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11

UNITED STATES DISTRICT COURT

12

CENTRAL DISTRICT OF CALIFORNIA—WESTERN DIVISION

13

14 OMAR VARGAS, ROBERT  
 BERTONE, MICHELLE HARRIS, and  
 15 SHARON HEBERLING individually,  
 and on behalf of a class of similarly  
 16 situated individuals,

Plaintiffs,

17

v.

18

FORD MOTOR COMPANY,

19

Defendant.

20

21

Case No. CV12-08388 AB (FFMx)

The Hon. André Birotte Jr.

**PLAINTIFFS' UNOPPOSED MOTION  
FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

Date: April 24, 2017  
 Time: 10:00 a.m.  
 Place: Courtroom 7B

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1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 24, 2017, at 10:00 a.m., in Courtroom  
3 7B of the above-captioned Court, located at 350 West First Street, Los Angeles, CA  
4 90012, the Honorable André Birotte Jr. presiding, Plaintiffs, on behalf of themselves and  
5 all others similarly situated, will, and hereby do, move this Court to:

- 6 1. Preliminarily approve the settlement described in the Settlement  
7 Agreement, attached as Exhibit 1 to the Declaration of Jordan L. Lurie;
- 8 2. Conditionally certify the Settlement Class;
- 9 3. Approve distribution of the proposed Notice of Class Action Settlement  
10 and Claim Form to the Settlement Class;
- 11 4. Appoint Plaintiffs Omar Vargas, Michelle Harris, Sharon Heberling,  
12 Robert Bertone, Kevin Klipfel, Andrea Klipfel, Maureen Cusick, Eric Dufour, Abigail  
13 Fisher, Christi Groshong, Virginia Otte, Tonya Patze, Lindsay Schmidt, Patricia  
14 Schwennker, Patricia Soltesiz, Joshua Bruno, Jason Porterfield, and Jamie Porterfield as  
15 the Class Representatives;
- 16 5. Appoint Capstone Law APC as Lead Class Counsel and Berger &  
17 Montague and Zimmerman Law Offices P.C. as Class Counsel;
- 18 6. Appoint Kurtzman Carson Consultants (“KCC”), as the Claims  
19 Administrator; and
- 20 7. Set a hearing date and briefing schedule for final settlement approval and  
21 Plaintiffs’ fee and expense application.

22 This Motion, unopposed by Ford, is based upon: (1) this Notice of Motion and  
23 Motion; (2) the Memorandum of Points and Authorities in Support of Motion for  
24 Preliminary Approval of Class Action Settlement; (3) the Declarations of Jordan L.  
25 Lurie, Russell D. Paul, and Thomas A. Zimmerman, Jr.; (4) the Settlement Agreement  
26 and attached exhibits thereto; (5) the [Proposed] Order Granting Preliminary Approval  
27 of Class Action Settlement; (6) the records, pleadings, and papers filed in this action; and  
28

1 (7) such other documentary and oral evidence or argument as may be presented to the  
2 Court at or prior to the hearing of this Motion.

3  
4 Dated: March 24, 2017

Respectfully submitted,

5  
6 By: */s/ Jordan Lurie*

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1 **I. INTRODUCTION**

2 After nearly four years of litigation, including over a year of intensive and  
3 protracted settlement negotiations, the Parties have resolved this consumer class action  
4 on behalf of owners and lessees of the 2011-2016 Ford Fiesta and 2012-2016 Ford  
5 Focus vehicles (“Class Vehicles”).<sup>1</sup> As detailed below, the Settlement provides Class  
6 Members with a range of available remedies, including cash payments and  
7 reimbursements, credits towards the purchase of new vehicles, and the repurchase of  
8 Class Vehicles through a streamlined Arbitration process that allows claims to be  
9 submitted for up to six years from the date of original sale.

10 Class Members will be notified of the proposed Settlement and its benefits  
11 through a direct mailing to each Class Member, a long-form notice published on the  
12 Settlement website, and publication notice.<sup>2</sup> The Settlement website also shall maintain  
13 all Settlement documents for review by Class Members.

14 Because the Settlement is fair, adequate, and reasonable, Plaintiffs respectfully  
15 request that it be preliminarily approved.

16 **II. SUMMARY OF THE SETTLEMENT BENEFITS**

17 During the course of this hotly litigated action, thousands of Class Members  
18 contacted Class Counsel to report that their Class Vehicles slip, buck, kick and/or jerk,  
19 resulting in sudden or delayed acceleration—problems that echo Plaintiffs’<sup>3</sup> allegations  
20 against Defendant Ford Motor Company (“Ford”) in the Complaint.

21 Plaintiffs diligently investigated these claims, reviewing millions of documents  
22

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23 <sup>1</sup> All capitalized terms herein are defined in the Settlement Agreement attached  
as Exhibit 1 to the Declaration of Jordan L. Lurie.

24 <sup>2</sup> The three forms of class notices are attached to the Settlement Agreement as  
25 Exhibits A, B, and C.

26 <sup>3</sup> Plaintiffs are Omar Vargas, Michelle Harris, Sharon Heberling, Robert  
27 Bertone, Kevin Klipfel, Andrea Klipfel, Maureen Cusick, Eric Dufour, Abigail  
28 Fisher, Christi Groshong, Virginia Otte, Tonya Patze , Lindsay Schmidt, Patricia  
Schwennker, Patricia Soltesiz, Joshua Bruno, Jason Porterfield, and Jamie  
Porterfield.

1 and cataloguing Class Members’ experiences with the PowerShift dual clutch  
2 transmission (“Transmission”). For its part, Ford denies any wrongdoing. Following  
3 many months of negotiations, including three meetings in Boston with respected  
4 mediator, Professor Eric D. Green, and several face-to-face meetings in Detroit, the  
5 Parties have reached a Settlement that addresses Class Members’ concerns and provides  
6 them substantial relief. The proposed Settlement has several key components.

7 **First**, the Settlement entitles Class Members to substantial cash payments from  
8 Ford for the inconvenience of taking their Class Vehicles to Ford Dealers for often  
9 unsuccessful repairs, even where Class Members have incurred no out-of-pocket costs.  
10 Following Plaintiffs’ lawsuit, though Ford issued customer service programs providing  
11 free repairs and warranty extensions to affected Class Members, the Class nonetheless  
12 had to expend considerable time and energy in an attempt to remedy the alleged defect.  
13 In very many cases, multiple software and hardware repairs were necessary, and, due to  
14 parts’ backlogs, Class Members often had to wait weeks, if not months, for repairs.

15 The Settlement provides Class Members with payments for two types of repairs.  
16 Class Members with more serious problems—those who have three or more Service  
17 Visits for a replacement of one of the primary Transmission parts (“Transmission  
18 Hardware Replacement”)<sup>4</sup>—will receive \$200 for the third Service Visit, with increasing  
19 payments for each additional Service Visit. In lieu of cash, Class Members may elect to  
20 receive a Vehicle Discount Certificate (“Certificate”) toward the purchase of a Ford  
21 vehicle for twice the cash value. Class Members may collect up to \$2,325 in total cash  
22 payments or \$4,650 in Certificate value. With over 6,000,000 of the qualifying  
23 replacement parts sold to dealers for the roughly 1,500,000 Class Vehicles, the Parties  
24 expect that a substantial number of Class Members will qualify for this benefit.

25 Class Members who have had at least three Software Flashes performed by Ford  
26

27 <sup>4</sup> The Transmission Hardware Replacement must have been performed within  
28 7 years or 100,000 miles from the date of original sale and cannot be performed in  
connection with a safety or non-safety Recall Program.

1 Dealers will receive \$50 starting with the third Software Flash, with an additional \$50  
2 for each subsequent Software Flash, up to \$600 (or 12 flashes).<sup>5</sup> Software Flashes are  
3 exceedingly common. Accordingly, these cash payments will compensate a large  
4 number of Class Members for the nuisance of repeated Service Visits.

5 **Second**, the Settlement provides that Class Members can expeditiously obtain  
6 from Ford a repurchase of or a replacement for their defective Class Vehicles through a  
7 Settlement-created private dispute resolution program (“Arbitration Program” or  
8 “Program”), paid for by Ford. This Program will resolve the claims of each qualifying  
9 Class Member, based on his or her state’s lemon law, in one or two months, compared to  
10 a protracted lemon law action in court that would span a year or longer.

11 Aside from speed and efficiency, the Program protects Class Members’ rights  
12 and, in many cases, expands them. The Arbitrator has authority to award a repurchase or  
13 replacement under the claimant’s own state lemon law. A repurchase or replacement  
14 may also be awarded through the Program’s default rules, which authorize a repurchase  
15 or replacement if the Vehicle has had four visits for Transmission Hardware  
16 Replacements within 5 years/60,000 miles and is still malfunctioning. For any Class  
17 Member residing in a state with onerous lemon laws or other legal requirements for  
18 repurchase, the Settlement provides remedies that would otherwise be unavailable.  
19 Class Members will benefit from consumer-friendly rules in the Program that are not  
20 available in court, including an extension of the statute of limitations to six (6) years (or  
21 6 months from the Effective Date<sup>6</sup> of the Settlement, whichever is later) for current

22 \_\_\_\_\_  
23 <sup>5</sup> The Software Flashes must have been performed within 7 years or 100,000  
24 miles from the date of delivery of the class vehicle to the first owner and cannot be  
performed in connection with a safety or non-safety Recall Program.

