture fees for themselves by filing a complaint in a securities class action. On the other hand, attorneys who alone discover grounds for a suit, based on their own investigation rather than on public reports, legitimately create a benefit for the class, and

> comport with the purposes of the securities laws. Such attorneys should generally be compensated out of the class's recovery, even if the lead plaintiff does not choose them to represent the class. More generally, attorneys whose complaints contain factual research or legal theories that lead counsel did not discover, and upon which lead counsel later rely, will have a claim on a share of the class's recovery.

404 F.3d at 196-97 (footnote omitted). Undoubtedly, Appellants undertook various pre-consolidation efforts on behalf of *their individual clients*, but there is no indication, either in the voluminous record they provided or in the briefs, that this work contributed to the negotiation or crafting of the Settlement or otherwise benefited the class in any meaningful way. Appellants may have filed complaints and conducted preliminary discovery and settlement work on behalf of their clients before consolidation of the MDL and appointment of Class Counsel, but they do not appear to have discovered grounds for suit outside of the information contained in the widely publicized NOVs, or otherwise provided guidance or insights that were later used in securing the Settlement. In short, Appellants have not demonstrated that, in Plaintiffs' words, "they engaged in serious settlement efforts, much less that any such efforts contributed to the class settlement framework that was ultimately reached, approved, and successfully implemented." Therefore, the district court did not abuse its discretion when it concluded that there "was little to any pretrial activity in the cases filed by Non-Class Counsel, and the filings

alone did not materially drive settlement negotiations with Volkswagen."[5]

ii. Work After Appointment of Class Counsel

Nagel Appellants indicate that most of their post-appointment efforts consisted of fielding inquiries from prospective clients, explaining the process and mechanics of the Settlement, and "remain[ing] updated on the case." Such work was specifically mandated by PTO No. 11, which also emphasized that "[o]nly Court-appointed Counsel and those attorneys working on assignments therefrom that require them to review, analyze, or summarize those filings or Orders in connection with their assignments are doing so for the common benefit. *All other counsel are reviewing those filings and Orders for their own benefit and that of their respective clients and such review will not be considered Common Benefit Work*." (emphasis added). The district court applied similar restrictions to attendance at status conferences ("Individual attorneys are free to attend any status conference . . . but except for Lead Counsel and members of the Plaintiffs' Steering Committee or their designees, attending and listening

5. Although Nagel Appellants claim that Class Counsel's work "consisted of combining/duplicating the work of others to file an amended complaint followed by their negotiation of the terms of the settlement and the preparation of settlement documents," and thus "was *ipso facto* the ongoing work by all counsel in the early months following the September 2015 public disclosure of the cheat devices," this assertion is countered by Class Counsel's motion for attorneys' fees, which recounted their extensive, non-duplicative efforts on behalf of the Settlement.

to such conferences is not compensable Common Benefit Work"), pleading and brief preparation (the court specified that "factual and legal research and preparation of *consolidated* class action complaints and related briefing" would be compensable), and attendance at seminars ("Except as approved by Lead Counsel, attendance at seminars . . . shall not qualify as Common Benefit Work"). (emphasis added). Therefore, under the PTOs issued pursuant to the managerial authority possessed by the district court, Appellants' post-appointment work did not benefit the class and hence was not compensable.

No Appellant challenges the PTOs or the district court's authority to issue them. Indeed, the Federal Judicial Center has noted that a court will often "need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation," and further encouraged that "[e]arly in [complex] litigation, the court should define designated counsel's functions, determine the method of compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions." *Manual for Complex Litigation* §§ 10.22, 14.215 (4th ed. 2004); *see also Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) ("It is well established that '[d]istrict courts have inherent power to control their docket.'" (alteration in original) (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998))); *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1388

(9th Cir. 1986) (permitting district court's pretrial order to govern recovery of attorneys' fees). Accordingly, given the district court's inherent power to manage the MDL, as well as its discretion in granting attorneys' fees, there is no dispute that Appellants were required to abide by the PTOs, including PTO No. 11. We are told that nearly 100 other law firms followed the PTOs, and received compensation accordingly. But there is no indication in the record before us that Appellants fully adhered to the PTOs' guidance and procedures.

iii. Summation

Ultimately, we agree with Plaintiffs' summary of the work undertaken by Appellants and attested to by the voluminous documentation provided to the district court:

> Appellants chose to represent individual clients who were Class Members in a consolidated class action prosecuted by a leadership team appointed by the District Court. In so choosing, these attorneys knowingly undertook work that the District Court had correctly concluded would inure only to the benefit of their individual clients, and not to the Class as a whole. In other words, these lawyers knew that, although their work might establish a right to recovery under their respective attorney-client agreements and subject to the ethical constraints on lawyers, it would not be compensable through any petition in the MDL.

Appellants point to nothing in the 13,000-page record that indicates that the work they performed on behalf of their individual clients, either before or after appointment of Class Counsel, informed the Settlement or otherwise benefited the class.[6] Furthermore, the district court explicitly precluded compensation for many of these efforts in its PTOs.[7]

As the Third Circuit concluded in *In re Cendant*, "The mere fact that a non-designated counsel worked diligently and competently with the goal of benefiting the class is *not* sufficient to merit compensation. Instead, only attorneys 'whose efforts create, discover, increase, or preserve' the class's ultimate recovery will merit compensation from that recovery." 404 F.3d at 197 (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 n.39 (3d Cir. 1995)). Here, the record clearly indicates that Appellants worked diligently and presumably competently for their clients.

---

6. In their reply brief, Nagel Appellants suggest that one firm, Appellant Ryder Law Firm, P.C. (Ryder), benefited the class by "provid[ing] the Court with comments in relation to the proposed settlement." However, the excerpts of the record to which Nagel Appellants point do not demonstrate that Ryder actually did this, let alone that its contributions were utilized in any way by Class Counsel, Volkswagen, or the district court.

