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12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

16 JONAS SUGARMAN and QUANG LE, on behalf
17 of themselves and all others similarly situated,

18 Plaintiffs,

19 vs.

20 DUCATI NORTH AMERICA, INC.,

21 Defendant.

22 Case No. 5:10-cv-05246-JF

23 **PLAINTIFFS' REPLY MEMORANDUM IN**
24 **SUPPORT OF CLASS SETTLEMENT**
25 **APPROVAL**

26 Date: January 06, 2012

27 Time: 2:00 p.m.

28 Judge: Hon. Jeremy Fogel

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In considering whether a proposed class settlement should be approved as fair, reasonable, and
4 adequate, the Ninth Circuit has directed district courts to begin by balancing eight factors. *Churchill*
5 *Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Plaintiffs previously analyzed the first
6 seven of these *Churchill* factors, but noted that the final factor—the reaction of the class—could not be
7 evaluated until after the December 27th deadline for class members to comment on the proposed
8 settlement. Now that the deadline has passed, Plaintiffs submit this report of the class’s reaction to the
9 proposed settlement; respond to the objections raised by certain class members; and submit a proposed
10 Final Order and Judgment for the Court’s consideration that includes the final list of opt-outs.

11 **II. CLASS REACTION TO THE SETTLEMENT**

12 Out of 38,774 class notices sent out about the proposed settlement, only 24 Ducati owners have
13 elected to exclude themselves from the settlement. Such a low opt-out rate (0.06%) shows that overall
14 the class considers the settlement to be fair. *See Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL
15 1687832, *15 (N.D. Cal. 2010) (0.4% opt-out rate “is a further indication of the fairness of the
16 Settlement”); *see also Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001) (finding opt-
17 out rate of only 0.1% indicates “overwhelming support” and provides “strong circumstantial evidence
18 supporting the fairness of the Settlement”).

19 In addition to the 24 Ducati owners who have opted out of the settlement, 42 Ducati owners—
20 representing 0.11% of the class—have objected to the terms of the settlement. This is a relatively low
21 objection rate, particularly when it is considered that one of the objectors (an attorney who has been
22 attempting to negotiate a class-wide solution on his own) has been actively soliciting objections from
23 the large number of engaged Ducati owners who participate in online forums. *See, e.g., Churchill*
24 *Village, L.L.C. v. General Electric.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming final approval with 45
25 objections out of 90,000 notices [a 0.05% objection rate.]); *Wren v. RGIS Inventory Specialists*, C-06-
26 05778 JCS, 2011 WL 1230826, at *10 (N.D. Cal. Apr. 1, 2011) (0.02% objection rate “strongly
27 supports approval of the settlement”).
28

1 Although the objection rate can be helpful in evaluating overall class reaction to the settlement,
 2 the Court should also consider the nature of the objections that have been made and “evaluate whether
 3 they suggest serious reasons why the settlement proposal might be unfair.” *Californians for Disability*
 4 *Rights, Inc. v. California Dept. of Transp.*, C 06-5125 SBA, 2010 WL 2228531, at *2 (N.D. Cal. June
 5 2, 2010). Toward that end, Plaintiffs address the specific objections raised by class members below.
 6 Before turning to those class members’ concerns, however, it is worth noting that most of the class
 7 members who have contacted class counsel are pleased with the settlement and several have gone out
 8 of their way to express their thanks in writing:

- 9 • Thank you for sending this notice. I have definite problems. . . . I thought it was just
 10 poor QI at the factory which surprised me, but this makes a lot more sense. . . . Thank
 11 you for the time and effort you will be putting into this case, I hope you will be more
 12 than adequately rewarded for your work.
- 13 • I just wanted to inform you that I have a 2006 Sr1000 Monster Ducati that has these
 14 tanks problems as mentioned in the Lawsuit. I thank you for representing me in this
 15 lawsuit.
- 16 • Thank you for representing the Ducati owners who have purchased machines effected by
 17 the fuel expansion problem. My Ducati GT1000 is a great motorcycle, but the fuel
 18 tank's degradation is a serious cosmetic and safety flaw. I look forward to Ducati's
 19 remedy. Thanks again.
- 20 • Frankly, I’m glad to know what caused this problem – I never would have guessed that
 21 the fuel tank was growing larger!

