Case No. SC92770

IN THE SUPREME COURT OF MISSOURI

VOLKSWAGEN GROUP OF AMERICA, INC.,

Defendant-Appellant,

v.

DARREN BERRY, et al.,

Plaintiffs-Respondents.

SUBSTITUTE BRIEF OF RESPONDENT

Appeal from the Circuit Court of Jackson County, Missouri at Independence
The Honorable Michael W. Manners, Division 2
Circuit Court Case No. 0516-CV01171-01
Court of Appeals, Western District Case No. 73974

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

SUMMARY OF THE ARGUMENT

Over a decade after Volkswagen refused to extend its expired 2-year, 24,000 mile warranty to the failed window regulators at issue, Volkswagen finally agreed to a lifetime warranty for all 16,000 Missouri class member's vehicles (10 years and unlimited miles for every window regulator), full out-of-pocket damages (repair or reimbursement for every broken window regulator) plus $75 for every trip to the repair shop. In support of the fairness of the settlement, Volkswagen represented to the circuit court that the settlement achieved a result greater than what class counsel likely could have achieved at trial. It argued the circuit court should look at the relief made available to the entire class in exchange for the full release of all 16,000 class members and approve the settlement as fair and reasonable consideration for that full release from every class member. The circuit court agreed and approved the class-wide settlement.

Yet, Volkswagen now claims that the circuit court abused its discretion by enhancing class counsel's lodestar—by relying in part on the full relief made available to the entire class—the very relief that justified approving the settlement as fair and reasonable. Volkswagen now argues that Missouri law required the circuit court to rely solely on the number of class members who exercised their warranty and full reimbursement rights after the settlement was approved—and ignore all other fee-related factors. Thus, Volkswagen claims the circuit court erred in enhancing the lodestar by also considering, among other things, the fact that the "fee to be received by class counsel was always contingent, unlike the fees received by counsel for Defendant."

Volkswagen's appeal should be denied, and the circuit court's judgment affirmed, for several equally compelling reasons. *First*, although Volkswagen attempts to cast the circuit court as having committed an error of law, it points to absolutely no legal principle that the circuit court misstated. Indeed, Volkswagen agrees that the circuit court properly considered the so-called *Johnson* factors in determining a reasonable fee, none of which Volkswagen argues this Court should excise from Missouri law and which are even represented in the Missouri Rules of Professional Conduct. Instead, Volkswagen argues that this Court should adopt a *per se* rule that the first *Johnson* factor, "results achieved," should always be measured against the "amount paid" in claims submitted by the class after a class action settlement is approved, rather than the relief class counsel made available to class members through the settlement. In short, Volkswagen argues that class counsel's efforts should be measured not by their success in securing greater than full relief for each class member under the settlement but exclusively by the number of class members who exercised their rights under the settlement agreement to full relief and filed claims, a factor outside of class counsel's control or ability to influence.

Volkswagen points to no state or federal circuit court that agrees with its *per se* rule of law. To the contrary, several federal appellate courts have rejected Volkswagen's proposed rule. And certainly, no Missouri court has reached such a conclusion, and, in fact, the Court of Appeals for the Eastern District just recently recognized that the benefits achieved in a settlement class should not be measured against the "claims paid" but the benefits conferred, as it better reflects the efforts and activities of class counsel. Nonetheless, this is not a case where the circuit court ignored the claims rate. At

Volkswagen's urging, the circuit court waited until the claims period closed, considered the "claims paid," and then heard three days of evidence regarding whether that fact should have any influence, let alone controlling influence, in the fee award in this case. Class counsel presented a mountain of evidence that the claims rate should not influence the fee, including the numerous junctures at which Volkswagen could have entered into a claims-made settlement earlier when the fees were less and when the claims rate would likely have been higher.

Second, Volkswagen (and the consortium of products liability companies who filed an amicus) argues that this Court should ignore the factual findings of the circuit court and adopt the rigid federal fee-shifting jurisprudence of the United States Supreme Court, as set out in *Perdue v. Kenny A. ex. rel. Winn*, 130 S. Ct. 1662, 1676-77 (2010). In that case and earlier cases, the U.S. Supreme Court held that, except in "rare and exceptional circumstances," a lodestar fee should not be enhanced for exceptional results or for the contingent-nature of the case because such factors are allegedly subsumed in the lodestar calculation. Such a rule ignores the evidence and unnecessarily ties a trial court's hands in fashioning a fee award that fits the particular circumstances of a case. To give but one example from the record below, it was undisputed that the hourly rates used to calculate class counsel's lodestar did not account for the contingent nature of the case. Rather, class counsel used the rates they charged (and collected from) non-contingent, fee-paying clients. To adopt a rule, like *Perdue*, that assumes a fact which flies in the face of the actual evidence is not only illogical and nonsensical, it substantially changes Missouri law and trial court discretion.

Simply put, Missouri law has long permitted trial courts the discretion to adjust a fee given the factual circumstances of a case. Sometimes such adjustments reduce the lodestar, such as where counsel achieves limited success, and other times it results in an enhancement, such as where the contingent nature of the case requires a greater-than-lodestar fee to incentivize attorneys to assume the risk of recovery. The circuit court acted within its discretion in finding that the latter, and not the former, circumstances apply here.

Third, Volkswagen urges that public policy supports a reduction in the fee but the underlying policies of the MMPA support the fee award, as substantial and uncontrovered evidence supported that Volkswagen's arguments would drive counsel from the market for MMPA cases. Finally, Volkswagen argues, without merit, that Due Process forbids the fee. But this case does not involve punitive damages and there is no support for fee-to-award ratios where fees are considered an element of the Plaintiffs' claim and not intended to punish.

For these reasons and those set forth below, the circuit court did not abuse its substantial discretion below. The fee should be affirmed and class counsel should be awarded attorney's fees on appeal.

STATEMENT OF FACTS

Although this appeal involves only the amount of attorney's fees, a thorough history of the case, as set out through the three-day evidentiary hearing on fees, is necessary to understand the results achieved for the Class and the amount of time and expense incurred by class counsel to achieve these results.

I. The Settlement.

The settlement in this case provided broad relief to every single class member in Missouri, and covered all class vehicles regardless of mileage. A192-A196. Upon submission of a completed claim form, every owner or lessor of a vehicle who experienced one or more window regulator failures within 10 years of the date the vehicle first went into service, and who paid out-of-pocket for repair or replacement, was entitled to full reimbursement for the repairs or replacements. A193. On top of this, consumers received $75 for each documented incident or workshop visit in which one or more window regulator failures were diagnosed, repaired, or replaced. A193. Every consumer who experienced one or more window regulator failures within 10 years of when the vehicle first went into service, and had not replaced the window regulator(s), was entitled to free repair or replacement of the window regulator(s) at any authorized Volkswagen dealer within 90 days of the date on which the class settlement notice was mailed, plus a $75 payment. A193-A194. Volkswagen also agreed to pay the notice and administration

costs of the settlement and class counsel's expenses. A194; Tr. 344[1]. Volkswagen has not contested counsel's $550,000 in expenses, and has paid an additional $130,464.53 in settlement administration costs. Tr. 579:18-20. Central to this appeal, Volkswagen is contractually obligated under the express terms of the settlement to pay reasonable attorney's fees. A195-A196.

The uncontroverted evidence shows that before settling, Volkswagen demanded that class counsel provide its lodestar, the multiplier class counsel would seek on their lodestar, and class counsel's expenses. Tr. 372:5-16. Class counsel advised Volkswagen's counsel over the phone that the lodestar at that time was approximately $2,600,000, and counsel would seek a modest lodestar multiplier of between two and three. Tr. 373. Class counsel also communicated their approximate expenses. *Id.* Volkswagen's counsel responded: **"So long as you guys aren't asking for nine or ten million dollars, we should be able to take care of this."** *Id.*

Volkswagen then signed a term sheet, which provided: "The parties agree to negotiate in good faith the amount of reasonable fees and expenses." Ex. P-32 to Tr.,

[1] All citations to "Tr." refer to the transcript of the three-day evidentiary hearing held on fees by the circuit court. A copy of the transcript is included in Respondent's Appendix A4-A191. For preciseness, Respondents' cite to the transcript pages rather than the appendix pages.

p.2.[2] After signing the term sheet, the parties negotiated and signed the formal settlement agreement, which has a nearly identical good-faith clause. A195. Volkswagen specifically agreed to pay reasonable attorney's fees. A195-A196. When signing the agreement, Volkswagen and its counsel never indicated that they were going to seek to cap class counsel's fees based on the claims paid or on a multiple of the claims paid. Tr. 377:15-24. They never indicated that the lodestar and multiplier class counsel had communicated were in any manner unreasonable or unacceptable. Tr. 377:25-78:4.

II. The Final Fairness Hearing.

The settlement agreement charged the circuit court specifically with assessing whether class counsel's fee request was "reasonable . . . under Missouri law at the time the parties file their Motion for Preliminary Approval of the Settlement." A195-A196. In doing so, Volkswagen asked that the circuit court delay the determination until all claims were filed under the settlement. Tr. 25:17-21. Although no Missouri case at the time of preliminary approval required the circuit court to consider the claims rate in assessing the reasonableness of fees, it granted Volkswagen's request. In insisting that the circuit court measure the "results achieved" by class counsel by the amount in "claims paid," the circuit court heard evidence that the modest claims rate did not reflect the actual number of members who were eligible to obtain a benefit from the settlement nor that the claims rate could be blamed on class counsel. Tr. 603:22-25, 607:3-608:3.

[2] All citations to "Ex." refer to exhibits to the hearing transcript and are contained in the record but are not paginated L.F. like the rest of the legal file.

Specifically, the circuit court heard evidence that it was Volkswagen's vexatious litigation conduct that so delayed the case as to make it more difficult to find, alert and incentivize class members to file a claim (Tr. 508-512); that Volkswagen refused to counter or walked out of earlier settlement negotiations and that it even walked away from an earlier settlement, driving up the very lodestar that Volkswagen sought to reduce (Tr. 180:21-184:12, 189:11-190:2); and testimony contradicting Volkswagen's contention that the court should accept the claims rate as proof there was no problem with its A3 window regulators from Plaintiffs' expert (Tr. 99:13-100:1) that the A3 window regulator was seriously defective, from class members themselves (Tr. 31:16-19, 51:18-22, 67:11-16), and from Volkswagen's own exceptionally high sales of replacement A3 regulators Hr'g 154:2-13. Finally, the circuit court heard expert testimony from a prominent Kansas City lawyer, Jack Brady, a partner at a large Kansas City law firm that both prosecutes class actions and does hourly defense work, regarding claims rates and class counsels' work in the matter. Tr. 470:9-473:1.

On May 3, 2011, the circuit court issued its Findings of Fact, Conclusions of Law, and Judgment. A1-3. The circuit court first made very specific factual findings that "Class counsel spent approximately 7,190 hours in time on this cause with a lodestar value of $3,087,320.00."[3] A1. The circuit court, in further analyzing the lodestar

[3] It appears that the circuit court intended this figure to be 7,910, because this lodestar approximately equals class counsel's request of their rates times the 7,910 hours expended.

amount, went on to specifically find that "[t]he 7,190 hours in time incurred in this case by class counsel was reasonable and necessary in light of the vigorous defense mounted by Volkswagen. The hourly rates charged by class counsel were reasonable." A2.

After analyzing and approving the lodestar based upon class counsel's reasonable time and hourly rates, the circuit court separately looked at the fact-specific criteria bearing on "determining that a multiplier is appropriate at bar" and further made specific factual findings in support of a multiplier enhancement to class counsel's lodestar. A1-A2. It then enhanced class counsel's lodestar by a 2.0 multiplier, and measured the reasonableness of the multiplier with respect to the entire benefit conferred by the settlement rather than looking exclusively at the amount paid to claiming class members. A2-A3. The circuit court did not intend these findings to be exclusive, stating that the determination to award a multiplier was based on these findings "among other things." A1-A2.

Ultimately, the circuit court declared the parties' settlement agreement to be fair and reasonable, approved and awarded class counsel $6,174,640.00 in attorney's fees, and $550,000.00 in expenses, and assessed all other court costs against Volkswagen. *Id.*

III. The Underlying Claims.

The underlying litigation revolved around plastic window regulators (the "A3 regulator") used by Volkswagen in its Jetta, Golf, GTI, and Cabriolet model vehicles. Tr. 165:14-24. Plaintiffs alleged that the use of plastic in A3 window regulator designs was defective, causing it to crack and ultimately break, rendering the vehicle-owners' window inoperable. The circuit court ultimately certified a 16,000-member statewide class, but

declined nationwide certification. Tr. 180:4-20; Ex. P-4, p.6. The settlement made available benefits to all 16,000 class members.

The litigation over A3 regulators actually began as part of a lawsuit filed in 2001, alleging that both the A3 and its successor the A4 regulator were defective (the "Goodwin" case). Within weeks of filing, Volkswagen expressed interest in a global settlement of that case. Tr. 166:10-20; Ex. P-4, p.3. However, Volkswagen contended that it had sold very few A3 replacement regulators, proffering that, in fact, it had sold only 53,000 A3 replacement parts nationwide. Tr. 170:4-171:19; Ex. P-4, p.3.

On January 20, 2005, the instant plaintiffs filed this lawsuit, asserting that the A3 regulator was defective. Plaintiffs filed the instant case in the wake of the A4 settlement after hundreds of A3 owners contacted class counsel reporting that they had suffered multiple regulator failures. Tr. 172; Ex. P-4, p.3. Despite Volkswagen's proffer that only 53,000 replacement parts had been sold, the problem turned out to be much more widespread. On the eve of trial in this case, class counsel finally confirmed what they suspected when Volkswagen finally produced previously-hidden parts data showing about 210,000 A3 replacement regulators had been sold. Tr. 206:11-210:2.

IV. The Circuit Court's Calculation of the Lodestar.

A. Undisputed Evidence of Class Counsel's Hours Expended In Reaching The Settlement.

The circuit court found that the "7,190 hours in time incurred in this case by class counsel was reasonable." A2. Although Volkswagen argued in its original opposition to class counsel's fee application that class counsel had allegedly "run up the bills" in an

effort to seek a fee that they knew was "greatly disproportionate to the ultimate benefits that were reasonably attainable," L.F. 6125. Volkswagen ultimately abandoned that argument and no longer directly contests the reasonableness of the hours expended by class counsel. Indeed, as proved at the evidentiary hearing, Volkswagen's counsel spent more hours on the case than class counsel. Tr. 708:15-709:18. And the circuit court characterized and found that the time spent on the case was "necessary in light of the vigorous defense mounted by Volkswagen." A1. Neither Volkswagen nor the Court of Appeals took issue with this finding.

B. Undisputed Evidence of Class Counsel's Non-Contingent Hourly Rates.

Volkswagen does not directly object to the hourly rates used by the circuit court to calculate the lodestar. The circuit court expressly found that "[t]he hourly rates charged by class counsel were reasonable." In reversing the award of the lodestar enhancement, the Court of Appeals held, however, that class counsel's "hourly rate . . . already reflects that counsel has chosen the instant case over pursuing other cases, contingent and non-contingent alike." Opinion of the Court of Appeals (June 12, 2012). The Court of Appeals did not rely on any record evidence of this fact but, instead, cited to the United States Supreme Court opinion in *Perdue*, 130 S. Ct. at 1676. But the record evidence, *in this case*, was uncontested that the hourly rates used to calculate the lodestar were non-contingent rates. Tr. 234:9-235:2; Ex. P-4, p.20.

Indeed, class counsel submitted evidence that they take "hourly matters . . . on a fairly regular basis," in which they "charge the rates that [were] submitted in" this case. Tr. 234:9-17. More specifically, class counsel cited to "three instance that are directly

relevant:" in two instance, Mr. Stueve was retained "at $650 an hour on an hourly basis, paid monthly;" and in another instance, Mr. Hilton was retained "at $450 an hour on an hourly basis, to be paid each month." Tr. 234:18- 235:2.

Plaintiffs also submitted expert testimony from Jack Brady, a partner at Polsinelli Shughart. Mr. Brady testified that the non-contingent hourly rates used by class counsel in their lodestar calculation were reasonable. He based this opinion on several things. *First*, he compared the rates submitted to the "hourly rates that [he] and [his] partners charge," along with "rates approved by courts here in the State of Missouri in other class actions." Tr. 478:11-480:12. *Second*, he reviewed those rates in conjunction with a survey of Missouri rates "for hourly, noncontingent work," which he found to be "consistent with . . . [his] firm's rates for partners and associates." Tr. 480:13-481:14. *Third*, he reviewed rates submitted by class counsel in other class actions and orders approving those rates as reasonable. Tr. 482:3-484:20. Mr. Brady concluded that the rates used to calculate the lodestar "were very reasonable." Tr. 484:15-20. He testified that these rates "don't encompass the risk at all" but that the risk was "really, really substantial" and was accounted for in the enhancement. Tr. 479:18-25.

Volkswagen did not present any evidence to contradict Mr. Brady or to even rebut the fact that the hourly rates used in the calculation of the lodestar did not account for the contingent risk of the case in any manner whatsoever.