7. Additionally, the district court expressly set forth a process through which non-Class Counsel could receive reimbursement for any work that was "for the common benefit of Plaintiffs," was "timely submitted," and was "reasonable." However, no Appellant argues that it was authorized by Lead Counsel to perform work, of common benefit or otherwise, and then submitted time records as required by the district court's protocol.

But because there is no indication that any of these efforts actually benefited the class and complied with the PTOs, the district court did not abuse its discretion, by either applying the wrong law or relying on erroneous factual determinations, when it denied Appellants' motions for attorneys' fees.

B. Additional Arguments

Nagel Appellants advance three additional arguments as to how the district court abused its discretion when it issued the Fee Order.[8] We will consider each in turn.

i. Explanation of Denial

Nagel Appellants assert that "[t]he District Court should have, but did not, support its denial with a clear

8. In the "Issues Presented" section of their opening brief, Nagel Appellants identify a fourth additional issue: "whether the District Court erred in the selection of the lead firms by requesting that the firms indicate the support of other firms applying for the appointment and considering this 'popularity' factor." However, they provide no substantive argument to accompany this issue, either in that introductory section or anywhere else in the brief, and the issue is not raised in the opposition briefs or in Nagel Appellants' reply. We will therefore treat the issue as waived. *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1424 (9th Cir. 1994) ("[L]ack of argument waives an appeal of [an] issue."). Incidentally, a district court's selection of class counsel is reviewed for abuse of discretion, *see Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 634-35 (9th Cir. 2018), and we see no indication that the district court's consideration of this or any other factor when it selected Class Counsel constituted such an abuse.

explanation based upon an evaluation of the underlying fee petitions. This was legal error." We disagree. The district court was required only to "articulate with sufficient clarity the manner in which it ma[de] its determination." *Carter v. Caleb Brett LLC*, 757 F.3d 866, 869 (9th Cir. 2014) (quoting *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988)); *see also McGinnis v. Ky. Fried Chicken of Cal.*, 51 F.3d 805, 809 (9th Cir. 1994) (determining that "when ruling on the appropriate amount of fees, no rote recitation [of factors] is necessary" where the court's "decision gives [] no basis for doubting that [it] was familiar with controlling law" and there is no "factor which the judge failed to consider"). Here, the district court sufficiently explained its decision. It first set forth the guidance provided by Rule 23 and relevant appellate decisions, and then accurately described the various work Appellants performed both before and after the appointment of Class Counsel—none of which constituted "evidence that their services benefited the class as a whole." This is all that we require: a description of the applicable standard and an engagement with the facts as illustrated by the fee motions. It would be unreasonable to expect the court to undertake an extensive analysis of each individual motion[9] when all that is needed is engagement with the controlling law and explanation of the court's reasoning. As Volkswagen notes, "The fact that Appellants' fee motions were all found deficient for similar reasons does not make the District Court's ruling insufficiently reasoned." Because the district court's order

9. In the aggregate, these 244 motions included more than 13,000 pages of supporting documentation.

supplied the necessary level of explanation for its decision, it did not abuse its discretion in this regard.

ii. Parties' Agreement

Noting that Rule 23 permits recovery of fees "that are authorized . . . by the parties' agreement," Fed. R. Civ. P. 23(h), Nagel Appellants contend that the district court incorrectly concluded that Volkswagen did not agree to pay the fees at issue here as part of the Settlement. But the Settlement clearly provided only that "Volkswagen agrees to pay reasonable attorneys' fees and costs for work performed *by Class Counsel* in connection with the Action as well as the work performed *by other attorneys designated by Class Counsel* to perform work in connection with the Action." (emphases added). No other document filed as part of the Settlement indicates any additional commitment on Volkswagen's part. Although Nagel Appellants suggest that class members were "led to believe—via the Settlement Agreement—that their attorneys would be reasonably compensated by Defendants,"[10] this proposition is belied by the Settlement's Long Form Notice, which read,

> Class Counsel will represent you at no charge to you, and any fees Class Counsel are paid will not affect your compensation under this

10. This assertion is apparently based on language in the Long Form Notice that indicated that "Volkswagen will pay attorneys' fees and costs in addition to the benefits it is providing to the class members in this Settlement." However, on the previous page, the Notice specified that only Class Counsel would receive those fees.

> Class Action Settlement. *If you want to be represented by your own lawyer, you may hire one at your own expense.* It is possible that you will receive less money overall if you choose to hire your own lawyer to litigate against Volkswagen rather than receive compensation from this Class Action Settlement.

(emphasis added).[11] Accordingly, there was no agreement between the parties, either explicit or implicit, that Volkswagen would compensate Appellants for their efforts.

iii. Quantum Meruit and Unjust Enrichment

Lastly, Nagel Appellants suggest that the district court erred when it failed to consider the equitable principles of quantum meruit and unjust enrichment. However, although a court's power to award attorneys' fees might be derived from equity, the existence of this power alone does not vitiate the long-recognized requirement that the work of a lawyer in a case like this must benefit the class. If, as the district court concluded, Appellants did not provide a substantial benefit, then

---

11. Nagel Appellants note that this language appeared under the heading "Do I need to hire my own attorney . . . ?" and therefore, "[g]iven that Independent Counsel had already been retained prior to the Notice, Class Members would assume the provision, expressed in a future tense, did not apply." But however misleading the Long Form Notice might have been on this point, this ambiguity certainly did not constitute an agreement that Volkswagen would pay non-Class Counsel's fees.

neither the class members nor Class Counsel would have been unjustly enriched at Appellants' expense. Nagel Appellants' invocation of quantum meruit therefore only begs the original question of whether non-Class Counsel's efforts benefited the class. As they did not, no unjust enrichment occurred.