22 Many more class members have expressed similar sentiments. (*See* Zeman Decl. ¶¶ 3 & 4; *id.*, Exh. 1
 23 (Dec. 28, 2011 Letter from A. Hernandez) (“I want to thank your law firm for representing owners of
 24 Ducati motorcycles with the gas tank problems.”) What is most important (and gratifying) to Plaintiffs
 25 is how many class members were not aware of the issue previously, only to discover when they
 26 received the notice that their tank is indeed expanding. They will now be able to obtain corrective
 27 repairs that address all the alleged safety issues, such as unstable fuel tanks, steering impingement, or
 28 fuel leaks. As some of the objecting class members point out, Ducati was not previously

1 communicating about the fuel tank expansion issue directly to its customers. (*See* Dkt. Nos. 85
 2 (Gilbride Objection); 94 (M. Hopkins Objection); Zeman Decl., Exh. 2 (Wisniewski Objection;
 3 Drayson Objection; Gregori Objection).¹) One of Plaintiffs' major goals for this litigation was to
 4 require Ducati to remedy that situation and acknowledge fuel tank expansion (the other major goal
 5 being to require Ducati to provide solutions); thanks to a relatively early and practical settlement, that is
 6 happening sooner rather than later.

7 **III. RESPONSE TO CLASS MEMBER OBJECTIONS**

8 **A. Objection #1: The Settlement's Repairs Don't Adequately Address Safety Issues.**

9 Many of the objecting class members are concerned that the repairs made available under the
 10 settlement will not resolve the safety-related issues they and others say they have experienced with their
 11 Ducati motorcycles. (*See* Dkt. Nos. 86 (Hurley Objection); 87 (Stanton Objection); 88 (Spain
 12 Objection); 90 (Garcini Objection); 91 (S. Hopkins Objection); 92 (Bozof Objection with 14
 13 Supporters); 95 (Hall Objection); Zeman Decl., Exh. 2 (Brechtner Objection; DeLeon Objection; Levy
 14 Objection; Parker Objection; Soares Objection; Yates Objection); M. Hopkins Objection; Wisniewski
 15 Objection; Drayson Objection.) Mr. Garcini expresses the overriding safety concerns well:

16 I am very concerned about riding my motorcycle as I don't know how this expansion
 17 affects the stability of the fuel tank and or any possible leakage of fuel onto a hot engine
 18 while going down the road. The outcome of such an occurrence while riding the
 19 motorcycle would be disastrous and potentially life threatening.

19 (Garcini Objection.) Another objecting class member, Mr. Parker, reports that after his SportClassic
 20 fuel tank expanded and became loose on its mounts, he "noticed on multiple occasions that the fuel
 21 tank can flop in excess of one inch vertically," and as a result he has "lost trust in the motorcycle to
 22 operate safely while driving on the freeway." (Parker Objection.)

23 Safety concerns like these are the reason Plaintiffs pursued this class action against Ducati.
 24 Even though nobody has reported any personal injury or an accident, many class members have
 25 expressed their fear that a serious accident might result from the fuel tank instability, steering
 26 impingement, and fuel leaks allegedly associated with fuel tank expansion. Class counsel spent several
 27

28 ¹ All class member objections are attached as exhibits 2 and 3 to the declaration of Amy M. Zeman for the Court's
 convenience.

1 months working with an expert consultant, culling public NHTSA reports and Ducati's internal data,
2 and interviewing class members regarding their experiences—all in an effort to make sure that they
3 understood the precise safety issues affecting each model motorcycle in the class and could evaluate
4 potential repairs. (*See* Dkt. No. 81 (Gibbs Decl.) ¶¶ 20-24.)

