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Michael T. Kirkpatrick (admitted *pro hac vice*)  
mkirkpatrick@citizen.org  
Public Citizen Litigation Group  
1600 20th Street NW  
Washington, DC 20009  
(202) 588-1000

David J. Gorberg (admitted *pro hac vice*)  
david@mylemon.com  
David J. Gorberg And Associates  
103 Sibley Avenue  
Ardmore, PA 19003  
(215) 665-7660

Attorneys for the Lott Group

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA—WESTERN DIVISION

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

Plaintiffs,

v.

FORD MOTOR COMPANY,  
Defendant.

Case No. 2:12-cv-08388-AB-FFMx  
Hon. Judge André Birotte Jr.

**LOTT GROUP’S WITHDRAWAL  
OF OBJECTIONS AND NOTICE OF  
NON-OPPOSITION TO  
PLAINTIFFS’ RENEWED MOTION  
FOR FINAL APPROVAL OF  
CLASS ACTION SETTLEMENT**

Date: February 28, 2020

Time: 10:00am

Place: Courtroom 7B

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## INTRODUCTION

Class members Brenda Lott, Suzanne Lutz, Carlie Olivant, Gail Slomine, and Philip Woloszyn (the Lott Group) withdraw their objections to final approval of the revised proposed settlement. As explained below and in plaintiffs’ renewed motion for final approval (ECF No. 279), the original settlement agreement has been substantially improved as the result of the Lott Group’s participation in a mediation and further negotiations, following a decision of the Court of Appeals (ECF No. 272) vacating this Court’s final approval of the original settlement agreement (ECF No. 193). Those improvements, as well as the provision of additional information and developments in related litigation, have resolved many of the concerns that drove the Lott Group’s opposition to final approval of the original settlement agreement.

## SUMMARY OF THE IMPROVED SETTLEMENT TERMS

Following remand from the Ninth Circuit, the parties, with the participation of the Lott Group, have improved the settlement in several important respects.<sup>1</sup> First, Ford has guaranteed that it will pay at least \$30 million to class members who submit a valid claim under the cash payment component of the settlement. If such claims do not exceed \$30 million, the residue will not revert to Ford. Rather, it will be used to make a second distribution to class members who submitted valid claims.

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<sup>1</sup> The amendments to the settlement agreement are set forth in Exhibit 2 to the declaration of Ryan Wu, ECF No. 279-1.

1 If the residue is too small to make such distribution feasible, it will be distributed to  
2 a cy pres beneficiary. The guaranteed minimum payout is a significant improvement  
3 over the original settlement, which risked a far smaller payment to class members  
4 because it provided for payments only on a claims-made basis.

5 Second, the number of class members eligible for the cash payment  
6 component of the amended settlement agreement is greater than under the original  
7 settlement. The amended settlement allows for payments to those who lacked the  
8 minimum number of software flashes or transmission hardware replacements to  
9 qualify for a payment under the original agreement, and who attest that they sought  
10 transmission repairs but were turned away by a dealer who claimed that there was  
11 nothing wrong with the car. This provision both expands the number of class  
12 members eligible for a cash payment and addresses the allegation that Ford  
13 discouraged repeated service visits by claiming that the transmission was operating  
14 as intended.

15 Third, the amended settlement agreement allows a greater number of class  
16 members to immediately seek repurchase because it eliminates entirely the  
17 requirement that class members with fewer than four transmission repair attempts  
18 provide Ford with a final opportunity to repair the vehicle before proceeding to  
19 arbitration.

20 Fourth, the amended settlement agreement significantly expands the benefits  
21 to former owners by extending the statute of limitations for former owners to seek

1 repurchase and by allowing former owners to utilize the settlement-created  
2 repurchase standard.<sup>2</sup> These changes are particularly valuable because many state  
3 lemon laws do not provide repurchase for former owners and the original agreement  
4 imposed a much shorter statute of limitations for former owners than for current  
5 owners.

6 Fifth, the amended settlement agreement, unlike the original agreement,  
7 allows the arbitrator to award civil penalties in addition to repurchase where such  
8 penalties are available under the applicable state law and certain conditions are met.  
9 This change helps to ensure fairness among class members by taking into account  
10 an important difference in state-law remedies, and it provides an incentive for Ford  
11 to offer repurchase without requiring class members in states that allow civil  
12 penalties to proceed to arbitration.