III. The Lien Order

Feinman, in his separate brief, ostensibly appeals, like the other Appellants, from the Fee Order. He indicates that "[t]his is an appeal from the United States District Court for the Northern District of California in which the trial court determined Volkswagen is not required to pay Non-Class Counsel attorney fees and costs." However, the main focus of his appeal, as evidenced by his preliminary statement, is the "injunction issued by the District Court for the Northern District of California in the Volkswagen Clean Diesel litigation enjoining efforts to assert attorney fee lien claims under State law"—the Lien Order. It is that injunction, and not the Fee Order, that is the basis of Feinman's various arguments: that the injunction violated the Anti-Injunction Act; that the district court did not have subject matter jurisdiction to issue the injunction as to his Virginia lien; that the injunction had the effect of imposing the cost of removing polluting vehicles from the roadway on him; that the injunction was premised on an unfounded legal premise; that the injunction violated his due process rights; and that the injunction violated the Fifth Amendment. Indeed, Feinman's conclusion and request for relief references only the Lien Order and *not* the Fee Order.

The district court already vacated the Lien Order and its injunction, and so they are no longer in effect. Therefore, all of the issues contained in Feinman's brief were rendered moot, and we need not consider them. *See Berkeley Cmty. Health Project v. City of Berkeley*, 119 F.3d 794, 795 (9th Cir. 1997) ("Because the district court has vacated its preliminary injunction, this appeal is dismissed as moot."). Both Feinman's opening brief and his reply brief demonstrate that he is, in effect, asking us for an advisory opinion: "What Feinman wants from this appeal is a ruling that nothing the Northern District of California Court ruled can prohibit Feinman from seeking to enforce his attorney fee lien rights against Defendant Volkswagen. . . . Feinman has no interest in violating a Federal Court injunction and merely seeks to assert his claim in Virginia State Courts free from jeopardy." He even concedes that "[i]f the concession of Volkswagen and the Plaintiff-Appellees that the issue is moot makes it so Feinman can have the relief requested, there is no need to go further." There is no doubt that the issues he raised are indeed moot. Whether he "can have the relief requested"—which is to say, a lien against Volkswagen pursuant to Virginia law—is not an issue properly before us.[12]

---

12. We might infer from Feinman's opening brief that his jurisdictional challenge applies to the Fee Order as well as the vacated injunction. Such an argument would have no merit. We have held that "[a] transferee judge exercises all the powers of a district judge in the transferee district under the Federal Rules of Civil Procedure," which includes "authority to decide all pretrial motions, including dispositive motions such as motions to dismiss, motions for summary judgment, motions for involuntary dismissal under Rule

CONCLUSION

We are sympathetic to Appellants, and have no doubt that many of them dutifully and conscientiously represented their clients. This is not necessarily a case where latecomers attempt to divide spoils that they did not procure.[13] But Appellants' efforts do not entitle them to compensation from the MDL, when the record indicates that they did not perform work that benefited the class, and that they neglected to follow the protocol mandated by the district court. We commend the district court's efforts to successfully manage a massive and potentially ungainly MDL, and conclude that the court did not abuse its discretion when it determined that Appellants were not entitled to compensation.

Accordingly, we AFFIRM the district court's denial of Appellants' motions for attorneys' fees.

41(b), motions to strike an affirmative defense, *and motions for judgment pursuant to a settlement*." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230-31 (9th Cir. 2006) (emphasis added); *see also K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 968 (9th Cir. 2014) ("There is no debate that a federal court properly may exercise ancillary jurisdiction 'over attorney fee disputes collateral to the underlying litigation.'" (quoting *Fed. Sav. & Loan Ins. Corp. v. Ferrante*, 364 F.3d 1037, 1041 (9th Cir. 2004))). Therefore, the district court had jurisdiction over the attorneys' fees motions.

13. *See generally* Florence White Williams, *The Little Red Hen* (1918).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED APRIL 24, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MDL No. 2672 CRB (JSC)

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

ORDER DENYING NON-CLASS COUNSEL'S MOTIONS FOR ATTORNEYS' FEES

This Order Relates To: ALL ACTIONS (except the securities action)

Six months ago, this Court approved a settlement between Volkswagen and owners and lessees of certain model Volkswagen and Audi 2.0-liter TDI diesel vehicles, resolving claims predicated on Volkswagen's use of a "defeat device" in those vehicles—software designed to cheat emissions tests. Shortly after final approval of the 2.0-liter Settlement, plaintiffs' Lead Counsel, and the 21 other attorneys the Court appointed to the Plaintiffs' Steering Committee ("PSC," and together with Lead Counsel, "Class Counsel"), filed a motion for $167 million in attorneys' fees and $8 million in costs on behalf of "all counsel performing common benefit services under the provisions of [Pretrial Order No.] 11" for work performed in connection with the consolidated class action complaint

and resulting settlement. (Dkt. No. 2175 at 5.) The Court granted Class Counsel's motion in March. (Dkt. No. 3053.)

Now before the Court are 244 motions for attorneys' fees and costs filed by attorneys who did not serve as Class Counsel, and who were not compensated out of the $175 million ultimately awarded for common benefit work (collectively referred to as "Non-Class Counsel").[1] Non-Class Counsel, in many instances, filed complaints against Volkswagen in courts throughout the United States prior to consolidation of the litigation before this Court. Before and after the Court appointed Class Counsel, Non-Class Counsel also monitored the proceedings, and ultimately advised their clients on the Settlement's terms. For these services, they seek attorneys' fees and costs from Volkswagen. Because Volkswagen did not agree to pay these fees and costs as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the *class*, as opposed to their individual clients, the Court DENIES the motions. To the extent that Non-Class Counsel seek to enforce their fee agreements with individual clients, however, they may bring such claims in an appropriate venue.

BACKGROUND

After the public learned in September 2015 that Volkswagen had installed defeat devices in its "clean diesel" 2.0-liter TDI vehicles, ligation quickly ensued. Attorneys filed complaints against Volkswagen on behalf

1. A list of the docket entries for the 244 motions is attached to this Order as an Appendix.

of consumers across the country, and government entities launched criminal and civil investigations. (*See* Dkt. No. 1609 at 11.) On December 8, 2015, the Judicial Panel on Multidistrict Litigation transferred all related federal actions to this Court, where more than 1,200 cases have since been consolidated. (*See* Dkt. No. 2175-1 ¶ 3.)

