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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

16 In re:
17 MYFORD TOUCH CONSUMER
18 LITIGATION

Case No. 13-cv-03072-EMC

**FORD'S MEMORANDUM IN
SUPPORT OF PLAINTIFFS'
UNOPPOSED MOTION FOR FINAL
APPROVAL OF CLASS
SETTLEMENT**

Judge: Hon. Edward M. Chen
Hearing: November 27, 2019

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1 **I. INTRODUCTION**

2 The Settlement Agreement before the Court is the product of nearly six years of litigation,
3 extensive settlement negotiations that culminated in acceptance of a mediator’s proposal made by
4 Magistrate Judge Sallie Kim, and further modifications based on additional feedback from this
5 Court. ECF No. 517 at 1-2. It represents a compromise that is fair and reasonable to class
6 members’ claims as they stood at the time of the settlement. The Settlement Agreement provides
7 guaranteed monetary compensation to at least one owner of all identifiable Class Vehicles, with
8 the amount tailored to the specific experiences of class members in different circumstances, and
9 provides free access to the latest software upgrade for their class vehicles. The speed and
10 certainty of the benefits secured through the Settlement Agreement is a far superior outcome for
11 the class members than attempting to surmount the substantial barriers to obtaining greater
12 benefits through litigation.

13 The attractiveness of the Settlement Agreement is evident in the positive reaction by class
14 members. Of the more than 380,000 members of the settlement class, only one class member
15 filed a purported objection to the proposed settlement, and it is not in fact directed at the terms of
16 this settlement. And only 166—or less than 1/10th of one percent—excluded themselves from
17 the settlement.

18 **II. BACKGROUND**

19 **A. The Litigation**

20 This litigation has been ongoing since July 2, 2013, when Jennifer Whalen filed a putative
21 class action alleging breach of express warranty, violations of the California Unfair Competition
22 Law and Consumers Legal Remedies Act, and unjust enrichment. She alleged that the MyFord
23 Touch or MyLincoln Touch information and entertainment systems (collectively, “MFT”)
24 installed in her own vehicle as well as the vehicles of other class members suffered from design
25 defects which caused the MFT systems to function improperly. She sought certification of a class
26 of current and former owners and lessees of certain Ford vehicles equipped with MyFord Touch
27 or MyLincoln Touch systems (collectively, “MFT”). ECF No. 1. Several other similar lawsuits
28 followed.

1 On November 12, 2013, Plaintiffs filed the First Amended Class Action Complaint
2 (“FAC”) on behalf of 24 plaintiffs from 15 states. ECF No. 47. Ford moved to dismiss the FAC,
3 and the Court granted that motion in part, dismissing the Magnusson-Moss Warranty claims, the
4 California secret warranty claims, the Alabama, Arizona, Colorado, Connecticut, New York,
5 Ohio, and Texas express warranty claims, the Alabama, Arizona, Colorado, Connecticut, Iowa,
6 New York, and Texas implied warranty claims, and Arizona common law warranty claims, and
7 the Connecticut breach of contract/common law warranty claims. ECF No. 97. On May 8, 2015,
8 Plaintiffs filed their Second Amended Class Action Complaint, adding Plaintiffs and claims from
9 Washington and Ohio. ECF No. 145. Ford again moved to dismiss, and the Court granted that
10 motion in part, dismissing all breach of contract claims, the Iowa fraud and express warranty
11 claims, Ohio and Washington fraud claims, and Washington implied warranty claims. ECF No.
12 175. Plaintiffs filed their Third Amended Class Action Complaint on October 13, 2015, asserting
13 claims on behalf of 19 Plaintiffs from 14 states. ECF No. 183.

14 The Parties conducted significant discovery, including: initial disclosures; production of
15 more than 8.3 million pages of documents by Ford; many months of review by Plaintiffs’ experts
16 of source code for the MFT software; responses to at least nine sets of written discovery requests;
17 depositions of fourteen Ford fact witnesses and five Ford experts; depositions of twenty Plaintiffs
18 and four Plaintiffs’ experts; and inspections of over a dozen Plaintiffs’ vehicles. *See* ECF 515 at
19 4.

20 Plaintiffs moved for class certification on January 28, 2016, and following a hearing, the
21 Court issued an order on September 14, 2016 partially granting and partially denying Plaintiffs’
22 class certification motion. ECF No. 279 at 47-49. After both sides moved for reconsideration of
23 the Court’s class certification order, the Court declined to certify several additional claims. ECF
24 No. 301. The Court ultimately certified classes of California, Colorado, Massachusetts, New
25 Jersey, North Carolina, Ohio, Virginia, and Washington purchasers of MFT-equipped vehicles
26 who purchased their MFT vehicles (“Class Vehicles”) from a Ford or Lincoln Dealership before
27 August 9, 2013 for claims for breach of implied warranty of merchantability under California,
28 Massachusetts, North Carolina, Ohio, and Virginia law, claims for breach of express warranty

1 under California and Washington law, a claim for strict liability under Colorado law, a claim for
2 negligence under Ohio law, and a claim under the Massachusetts Consumer Protection Act. *Id.*

3 Ford moved for summary judgment with respect to all certified claims, as well as certain
4 non-certified fraud-based claims, and the Parties briefed their respective positions. The Court
5 partially granted and partially denied Ford's motion for summary judgment on February 14, 2018.
6 ECF No. 383. Specifically, the Court granted Ford summary judgment against the implied
7 warranty claims of used-vehicle purchasers under California's Song-Beverly Act, the Colorado
8 strict product liability claims, and Plaintiff Center for Defensive Driving's CLRA claim. *Id.* at
9 56-57.

10 On March 1, 2018, Ford filed a motion to decertify certain of the remaining claims. ECF
11 No. 393. The Court granted in part and denied in part Ford's decertification motion, decertifying
12 the Massachusetts Consumer Protection Act claims. ECF No. 465.