25 <sup>6</sup> The “Effective Date” is defined as the first date after (1) the Court enters a  
26 Final Order and Judgment approving the Settlement Agreement, substantially in the  
27 form attached to the Settlement Agreement as Exhibit F, and (2) all appellate rights  
28 with respect to said Final Order and Judgment, other than those related solely to any  
award of attorneys’ fees, costs or incentive payments, have expired or been exhausted  
in such a manner as to affirm the Final Order and Judgment. (Settlement Agreement  
¶ I.R.)

1 owners or lessees, \$6,000 in attorneys' fees if they prevail (with Ford having no right to  
2 be awarded attorneys' fees from the claimant), and the right to appeal to a second  
3 arbitration panel staffed by JAMS arbitrators (with no corresponding appellate rights for  
4 Ford). Further, unlike a claim brought before a state or federal court that is subject to *res*  
5 *judicata*, Class Members may pursue arbitration through the Program even if they were  
6 already denied a repurchase claim but their vehicle continues to malfunction, accruing  
7 additional repairs.

8 **Third**, Class Members who believe they were either improperly charged for  
9 repairs or denied repairs that should have been covered under Ford's New Vehicle  
10 Limited Warranty can pursue these warranty claims in a more limited arbitration  
11 ("Warranty Arbitration"). Ford will also cover the cost of the Warranty Arbitration, and  
12 the Arbitrator is authorized to award to the prevailing Class Member reimbursement of  
13 out-of-pocket costs, complimentary repair, or warranty extension by Ford.

14 **Fourth**, the Settlement provides full reimbursement to Class Members who  
15 replaced a third clutch after having had two clutches replaced within the five  
16 years/60,000 mile Powertrain Warranty for certain vehicles. The replacement clutch will  
17 come with a 2-year warranty.

18 **Fifth**, Ford will provide dealers with language designed to make prospective  
19 buyers aware of issues related to the unusual characteristics of the Transmission.

20 Together, these Settlement benefits compensate Class Members for the alleged  
21 Transmission defect. Class Members already have benefitted from the warranty  
22 extension and other services under the two customer service programs implemented by  
23 Ford following the filing of this suit.<sup>7</sup> However, without the Settlement, Class Members  
24 would not be compensated for the inconvenience of taking their Vehicles in for multiple  
25 Transmission repairs. And by creating a consumer-friendly resolution forum for Class  
26

27 <sup>7</sup> These are the 14M01 and 14M02 Customer Service Programs, which were  
28 implemented by Ford after the lawsuit but which Plaintiffs allege did not fully  
remedy the problems alleged by Plaintiffs.

1 Members to initiate a repurchase of their vehicles, protecting and expanding Class  
2 Members' rights while doing so, the Settlement helps Class Members who were most  
3 affected by the alleged defect. Consumers with pending suits related to the Transmission  
4 are automatically excluded from the Settlement but may opt-in, and personal injury and  
5 property claims are not released.

6 The Settlement's benefits are particularly impressive in light of the considerable  
7 risks faced by Plaintiffs if litigation continued, including the difficulties in certifying the  
8 class on vehicle defects, prevailing at trial, and surviving an appeal. In particular, Class  
9 Members benefit by the final resolution of this litigation and the opportunity to obtain a  
10 repurchase before their claims get stale and their Vehicles lose all value.

11 In sum, the proposed settlement is fair, reasonable, and adequate. Accordingly,  
12 the parties respectfully request that the Court enter an order (a) granting preliminary  
13 approval of the Settlement, (b) certifying the proposed Settlement Class, (c) appointing  
14 Plaintiffs as Class Representatives, (d) appointing Capstone Law APC ("Capstone") as  
15 Lead Class Counsel and Berger & Montague P.C. and Zimmerman Law Offices P.C. as  
16 Class Counsel, (e) approving the parties' proposed form and method of giving Class  
17 Members notice of the proposed Settlement, and (f) setting a hearing date and briefing  
18 schedule for final settlement approval and Plaintiffs' fee and expense application.

19 **III. FACTS AND PROCEDURE**

20 **A. Overview Of The Litigation**

21 On September 28, 2012, Plaintiff Omar Vargas filed the initial complaint in this  
22 putative class action in the Central District of California against Defendant Ford Motor  
23 Co., complaining of symptoms of the Transmission Defect, including lunging or jerking  
24 forward when attempting to decelerate, hesitation, and jerking when attempting to  
25 accelerate, akin to a slingshot effect. (Dkt. No. 1.) The Complaint alleged that the  
26 Transmission, which Ford billed as a new type of transmission that combines the best  
27 features of automatic and standard transmissions, causes Class Vehicles to slip, buck,  
28 and jerk and to suffer sudden or delayed acceleration and delays in downshifts. Plaintiff

1 Vargas alleges that he began experiencing these types of Transmission problems with  
2 his 2011 Ford Fiesta soon after his lease began and made multiple visits to Ford dealers  
3 to have the Transmission repaired, to no avail.

4 The Complaint alleges that Ford knew that the Transmission was defective and  
5 presented a safety hazard but did not disclose this information to its customers. The  
6 Complaint seeks damages and injunctive relief against Ford for violating California  
7 consumer protection laws, breach of express warranty, and breach of implied warranty  
8 under the Song-Beverly Consumer Warranty Act.

9 The First Amended Complaint was filed on December 12, 2012, to add a claim  
10 for damages. (Dkt. No. 24). The Second Amended Complaint was filed on August 30,  
11 2013, to join additional plaintiffs Robert Bertone, Michelle Harris, and Sharon Heberling  
12 and to add a claim for violation of Florida's consumers' laws. (Dkt. No. 57.)

13 Another suit alleging the same claims, *Klipfel v. Ford Motor Co.*, No. 15-  
14 CVP0044, was first filed in San Luis Obispo Superior Court on February 20, 2015. Ford  
15 then removed *Klipfel* to the Central District of California under the assigned case  
16 number 2:14-cv-02140-AB (FFMx). Ford's motion to dismiss the *Klipfel* Plaintiffs'  
17 claims was denied as moot after Plaintiffs filed a First Amended Complaint. (*Klipfel*  
18 Dkt. No. 17.) The Parties later stipulated to consolidate the *Vargas* and *Klipfel* actions.  
19 The stipulation was granted on December 2, 2015. (*Vargas* Dkt. No. 34.)

20 Ford instituted two Customer Satisfaction Programs, called 14M01 and 14M02,  
21 during the pendency of the litigation. The 14M01 Program attempted to address the  
22 problems Plaintiffs identified in this lawsuit by extending the warranty coverage for the  
23 Transmission's input shafts, clutch, and software calibration in those Class Vehicles  
24 manufactured prior to June 5, 2013. The 14M02 Program extended the warranty on the  
25 Transmission Control Module to 10 years of service or 150,000 miles for specific 2011-  
26 2015 Fiesta and 2012-2016 Focus vehicles. However, Plaintiffs allege that neither  
27 program fully remedied the harm Class Members experienced.

28 Two additional actions alleging the same claims, *Cusick v. Ford Motor Company*,

1 Case No. 2:15-cv-08831-AB (C.D. Cal.), filed on November 12, 2015, and *Anderson v.*  
2 *Ford Motor Co.*, No. 1:16-cv-01632 (N.D. Ill.), filed on April 21, 2016, were brought by  
3 Ford consumers. *Cusick* was consolidated with the instant action on February 22, 2017  
4 (*Vargas* Dkt. 52), and the First Amended Complaint in *Cusick*, filed on February 22,  
5 2016, was deemed the “Operative Complaint” for settlement purposes.