In January 2016, the Court appointed Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein, LLP as Plaintiffs' Lead Counsel and as Chair of the PSC, to which the Court also named 21 other attorneys. (*See* Pretrial Order No. 7, Dkt. No. 1084.) The Court tasked the PSC with conducting and coordinating the MDL litigation, but vested Lead Counsel with authority to retain the services of other attorneys to perform work for the benefit of the class. (*See id.* ¶ 2; Pretrial Order No. 11, Dkt. No. 1254 at 1-2.)

In the months that followed, Class Counsel prosecuted the consumers' civil cases and worked with Volkswagen, federal and state agencies, and the Court appointed Settlement Master, to try and resolve the claims asserted. (*See* Dkt. No. 1609 at 11-12.) Class Counsel filed initial and amended consolidated class action complaints, conducted common discovery, and ultimately negotiated the 2.0-liter Settlement with Volkswagen (Dkt. No. 1685), which the Court approved on October 25, 2016. (Dkt. No. 2102.) With regard to attorneys' fees and costs, the Settlement Agreement provides that Volkswagen will "pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as work performed by other attorneys designated by Class Counsel

to perform work in connection with the Action . . . ." (Dkt. No. 1685 ¶ 11.1.) The Settlement Agreement defines Class Counsel as "Lead Counsel [*i.e.*, Ms. Cabraser] and the PSC." (*Id.* ¶ 2.19.)

In early November 2016, Class Counsel filed a motion seeking $167 million in attorneys' fees and $8 million in costs on behalf of "all counsel performing common benefit services under the provisions of [Pretrial Order No.] 11." (Dkt. No. 2175 at 5.) In addition to seeking fees for work performed by the PSC, the motion also sought fees for the work of nearly 100 other law firms who Lead Counsel authorized to perform common benefit work. (*See* Dkt. No. 2175-1 ¶ 7.) The common benefit work included not only time spent drafting pleadings and participating in negotiations, but also time spent communicating with class members, which includes 20,000 communications between PSC attorneys and class members. (*Id.* ¶ 3.) Class Counsel's fees motion also included 21,287 hours of reserve time to cover work necessary to "guide the hundreds of thousands of Class Members through the remaining 26 months of the Settlement Claims Period." (*Id.* ¶ 15.) Recognizing that counsel had achieved an extraordinary result for the class and the public as a whole, the Court granted the fees motion in March of this year. (Dkt. No. 3053 at 3.)

At the time the Court awarded fees, it noted that various class members' private attorneys—i.e., Non-Class Counsel—had also filed motions for fees and costs. (*Id.* at 2 n.1.) Some non-class attorneys began filing these motions even before the Court approved the 2.0-liter Settlement (*see, e.g.*, Dkt. No. 2029, filed on October 13, 2016), while

the bulk of the motions were filed in late December 2016 and early January 2017. Some non-class attorneys initially took a different approach, placing liens on several class members' settlement proceeds. (*See* Dkt. No. 2159.) The Court, in two related orders, enjoined any state court action seeking to enforce feerelated liens, assignments, trust-account agreements, or other means that could diminish class members' recovery under the Settlement. (Dkt. Nos. 2247, 2428.) The Court also ordered Volkswagen to pay class members the full amount to which they were entitled under the terms of the Settlement. (*Id.*)

In total, Non-Class Counsel have now filed 244 motions for attorneys' fees and costs. The motions vary in length and detail, but ultimately raise similar bases for relief. A significant number of the motions seek fees for time spent filing individual and class complaints against Volkswagen prior to the centralization of proceedings before this Court.[2] Many of the motions also seek fees for time spent communicating with class members—both before and after the Court appointed Class Counsel—monitoring MDL proceedings, and ultimately advising clients on the 2.0-liter Settlement.[3]

---

2. (*See, e.g.*, Dkt. No. 2272 at 5 ("We were one of the first filed complaints in the Commonwealth of Pennsylvania."); Dkt. No. 2531 (filed putative class action complaint in the Central District of Illinois); Dkt. No. 2588 (filed putative class action complaint in the Eastern District of Virginia); Dkt. No. 2729 (filed complaints in 14 district courts on behalf of 697 individuals who purchased Volkswagen vehicles).)

3. (*See, e.g.*, Dkt. No. 2696 ("Met and corresponded with Plaintiff regarding his individual claims, settlement, and various other issues arising during [the] course of this litigation."); Dkt.

Appendix B

On February 13, 2017, Volkswagen filed an omnibus opposition to Non-Class Counsel's motions for attorneys' fees and costs. (Dkt. No. 2903.) Volkswagen argues that it has no obligation to pay the fees of Non-Class Counsel under the Settlement or governing law. Non-Class Counsel responded by filings numerous reply briefs in support of their motions.[4]

DISCUSSION

The question at issue is whether the Court should require Volkswagen to pay Non-Class Counsel attorneys' fees and costs as a result of the 2.0-liter Settlement. Because Volkswagen did not agree to pay these fees, and because Non-Class Counsel's work did not benefit the class as a whole, the answer is no.

No. 2532 ("Counsel[ed] and advise[d] the Class Member as to developments in the [MDL]" and the "'pros and cons' of the [Settlement]."); Dkt. No. 2648 at 6 (participated in "discussions with class members after each hearing and regarding the Settlement").)

4. Many non-class attorneys argue in their reply briefs that the Court should disregard Volkswagen's opposition as untimely. (*See, e.g.*, Dkt. No. 2927 at 2-3; Dkt. No. 2952 at 2.) Volkswagen filed its omnibus opposition on February 13, 2017, more than 14 days after each nonclass attorney filed his or her motion. *See* Local Rule 7-3(a). Under the unique circumstances at issue, however, where Volkswagen needed to respond to 244 separate motions, and where these motions were filed on a rolling basis, the Court concludes that Volkswagen filed its opposition within a reasonable period of time. In the future, however, Volkswagen (and other parties seeking to file pleadings outside of the time periods prescribed in the Local Rules) should seek leave in advance to file late pleadings.