13 On March 7, 2018, the Court ordered that the trial be bifurcated, separating trial of the
14 certified two express warranty, six implied warranty, and Ohio negligence class claims from trial
15 of the remaining individual claims. At the time of the initial settlement, the first phase of the jury
16 trial was set to commence on May 11, 2018. ECF No. 403.

17 **B. Settlement Negotiations**

18 The Parties held a mediation session before Randall W. Wulff on July 11, 2016, which did
19 not result in a settlement. *See* ECF No. 516 ¶ 5. In early 2018, the Parties re-engaged regarding a
20 possible settlement. *Id.* ¶ 9. On March 8, 2018, counsel for Plaintiffs and Ford participated in
21 settlement discussions in Chicago via face-to-face meeting. *See* ECF No. 446 ¶ 4. At the outset
22 of the meeting, all counsel agreed to focus their discussions initially on benefits to the class and
23 defer discussion of attorneys' fees and expenses until after reaching agreement on such matters.
24 *Id.* While the broad parameters of an agreement were established at that time, an agreement was
25 not finalized on that date. *Id.* The Parties met in San Francisco on March 19, 2018, and reached
26 an agreement in principle on all issues in this litigation other than attorneys' fees and costs,
27 preparing a term sheet which noted that open issue. *See* ECF No. 447 ¶ 3.

28 After further discussions regarding fees and expenses, the Parties reached a provisional

1 settlement on March 29, 2018, just over a month before phase one of the trial was set to
2 commence. *See* ECF No. 515 at 5. After obtaining a stay of the litigation from this Court, the
3 Parties finalized the settlement agreement on June 1, 2018, and Plaintiffs moved for preliminary
4 approval of the initial settlement agreement on the same date. ECF No. 437. This Court held a
5 hearing on June 11, 2018, and issued three orders raising questions and concerns regarding
6 different aspects of the settlement agreement. ECF Nos. 442, 448, 449. In response to the
7 Court's directive, the Parties met and conferred to discuss the Court's questions and concerns.
8 *See* ECF No. 515 at 5. Plaintiffs then filed a Notice of Withdrawal of Class Action Settlement
9 Agreement. ECF No. 452.

10 On August 24, 2018, the Court ordered the parties to participate in a settlement conference
11 with Magistrate Judge Kim. ECF No. 479. On October 16, the parties participated in a day-long
12 conference, during which they exchanged multiple proposals and counter-proposals, but which
13 did not result in an agreement. ECF No. 500 at 4. Over the following weeks, the parties
14 continued to exchange proposals via Magistrate Judge Kim. *Id.* Upon concluding that the parties
15 had reached an impasse, Magistrate Judge Kim issued a mediator's proposal, which both parties
16 accepted on November 20, 2018. *Id.* The Parties signed a revised settlement agreement on
17 December 21, 2018. ECF No. 498. Following a hearing on January 24, 2019, in which the Court
18 raised concerns about the timing of the claims submission process, the Parties agreed to advance
19 the claims process to ensure it would be substantially complete before the Fairness Hearing, and
20 agreed to send a second notice to the class following the Effective Date to inform class members
21 of the availability of free dealer-installed software updates. ECF No. 517 at 16-17.

22 The Parties entered into the currently proposed Settlement Agreement on February 7,
23 2019, and Plaintiffs again moved for preliminary approval on the same date. ECF No. 515. With
24 these changes in place, the Court granted preliminary approval to the Settlement Agreement on
25 March 28, 2019. ECF No. 526.

26 **C. The Settlement Agreement**

27 The Settlement Agreement resolves all claims relating to malfunctions of the MFT in Ford
28 and Lincoln vehicles sold or leased from Ford or Lincoln dealerships before August 9, 2013 in

1 California, Massachusetts, New Jersey, North Carolina, Ohio, Virginia, and Washington.

2 Records from Ford and state Departments of Motor Vehicles indicate that there are approximately
3 385,000 potential Class Vehicles, which were owned or leased by approximately 388,000
4 individuals or entities. (Keough Decl. ¶¶ 6-7.) (The difference between these figures reflects the
5 fact that many vehicles have had multiple owners or lessees, partially offset by the fact that some
6 class members owned or leased multiple vehicles.)

7 Settlement class members are eligible for benefits based on their experiences with their
8 class vehicles, as follows:

9 **1. Monetary Compensation**

10 The Final Settlement offers the following categories of compensation:

11 ***Compensation for MFT Software Repairs:*** Class Members who submit a valid claim
12 confirming that they took their vehicle to a Ford dealer for one or more MFT Software Repairs –
13 defined as warranty repairs, all software updates in response to an Owner Notification Program or
14 Field Service Action, and all post-warranty repairs occurring within one year of the expiration of
15 the MFT extended warranty – during the relevant period will receive a payment of \$100 if they
16 received one repair, \$250 if they received two repairs, or \$400 if they received three or more
17 repairs.

18 Ford believes it is most appropriate to provide three-figure monetary payments to those
19 Class Members who (1) sought one or more MFT Software Repairs, and (2) submit a claim
20 containing minimal evidence that they sought such repairs. Based on its warranty records, Ford
21 believes that roughly 61% of Class Vehicles obtained at least one MFT Software Repair that
22 would make whichever owner or lessee who took the vehicle to a Ford dealer for this service
23 eligible for compensation under this benefit. (ECF No. 393-3 ¶ 4b.) As discussed in greater
24 detail below, Ford's records track warranty repairs for each vehicle, but do not identify the owner
25 or lessee of that vehicle at the time of such repairs. Nor do Ford's or the DMVs' records establish
26 where a non-original owner purchased his or her vehicle. This is why Ford believes a claims
27 process is necessary for a claimant to show that he or she owned or leased the Class Vehicle at the
28 time that any MFT Software Repairs were made, and for a non-original owner to show that he or

1 she is a Class Member (*i.e.*, he or she bought or leased a Class Vehicle from a Ford dealer during
2 the class period in a class state).