13 As a result of these improvements, the Lott Group believes that the amended  
14 settlement agreement is sufficiently fair, reasonable, and adequate to be approved  
15 by the Court under Federal Rule of Civil Procedure 23(e)(2).

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20 <sup>2</sup> In the context of former owners, “repurchase” does not involve a return of  
21 the vehicle because it is no longer in the possession of the class member. Rather,  
repurchase for former owners is a refund of their purchase price less the amount  
they recovered when they sold the vehicle.

## ARGUMENT

### I. The improved settlement is a reasonable compromise.

To determine the fairness of a class settlement in a case seeking money damages, a court should compare the value of the relief provided by the settlement to the range of potential recovery if the litigation is successful, discounted for the risk, expense, complexity, and likely duration of further litigation. This formulation is the essence of the non-exhaustive list of factors set forth in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). It is also encompassed in the 2018 amendments to Rule 23(e)(2), which require courts to consider, among other things, whether “the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal.” As explained by the Advisory Committee, the amendments seek to focus the substantive review of the terms of the proposed settlement on “[t]he relief that the settlement is expected to provide to class members.” Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018 amendments.

At the first fairness hearing, the Lott Group urged the Court to deny final approval because the Court lacked reliable information regarding both the value of the relief provided by the settlement and the value of the claims surrendered. As described below, that concern has been substantially eliminated.



1           **A. The cash payment component of the new settlement is guaranteed to**  
2           **provide at least \$30 million to the class.**

3           At the time of the first fairness hearing, the Court lacked reliable information  
4 regarding the potential value of the settlement. Based on warranty data showing the  
5 number of class vehicles with at least three transmission hardware replacements,  
6 plaintiffs had estimated that the cash payment provision would cost Ford about \$35  
7 million, but that estimate assumed that at least three such repairs were obtained by  
8 a single owner and that each owner with three qualifying repairs would submit a  
9 claim. At the fairness hearing, the Lott Group, observing that a typical claims rate  
10 is less than ten percent, explained that using a realistic claims rate was particularly  
11 important because Ford had not committed to any minimum guaranteed payout.  
12 Thus, the Lott Group pointed out that the cost to Ford of the cash payment provision  
13 might be \$3.5 million or less. Moreover, because many class members who  
14 qualified for the cash payment provision would also qualify for the more valuable  
15 repurchase program, but could not benefit from both, the cost to Ford of the cash  
16 payment provision was highly speculative, raising the concern that Ford was  
17 purchasing res judicata for an unreasonably low price. The Lott Group was also  
18 concerned that many class members would not qualify for a cash payment because  
19 they sought service but were turned away by a dealer, and that former owners who

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1 had been turned away when they sought repair could not qualify for the cash  
2 payment component in the future by accumulating additional service visits.

3 The new settlement agreement avoids speculation about the expected value  
4 of the cash payment component by requiring Ford to pay at least \$30 million, with  
5 no maximum cap. If claims do not exceed \$30 million, the residue will not revert to  
6 Ford but will be used to make a second distribution to class members or, if such  
7 distribution is not feasible, to a cy pres beneficiary. Moreover, the cash payment  
8 provision has been expanded to provide relief to class members, including former  
9 owners, who lacked the minimum number of software flashes or transmission  
10 hardware replacements to qualify for a payment under the original agreement  
11 because they sought repairs but were turned away.

12 **B. Ford has submitted evidence showing that the repurchase program**  
13 **will provide significant value to the class.**

14 At the time of the first fairness hearing, the settling parties offered no estimate  
15 of the value of the repurchase component of the settlement. During the pendency of  
16 the appeal, Ford instituted the repurchase program in the original agreement on an  
17 individual basis for class members who submitted notices of intent to arbitrate under  
18 the settlement agreement. As set forth in the declaration of G. Keith Barron (ECF  
19 No. 279-3), as of the end of 2019, Ford had repurchased about 2,666 class vehicles,  
20 either through a voluntary resolution before arbitration or as the result of an  
21 arbitrator's award, at a total cost of over \$47 million. Thus, Ford has paid an average

1 of more than \$17,000 for each repurchase. Although it is impossible to predict how  
2 many class members will pursue repurchase, it is reasonable to expect that the  
3 number of repurchase claimants will increase at least ten-fold after the settlement is  
4 final, based on the number of class vehicles that have had at least three transmission  
5 repairs.<sup>3</sup> Thus, the repurchase program is likely to provide hundreds of millions of  
6 dollars of value to the class.

