Lauren Ungs, Bar No. 273374
LaurenU@knightlaw.com
Steve Mikhov, Bar No. 224676
stevem@knightlaw.com
KNIGHT LAW GROUP, LLP
10250 Constellation Blvd., Suite 2500
Los Angeles, California 90067
Telephone: (310) 552-2250
Facsimile: (310) 552-7973

Bryan C. Altman, Bar No. 122976
bryan@altmanlawgroup.net
THE ALTMAN LAW GROUP
10250 Constellation Blvd., Suite. 2500
Los Angeles, CA 90067

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION This Document Relates To: ACTIONS SET FOR FEBRUARY 24, 2020 TRIAL	Case No. MDL No. 2672 CRB (JSC) PLAINTIFFS' NOTICE OF MOTION AND MOTION TO DISQUALIFY JUDGE BREYER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF (1) EX PARTE APPLICATION TO SHORTEN TIME TO HEAR MOTION; (2) [PROPOSED] MOTION TO DISQUALIFY JUDGE BREYER; DECLARATION OF LAUREN UNGS; [PROPOSED] ORDER Trial Date: February 24, 2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Judge Breyer helps to fashion and approves the class action settlement. 2

B. Judge Breyer makes statements regarding the fairness of the settlement that he helped to fashion and that he approved. 3

C. Plaintiffs opt out of the class settlement that Judge Breyer has publicly stated was "fair, reasonable and adequate." 4

D. Judge Breyer orders the opt-out plaintiffs to participate in mediation before a magistrate judge who also participated in fashioning the Class Settlements. 4

E. On February 4, 2020, Judge Breyer issues a summary judgment ruling that turns Phase I of the trial into a test of the fairness of the Class Settlement—and makes himself the decisionmaker. 4

III. GOVERNING LAW 5

IV. A REASONABLE PERSON WITH KNOWLEDGE OF ALL THE FACTS WOULD CONCLUDE THAT JUDGE BREYER'S IMPARTIALITY MIGHT BE REASONABLY QUESTIONED IN THIS CASE. 7

A. Judge Breyer's intimate involvement in fashioning the Class Settlement raises the appearance of bias. 7

B. Judge Breyer's recent summary judgment order shows the Court's vested interest in defending the adequacy of the class action settlement. 8

C. Judge Breyer's degree of favorable predisposition toward the class action settlement he crafted displays clear inability to render fair judgment. 9

1. Treating Plaintiffs as greedy for rejecting the Class Settlement and indicating that the Court will allow Volkswagen to paint them as such. 9

2. Concluding that the cars necessarily had some value, which must be factored into damages. 10

3. Prejudging evidence. 11

CONCLUSION 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

Cases

Benipayo v. Volkswagen Grp. of Am., Inc.,
No. 15-MD-02672-CRB, 2020 WL 553884 (N.D. Cal. Feb. 4, 2020) 3

Clemens v. U.S. Dist. Court for Central Dist. Of California,
428 F.3d 1175 (9th Cir. 2005) 7

In re Mason,
916 F.2d 384 (7th Cir. 1990) 7

In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.,
No. MDL 2672 CRB (JSC), 2016 WL 6248426, (N.D. Cal. Oct. 25, 2016) 2-3

Liteky v. United States,
510 U.S. 540 (1994) passim

Tenants & Owners in Opposition to Redevelopment (TOOR) v.
U.S. Dep't of Hous. & Urban Dev. (HUD),
338 F. Supp. 29 (N.D. Cal. 1972) 7, 11

United States v. Azhocar,
581 F.2d 735 (9th Cir. 1978) 7

United States v. Holland,
519 F.3d 909 (9th Cir.2008) 7-8

United States v. Sibla,
624 F.2d 864 (9th Cir. 1980) 6

Yagman v. Republic Ins.,
987 F.2d 622 (9th Cir. 1993) 2, 7, 9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Statutes

28 U.S. Code § 144 6-7

28 U.S. Code § 455 1, 5-7

California Civil Code, § 1782 5

Rules

Civil Local Rule 3-14 6-7

Other Authorities

Associated Press, *Volkswagen Settlement of Nearly $15 Billion Approved by Judge*, S.F. Gate, October 25, 2016 4

Bomey, *Judge Approves $15B Volkswagen Settlement*, Courier Journal, October 25, 2016 4

Ewing and Tabuchi, *Behind Volkswagen Settlement, Speed and Compromise*, N.Y. Times, July 15, 2016 3

TO THE COURT, PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiffs will, and hereby do, move the Court *ex parte* to disqualify Judge Charles R. Breyer from presiding over trial of the individual claims of the consumer plaintiffs who opted out of the Volkswagen "clean diesel" class action settlement crafted by Judge Breyer.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Requests for disqualification are rarely appropriate, but this is the rare case where one is necessary. Judges must disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned," (28 U.S. Code § 455(a)), including where they have any "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" (*id*. at § 455(b)(1)). What matters "is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). Indeed, the test for disqualification is an objective one. *Id*.