3 ***Reimbursement of Costs of MFT Software Post-Warranty Repairs:*** Ford has agreed to
4 reimburse a Class Member the full cost of any post-warranty repair he/she received within one
5 year after the expiration of the extended warranty coverage for MFT.¹ Members of the
6 Settlement Classes, who within 180 days after the Preliminary Approval Order, submit a claim
7 with evidence that they paid for a MFT Software Repair within one year after the expiration of
8 the MFT Extended Warranty, may receive reimbursement of the full amount they paid for all
9 such repairs.

10 ***Compensation for Unsatisfactory MFT Performance:*** In response to Plaintiffs' concern
11 about possible undocumented "silent sufferers" who experienced MFT software problems but
12 never presented their vehicles to a Ford dealer for a MFT Software Repair, Ford agreed in the
13 original settlement to pay \$35 to Class Members who submit a claim that merely attests (with no
14 contemporaneous evidence needing to be submitted) that they experienced unsatisfactory
15 performance from their MFT. During the Autumn 2018 mediation negotiations, Ford agreed to
16 increase this payment amount to \$45, without requiring any additional substantiation of
17 unsatisfactory performance.

18 ***Unilateral Payment to Original Owners and Lessees of Class Vehicles That Received***
19 ***MFT Software Repairs:*** In light of the Court's stated concern in June 2018 that few Class
20 Members may submit claims for relief in the hundreds of dollars with respect to Class Vehicles
21 that received a MFT Software Repair, Ford agreed through the subsequent mediation process to
22 pay money to certain Class Members who do not submit a claim. Notwithstanding its
23 philosophical objection to paying money to Class Members who submit no claim (and, hence, in
24 Ford's view, do not present any evidence of feeling injured by their purchase of a Ford vehicle
25 with MFT), Ford agreed to unilaterally pay \$55 to the Original Owner or Lessee of any

26 _____
27 ¹ Ford's extended warranty covered MFT malfunctions in all new Ford vehicles from five years
28 from the date of first purchase or lease (regardless of the vehicle mileage), and in all new Lincoln
vehicles from six years from the date of first purchase or lease (regardless of the vehicle mileage).
See ECF No. 516-1 at 12.

1 identifiable Class Vehicle that received an MFT Software Repair but as to which no claim is
2 submitted for that vehicle. For purposes of this benefit, Ford effectively agreed to assume that it
3 was the Original Owner or Lessee who obtained a documented MFT Software Repair to the Class
4 Vehicle he or she has at some point owned. As explained below, this is merely an assumption
5 whose accuracy cannot be determined because, absent ownership information submitted in a
6 claim, Ford does not have information that allows it to determine the identity of the owner or
7 lessee that obtained each repair. This benefit nevertheless ensures that Ford will make a payment
8 of at least \$55 for each of the approximately 193,000 Class Vehicles that could be identified
9 though Ford's records or DMV data, and which received at least one MFT Software Repair, as
10 reflected in Ford's warranty records.

11 ***Unilateral Payment to Original Owners and Lessees of Class Vehicles That Did Not***
12 ***Receive MFT Software Repairs:*** In light of the Court's concern that some potentially unsatisfied
13 customers might not be motivated to submit a claim for monetary compensation, Ford agreed as
14 part of the settlement process to set aside its belief about satisfactory performance of those
15 vehicles and will unilaterally pay \$20 to the Original Owners or Lessees of the approximately
16 150,000 Class Vehicles that could be identified through Ford's records or DMV data, and which
17 did not receive any MFT Software Repairs as identified in Ford's warranty records, and as to
18 which Class Vehicle no claim was submitted. Nevertheless, this added unilateral payment benefit
19 responds to the Court's stated concern about the amount of money Ford will pay to Class
20 Members regardless of the number of claims they submit.

21 ***Guaranteed Minimum Payment:*** In addition to making unilateral payments to non-
22 claimants to address the Court's concerns that certain allegedly aggrieved Class Members may
23 not submit claims for monetary compensation and that this inaction would reduce the amount
24 Ford pays in settlement (*see* ECF No. 454 at 18:4-5 (expressing concern that a low number of
25 claims might lead to a payout "well below 10 million" and "maybe a low seven figure" amount)),
26 Ford agreed during the Autumn 2018 mediation process to guarantee that the total dollar amount
27 paid to Class Members will be at least \$17 million.
28

2. Access to Latest MFT Software Update

Ford will make the most current compatible update of the MFT software available without charge for six months after the Effective Date of Settlement to all Class Members whether or not their warranty has expired. This benefit informs all Class Members that they may receive, at no charge, the most current compatible version of MFT, either (1) by downloading it from a link provided on the Settlement Website and on Ford's website and installing it themselves, for those class vehicles for which a downloaded installation would be possible, or (2) by bringing it to a Ford dealer for a free installation, for any class member who would like a dealer installation of the update.² Ford also guarantees that, for one year after the installation of this update, Ford dealers will address any issues a Class Member may experience with the updated software by ensuring that the update was installed successfully.³

In June 2018, the Court asked questions about how to value this settlement benefit. The dollar value of offering the current version of MFT is difficult to quantify. Yet Ford believes the record evidence shows that MFT Version 3.6 (released in August 2013) conferred an additional performance improvement over prior versions that had themselves addressed many specific identified issues and bugs in the earliest versions of MFT; and Ford's analysis of third-party survey data of initial quality showed Ford that version 3.6 achieved best-in-class performance. *See* ECF No. 408-1 (Declaration of Kenneth Williams) ¶ 38; ECF Nos. 517-2-517-4. Version 3.6 incorporated and added to a long series of software enhancements made in earlier versions that collectively improved performance by reducing black screen occurrences and screen freezes,

² While the Settlement Agreement contemplated that Class Members would be required to obtain a certificate entitling them to have an Authorized Ford Dealer install the software update in their vehicle, Ford has been able to establish a simpler alternative system in which eligible Class Members can be determined solely based on the VIN for their vehicle. Consequently, any Class Member who presents the vehicle for this upgrade may receive the benefit without a certificate. Certificates will still be available via the settlement website or via mail upon request of class members who would like one.