5 The result of class counsel's effort is a settlement that prescribes specific repairs for all the
6 affected models and also affords class members a grievance and arbitration procedure if those repairs
7 prove unsatisfactory. (*See* Gibbs Decl., Exh. 1 (Settlement Agreement) III.A-L.) While class counsel
8 understand that some class members are skeptical—particularly those who experienced problems with
9 Ducati's previous repair procedures—the repairs provided by the settlement stem from a detailed
10 investigation, prolonged negotiations, and the expertise of several engineers and scientists. (*See*
11 Kasbekar Decl. ¶¶ 1-2 & 4; Scott Decl. ¶¶ 1-4 & 7; Forni Decl. ¶¶ 1, 6 & 11.) In particular, the
12 materials scientist retained by class counsel to assist them throughout this litigation, Dr. Anand
13 Kasbekar, has independently reviewed the repairs and concluded that they are reasonable solutions
14 designed to address the potentially unsafe conditions experienced by class members. (*See* Kasbekar
15 Decl. ¶ 4.) Under these circumstances, objections questioning the repairs' ability to address potentially
16 unsafe conditions should be overruled. *See Kent v. Hewlett-Packard Co.*, 5:09-CV-05341-JF HRL,
17 2011 WL 4403717, at *3 (N.D. Cal. Sept. 20, 2011) (overruling objection to efficacy of a negotiated
18 repair remedy where class counsel submitted evidence that the remedy would address the problem).

19 Aside from skepticism, the objecting class members' ongoing safety concerns seem to arise
20 from speculation that, even after their motorcycles have been modified to accommodate fuel tank
21 expansion, their fuel tanks will continue expanding indefinitely. (*See, e.g.*, Spain Objection (“As the
22 tanks continue to enlarge they will effectively continue to create the same problem without additional
23 room to compensate.”); Wisniewski and Drayson Objections (“further expansion could occur beyond
24 the limits of the replacement hardware”); Soares Objection (“the gas tanks will still continue to expand
25 and will interfere with the operation of the motorcycle”). The scientific principles involved, studies
26 involving ethanol and PA 6, and the degree of fuel tank expansion observed in Ducati motorcycles in
27 the field all show, however, that the fuel tanks will not expand indefinitely. (*See* Kasbekar Decl. ¶ 5;
28 Forni Decl. ¶ 15; Scott Decl. ¶ 7, 9-11, 23 & 31.) The settlement's repairs are designed to

1 accommodate the expansion observed in each specific Ducati model and expected by principles of
2 materials science. (*See id.*; Forni Decl. ¶ 15; Scott Decl. ¶ 7 & 23.) These repairs are well suited to
3 address the fuel tank instability, steering impingement, and fuel leaks at the heart of this action and
4 should be implemented pursuant to the proposed settlement.

5 **B. Objection #2: The Settlement’s Repairs Do Not Adequately Address Cosmetic**
6 **Issues.**

7 Almost all of the objecting class members believe that the repairs offered by the settlement
8 should do a better job of addressing cosmetic problems. They point out that the repairs accommodate
9 fuel tank expansion but do not eliminate it. (*See, e.g.*, Gilbride Objection (“The settlement does
10 nothing to fix the problem. The tanks’ manufacturing materials are incompatible with the fuel being
11 used in the United States.”); Dkt. No. 89 (McQueary Objection) (the settlement “does absolutely
12 nothing to correct the underlying problem: e.g. the plastic fuel tanks reacting adversely to the ethanol
13 content of modern fuels”).) Some call the settlement a “band aid” or “bandage” (*see* Zeman Decl., Exh.
14 2 (Kinney Objection); Levy Objection; Parker Objection); some call it “just a temporary fix” or remedy
15 or “kick[ing] the can further down the road” (*see* Zeman Decl., Exh. 2 (Elie Objection); Soares
16 Objection; Yates Objection; Stanton Objection; Wisniewski Objection; Drayson Objection; Gregori
17 Objection; Hall Objection); and some call it replacing one defective tank with another defective tank
18 (*see* Hurley Objection; McQueary Objection; Kinney Objection; Garcini Objection; Parker Objection;
19 Dkt. No. 93 (Tamara Objection)). One class member wants repairs for all cosmetic issues, no matter
20 how small the distortion. (Brechtner Objection (“[A]ny imperfection, even 1 or two mm, is not
21 acceptable, and reference to size of imperfection should be removed.”).)