C. Undisputed Evidence of the Need for an Enhancement.

Mr. Brady also testified of the need to enhance class counsel's lodestar by an appropriate multiplier to account for the risk of taking a case on a contingent basis and to

incentivize lawyers to take cases under the MMPA. Tr. 472:147-473:1; A201-A205. In doing so, Mr. Brady explained the practical reality facing a lawyer who has to choose between contingent and non-contingent cases:

> When I go to the committee at my firm, you know, I do a lot of hourly work and they say, Why do you want to take this case even if you're going to bill at $600 an hour and record your time at $600 an hour and hopefully win this case? Very risky. Why don't you just work at five hundred dollars an hour or five fifty or whatever you get, you know, on hourly work cases? Because there's no risk. And so that's what – at least my understanding of what the -- why the lodestar multipliers come along. Your hourly rate does not take into account the risk that you face when you are prosecuting these cases. . . .[So, t]he risk you took is another factor that I think that needs to be taken into account.

Tr. 492:7-493:9. Mr. Brady also analyzed other class actions, the multiplier received in those cases, and testified that the 2.6 multiplier requested by class counsel was reasonable. Tr. 485:24-487:19.

He also based this expert opinion on a number of other factors, including: (1) the particular defect was a very novel problem, requiring a high degree of skill and ingenuity; (2) class counsel had to find window regulator and plastics experts; (3) class counsel "survived a lot of vigorous defense" by Volkswagen; (4) class counsel stood ready to try a three-week class action case; (5) class counsel was able to negotiate an outstanding settlement that provides complete relief to the entire Missouri class; (6) the time could

have been invested in a case with far less risk, and with a greater chance of reward; (7) what class counsel did embodies the rationale for fee-shifting and enhancement; and (8) to pay class counsel only their hourly rates would take away the incentive to take the risk they did. Tr. 487:23-99; A201-202.

Further showing the need for an enhancement, it was undisputed that class counsel fronted more than $550,000 in out-of-pocket expenses, all of which were entirely contingent on winning the case. App. Br. 12. As Mr. Brady testified, "[w]hen you're putting out $550,000 over five years, that's a heck of a lot of money. And there's a carrying charge to that." Tr. 489:19-21.

In addition to Mr. Brady, class members themselves testified that they could not have retained counsel on an hourly basis to pursue their claims against Volkswagen. Tr. 43:20-44:5, 59:18-21, 76:24-77:3. They also testified that no other firm ever offered to represent them, or the class, on a contingent basis. Tr. 44:6-8, 59:22-25.

In weighing the testimony and other evidence, the circuit court "determin[ed] that a multiplier [wa]s appropriate at bar." A1. In so doing, it identified that "an enhancement is especially congruent with fee awards under the MMPA, which the Supreme Court has described as having been enacted by the Missouri General Assembly as 'paternalistic legislation designed to protect those that could not otherwise protect themselves.'" *Id.* (quoting *Huch v. Charter Comm., Inc.*, 290 S.W.3d 721, 725-26 (Mo. banc. 2009)).

D. Undisputed Evidence Regarding the Claims Rate.

The circuit court heard extensive evidence regarding the claims rate in this case. Claims rates in all consumer class action cases are generally far less than 100%. Mr. Brady testified that the claims rate in similar consumer class cases was significantly less than 10%. Tr. 501:13-23. He also testified that the claims rate in another automotive case he was involved with was approximately 4.5%. Tr. 503:11-504:2. In fact, in Mr. Brady's experience in class action cases, the claims rate in consumer class actions has always been in the single digits, and the claims paid has been even a lower percentage. Tr. 504:16-505:9. The settlement administrator's Senior Project Administrator, Missy Eisert, was unable or unwilling to refute Mr. Brady's testimony regarding typical claims rates. Tr. 609:15-610:22, 621:9-21.

Low claims rate in a consumer class action like this case does not suggest Volkswagen's A3 window regulators were without defect or few people were harmed. The record revealed a number of reasons why the claims rate was low in this case like other consumer cases, including the age of the vehicles, the large number of the class members who no longer owned their A3 vehicle, the loss of documentation, and the fact that some class members never received direct notice. Tr. 508:9-512:2; 603:22-605:13, 625:4-628:19.

Consistent with Mr. Brady's experience in class action cases, the circuit court also heard unrebutted testimony that numerous class members informed class counsel that they have been prevented from filing any settlement claim for reimbursement in this case because they no longer own their vehicles, no longer have repair receipts, and have been

unable to get records from dealership/repair facilities because of the time delay between when the replacement or repairs were originally done and the time when Volkswagen finally accepted responsibility. Tr. 508:9-512:2.

Ms. Eisert was unwilling or unable to refute: that no longer owning the vehicle can impact the claims rate; that it is common for class members that do not own the vehicle to not have receipts; that the claims rate decreases with the passage of time; that the claims rate decreases with the age of vehicles; or that the claims rate would be any different several years down the road. Tr. 625:14-631:10. Instead, the circuit court heard undisputed evidence that class counsel did everything in its power to ensure that claims were properly administered and approved in connection with the terms of the Agreement. Tr. 282:12-19. In fact, Ms. Eisert testified that she did not know anything else class counsel could have done to guarantee that class members would file claims. Tr. 607:22-608:3.

The trial court also heard undisputed evidence that Volkswagen was the only ultimate beneficiary of the low claims rate in this case. Tr. 346:17-20. Every year that passed after class counsel filed suit, Volkswagen benefitted because of the likely lower claims rate. Tr. 347:6-8.

V. Undisputed Evidence Regarding Plaintiffs' Consistent Efforts to Achieve Settlement.

Time and again, Plaintiffs offered Volkswagen the opportunity to stop the tide of increasing attorney's fees and costs. For instance, Volkswagen could have settled in 2008 when class counsel's lodestar was only 21.3% of its final size. A198 (chart

showing time spent at each juncture in the case). In 2009, settling would have kept the lodestar to 42.9% of its final size. *Id.* Instead, Volkswagen chose to run up the bill. The circuit court received into evidence a chart showing the breakdown of time incurred by class counsel at each settlement opportunity in the case. A198. There were three such opportunities.

In March 2007, class counsel sent a demand letter to Volkswagen proposing a settlement structure similar to the claims-made settlement that the parties ultimately entered. Tr. 211:12-21, 212:3-23; Ex. P-4, pp.7, 13. On an individual basis, the terms were better to Volkswagen than the settlement ultimately reached. Tr. 212:3-23. Volkswagen would have paid more only if the claims right was higher. The 2007 demand letter accurately warned Volkswagen that class counsel's "attorneys' fees in this case will far exceed several million dollars of actual time by the date of trial" if Volkswagen refused to negotiate. Tr. 213:1-9; Ex. P-4, p.13. Volkswagen did not even counter this original 2007 settlement proposal. *See* Ex. P-4, p.13.

In February 2008, the parties formally mediated the case and tentatively reached an agreement. *See id.* Like the 2007 settlement, the terms of the 2008 settlement were again more favorable to Volkswagen. Tr. 213:10-214:2; Ex. P-4, p.13. Volkswagen knew that class counsel's lodestar and expenses were less than $1,000,000. Tr. 214:3-11; Ex. P-4, p.13. Volkswagen admitted that it backed out of the tentative 2008 agreement, sending the parties toward trial. Ex. P-4, p.13.

In mid-July 2009, class counsel attempted to formally mediate the case again. Ex. P-4, p.14. In several e-mail exchanges among counsel, defense counsel specifically

concluded that a "common fund"-type settlement was necessary in order to achieve any potential settlement—rather than the unlimited and uncapped "claims-made" settlement structures previously exchanged by the parties at the 2008 mediation. Tr. 215:9-216:5; Ex. P-4, p.14. At this second mediation, Volkswagen presented class counsel with a "common fund" settlement, which would have barely paid for the out-of-pocket expenses class counsel had incurred in the case—let alone administration costs, notice costs, attorney's fees, or payment to class members. Ex. P-4, p.14.

Class counsel immediately rejected Volkswagen's initial offer and made a larger counter-proposal based upon the "common fund"-type settlement structure that Volkswagen demanded. Tr. 218:5-17, 407:23-25, 427:3-19; Ex. P-4, p.14. After class counsel explained the damage theories and the ranges of the size of the "common fund" necessary for any settlement to protect the class's interests, Volkswagen rejected class counsel's proposal and immediately ended the mediation. Tr. 218:22-219:1, 429:19-21. Volkswagen never put back on the table the claims-made tentative agreement that the parties had reached in 2008. Tr. 219:2-7. Volkswagen never provided any type of settlement structure that resembled the ultimate 2010 settlement structure at issue in this appeal. Tr. 439:17-440:6; Ex. P-4, pp.15-16.

VI. Volkswagen's Admissions Concerning the Result Achieved for the Benefit of the Entire Class

In support of the fairness of the Settlement which would result in a full release for all 16,000 class members, Volkswagen admitted that "*[a]ny* class member" could file claims pursuant to the Settlement Agreement. A252. Volkswagen trumpeted the settlement's

benefits, representing that "[t]he terms of the agreement provide meaningful, substantial relief" to each and every single Missouri class member. A249-52; Tr. 397:2-17. The A3 vehicles originally had carried a two-year, 24,000-mile warranty. A249-250; Tr. 341:22-342:25. As a result of the settlement and class counsel's negotiations, all 16,000 class members received ten-year, unlimited-mileage warranties on the window regulator parts. A250; Tr. 341:22-342:25. As Volkswagen put it prior to the circuit court's approval of the settlement, "Effectively, the class members' protection against mechanical failure of an original or genuine VW replacement window regulator ha[d] been quintupled." A252. Volkswagen acknowledged that the settlement specifically conferred "a benefit that extends up to and past the service life of many vehicles" to each and every class member. *Id.* In addition to reimbursement or repair, class members could receive $75 per visit to a repair shop. *Id.*; Tr. 343:1-18. If class counsel had taken this case to trial, it is highly unlikely they would have secured greater benefits. A251; Tr. 352:13-17, 400:17-22, 402:6-17. The settlement required a substantial change in Volkswagen's business practices. Tr. 351:5-352:12. It was the equivalent of an injunction (Tr. 525:11-526:5) and at the hearing Volkswagen offered no example of injunctive relief under the MMPA that would have been more beneficial to the class.

ARGUMENT

I. A CIRCUIT COURT'S FEE AWARD MUST BE AFFIRMED UNLESS IT SO ARBITRARY AND UNREASONABLE AS TO SHOCK ONE'S SENSE OF JUSTICE.

Although Volkswagen relies heavily on the Court of Appeals opinion below, this Court reviews the judgment of the circuit court "the same as on original appeal." Mo. Const. art. V, § 10; *accord* Mo. Sup. Ct. R. 83.09. Naturally, an appeal begins with adoption of the appropriate standard of review.

As this Court so recently reaffirmed, "The trial court is considered an expert at awarding attorney's fees, and may do so at its discretion." *Howard v. City of Kansas City*, 332 S.W.3d 772, 792 (Mo. banc 2011). Missouri appellate courts have long applied a deferential standard to an award of fees. *Roberds v. Sweitzer*, 733 S.W.2d 444, 447 (Mo. banc 1987). And trial court discretion has been the rule in Missouri for over half a century because it is the circuit court that "is acquainted with all the issues involved [and] is in a position to fix the amount of attorneys' fees." *Agnew v. Johnson*, 176 S.W.2d 489, 493-94 (Mo. 1943); *accord Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980); *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009). The appellate court, so divorced from the intricacies of a case and first hand observance of counsel, thus reviews that award for an abuse of discretion. *Howard*, 332 S.W.3d at 792. The burden of "demonstrat[ing] an abuse of discretion" rests on the appellant—in this case, Volkswagen—who must "show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." *Id.*

(*quoting Russell v. Russell*, 210 S.W.3d 191, 199 (Mo. banc 2007)). In sum, "[i]f reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003) (citation omitted).

These standards should heavily inform the Court's review of this appeal. This is particularly so because the fee award below was reached by a circuit court who observed the actions of counsel over five years and heard three-days of live testimony. In so doing, the circuit court necessarily judged the credibility of the witnesses and gave due weight to the evidence.

II. THE CIRCUIT COURT CORRECTLY APPLIED MISSOURI LAW FOR ASSESSING REASONABLE ATTORNEYS' FEES. (Responding to Point III.)

Plaintiffs respond to Volkswagen's points in their logical order: first, in this section, responding to Point III, in part, by showing that the circuit court not only applied the correct legal standard for determining and awarding "reasonable fees" but applied exactly the standard *both* parties urged it to apply. Applying the correct legal standard, Plaintiffs then show (Section III) that the circuit court acted within its discretion by refusing to reduce class counsel's lodestar for the reasons Volkswagen urges in Points I & II. In Section IV, Plaintiffs respond to Volkswagen's argument in Point III that the circuit court acted outside its discretion in awarding an enhancement to the lodestar. And, in Sections V and VI, Plaintiffs respond to Volkswagen's policy (Point IV) and Due Process arguments respectively (Point V).

A. In This Instance, Fees Are Governed by the Parties' Agreement.

Volkswagen relies heavily on cases interpreting "reasonable attorney's fees" under various fee-shifting statutes, such as federal civil rights statutes, which permit the court to award fees to a prevailing party. *See, e.g.*, R.S.Mo. § 407.025(2) (giving court discretion to award reasonable fees under Missouri Merchandising Practices Act); *Zweig v. Metro. St. Louis Sewer Dist.*, --- S.W.3d ----, 2012 WL 1033304 (Mo. App. E.D. Mar. 27, 2012) (reviewing fees to prevailing party under Hancock Amendment), *transfer granted* (Oct. 30, 2012); *Perdue*, 130 S.Ct. 1662 (awarding fees to "prevailing party" under federal civil rights statute, 42 U.S.C. § 1988). But these cases have little application here; Volkswagen agreed "to pay Plaintiffs' Counsel's reasonable attorneys' fees and expenses in an amount approved by the Court." A195. In other words, by contractual agreement, the parties obviated the requirement that Plaintiffs prove they "prevailed" for purposes of any fee-shifting statute. And fees are tethered generally to Missouri law and its understanding of reasonableness, not any particular federal jurisprudence or statutory provision. These principles are important because Missouri law has long taken the multi-factor approach to the determination of reasonable fees that the circuit court applied.

B. Missouri Law Begins With Lodestar That Can Then Be Adjusted Upward or Downward Based on the Relevant Factors.

Volkswagen's agreement that it would pay reasonable fees "under Missouri law" had certain meaning beyond the interpretation of fee-shifting statutes and has roots in both common law and ethical rules. For instance, the Missouri Rules of Professional Conduct passed by this Court dictate that attorneys charge only reasonable fees and sets

forth a list of non-exclusive "factors to be considered in determining the reasonableness of a fee:"

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Mo. Sup. Ct. R. 4-1.5(a). Missouri law has looked to these factors in setting reasonable fees in the absence of a contract for nearly fifty years. *German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W.2d 705, 711 (Mo. 1966); *accord Bachman v. A.G. Edwards*, 344 S.W.3d 260, 267 (Mo. App. E.D. 2011), *transfer denied* (Aug. 30, 2011); *Koppe v. Campbell*, 318 S.W.3d 233, 242 (Mo. App. W.D. 2010). Importantly, these factors "are not exclusive" and not "each factor [will] be relevant in each instance." Mo. Sup. Ct. R. 4-1.5, cmts. Instead, the guiding principle, as expressed by this Court, is that a "trial court sits as an expert in consideration of attorney fees and can determine the amount of reasonable attorney fees due appellants after consideration

of all relevant factors." *Roberds v. Sweitzer*, 733 S.W.2d 444, 447 (Mo. banc 1987) (internal citation omitted).

Here, the circuit court faithfully executed Missouri law, drawing on a recitation of the factors set out in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). This Court favorably referred to the so-called *Johnson* factors in its decision in *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc. 1989). Those factors mirror the considerations employed at common law and memorialized in Missouri's Rules of Professional Conduct:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Johnson, 488 F.2d at 717-19.

In applying these factors, the circuit court took a well-travelled path; it "first look[ed] at the lodestar amount," a product of reasonable hourly rates and the hours expended, and then considered if "it may be appropriate to enhance (or . . . reduce) the amount of fees awarded based on a multiplier, considering a number of different factors."

A2. This Court suggested just such an approach in *O'Brien*, which the Courts of Appeals have applied for many years. *O'Brien*, 768 S.W.2d at 71 ("Consideration of the appropriate fee should begin with the rates customarily charged by the attorneys involved, and by other attorneys in the community for similar services."); *accord Alhalabi v. Missouri Dept. of Natural Res.*, 300 S.W.3d 518, 530 (Mo. App. E.D. 2009) (calling lodestar the "starting point in determining attorneys' fees"); *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 184-85 (Mo. App. W.D. 2002) ("consideration should begin with the rates. . . [and] number of hours reasonably expended" and then adjusted according to the facts or circumstances of the case).

Thus, in applying Missouri law at the time when Volkswagen contractually agreed to pay "reasonable fees," the circuit court indisputably applied the correct legal standard.

C. The Circuit Court Was Not Restricted in Adjusting the Lodestar to Cases Demonstrating "Rare" or "Exceptional" Circumstances.

Despite seeking a reduction of the lodestar, Volkswagen urges this Court to adopt a new standard drawn from federal jurisprudence that restricts adjustments of the lodestar to "rare" and "exceptional" circumstances. Specifically, it claims that the circuit court abused its discretion by "overlook[ing] the fact that the U.S. Supreme Court has substantially refined the *Johnson* method of analysis since 1974." (App. Br. 49, 51-52.) In support of its new rule, Volkswagen asks this Court to disregard decades of Missouri law reaffirming trial court discretion in favor of U.S. Supreme Court jurisprudence, most recently articulated in *Perdue*, 130 S. Ct. 1662; *accord Zweig*, 2012 WL 103334, *7. That jurisprudence substantially narrows the discretion of trial judges to award attorney's

fees, transforming the court from an "expert" on attorney's fees to a mere calculator who simply multiplies the appropriate hourly rate by the hours expended.