Here, Plaintiffs are individual consumers who chose to opt out of the consumer class action settlement in the Volkswagen "clean diesel" marketing, sales practices, and products liability class action. The judge in the present case, Hon. Charles Breyer, is the same judge who oversaw that highly complex consumer class action settlement process—a process that required intimate involvement by the judge, who personally fashioned and approved the final settlement ("Class Settlement").

Given Judge Breyer's close identification with the Class Settlement, Plaintiffs have harbored concerns that his service as judge in the opt-out cases would raise an appearance of bias against Plaintiffs. Nonetheless, Plaintiffs proceeded in good faith in this litigation. But now, in the wake of the February 4, 2020 summary judgment order, the concerns about appearance of bias require disqualification. This is so, because the Court has turned Phase I into a trial of whether the Class Settlement was a fair resolution of Plaintiffs' CLRA claims—and has mandated that this determination will be made *by this Court*, not a jury.

In other words, Judge Breyer has given to himself the power to decide whether the Class Settlement that he fashioned and that he approved, was fair. Moreover, further rulings and statements made on the record in the wake of the summary judgment order hammer home the impression that Judge Breyer is favorably predisposed toward the Class Settlement to a degree that renders him unable to be a fair and impartial judge of this trial.

Moreover, as of February 18, 2020, the Court has stated that it will grant a non-suit motion against the Plaintiffs if counsel argues that the vehicles had no value. This issue is intricately intertwined with the issue of the adequacy of the purported correction by Volkswagen in response to Plaintiffs' CLRA demands. Yet, the Court's statements suggest it has prejudged the issued before hearing any evidence on it whatsoever.

Judge Breyer has a dog in this fight. He has a vested interest in determining that the settlement he presided over and approved was a fair resolution of consumer claims. A "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Yagman v. Republic Ins*., 987 F.2d 622, 626 (9th Cir. 1993). Judge Breyer should recuse.

II. STATEMENT OF FACTS

A. Judge Breyer helps to fashion and approves the class action settlement.

Beginning in 2015, over a thousand civil lawsuits against Volkswagen in federal courts across the United States were consolidated in the United States District Court for the Northern District of California before Judge Breyer. *See generally In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.,* No. MDL 2672 CRB (JSC), 2016 WL 6248426, (N.D. Cal. Oct. 25, 2016), *aff'd sub nom. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.,* 895 F.3d 597 (9th Cir. 2018), and *aff'd sub nom. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.,* 741 F. App'x 367 (9th Cir. 2018).

Judge Breyer oversaw the highly complex class action settlement process and helped fashioned the two settlements. (Decl. of Laura Ungs, ¶ 8.) Indeed, after months of negotiations

facilitated by Court-appointed Settlement Master Robert Mueller III, former director of the Federal Bureau of Investigation, the bulk of the civil actions were resolved in two settlements (one concerning 2.0-liter TDI vehicles and another for 3.0-liter TDI vehicles). *See id.*; *Benipayo v. Volkswagen Grp. of Am., Inc.,* No. 15-MD-02672-CRB, 2020 WL 553884, at *1-2 (N.D. Cal. Feb. 4, 2020). Both settlements similarly offered a buyback or a free emissions modification repair, and cash restitution, and required class members to release all claims arising from the emissions scandal. *Benipayo*, 2020 WL 553884, at *2.

B. Judge Breyer makes statements regarding the fairness of the settlement that he helped to fashion and that he approved.