Appendix B

Federal Rules of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The second of these two avenues clearly does not apply here, because Volkswagen did not agree to pay the fees at issue as part of the Settlement Agreement. The Settlement Agreement provides that Volkswagen will "pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as work performed by other attorneys *designated by Class Counsel* to perform work in connection with the Action." (Dkt. No. 1685 ¶ 11.1 (emphasis added).) Non-Class Counsel are, by definition, not "Class Counsel," nor do they assert that the fees at issue are for work "designated by Class Counsel." Non-Class Counsel therefore cannot demonstrate that an award of attorneys' fees and costs is "authorized . . . by the parties' agreement." Fed. R. Civ. P. 23(h).[5]

The first avenue under Rule 23(h)—that the Court may award fees and costs that are authorized by law—also does not apply. In "common fund" cases, a court may

5. At least one non-class law firm has offered evidence that it provided substantive information to PSC counsel upon request. (*See* Dkt. No. 2176-2 ¶ 8.) That law firm, however, does not currently seek compensation for that work, for which it may have already been compensated as part of the award of attorneys' fees made to Class Counsel. Other non-class attorneys assert that they made suggestions to the PSC regarding the language used in the consolidated class action complaints. (*See, e.g.*, Dkt. No. 2316.) Those attorneys, however, have not submitted evidence that Lead Counsel requested and authorized this work.

award non-class counsel a reasonable attorney's fee only if counsel's work conferred a benefit on the *class*, as opposed to on an individual client. *See In re Cendant Corp. Secs. Litig*, 404 F.3d 173, 191 (3d Cir. 2005) ("Non-lead counsel will have to demonstrate that their work conferred a benefit on the class *beyond* that conferred by lead counsel." (emphasis in original)); *Gottlieb v. Barry*, 43 F.3d 474, 489 (10th Cir. 1994) (holding that non-lead counsel should receive compensation if "they have . . . conferred a benefit on the class"); *cf. Stetson v. Grissom*, 821 F.3d 1157, 1164 (9th Cir. 2016) (holding that, to be entitled to an award of attorneys' fees, an objector "must increase the fund or otherwise substantially benefit the class members" (internal quotation marks omitted)). Non-Class Counsel have not made such a showing here.

First, Non-Class Counsel's filing of individual and class complaints prior to the MDL did not benefit the class. These cases were consolidated before this Court as part of a multidistrict litigation less than three months after the public disclosure of Volkswagen's use of a defeat device. And approximately four months after the disclosure, the Court appointed Class Counsel to prosecute the consolidated consumer class action. There consequently was little to any pretrial activity in the cases filed by Non-Class Counsel, and the filings alone did not materially drive settlement negotiations with Volkswagen. *See In re Cendant*, 404 F.3d at 191, 196, 204 (explaining that non-class counsel should not normally be compensated for "fil[ing] complaints and otherwise prosecut[ing] the early stages of litigation," which is best viewed as an "entrepreneurial effort," rather than as work that benefits the class). The relatively short time period between the

public disclosure of Volkswagen's use of a defeat device and the consolidation of proceedings also distinguishes this case from *Gottlieb*, 43 F.3d at 488-89, where the Tenth Circuit reversed a district court order that did not award fees to non-class counsel who had "vigorously pursued [numerous] cases for *sixteen months* before class counsel was designated." *Id.* at 488 (emphasis added). Here, by contrast, Non-Class Counsel simply did not have the time needed to materially impact the consolidated class proceedings.

Second, Non-Class Counsel offers evidence that, before the appointment of Class Counsel, they fielded hundreds of phone calls from prospective and actual clients, and consulted with prospective class members about their potential legal claims. While undoubtedly requiring time and effort, this work at most benefited individual class members, not the class as a whole. *See, e.g.*, *In re Auction Houses Antitrust Litig.*, No. 00-CIV-0648., 2001 WL 210697, at *4 (S.D.N.Y. Feb. 26, 2001) (finding no reason "for the class as a whole to compensate large numbers of lawyers for individual class members for keeping abreast of the case on behalf of their individual clients"). Further, the significant majority of 2.0-liter class members did not retain private counsel. In the 244 motions at issue, counsel seek fees for their work representing 3,642 class members, which represents only 0.74 percent of the total class of 490,000. (*See* Dkt. No. 1976 at 6.) That such a small percentage of class members actually retained Non-Class Counsel makes it even less likely that Non-Class Counsel's services benefited the class as a whole.

Third, Non-Class Counsel seek fees and expenses for services provided after the Court appointed Class Counsel, including time spent monitoring class proceedings, keeping class members informed, and ultimately advising class members on the terms of the proposed Settlement. Similar to Non-Class Counsel's efforts prior to the appointment of Class Counsel, the Court "cannot see how the monitoring itself benefits the class as a whole, as opposed to the attorney's individual client." *In re Cendant Corp.*, 404 F.3d at 201. Further, after this Court appointed Class Counsel, it explained that only "Court-appointed Counsel and those attorneys working on assignments . . . that require them to review, analyze or summarize . . . filings or Orders [in these proceedings] are doing so for the common benefit." (Dkt. No. 1253 at 4.) Non-Class Counsel therefore were on notice that they would not receive common benefit compensation for these efforts.