6 **B. Plaintiffs’ Considerable Investigation And Discovery**

7 Both before and after these actions were filed, Plaintiffs thoroughly investigated  
8 and litigated their claims, including conducting testing regarding the Transmission  
9 defect, which allowed Plaintiffs’ counsel to evaluate Ford’s representations concerning  
10 the alleged Transmission problems and repair solutions. (*See, e.g.*, Declaration of Jordan  
11 L. Lurie [“Lurie Decl.”], ¶ 8.) Among other tasks, Plaintiffs’ Counsel fielded thousands  
12 of inquiries from prospective Class Members and investigated many of their reported  
13 claims. They consulted and retained automotive experts and researched publicly  
14 available materials and information provided by the National Highway Traffic Safety  
15 Administration (“NHTSA”) concerning consumer complaints about the Transmission.  
16 They reviewed and researched consumer complaints and discussions of Transmission  
17 problems in articles and forums online as well as various manuals and technical service  
18 bulletins discussing the alleged defect. Finally, they conducted research into the various  
19 causes of actions and other similar automotive actions. (*Id.*)

20 Plaintiffs also propounded discovery on Ford. (Lurie Decl. ¶ 9.) In response,  
21 Ford produced over 1.5 million pages of documents as well as spreadsheets with  
22 millions of lines of data, including owners’ manuals, maintenance and warranty  
23 manuals, design documents (*e.g.*, technical drawings), VIN Decoders, technical service  
24 bulletins, field reports, customer comments detail reports, warranty data, internal emails,  
25 and emails between Ford and third parties regarding the Transmission. Furthermore,  
26 Plaintiffs’ Counsel defended depositions of four (4) class representatives. (*Id.*)

27 Plaintiffs also obtained significant discovery from third-parties Getrag  
28 Transmission Corporation (“Getrag”), and LuK USA LLC, LuK Clutch Systems, LLC

1 and LuK Transmission Systems, LLC. (collectively, “LuK”), the manufacturers and  
2 suppliers of the Transmission and its clutches. Plaintiffs subpoenaed and received over  
3 20,000 documents comprised of 117,000 pages from Getrag and nearly 10,000  
4 documents comprised of over 36,000 pages from LuK. In addition, Plaintiffs took the  
5 deposition of Getrag’s corporate representative. (Declaration of Russell D. Paul [“Paul  
6 Decl.”] ¶¶ 7-10.)

7 In reviewing this discovery, including reviewing hundreds of thousands of pages  
8 of email correspondence and databases containing millions of lines of data produced by  
9 Ford, Plaintiffs identified information that was instrumental to the case and to Plaintiffs’  
10 efforts during mediation (Lurie Decl. ¶ 10.) For example, Plaintiffs identified the “DPS6  
11 Evidence Book (November 22, 2013),” a 166 page document compiled by Ford after the  
12 original *Vargas* action was filed that catalogued the steps taken by Ford during the  
13 Transmission’s development, manufacture, and implementation. (*Id.*)

14 Moreover, Plaintiffs identified topics for their Fed. R. Civ. P. 30(b)(6)  
15 depositions, including Chris Kwasniewicz, the engineer Ford assigned to “problem  
16 solve” the DPS6 Transmission, and Matt Fyie, a Design Analysis Engineer for  
17 automatic transmissions. (Lurie Decl. ¶ 11.) Mr. Kwasniewicz’s deposition elicited  
18 information about the DPS6’s design, its dual-clutch function, the manufacturing  
19 processes of its various components, the problems it exhibited and their root causes,  
20 changes to the clutch material, the input shaft seals, control software, and the customer  
21 service programs and warranty extensions Ford initiated during the litigation. (*Id.*) Matt  
22 Fyie’s deposition elicited information about the incidences of Transmission problems  
23 and the number of replacement parts provided to the class. (*Id.*)

24 Lastly, in the course of litigation, thousands of Class Members contacted  
25 Plaintiffs’ Counsel to report problems with their Class Vehicles. (Lurie Decl. ¶ 12.)  
26 Plaintiffs’ Counsel logged each Class Member’s complaint in a database and developed  
27 a plan for litigation and settlement based in part on Class Members’ reported experiences  
28 with their Class Vehicles and with Ford dealers. (*Id.*)



1           **C.     The Parties' Protracted Arms-Length Settlement Negotiations**

2           The proposed Settlement is the culmination of lengthy discussions between the  
3 Parties, consultation with their experts, comprehensive discovery, and thorough analysis  
4 of the pertinent facts and law at issue. (Lurie Decl. ¶ 13.) To facilitate settlement, the  
5 Parties, on August 18, 2015, attended the first of a series of mediation sessions in  
6 Boston, Massachusetts with one of the top mediators in the field, Professor Eric D.  
7 Green of Resolutions LLC. (*Id.*) In advance of the mediation, the Parties submitted  
8 detailed mediation briefs setting forth their positions. (*Id.*) The Parties were unable to  
9 reach an agreement on all material terms of the proposed relief to the Class in this initial  
10 mediation but agreed to engage in further negotiations with Prof. Green. (*Id.*)

11           In a subsequent mediation in Boston on May 6, 2016, the Parties made substantial  
12 progress, and, with Prof. Green's continuing assistance, on June 2, 2016, were able to  
13 agree to terms regarding relief for the Class. (Lurie Decl. ¶ 14.) After confirming the  
14 terms for class relief, on June 9, 2016, the Parties participated in another mediation in  
15 Boston with Prof. Green solely on the issue of attorneys' fees, costs, and incentive  
16 awards, which they were ultimately able to resolve. (*Id.*) Plaintiffs and Class Counsel  
17 took care to ensure that their interests aligned with those of the Class by negotiating  
18 attorneys' fees only after the class relief had been settled. (*Id.*)

19           After completing the mediation, the Parties worked diligently to formalize this  
20 complex, sweeping Settlement. Counsel for the Parties devoted considerable effort and  
21 time to, *inter alia*, (a) refining and harmonizing the separate cash payment components  
22 of the Settlement, (b) drafting the Arbitration Rules, (c) creating notices that would  
23 clearly answer Class Members' questions regarding the Settlement, and (d) drafting the  
24 final settlement and motion papers. (Lurie Decl. ¶ 15.)

25           During the Settlement negotiation process, dozens of Class Members have  
26 continued to contact Plaintiffs' Counsel every week, inquiring about possible remedies  
27 for the Transmission problems they continue to experience. (Lurie Decl. ¶ 16.)  
28 Plaintiffs' Counsel continue to devote considerable time and resources to respond to

1 Class Member inquiries and have designed a plan to alert these Class Members, which  
2 now number in the tens of thousands, to the benefits of the Settlement following  
3 preliminary approval. (*Id.*)

4 **IV. MATERIAL TERMS OF THE PROPOSED CLASS ACTION**  
5 **SETTLEMENT**

6 **A. The Proposed Settlement Class**

7 The Settlement Class consists of all current residents and entities, who, prior to  
8 the Preliminary Approval date, purchased or leased a Class Vehicle, defined as any  
9 2011-2016 model year Ford Fiesta or 2012-2016 model year Ford Focus equipped with  
10 the Transmission that was sold by Ford in the United States of America and/or U.S.  
11 Territories. (Settlement Agreement, ¶ I.L.)

12 The following are expressly excluded from the Settlement: (1) all owners or  
13 lessees of Class Vehicles who have filed and served litigation against Ford alleging  
14 problems with the Transmission in Class Vehicles that was pending as of the Notice  
15 Date and who do not both dismiss their actions before final judgment and affirmatively  
16 elect to opt-in to the Settlement;<sup>8</sup> (2) Ford's officers, directors, employees, affiliates and  
17 affiliates' officers, directors and employees; their distributors and distributors' officers,  
18 directors, and employees; and Ford Dealers and Ford Dealers' officers and directors; (3)  
19 judicial officers assigned to the Actions and their immediate family members, and any  
20 judicial officers who may hear an appeal on this matter; (4) all entities and natural  
21 persons who have previously executed and delivered to Ford releases of their claims  
22 based on the Transmission; (5) all parties to litigation against Ford alleging problems  
23 with the Transmission in Class Vehicles in which final judgment has been entered; and  
24 (6) all those otherwise in the Class who timely and properly exclude themselves from the  
25 Class as provided in this Settlement. (*Id.*)

26  
27  
28 <sup>8</sup> Excluding the Named Plaintiffs and the putative class in the *Anderson* case.

1           **B.      Cash Payments or Vehicle Discount Certificates for Transmission**  
 2                           **Hardware Replacements**

3           The Settlement provides that Class Members who have had three or more Service  
 4 Visits to authorized Ford dealers to replace qualifying Transmission Parts<sup>9</sup> will be  
 5 entitled to either a cash payment or a Certificate, valued at twice the amount of the cash  
 6 payment, toward the purchase or lease of a Ford vehicle. (Settlement Agreement ¶ II.C.)  
 7 The Transmission Hardware Replacement must have been performed within seven years  
 8 of the date of the delivery of the Vehicle to the first retail customer or within 100,000  
 9 miles, whichever comes first. The value of each cash payment or Certificate is based on  
 10 the number of repair visits, with \$2,325 cash or \$4,650 Certificate value being the  
 11 maximum amount payable. The full payment schedule is below:

Number of Service Visits For Transmission Hardware Replacements	Cash Payment	Certificate Value
3	\$200	\$400
4	\$275	\$550
5	\$350	\$700
6	\$425	\$850
7	\$500	\$1,000
8	\$575	\$1,150
Total maximum	\$2,325	\$4,650

12  
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21           The Settlement imposes no formal cut-off date for Class Members to qualify for  
 22 benefits or to obtain additional benefits. (Settlement Agreement ¶ II.D.) So long as a  
 23 Service Visit for a Transmission Hardware Replacement is made within the 7  
 24 year/100,000 mile period and the Class Member timely files a claim, the Class Member

25           <sup>9</sup> Transmission Parts are defined as the following parts for the Transmission:  
 26 (1) 7B546 Disc Asy-Clutch; (2) 7Z369 Control Mod Trans (TCM); (3) 7052 Oil  
 27 Seal-Trans Rear; (4) 7000 Transmission Asy-Aut; (5) 7C604 Motor-Frt Clutch; (6)  
 28 7A508 Rod-CI/Slave Cyl Pus; (7) 6K301 Seal/RetC/Shft Oil; (8) 7060 Shaft/Bshg  
 Asy-Out; (9) 7048 Seal-Input Shaft Oil; and/or (10) 7515 Lever Asy-Clutch Rel.  
 These ten parts are the most common parts replaced on the Transmission.