³ Confirmation of a successful installation is the only potentially viable remedy if a customer is continuing to experience problems. Ford believes the most current version of the software builds on the version that achieved essentially "best-in-class" status, and does not contemplate further versions. To the extent individual Class Members experience unique problems, including those caused by compatibility issues with peripheral devices, it is not practical for Ford to create a new version of the MFT software.

1 simplifying the user interface, and introducing new software technologies and designs that
2 improved speed and system performance. Williams Decl. ¶¶ 23-31. Version 3.6 further
3 improved stability caused by phonebook download issues, improved search for street names,
4 improved traffic incident pop-up behavior for TravelLink, and reduced USB re-indexing
5 scenarios. *Id.* ¶ 31. In Ford’s view, the multitude of programming corrections reflected in
6 Version 3.6 led to materially more reliable and stable performance. This is illustrated by the fact
7 that 71% of the Class Members stopped availing themselves of the free updates to their MFT
8 systems even before version 3.6 (*see* ECF 346-1 (Taylor Rpt.) Fig. 2), which Ford believes likely
9 indicates that they were satisfied with the performance of their systems.

10 Ford believes the most current compatible version (MFT Version 3.10) has continued
11 Ford’s longstanding trend of improvement in its in-vehicle information and entertainment
12 systems, which led to improved reliability throughout the 2010-2013 class period and beyond in
13 systems designed for use in the Class Vehicles (which are now between six and ten years old).
14 Specifically, version 3.10 (along with interim versions 3.7 and 3.8) addressed various bugs and
15 stability issues, and added compatibility with Siri, Apple’s virtual assistant. This means that any
16 Class Member who today obtains the most currently available version of MFT is, in Ford’s view,
17 even more likely to be satisfied with its performance.

18 As Ford has noted, the MFT system was never sold as a standalone feature (and Ford
19 disagreed with Plaintiffs’ experts’ attempts in litigation to determine damages notwithstanding
20 that fact). Hence, it is difficult to provide a concrete “dollar value” to the free provision of the
21 current version of MFT that the Court previously requested. However, Ford notes that Ford will
22 bear dealer labor costs of approximately \$80-100 for each installation of an update; any dealer
23 retail charges for installations would be borne by vehicle owners if not paid by Ford under this
24 settlement. As the Court previously recognized, the availability of the free upgrades to version
25 3.10 does “add some value to the settlement.” ECF No. 526 at 11.

26 3. Attorneys’ Fees

27 The Court’s concerns about the June 2018 settlement focused in part on the fact that (1)
28 the monetary value to class members of the collective package of settlement benefits, including

1 the amounts likely to be paid to those Class Members who submit valid claims, would be difficult
2 to reliably quantify, while (2) Ford agreed to not oppose Plaintiffs' counsel's request for a fee and
3 expense award of up to \$22 million. The Court expressed concern that Plaintiffs' fee request
4 might be too large when compared to the value of the benefits actually transmitted to Class
5 Members. The parties' subsequent revisions, reflected in the Settlement Agreement, address the
6 Court's concern. First, as noted above, the parties negotiated an array of unilateral payments to
7 Class Members and a \$17 million guaranteed minimum payment to provide more certainty about
8 the value of the benefits that will go to Class Members. Second, the accepted mediator's proposal
9 included a reduction to \$16 million of the maximum amount of fees and costs Plaintiffs' counsel
10 may ask the Court to award. Plaintiffs subsequently moved for an award of fees and costs in the
11 amount of \$16 million (ECF No. 527), which does not exceed the cap set forth in the Settlement
12 Agreement.

13 **D. Class Notice**

14 The Court's Preliminary Approval Order directed Ford to send mailed notice to the class
15 members on or before June 10, 2019. ECF No. 526 (Prelim. Approval Order ("PAO")) at 23.
16 Through the Settlement Administrator (JND Legal Administration ("JND")), Ford completed the
17 notice mailing program by this deadline. *See* ECF No. 540 (Keough Decl.) ¶¶ 6-9. Ford provided
18 to JND a list of the Vehicle Identification Numbers ("VINs") and the state of original purchase
19 for all Ford and Lincoln vehicles equipped with MFT and sold before August 9, 2013. *Id.* ¶ 6.
20 JND searched government vehicle-registration records, and identified 387,902 names and
21 addresses comprising past and current owners and lessees of potential Class Vehicles. *Id.* ¶ 7.
22 Between May 10 and June 10, 2019, JND mailed Short Form Class Notices to each of these
23 addresses. *Id.* The U.S. Postal Service returned 4,108 Short Form Class Notices with forwarding
24 addresses to which JND re-sent Short Form Class Notices. *Id.* ¶ 8. An additional 25,435 Short
25 Form Class Notices were returned without forwarding notices. *Id.* JND attempted to locate new
26 addresses for these class members by performing advanced address/skip-trace research. *Id.*
27 Through these searches, JND located new addresses for 13,508 class members, to which JND re-
28 mailed Short Form Class Notices. *Id.* JND also sent email notices to 166,097 addresses

1 associated with Class Vehicle VINs in Ford's records. *Id.* ¶ 9. Of these, 23,911 were returned as
 2 undeliverable. *Id.* In total, 373,596 Short Form Class Notices were mailed and not returned as
 3 undeliverable. *Id.* ¶ 8.

4 **E. Notice to Attorneys General**

5 On February 14, 2019, in compliance with the Class Action Fairness Act, 28 U.S.C. §
 6 1715, Ford sent notice of this proposed Settlement to the Attorney General of the United States,
 7 and the attorneys general of all 50 states, the District of Columbia, and U.S. territories.
 8 Declaration of Sarah Trela ¶ 2. The notice contained the proposed Class Notice, the Parties'
 9 February 7, 2019 Settlement Agreement and its exhibits, the Motion for Preliminary Approval
 10 and Memorandum in Support, and copies of the Third Amended Class Action Complaint and all
 11 prior complaints submitted in this action. *Id.* ¶ 3. Ford received no response to this
 12 correspondence. *Id.* ¶ 4.