As for the time Non-Class Counsel spent advising class members on the terms of the Settlement, this work was duplicative of that undertaken by Class Counsel, and therefore did not "confer[] a benefit *beyond* that conferred by lead counsel." *In re Cendant Corp.*, 404 F.3d at 191. As noted in Class Counsel's motion for attorneys' fees, by the time the Court approved the 2.0-liter Settlement, the law firms comprising the PSC had logged over 20,000 communications with class members, responding to questions and requests for information. (*See* Dkt. No. 2175-1 ¶ 3.) Additionally, as part of an expansive Settlement Notice Program, the parties established a Settlement call center and website, which—as of the final Settlement approval hearing on October 18, 2016—had respectively received more than 130,000 calls and more than 1 million visits. (*See* Dkt. No. 2102 at 26.) Lead Counsel's fees award

also included 21,287.4 hours of reserve time to cover additional work necessary to, among other things, guide the class members through the remaining Settlement Claims Period. (*See* Dkt. No. 2175-1 ¶ 15.) Thus, even without retaining Non-Class Counsel, class members could, did, and continue to obtain legal advice from Lead Counsel and the PSC.

Finally, Non-Class Counsel's requests for fees and costs for work performed after the Court appointed Class Counsel are deficient in another—procedural—respect. In Pretrial Order No. 11, this Court explained that all plaintiffs' attorneys needed to obtain Lead Counsel's authorization to perform compensable common benefit work. (*See* Dkt. No. 1254 at 1-2 (noting that the recovery of common benefit attorneys' fees would be limited to Lead Counsel, members of the PSC, and "any other counsel authorized by Lead Counsel to perform work that may be considered for common benefit compensation").) As noted above, Non-Class Counsel have not asserted that they obtained authorization from Lead Counsel to perform the common benefit work for which they now seek compensation, as required.

In sum, because Volkswagen did not agree to pay the fees and costs at issue as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the class as a whole, Volkswagen is not required to pay Non-Class Counsel's attorneys' fees and costs as a result of the 2.0-liter Settlement.[6]

6. Certain non-class counsel argue that they are entitled to attorneys' fees because they filed complaints bringing claims under statutes with fee-shifting provisions, providing that a "prevailing

Appendix B

***

While Non-Class Counsel are not entitled to fees from Volkswagen as part of this class action, Non-Class Counsel may be entitled to payment of certain fees and costs pursuant to attorney-client fee agreements. This is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum. To that end, the Court VACATES the injunction on state court actions, to the extent those actions are brought to enforce an attorney-client fee agreement. Volkswagen, however, must continue to "directly pay consumers the full amount to which they are entitled under the Settlement" for all the reasons stated in the Court's previous Order. (Dkt. No. 2428 at 2.)

---

party" may recover attorneys' fees and expenses. (*See, e.g.*, Dkt. No. 2356 at 2-3 (citing South Carolina Dealers Act, S.C. Code § 56-15-110); Dkt. No. 2243 at 2 (citing Magnuson-Moss Warranty Act, 15 U.S.C. § 2310).) To the extent that class members are prevailing parties as a result of the 2.0-liter Settlement, however, they prevailed because of the work of Lead Counsel and the PSC, not because of Non-Class Counsel's efforts. As a result, awarding fees to Non-Class Counsel under these provisions would be inappropriate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (reasoning that a "prevailing party" should be awarded fees based on the "value of a lawyer's services"). Further, the Ninth Circuit has held that, "[a]pplication of the common fund doctrine to class action settlements does not compromise the purposes underlying fee-shifting statutes," and "common fund fees can be awarded [even] where statutory fees are available." *Staton v. Boeing Co.*, 327 F.3d 938, 968-69 (9th Cir. 2003).

Appendix B

To the extent that a non-class attorney brings an action against his or her client or makes a demand to enforce a fee agreement, the Court orders that attorney to first provide his or her client with a copy of this Order, and to file a certificate of service with this Court.

IT IS SO ORDERED.

Dated: April 24, 2017

/s/
CHARLES R. BREYER
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED NOVEMBER 22, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MDL No. 2672 CRB (JSC)

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

This Order Relates To:

ALL ACTIONS (except the securities action)

November 22, 2016, Decided
November 22, 2016, Filed

ORDER RE: ATTORNEYS' LIENS

Volkswagen has notified the Court that certain attorneys have placed liens on several Class Members' settlement proceeds. (*See* Dkt. No. 2159.) Specifically, The Driscoll Firm, P.C.; Wayne Wright LLP; Lashley & Baer, P.C.; the Davis Law Firm; and Aylstock, Witkin, Kreis & Overholtz, PLLC have sent letters to Volkswagen Group of America, Inc.; Volkswagen AG; Audi of America, LLC; and/or Audi AG (collectively, "Volkswagen") notifying them that they have placed attorneys' liens on their clients' recovery under the Amended Consumer and Reseller Dealership Class Action Settlement ("Settlement").

(Dkt. Nos. 2159-1, 2159-2, 2159-3, 2159-4, 2159-5, 2159-6; *see* Dkt. No. 1685.) These five firms claim to represent approximately 1,185 Class Members.[1] (*See* Dkt. No. 2159 at 2.)

It is obvious that satisfaction of these liens would have a substantial impact on Class Members. Not only does a reduced payment fail to adequately compensate Class Members, but it also negatively effects the environmental benefits contemplated by the Settlement. With a smaller cash payment, Class Members may have little incentive to sell their vehicles back and, as a result, these vehicles will remain in their current polluting state. For the reasons set forth below, the Court **ORDERS** Volkswagen to pay Class Members their Settlement compensation directly and in full, notwithstanding any purported liens on that compensation. Not only does recognizing these liens require Volkswagen to violate the terms of the Settlement, but ensuring that Class Members are made whole, whether or not they retained counsel, must be the highest priority.