1 will qualify for new or additional benefits. For example, a Class Member may qualify  
2 for a \$200 payment even if her third Service Visit for a Transmission Hardware  
3 Replacement takes place months after the Effective Date of the Settlement, provided that  
4 her claim is made within 180 days of the Service Visit. Likewise, a Class Member who  
5 received a \$200 payment (for the third Transmission Hardware Repair made prior to the  
6 Effective Date) may receive a \$275 payment for a Transmission Hardware Replacement  
7 performed after the Effective Date, provided that she submits her claim within 180 days  
8 of that fourth Service Visit.

### 9 **C. Cash Payments for Software Flashes**

10 The Settlement provides that Class Members are also entitled to receive \$50 for  
11 each Software Flash, starting with the third Software Flash, performed within the 7  
12 years/100,000 miles period. (Settlement Agreement ¶ II.B.) Class Members may not  
13 receive more than \$600 for Software Flash payments. As with the payments for the  
14 Transmission Hardware Replacements, Class Members may continue to submit new or  
15 additional claims so long as each qualifying Service Visit is made within the 7  
16 year/100,000 mile period. (*Id.*, ¶ II.D.) Once Class Members have qualified for a  
17 Transmission Hardware Replacement payment, they are no longer eligible for the  
18 Software Flash payments.

### 19 **D. Arbitration Program for Repurchase**

20 The Settlement provides that Class Members are eligible to participate in the  
21 Program, paid for by Ford, to seek the repurchase or replacement of their Class Vehicles.  
22 (Settlement Agreement ¶ II.N.) This Program enhances Class Members' rights in  
23 several ways. First, the Program resolves Class Members' lemon law claims quickly—  
24 within two months rather than the year or more for a lemon law suit filed in court.

25 Second, for repurchase claims brought by current owners or lessees, the Program  
26 extends the statute of limitations by preserving claims for six years from the date of  
27 original sale or six months of the effective date of the Settlement, whichever is later.  
28 (*Id.*, ¶ II.N.1.d.)

1 Third, Ford will pay a maximum of \$6,000 in attorneys' fees to a Class Member  
2 who prevails in the Program. (*Id.*, ¶ II.N.1.h.)

3 Fourth, Class Members will have the opportunity to appeal an adverse decision to  
4 a second arbitrator; however, any costs for an appeal must be advanced by the Class  
5 Member, to be reimbursed by Ford if the Class Member prevails. (*Id.*, ¶ II.N.1.g.) Ford  
6 does not have a corresponding right to appeal. The Arbitrator may not award civil  
7 penalties or punitive damages, which are available in some jurisdictions, and Class  
8 Members cannot appeal an adverse award to a court. (*Id.*, II.N.1.g & II.N.3.)

9 Fifth, even if a Class Member's first repurchase claim is denied, he or she may  
10 pursue a second repurchase claim under the Program if his or her Class Vehicle has  
11 subsequent qualifying Transmission repairs. (*Id.*, ¶ II.N.1.i.) And Class Members will  
12 not be denied any opportunity to submit a Program repurchase claim even if a claim for  
13 a buyback made prior to the Settlement was denied by an arbitrator with the Better  
14 Business Bureau or other similar organization. (*Id.*)

15 Claims submitted to the Arbitration Program will be governed by the state law  
16 applicable to each Class Member. (*Id.*, ¶ II.N.1.e.) The Arbitrator is authorized to grant  
17 for all Class Members an award consistent with the claimant's state lemon law or  
18 warranty law—including former owners and lessees of Class Vehicles. Importantly, for  
19 current owners or lessees, the Settlement also authorizes the Arbitrator to award a  
20 repurchase if four or more Transmission Hardware Replacements were performed and  
21 the vehicle continues to malfunction, even if the applicable state law does not otherwise  
22 authorize a repurchase under the claimant's circumstances. For a repurchase award  
23 under this default rule, Ford will refund the actual amount that the Class Member paid  
24 for the vehicle (excluding any modifications or additions after the vehicle's purchase or  
25 lease), including finance charges, less a reasonable allowance for use. If the vehicle was  
26 leased, Ford will refund to the Class Member payments made to the lending institution  
27 or lessor plus net trade-in and cash down payment (excluding rebates, if any), less a  
28 reasonable allowance for use. Class Members who sold or returned the Class Vehicle

1 may seek a repurchase if their states' lemon laws permit it *and* if the request for  
2 Arbitration is filed before the expiration of the applicable state's statute of limitations for  
3 the claim or 180 days after the Approval Date, whichever is earlier.

4 **E. Arbitration Program for Breach of New Vehicle Limited Warranty**

5 Class Members who have incurred out-of-pocket expenses for repairs they  
6 believed were covered by Ford's New Vehicle Limited Warranty ("Warranty") or who  
7 believe that a Ford dealer improperly denied Warranty repairs are eligible to pursue their  
8 claims in a limited version of the Arbitration Program ("Warranty Arbitration").  
9 (Settlement Agreement ¶ II.N.2.) Ford will pay the costs of each Warranty Arbitration.  
10 The Arbitrator is authorized to award reimbursement, a complimentary repair, or an  
11 extension of warranty by Ford. Ford will not be responsible for a claimant's attorneys'  
12 fees incurred for the Warranty Arbitration.

13 **F. Reimbursement For Clutch Replacement**

14 The Settlement provides that Class Members who own or lease a Class Vehicle  
15 manufactured after June 5, 2013, and had two clutches replaced during the 5-year/60,000  
16 mile Powertrain Warranty are entitled to a third, complimentary clutch replacement (or  
17 reimbursement for out-of-pocket costs for a clutch replacement) within 7 years/100,000  
18 miles from delivery to the first retail customer.<sup>10</sup> (Settlement Agreement ¶ II.G.) The  
19 replacement clutch will be covered by a two-year warranty.

20 **G. A Consumer-Friendly Claims Process**

21 The claims process has been designed to minimize the burden on Class Members  
22 while ensuring that only valid claims are paid.

23 **Standard Documentation.** The Settlement requires Class Members to supply  
24 standard documentation to substantiate claims for each cash payment or Certificate.  
25 (Settlement Agreement ¶ II.E.) In addition to providing information on the website's  
26

27 <sup>10</sup> Customer Service Program 14M01 covers clutch replacements for Class  
28 Vehicles manufactured before June 5, 2013. This benefit is available to Class  
Members whose Class Vehicles were not covered by 14M01.

1 claim portal (a paper claim form will also be available to Class Members upon request),  
2 Class Members need only provide a receipt or repair order containing standard  
3 information, (*e.g.*, repair date, a description of the vehicle, the dealership or facility  
4 where the work was performed, the vehicles' mileage at the time of repair, an itemized  
5 list of parts and labor), along with proof of ownership and a sworn declaration attesting  
6 to the authenticity of the documents provided. (*Id.*) Subsequent claims for cash  
7 payments will have a reduced standard for proof. (*Id.* ¶ II.E.4.) For reimbursement of a  
8 clutch replacement, Class Members will need to show proof of payment (common for  
9 such claims) and a diagnostic from a Ford dealer showing that a clutch replacement was  
10 necessary (provided as a matter of course). (*Id.* ¶ II.G.1-2.) This process imposes  
11 minimal burdens on Class Members while satisfying the need for proof.

12 **Web Site Claims Portal.** Claims may be submitted through the Settlement  
13 website immediately following Final Approval. A portal will walk Class Members  
14 through a series of prompts with fields for Class Members to fill in. The site will  
15 provide clear instructions, and the portal will permit Class Members to upload scanned  
16 documents to support their claims.

17 **Timing and Continuing Duties to the Class.** Ford will pay a Claims  
18 Administrator to process these claims expeditiously following Final Approval, including  
19 reviewing all claims. (Settlement Agreement ¶ II.O.) Class Members who are entitled  
20 to a cash payment or Certificate will be paid promptly following the claim submission or  
21 after the Effective Date, whichever is later. (*Id.*)

22 The Claims Administrator's duties will continue for many years. As explained  
23 above, so long as a Service Visit for a Transmission Hardware Replacement or Software  
24 Flash is made within the 7-year/100,000 mile period, the Class Member will qualify for  
25 benefits for Service Visits made after the Effective Date. For such claims, Class  
26 Members will have up to 180 days from the qualifying repair to submit a claim.