22 Each objecting class member wants the same thing that Plaintiffs initially suggested when they
23 filed this case—replacement tanks that won’t expand when they come into contact with the
24 motorcycles’ fuel. Some of the objecting class members suggest a metal tank. (McQueary Objection;
25 Kinney Objection; Elie Objection; Wisniewski Objection; Drayson Objection; Parker Objection;
26 Gregori Objection; Yates Objection; Zeman Decl., Exh. 2 (Nades Objection).) Others suggest an
27 interior tank lining or coating that would act as a barrier between the nylon tank and the motorcycle’s
28 fuel. (Stanton Objection; Spain Objection; McQueary Objection; Elie Objection; Bozof Objection with

1 14 Supporters; DeLeon Objection; Zeman Decl., Exh. 2 (Davies Objection).) And two class members,
2 using nearly identical language throughout their objections, suggest using the plastic formulation used
3 by Ducati in New Zealand, which they claim is not prone to expansion. (Wisniewski Objection;
4 Drayson Objection.)

5 Class counsel agree that a new-material tank would be ideal, but it is unfortunately not practical.
6 When Plaintiffs filed their case, they believed that Ducati was developing an aluminum fuel tank
7 behind-the-scenes for use in future class vehicles. (*See* Am. Compl., ¶¶ 3, 22.) That turned out not to
8 be the case. Ducati has designed an aluminum tank for production on only three motorcycles in one
9 particular model family (Superbike) included in the class vehicles. (*See* Forni Decl. ¶ 8.) Most of the
10 models covered by the settlement are designed for use only with a plastic fuel tank, so it would take
11 years of design work and testing—if it is even possible—to produce a metal tank for all class vehicles.
12 (*See* Forni Decl. ¶ 7.) This is something Ducati is not willing to do. Moreover, there are substantial
13 drawbacks associated with just about any alternative material, including aluminum. (*See* Scott Decl.
14 ¶¶ 13 & 14; Forni Decl. ¶¶ 7 & 9.)

15 An interior tank coating might seem to be the simplest solution, but any additive that is in
16 constant contact with fuel would need to prove both effective at creating a barrier and compliant with
17 emissions standards. Testing of existing after-market coating products has shown that the linings do
18 not work particularly well and can wear off over time, making the products ultimately ineffective and
19 introducing foreign substances into the fuel system that can cause engine problems down the road. (*See*
20 Forni Decl. ¶¶ 12-14; Scott Decl. ¶¶ 15-22.) And some Ducati owners who have tried these products
21 on their own have reported continued expansion-related issues even after applying the tank linings.
22 (Zeman Decl. ¶ 5.)

23 As to the plastic material used in New Zealand, Mr. Wisniewski and Mr. Drayson are
24 misinformed. Ducati uses the same material for painted, uncovered fuel tanks in New Zealand as it
25 uses in the United States. (Forni Decl. ¶ 10.) Ducati does use a different plastic material for its
26 covered tanks in New Zealand than it uses on the same models in the United States, but that material
27 does not satisfy United States air emissions standards. (*Id.*)

1 Faced with the reality that a new-material tank is not practical, the class faces a choice. Ducati
2 owners can settle now for free repairs designed to accommodate normal expansion of the PA 6 material
3 and alleviate all potentially unsafe conditions, along with an extended warranty that will address the
4 cosmetic effects of expansion for at least five years after the date of original sale. Or they can reject the
5 settlement and attempt to compel better repairs through litigation. Class counsel believe that a more
6 favorable result is unlikely and so urge settlement approval rather than further litigation, with all its
7 attendant uncertainties. Even putting aside Ducati's asserted defenses to Plaintiffs' claims and class
8 certification, the chances of a court requiring Ducati to develop and implement better repairs are
9 relatively remote—mandatory injunctive relief is difficult to obtain, particularly when it would require
10 considerable ongoing judicial supervision. *See Natural Resources Defense Council, Inc. v. U.S. E.P.A.*,
11 966 F.2d 1292, 1300 (9th Cir. 1992). The chances of compelling Ducati to provide repairs that better
12 address the cosmetic effects of fuel tank expansion would be particularly challenging, as California
13 courts have been increasingly hesitant to impose duties on vehicle manufacturers beyond the stated
14 warranty period (here, 2 years) except when safety concerns are implicated. *See Daugherty v. Am.*
15 *Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 836 (2006); *see also Oestreicher v. Alienware Corp.*,
16 544 F. Supp. 2d 964, 969 (N.D. Cal. 2008). The improved repairs Ducati will provide under the
17 settlement reasonably address the potentially unsafe conditions experienced by class members,
18 (Kasbekar Decl. ¶ 4); under the current state of warranty and consumer protection law, it is difficult to
19 imagine that Ducati could be required to do more.