DISCUSSION

When the Court granted final approval of the Settlement, it "retain[ed] the exclusive jurisdiction to enforce, administer, and ensure compliance with all terms of the Settlement in accordance with the Settlement and

1. This figure takes into account any duplicate names listed in The Driscoll Firm's June 28, 2016 and August 17, 2016 letters. (*See* Dkt. Nos. 2159-1, 2159-3.)

this Order." (Dkt. No. 2102 at 48.) As such, the Court possesses ancillary jurisdiction to adjudicate any lien disputes that arise from the Settlement. *See Fed. Sav. & Loan Ins. Corp. v. Ferrante*, 364 F.3d 1037, 1041-42 (9th Cir. 2004) (explaining "ancillary jurisdiction exists over attorney fee disputes collateral to the underlying litigation" and noting "[h]ad [the firm] attempted to assert its attorney liens for services performed in connection with a particular action, it might have successfully invoked ancillary jurisdiction"); *Curry v. Del Priore*, 941 F.2d 730, 731 (9th Cir. 1991) ("Courts have long recognized that fee disputes arising from litigation pending before a district court fall within that court's ancillary jurisdiction."); *see also Elusta v. City of Chicago*, 696 F.3d 690, 694 (7th Cir. 2012) ("Attorney's fee disputes are closely enough related to the underlying litigation to be the basis for supplemental jurisdiction, even if other attorney-client disputes, such as malpractice actions, are not."); *Guy v. Lexington-Fayette Urban Cty. Gov't*, 624 F. App'x 922 (6th Cir. 2015) (district court had jurisdiction over motion to quash attorney's lien where lien was "'so related to claims in the action within . . . original jurisdiction that they form[ed] part of the same case'" (edits in *Guy*; quoting 28 U.S.C. § 1367(a)).

Among other things, the Settlement seeks to make Class Members whole. (*See* Dkt. No. 1976 at 13, 15.) As the Federal Trade Commission ("FTC") explains, "[t]o be made whole, consumers must receive full compensation for their vehicles' full retail value and all other losses caused by Volkswagen's deception. Full compensation has to be sufficient for consumers to replace their vehicle." (Dkt. No. 1781 at 1.) To effectuate this goal, the

Settlement requires Volkswagen to pay cash compensation directly to Class Members. *See, e.g.*, Dkt. No. 1685 ¶ 2.16 ("'Lessee Restitution' means monetary compensation that *Volkswagen will pay to Eligible Lessees* . . . ." (emphasis added)), ¶ 2.52 ("'Owner Restitution' means monetary compensation that *Volkswagen will pay to Eligible Owners* . . . ." (emphasis added)), ¶ 2.60 ("'Seller Restitution' means monetary compensation that *Volkswagen will pay to Eligible Sellers* . . . .") (emphasis added)).[2] The compensation provided under the Settlement "restore[s] Class members to the positions they would have occupied if Defendants had never committed the frauds." (Dkt. No. 1976 at 13.) In other words, the Settlement ensures Class Members who participate in a Buyback have sufficient cash to purchase a comparable replacement vehicle and thus facilitates removal of the polluting vehicles from the road.

---

2. The FTC's Consent Order likewise states that payments shall be made directly to consumers. *See* Dkt. No. 1607 ¶ H ("'Consumer Payment' means *any payment under the Settlement Program made directly to an Eligible Consumer* or to a lender on behalf of an Eligible Owner for the purpose of satisfying an outstanding Loan Obligation related to an Eligible Vehicle." (emphasis added)).

That said, Eligible Owners who are eligible for Loan Forgiveness may have some or all of their compensation paid directly to their lenders. (Dkt. No. 1685 ¶ 4.2.2; Dkt. No. 1685-1 ¶ 14.) This still makes Eligible Owners whole; even if they do not receive cash, it relieves them of their obligation to make payments on a vehicle they no longer own.

An attorneys' lien on a Class Member's recovery frustrates this goal. By diverting a portion of Class Members' compensation to private counsel, a lien reduces Class Members' compensation and places them in a position where they must purchase another vehicle but lack the funds to do so. Put another way, attorneys—notably, attorneys who did not have a hand in negotiating the Settlement—stand to profit while their clients are left with inadequate compensation.[3] This interferes with the Settlement's purpose and the Class Member's decision to participate. By electing to remain part of the Class, consumers can and should expect to be compensated in an amount determined by the Settlement terms, not by attorneys who may have played no role in obtaining the Settlement.

---

3. For instance, The Driscoll Firm's "retainer agreements with Claimants provides [sic] for a contingent attorney's fee to the Firm of forty percent (40%) of any amount paid in settlement or to satisfy any judgment after suit is filed." (Dkt. Nos. 2159-1 at ECF p.1, 2159-3 at ECF p.1.) Assume, for argument's sake, that each of The Driscoll Firm's clients is an Eligible Owner entitled to the *minimum* restitution payment of $5,100. (*See* Dkt. No. 1685-3 at 8-9.) Of that, The Driscoll Firm would take $2,040, leaving each client with only $3,060. Under these facts and with approximately 362 clients, The Driscoll Firm would be entitled to a total of $736,480. This figure could also reasonably be expected to be greater, as the $5,100 represents only the minimum, guaranteed amount of Restitution and does not include compensation for selling the vehicle back to Volkswagen in a Buyback. Indeed, if The Driscoll Firm takes 40% of an Eligible Owner's Buyback package—the cash received in a Buyback plus Restitution—its fees could easily run into the millions of dollars.

Accordingly, the Court orders Volkswagen to pay Class Members the full amount of compensation as required by the terms of the Settlement, regardless of whether an attorney purports to have placed a lien on those funds. First, the Settlement does not allow Volkswagen to make payments to Class Members' private attorneys. Should Volkswagen recognize these liens and direct payment to counsel, Volkswagen risks violating the Settlement. Second, complete payment to Class Members is necessary to fulfill the Settlement's purpose of making Class Members whole; a Class Member's ability to purchase a comparable vehicle should not be hampered by an attorneys' lien. Finally, providing Class Members with the funds effectuates another goal of the Settlement—to ensure that polluting vehicles are removed from the roads. (*See* Dkt. No. 1976 at 16.) If Class Members do not receive sufficient monies to replace their vehicles, or if their compensation is otherwise reduced, they have little incentive to participate in the Settlement's Buyback or Fix programs. As a result, Class Members will likely continue to use their vehicles in their current polluting state. For these reasons, it is necessary that Volkswagen compensate Class Members in strict compliance with the Settlement.