Judge Breyer's involvement in the class settlement ("Class Settlement") garnered enormous public attention, including recognition of how closely he worked to fashion it and his belief that the Class Settlement represented fair and adequate compensation for consumers. For example, the New York Times reported that the negotiations looked increasingly impossible, but that "[a]n extra push came from Judge Charles R. Breyer of Federal District Court in San Francisco," who "set the tone" for the settlement negotiations. (Ungs Decl., ¶ 15, Ex. F [Ewing and Tabuchi, *Behind Volkswagen Settlement, Speed and Compromise*, N.Y. Times, July 15, 2016.) Judge Breyer "put the lawyers on notice" at an early settlement hearing that the goal was to figure out "'what is fair and just compensation for the people who have been damaged by this matter?'" *Id.* "Settlement talks intensified under pressure from Judge Breyer." *Id.* "Soon, the lack of personal time for the negotiators became a cruel, running joke. At periodic conferences with the parties in San Francisco, Judge Breyer would repeatedly refer to the long days the lawyers were putting in, at sacrifice to their families, to groans from those assembled." *Id.*

In the end, Judge Breyer made clear that he believed it was appropriate that the Class Settlement did not give consumers a full refund for their vehicles: "Breyer said in his order approving the settlement that the affected car owners are not entitled to a full refund because many had 'received a great deal of use out of their vehicles.' He also raised the specter of bankruptcy for Volkswagen if it had to pay the full purchase price." (Ungs Decl., ¶ 16, Ex. G

[Associated Press, *Volkswagen Settlement of Nearly $15 Billion Approved by Judge*, S.F. Gate, October 25, 2016].)

Judge Breyer also made clear that he believed that "the agreement is 'fair, reasonable and adequate.'" (Ungs Decl., ¶ 17, Ex. H [Bomey, *Judge Approves $15B Volkswagen Settlement*, Courier Journal, October 25, 2016].)

C. Plaintiffs opt out of the class settlement that Judge Breyer has publicly stated was "fair, reasonable and adequate."

Plaintiffs exercised their due process rights to opt out of the class action settlement in the Volkswagen "clean diesel" marketing, sales practices, and products liability class action. (Ungs Decl., ¶ 4.) A majority of plaintiffs are low income, and many are less educated and/or immigrants. (Ungs Decl., ¶ 5.)

D. Judge Breyer orders the opt-out plaintiffs to participate in mediation before a magistrate judge who also participated in fashioning the Class Settlements.

Before allowing Plaintiffs' cased to go to trial, Judge Breyer ordered Plaintiffs to participate in an intensive settlement process with Magistrate Judge Jaqueline S. Corley, who was also intimately involved in the class action settlement process. (Ungs Decl., ¶ 6.) In December 2018, Plaintiffs moved for relief from the settlement process or for a new settlement officer, concerned that Corley's close affiliation with the class action settlement process might impede the fair resolution of their individual claims by predisposing her to settlement options that effectively mirrored the class action settlement. (Ungs Decl., ¶ 7.)

Judge Breyer denied this motion. (*Id.*)

E. On February 4, 2020, Judge Breyer issues a summary judgment ruling that turns Phase I of the trial into a test of the fairness of the Class Settlement—and makes himself the decisionmaker.

Volkswagen moved for summary judgment on the ground that Plaintiffs could not recover damages under the CLRA, because Volkswagen had made an appropriate correction offer under California Civil Code, § 1782(b), which provides that "no action for damages may be

maintained under Section 1780 if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice." Volkswagen argued that the Class Settlements constituted an appropriate correction offer to each of the Plaintiffs. (*See* MSJ Order at 8.)

In opposing the motion, Plaintiffs argued that the Class Settlement could not be deemed an appropriate offer of correction because (1) the Class Settlements would require Plaintiffs to release all of their other, non-CLRA claims, (2) the Class Settlements were inadequate because each consumer would receive only a portion of their vehicle purchase price, and (3) the Class Settlements were inadequate because they offered remedies that were subject to Volkswagen's unilateral determination based on subjective criteria. (MSJ Order at 10.) They also argued that adequacy of a correction offer is a factual issue for a jury. *Id.*

In ruling on the summary judgment motion, the Court gave the issue to *itself*: "[I]t it would be appropriate for the Court to determine whether the Class Settlements constituted appropriate CLRA correction offers after the close of evidence and with the benefit of an advisory jury verdict." (MSJ Order, 10:16-19.) And, as of February 13, the issue apparently will be tried *directly to the Court* in a bench trial. (Ungs Decl., ¶ 20.)