27 Furthermore, the Settlement provides that Class Members have 30 days to cure  
28 and resubmit a claim if the Claims Administrator rejects it due to missing information or

1 for some other reason where a cure is available.

2 **Arbitration.** The Arbitration Program is also streamlined. A Class Member  
3 initiates the arbitration process by calling a dedicated phone number or by submitting a  
4 form through the Settlement website that indicates his or her intent to arbitrate (Class  
5 Members can obtain a paper claim form for submission upon request). (Settlement  
6 Agreement ¶ II.N.1.) Ford will then have ten days to try to resolve the matter informally  
7 with the Class Member.

8 Moreover, if the Class Member has had no more than three Transmission repair  
9 attempts, Ford will have an opportunity to perform a single, additional repair at no cost  
10 to the Class Member. If that additional repair does not immediately resolve the problem,  
11 the Class Member may then proceed to Arbitration after the 10-day notice period.  
12 (Settlement Agreement ¶ II.N.1.b.) Class Members who have had four or more repair  
13 attempts on the Transmission by a Ford dealer or who have already sold or returned the  
14 Class Vehicle may proceed directly to Arbitration after the 10-day Notice period. (*Id.*)

15 **H. The Proposed Notice to the Settlement Class**

16 Ford will pay for and the Claim Administrator will send a Short-Form Class  
17 Notice, in the form approved by the Court, within 75 days of the Court's entry of the  
18 Preliminary Approval Order. (Settlement Agreement ¶ III.C.) The Short-Form Class  
19 Notice will be disseminated by direct mail following the Claims Administrator's running  
20 the name of each potential Class Member, obtained through Ford and HIS Automotive  
21 (formerly R.L. Polk), through the National Change of Address Database. The Parties  
22 expect to reach most Class Members through the Short-Form Class Notice.

23 In addition, the Long-Form Class Notice will be published on a website  
24 maintained by the Claims Administrator and can be mailed to any Class Member upon  
25 request. (*Id.*) The Long-Form Class Notice provides a comprehensive summary of the  
26 Settlement and answers to anticipated questions. Both the Long-Form Class Notice and  
27 the website will instruct Class Members how and when to submit a Claim Form, opt-out,  
28 or object. (*Id.*) The Claims Administrator will also arrange for the Publication Notice to



1 be published in *USA Today* by the day that the Claims Administrator completes the  
2 mailing of Class Notices.

3 **I. Proposed Attorneys' Fees, Litigation Expenses, and Service Awards**

4 The Parties have negotiated sums for attorneys' fees, expenses, and service  
5 awards separately, with the amount finally awarded by the Court not affecting the Class  
6 benefits in any way. (*See* Settlement Agreement ¶ II.P.) Subject to Court approval, Ford  
7 has agreed to pay Class Counsel's attorneys' fees and documented costs of a combined  
8 sum up to \$8,856,600 on behalf of all Plaintiffs' Counsel. (*Id.*) Subject to Court  
9 approval, Ford has also agreed to pay service awards to the named Class Representatives  
10 for their efforts to secure relief on behalf of the Settlement Class, in the sum of between  
11 \$1,000 and \$10,000 each, to be paid separately from the benefits to the Settlement Class.  
12 (*Id.* ¶ II.Q.) Further details will be provided when Plaintiffs submit their application for  
13 fees, costs, and service awards.

14 **V. ARGUMENT**

15 **A. The Court Should Grant Preliminary Approval of the Class**  
16 **Settlement**

17 **1. The Standard for Preliminary Approval Has Been Met**

18 Class action settlements must be approved by the court, and notice of the  
19 settlement must be provided to the class before the action can be dismissed. Fed. R. Civ.  
20 P. 23(e)(1)(A). Court approval occurs in three steps: (1) preliminary approval of the  
21 proposed settlement, including (if the class has not already been certified) conditional  
22 certification of the class for settlement purposes; (2) notice to the class providing them an  
23 opportunity to object or exclude themselves from the settlement; and (3) a final fairness  
24 hearing concerning the fairness, adequacy, and reasonableness of the settlement. *See*  
25 Fed. R. Civ. P. 23(e)(2); Manual for Complex Litigation § 21.632 (4th ed. 2004).

26 As a matter of policy, federal courts favor settlements, particularly in class  
27 actions, where the costs, delays and risks of continued litigation might otherwise  
28 overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v.*

1 *City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the “strong policy that favors  
2 settlements, particularly where complex class action litigation is concerned”).

3 As one court put it, “[t]he economics of litigation are such that pre-trial settlement may  
4 be more advantageous for both sides than expending the time and resources inevitably  
5 consumed in the trial process.” *Franklin v. Kaypro*, 884 F.2d 1222, 1225 (9th Cir.  
6 1989). Thus, in reviewing class action settlements, the court should give “proper  
7 deference to the private consensual decision of the parties.” *Hanlon v. Chrysler Corp.*,  
8 150 F.3d 1011, 1027 (9th Cir. 1998).

9 At the preliminary approval stage, the Court first determines whether a class  
10 exists. *Staton v. Boeing Company*, 327 F.3d 938, 952 (9th Cir. 2003). The Court makes  
11 only a preliminary determination of the settlement’s fairness, reasonableness, and  
12 adequacy, granting preliminary approval unless the settlement terms are so unacceptable  
13 that a formal fairness hearing would be a waste of time. *See Manual for Complex*  
14 *Litigation* § 21.632.

## 15 **2. The Settlement Is Entitled To A Presumption of Fairness**

16 In reviewing what is “otherwise a private consensual agreement negotiated  
17 between the parties to a lawsuit,” the district court’s scrutiny should be “limited to the  
18 extent necessary to reach a reasoned judgment that the agreement is not the product of  
19 fraud or overreaching by, or collusion between, the negotiating parties and that the  
20 settlement, taken as a whole, is fair, reasonable and adequate in all concerned.” *Officers*  
21 *for Justice v. Civil Service Comm’n*, 668 F.3d 615, 625 (9th Cir. 1982).

22 A non-collusive settlement, negotiated with the involvement of a respected  
23 mediator, is entitled to “a presumption of fairness.” *In re Toys “R” Us-Del., Inc.*  
24 *FACTA Litig.*, 295 F.R.D. 438, 450 (C.D. Cal. 2014). The proposed Settlement is the  
25 product of multiple mediations before one of the preeminent mediators in legal practice,  
26 Eric D. Green. Professor Green is the co-author of the first textbook on alternative  
27 dispute resolution and has successfully mediated many high stakes cases, including the  
28 *United States v. Microsoft* antitrust case. *See Fleisher v. Phoenix Life Ins. Co.*, No. 11-

1 8405, 2015 WL 10847814, at \*3 (S.D.N.Y. Sept. 9, 2015) (summarizing Prof. Green’s  
 2 impressive credentials). Through this experienced mediator’s guidance, the Parties  
 3 forcefully advocated their respective positions in arms’-length negotiations over many  
 4 months. (Lurie Decl. ¶¶ 13-14.) The Parties then reached a resolution for class relief  
 5 before conducting a separate mediation on attorneys’ fees and class representative  
 6 payments. (*Id.* ¶ 14.) Based on these factors, the Settlement is entitled to a presumption  
 7 of fairness.<sup>11</sup> *See In re Toys “R” Us-Del FACTA Litig.*, 295 F.R.D. at 450 (finding a  
 8 presumption of fairness where the settlement was reached following a mediation).

9 In addition, the Court may consider some or all of the following factors in  
 10 evaluating the reasonableness of a settlement: the extent of discovery completed and the  
 11 stage of proceedings; the strength of the plaintiff’s case and the risk, expense,  
 12 complexity, and likely duration of further litigation; the risk of maintaining class action  
 13 status throughout trial; the amount offered in settlement; and the experience and views of  
 14 counsel. *See Churchill Village v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). “Under  
 15 certain circumstances, one factor alone may prove determinative in finding sufficient  
 16 grounds for court approval.” *Nat’l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D.  
 17 523, 525-526 (C.D. Cal. 2004).

18 **3. The Proposed Settlement Is Well Within the Range of**  
 19 **Reasonableness As The Class Relief Is Substantial And**  
 20 **Justified In Light of The Risks of Continued Litigation**

21 The proposed Settlement is well within the range of reasonableness, particularly  
 22 when compared to the likely outcome of prosecuting the action. In its evaluation, “the

23 \_\_\_\_\_  
 24 <sup>11</sup> *See, e.g., Halley v. Honeywell Int’l, Inc.*, No. 10-3345, 2016 WL 1682943, at  
 25 \*12 (D.N.J. Apr. 26, 2016) (considering the participation of mediator Eric Green,  
 26 “whose background the Court has independently reviewed,” as an important factor in  
 27 approving a \$10 million settlement); *Fleisher*, 2015 WL 10847814, at \*5 (finding  
 28 that “the extensive participation of an experienced mediator [Prof. Green] also  
 ‘reinforces that the Settlement Agreement is non-collusive’” in a case valued at over  
 \$100 million); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 10-00302 MRP,  
 2013 WL 6577020, at \*12 (C.D. Cal. Dec. 5, 2013) (naming Prof. Green as one  
 factor in finding presumption of fairness of a settlement valued at over \$500 million).