Volkswagen's insistence that federal law apply to this case fails for two reasons: (1) the parties agreed that the circuit court had discretion to enhance or reduce the lodestar on the basis of the *Johnson* factors and (2) Missouri's standard of review materially differs from federal law.

i. The Parties Agreed that the Circuit Court Had Discretion to Modify the Lodestar Based on the Johnson Factors.

The parties agreed that the amount of the fee would be measured by Missouri law, not federal fee-shifting jurisprudence, as reflected in *Perdue*. Missouri law, when the agreement was executed, did not restrict a circuit court's discretion to adjust the lodestar to only "rare" or "exceptional" circumstances. Nor did Missouri law (or the evidence presented to the circuit court) follow the position that the lodestar necessarily accounts for each *Johnson* factor, prohibiting enhancements or reductions. Volkswagen points to the Eastern District opinion in *Zweig*, for which transfer has recently been granted, adopting *Perdue* under the fee-shifting provisions of the Hancock Amendment. *Zweig*, 2012 WL 1033304, *7. But that opinion was not released until March 27, 2012. Volkswagen agreed to pay "reasonable attorney's fees. . . under Missouri law at the time the parties file their Motion for Preliminary Approval of the Settlement" A195. That agreement was signed on May 17, 2010 and class counsel filed for preliminary approval on May 27, 2010—two years before *Zweig*, which was released five days after the Western District heard oral argument in this case.

Prior to *Zweig*, there was no basis for concluding that Missouri law prohibited enhancements to "rare" or "exceptional" circumstances. *Zweig* called the "the multiplier issue . . . one of first impression in Missouri courts." *Id.* But, in fact, an opinion from the Court of Appeals not discussed in *Zweig* suggests otherwise. In *Koppe v. Campbell*, released less than a month after the parties signed the settlement agreement here, the Court of Appeals affirmed a fee award where the attorney "doubled the hourly rate of $350 to account for the risk [the attorney] took in case the appeal was unsuccessful—" in effect applying the risk-based adjustment to the lodestar that *Zweig* purports to foreclose. *Koppe*, 318 S.W.3d at 242 (awarding reasonable fees under quantum meruit analysis), *transfer denied* (July 27, 2010). In that opinion, which was much closer in time to the parties' agreement than *Zweig*, the Court of Appeals did not express any hesitance in affirming a fee award with a multiplier. *Id.*

Moreover, circuit courts regularly applied enhancements in class actions. *Cf. Hale v. Wal-Mart Stores Inc.*, 2009 WL 2206963, at ¶¶ 14-15 (Mo. Cir. Ct. May 15, 2009) (awarding common fund fees of 2.3 times lodestar); *Daily v. DaimlerChrysler Corp.*, 2005 WL 5532773, ¶ 5 (Mo. Cir. Ct. Oct. 4, 2005).

And Volkswagen's own contemporaneous conduct shows that it understood when it signed the settlement agreement that the circuit court had the discretion to make lodestar adjustments. *First*, before it even agreed to settle on the eve of trial, Volkswagen asked class counsel for their lodestar and the multiplier they would seek. Tr. 372:5-16. Class counsel told Volkswagen that their lodestar (at the time) was about $2,600,000 and that they would seek a multiplier between two and three. Tr. 372:22-373:7. Volkswagen

did not object to the multiplier, assert that it was unreasonable or prohibited by Missouri law, indicate they would challenge the application of an enhancement, or attempt to negotiate a cap on fees at or below the lodestar before it agreed to pay reasonable attorney's fees. Tr. 373:19-375:1. To the contrary, Volkswagen's counsel responded: **"So long as you guys aren't asking for nine or ten million dollars, we should be able to take care of this."** Tr. 373:8-14 (emphasis added). The parties then executed the term sheet and ultimately the settlement agreement. It was only *after* the parties signed the settlement agreement that Volkswagen began relying on *post-hoc* facts to interpret the agreement, such as the claims rate.

Second, at the evidentiary hearing, Volkswagen's counsel conceded that the circuit court "certainly should look at the lodestar" which could then "be adjusted either downward or upward, depending on the unique circumstances in the case." Tr. 719:20-720:5. Moreover, Volkswagen did not object to the use of the *Johnson* factors, stating "we're not contending the Court should ignore that kind of analysis." Tr. 19:3-18. Indeed, in arguing for a reduction of the lodestar, Volkswagen emphasized the circuit court's discretion, arguing that it had "even more discretion in a class action" to set the amount of the fee. Tr. 18:3-6. Only later, after the settlement had been approved, and the circuit court exercised its discretion in favor of an enhancement, did Volkswagen seek to tie that court's hands, turning it from an expert on fees to a lodestar calculator.

The terms of the parties' agreement, Missouri law at the time that agreement was executed, and Volkswagen's contemporaneous conduct all demonstrate that the parties intended the circuit court to have wide discretion to set an appropriate fee. The court

exercised that discretion consistent with both parties understanding. Volkswagen should not be allowed to rewrite history.

ii. Missouri Law Does Not and Should Not Restrict Consideration of the Johnson Factors in Adjusting the Lodestar.

Volkswagen argues that Missouri courts have freely adopted federal fee-shifting jurisprudence, pointing to Missouri cases recognizing the similarity between the federal class action rule of civil procedure and the Missouri class action rule. (App. Br. 49-50). Although Missouri courts have looked to interpretations of Federal Rule of Civil Procedure 23 in interpreting the *prerequisites* to maintaining a class action, Volkswagen points to no case where Missouri courts looked to federal Rule 23 interpretations for the meaning of "reasonable fees." *Dale v. DaimlerChrysler Corp*., 204 S.W.3d 151, 163 (Mo. App. W.D. 2006) (affirming class certification); *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707 (Mo. App. W.D. 2009) (same); *Hope v. Nissan North Am., Inc.*, 353 S.W.3d 68, 92 (Mo. App. W.D. 2011) (affirming class certification in part and reversing in part); *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 864 (Mo. banc 2008) (reversing class certification). Indeed, in *Dale*, the Court of Appeals made clear that federal interpretations of Rule 23 were merely a source of legislative intent (because the Missouri legislature directed courts to look there, R.S.M.O. § 407.025(3)) in determining the "the manner of maintaining the action," *i.e.*, the prerequisites to certification; such cases do not otherwise displace Missouri law or rules. *Dale*, 204 S.W.3d at 163

(rejecting argument that Missouri court of appeals obligated to follow federal Rule 23 standard of review in a class action).

Nothing in § 407.025 suggests that the Missouri legislature intended to sweep aside Missouri's own common law development of "reasonable fees," or its interest in governing lawyer compensation through its own rules of professional conduct, in favor of federal decisions evaluating fees as part of a Rule 23 class action. And even if it did, Volkswagen's argument is misplaced because the federal cases it relies upon interpret "reasonable attorneys' fees" in the context of federal fee-shifting statutes, not Rule 23. *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983) (awarding fees under federal civil rights statute, 42 U.S.C. § 1988); *Perdue*, 130 S.Ct. at 1671 (same); *Blum v. Stenson*, 465 U.S. 886, 889 (1984) (same); *Pennsylvania. v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558 (1986) (awarding fees under Clean Air Act, 42 U.S.C. § 4604(d)) ("Delaware Valley I"); *Gisbrecht v. Barnhart*, 535 U.S. 789, 792 (2002) (awarding fees in Social Security case under 42 U.S.C. § 406(b)); *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992) (awarding fees under Clean Water Act, 33 U.S.C. § 1365(d), and Solid Waste Disposal Act, 42 U.S.C. § 6972(e)). So, in fact, it is these cases that Volkswagen now urges Missouri law to follow, not cases interpreting Rule 23.

As proof that Missouri law follows federal jurisprudence, Volkswagen refers to *Hensley v. Eckerhart*, a decision from 1983, cited by this Court in *O'Brien*, 768 S.W.2d at 71 (1989) and *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 523 (Mo. banc. 2009). Volkswagen argues that because this Court has cited favorably to *Hensley*, it should thoughtlessly follow the last thirty years of federal jurisprudence that culminated in

Perdue decided in 2010. (App. Br. 50-57.) But this is not a logical step. *Hensley* broadened trial court discretion by permitting district judges to reduce the amount of a fee awarded to prevailing parties based on limited success. 461 U.S. at 437 ("There is no precise rule or formula for making these determinations. . . .The court necessarily has discretion in making this equitable judgment."). Indeed, *Hensley* endorsed use of the *Johnson* factors in setting a fee above or below lodestar. *Id.* at 449 n.8 ("the Court's opinion should not be read to imply" a limitation "for awarding a fee higher than the reasonable rate times the reasonable number of hours. . . .To the contrary, the Court expressly approves consideration of the full range of *Johnson v. Georgia Highway Express* factors."). The adoption of *Hensley* was consistent with the premium Missouri law places on the trial court's unique perspective of a case and its ability to apply the relevant factors. *Supra*, Section I. After, *Hensley*, however, the U.S. Supreme Court turned away from a jurisprudence of trial court discretion, toward inflexible *per se* rules that ignore the given facts of a case.

In fact, in *Perdue*, Justice Thomas referred to the development of federal law as a "decisional arc that bends decidedly" against lodestar adjustments, restricting trial judge discretion. *Perdue*, 130 S.Ct. at 1677-78 (Thomas, J., concurring). This constriction began in cases like *Blum v. Stenson*, 465 U.S. at 898-901 (1984) (limiting upward adjustment based on exceptional results) and *Delaware Valley I*, 478 U.S. at 565 (1986) (limiting adjustment based on quality of performance). There, phrases like "rare" and "exceptional" circumstances crept into the standards for when a trial court could depart from the lodestar. In *Delaware Valley I*, Justice Blackmun, dissenting on behalf of

himself and Justices Marshall and Brennan, took note that the federal law was veering away from the traditional standard of review announced in *Hensley* towards a system of less discretion. 478 U.S. at 569 (Blackmun, J. dissenting) ("If the majority applied the proper, deferential standard of review on the quality issue rather than substituting its judgment for that of the District Court it may have reached the same result as I do that the court did not abuse its discretion "in multiplying the lodestar to adjust for quality.")

The shift became very prominent in *City of Burlington v. Dague*, when the Court held as a matter of law that a lodestar could not be enhanced based on the contingent nature of the representation and risk of non-recovery. 505 U.S. 557, 567 (1992). At this point, many states that had been following federal jurisprudence in the interpretation of their own laws, jumped off the so-called "decisional arc," recognizing as the dissenters recognized that contingent risk has long been an appropriate factor in setting a reasonable fee. *Infra*, Section IV.A.

For decades, Missouri courts have continued to cite the *Johnson* factors and to *Hensley*. Volkswagen has identified no case adopting the post-*Hensley* jurisprudence.[4] To the contrary, unlike the U.S. Supreme Court, this Court has continued to apply a very

[4] *Blum* was cited once by the Court of Appeals in awarding fees under 42 U.S.C. § 1988(b), for which it is obviously controlling as an interpretation of federal law. *Browning by Browning v. White*, 940 S.W.2d 914, 926 (Mo. App. S.D. 1997) *overruled by Amick v. Pattonville-Bridgeton Terrace Fire Prot. Dist.*, 91 S.W.3d 603 (Mo. banc 2002).

deferential abuse of discretion standard of review. *Supra*, Section I. The only case to the contrary was issued this year in *Zweig* where the Court of Appeals adopted *Perdue*, under the Hancock Amendment to the Missouri Constitution, and by reference the intervening decades of jurisprudence. *Zweig*, 2012 WL 1033304, *6. But *Zweig* does not attempt to reconcile Missouri's longstanding standard of trial court discretion with the concomitant federal constriction of such discretion.

That constriction cannot be understated. If the fact was uncertain in federal jurisprudence before *Perdue*, that case settled the question, re-affirming that lodestar adjustments based on quality, performance, success, or risk are unavailable. *Perdue*, 130 S.Ct. at 1675-76. *Perdue* nominally left open that the "rare" or "exceptional" case justifying an enhancement might arise but the facts of that case show the exception is truly mythical. Consider the facts in *Perdue*. The plaintiffs were 3,000 "children in the Georgia foster-care system" who filed a class action claiming that system violated their constitutional and statutory rights. *Id.* at 1669. The "plaintiffs' lawyers spent eight years investigating the underlying facts, developing the initial complaint, conducting court proceedings, and working out final relief." *Id.* at 1679 (Breyer, J. dissenting). They advanced over $800,000 to cover case costs. *Id.* at 1683-84. And they faced heavy opposition from a well-funded defendant, the State of Georgia, who spent at least $2.5 million on outside counsel and had access to thousands of investigative hours through its law enforcement division. *Id.* at 1679. The district court's docket consisted of "over 600 entries" and the record "fill[ed] 20 large boxes." *Id.* Despite such opposition, eight years of litigation (without being paid) produced a fundamental "reform" to the State of

Georgia's "entire foster-care system," which until then had failed to provide "essential medical and mental health services," resulting in unnecessary "illness and lifelong medical disabilities," put "children in the care of individuals with dangerous criminal records," exposed "vulnerable children to suffer regular beatings and sexual abuse," and housed them in "shelters that were 'unsanitary and dilapidated, 'unclean,' 'infested with rats,' 'overcrowded,' unsafe, and 'out of control.'" *Id.* at 1680. The record showed that "litigation was necessary to force reform." *Id.* Critically, the experienced trial judge who oversaw all of this found that class "counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 1682 (internal quotes omitted). As Justice Breyer concluded, "If this is not an exceptional case, what is?" *Id.* at 1683.

Zweig hastily, and without analysis, adopted this jurisprudence. This is a rule that considers it unreasonable for counsel to receive compensation for the hundreds of thousands of dollars in case expenses advanced. It is a rule that exposes counsel to a lodestar reduction, when part of their claims fail, but offers them no chance of an enhancement when they succeed. It is a rule that, rather than show deference enables appellate courts "to second-guess a district judge" who is most "aware of the many intangible matters that the written page cannot reflect." *Id.* at 1679. Missouri common law, this Court's rules of professional conduct, and its belief that trial courts can apply their experience and knowledge of the case in a reasoned and fair manner to the determination of a fee show that *Zweig* is not persuasive and should be overruled or, at

minimum, limited to fees awarded under the Hancock Amendment (*Infra*, Section III.A-C & IV.B), leaving intact the common law and MMPA standards that existed prior to *Zweig* when it adopted *Perdue*. *See Howard*, 332 S.W.3d at 792 ("The trial court is considered an expert at awarding attorneys' fees, and may do so at its discretion."); *id.* (fee must be affirmed unless the "trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice."); *Hancock*, 100 S.W.3d at 795 ("[i]f reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion.").

III. THE CIRCUIT COURT DID NOT ERR IN DECLINING TO REDUCE THE LODESTAR BASED ON THE "RESULTS ACHIEVED."

(Responding to Points I and II)

Volkswagen argues that Plaintiffs achieved only "limited success," compelling a reduction of their lodestar under the "results achieved" *Johnson* factor. In pursuing its "limited success" argument, Volkswagen relies on two points: *first*, although it does not dispute that the settlement makes available to each class member monetary relief that exceeds their out-of-pocket damages, it argues the court erred in relying on this fact because the circuit court should have considered the amount claimed and *only the amount claimed* in setting the fee; and *second*, it argues that a reduction was required because the circuit court only certified a statewide, not a nationwide, class. Both arguments fail as the circuit court's findings were supported by substantial evidence and Missouri law.

A. The Circuit Court Acted Within Its Discretion By Refusing to Award A Fee Based Solely on the Claims Paid.

Volkswagen seeks to import controlling weight to the "claims paid" as the only appropriate measure of the "results achieved" factor. But no Missouri case has ever measured the "results achieved" in a claims-made class action by the "claims paid." *Infra*, Section III.A.i. Rather, Missouri courts have routinely measured success by the settlement benefits made available to the class. *Infra*, Section III.A.ii. And the circuit court, after hearing three-days of evidence, concluded that the benefits-conferred was the appropriate measure in this case.

The circuit court reached its conclusion despite Volkswagen's protestations to the contrary. But Volkswagen cannot show an abuse of discretion. To do so, it first relies on a series of Missouri cases measuring the "results achieved" in *individual* cases. By their nature these cases that were not claims-made class actions cannot justify the rule Volkswagen proposes—that success in a class action is measured solely by the "claims paid." To the contrary, these cases demonstrate that success is measured by looking at what was achieved for the individual plaintiff versus what could have been achieved at trial—in effect, focusing on the legal efforts and activities of class counsel. By this measure, Volkswagen does not dispute the incredible results achieved through the settlement, where each claimant received more than what they likely could have achieved at trial. *Every* class member had the opportunity to seek their entire out-of-pocket damages plus an additional $75 per trip to the repair shop. None of the individual cases cited by Volkswagen involved equivalent relief. Rather, each involved success that was

less than what the plaintiff could have achieved. *Infra*, Section III.A.i. Acknowledging that no Missouri case measures success by the "claims paid," Volkswagen then turns to federal class action jurisprudence. But its attempts to show an abuse of discretion falter. No federal appellate court has mandated that "results achieved" be measured by the "claims paid." To the contrary, three circuits and the U.S. Supreme Court either require, or at minimum, permit a trial court the discretion to award fees based on the benefits conferred, as the circuit court did here. These cases recognize an obvious proposition—that class counsel can make excellent results available to the class but if, for reasons outside their control, the claims rate is modest, they should not be penalized. *Infra*, Section III.A.ii. Substantial evidence supported the circuit court's decision to measure success by the benefits conferred and not to lay the claims rate at class counsel's feet. *Infra*, Section III.A.iii.