III. GOVERNING LAW

Requests for judicial disqualification are governed by 28 U.S. Code sections 144 and 455, and Civil Local Rule 3-14. Under Section 455, judges must disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned," (*id.* § 455(a)), including where they have any "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" (*id.* § 455(b)(1). Section 455(b)(1) "simply provides a specific example of a situation in which a judge's 'impartiality might reasonably be questioned' pursuant to section 455(a)." *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). What matters under section 455(a) "is not the reality of bias or prejudice but its appearance[,]" and the test for disqualification under section 455(a) is an objective one. *Liteky*, 510 U.S. at 548.

If a party files "a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time."[1] *Id.* The allegations in the affidavit must be taken as true. *United States v. Azhocar*, 581 F.2d 735, 740 (9th Cir. 1978).

"Whenever an affidavit of bias or prejudice directed at a Judge of this Court is filed pursuant to 28 U.S.C. § 144, and the Judge has determined not to recuse him or herself and found that the affidavit is neither legally insufficient nor interposed for delay, the Judge shall refer the request for disqualification to the Clerk for random assignment to another Judge." Civil L.R. 3-14.

Under both section 455 and 144, recusal is appropriate where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993). "The 'reasonable person' in this context means a 'well-informed, thoughtful observer,' as opposed to a 'hypersensitive or unduly suspicious person.'" *Clemens v. U.S. Dist. Court for Central Dist. Of California*, 428 F.3d 1175 (9th Cir. 2005) (citing *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)). This is an objective standard, from the perspective of "someone who 'understand[s] all the relevant facts' and has examined the record and the law." *United States v. Holland,* 519 F.3d 909, 913 (9th Cir.2008).

---

[1] The ten-day clause is a dated and "insubstantial" requirement, and good cause exists in any event for ex parte relief. *Tenants & Owners in Opposition to Redevelopment (TOOR) v. U.S. Dep't of Hous. & Urban Dev. (HUD)*, 338 F. Supp. 29, 31-32 (N.D. Cal. 1972).

Recusal is justified "either by actual bias or the appearance of bias." *Yagman,* 987 F.2d at 626; *accord Liteky,* 510 U.S. 540 (what matters "is not the reality of bias or prejudice but its appearance").

Although alleged bias cannot result from "mere disagreement" with a judge's rulings; opinions formed by the judge on the basis of events of current or prior proceedings will constitute a basis for a bias or partiality motion if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Generally disqualification is supported by evidence from an "extrajudicial source"—"something other than rulings, opinions formed, or statements made by the judge during the course of trial." *Holland,* 519 F.3d at 913-14. But judicial remarks that are critical or disapproving of, or hostile to, counsel, the parties, or their cases, will support a bias or partiality challenge "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.*, *accord Liteky*, 510 U.S. at 551 (absent any "extrajudicial source," a judge's "favorable or unfavorable predisposition" in the course of the proceedings will be characterized as bias or prejudice "if it is so extreme as to display clear inability to render fair judgment"). This is such a case.

IV. A REASONABLE PERSON WITH KNOWLEDGE OF THE FACTS WOULD CONCLUDE THAT JUDGE BREYER'S IMPARTIALITY MIGHT BE REASONABLY QUESTIONED IN THIS CASE.

A. Judge Breyer's intimate involvement in fashioning the Class Settlement raises the appearance of bias.

This case has long presented a troubling situation for Plaintiffs. Judge Breyer oversaw the class action and ultimately approved the Class Settlement as fair, reasonable and adequate. He has made statements regarding his beliefs regarding the fairness of the Class Settlement's terms. And he has expressed frustration with the continuing litigation of individual case after the huge amount of time he spent overseeing and crafting the settlement. (*E.g.,* Ungs Decl. ¶ 12, Ex. C [09/13/19 RT] at 9:20-22 ("And I'm not going to – this court has devoted some time to Volkswagen already, and it's not going to spend the rest of its judicial life trying one after

another after another.") A well-informed, reasonable observer, familiar with the facts and law could conclude that Judge Breyer's impartiality might reasonably be questioned in this situation. *Yagman,* 987 F.2d at 626.

What's more, a reasonable observer could recognize that if Plaintiffs were to obtain a significant recovery (i.e., compensatory damages and punitive damages exceeding what they would have recovered in the Class Settlement), it might tend to suggest that the Class Settlement did not fairly, reasonably, or adequately compensate consumers—thus, undermining the legitimacy of the settlement.