13 **III. THE SETTLEMENT AGREEMENT MEETS ALL REQUIREMENTS AND** 14 **SHOULD BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE**

15 Judicial policy favors settlements, particularly where complex class action litigation is
 16 concerned. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *In re Uber FCRA*
 17 *Litig.*, 2018 WL 2047362, at *2 (N.D. Cal. May 2, 2018) (Chen, J.). In a class action, Federal
 18 Rule of Civil Procedure 23(e) "requires the district court to determine whether a proposed
 19 settlement is fundamentally fair, adequate and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d
 20 1011, 1026 (9th Cir.1998). "It is the settlement taken as a whole, rather than the individual
 21 component parts, that must be examined for overall fairness." *Id.* (citing *Officers for Justice v.*
 22 *Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 628 (9th Cir.1982)). A presumption of fairness applies
 23 where a settlement agreement "was the product of non-collusive, arms' length negotiations
 24 conducted by capable and experienced counsel." *In re Netflix Privacy Litig.*, 2013 WL 1120801,
 25 at *4 (N.D. Cal. Mar. 18, 2013).

26 This Settlement Agreement is entitled to this presumption of fairness. It is the product of
 27 almost one year of arm's-length negotiations among well-informed, sophisticated counsel who
 28 were prepared to continue litigating aggressively on behalf of their respective clients. This

1 litigation has been underway for almost six years and has gone through the full array of
2 substantive and procedural pre-trial motions, extensive discovery involving production of more
3 than 8 million pages of documents and 50 fact and expert depositions, and was being shaped for
4 trial through the entry of various pre-trial orders. In response to the Court's concerns about the
5 parties' original June 2018 agreement, the parties reached a revised Agreement in December 2018
6 following negotiations under the supervision of court-appointed mediator Magistrate Judge Kim,
7 with the terms of that Agreement based on Judge Kim's Mediator's Proposal. In response to this
8 Court's concerns about the timing of the claim process, the parties revised the agreement yet
9 again, finalizing it in February 2019. As this Court has previously found, this background
10 supports a finding that the agreement is the product of non-collusive, arms' length negotiations.
11 *See* ECF No. 526 at 14.

12 The Ninth Circuit has established a list of factors to consider when assessing whether a
13 proposed settlement is fair, reasonable and adequate: (1) the strength of the plaintiffs' case; (2)
14 the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining
15 class action status throughout the trial; (4) the benefits offered in the settlement; (5) the extent of
16 discovery completed and the stage of the proceedings; (6) the experience and views of counsel;
17 (7) the presence of a governmental participant; and (8) the reaction of the class members to the
18 proposed settlement. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004);
19 *see also Hanlon*, 150 F.3d at 1026. An analysis of the *Churchill* factors overwhelmingly supports
20 approval of this Settlement Agreement.

21 **A. Strength of the Plaintiffs' Case**

22 Despite years of litigation, a substantial, sustainable, remunerative victory for the classes
23 faces serious remaining obstacles. Although some individuals experienced intermittent issues
24 with their MFT system (especially the earliest versions), at trial Ford would have presented
25 evidence from which a jury could have concluded that Plaintiffs and Class Members safely and
26 reliably drove their class vehicles for tens of thousands of miles to rebut Plaintiffs' allegation that
27 their vehicles were unmerchantable. Ford also believes Plaintiffs' breach of express warranty
28 claims would not have prevailed in a class trial given evidence showing that a large portion of

1 class members obtained no, or only one, warranty repair. Additionally, as Plaintiffs
2 acknowledged (ECF No. 403), their theory of the case for the Phase I trial hinged on proving that
3 all MFT versions up to and including 3.6 were so defective as to create liability for express
4 warranty, implied warranty, and negligence. This theory of liability created substantial risks for
5 Plaintiffs' claims going forward, as Ford intended to produce evidence at trial proving that the
6 various MFT updates (which Ford made available at no cost) improved the MFT system over
7 time, and that Ford determined that third-party survey data of initial quality indicated that version
8 3.6 achieved best-in-class performance compared to similar systems in other manufacturers'
9 vehicles.⁴ Ford also intended to point to customer surveys in which the majority of responding
10 owners reported satisfaction with their MFT systems and said they would recommend MFT to a
11 friend. Plaintiffs would have had to overcome this and other Ford evidence before they could
12 obtain a classwide defect finding. Even if Plaintiffs persuaded the jury that the MFT system
13 reflected a flawed development process and design, they still would have had to convince the jury
14 to award substantial classwide diminished-value based damages, regardless of whether they
15 experienced a malfunction, and regardless of whether Ford dealers successfully repaired the
16 malfunction.

17 As this Court noted at the preliminary approval stage, Plaintiffs also faced significant
18 challenges to establishing damages, even if they were able to convince a jury of Ford's liability.
19 See ECF No. 526 at 16. Specifically, the damages models from Plaintiffs' experts relied on a
20 conclusion that the MFT system had no value. *Id.* Ford believes it would be able to show at trial
21 that those models are methodologically flawed and overlook the significant value that the MFT
22 systems provided to class members.

23 This factor strongly weighs in favor of approving the settlement.

24 **B. Risk, Expense, Complexity, and Likely Duration of Further Litigation**

25 Ford believes the presence of several individualized issues necessary to the resolution of
26 any particular class member's claim for damages means that a class trial would not have resolved

27 _____
28 ⁴ Note that the vehicles originally equipped with version 3.6 are not included in the Settlement
Classes.