The Court of Appeals and now Volkswagen attempt to justify reliance on the "claims paid" through a handful of federal trial court decisions. But these cases only demonstrate that, in certain circumstances, a trial court should have the *discretion* to consider the "claims paid" in addition to the individual results achieved. Each of those cases involved facts that arguably justified the trial court's decision to give weight to the "claims paid" because, in each case, the individual results achieved were highly compromised, involving "coupon" relief or cost-of-defense settlements. *Infra*, Section III.A.ii.

Finally, the best evidence that the circuit court acted within its discretion in concluding that all class members were benefited by the settlement is Volkswagen's own

conduct. In order to persuade the circuit court to approve the class action settlement and secure releases from all 16,000 class members, Volkswagen itself argued that the lifetime warranty, full reimbursement rights, and $75 for every visit to repair shop secured for all class members was more than sufficient consideration for a release. Volkswagen touted these benefits as "meaningful, substantial" relief to the class—the equivalent of Volkswagen having "[e]ffectively [given] the class members' protection against mechanical failure of an original or genuine VW replacement window regulator" that "extends up to and past the service life of many vehicles." A224-A250; Tr. 342. The fact that the benefits were not claimed do not diminish their value anymore than a warranty which goes unused diminishes its value at the time of purchase. In seeking approval of the settlement, Volkswagen never asked the circuit court to measure the reasonableness of the 16,000 releases by the "claims paid." Thus, the circuit court acted well within its discretion in holding Volkswagen to the representations it made to secure the judgment.

i. Missouri Law Does Not Require That "Results Achieved" Be Measured by the "Claims Paid."

Like putting a round peg in square hole, Volkswagen first attempts to fit its "limited success" argument, built entirely around the "claims paid," into existing Missouri case law analyzing "results achieved" in non-class action cases. These cases only support the circuit court's judgment because, here, it was undisputed that each class member was given the opportunity to receive more than complete relief for the harm caused by Volkswagen's defective A3 window regulator.

Volkswagen contends that the "leading case" is *O'Brien*, 768 S.W.2d at 64. In *O'Brien*, plaintiff appealed a $1,000 fee award where the plaintiff prevailed at trial and its lodestar was $28,000. This Court reversed because the circuit court failed to consider plaintiffs' evidence or arguments in setting the amount of the disputed fee. *Id.* Thus, the actual holding in *O'Brien* provides no basis for reversal here: the circuit court plainly gave Volkswagen sufficient opportunity to present its evidence and arguments both during the three-day evidentiary hearing and through prior and subsequent briefing.

Nonetheless, Volkswagen argues here that the circuit court failed to take heed of guidance this Court gave to the trial court in that case. Specifically, the Court advised that the "fee should bear some relation to the award, but there is no established principle that the fee may not exceed the damages awarded." *O'Brien*, 768 S.W.2d at 71 (internal citation omitted). This statement was prompted by the "results achieved" factor and the undisputed fact in that case that the "efforts of plaintiff's attorneys at trial were not wholly successful" (*id.*) because the actual damages awarded by the jury to the individual plaintiff failed to exceed amounts secured and offset by an earlier settlement. *Id.* at 66-67, 72. In requiring the circuit court to consider plaintiff's evidence that the $1,000 fee was too low, given the $28,000 lodestar, this Court emphasized that, while the fee should bear some relation to the award, the circuit court should not discount other factors, including counsel's "activities . . . undoubtedly contributed to the settlement reached with [the other defendants]." *Id.* at 71.

Nothing in *O'Brien* ties a circuit court's hands in a claims-made settlement. To the contrary, *O'Brien* merely demonstrates that a circuit court can be guided by many

factors, not any single factor, in setting a fee. Here, the circuit court gave *O'Brien* careful consideration. And it expressly addressed the "results achieved" factor, concluding the fee bore sufficient relation to the results achieved as "measured against the benefit conferred by the settlement. . . ." A3.

Volkswagen's myopic reading of *O'Brien's* reference to the word "award" in its analysis of "results achieved" is misplaced. (App. Br. 25-26). *O'Brien* merely stands as an application of the "results achieved" factor in the factual circumstances of that case, where there was an actual "award" to an individual plaintiff in the form of a jury verdict that failed to offset a prior settlement. Nothing in *O'Brien* suggests that the term "award" is limited in a class action to amounts paid pursuant to claims made against a settlement fund or judgment. To the contrary, *O'Brien* focuses its analysis on the "*efforts* of plaintiff's attorneys" and their "*activities*" in bringing about the "results achieved," not on the particular monetary amount paid by the defendant. *O'Brien*, 768 S.W.2d at 71 (emphasis added).

Next, Volkswagen seizes on the Court of Appeal's[5] articulation of the "results achieved" factor in *Knopke v. Knopke*, where it was characterized as "[t]he degree of success. . .*i.e.*, the amount recovered." *Knopke v. Knopke*, 837 S.W.2d 907, 922 (Mo. App. W.D. 1992). Like *O'Brien*, the phrase "amount recovered" was made in the

[5] Volkswagen incorrectly refers to the *Knopke* as a decision of "this Court" (App. Br. 54) but it was actually a decision by the Court of Appeals for the Western District. *Knopke*, 837 S.W.2d 907.

specific factual context of that case, where the case was tried and a judgment was recovered. The case was not a class action, did not involve a claims process, and did not involve a fee-shifting statute or agreement; it involved a common fund created from the judgment achieved by plaintiffs when they sued their partners on behalf of a shared partnership. *Id.* Moreover, the Court of Appeals only reduced the fee in that case because "[t]wo of the items awarded [on which the fees were based]" was substantively "reversed" on appeal, justifying an adjustment to the lodestar. *Id.* This comports with *O'Brien* because it directs the analysis to counsel's "efforts" and "activities," in that their efforts failed on certain discrete claims.

Volkswagen next turns to federal law, citing *Tusa v. Omaha Auto Auction Inc.*, where the U.S. Court of Appeals for the Eighth Circuit reversed a $12,000 fee because plaintiff proved no actual damages and received only his entitlement to statutory damages of $1,500. *Tusa*, 712 F.2d 1248, 1249, 1254-56 (8th Cir. 1983) (applying federal Motor Vehicle Information and Cost Savings Act). Like *O'Brien*, though, *Tusa* is merely an application of the *Johnson* factors to an individual case. In fact, in reducing the fee in *Tusa*, the Eighth Circuit was particularly persuaded by the fact that similar results had been achieved in other cases pursuing the same claim but where the attorneys expended fewer hours. This is an entirely different *Johnson* factor than the "results achieved." *Johnson*, 488 F.2d at 717-19 (relevant factor is "awards in similar cases"). Here, the circuit court heard direct (and undisputed) evidence of fees in other claims-made class actions, all of which supported the award. Tr. 330:4-334:21, 485:24-488:6; A203-A204.

Moreover, Volkswagen's suggestion that this Court use *Tusa* to set a fee-to-"claims paid" ratio (App. Br. 31) is contrary to even federal standards: the U.S. Supreme Court has said that "[t]here is no precise rule or formula for making these determinations," rejecting any ratio, and stating that "[t]he amount of the fee, of course, must be determined on the facts of each case." *Hensley*, 461 U.S. at 429-36; *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion) ("The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988 [but is] only one of many factors that a court should consider in calculating an award of attorney's fees."). Likewise, this Court rejected any such approach in *O'Brien*, 768 S.W.2d at 71, necessarily leaving the weight given to the award –meaning the individual award in a case—to the trial court in light of all the relevant facts. *Cf. Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980) ("The attorney is entitled to a reasonable fee in light of the nature and extent of the services rendered, and the fee should not be calculated according to an arbitrary, fixed percentage of the value of the property involved.").

This Court's decision in *Gilliland* provides even less justification for a fee-to-"claims paid" ratio. (App. Br. 29.) In *Gilliland*, the circuit court granted a $22,000 fee award under the Missouri Human Rights Act. The plaintiff appealed because his lodestar was $170,149 even though the jury returned a defense verdict on several of his claims. *Gilliland*, 273 S.W.3d at 523-24. The Court believed that the plaintiffs' appeal for a higher fee "might have been well taken" except that the plaintiff actually did not prevail on the Missouri Human Rights Act claim at all; he actually prevailed only on his

common law claim for constructive discharge. *Id.* Because a party is not entitled to recover attorney's fees at common law, the trial court could not have erred in "only" awarding $22,000.[6] Thus, *Gilliland*, provides no support to Volkswagen's proposed rule that the fee must be measured by the "claims paid," as it was not a class action and the holding had nothing to do with the relation between the results and the fee. Here, unlike *Gilliland*, Plaintiffs' entitlement to reasonable fees is uncontested.

What can be drawn from these cases? Simple: the circuit court has the discretion to set an appropriate fee in light of *all* the factual circumstances of each case; the fee is not driven by any single factor. Thus, in certain cases, the "results achieved," not measured in a vacuum, but as compared to the individual "amount involved," *Gilliland*, 273 S.W.3d at 523, *may* support a lodestar reduction, such as where:

- part of the underlying judgment is reversed (*Knopke*);
- a jury fails to award any actual damages following trial (*Tusa*);
- there was no fee entitlement in the first place (*Gilliland*);
- a plaintiff fails to recover sufficient damages to offset an earlier settlement, (*O'Brien*); or
- a plaintiff prevails but succeeds "on only some of his claims for relief" (*Hensley*).

[6] Indeed, the defendant may have been entitled to reversal of even the $22,000 fee but they did not appeal for strategic reasons. *Id.* at *522-23*.

These cases merely show that the trial court has the discretion to give weight to the "results achieved" factor where Plaintiffs attempted to but failed to achieve certain relief at trial. They do not support Volkswagen's insistence that the "results achieved" be measured by the "claims paid" because none of these cases were class actions and each merely measured the degree of success obtained as compared to the amount available at trial.

ii. The Benefits-Conferred Were Meaningful and Go Beyond the "Claims Paid."

In a class action, the only Missouri case to have considered the factor weighed the "results achieved" based on the "benefit conferred on the Class," not the claims paid. *Bachman*, 344 S.W.3d at 267; *accord German*, 404 S.W.2d 705, 711 (factor is measured by "the benefits resulting to the client from the services"). Properly measured, as these cases instruct, class counsel's efforts resulted in complete success and, the circuit court properly found that no reduction for "limited success" was appropriate. Each class member received an extension of the vehicles' regulator warranty from 2 years to 10 years and from 24,000 miles to unlimited miles and the right to receive their entire out-of-pocket damages plus $75 per visit to the repair shop—far more than class counsel had negotiated through a settlement much earlier in the case that Volkswagen backed out of. The settlement guaranteed that class members received these benefits immediately rather than many years down the road following trial, post-judgment motions, and the appeal process. A193-A195. Simply put, class counsel could not have achieved a better result for any class member at trial—a point Volkswagen conceded at the evidentiary hearing.

Tr. 402:12-17 ("we're in absolute agreement" that "had this case gone to trial it is highly unlikely [plaintiffs] would have gotten a better result").

Volkswagen argues that the claims rate demonstrates a lack of success. But even if this case had gone to trial and class counsel had obtained a judgment in the form of a "common fund" representing damages for all 16,000 class members, those members would still have had to participate in a claims process to show their entitlement to a portion of the award. 3 Newberg on Class Actions § 10:12 (4th ed. 2002) (describing the "four steps" in the distribution of damages to individual class members, "as notice, submission of a proof of claim, claim verification, and actual distribution"). This is not true in all class actions, such as where the class judgment can be distributed "on the basis of the defendant's records or according to an apportionment plan based on public data, thus eliminating the need for proof of claims by class members." *Id*. But it was indisputably true here, where there was no independent record—except to ask each class member—of the number of regulator failures suffered by each individual class member.

When less than all class members file a claim, the court is then faced with how to distribute the unclaimed funds, which could have reverted to Volkswagen, escheated to the state, or been sent to *cy pres*. *See, e.g., Kansas Ass'n of Private Investigators v. Mulvihill*, 159 S.W.3d 857, 861 (Mo. Ct. App. 2005). Given that a claims process was inevitable, class counsel achieved precisely what it could have achieved at trial. This is not a case, like *O'Brien*, where plaintiffs tried a case to judgment and failed to satisfy the offset from an earlier settlement or a case like *Knopke* or *Tusa*, where plaintiffs failed to secure less than their actual damages. Class counsel secured, by way of claims-made

settlement, exactly what the Missouri Merchandising Practices Act provides for in the way of actual damages. Certainly, it would not have been in the best interests of the class for class counsel to reject the claims-made settlement and try the case, delaying and risking the certain recovey a settlement provides to the class, merely to create a common fund that would ultimately result in unclaimed funds.

As such, these facts could not be more different than those presented in *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.*), a case Volkswagen relies heavily on to demonstrate Plaintiffs' "limited success." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011). (App. Br. 26-27.) In *Bluetooth*, plaintiffs who alleged the defendant made misleading statements about the safety of headsets "sought actual damages in the amount paid for headsets, which they claimed to be between $70 and $150 per headset." *Id.* at 939. The settlement (for which class counsel was awarded $800,000 by the trial court) provided only that the defendant would post prospective warnings about the product and donate "a total of $100,000 to *cy pres*." *Id.* at 939-40. In other words, the settlement made *no* direct benefits available to any class member; they could *not* receive reimbursement of any part of the $70-150 they spent on the headset—the very relief plaintiffs purported to be seeking. Unsurprisingly, the Ninth Circuit found that this amounted to "limited success," reversing both the fee and the settlement approval entered by the district court. In stark contrast, here, Volkswagen was "in absolute agreement" that "had this case gone to trial it is highly unlikely [plaintiffs] would have gotten a better result." Tr. 402:6-17.

Indeed, Volkswagen cites no case reducing a fee award where a settlement made available cash relief and reimbursement that *exceeded* each class member's out-of-pocket damages. All of its cases involve claims where the individual relief afforded was highly compromised—even the case it cited to the circuit court as its "white mule" involved only a "coupon" settlement with minimal relief (Tr. 730:1-731:5). *Strong v. BellSouth Telecomms., Inc.*, 173 F.R.D. 167, 169 (W.D. La. 1997), *aff'd*, 137 F.3d 844 (5th Cir. 1998) (settlement provided "coupon" in the form of a credit that ranged from 50 to 80 cents per month for defendant's telephone services and was only available if the class member opted to discontinue the disputed service); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 775 (N.D. Ohio 2010) (average payment per class member of about $36.82 "represent[ed] a 20 percent recovery"), *on reconsideration in part* (July 21, 2010).

The only case that comes within striking distance of providing the type of relief the settlement here provides, *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 400 (D. Mass. 2008), involved a settlement that created a mix of coupon-type relief (vouchers and free credit monitoring services), reimbursements, and cash payments for actual damages that did not exceed $30. And in that case, the court affirmed a fee that resulted in the"suggested multiplier of 1.97." *Id.* at 408 (basing value of settlement on *non-cash* coupon-like benefits of credit monitoring). Thus, unlike the plaintiffs in *Bluetooth, Strong, Londardo* or any of the Missouri cases cited by Volkswagen, here class counsel's efforts resulted in unquestionable success for each class member.

The benefits of the settlement are evident in Volkswagen's own conduct. When advantageous to Volkswagen, it freely admits that the settlement agreement provides

substantial benefit to all class members. But, in contesting the fee, Volkswagen sings a different tune, contending that the only relief it provided was the amount of "claims paid."

As a class action which releases the claims of thousands of absent class members, the circuit court was required to approve the settlement before the claims of the class members could be "dismissed or compromised." *Ring v. Metro. St. Louis Sewer Dist.*, 41 S.W.3d 487, 492 (Mo. App. E.D. 2000); Mo. Sup. Ct. R. 52.08. The "most important consideration in determining if a settlement is fair, reasonable, and adequate is the strength of the plaintiff's case on the merits balanced against the offered settlement." *Ring*, 41 S.W.3d at 492. Thus, the parties were obligated to persuade the circuit court that the terms of the settlement justified the release of each class member's claim, not just the releases of the 130 people who filed claims.

In persuading the court to approve that release, Volkswagen did not argue that "the entire benefit conferred on the class is [the] $125,621" paid in claims, as it does now (App. Br. 25). Rather, Volkswagen argued that the "terms of the agreement provide meaningful, substantial relief" to the class, Tr. 397:2-17 (quotation marks omitted). The opportunity to make a claim means that "[e]ffectively the class members' protection against mechanical failure of an original or genuine VW replacement window regulator has been quintupled," from a 2-year limited-mile warranty to a ten-year unlimited mile warranty. A252. "Any class member may file . . . claims," Volkswagen emphasized. *Id.* This—the opportunity to file a claim—that Volkswagen likened to a warranty was "a *benefit* that extends up to and past the service life of many vehicles." *Id.* (emphasis

added). When asked about these statements on cross examination at the fee hearing, Volkswagen's counsel reiterated that the settlement creates benefits not only in those who claim but in those who do not. Tr. 399:4-8.