Nevertheless, despite Plaintiffs' initial concerns, Plaintiffs proceeded in good faith in this litigation. (Ungs Decl., ¶ 9.) Indeed, they did not want to assume that Judge Breyer would be unable to fairly adjudicate this case. However, recent events have made clear that Judge Breyer's close involvement with the Class Settlement and his interest in protecting its legitimacy have created an impression of bias—if not actual bias—that makes it impossible for him remain the judge in this matter.

B. Judge Breyer's recent summary judgment order shows the Court's vested interest in defending the adequacy of the class action settlement.

The February 4, 2020 summary judgment order (MSJ Order) has created a situation where a reasonable observer would entertain doubts about whether Judge Breyer can act as an impartial decisionmaker. One of Volkswagen's defenses to the CLRA claim is that Volkswagen offered Plaintiffs an "appropriate correction" via the Class Settlements. Volkswagen moved for summary judgment on that basis. (§ II.E, *ante*.) In ruling on that motion, Judge Breyer has given *himself* the power to decide the question—that is, to decide whether the Class Settlement that he helped fashion and that he approved, and which he has publicly stated is fair and adequate, was an appropriate correction. (MSJ Order, 10:16-19 ["[I]t it would be appropriate for the Court to determine whether the Class Settlements constituted appropriate CLRA correction offers after the close of evidence and with the benefit of an advisory jury verdict"]; § II.E.) Moreover, as of February 18, 2020, it now appears that the adequacy of Volkswagen's purported

offer of correction under the CLRA will be tried *directly to the Court* in a bench trial. (Ungs Decl., ¶ 20.)

Concerns about the bad optics of having the judge who presided over the settlement be the one to adjudicate the opt-out plaintiffs' claims aside, the summary judgment order has now put the issue front and center. Judge Breyer has turned Phase I into a trial of the adequacy of the remedies in the Class Settlement which he engineered and which he *has stated he believes* is a fair resolution of the VW cases. There is now a strong—indeed, overwhelming—appearance that the Court has a dog in this fight, because the Court has a vested interest in deciding that the settlement that it presided over and approved was fair. It is inappropriate for Judge Breyer to continue to preside over this case, even with an advisory jury.

C. Judge Breyer's favorable predisposition toward the class action settlement he crafted creates an inability to render fair judgment.

Buttressing the impression of bias, Judge Breyer's statements in multiple pre-trial hearings indicate that the Court already favors Volkswagen's case, and harbors significant antagonism toward Plaintiffs' case—sufficient to support his disqualification for impartiality. *Liteky*, 510 U.S. at 555.

1. Treating Plaintiffs as greedy for rejecting the Class Settlement and indicating that the Court will allow Volkswagen to paint them as such.

The Court has made numerous statements suggesting that it will allow Volkswagen to paint Plaintiffs as greedy for failing to opt into the Class Settlement or, alternatively, that *the Court itself* views Plaintiffs that way—i.e., that because 99% of consumers in the class actions thought the settlement was reasonable, Plaintiffs' minority position is unreasonable. (Ungs Decl. ¶ 14, Ex. E [2/11/20 RT] at 116:1-18 (Court: "[I]s it probative that 99.5 percent of those people who purchased Volkswagens thought the offer was reasonable? Is that probative as to whether or not the offer was a reasonable offer?"); *id.* at 117:15-24 ("[D]efendant is going to get up and say 99.5 percent settled it, accepted the offer, accepted the corrective action. . . . It may be that it's for the Court to decide (the reasonableness of the corrective action). But what I've said is

1 that – that I would have an advisory jury on that issue, and I would consider the evidence that's
2 being presented").)
3 Indeed, the Court has attempted to push Plaintiffs into settling by making numerous
4 statements suggesting that the opt-out plaintiffs are greedy, since they rejected the Class
5 Settlement. (Ungs Decl. ¶ 10, Ex. A [3/21/18 RT] at 4:18-23 ("[T]here has been a substantial,
6 massive, and nearly complete settlement of these claims. As a matter of fact, I think somewhere
7 in the neighborhood of 99.4 percent of people who were Volkswagen consumers have resolved
8 those claims. So we're now dealing with six-tenths of one percent who have not resolved their
9 claims"]; *id*. at 7:14-18 ["[O]nly six-tenths of one percent objected. So I think you have to look
10 at why your six-tenths of one percent is somehow more reasonable than 99.4 percent. 99.4.
11 That's right. You have to sort of figure that out."); *id*. at 7:25 – 8:2 ("[I]f you're in the minority,
12 you ought to think about why is it that more people think you're wrong than think you're right");
13 *id*. at 8:5-13 ("And it's an effort to reexamine your position but to understand it in the context
14 that a lot of people have examined their position and have come to a conclusion that's different
15 from the one that you're coming to.[¶] So I just urge you this morning and today to take a look
16 at that, to engage into settlement discussions with that in mind; that there is a real problem out
17 there, you've got to solve that problem, and that there are people who have solved that problem
18 and come to terms with it."); *id*. at 9:14-16, 9:20-22 ("At the end of the day I want you [i.e.,
19 plaintiffs' counsel] to report back to me that you have a settlement proposal from Volkswagen
20 that you would recommend to your clients…. What I'm asking you to do is to sit down and
21 negotiate a settlement that you, as a responsible member of the Bar, would recommend to your
22 clients.").) The Court's bias in favor of the Class Settlement is unavoidable, as is the Court's
23 disapproval of the opt-out plaintiffs for having rejected that settlement.