1 all of the elements of the claims against Ford. As such, some second phase individualized fact-
2 finding procedure would have been required to make class-member specific adjudications as
3 which, if any, class members should receive monetary damages based on their purchase of MFT-
4 equipped vehicles. *See* ECF No. 383 at 25 & 26 n.19; ECF No. 396 at 5. This tiered liability
5 determination process would have delayed any potential recovery for class members and
6 introduced further uncertainty as to whether class members would receive damage awards.
7 Furthermore, there is a very strong likelihood that Ford would have appealed any adverse jury
8 verdict at the Phase I trial stage, which would have both prolonged the time for any potential
9 recovery for class members as well as potentially jeopardized any potential recovery. This factor
10 too strongly weighs in favor of approving the settlement.

11 **C. Plaintiffs Faced Challenges to Maintaining Class Action Status Throughout**
12 **the Trial**

13 Even if Plaintiffs were able to satisfy a jury that class members were entitled to some
14 recovery, Ford believes Plaintiffs faced material risks to maintaining class action status
15 throughout the trial process. Specifically, Ford believes the express warranty claims for the
16 California and Washington classes were vulnerable to challenge as to their continued class status
17 after the Phase I trial, on the basis that the issues of presentment and repair are inherently
18 individualized, and resolving these claims in a single trial that respects both class members' and
19 Ford's due process rights would be unmanageable. ECF No. 393 at 5-9. This factor also strongly
20 weighs in favor of approving the settlement.

21 **D. The Settlement Provides Benefits to the Entire Class**

22 As noted in Section II.C above, the proposed settlement offers Plaintiffs and Settlement
23 Class Members multiple benefits relevant to their allegations. The settlement enhancements to
24 which the parties agreed following mediation in Autumn 2018 confer additional value and
25 certainty of monetary recovery upon the Class. Class Members who submitted a valid claim
26 confirming that they took their vehicle to a Ford dealer for one or more MFT Software Repairs
27 during the relevant period will receive a payment of \$100 if they received one repair, \$250 if they
28 received two repairs, or \$400 if they received three or more repairs. Class Members who

1 submitted a valid claim confirming that they received a post-warranty repair within one year after
2 the extended MFT warranty expired are entitled to reimbursement for the full cost of those
3 repairs. Class Members who never sought an MFT Software Repair but submitted a claim merely
4 attesting that they experienced unsatisfactory performance from their MFT will receive \$45 in
5 recognition of Plaintiffs' concern about possible "silent sufferers" who experienced problems but
6 never presented their vehicles to a Ford dealer for an MFT Software Repair. Finally, all Class
7 Members who are identified in Ford's records and/or DMV records as Original Owners or
8 Lessees of Class Vehicles for which no claim was submitted are entitled to receive a unilateral
9 payment of either \$20 or \$55, depending on whether Ford's records indicate that their vehicle
10 received an MFT Software Repair. Regardless of how many, or how few, Class Members
11 submitted claims, Ford committed that the total dollar amount paid to Class Members will be at
12 least \$17 million. There is no cap on the amount Ford will pay pursuant to the Settlement
13 Agreement.

14 To minimize impediments to submitting claims, the Parties developed a streamlined
15 claims process that imposed minimal burdens on class members. Wherever possible, the parties
16 utilized information in Ford's possession or available state vehicle registration data to pre-
17 populate claim forms. Specifically, the parties used (1) Ford's warranty data, which identifies
18 when each vehicle obtained a warranty repair (but does not identify the owner who received that
19 repair), (2) Ford's sales data, which indicates when and where a vehicle was originally sold (but
20 does not indicate if and when that vehicle was subsequently transferred to another owner), and (3)
21 vehicle registration data, which identifies the owner(s) or lessee(s) of the vehicle and indicates the
22 state in which the vehicle was registered. This data eliminated the need for any Original Owners
23 to provide proof that they were class members, and eliminated the need for class members to
24 provide documentation of an MFT Software Warranty Repair.

25 Because the available data does not necessarily indicate whether a vehicle was
26 subsequently sold to another owner, much less the date of such sale, the state in which it
27 occurred, or whether the vehicle was sold by an Authorized Ford Dealer, the Settlement
28 Agreement required class members to submit documentation in three areas. *First*, because the

1 available data was insufficient to determine whether non-Original Owners were class members
2 (e.g., whether they purchased or leased a MFT-equipped vehicle from an Authorized Ford Dealer
3 before August 9, 2013 in one of the seven class states), these claimants were required to provide
4 proof of class membership. **Second**, because Ford's warranty data does not indicate who
5 obtained a warranty repair, class members seeking an Option 1 claim were required to submit
6 proof of ownership at the time of the repairs. For the Original Owners, the Settlement
7 Administrator can determine the ownership start date from Ford's records, so these class
8 members would just need to submit a single readily-available document, such as a repair invoice,
9 vehicle registration, or proof of insurance, showing that they continued to own the vehicle on the
10 date of the last repair (or at some subsequent date). For Option 3 claims, the parties agreed no
11 proof of ownership would be required as the lower amount available under these claims lessened
12 the risk of fraudulent claims. **Third**, class members seeking an Option 2 claim or an Option 1
13 claim including a MFT Software Post-Warranty Repair would also need to provide proof of that
14 repair as Ford's warranty records do not reflect post-warranty repairs.