In approving the settlement, the circuit court took Volkswagen at its word that each of the 16,000 class members received a benefit in the form of an opportunity to make a claim. This only makes sense because the settlement terms must be given a singular interpretation. It was certainly not an abuse of discretion for the circuit court to hold Volkswagen to that position in evaluating the value of the settlement for purposes of determining the fee award, where Volkswagen contends that the consideration it paid for those 16,000 releases are "illusory." *See State ex rel. York v. Daugherty*, 969 S.W.2d 223, 225 (Mo. banc 1998) (a party cannot accept the benefits of a judgment and then attack it). The circuit court did not abuse its discretion in holding Volkswagen to the contractual bargain reached between the parties and to its prior representations to the court.

iii. The Weight of Federal Authority Supports the Benefit-Conferred Approach.

In adopting the benefit-conferred approach, over the "claims paid" approach, the circuit court followed federal authority. No federal appellate court has ever held that a district court abuses its discretion in refusing to give the "claims paid" controlling weight. To the contrary, two of the three appellate courts to have considered the issue *require* federal district courts to measure fees against the benefit-conferred, not the amount claimed. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436-37 (2d Cir.

2007); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam). A third appellate court does not require district courts to measure the fee by the benefit-conferred but also does not restrict the discretion to do so "according to the circumstances presented in each case." *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1297-98 (11th Cir. 1999) (holding trial court did not abuse its discretion by awarding fees based on the benefit-conferred).

Important reasons justify declining Volkswagen's unsupported *per se* rule. For instance, in *Masters*, the Second Circuit disagreed that the benefit-conferred approach created a "windfall for the attorneys," reasoning that the entire settlement is "created through the efforts of counsel at the instigation of the entire class." *Masters*, 473 F.3d at 437. Thus, fees should be measured "on the basis of the total funds made available, whether claimed or not." *Id.* Volkswagen's alternative rule, forbidding consideration of the benefit-conferred, places too much weight on a factor that is difficult for class counsel to predict and impossible for them to control:

> [B]y limiting the attorney to a fixed percentage of the judgment actually claimed, the resulting fee would be entirely dependent on the number of plaintiffs who came forward. Considerations of the difficulty of the case, the quality of representation, and the hours spent by the attorney, would not determine the ultimate size of the fee. Nor can the attorney always determine whether it would be worthwhile for him to undertake the risks of litigation, for the number of plaintiffs who will come forward after judgment is often unpredictable. Of course, the risk that only a fraction of

plaintiffs will claim is greatest if the individual claims are small.

Van Gemert v. Boeing Co., 590 F.2d 433, 441 (2d Cir. 1978) (en banc), *aff'd*, 444 U.S. 472 (1980)); A3 (*citing id.*). In affirming that case, the U.S. Supreme Court emphasized that by making the monetary relief available to class members a benefit is conferred on each class member, regardless of whether they claim: the "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit . . . created by the efforts of the class representatives and their counsel." *Boeing Co. v. Van Gemert*, 444 U.S. at 480 (rejecting argument that fees should be awarded only on claimed portion of class judgment).

Volkswagen attempts to distinguish *Boeing*, arguing that it involved a class action judgment, not a settlement, where the unclaimed common funds would not revert to the defendant and, thus, where the defendant's total liability was equal to the entire fund. (App. Br. 34-35.) But the fact that, as part of settlement here, the parties negotiated a reversion of the unclaimed funds does not change the underlying principle that even those who did not file a claim enjoyed a benefit "whether or not [the class member] exercise[s] it." *Boeing*, 444 U.S. at 480. Moreover, the three appellate courts to have considered Volkswagen's argument have rejected it. *Masters*, 473 F.3d at 436-37; *MGM-Pathe*, 129 F.3d at 1027; *Waters*, 190 F.3d at 1297-98. Volkswagen urges that these too were "common fund" cases but that is only nominally so because they required a claims process and unclaimed funds would revert to the defendant. Thus, like here, the defendant's total liability in each of these cases to the class was merely for the "claims

paid." Thus, they are, for all practical purposes, the equivalent of a claims-made settlement.

Why should the benefit be measured differently in a claims-made settlement? Such settlements do not inherently produce fewer benefits for the class than "common fund" judgments like *Boeing*. Nor do settlements that purport to create a "common fund" with a reversion confer greater benefits on a class than a claims-made settlement. Since reversionary common funds are judged by the entire fund, for purposes of the fee award, not the amount claimed, it follows that pure claims-made settlements should be judged under the same standard. *Masters*, 473 F.3d at 436-37; *MGM-Pathe*, 129 F.3d at 1027. In *Bachman v. A.G. Edwards, Inc.*, the Court of Appeals affirmed a $21 million fee equal to one-third of a "common fund" that was made up of $26,000,000 gross cash fund subject to a claims process and $34,000,000 in redeemable vouchers for defendants' services. *Bachman*, 344 S.W.3d 260, 264-65, 267 (Mo. App. E.D. 2011), *transfer denied* (Aug. 30, 2011). The Court of Appeals did not measure the fee by the amount of cash claimed or the coupons redeemed; it affirmed one-third of the "the benefit conferred on the Class." *Id.*

Moreover, purely claims-made settlements provide even greater benefits to individual class members than a typical "common fund" settlement. Unlike a common fund, which typically have caps on the amount to be paid out under the fund, the claims-made settlement here provided *no limit* to Volkswagen's liability. Tr. 344:10-17 ("There was no cap of any kind on any of Volkswagen's obligations that they committed to pursuant to the settlement agreement, none whatsoever"). Indeed, it can be perilous to

contractually agree to a "common fund," where the defendants' liability is capped, in a case like this because if the claims exceed expectations, each claimant ends up with less than the intended recovery. Tr. 363:8-24. Thus, an uncapped claims-made settlement, like this one, offers a better, more secure deal for the class because each class member is contractually guaranteed full reimbursement or repair plus $75 per trip regardless of the number of claims, the amount of attorney's fees and expenses, or the costs of settlement administration. Tr. 342:5-344:17.

Volkswagen's argument that "common fund" cases with reversion be treated differently than claims-made settlements misaligns the incentives between counsel and the class because in many cases where the claims rate would likely be modest it would incentivize class counsel to try and obtain a class judgment in hopes of a greater fee. This only harms the individual class members by delaying their payout, increasing the attorney's fees in terms of time and cost, risking the relief, and diminishing claims (through the passage of time).

The only appellate court decision Volkswagen cites in support of its proposed rule is *Strong v. BellSouth*, 137 F.3d 844 (5th Cir. 1998). But the Fifth Circuit did not adopt the *per se* rule proposed by Volkswagen here. Rather, it simply held that the district court did not abuse its discretion by reducing a fee based on the claims-paid amount. *Id.* at 851 In fact, the Fifth Circuit took a lukewarm view of the district court's exercise of that discretion. *See id.* at 853 ("we recognize that this course of action is not the usual one") (citation omitted). However, applying the deferential standard of review, the court affirmed, saying "under the atypical circumstances of this case, the district court did not

abuse its discretion in considering the actual results of the settlement." *Id.* (footnote omitted).

Moreover, unlike here, the district court in *Strong* made an affirmative finding that the settlement benefits were a "phantom" or "illusory" likening them "to settlements providing class members with coupons or certificates, where the true value of the award was less than its face value." *Id.* at 852. And, in fact, the settlement provided nothing more than the opportunity to receive a "coupon" in the form of a *de minimis* credit against the defendant's telephone services. *Strong v. BellSouth Telecommunications, Inc.*, 173 F.R.D. 167, 169 (W.D. La. 1997) *aff'd*, 137 F.3d 844. That credit, which "varied by state," ranged from only 50 to 80 cents per month and was available only if the class member opted to discontinue the disputed service. *Id*. In contrast, here, Plaintiffs did not agree to a compromise settlement, providing only "coupon" relief. The settlement makes available true cash benefits greater than full relief of the same type that would have been available at trial. And further distinguishing *Strong* from this case, the district court there relied on the fact that class counsel had already received millions of dollars in fees from parallel cases. *Strong*, 137 F.3d at 847-48.

Volkswagen cites to a handful of federal district court cases that have looked to the claims-paid in various contexts. Each merely demonstrates an exercise of the trial court's discretion and by their very nature cannot prove an *abuse* of such discretion. Moreover, each is tied to its specific facts, and none set forth the rigid rule that Volkswagen proposes. In *Duhaime v. John Hancock Mut. Life Ins. Co.*, the district court awarded a fee equal to lodestar plus a 1.5 multiplier but held back the remainder of the

agreed fee until the claims process had completed. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997). There, the district court believed it lacked sufficient evidence to value the settlement until the completion of individual damage calculations through a complex Alternate Dispute Resolution process for calculating individual awards. *Id*. In contrast, the value of each class member's claim in this case was established and accepted by the circuit court. (*Infra,* Section IV.B)

In *Wise v. Popoff*, the court had concerns about the merits of the case, as it affirmatively found that the settlement was nothing more than a costs-of-defense settlement. *Wise v. Popoff*, 835 F. Supp. 977, 980-81 (E.D. Mich. 1993) (claiming that the "bases of the claims made against the defendants, although minimally sufficient under Rule 12 analysis, were indefinite and speculative" and if "not for the lenient pleading standards employed in the Sixth Circuit, this case would almost certainly have been dismissed early on."). It is not clear that this factor is relevant to the determination of the fee award but, even so, the circuit court here had ample evidence to conclude that Plaintiffs' claims were meritorious, finding that the fee was "especially congruent with fee awards under the MMPA." A2.

In *TJX*, an opinion heavily cited by the Court of Appeals below (but cited by neither party in prior briefing and unaddressed at oral argument), a federal district court awarded a fee that was equivalent to lodestar with a "multiplier of 1.97." *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 408 (D. Mass. 2008). It awarded this fee despite its expressed concerns about measuring the fee against the parties' agreed valuation of the settlement benefits, which it called "illusory." But, it

supports only that the trial court should have the discretion, not the obligation, to weigh the "claims paid" in the fee analysis. This is evident in the purported concerns the *TJX* court sought to solve by tying the fee to the claims paid.

Unlike the speculative belief raised in *TJX* that measuring the fee by the "claims paid" might encourage class counsel to "adopt mechanisms that lend themselves toward getting benefits to the consumer," such as better notice programs (*id.* at 404) and "settlements that offer benefits that actively appeal to the consumers [counsel] represent" (*id.*), this settlement was not built on unwanted coupons or vouchers but cash relief that likely exceed what would have been available by judgment. The notice program for alerting and informing class members of their right to claim was unchallenged: it included direct mail to every vehicle-owner for whom an address could be identified and was approved by the circuit court. Tr. 596:20-599:20. In fact, mailings went out to 22,000 addresses, even though there were only about 16,000 class members, because where duplicate addresses were identified, the mailing was sent to both addresses. Tr. 599:4-24 ("which was a benefit negotiated by class counsel that Defendant ultimately agreed to"). The notice was also published in different newspapers (Tr. 596:9-15) and through a website and toll-free number (Tr. 575:4-21, 578:3-22.) The evidence was unrebutted that class counsel did all they could to encourage claims.

And unlike the concern raised in *TJX* that class counsel will push for higher "illusory" caps to enhance their fee (so as to characterize the fee in terms of a "common fund"), *id.* at 405, class counsel here secured full relief for the class without any cap or any promise on the amount of fees to be paid.

Similarly, unlike the concern in *TJX* that class counsel might agree "to conditions on a settlement," such as "a short timeframe in which to make claims" or a "burdensome claims procedure" in order to obtain concessions from the defendant that enhance the fee award (*id.* at 406), Volkswagen did not challenge the claims period and there was no suggestion or evidence that a longer claims period would have resulted in greater claims. Moreover, there was no suggestion or evidence that the claims process was unfairly burdensome. The claims process required the minimal amount of information necessary to verify the integrity of the claims, namely a proof of purchase or an affidavit; the same forms of proof that would have been required after judgment. Importantly, the notice administrator testified that there was nothing else class counsel could have done to guarantee that class members would file claims. Tr. 607:22-608:3. Lastly, as this ongoing appeal demonstrates, this case does not present the concern presented in *TJX*, where class counsel agree to an unnecessary claims process to diminish claims in exchange for a higher fee because there was no agreement on the amount of fee.

In sum, *TJX* presents a list of circumstances that perhaps courts should consider in claims-made settlements where the circumstances warrant such scrutiny. As Justice O'Connor warned, claims-made settlements might decouple "class counsel's financial incentives from those of the class . . . enticing class counsel to settle lawsuits in a manner detrimental to the class." A12-A13 (*citing Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (O'Connor J. statement). But, as *TJX* acknowledges, despite all class counsel achieves, sometimes the claims rate disappoints. *TJX*, 584 F. Supp. 2d at 406. Volkswagen points to nothing in the settlement that is "detrimental to the class," as

Justice O'Connor warned so it makes no sense to adopt a rigid rule that class counsel must always bear the penalty for a modest claims rate outside their control than it would be to say an attorney deserves no fee because his client decides not to cash the settlement check. *Boeing* and the other appellate court cases that look to the benefits-conferred recognize this fact. And, it cannot go overlooked, that despite *TJX's* generalized concerns with the class action mechanism as a whole, it *affirmed* the fee award of $6 million based on the lodestar with a 1.97 multiplier. No better evidence exists that *TJX* did not propose, and certainly did not enforce, a *per se* rule that justifies finding an abuse of discretion.

iv. Substantial Evidence Supported the Circuit Court's Decision Not to Give the "Claims Paid" Dispositive Weight in the Fee Analysis.

The three-day evidentiary hearing provided Volkswagen with more than ample opportunity to convince the circuit court that the "results achieved" should be measured by the "claims paid." The circuit court was unconvinced. As the Eleventh Circuit held in affirming a fee award measured by the benefits-conferred, "[n]othing . . . precludes a district court judge in a different case from basing the attorneys' fee award on the actual class recovery or on the gross settlement figure," but "[t]he district court is in the unique position to evaluate the labors of both parties in the litigation" and "the factors the district court considers will vary according to the circumstances presented in each case." *Waters*, 190 F.3d at 1298. Likewise, Missouri law requires that that this Court view the "evidence, and permissible inferences therefrom" in "the light most favorable to the

judgment," regardless of whether the circuit court adopted it as a specific factual finding. *Farmers' Elec. Co-op., Inc. v. Missouri Dept. of Corr.*, 59 S.W.3d 520, 522 (Mo. banc. 2001). Moreover, all of Volkswagen's "contrary evidence and inferences" are disregarded. *Id.*

Volkswagen argues that the circuit court should have concluded that the claims rate demonstrated the merits of its defense and that their A3 window regulator was not defective, justifying valuing the settlement based on the "claims paid." (App. Br. 43-44). But substantial evidence supported the circuit court's refusal to adopt such a finding. Indeed, Volkswagen's attempt to blame class counsel for the modest claims rate backfired, as the evidence demonstrated that if anyone could be blamed for the modest claims rate it was Volkswagen, who delayed accepting responsibility which drove down the number of claims filed. The evidence refuting Volkswagen's contention took three forms: (1) Volkswagen's A3 window regulator suffered a significant defect affecting all class members, (2) a modest claims rate was typical of class actions and was not indicative of the injuries suffered, and (3) the claims rate in this case was likely affected by Volkswagen's refusal to settle or accept responsibility for its defective product for over a decade and not due to class counsel in any way.

1. The A3 window regulator was universally defective.

Substantial evidence supported that the A3 regulator was universally defective. Dr. Anand Kasbekar, Plaintiffs' liability expert from Duke University explained that he examined between 150-200 A3 parts—both new and old. *Every single part* was cracking in nearly *identical* locations (Tr. 101:8-12, 104:25-105:7, 112:14-24, 117:11-19) despite

the fact that by Volkswagen's own admission, the A3 regulators were supposed to last for the entire lifetime of the vehicle, Tr. 117:20-24, 119:2-11, 158:4-14, 685:3-6; A215. Even Volkswagen's own paid expert, Robert Lange, admitted that every part he examined was cracking. Tr. 117:11-19, 684:21-23. Dr. Kasbekar explained that the design of the plastic regulator was defective because Volkswagen used injection molded plastic over metal with sharp edges with little-to-no re-enforcement behind the load carrying components. Tr. 99:13-101:5. A computer generated animation was admitted at the fee hearing, which Dr. Kasebekar used to demonstrate the defect—a copy of which is included on DVD as Ex-2 to the Hearing Transcript.

Further demonstrating that the problem went beyond the 130 claimants, Volkswagen's own A3 regulator replacement records showed 210,000 to 211,000 manufacturer replacement parts sold—which amounted to 50% failure rate in terms of part failures per vehicle (1 out of 2 vehicles required manufacturer-sold replacement parts). And these numbers were full of what Mr. Lange admitted were "pretty big hole[s]" (Tr. 677:10-25) because the number did not account for unrepaired failures, failures repaired by class members themselves, failures repaired by non-Volkswagen dealers, failures repaired with the sale of aftermarket parts sold, and Volkswagen was missing data for four entire years. A216-A21; Tr. 118:1-10. Indeed, Volkswagen's corporate representative agreed that A3 window regulators were "a high breakage item" and a "high sales part." A216. Even its internal customer communications systems showed 10,000 *pages* consisting of about 5,400 customer complaints related solely to A3 regulator failures. Tr. 136:7-137:11; P. Ex. 3, pp. 5-15.