24 **2. Concluding that the cars necessarily had some value, which must be**
25 **factored into damages.**

26 Consistent with his comments about why the Class Settlement is fair even though it does
27 not provide consumers with the full value of their vehicles (*see* above), Judge Breyer has
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

apparently pre-determined—without evidence—that plaintiffs' cars necessarily have monetary value, for example on the black market:

- "Well, here's my question, you see, because we know there was a fair market value. The reality is that there was a market for these Volkswagens. There's a market for them. I mean, people were buying and selling them. They weren't buying and selling them from the dealer perhaps – I don't know; I don't have information on that subject – but there was a market. They had an asset that had some market value. . . . You have a market for cocaine. You have a market for illegal drugs. You have a market for guns. You have a market for all sorts of things that aren't legal. As a matter of fact, it's called a black market, and I'm not inventing that. That's been around awhile. So there's a market. There's a market." (Ungs Decl. ¶ 13, Ex. D [2/06/20 RT] 19:13 – 20:6.)
  - "[T]hey [plaintiffs' cars] have some value." (*Id*. at 28:19-21.)
  - "And, by the way, didn't all your clients [i.e., plaintiffs] drive these cars? I mean, if they thought for a moment, I would guess, that somehow it was unsafe or illegal to drive, why are they driving them?" (*Id*. at 78:5-8.)

In addition, the Court stated on February 18, 2020 that it will grant a non-suit motion against Plaintiffs if counsel argues that the vehicles had no value. (Ungs Decl., ¶ 21.) This issue is intricately intertwined with the issue of the adequacy of the purported CLRA correction by Volkswagen.

3. Prejudging evidence.

Before Plaintiffs have even had an opportunity to make their own case to a jury, the Court has also apparently decided disputed evidentiary issues in Volkswagen's favor. In addition to already deciding that the vehicles necessarily had value, the Court has already decided that Plaintiff's expert will not be able to testify that Volkswagen's increased emissions created any risk to anyone's health. (Ungs Decl. ¶ 13, Ex. D [2/06/20 RT] at 98:9-14 ("And he'll [i.e., plaintiffs' expert will] say, 'I'll tell you what it means. It means that there is an increased risk of harmful health effects.' He can say that. What he can't say is that these increased

emissions from the – from Volkswagen's vehicle increased the risk because there's no evidence of that").) And, the Court has already decided that the fraud in this case was less serious than other types of fraud. (Ungs Decl. ¶ 12, Ex. C [9/13/19 RT] at 33 at 8-11 ("Any way you characterize this fraud, it is perhaps quite different from the fraud that you see in the opioid crisis, quite different from the fraud that you see in any number of cases, at least while I've been on the bench").)

Collectively the appearance of bias is evident from the Court's on-the-record statements rulings and opinions. Plaintiffs in this case face that "rarest circumstance[]" where a judge's comments, opinions, and rulings in the course of the proceedings "evidence the degree of favoritism or antagonism required" to support disqualification. *Liteky,* 510 U.S. at 555.

CONCLUSION

For the foregoing reasons, Judge Breyer should be disqualified.

Dated: February 19, 2020

KNIGHT LAW GROUP
/s/ Lauren Ungs
Lauren Ungs (SBN 273374)
Steve Mikhov (SBN 224676)
Attorneys for Plaintiffs

THE ALTMAN LAW GROUP
/s/ Bryan Altman
Bryan Altman (SBN 122976)
Attorney for Plaintiff