Even if Volkswagen provides Class Members their full compensation, however, attorneys could seek to litigate their liens in state court. This too frustrates the administration and purpose of the Settlement. Given that the Court retains jurisdiction to enforce and ensure compliance with the Settlement, it now invokes its authority under the All Writs Act to enjoin any state court proceedings regarding attorneys' lien on Class Members' settlement compensation.

Appendix C

The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. This broad grant of authority is limited by the Anti-Injunction Act, which prohibits federal courts from enjoining state court proceedings "except where expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Nonetheless, "[u]nder an appropriate set of facts, a federal court entertaining complex litigation, especially when it involves a substantial class of persons from multiple states, or represents a consolidation of cases from multiple districts, may appropriately enjoin state court proceedings in order to protect its jurisdiction." *In re Diet Drugs*, 282 F.3d 220, 235 (3d Cir. 2002). An injunction is appropriate here to preserve the Court's jurisdiction. If attorneys seek to enforce their liens in state court, such proceedings will interfere with the Court's ability to enforce and ensure compliance with the Settlement terms, such as Volkswagen's obligation to directly pay consumers the full amount to which they are entitled under the Settlement. For that reason, the Court enjoins any state court proceeding relating to an attorneys' lien on any Class Member's recovery under the Settlement.

CONCLUSION

Under the power conferred by the All Writs Act, together with the Court's retention of jurisdiction over the enforcement and administration of the Settlement, the Court **ORDERS** the following:

1. Volkswagen shall pay Class Members directly the full amount to which they are entitled under the terms of the Settlement, notwithstanding any lien an attorney purports to impose on those funds.

2. The Court **ENJOINS** any state court action relating to attorneys' liens on Class Members' Settlement compensation.

3. The Court understands that some attorneys may have provided Class Members with compensable services. As with Class Counsel, those attorneys will not be paid out of the Settlement, and the Court will determine the appropriate amount of fees, if any. If an attorney seeks to recover fees in accordance with his or her lien, he or she shall file with the Court a separate application for each Class Member supported by declaration. The application shall set forth the amount sought; the specific legal service(s) provided, including time records; and the terms of the fee agreement that require such an award, and shall include a signed copy of the agreement. Any declarations shall be filed by **November 29, 2016**.

IT IS SO ORDERED.

Dated: November 22, 2016

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 28, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

---

JASON HILL; RAY PRECIADO; SUSAN TARRENCE; STEVEN R. THORNTON; ANNE DUNCAN ARGENTO; SIMON W. BEAVEN; JULIET BRODIE; SARAH BURT; AIMEE EPSTEIN; GEORGE FARQUAR; MARK HOULE; REBECCA KAPLAN; HELEN KOISK-WESTLY; RAYMOND KREIN; STEPHEN VERNER; LEO WINTERNITZ; MARCUS ALEXANDER DOEGE; LESLIE MACLISE-KANE; TIMOTHY WATSON; FARRAH P. BELL; JERRY LAWHON; MICHAEL R. CRUISE; JOHN C. DUFURRENA; SCOTT BAHR; KARL FRY; CESAR OLMOS; BRITNEY LYNNE SCHNATHORST; CARLA BERG; AARON JOY; ERIC DAVIDSON WHITE; FLOYD BECK WARREN; THOMAS J. BUCHBERGER; RUSSELL EVANS; CARMEL RUBIN; DANIEL SULLIVAN; MATTHEW CURE; DENISE DE FIESTA; MARK ROVNER; WOLFGANG STEUDEL; ANNE MAHLE; DAVID MCCARTHY; SCOTT MOEN; RYAN JOSEPH SCHUETTE; MEGAN WALAWENDER; JOSEPH MORREY; MICHAEL LORENZ; NANCY L. STIREK; REBECCA PERLMUTTER; ADDISON

Appendix D

MINOTT; RICHARD GROGAN; ALAN BANDICS; MELANI BUCHANAN FARMER; KEVIN BEDARD; ELIZABETH BEDARD; CYNTHIA R. KIRTLAND; MICHAEL CHARLES KRIMMELBEIN; WILL HARLAN; HEATHER GREENFIELD; THOMAS W. AYALA; HERBERT YUSSIM; NICHOLAS BOND; BRIAN J. BIALECKI; KATHERINE MEHLS; WHITNEY POWERS; ROY MCNEAL; BRETT ALTERS; KELLY R. KING; RACHEL OTTO; WILLIAM ANDREW WILSON; DAVID EBENSTEIN; MARK SCHUMACHER; CHAD DIAL; JOSEPH HERR; KURT MALLERY; MARION B. MOORE; LAURA SWENSON; BRIAN NICHOLAS MILLS,

Plaintiffs-Appellees,

BISHOP, HEENAN & DAVIES; *et al.*,

Objectors-Appellants,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; VOLKSWAGEN, AG; AUDI, AG; AUDI OF AMERICA, LLC; PORSCHE CARS NORTH AMERICA, INC.; ROBERT BOSCH GMBH; ROBERT BOSCH, LLC,

Defendants-Appellees.

Nos. 17-16020, 17-16065, 17-16067, 17-16068, 17-16082, 17-16083, 17-16089, 17-16092, 17-16099, 17-16123, 17-16124, 17-16130, 17-16132, 17-16156, 17-16158, 17-16172, 17-16180

Appendix D

D.C. No. 3:15-md-02672-CRB Northern District of California, San Francisco

ORDER

Before: M. SMITH and NGUYEN, Circuit Judges, and RESTANI,* Judge.

Judges M. Smith and Nguyen have voted to deny the petition for rehearing *en banc*, and Judge Restani has so recommended. The full court has been advised of the petition for rehearing *en banc* and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for rehearing *en banc* is DENIED.

---

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.