2. The number of claims filed is not indicative of the number of injured class members.

Volkswagen points to nothing but its own expert's testimony (Mr. Lange) that every class member who suffered a failed window regulator would have filed a claim. (App. Br. 42-42.) The circuit court had good reason to disregard Mr. Lange's testimony, as it was not based on any experience in a class action claims process but on his experience in manufacturer safety recalls. Moreover, none of those recalls involved the substantial delay in acceptance of responsibility that occurred in this case but were made within 120 days to a year of a federal investigation. Tr. 663:9-667:22. The only witness with personal knowledge of class action claims, including in automotive defect cases, was Mr. Brady who testified from personal knowledge that in consumer class actions the number of claims filed represents only a fraction of the injured class members. Tr. 503:1-505:9. Perhaps most tellingly, despite his protestations that no defect existed, Mr. Lange had to concede the existence of a problem: "every A3 window regulator that you looked at had cracks, correct? A: That's true." Tr. 684:21-23.

Volkswagen seeks to undermine these facts—not through evidence—but through reliance on (untested) assumptions or facts made in federal judicial opinions. (App. Br. 42-43.) For instance, Volkswagen seeks to adopt the comment from *In re TJX* that "it is not unusual for only 10 or 15% of the class members to bother filing claims," *In re TJX*, 584 F. Supp. 2d at 404, even though that opinion acknowledges that rates can be even lower, *id.* Thus, Volkswagen argues, at most, the settlement value here is no more than ten times the "claims paid." But Volkswagen was given three days to present evidence

about *this case* and no evidence from that hearing supports Volkswagen's assumption of the 10% figure. Volkswagen never even cited *TJX* to the circuit court, makings its use of it as factual evidence incredibly inappropriate.

Even if one accepts the factual assertion in *TJX* that a 10% claims rate is not "unusual," competent evidence supports that the claims rate in this case may have been unusually low because of the incredible delay between Volkswagen's agreement to repair or replace the A3 regulator and the first entry of the vehicles to the market. As Mr. Brady explained:

> The main issue [affecting claims rates] is when you have significant passage of time from when the cars were initially sold . . . the cars are going to change hands a number of times, and . . . its difficult to go back and find the owners because the cars have been sold two, three, four times. And I believe that that leads to a lower take rate, a lower claims-filed rate.

Tr. 510:21-511:7. Volkswagen complains that it "is illogical to presume that 99.5% of persons . . . would simply ignore the chance to get their money back" but the circuit court heard competent evidence to the contrary: Mr. Brady testified that in a similar case involving an automotive defect where a claims-made settlement made available a $400 reimbursement, the response rate from 1.5 million Missouri class members was only 68,000 (only 4.5%). Tr. 511:11-22. And that case involved vehicles that were newer at the time of settlement than those here. Tr. 511:23-512:2.

Volkswagen also points to the 41% claims rate in *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1167 n.1 & 1170-71 (C.D. Cal. 2010), a case prosecuted by

Mr. Hilton. Despite the opportunity to ask Mr. Hilton about that case on cross examination, the first time this factual assertion appears is on appeal, making it improper evidence. Nonetheless, the opinion itself notes that the claims rate was "high by typical class action standards." *Id.* at 1175 n.12. And, in fact, the vehicles in that case were much newer (with fewer changes in ownership) and still under warranty, meaning the defendant largely had current addresses for each class member. The repair was also much more expensive. There is no credible dispute that if Volkswagen had accepted responsibility during the warranty period many more class members would have received their free repair or reimbursement. Indeed, that is precisely why Volkswagen refused to extend the warranty over a decade ago.

3. Any relevance to the amount of "claims paid" was vitiated by Volkswagen's refusal to settle earlier.

Even if the Court accepts the relevance of the "claims paid" to the fee analysis, no court has held that this factor bears controlling weight no matter the circumstances. Missouri law does not countenance such a result. To the contrary, this Court has said just the opposite: "the amount of the verdict or judgment may have little bearing on the amount of attorney's fees," depending on the facts of the case. *Gilliland*, 273 S.W.3d at 523. Tying the fee to the "claims paid," and turning a blind eye to the *reason* that the "amount paid" is modest, would empower well-funded defendants to litigate obstinately, deterring counsel from even meritorious cases. Missouri law has never endorsed that approach. Rather, a party cannot "litigate tenaciously and then . . . complain about the time necessarily spent' overcoming its vigorous defense." *Williams v. Finance Plaza*,

Inc., 78 S.W.3d 175, 187 (Mo. App. W.D. 2002) (affirming lodestar fee of $74,129.25 against $12,000 recovery under Federal Odometer Act); *accord Gilliland*, 273 S.2W.3d at 523 (listing among fee factors "the vigor of the opposition"). Here, the circuit court expressly found that Volkswagen mounted a "vigorous defense."

Furthermore, the substantial evidence supported that Volkswagen could have agreed to a claims-made settlement much earlier, on better terms to Volkswagen, when class counsel's lodestar was much smaller. This Court has instructed that settlement negotiations are relevant factors in the fee analysis. *O'Brien*, 768 S.W.2d at 71 (instructing court to consider efforts of counsel in bringing about settlement in awarding fees); *Nelson v. Cowles Ford Inc.*, 77 F. App'x 637, 644 (4th Cir. 2003) (unpublished) (the district court did not abuse its discretion in finding that [plaintiff's] degree of success was limited" because judgment did not exceed earlier settlement offer). Negotiations between Volkswagen and Plaintiffs demonstrate that Volkswagen understood that by waiting until the eve of trial, the fee would likely exceed the "claims paid" and, so, it should not be made to complain about the size of that fee.

Initially, Volkswagen delayed litigation over the A3 regulator when it misled class counsel during settlement negotiations in the A4 case by provding false and incomplete parts data, inducing class counsel to dismiss the original A3 claims. Tr. 166:10-20, 170:4-171:19, 206:11-210:2 (disclosing 53,000 part sales when in actually they exceeded 210,000).

Then, in March 2007, class counsel sent a demand letter to Volkswagen proposing a settlement structure similar to the claims-made settlement that the parties ultimately

entered. Tr. 211:12-23; Ex. P-4, p.7. This opening demand sought less than half the relief made available under the final 2010 settlement because it capped out-of-pocket reimbursements at $250 per window regulator (even though the estimated average cost is $450 per window regulator) and did not provide the $75-per-shop-visit award Volkswagen ultimately agreed to pay. Tr. 211:24-212:14; Ex. P-4, p.13. The 2007 demand letter accurately warned Volkswagen that class counsel's "attorneys' fees in this case will far exceed several million dollars of actual time by the date of trial" if Volkswagen refused to negotiate. Tr. 213:1-9; Ex. P-4, p.13. Volkswagen did not even counter this original 2007 settlement proposal. Ex. P-4, p.13. Class counsel's lodestar at the time was minimal.

In February, 2008 the parties had actually agreed to a claims-made settlement following mediation. Tr. 341:9-21, 347:9-348:3. But, several weeks after the mediation, "Volkswagen elected not to follow through with the tentative settlement." Tr. 405:18-20. In Volkswagen's words, it declined to follow through with that settlement for business reasons because it was afraid a Missouri settlement might spark interest by consumers in other states injured by Volkswagen's conduct. 33 L.F. 6126. If Volkswagen had gone through with the claims-made settlement in 2008, class counsel's lodestar would have been less than 19% of its final size. Tr. 276:1-17. Moreover, the claims rate would have been higher, as class members would have been more likely to file claims. Tr. 345:25-347:8.

In July 2009, the parties mediated again. Prior to the mediation, defense counsel specifically concluded that a "common fund"-type settlement was necessary—rather than

the unlimited and uncapped "claims-made" settlement structures previously exchanged by the parties at the 2008 mediation. Tr. 215:9-216:5; Ex. P-4, p.14. At this second mediation, Volkswagen presented class counsel with a "common fund" settlement, which would have barely paid for the out-of-pocket expenses class counsel had incurred in the case—let alone administration costs, notice costs, attorney's fees, or payment to class members. Tr. 214:19-215:18; Ex. P-4, p.14. Despite the low-ball offer, class counsel responded with a counter proposal for a reversionary common fund settlement that would be sufficient to protect the class's interests. Tr. 218:5-17, 407:19-25, 427:3-19; Ex. P-4, p.14. Volkswagen rejected that counter proposal and immediately ended the mediation without any further offers. Tr. 218:19-219:7, 429:19-21. Volkswagen never put back on the table the claims-made tentative agreement that the parties had reached in 2008. Tr. 219:2-7. At no time did Volkswagen ever provide any type of settlement structure that resembled the ultimate 2010 settlement structure. Tr. 439:17-440:6; Ex. P-4, pp.15-16. When Volkswagen walked out of the mediation, class counsel's lodestar was only about 43% of its total. Tr. 214:19-219:7, 313:1-314:20.

Astonishingly, Volkswagen now asks class counsel to take a reduced fee for expending the thousands of additional hours it took to finally reach a settlement, for going out-of-pocket hundreds of thousands of dollars in costs, and for significantly improving the terms of settlement offers that Volkswagen previously rejected. Tr. 408:25-409:11. Certainly, Volkswagen's own attorneys did not work for free during this time. In fact, if Volkswagen had not backed out of the tentative 2008 settlement, class counsel's lodestar would have been $660,383.44. A198. Interestingly, Volkswagen asks

this Court to reduce the fee award to $665,000 (App. Br. 81). Thus, in essence, Volkswagen seeks to hold class counsel to its lodestar from a time when Volkswagen walked away from a settlement for reasons entirely unrelated to the merits.

Missouri law does not and should not permit such a result. *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 353 (Mo. App. E.D. 2006) ("A defendant who litigates tenaciously cannot be heard to complain about the time that the plaintiff necessarily spent overcoming defendant's vigorous defense.") (citation omitted). To endorse Volkswagen's rule would be to put tremendous pressure on class counsel to accept any settlement once the size of their lodestar fee begins to exceed *not* their potential damages but the estimated amount paid under a claims-made settlement. Such a standard is unworkable, misaligns the incentives between class counsel and the class, and is contrary to the fundamental purposes of the MMPA and fee-shifting statutes which is to level the playing field between well-funded defendants and injured plaintiffs. Moreover, the rule makes no sense.

The dangers inherent in such a rule are best exemplified by Volkswagen's obstinate discovery conduct. The circuit court appointed the Honorable Richard Ralston a former United States Magistrate Judge as Special Discovery Master. Tr. 187:2-10. During the fee hearing, Special Discovery Master Ralston, in response to a question from defense counsel, described Volkswagen's discovery behavior:

> I thought that getting discovery out of Volkswagen was like pulling teeth, one by one by one. First you get the incisors, then you get the molars, so on and so forth. And I thought it was fairly excruciating. I was not happy

with that part of it.

Tr. 453:4-9. By contrast, the Special Discovery Master did not consider any of Plaintiffs' discovery or pending sanctions motions to be frivolous or in bad faith. Tr. 431:15-432:23. Yet, Volkswagen seeks a rule that would encourage defendants to "run up the bill" knowing that if the "claims paid" are ultimately modest, it will escape the fees for that conduct.

For these reasons, the "claims paid" does not accurately measure the value of the settlement benefits conferred on the class. And the circuit court did not err in declining to reduce the lodestar based on the "claims paid."

B. The Uncertified Nationwide Class Does Not Justify a Reduction.

Volkswagen argues that the circuit court should have reduced the fee award because the court certified a statewide rather than nationwide class. But Volkswagen failed to satisfy the legal standard for the required segregation of time. The "efforts of the prevailing attorneys . . . should not be discounted where the effort and proof were the same for the claims on which [they] prevailed and those on which he did not." *Gilliland*, 273 S.W.3d 516, 523-24 (Mo. banc 2009). "This is especially true where the attorneys obtained complete relief for the client on the claims that were successful." *Id.* at 524; *accord Alhalabi v. Mo. Dep't. of Natural Res.*, 300 S.W.3d 518, 530-31 (Mo. App. E.D. 2009) ("[I]f the claims for relief have a common core of facts and are based on related legal theories and much of counsel's time is devoted generally to the litigation as a whole making it difficult to divide the hours expended on a claim-by-claim basis, such a lawsuit cannot be viewed as a series of distinct claims.").

Unlike a failed claim at trial, class certification was resolved early in the litigation. In fact, over 80% of the hours expended in the litigation had absolutely nothing to do with the nationwide class because they were incurred *after* the circuit court's certification decision. Tr. 340:13-341:8. And, of the 20% of hours expended when plaintiffs were still seeking nationwide certification, the only evidence presented show that "nearly all of that [time] would have been incurred whether or not [plaintiffs] proceeded initially on just the statewide action." Tr. 339:23-340:4; 337:14-338:6; 340:5-12. Such work consisted of issues relevant to the litigation as a whole, not specifically to the warranty claim, such as investigating the factual content of the complaint, written discovery, opposing Volkswagen's first removal to federal court, briefing the order granting remand to the Eighth Circuit, deposing Volkswagen's corporate witness, producing the class representatives for deposition, and briefing certification. Tr. 338:7-339:22. Substantial—and, in fact, the only—evidence supported the circuit court's decision not to apply a reduction based on the denial of nationwide certification.

IV. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING AN ENHANCEMENT. (Responding to Point III)

Plaintiffs sought an enhancement equivalent to a lodestar multiplier of 2.6 based on the *Johnson* factors. Volkswagen sought a "negative" multiplier of .365. Following the evidentiary hearing, several rounds of briefing, and proposed findings of fact and conclusions of law, the circuit court awarded an enhancement of the fee by a 2.0 multiplier. "In determining that a multiplier is appropriate at bar" the circuit court considered "among other things" the following factual findings:

(a) The nature of the defect involved was a novel problem;

(b) The skill requisite to prepare and try this case—which the parties estimated would take three weeks—was necessarily high;

(c) Taking this case precluded class counsel from accepting other employment that would have been less risky;

(d) The experience, reputation, and ability of class counsel is outstanding;

(e) The fee to be received by class counsel was always contingent, unlike the fees received by counsel for Defendant;

(f) The time required by the demands of preparing this cause for trial delayed work on class counsel's other work; and

(g) Class counsel adduced evidence that the fee this Court believes is appropriate in this case is not disproportionately excessive in light of the potential benefit conferred on members of the class.

In reversing the enhancement, the Court of Appeals relied on *Zweig*, 2012 WL 1033304 (reviewing fees to prevailing party under Hancock Amendment), *transfer granted* (Oct. 30, 2012) and its adoption of federal jurisprudence embodied by *Perdue*, 130 S. Ct. 1662 (awarding fees to "prevailing party" under federal civil rights statute, 42 U.S.C. § 1988). As explained in Section II, however, Missouri law at the time Volkswagen agreed to pay reasonable fees did not follow federal jurisprudence. Moreover, Missouri law has not and should not adopt the principles expressed in *Perdue* and the post-*Hensley* U.S. Supreme Court cases because those cases conflict with the

deference that Missouri appellate courts have long given to circuit courts to set appropriate fee awards and to adjust a lodestar under the facts of a given case factors.

More specifically, this Court should not adopt the federal principles that restrict enhancements to "rare" and "exceptional" circumstances because to do so necessarily fails to provide counsel with fees that are competitive with those obtainable in non-fee-shifting cases. As such, the jurisprudence would deter competent counsel from accepting cases, like this one, under the MMPA and from investing the oft-times significant costs and expenses necessary to successfully prosecute them. Accordingly, under the *Johnson* factors, the enhancement was fully supported by the contingent-nature of the representation, the results achieved, and the other factors relied on by the circuit court.

A. The Enhancement is Justified by the Contingent Nature of the Fee.

Volkswagen avoids any discussion of the contingent-nature of Plaintiffs' representation. Missouri law has long taken the contingent risk of the fee into account in evaluating the reasonableness of a fee. *German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W.2d 705, 712 (Mo. 1966) ("in this case the entitlement to fees was additionally burdened by being contingent upon success, another factor which the court could properly consider."); Mo. Sup. Ct. R. 4-1.5(a)(8) ("whether the fee is fixed or contingent."); *Koppe*, 318 S.W.3d at 242 (awarding reasonable fees under quantum meruit analysis where lawyer "doubled the hourly rate of $350 to account for the risk [the attorney] took in case the appeal was unsuccessful").

Volkswagen implicitly relies on federal jurisprudence restricting adjustments to the lodestar based on contingent-risk. Simply put, Missouri has and should continue to

follow its jurisprudence, along with the courts and jurists that reject federal law, permitting enhancements based on contingent-risk because they are needed to encourage counsel to take meritorious claims. Numerous state courts have continued to follow this rule, despite federal jurisprudence.

i. Missouri Law Permits Enhancements Based on the Contingent Nature of the Fee.

In adopting *Perdue*, the Court of Appeals implicitly accepted that contingent-risk cannot be factored into a lodestar adjustment. But *Perdue* was merely applying earlier federal precedent. *Perdue*, 130 S. Ct. at 1676 ("And the court's reliance on the contingency of the outcome contravenes our holding in *Dague*," 505 U.S. at 565). In *Dague*, the Supreme Court held that enhancements to the lodestar for the contingent-nature of the fee are "not permitted under the fee shifting statutes [of the Clean Water Act] at issue." *Dague*, 505 U.S. at 567. But the dissenters in *Dague*, lead by Justice Blackmun and relying on *Hensley*, noted that the purpose of a fee-shifting statute should be to deliver, to prevailing parties, a "'fully compensatory fee'" that is based on "rates and practices prevailing in the relevant market." *Id.* at 567 (Blackmun, J. dissenting) (*quoting Hensley*, 461 U.S. at 435); *accord id.* at 575 (O'Connor, J. dissenting). And "it is a fact of the market that an attorney who is paid only when his client prevails will tend to charge a higher fee than one who is paid regardless of the outcome, and relevant professional standards long have recognized that this practice is reasonable." *Id.* at 567 (Blackmun, J. dissenting); *accord* Mo. Sup. Ct. R. 4-1.5(a)(8). Justice Blackmun

criticized the *Dague* majority for ignoring this reality and eschewing the reliance on the well-established common law:

> If a statutory fee consistent with market practices is "reasonable," and if in the private market an attorney who assumes the risk of nonpayment can expect additional compensation, then it follows that a statutory fee may include additional compensation for contingency and still qualify as reasonable.