1 district court’s determination is nothing more than an amalgam of delicate balancing,  
2 gross approximations, and rough justice.” *Officers for Justice*, 688 F.2d at 625 (internal  
3 quotation omitted). Thus, there is “no single formula” to be applied, but the court may  
4 presume that the parties’ counsel and the mediator arrived at a reasonable range of  
5 settlement by considering the plaintiffs’ likelihood of recovery. *Rodriguez v. West Pub.*  
6 *Corp.*, 463 F.3d 948, 965 (9th Cir. 2009).

7 This Settlement offers substantial benefits to Class Members, including cash  
8 payments for multiple repair visits and an Arbitration Program that expands Class  
9 Members’ rights while providing an expeditious process for resolving their claims.  
10 Plaintiffs expect that a substantial number of Class Members will qualify to receive cash  
11 payments, which, to be clear, is not reimbursement for out-of-pocket expenses but  
12 payment for the inconvenience of taking their vehicle for repairs covered under  
13 warranty. The ability to obtain a repurchase under an expedited program with expanded  
14 rights is also significant—and directly provides a remedy to Class Members harmed by  
15 the alleged defect. *See Kearney v. Hyundai Motor Am.*, No. 09-1298-JST, 2013 U.S.  
16 Dist. LEXIS 91636, \*17 (C.D. Cal. June 28, 2013) (finding that the settlement benefits,  
17 including the arbitration for repurchase if a complementary repair does not fix airbag  
18 problem, is fair and reasonable).

19 When weighed against the risk of further litigation, the Settlement clearly falls  
20 within the range of reasonableness. To be sure, while Plaintiffs believe that their case is  
21 strong on the merits, Ford has raised a number of substantive defenses that present  
22 serious risks to Plaintiffs’ case. These defenses include, among others, that no  
23 Transmission defect exists, or that, even if a defect existed, Plaintiffs would not be able  
24 to show that it constitutes a safety concern. And Ford would likely have argued that  
25 individual issues as to liability and damages would prevail over common issues.

26 As a threshold matter, the existence of a defect may not lead to legal liability  
27 under federal or state statutes. *See, e.g., Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980,  
28 991-92 (N.D. Cal. 2010) (granting defendant’s motion for summary judgment and

1 finding alleged ignition-lock defect not a safety risk), *aff'd*, 462 F. App'x 660 (9th Cir.  
2 2011). Accordingly, Plaintiffs must meet a high burden to establish violations of state  
3 and federal consumer protection and warranty statutes.

4 Second, Plaintiffs may well be unable to maintain class status through trial. Ford  
5 contends that, as a result of changes in the manufacturing process, design and software,  
6 there are multiple versions of the Transmissions, precluding the likelihood that one  
7 common defect exists. (Lurie Decl. ¶ 27.) Had litigation continued, Ford would have  
8 argued that the variations in the Transmission and in the defects also preclude class  
9 certification of the consumer fraud claims for omission. In addition, Ford would have  
10 argued that, among other individual variations, questions regarding each customer's  
11 proper maintenance of the vehicle, driving conditions, and repair attempts, such as  
12 whether the vehicle was taken to the dealer in a reasonable time period for repairs,  
13 among others, would preclude certification of the warranty claims.

14 While Plaintiffs would vigorously dispute these claims, consumers bringing  
15 automotive defect actions are frequently denied class certification due to lack of  
16 common proof. *See, e.g., Grodzitsky v. Am. Honda Motor Co.*, No. 2-01142-SVW,  
17 2014 U.S. Dist. LEXIS 24599 (C.D. Cal. Feb. 19, 2014) (denying certification due to  
18 lack of evidence that common materials were used for all defective "window regulators"  
19 in the class); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 553 (C.D. Cal.  
20 2012) ("There is also no evidence that a single design flaw that is common across all of  
21 the drains in question is responsible for the alleged water leak defect...").

22 Recently, a California district court denied class certification involving a theory  
23 based on material omission of a similar defect involving a Ford vehicle. *See Philips v.*  
24 *Ford Motor Co.*, No. 14-02989, 2016 WL 7428810, \*17 (N.D. Cal. Dec. 22, 2016)  
25 (finding that the plaintiffs failed to present a compelling damages model supporting a  
26 classwide determination regarding Ford's alleged omission of a "systemic defect" in the  
27 vehicle's electronic steering system). *Philips* underscores the heightened litigation risk  
28 for Plaintiffs seeking class certification. This Court has also recently denied certification

1 of a consumer fraud claim in *Rafofsky v. Nissan N.A.*, No. 15-01848-AB (MANx) (C.D.  
2 Cal. Feb. 17, 2017), finding that Nissan’s advertising campaign was not so pervasive as  
3 to result a presumption of classwide reliance.

4 This body of recent case law demonstrates that, had the case continued, “plaintiffs  
5 [would] face[] a substantial risk of incurring the expense of a trial without any recovery.”  
6 *In re Toys “R” Us-Del FACTA Litig.*, 295 F.R.D. at 451. Indeed, the risk of continuing  
7 litigation, including the risk of new adverse statutory or case law, increased costs, and  
8 expiration of a substantial amount of time, weigh heavily in favor of settlement.  
9 *Rodriguez*, 463 F.3d at 966. In particular, Plaintiffs shoulder exceedingly high financial  
10 risks in pursuing this action. A class action against a major automotive manufacturer,  
11 where Plaintiffs allege that over a million vehicles suffer a serious defect, has the strong  
12 potential to engulf plaintiffs and attorneys in protracted, resource-draining court battles.

13 The difficulty of certifying such a class generally, and of prevailing on a contested  
14 motion in this technologically complex case specifically, is daunting. In a contested  
15 certification motion, Ford would likely submit expert testimony from a Ford engineer  
16 showing that the Transmission for various Class Vehicles differs in kind—for example,  
17 that some Transmissions contain a linear-sliding piston while others do not, or that some  
18 contain an “Anti-Shuffle Control” while others do not. Plaintiffs would rely on the  
19 testimony of a technical expert to dispute the import of these minor part variations, along  
20 with that of an expert on consumer expectations and a damages expert. These hefty  
21 costs would have to be advanced by Plaintiffs and Class Counsel and would add  
22 significantly to the risks of proceeding in litigation. *See Aarons v. BMW of N. Am. LLC*,  
23 No. 11-7667, 2014 U.S. Dist. LEXIS 118442, at \*29-31 (C.D. Cal. Apr. 29, 2014)  
24 (approving a settlement for repairs/reimbursement of transmission defect and observing  
25 that “it is the very uncertainty of outcome in litigation and avoidance of wasteful and  
26 expensive litigation that induce consensual settlements.” [citation omitted]).

27 Even if Plaintiffs were to certify the Class on contested motion, and prevail on  
28

1 dispositive motions and at trial,<sup>12</sup> the years of litigating this action would almost  
2 certainly diminish the value of the relief to Class Members, as their Vehicles' value will  
3 depreciate over time. Any restitution remedies they could obtain would also be subject  
4 to offsets for car owners' use of the vehicles. For example, even under consumer-  
5 friendly California law (the Song-Beverly Consumer Warranty Act), a repurchase would  
6 require an offset for the mileage driven. *See* Cal. Civ. Code § 1793.2(d)(2)(C); *see also*  
7 *Robbins v. Hyundai Motor America, Inc.*, 2015 WL 304142, at \*6 (C.D. Cal. Jan. 14,  
8 2015). State law offsets could also apply to claims under the federal Magnuson-Moss  
9 Warranty Act, which applies state substantive law for federal causes of action. *See*  
10 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (“[C]laims  
11 under the Magnuson-Moss Act stand or fall with... express and implied warranty claims  
12 under state law”). Furthermore, California's Lemon Law specifically enumerates a  
13 method for calculating depreciation on vehicles. *See* Cal. Civ. Code § 1793.2(d)(2)(C).  
14 The National Traffic and Motor Vehicle Safety Act likewise includes depreciation in any  
15 remedy following a safety recall. 49 U.S.C. §30120(a)(1)(A)(iii).

16 Because any repurchase or rescission remedy requires that a consumer return the  
17 product in a condition comparable to what he or she received, and because the vehicle's  
18 value depreciates significantly with use and time, Plaintiffs believe that a prompt  
19 resolution of this action provides the most benefit to Class Members. Thus, Plaintiffs  
20 negotiated a dispute resolution program that expeditiously resolves Class Members'  
21 claims while preserving their right to their own state lemon law remedies. The Program  
22 also expands Class Members' rights by increasing the statute of limitations for current  
23 owners and lessees bringing suit and providing for a default repurchase remedy.