15 As a practical matter, this means that Original Owners submitting an Option 3 claim did
16 not need to provide any supporting documentation, and Original Owners submitting an Option 1
17 claim needed to provide just a single document confirming they owned their vehicle at any point
18 on or after the date of the last claimed MFT Software Repair. To facilitate the submission of
19 these claims, the Settlement Administrator created claim forms pre-populated with information
20 from the vehicle registration data and Ford's records, and allowed claimants to submit any
21 required documentation by uploading a copy of the document to the claim submission website or
22 by taking a picture of the document and emailing it to the Settlement Administrator. Keough
23 Decl. ¶¶ 10-11. For any class member who did not include the requisite documentation, the
24 Settlement Administrator sent him or her a letter identifying the information that needed to be
25 submitted, indicating that the document could be submitted via the settlement website or by
26 taking a picture and emailing it to the Settlement Administrator. ECF No. 541 (Berman Decl.) ¶
27 7. If the class member did not submit the documentation, the Settlement Administrator sent
28 another letter and an email (if an email address was available) to remind the claimant to submit

1 the documentation. *Id.*

2 As noted previously, in response to the Court's comments in January 2019, the parties
 3 agreed to move the claims submission process forward so that the Court would know how many
 4 claims of each type were submitted before considering whether to give final approval to the
 5 settlement. A total of 17,445 claims were received by the Settlement Administrator by the
 6 September 24, 2019 claim submission deadline. Keough Decl. ¶ 23. The Settlement
 7 Administrator is nearing completion of its initial review of these claims. To date, it has
 8 completed its review of 14,560 claims, and has determined that at least 3,143 are eligible for
 9 payment and 159 are ineligible for payment. (*Id.*) For the remaining claims, the Settlement
 10 Administrator is working with the class members to obtain the required documentation. Until
 11 those efforts are concluded, the parties do not yet know the precise total number of valid claims.
 12 The parties intend to provide a supplemental submission seven days before the Final Approval
 13 Hearing with updated information regarding the number of valid claims. All told, claims were
 14 submitted on behalf of approximately 4.5% of all Class Vehicles. (*Id.* ¶¶ 7, 21.) Courts in this
 15 district and the Ninth Circuit routinely approve settlements with similar or lower claim rates. *See,*
 16 *e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944-45 (9th Cir. 2015) (affirming
 17 approval of settlement where less than 3.4% of the class filed any claim, valid or not); *Moore v.*
 18 *Verizon Commc'ns Inc.*, 2013 WL 4610764, at *8 (N.D. Cal. Aug. 28, 2013) (granting final
 19 approval of class action settlement with 3% valid claims rate); *Harris v. Vector Mktg. Corp.*, 2012
 20 WL 381202, at *2 (N.D. Cal. Feb. 6, 2012) (granting final approval of class action settlement
 21 with less than 1% valid claims rate); *Touhey v. United States*, 2011 WL 3179036, at *7-8 (C.D.
 22 Cal. July 25, 2011) (approving a settlement with a 2% total claims rate).

23 As noted above, the unilateral payment to non-claim-submitting identifiable Original
 24 Owners⁵ and the \$17 million guaranteed minimum payment – provisions to which Ford agreed in
 25

26 ⁵ The Settlement Administrator identified 384,985 unique vehicles as potentially in the class, but
 27 identified only 343,208 Original Owners from the vehicle registration data. This discrepancy is
 28 due to the fact that an Original Owner of a vehicle originally sold in a non-class state, and
 subsequently re-sold (and registered) in a class state would not be a settlement class member,
 even though the subsequent purchaser could be a settlement class member.

1 Autumn 2018 – mitigate whatever concerns the Court might have had that a lower claim rate
2 would minimize Ford’s ultimate payment to the Class. Because the total amount of the claim
3 payments and unilateral payments likely will not meet this amount if unadjusted, those Class
4 Members who submitted valid claims likely will receive an additional increase in payment on a
5 pro-rata basis. The exact amount will be calculated upon the conclusion of the claims process.
6 While the guaranteed minimum payment is but a portion of Plaintiffs’ estimated maximum
7 potential damages at trial of about \$300 million, courts in the Northern District of California
8 regularly have approved class action settlements amounting to less than 10% of the maximum
9 asserted value of the class claim, as this Court previously recognized. *See, e.g.*, ECF No. 526 at
10 18 (noting that “courts have approved settlements below the 10% threshold” and citing cases).

11 This factor weighs in favor of approving the settlement as well.

12 **E. The Parties Engaged in Fulsome Discovery and Reached this Settlement at an**
13 **Advanced Stage in the Litigation**

14 This litigation has been underway for over six years and has gone through the full array of
15 substantive and procedural pretrial motions, including multiple motions to dismiss, a motion for
16 class certification, multiple motions for reconsideration, an interlocutory appeal of this Court’s
17 certification decision, a motion for summary judgment, a motion to decertify certain subclasses,
18 and motions in limine to exclude certain evidence at the trial stage, among other things. *See*
19 *supra* Section II.A. During this process, the Parties engaged in extensive discovery involving
20 production of more than 8 million pages of documents and 50 fact and expert depositions, and the
21 case was being shaped for trial through the entry of various pre-trial orders. Discovery is closed,
22 and the Parties were fully apprised of all the evidence available in this case, allowing counsel to
23 intelligently assess the strengths and weaknesses of their claims and defenses and the benefits of
24 settlement. *See Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (“Extensive
25 discovery had been conducted, and the parties had gone through one round of summary judgment
26 proceedings. From this the district court could find that counsel had a good grasp on the merits of
27 their case before settlement talks began.”). This factor weighs in favor of approving the
28 settlement.

1 **F. Counsel Are Experienced in the Area of Consumer Class Action Litigation**
 2 **and Able to Appropriately Assess the Benefits of Settlement**

3 Courts are entitled to rely on the opinion of competent Class Counsel that the settlement is
 4 fair, reasonable, and adequate, where Class Counsel are qualified, and where discovery and
 5 settlement negotiations are extensive and thorough. *See In re LinkedIn User Privacy Litig.*, 309
 6 F.R.D. 573, 588 (N.D. Cal. 2015). Counsel in this case are capable lawyers well-versed in class-
 7 action litigation. ECF No. 202 at 23-24. Class Counsel and defense counsel both support the
 8 proposed settlement. In reviewing a proposed settlement, the Court should keep in mind the
 9 unique ability of class and defense counsel to assess the potential risks and rewards of litigation,
 10 and a class settlement reached in arms-length negotiations between experienced, capable counsel
 11 after meaningful discovery is presumptively reasonable. *In re Omnivision Techns., Inc.*, 559 F.
 12 Supp. 2d 1036, 1043 (N.D. Cal. 2008). This factor weighs in favor of approving the settlement.