Dague, 505 U.S. at 568; *id.* at 575 (O'Connor, J. dissenting) ("[W]hen an attorney must choose between two cases-one with a client who will pay the attorney's fees win or lose and the other who can only promise the statutory compensation if the case is successful-the attorney will choose the fee-paying client, unless the contingency client can promise an enhancement of sufficient magnitude to justify the extra risk of nonpayment.")

In their blanket adoption of *Perdue*, the Courts of Appeals failed to acknowledge that they were departing from the general standards of reasonableness understood in Missouri that a contingent-fee (when the plaintiff is successful) supports greater remuneration. *German Evangelical*, 404 S.W.2d at 712; Mo. Sup. Ct. R. 4-1.5(a)(8); *Koppe*, 318 S.W.3d at 242. In its opinion below, the Court of Appeals remarked that the "lodestar award of Class Counsel's hourly rate for time Counsel expended already reflects that counsel has chosen the instant case over pursuing other cases, contingent and non-contingent alike." A10. It was uncontested below that class counsel's hourly rates, used to calculate the lodestar, were commensurate with rates they charged in hourly, *non-contingent* matters and rates that lawyers charge in Missouri for similar work on a non-

contingent basis. Tr. 234:2-235:2. In fact, the circuit court specifically relied on the contingent-nature of the fee for the multiplier, not the lodestar. Moreover, the Court of Appeals simply missed the point. Counsel "choose the instant case over" non-contingent cases because of the possibility of receiving greater fees if they were successful, as Missouri law has always provided. By doing so, they fulfill the purpose of the fee-shifting provision to attract competent counsel to vindicate the important statutory rights. *Dague*, 505 U.S. at 568-69 ("The strategy of the fee-shifting provisions is to attract competent counsel to selected . . . cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation. If . . . fee-bearing litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers-who likely will be less competent than the successful, busy lawyers who would shun . . . fee-bearing litigation").

As such, "unless the fee-shifting statutes are construed to compensate attorneys for the risk of nonpayment associated with loss, the expected return from cases brought under . . . fee-shifting provisions will be less than could be obtained in otherwise comparable private litigation offering guaranteed, win-or-lose compensation." *Id*. at 569. The circuit court found that this case presented exactly that scenario, justifying the enhancement where "[t]he fee to be received by class counsel was always contingent, *unlike the fees received by counsel for Defendant*." A17 (emphasis added).

Both Missouri ethical rules and its common law jurisprudence favor Justice Blackmun and Justice O'Connor's reasoning in *Dague*. Indeed, the common law has never been offended by the reasonableness of a fee adjusted for contingent-risk, as is

expected in the private market for services. *Cf. Koppe*, 318 S.W.3d at 242 (quantum meruit fees awarded with 2.0 multiplier for risk); *O'Brien*, 768 S.W.2d at 72 (fees should be assessed by what "other attorneys in the community [charge] for similar services"). This is as true, perhaps more so, in the statutory fee-shifting context as it is in the common law.

In *O'Brien*, this Court expressed that the statutory policy of fee-shifting generally is to encourage "private litigants [to] aid the public authorities" so that "the cost of litigation [does] not stand in the way." *O'Brien*, 768 S.W.2d at 71. Thus, fees that take into account contingent risk, as the private market reasonably does, generate "competitive awards" of fees that encourage counsel take such cases, not the "kind of 'windfall profits'" that Volkswagen urges. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 742 (1987) (Blackmun, J. dissenting) ("Delaware Valley II"). The MMPA is entirely consistent with that approach, as it exists as "paternalistic legislation designed to protect those that could not otherwise protect themselves." *Huch v. Charter Comm., Inc.*, 290 S.W.3d 721, 725-26 (Mo. banc. 2009).

The majority in *Dague* concluded that by permitting enhancements for contingency risk, losing defendants "in effect pay for the attorney's time . . . in cases where his client does *not* prevail." *Dague*, 505 U.S. at 565 (majority opinion). But, this view has been roundly criticized. *Schefke v. Reliable Collection Agency, Ltd.*, 32 P.3d 52, 97 (Haw. 2001) ("in our view, contingency enhancement would not result in compensation for cases lost by plaintiff's counsel as posited by the *Dague* majority"). Indeed, this is demonstrated by the fact that there is an "absence of any link to time spent

on losing cases" with the contingency enhancement itself. *Id.* (*quoting Charles Silver, Incoherence & Irrationality in the Law of Attorneys' Fees*, 12 Rev. Litig. 301, 331-32 (1993). As at least one scholar has noted the contingency enhancement is not calculated to ensure that counsel is compensated for lost cases but to incentivize them to take winning cases:

> The absence of any link to time spent on losing cases becomes apparent when one realizes that contingency enhancements . . . bear no necessary relation to the amount of time a lawyer may have spent on matters that were lost. A lawyer who loses ninety-nine cases before eking out a win receives the same percentage enhancement in the successful case as a lawyer who wins one hundred times in a row. And a lawyer who invests zero hours in losing efforts—for example, a lawyer who accepts only one fee award case and wins—receives the same percentage enhancement as a lawyer who wastes 1000 hours of time.

Silver, *supra*, 12 Rev. Litig. at 331-32 (referring to *Dague* as "utterly [without] a foundation in an acceptable theory of fee awards, containing "no response to the simple point that enhancements enable parties to compete for lawyers' time in the private market by offsetting the risk of nonpayment," and riddled with "logical[] flaw[s], rest[ing] on unexamined assumptions, and distort[ed] evidence."); *accord Dague*, 505 U.S. at 568-72 (Blackmun, J. dissenting).

Unlike windfalls, "[c]ontingency enhancements merely compensate lawyers at market rates for services lawyers provide to clients who win." Silver, *supra*, 12 Rev.

Litig. at 331-32. Providing market rates to winning lawyers does not undermine the statutory condition that only prevailing parties are entitled to fees because "[i]f the attorney represents a client in an unsuccessful contingent litigation, no fees are recovered." *Delaware Valley II*, 483 U.S. at 752 (Blackmun, J. dissenting). "The fact is that an attorney still recovers fees *only* when that attorney's client prevails in a lawsuit." *Id.* Thus, Volkswagen's complaint that the enhancement encourages counsel to take non-meritorious claims is, itself, meritless. Unlike the common criticism leveled at the hourly, non-contingent practice, contingent lawyers are only incentivized to bring claims that have a high likelihood of success so that they will be paid. The small cost of this efficiency is that, in doing so, the fees they receive are higher than if they took non-contingent work. This ensures that access to the courts exists on a level playing field, fulfilling the role of the statutory fee shift.

Volkswagen cites a number of cases in an attempt to show that the majority position in *Perdue* (and *Dague*) has been widely accepted. (App. Br. 57.) Yet, all but two of those cases involved *federal* law, where the court was obligated to accept the *Dague* majority's faulty logic. *E.g. Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 51 (Pa. 2011) ("The authorizing statute here—the MMWA—is a federal statute. 'The construction of a federal statute is a matter of federal law.'") *cert. denied* (June 25, 2012). Neither of the two cases cited by Volkswagen interpreting state law support Volkswagen's argument. The Connecticut case cited by Volkswagen does not even discuss fee enhancements. *Elec. Wholesalers, Inc. v. V.P. Elec., Inc.*, 33 A.3d 828, 831-32 (Conn. Ct. App. 2012). And the Pennsylvania case only reversed the award of a

multiplier because the trial court double counted the contingency by applying a multiplier to hourly rates that already included contingent risk. *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 980 (Pa. Super. Ct. 2011), *appeal granted in part*, 47 A.3d 1174 (Pa. 2012). In fact, under a record like this one—where it was uncontested that the lodestar was based on *non-contingent* hourly rates—Pennsylvania law indisputably permits an enhancement. *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa. Super. Ct. 2005) (rejecting "federal approach in limiting the use of a contingency multiplier"); *Braun*, 24 A.3d at 980 ("[a] contingency enhancement on top of the lodestar is appropriate if the lodestar does not reflect counsel's contingent risk.")

Numerous other state appellate courts have found the reasoning of the dissent in *Dague* and *Delaware Valley II* compelling, eschewing the bright line prohibition on enhancements currently embedded in federal law. *Schefke*, 32 P.3d at 96-98 (Hawaii) ("we disagree with the reasoning in opposing [federal] case law and commentary" limiting multipliers; in "our view, contingency enhancement may at times be necessary to ensure enforcement of statutes with fee-shifting provisions."); *Rendine v. Pantzer*, 661 A.2d 1202, 1228 (N.J. 1995) ("[A] counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed."); *Atherton v. Gopin*, 272 P.3d 700, 701 (N.M. Ct. App. 2012) ("district court has discretion to apply a multiplier in a UPA [antitrust] case" despite defendant's argument that "federal cases precluded the district court from applying a multiplier except in rare or exceptional circumstances");

Ketchum v. Moses, 17 P.3d 735, 745-46 (Cal. 2001) (multipliers "reflect[] the risk that the attorney will not receive payment if the suit does not succeed" and "constitutes earned compensation; unlike a windfall . . . it is intended to approximate market-level compensation for such services."); *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412 (Tex. Ct. App. 2002) (trial court did not abuse discretion in awarding "fees at double the customary hourly rate").

Even in the class action context, Missouri trial courts have regularly awarded enhancements based on this factor, finding that a "multiplier accounts for the significant risk of non-recovery." *McLean v. First Horizon Home Laon Corp.*, 2007 WL 5674689, at ¶ 11 (Mo. Cir. Ct. June 7, 2007); *accord Hale*, 2009 WL 2206963 at ¶¶ 12, 15 ("the lodestar may be multiplied by a risk premium factor, or 'multiplier'"); *Daily*, 2005 WL 5532773 at ¶ 5 (the "multiplier requested here is reasonable because . . . the considerable risk [counsel] bore in pursuing this matter"). To do as Volkswagen urges would not only alter Missouri law but place Missouri's fee-shifting statutes at a competitive disadvantage with the fee-shifting statutes of these states that permit enhancements based on contingent risk.

Lastly, federal law prohibiting contingency-based enhancements has developed in cases where the fees awarded are being paid by the taxpayers. Indeed, *Perdue* itself relied on this fact in reaffirming its restriction of enhancements, reasoning "attorney's fees awarded . . . are not paid by the individuals responsible for the constitutional or statutory violations . . . [but] [i]nstead, the fees are paid in effect by state and local taxpayers." *Perdue*, 130 S. Ct. at 1676-77. Likewise, *Zweig* involved a claim under the

Hancock Amendment to the Missouri Constitution where fees were paid by taxpayers. In such cases, "money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services." *Perdue*, 130 S. Ct. at 1676-77. And the deterrent aspect of the fee is lessened because the fees are borne by the taxpayers, not the bad actors. Under a claim brought pursuant to contract or the MMPA, like this one, these concerns do not exist. The fee provides, in addition to remuneration, a valuable deterrent purpose because companies who engage in unfair conduct will be forced to shoulder the entire consequential weight of that conduct, including a fee that is consistent with what counsel could have earned on the private market. *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 358 (Mo. banc 2001) (fee shifting serves as a "valuable deterrent" to unlawful behavior.) Though the class relief and fee award are intended to compensate, not punish, the fact of bringing suit fulfills a function that the government would otherwise have to perform. Plaintiffs act "as private attorneys general in enforcing" the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 770-71 (Mo. banc 2007) (quotation marks and citations omitted). Thus, even if this Court were inclined to restrict enhancements in taxpayer funded cases, like *Zweig* and *Perdue*, the policies of the MMPA counsel against such a restriction here.

ii. Substantial Evidence Supported the Contingency Enhancement.

Three of the seven factual findings made by the circuit court that supported the multiplier directly related to the contingent nature of the fee: "[t]he fee to be received by class counsel was always contingent, unlike the fees received by counsel for Defendant,"

"[t]aking this case precluded class counsel from accepting other employment that would have been less risky," and "[t]he time required by the demands of preparing this cause for trial delayed work on class counsel's other work." In other words, consistent with the policies outlined above, the multiplier was necessary to ensure a market fee that remunerates class counsel for taking this case *in lieu* of working less risky cases. Volkswagen has not challenged the factual basis for any of these findings and substantial evidence supports them. Class counsel presented specific evidence of three recent hourly, non-contingent cases where Mr. Stueve was retained "at $650 an hour on an hourly basis, paid monthly" and Mr. Hilton was retained "at $450 an hour on an hourly basis, to be paid each month." Tr. 234:18- 235:2. Testimony from Mr. Brady further supported these rates as customary in non-contingent cases for the type of litigation at issue. Tr. 478:16-479:11, 481:2-10, 482:5-484:20. The circuit court apparently had no reason to disagree with Mr. Brady's opinion that the rates used to calculate the lodestar "were very reasonable" (Tr. 484:19) and "don't encompass the risk at all" but that the risk was "really, really substantial" and should be accounted for in the enhancement, Tr. 479:19-25.

Mr. Brady, a partner at large and diversified law firm, also testified from his own personal experience that his firm would not accept contingent cases if they were limited to lodestar based on the rates submitted here. Tr. 492:4-493:9; A197-A205. Finally, Mr. Brady looked at customary multipliers in similar class actions and testified that the 2.6 multiplier requested by class counsel was reasonable. Tr. 486:3-487:22. Supporting Mr. Brady's testimony is the testimony of the class members themselves, who each testified

that they could not have retained class counsel to recover their out-of-pocket damages on an hourly basis and no other firm ever offered to represent them. Tr. 43:20-44:8, 59:18-25, 76:24-77:3. Thus, substantial evidence supports that this case represents the category of cases, described by the dissents in *Dague* and *Delaware Valley II*, that justify contingency-based enhancements.

B. The "Results Achieved" By the Settlement Support the Enhancement.

Turning to Volkswagen and the Court of Appeals' principle reason for reversing the multiplier, the circuit court concluded that the multiplier did not result in a fee "disproportionately excessive in light of the potential benefit conferred on members of the class," which the circuit court concluded was $23,000,000. As described in great detail in Section III, the circuit court properly valued the settlement based on the benefits conferred, not the amount of "claims paid." Contrary to the Court of Appeals opinion, the reasons that support that approach apply equally to the argument for reduction as they do for an enhancement. Plainly, the settlement deserves a single interpretation, and the circuit court found that the settlement conferred a $23,000,000 "benefit to all class members." A3.

Volkswagen challenges the sufficiency of the evidence submitted in support of the $23,000,000 finding by the circuit court. But substantial evidence supports that finding. Volkswagen's attacks on the sufficiency of the evidence fail especially given the high standard of review, where this Court "disregard[s] all contrary evidence and inferences." *Farmers' Elec. Co-op., Inc.*, 59 S.W.3d at 522.

Much of the valuation is based on uncontested facts, beginning with the parties' stipulation as to the value of repairing or replacing a broken window regulator ($450 not including the $75 per service trip to the repair shop). Tr. 567:8-15. Plaintiffs' introduced expert evidence that each vehicle suffered about 6.5 window regulator failures over the lifetime of the vehicle, which "was based solely upon Volkswagen's own internal documents [and] customer complaint data." Tr. 251:15-23. The product of those numbers was then applied to the number of vehicles in the class to reach the $23,000,000 valuation. Tr. 251:15-253:12.

Volkswagen challenges the admissibility of the 6.5 regulator failures per vehicle because it was introduced through the testimony of Mr. Hilton, class counsel. But it is axiomatic that counsel may testify about services rendered. *See* Mo. Sup. Ct. R. 4-3.7(a)(2), Resp. Appx. A4 (testimony permitted where it "relates to the nature and value of legal services rendered in the case"). The circuit court accepted his testimony as an expert on the value of the settlement. And in valuing the settlement, Mr. Hilton relied on the calculations of Plaintiffs' damages expert regarding the estimated number of window regulator failures; Volkswagen argued that the damages expert needed to testify personally, despite the fact that Volkswagen had previously deposed him on these very topics, Tr. 255:7-261:14, and could have used that cross-examination to rebut any errors or misassumptions in Mr. Hilton's testimony. Nonetheless, Volkswagen did not even cross examine Mr. Hilton about the valuation.

The circuit court admitted Mr. Hilton's testimony because he had litigated the case from its beginning, and his testimony recounted the details of the case from personal

knowledge, and also qualified as expert opinion. *See* Tr. 256:4-22. "[U]nder Missouri law, the evidence experts rely on in forming their opinions need not be independently admissible, so long as it is the type of evidence reasonably relied on by experts in the field and is otherwise reasonably reliable." *Peterson v. National Carriers, Inc.*, 972 S.W.2d 349, 355 (Mo. App. W.D. 1998) (citations and quotation marks omitted). Mr. Hilton applied the same method any attorney would use in valuing a complex class action: he obtained an expert model of damages.