7 Further, the amended settlement expands substantially eligibility for the  
8 repurchase program by eliminating the requirement that class members with fewer  
9 than four transmission repair attempts provide Ford with a final opportunity to  
10 repair the vehicle before proceeding to arbitration. As a result of this change, the  
11 repurchase program no longer imposes a requirement to bring a lemon-law claim in  
12 arbitration that exceeds those required to bring the same claim in court. Moreover,  
13 the amended agreement extends the statute of limitations for former owners to seek  
14 repurchase, and it allows former owners to utilize the settlement-created repurchase  
15 standard. These changes are particularly valuable because many state lemon laws

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<sup>3</sup> The record does not reflect the number of class vehicles that have had at least three transmission repair attempts, which is the standard for relief under most state lemon laws. An article in the Detroit Free Press, however, states that, as of December 2016, an internal Ford report stated that 350,000 vehicles had reached three or more repairs. Phoebe Wall Howard, *Ford knew Focus, Fiesta models had flawed transmission, sold them anyway*, Detroit Free Press, Sept. 10, 2019, available at <https://www.freep.com/in-depth/money/cars/ford/2019/07/11/ford-focus-fiesta-transmission-defect/1671198001/>.

1 do not provide repurchase for former owners, and the original agreement imposed  
2 a much shorter statute of limitations for former owners than for current owners.  
3 Finally, by authorizing the arbitrator to award civil penalties in addition to  
4 repurchase where such penalties are available under the applicable state law, the  
5 amended agreement provides an incentive for Ford to offer repurchase to class  
6 members in such states without requiring resort to arbitration.

7 **C. Developments since the first fairness hearing provide new**  
8 **information regarding the value of the released claims and the risks**  
9 **of further litigation.**

10 At the first fairness hearing, the Lott Group argued that the Court could not  
11 determine whether the settlement was a reasonable compromise because it lacked  
12 adequate information regarding the value of the claims released.<sup>4</sup> The Lott Group  
13 noted, however, that—in the absence of a damages model—the Court could  
14 potentially derive such information by inquiring into the amounts paid by Ford to  
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16 <sup>4</sup> The Lott Group has not argued that the Court must calculate a specific  
17 monetary value corresponding to each cause of action set forth in the operative  
18 complaint. *See Lane v. Facebook*, 696 F.3d 811, 823 (9th Cir. 2012) (holding that  
19 “a district court must of course assess the plaintiffs’ claims in determining the  
20 strength of their case relative to the risks of continued litigation,” but may evaluate  
21 “the strength of plaintiffs’ case in its entirety rather than on a claim-by-claim  
basis”). Rather, the Court will “arrive at a reasonable range for settlement by  
considering the likelihood of a plaintiffs’ or defense verdict, the potential  
recovery, and the chance of obtaining it, discounted to present value.” *Rodriguez*  
*v. West Publishing Corp.*, 563 F.3d 948, 964–65 (9th Cir. 2009); *see Eubank v.*  
*Pella Corp.*, 753 F.3d 718, 727 (7th Cir. 2014) (holding that a court should  
estimate “the likely outcome of a trial ... in order to evaluate the adequacy of the  
settlement”).

1 settle individual claims or the amounts awarded in any individual cases that went to  
2 judgment. *See, e.g., True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1071  
3 (C.D. Cal. 2010) (denying approval of a low-value class settlement because, among  
4 other things, the settlement of a single-plaintiff case alleging substantially similar  
5 claims suggested that the claims of class members had significant value). At that  
6 time, Ford declined to reveal what it had paid in individual settlements, and the Lott  
7 Group was unaware of any judgments.

8 Since that time, this Court has presided over *In re Ford Motor Co. DPS6*  
9 *PowerShift Transmission Products Liability Litigation*, No. 18-ML-2814-AB (C.D.  
10 Cal.) (the MDL), and the related trials of two member cases that resulted in jury  
11 verdicts for the plaintiffs for violations of the Song-Beverly Act, Cal. Civ. Code  
12 § 1790 *et seq.* *See Pedante v. Ford Motor Co.*, No. 17-6656 (C.D. Cal. Nov. 14,  
13 2019); *Quintero v. Ford Motor Co.*, No. 18-1912 (C.D. Cal. Dec. 17, 2019). In both  
14 cases, the jury awarded the amount paid to buy or lease the vehicle plus two times  
15 that amount in civil penalties. Further, when Ford removed cases filed in state courts  
16 to federal court for inclusion in the MDL, it routinely offered to pay plaintiffs  
17 \$75,000 to settle the claims asserted. *See, e.g.,* Notice of Removal at 6, *Quintero v.*  
18 *Ford Motor Co.*, No. 18-1912 (C.D. Cal. Mar. 7, 2018), ECF No. 1.