13 **G. The Absence of Any Governmental Participant Does Not Weigh Against Final**
 14 **Approval**

15 No governmental participant was involved in this case. Consequently, this factor does not
 16 apply or weigh against final approval. *Dearaujo v. Regis Corp.*, 2017 WL 3116626, at *10 (E.D.
 17 Cal. July 21, 2017); *In re Toys R Us-Delaware, Inc.—Fair & Accurate Credit Transactions Act*
 18 *(FACTA) Litig.*, 295 F.R.D. 438, 455 (C.D. Cal. 2014).

19 **H. Class Members’ Reactions to the Settlement Agreement Have Been**
 20 **Overwhelmingly Positive**

21 The reaction of class members to the settlement has been positive. Of roughly 380,000
 22 class members who received Class Notice, less than 200 sought to exclude themselves from the
 23 class, and only one person submitted an objection in this case (ECF No. 536). This contrasts with
 24 the thousands of Class Members who have submitted a settlement claim.

25 The objection should have no bearing on the Court’s final approval decision. The objector
 26 briefly mentions an unspecified glitch (which she says she “tolerated”) in her class vehicle, a
 27 2013 Ford Edge. But the thrust of her complaints appear to stem primarily from her experience
 28 with a 2015 Ford Fusion, which is not a Class Vehicle. *Id.* at 1. Her concerns do not relate to the

1 MFT, but rather involve alleged defects in the electrical system of her vehicle that led to doors
2 and windows being inoperative and the alleged wrongful repossession of the objector's vehicle.
3 *Id.* So, while the objector claims that \$400 is an inadequate benefit for her contentions about that
4 other vehicle, she does not identify any alleged deficiencies with the Settlement Agreement
5 regarding the claims at issue in this case, and the objection should be rejected. *See Schulte v.*
6 *Fifth Third Bank*, 805 F. Supp. 2d 560, 595 (N.D. Cal. 2011) (an objection simply arguing “that
7 the amount awarded to class members should be increased... is tantamount to complaining that
8 the settlement should be better, which is not a valid objection”).

9 In addition, only a very small minority of Class Members—a total of 166, or under 1/10th
10 of 1 percent—have sought to exclude themselves from this Settlement Agreement.

11 The participation rate, compared to solitary objection and the negligible number of class
12 members seeking exclusion from the Settlement's benefits, weighs in favor of final approval.
13 *E.g., Moore*, 2013 WL 4610764, at *8 (“Given the amount of valid claim forms submitted, and
14 the relatively small number of objections and opt-outs, the reaction of the class to the Settlement
15 is positive, which favors approving the Settlement.”)

16 **IV. THE ATTACHED LIST OF EXCLUSIONS SHOULD BE ADOPTED**

17 Under the Preliminary Approval Order, a class member wishing to be excluded from the
18 settlement class must send to the address specified in the Class Notice so that it is received at that
19 address on or before September 20, 2019: (a) the class member's full name, address, and
20 telephone number, (b) the model, model year, and VIN of his, her, or its Class Vehicle, (c) an
21 explicit and unambiguous statement of desire to be excluded from the settlement class, and (d) an
22 individual and personal signature by the class member (and, if represented by counsel, an
23 additional signature by such counsel). PAO ¶ 12. The Class Notice informed class members that
24 “[i]f you do not submit a clear and timely request for exclusion to the Ford MFT Settlement
25 Exclusion Center, you will be bound by the Settlement Agreement and relinquish any claims
26 against Ford related to the MFT system (except for personal injury claims).” Class Notice ¶ 16
27 attached as Ex. A to Keough Decl. A total of 121 class members sent Requests for Exclusion to
28 the correct address that were received by September 20, 2019 and contained all of the information

1 required by the Preliminary Approval Order to constitute a valid Request for Exclusion. Keough
2 Decl. ¶ 17.

3 An additional 45 communications from class members were sent in a timely manner and
4 that, while imperfect in some respect, appear to manifest a desire by the sender to be excluded
5 from the Settlement Class. This includes written communications that did not include the class
6 member's telephone number or failed to provide the vehicle's model, model year, and/or the VIN.
7 *Id.* ¶ 18. Ford believes these requests are sufficiently complete to permit identification of the
8 class member seeking exclusion, and it would not object if the Court determines them to be valid
9 requests for exclusion notwithstanding their failure to comply with the terms of the Preliminary
10 Approval Order.

11 The Settlement Administrator also received 4 written communications that were not
12 received by the deadline, do not include an unambiguous statement expressing a desire to be
13 excluded from the class, are not signed, or are missing necessary identification information, such
14 as the class member's address. *Id.* ¶ 20. Two other individuals submitted both a request for
15 exclusion and also filed a claim under the Settlement Agreement. *Id.* These requests should thus
16 be deemed invalid requests for exclusion because they are internally inconsistent. *See* Settlement
17 Agreement at 37 ("Any purported Request for Exclusion or other communication sent to such
18 address that is unclear or internally inconsistent with respect to the Member of the Settlement
19 Classes' desire to be excluded from the Settlement Classes will be deemed invalid unless
20 determined otherwise by the Court.") Counsel for the parties agree that these communications
21 should be excluded from the list of requested exclusions from the class. Keough Decl. ¶ 20.

22 The Settlement Administrator also received 103 written communications requesting
23 exclusion from the class with respect to a vehicle that does not fall within the class definition,
24 either because it is not equipped with a MFT or was originally sold after August 9, 2013. *Id.* ¶
25 21. Because these vehicles do not fall within the class definition in the first place, there is no
26 need for them to be excluded from the class.

27 Exhibit B to the Keough Declaration identifies the names, addresses, and VINs of the
28 class members who have submitted valid Requests for Exclusion. Counsel requests that the Court

1 adopt this list in its Final Approval Order.

2 **V. CONCLUSION**

3 Ford respectfully asks the Court to enter the Preliminary Approval Order submitted with
4 Plaintiffs' Motion.

5

6 Dated: November 7, 2019

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7

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