Volkswagen points to nothing that would undermine the reliability of the calculation, except to argue that its own expert, Mr. Lange, believed that every class member who suffered a failed window regulator would have filed a claim. (App. Br. 42-42.) As discussed above, the circuit court had substantial reasons to disregard Mr. Lange's testimony, including his admission that every A3 regulator he examined was cracking. *Supra*, Section III.A.iv.2.

Moreover, even if Mr. Hilton's testimony were deemed inadmissible or the circuit court's factual finding reversed, the fee award stands because "[i]n a court-tried case it is extremely difficult to predicate reversible error on the erroneous admission of evidence." *Sanders v. Insurance Co. of N. Am.*, 42 S.W.3d 1, 11 (Mo. App. W.D. 2000). "Erroneous admission of evidence only requires reversal where the complaining party is prejudiced." *Id.* Volkswagen cannot show prejudice for two reasons. *First*, it has not demonstrated how the absence of Mr. Hilton's testimony would lead to a different result. "The trial court is considered to be an expert on the question of attorney fees," and it "may fix the amount of attorneys' fees without the aid of evidence." *Essex Contracting, Inc. v.*

Jefferson County, 277 S.W.3d 647, 656 (Mo. 2009) (formatting and citation omitted).[7] It was undisputed that plaintiffs' damages expert would have supported the 6.5 failures per vehicle figure, which leads to the $23,000,000 valuation, and, in this setting, the circuit court was entitled to take notice of that fact.

Second, the valuation is supported by other uncontested evidence. For instance, Volkswagen did not dispute that the class included 16,000 Missouri vehicle owners. Several class members submitted evidence of the number of failures they personally suffered while they owned the vehicles. One class member, Sheila Thompson, suffered eight window regulator failures and one on each window had failed during the first 34,000 miles driven of her vehicle. A216-A219. Another class member, Justin Tanner, suffered six failures. A220-A230. Class representative Darren Berry suffered four. Tr. 31:16-19. Lisa Hedges suffered three. Tr. 51:18-57:2. Kevin Darst suffered four. A231-A239. Arthur Ransford suffered five. Tr. 66-67. Bridge Barker suffered four. A248-A255. Moreover, Volkswagen's customer complaint data reflected the fact that vehicle owners suffered multiple failures per vehicle and even per window. Tr. 141:17-

[7] Volkswagen incorrectly relies on *Haley v. Horwitz*, 290 S.W.2d 414 (Mo. App. St. L. 1956). The *Haley* court designated its opinion as "Not to be reported in State Reports." *Haley*, 290 S.W.2d at 415. In any event, the intervening Missouri Supreme Court law in *Essex Contracting* has abrogated *Haley*'s suggestion that the circuit court must receive evidence on fees; the circuit court may award fees without hearing evidence. *Essex Contracting*, 277 S.W.3d at 656.

149:12; Ps' Ex. 3, pp.6-15. Assuming the circuit court found credible even the *lowest* estimate of three regulator failures per class member, the out-of-pocket benefits alone (not including the $75 per repair visit) made available by the settlement is $22,800,000 ($475 x 3 failures x 16,000 class members), or virtually the same as the circuit court's finding.

The $23,000,000 valuation of the settlement—which Volkswagen agreed was the equivalent of an unlimited-mile warranty on the A3 regulator that extended up to and past the service life of the vehicle—is clearly supported by substantial evidence. Moreover, that valuation does not include the $550,000 in expenses Volkswagen is obligated to pay, the $150,000 in notice and administration costs, and the attorney's fees—all benefits secured for the entire class through the settlement. As such, the fee awarded easily falls within the range of reasonableness equivalent to less than one-third of the value of the settlement. *Bachman*, 344 S.W.3d at 267 (holding that "a one-third contingent fee award," calculated based on reversionary common fund "is not unreasonable."); Newberg on Class Actions §14.60 ("[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); *accord State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 388 (Mo. App. E.D. 1997) (Stith, J.).

C. The Circuit Court's Remaining Findings Support the Enhancement.

The remaining findings that the circuit court held supported the multiplier included that "the nature of the defect involved was a novel problem," "[t]he skill requisite to prepare and try this case—which the parties estimated would take three

weeks—was necessarily high," and "[t]he experience, reputation, and ability of class counsel is outstanding." A1-2. The Court of Appeals concluded, under *Perdue*, that these facts were subsumed in the lodestar, although neither Volkswagen nor the court have identified any factual evidence in the record to support this presumption. Indeed, the novelty of the defect and class counsel's skill and ability in prosecuting such a case is not entirely subsumed in the lodestar because it required substantial expert analysis *that class counsel had to pay for* and was not incorporated into their hourly rate. Such analyses are costly, contributing at least $323,432.94 of the $550,000 in out-of-pocket expenses that class counsel had to incur to prosecute the case. A206. As Mr. Brady testified, "[w]hen you're putting out $550,000 over five years, that's a heck of a lot of money. And there's a carrying charge to that." Tr. 489:19-21.

The Court of Appeals acknowledged that "Class Counsel did demonstrate an 'extraordinary outlay of expenses'" but concluded that because "those expenses were awarded by the trial court and are not contested here by Volkswagen . . . the outlay . . . does not justify a multiplier." Op. p.10. But it is not the fact of reimbursement that justifies the enhancement, it is the risk that the expenses will be unrecoverable. If they had lost, class counsel would have been completely out-of-pocket over half a million dollars. This risk is not reflected in the lodestar, which is only a measure of their time and rate. Accordingly, these findings, uncontested, support the multiplier.

V. THE FEE AWARD ADVANCES THE LEGISLATURE'S PUBLIC POLICY OF MAXIMIZING ENFORCEMENT OF CONSUMER RIGHTS AND DETERRING FRAUD. (Responding to Appellant's Point IV.)

Volkswagen's fourth point does nothing more than repackage earlier arguments under the guise of public policy, as its contention that the results in this case were "de minimis" or "modest" depend entirely on measuring the results of the lawsuit by the claims paid. For the reasons previously expressed, *supra* Section III, the results are not measured by the "claims paid" but "the benefit conferred on the Class," *Bachman*, 344 S.W.3d at 267, which the circuit court properly valued as $23,000,000, not including the fees, expenses and administration costs which push the total benefit to the class over $30,000,000. *Supra* Section IV.B.

Moreover, vindicating the rights of injured consumers, whatever their number and whatever the value of their claims, fulfills the fundamental purposes of the MMPA. "It is the sense of the statute that private litigants aid the public authorities . . . and that the cost of litigation not stand in the way. Fees must be determined with this statutory policy in mind." *O'Brien*, 768 S.W.2d at 72. If Volkswagen is able to litigate a case, as the evidence here demonstrates, to suppress the claims rate through delay in settlement and to drive up the lodestar through obstinate procedural and discovery tactics, then defendants will be able to thwart the very purpose of the fee-shifting statute. Indeed, they will be able to use the high costs of litigation against the injured consumers and their attorneys to deter counsel from taking such cases. The evidence, here, confirms these facts. Mr.

Brady testified that his own firm of Polsinelli Shughart—a very large, respected practice with potentially greater ability to bear risk than class counsel—would never take an MMPA contingency case if fees were "capped at the claims-paid amount or some ratio of that claims-paid amount." Tr. 523:6-12.

Indeed, there is good reason to believe that Volkswagen is actively engaged in precisely this corporate strategy. In *In re Volkswagen and Audi Warranty Extension Litig*., Volkswagen entered a claims-made settlement; the district court awarded $37.5 million in fees based on the fact that the value of the relief obtained was between $50 million (Volkswagen's estimate) and $414 million (Plaintiffs' estimate). *In re Volkswagen*, 692 F.3d 4, 11 (1st Cir. 2012). The district court determined that the fee was reasonable based on the size of the settlement. *Id.* In other words, the district court applied the methodology Volkswagen urges here. But, in that case, Volkswagen insisted and the First Circuit agreed that a lodestar methodology had to be used to cap fees at the lodestar amount, regardless of the value of the settlement. In doing so, Volkswagen contended that *state* law rather than federal law governed and state law did not permit recovery based on the settlement value. *Id.* at 22. Volkswagen's conduct in that case demonstrates that it has adopted a corporate strategy to delay the class members' recovery, suppress claims, and then fight fees. In other words, Volkswagen wants this Court to do what the legislature has not: effectively eliminate MMPA class actions by undercutting their economic viability.

Volkswagen's "integrity of the courts" argument merits little discussion. Parties may contractually agree to pay reasonable attorney's fees in settlement agreements. *See*

Major Saver Holdings, Inc. v. Education Funding Group, Inc., 350 S.W.3d 498, 508 (Mo. App. W.D. 2011) (per curiam). The trial court has broad discretion in construing what is reasonable under the terms of the agreement. *See id.* at 509. And the MMPA expresses a policy of enforcement, and grants attorney's fees to aid that objective. *See O'Brien*, 768 S.W.2d at 72. The circuit court listened to the evidence, granted an award supported by the facts and the law, and managed this complex case in an exemplary fashion. This reflects highly on the judiciary. And although the circuit court properly valued the settlement at $23 million, even accepting Volkswagen's arbitrary accounting, the fee stands because Missouri imposes no fee-to-"claims paid" ratio, particularly where fee are agreed to by contract. *See Evans v. Werle*, 31 S.W.3d 489, 493 (Mo. App. W.D. 2000) (awarding $1,000 in fees for one-dollar damage award under contractual fee-shifting agreement).

Volkswagen complains that "if, perversely, it turns out to be cheaper for defendants to fight and win than to compromise and resolve litigation, no one . . . will benefit." (App. Br. 66.) The statement assumes its own premise. Volkswagen's conduct was not "cheaper for" anyone. Volkswagen could have settled in 2007, 2008, or 2009—at any of the junctures when class counsel was willing to accept a claims-made settlement. *Supra*, Section III.A.iv. Rather, Volkswagen fought tooth and nail. No one is denying Volkswagen's right to defend itself but Volkswagen cannot litigate aggressively and then offer to settle when defeat is imminent and pretend as though none of the hard work and hours expended to secure that settlement matters. No policy supports such a result.

Moreover, Volkswagen's claim that the fee award misaligns the incentives for settlement is unfounded. The fees are a component of the statutory damages. R.S.Mo. 407.025. To suggest that Defendants "would have less incentive to consider and accept a reasonable settlement demand if courts force them to pay attorney's fees bearing no relation to the damages paid in settlement" ignores that the settlement demand is inherently unreasonable if it does not account for this component of the claim. That is not to say that parties cannot compromise fees as part of settlement. But where the fees are contested, the settlement must be measured against damages available under the law. Here, each plaintiff was provided in excess of their out-of-pocket damages. Everyone agrees they could not have secured better relief at trial.

Volkswagen attempts to justify its conduct by claiming that this settlement was nothing more than a "small sum of money to a small number of people—and nothing else." (App. Br. 69). Even if Volkswagen's "claims paid" calculation is accepted, why should that justify a reduction in fees *in this case*? It is not as though Volkswagen offered to make this "small number of people" and their "small sum of money" whole earlier with less cost and less effort. The record here is undisputed that class counsel thrice tried to settle on a claims-made basis and thrice was rejected by Volkswagen. Counsel's further investment of time, effort and costs produced the best settlement ever demanded in negotiations. If Volkswagen was so convinced the claims would involve such a "small sum of money," why spend millions of dollars defending the case until the eve of trial? There is no justifiable reason. Either Volkswagen is using the claims rate as a post-hoc justification or it has known all along that the slower it walked this case to

resolution, the fewer the claims that would be filed and the higher the lodestar. Public policy supports the fee, not Volkswagen's perverse incentive to undermine legislative policy.

VI. THE FEE COMPORTS WITH DUE PROCESS. (Responding to Appellant's Point V.)

Volkswagen argues that the Due Process proportionality standards governing punitive damages also cover attorney's fees. Volkswagen conceded it is unaware of any case applying Due Process proportionality to attorney's fees. Hr'g 23:23-24:17. Due Process proportionality does not apply because this case involves the award of reasonable fees as set by contract, and thus, are not "tort" damages. Moreover, even if they were tort damages, they are consequential, not punitive. And finally, even if proportionality applied, the fee award in this case would comply with Due Process.

This Court reviews constitutional issues de novo. *In re Estate of Downs*, 300 S.W.3d 242, 246 (Mo. App. W.D. 2009).

A. Punitive Damage Proportionality Standards Do Not Apply Because Attorney's Fees Compensate The Class for the Cost of Bringing Suit.

"The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Attorney's fee awards compensate litigants for the fees they otherwise would pay out-of-pocket. The award of attorney's fees "is not a punishment device." *Lester v. Lester*, 452 S.W.2d 269, 270 (Mo. App. St. L. 1970). *See also Peter v. Jax*, 187 F.3d 829, 838 (8th Cir. 1999) ("[a]n award of

attorney's fees is compensatory, not punitive") (citation and quotation marks omitted). Volkswagen's antiquated *Lochner*-era cases all deal with civil penalties or punishments. Attorney's fee awards do not come within this category.[8] In any event, the Supreme Court has discarded the expansive view of substantive Due Process that these cases represent. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."). Thus, Volkswagen's constitutional argument lacks foundation.

B. Even If Constitutional Proportionality Standards Apply, This Award Complies.

Even if substantive due process applies to attorney's fees, this award easily passes review. While noting a preference for single-digit punitive-to-actual-damage ratios, the Supreme Court has refused to draw bright lines: "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have

[8] Volkswagen also cites the state due process clause, Mo. Const. art. I, § 10. Volkswagen has forfeited this argument by failing to raise it in the circuit court. *See Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 823 (Mo. 2000) (per curiam) (discussion of federal due process clause does not preserve state due process argument). Regardless, Volkswagen does not indicate any difference between the state and federal due process clauses in this case.

previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *State Farm*, 538 U.S. at 425 (citation and quotation marks omitted).

The circuit court correctly assigned a $23 million value to the settlement. Applying the $6,147,000 award, the ratio is less than 1:3, presenting no due process concerns. Volkswagen again presents its $125,261.34 figure and argues a 49:1 ratio. But Volkswagen fails to include the $550,000.00 in costs and the $130,464.53 in administration expenses it agreed to pay, in addition to the $125,261.34 in direct claims. If Volkswagen legitimately applied its own proposed rule, the "claims made" value of the settlement would be $805,725.87. The ratio would be less than 8:1, posing no due process concern. Yet even accepting Volkswagen's 49:1 figure, this is exactly the type of case *State Farm* singles out as meriting a higher ratio: class members did not individually suffer catastrophic economic losses, and Volkswagen took advantage of each consumer's reduced incentive to sue by failing to fix the problem, despite complaint after complaint for years. Volkswagen emphasizes *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841 (Mo. App. E.D. 2007). *Kelly* involved a 651:1 punitive-to-actual damages ratio. *Id.* at 851. By contrast, this Court has upheld a 111:1 and a 75:1 ratio – both well above the 49:1 Volkswagen argues here. *See Lynn v. TNT Logistics N. Am. Inc.*, 275 S.W.3d 304, 306, 312 (Mo. App. W.D. 2008) (ordering remittitur to $3.75 million in punitive damages, where jury returned verdict for $50,000 in actual and $6.75 million in punitive damages); *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 374 (Mo. 2012) (holding punitive damages of $500,000 where

actual damages awarded was $4,500 did not offend Due Process), *cert. denied*, 2012 WL 1552959 (U.S. June 25, 2012).

C. The Fee Award Complies with Procedural Due Process.

Ignoring unrebutted testimony, Volkswagen argues that it lacked notice of the possibility of this fee award. It claims a procedural due process violation, citing *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Volkswagen never raised procedural due process in the circuit court. *See* Def.'s Proposed Findings of Fact and Conclusions of Law 32-33, 37 L.F. 6805-06 (raising only substantive due process). As such, the argument is forfeited.

Even if this Court considered the argument, Volkswagen misconstrues the concept of due process notice. A "law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio*, 382 U.S. at 402-03 (citations omitted). In *Giaccio*, a statute allowing juries to impose costs on acquitted defendants contained "no standards at all," and state courts had lent very little guidance on its application. *See id.* at 403-04. By contrast, Missouri law has set forth an exhaustive list of specific factors for trial courts to consider in awarding fees. *Supra*, Section II. The circuit court's judgment references relevant factors.

Volkswagen had abundant notice of its exposure to this fee award. Volkswagen's attorneys spent more hours than class counsel. Tr. 708:5-709:18. Every hour billed would alert a rational litigant that the Plaintiffs would probably incur an equivalent

amount of attorney time. *Giaccio*, 382 U.S. at 404. Before it agreed to settle, Volkswagen demanded to know what class counsel's lodestar and expenses were and what multiplier they would want. All such information was provided to Volkswagen before it agreed to the settlement term sheet. When Volkswagen finally settled, it not only acknowledged how much the court might award, but agreed to pay that award: "So long as you guys aren't asking for nine or ten million dollars, we should be able to take care of this." Tr. 374:17-22. This Court should reject Volkswagen's due process claim.

CONCLUSION

The circuit court gave careful and deliberate consideration to this dispute, holding a three-day evidentiary hearing, permitting numerous briefs, and reaching a reasoned conclusion. It appropriately exercised its broad discretion and should be affirmed.

Respectfully Submitted,

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CERTIFICATION PURSUANT TO MO. SUP. CT. R. 84.06(C)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the requirements of Missouri Supreme Court Rule 84.06(b); and (3) contains 27,687 words, as calculated by Microsoft Word software used to prepare this Brief.

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CERTIFICATE OF SERVICE

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