19 The Court's experience with the cases in the MDL and this further  
20 information demonstrate that the claims asserted in the class action have substantial  
21 value and Ford's exposure is high, especially in states like California that allow for

1 civil penalties. At the same time, the experience of the plaintiffs in *Pedante* and  
2 *Quintero* demonstrate that there is substantial risk for plaintiffs in the class action.  
3 In both cases, the Court granted summary judgment for Ford on the fraud claims.<sup>5</sup>  
4 *See, e.g., In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab. Lit.*, No.  
5 18-ML-2814-AB (C.D. Cal. Oct. 29, 2019), ECF No. 605 at 5–12. Further, absent  
6 a nationwide settlement, there is considerable uncertainty as to whether *American*  
7 *Pipe* tolling would apply to some state-law claims, because some states do not  
8 recognize cross-jurisdictional tolling. *See* Pls. Renewed Mtn. for Fin. App. at 28  
9 (discussing state statutes of limitation for lemon-law claims and identifying states  
10 that have rejected cross-jurisdictional tolling); *see In re Ford Motor Co. DPS6*  
11 *Powershift Transmission Prod. Liab. Lit.*, No. 18-ML-2814-AB, 2019 WL  
12 6998668, at \*4 (C.D. Cal. Sept. 5, 2019) (rejecting cross-jurisdictional *American*  
13 *Pipe* tolling asserted with regard to an implied warranty claim in the MDL).  
14 Moreover, if this case proceeded to trial, it might have to be maintained on a  
15 nationwide class basis on the issue of liability only, with damages addressed by state  
16 subclasses. *See* Pls. Renewed Mtn. for Fin. App. at 32–33.

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19 <sup>5</sup> In contrast, in *Myers v. Ford Motor Co.*, No. BC638302, 2018 WL  
20 4370246 (Cal. Super. Ct. July 5, 2018); *id.*, 2018 WL 4370230 (Cal. Super. Ct.  
21 Aug. 30, 2018) (denying post-trial motions), Ford conceded liability as to the  
Song-Beverly claims and agreed to pay damages and civil penalties. The fraud  
claims were tried to a jury, which found for plaintiff and awarded an additional  
\$500,000 in punitive damages. *Id.*

1           Based on these considerations, the Lott Group believes that the value of the  
2 improved settlement represents a reasonable compromise in light of the risk, delay,  
3 and expense of pursuing the class action to judgment.

4       **II.    The amended settlement expands the number of class members eligible**  
5       **for relief and addresses issues of fairness within the class.**

6           In addition to considering whether it is a fair compromise in terms of value  
7 received for claims released, a court evaluating the fairness of a proposed class  
8 action settlement must consider whether “the proposal treats class members  
9 equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). As explained by the  
10 Advisory Committee, of particular concern is “whether the apportionment of relief  
11 among class members takes appropriate account of differences among their claims.”  
12 Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018 amendments. At the first  
13 fairness hearing, the Lott Group urged the Court to deny final approval because the  
14 benefits of the settlement were not fairly distributed among the class. Specifically,  
15 the Lott Group raised concerns that class members turned away by Ford dealers  
16 when they sought repairs would not qualify for a cash payment, that former owners  
17 were disadvantaged relative to current owners because they had a shorter statute of  
18 limitations to pursue repurchase and could not avail themselves of the settlement-  
19 created repurchase standard, and that class members from states that allow civil  
20 penalties for lemon law claims were treated the same as those from states that allow  
21 only repurchase.





1 Dated: January 31, 2020

Respectfully submitted,

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/s/ Michael T. Kirkpatrick  
Michael T. Kirkpatrick (admitted *PHV*)  
Public Citizen Litigation Group  
1600 20th Street NW  
Washington, DC 20009

3

4

5

David J. Gorberg (admitted *PHV*)  
David J. Gorberg And Associates  
103 Sibley Avenue  
Ardmore, PA 19003

6

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Attorneys for the Lott Group

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