24 In light of the substantial risks of continued litigation, including the risk of  
25 maintaining class certification, the significant relief secured for the Class by the

26 <sup>12</sup> The inherent risks of proceeding to trial weigh in favor of settlement. *See In*  
27 *re Portal Software, Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 88886, \*7-8 (N.D. Cal.  
28 Nov. 26, 2007) (recognizing that “inherent risks of proceeding to... trial and appeal  
also support the settlement”).

1 proposed Settlement should be viewed as a fair, reasonable, and adequate compromise  
2 of the issues in dispute.

3 **4. The Settlement Was Finalized After a Thorough Investigation**

4 Courts may also consider the extent of discovery and the current stage of the  
5 litigation to evaluate whether parties have sufficient information to make an informed  
6 decision to settle the action. *See Linney v. Cellular Alaska Partnership*, 151 F.3d 1234,  
7 1239 (9th Cir. 1998). A settlement negotiated at an earlier stage in litigation will not be  
8 denied so long as sufficient investigation has been conducted. *Eisen v. Porsche Cars*  
9 *North American, Inc.*, 2014 WL 439006, at \*13 (C.D. Cal. Jan. 30, 2014)(finding that  
10 counsel had “ample information and opportunity to assess the strengths and weaknesses  
11 of their claims” despite “discovery [being] limited because the parties decided to pursue  
12 settlement discussions early on.”)

13 As described in Section II.B, *supra*, Plaintiffs engaged in extensive investigation  
14 and discovery, including reviewing over a million documents, retaining experts and  
15 conducting their own testing, and taking depositions of two of Defendant’s corporate  
16 representatives in Michigan, as well as a deposition of a corporate representative of third  
17 party Getrag Transmissions Corporation. (*See* Lurie Decl ¶¶ 9-11; Paul Decl. ¶¶ 7-10.)

18 Based on this discovery and on their independent investigation and evaluation,  
19 Class Counsel is of the opinion that this Settlement for the consideration and on the  
20 terms set forth in the Settlement Agreement is fair, reasonable, and adequate, and is in  
21 the best interest of the Settlement Class in light of all known facts and circumstances,  
22 including the risk of significant delay and uncertainty associated with litigation of this  
23 type, as well as the various defenses asserted by Defendants.

24 **5. The Views of Experienced Counsel Should Be Accorded**  
25 **Substantial Weight**

26 The fact that sophisticated parties with experienced counsel have agreed to settle  
27 their dispute should be given considerable weight by courts, since “parties represented  
28 by competent counsel are better positioned than courts to produce a settlement that fairly



1 reflects each party's expected outcome in the litigation." *In re Pac. Enters. Sec. Litig.*,  
2 47 F.3d 373, 378 (9th Cir. 1995).

3 Here, the Parties achieved a settlement after a thorough review of relevant  
4 documents and testimony, as well as a rigorous analysis of the Parties' claims and  
5 defenses. The expectations of all Parties are embodied by the Settlement, which, as set  
6 forth above, is non-collusive, being the product of arms'-length negotiations and  
7 finalized with the assistance of an experienced mediator. The Parties were represented  
8 by experienced class action counsel possessing significant experience in automotive  
9 defect and class action matters. (*See, e.g.*, Lurie Decl. ¶¶ 35-36 & Ex. 2; Paul Decl. ¶¶  
10 20-27.) Likewise, Ford's counsel, Dykema Gossett, is a renowned defense firm. The  
11 Parties' recommendation to approve this Settlement should therefore "be given great  
12 weight." *Eisen v. Porsche*, 2014 WL 439006, at \*5 (crediting the experience and views  
13 of counsel in approving a settlement resolving automotive defect allegations).

14 **B. Conditional Class Certification Is Appropriate for Settlement**  
15 **Purposes**

16 **1. The Proposed Class Meets the Requirements of Rule 23**

17 Before granting preliminary approval of the Settlement, the Court should  
18 determine that the proposed settlement class meets the requirements of Rule 23. *See*  
19 *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); Manual for Complex Litigation,  
20 § 21.632. An analysis of the requirements of Rule 23(a) and (b)(3), commonly referred  
21 to as numerosity, commonality, typicality, adequacy, predominance, and superiority,  
22 shows that certification of this proposed Settlement Class is appropriate.

23 **2. The Proposed Class Is Sufficiently Numerous and**  
24 **Ascertainable**

25 The numerosity requirement is met where "the class is so numerous that joinder  
26 of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, courts will find a  
27 class sufficiently numerous if it consists of 40 or more members. *Vasquez v. Coast*  
28 *Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal. 2009) (numerosity is

1 presumed at a level of 40 members). Here, the settlement Class consists of current and  
2 former owners of approximately 1,500,000 vehicles, satisfying this requirement.

3 The Ninth Circuit recently clarified that there is no threshold “ascertainability”  
4 requirement in this Circuit. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125  
5 n.4 (9th Cir. Jan. 3, 2017). Nonetheless, the Class is ascertainable as they can be readily  
6 identified by each state’s department of motor vehicle records.

### 7 **3. There are Questions of Law and Fact that Are Common to the** 8 **Class**

9 The second Rule 23(a) requirement is commonality, which is satisfied “if there  
10 are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The  
11 operative criterion for commonality is “the capacity of a classwide proceeding to  
12 generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores,*  
13 *Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The “commonality requirement has been  
14 ‘construed permissively,’ and its requirements deemed minimal.” *Estrella v. Freedom*  
15 *Fin’l Network*, No. C-09-03156-SI, 2010 U.S. Dist. LEXIS 61236, at \*25 (N.D. Cal.  
16 June 2, 2010) (quoting *Hanlon*, 150 F.3d at 1019-1020). The existence of a single  
17 common question of law or fact satisfies this requirement. *See Dukes*, 564 U.S. at 369.

18 Here, each Class Member purchased a Ford vehicle equipped with the  
19 Transmission that suffered from an alleged Transmission defect that Ford failed to  
20 disclose to its customers. Ford contends that the Transmission is not defective. Given  
21 that the issues in dispute—*e.g.*, whether the Transmission is defective, and, if so, whether  
22 and when Ford knew about the defect; whether Ford had a legal obligation to disclose  
23 the defect pursuant to consumer protection statutes; and whether Ford had the legal  
24 obligation to repair the defect under warranty—all reflect common questions of fact and  
25 law, the resolution of those issues are apt to drive resolution of this litigation.<sup>13</sup>

26  
27 <sup>13</sup> Ford denies that whether a defect exists is a common question. However,  
28 Ford agrees that the commonality requirement is satisfied by the existence of one  
common question of law or fact. Ford believes that one common question exists for  
all class members—whether the settlement agreement is fair, reasonable and

1 The need to determine whether an inherent defect exists not only satisfies  
 2 Rule 23’s commonality requirement, it raises the overarching common question that has  
 3 resulted in class treatment in other automotive defect cases. *See, e.g., Hanlon*, 150 F.3d  
 4 at 1020 (allegedly defective rear liftgate latches); *Browne v. American Honda Motor*  
 5 *Co., Inc.*, Case No. 09-cv-06750, 2010 WL 9499072, at \*1 (C.D. Cal. 2010) (allegedly  
 6 defective braking system); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 595-97  
 7 (C.D. Cal. 2008) (allegedly defective flywheels); *Chamberlan v. Ford Motor Co.*, 223  
 8 F.R.D. 524, 526 (N.D. Cal. 2004) (allegedly defective engine intake manifolds); *Daffin*  
 9 *v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (allegedly defective throttle body  
 10 assembly); *see also, Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1172 (9th Cir.  
 11 2010) (holding that whether the LR3’s alignment geometry was defective, whether Land  
 12 Rover was aware of the defect, whether Land Rover concealed the nature of the defect in  
 13 violations of consumer protection statutes, and whether Land Rover was obligated to pay  
 14 for or repair the alleged defect pursuant to the express or implied terms of its warranties  
 15 are all common issues of law or fact that satisfy the commonality requirement).

#### 16 **4. Plaintiffs’ Claims Are Typical of the Proposed Settlement Class**

17 “In determining whether typicality is met, the focus should be on the defendants’  
 18 conduct and plaintiff’s legal theory, not the injury caused to the plaintiff.” *Lozano v.*  
 19 *AT&T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007). Thus, typicality is  
 20 “satisfied when each class member’s claim arises from the same course of events, and  
 21 each class member makes similar legal arguments to prove the defendant’s liability.”  
 22 *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citation omitted).

23 Here, Plaintiffs assert that Class Members’ claims arising from the defect are  
 24 reasonably coextensive with the legal claims asserted by the named Plaintiffs. Each  
 25 Class Member’s claims arise from the same alleged course of conduct—that Ford  
 26 knowingly failed to disclose that the Transmission is defective to its customers.

27  
 28 adequate—thus satisfying the commonality requirement.

1 Plaintiffs' claims are thus typical of the Class, as "they are reasonably coextensive with  
2 those of absent class members." Plaintiffs and Class Members would also similarly  
3 benefit from the relief provided by the Settlement. Accordingly, typicality is satisfied.

4 **5. Plaintiffs and Plaintiffs' Counsel Will Adequately Represent**  
5 **the Interests of the Proposed Settlement Class**

6 Adequacy is satisfied because "the representative parties will fairly and  
7 adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4); specifically: (1) the  
8 proposed representative Plaintiffs do not have conflicts of interest with the proposed  
9 class, and (2) Plaintiffs are represented by qualified and competent counsel. *Hanlon*,  
10 150 F.3d at 1020. Here, Plaintiffs are adequate class representatives, as they have no  
11 conflict of interest with the proposed Class. In fact, Plaintiffs share a common interest in  
12 holding Ford accountable for selling vehicles with an alleged Transmission defect that  
13 they did not disclose to their customers. In addition, Plaintiffs are represented by  
14 competent counsel well-versed in prosecuting automotive litigation and/or class action  
15 matters. (*See, e.g.*, Lurie Decl. ¶¶ 35-36; Ex. 2; Paul Decl. ¶¶ 20-27; Declaration of  
16 Thomas Zimmerman, ¶¶ 16-18.)

17 **6. Common Issues Predominate Over Individual Issues**

18 "In addition to meeting the conditions imposed by Rule 23(a), the parties seeking  
19 class certification must also show that the action is maintainable under Fed. R. Civ. P.  
20 23(b)(1), (2) or (3)." *Hanlon*, 150 F.3d at 1022. The predominance inquiry under Rule  
21 23(b)(3) asks "whether the common, aggregation-enabling issue are more prevalent or  
22 more important than the non-common, aggregation-defeating, individual issues." *Tyson*  
23 *Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). "When one or  
24 more of the central issues in the action are common to the class and can be said to  
25 predominate, the action may be proper under Rule 23(b)(3) even though other important  
26 matters will have to be tried separately, such as damages or some affirmative defenses  
27 peculiar to some individual class members." *Id.* So long as there is a "clear justification  
28 for handling the dispute on a representative rather than an individual basis" (*Hanlon*, 150

1 F.3d at 1022), the inquiry is satisfied.

2 Manageability at trial is not a concern in the class action settlement context, “for  
3 the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620. Indeed, the  
4 predominance inquiry in the context of a nationwide settlement should be considered  
5 under “three guideposts”:

6 [F]irst, that commonality is informed by the defendant’s  
7 conduct as to all class members and any resulting injuries  
8 common to all class members; second, that variations in state  
9 law do not necessarily defeat predominance; and third, that  
concerns regarding variations in state law largely dissipate  
when a court is considering the certification of a settlement  
class.

10 *Sullivan v. DB Invs. Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc); *see also, Wakefield*  
11 *v. Wells Fargo & Co.*, No. C 13-05053 LB, 2014 WL 7240339, at \*4 (N.D. Cal. Dec.  
12 18, 2014) (adopting *Sullivan*’s analysis that state law variations dissipate in a settlement  
13 class). Under similar guiding principles, the Ninth Circuit has similarly upheld  
14 settlement-only class certification in nationwide settlements. *See, e.g., Hanlon*, 150 F.3d  
15 at 1022–23 (“[G]iven the limited focus of the action, the shared factual predicate and the  
16 reasonably inconsequential differences in state law remedies, the proposed class was  
17 sufficiently cohesive to survive Rule 23(b)(3) scrutiny.”).

18 Here, for purposes of settlement, the predominance test is satisfied, as the  
19 proposed Settlement makes the relief for cash payment or Vehicle Discount Certificates  
20 available for all Class Members based on easily ascertainable criteria, bypassing  
21 whatever individual evidentiary and factual issues that could arise in litigation in  
22 determining liability or damages. Furthermore, the Arbitration Program incorporates  
23 variations in different states’ lemon laws into its design, thereby neutralizing any choice-  
24 of-law concerns. Specifically, each Class Member’s claim shall be governed by the law  
25 of their state. Further, to the extent a Class Member’s state does not provide for a lemon  
26 law, or the individual does not meet his or her state’s requirements, the default lemon  
27 law program allows for a universal method for a repurchase or replacement.  
28

1 Consequently, common questions predominate over individual issues that might have  
2 arisen had this action continued to be litigated.

3 **7. A Class Settlement Is Superior to Other Available Means of**  
4 **Resolution**

5 Similarly, there can be little doubt that resolving all Class Members' claims  
6 through a single class action is superior to a series of individual lawsuits. "From either a  
7 judicial or litigant viewpoint, there is no advantage in individual members controlling the  
8 prosecution of separate actions. There would be less litigation or settlement leverage,  
9 significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d  
10 at 1023. Indeed, the terms of the Settlement negotiated on behalf of the Class  
11 demonstrate the advantages of a collective bargaining and resolution process.

12 The damages sought by each Class Member here, while representing an  
13 important purchase for Class Members, are not so large as to weigh against the  
14 certification of a class action. *See Smith v. Cardinal Logistics Mgmt. Corp.*, 2008 WL  
15 4156364, at \*\*32-33 (N.D. Cal. Sep. 5, 2008) (finding that class members had a small  
16 interest in personally controlling the litigation even where the average amount of  
17 damages were \$25,000-\$30,000 per year). The sheer number of separate trials that  
18 would otherwise be required also weighs in favor of settlement.

19 The superiority of proceeding through the class action mechanism is  
20 demonstrable. Through the class action device, Class Counsel was able to negotiate a  
21 global Settlement with Ford that, if approved, will provide Class Members with  
22 substantial cash benefits, and an opportunity for a repurchase of their vehicle. By design,  
23 this Settlement provides benefits to all Class Members who may have been harmed  
24 while offering an opportunity for those with the most serious problems to resolve their  
25 claims through the binding Arbitration Program, where they can marshal individual  
26 evidence to obtain a repurchase or replacement. Moreover, those with pending lemon  
27 law actions are excluded from the Settlement.

28 As the class action device provides the superior means to effectively and

1 efficiently resolve this controversy, and as the other requirements of Rule 23 are  
2 satisfied, certification of the proposed Settlement Class is appropriate.

3 **C. The Proposed Class Notice Adequately Informs Class Members**  
4 **About the Case and Proposed Settlement**

5 Upon certifying a Rule 23(b)(3) class, Rule 23(c)(2)(B) requires the Court to  
6 “direct to class members the best notice that is practicable under the circumstances,  
7 including individual notice to all members who can be identified through reasonable  
8 effort.” *See also, Briseno*, 844 F.3d at 1129 (recognizing that [t]he rule does not insist on  
9 actual notice to all class members in all cases” and “recognizes it might be impossible to  
10 identify some class members for purposes of actual notice” (citation omitted)). In  
11 addition, Rule 23(e)(1) requires that before a proposed settlement may be approved, the  
12 Court “must direct notice in a reasonable manner to all class members who would be  
13 bound by the proposal.” *See Zaksorn v. Am. Honda Motor*, 2015 WL 3622990, \*3, \*6  
14 (E.D. Cal. June 9, 2015) (finding class notice by U.S. mail to over 1 million class  
15 members as having “adequately protected class members’ interests”).

16 The Parties have agreed on a notice plan that satisfies the requirements of  
17 Rule 23. (Settlement Agreement ¶ III.C.) Under this plan, Ford will pay the claims  
18 administrator to mail a Short-Form Class Notice to all current and former owners and  
19 lessees of Class Vehicles who can be reasonably identified (through Ford and HIS  
20 Automotive, which obtains Class Member information from state motor vehicle  
21 agencies); to publish a Publication Notice in the first section of the National Edition of  
22 USA Today; and to publish the Long-Form Class Notice—which contains a series of  
23 questions-and-answers about the Settlement in a readable format—on a website  
24 maintained by the Claims Administrator. *See In re Toyota Motor Corp. Unintended*  
25 *Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML2151 JVS  
26 FMOX, 2012 WL 6733023, at \*3 (C.D. Cal. Dec. 28, 2012) (approving a notice plan  
27 like the one proposed here, with a short-form postcard notice mailed to all class  
28 members, and a long-form class notice stored on a settlement website); *Browne*, 2010

1 WL 9499072, at \*7 (finding notice by mail sufficient after Honda employed a consultant  
2 similar to the one proposed here to find addresses of potential class members).

3 The form of the notice to be mailed, attached to the Settlement Agreement as  
4 Exhibits A-C, includes all the content required by Rule 23(c)(2)(B), such as a description  
5 of the action and Class claims, as well as the Class Members’ right to opt out of, object  
6 to, or comment on the proposed Settlement.

7 **VI. CONCLUSION**

8 The Parties have negotiated a fair and reasonable settlement. Accordingly,  
9 Plaintiffs move the Court to preliminarily approve the Settlement Agreement; direct the  
10 dissemination of notice to the class as proposed; and set a hearing date and briefing  
11 schedule for final Settlement approval and Plaintiffs’ fee and expense application.

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Respectfully submitted,

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