20 **C. Objection #3: The Extended Warranty Period Is Too Short**

21 In addition to requesting repairs that better address the cosmetic effects of fuel tank expansion,
22 several of the objecting class members add that, if the settlement's repairs are implemented, the
23 extended warranty period during which those repairs are available should be longer. (*See* Dkt. No. 84
24 (Jarocki Objection); Zeman Decl., Exh. 2 (Hunt Objection); Davies Objection; Spain Objection; Hurley
25 Objection; Soares Objection; Gregori Objection; Yates Objection; Brechner Objection; Bozof
26 Objection with 14 Supporters; DeLeon Objection; Neades Objection.) Under the settlement, Ducati's
27 limited warranty is being extended from 2 years of coverage to 5 years for cosmetic issues and 6 years
28 for non-cosmetic issues. (Settlement Agreement III.B.1-2.) Older motorcycles will receive a warranty

1 extension that will expire 18 months after the settlement becomes effective, if this provides longer
2 coverage. (*Id.*) And any repair provided under these extended warranties will be further warranted for
3 an additional six months in the case of cosmetic issues or an additional year in the case of non-cosmetic
4 issues. (*Id.*)

5 Class members' desire for an even longer extended warranty is understandable, but should not
6 pose an obstacle to settlement approval. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.
7 1998) (“[T]hat the settlement could have been better . . . does not mean the settlement presented was
8 not fair, reasonable or adequate. Settlement is the offspring of compromise.”). An extension of any
9 kind for cosmetic repairs is an accomplishment given the limitations discussed above in warranty and
10 consumer protection law. *See Daugherty*, 144 Cal. App. 4th at 836; *Oestreicher*, 544 F. Supp. 2d at
11 969. And affording class members between eighteen months and six years (depending on the age of
12 their motorcycle) to obtain repairs for potential safety-related issues is also reasonable.

13 One of the reasons the objecting class members would like even longer extended warranties is
14 because they consider their motorcycles collectors' items and believe that the possibility of out-of-
15 warranty cosmetic problems will affect resale value. (*See Jarocki Objection; McQueary Objection; Elie*
16 *Objection; Yates Objection; Hunt Objection; Zeman Decl., Exh. 2 (Atwood Objection).*) As a
17 threshold matter, courts have held that alleged reduced resale value is not recoverable unless the
18 claimants prove that the product is substantially certain to fail during its useful life, which the record
19 here does not support. *See Chamberlan v. Ford*, 369 F. Supp.2d 1138, 1146-48 (N.D. Cal. 2005).
20 Moreover, such a claim would face the severe hurdle of there having been only a 2-year limited
21 warranty on these motorcycles at the time of sale. Any diminished resale value would also be difficult
22 to prove on a class-wide basis, as differences in each motorcycle's age and condition would make
23 systematic calculations problematic. If the class members concerned about resale value wish to pursue
24 a diminished value theory, they would be better served to opt out of the class and pursue that relief
25 individually.

26 Finally, Mr. Hurley's objection that the settlement may reduce the warranty period for many
27 motorcycles stems from a misinterpretation of the settlement and previously applicable warranty. Mr.
28 Hurley reads the settlement to limit the warranty period for any motorcycle that has received a repair or

1 replacement to 6 months for cosmetic expansion-related issues and 1 year for non-cosmetic expansion-
2 related issues. (*See* Hurley Objection.) However, those periods apply only to replacement parts and are
3 *in addition to* the base 5-year/6-year extended warranty provided by the settlement. (*See* Settlement
4 Agreement III.B.1-2.) Mr. Hurley’s belief that a 5-year federally-mandated emissions warranty would
5 apply even without the settlement is also flawed. While Plaintiffs alleged that the emissions warranty
6 applies to a fuel tank exhibiting an unsafe condition, Ducati vigorously opposed that contention,
7 claiming that it was bound only by its 2-year warranty. (*See* Dkt. No. 37 (Mot. to Dismiss) at 10-11.)
8 That fundamental dispute has not been resolved and only underscores how favorable a 5-year/6-year
9 extended warranty is to class members.

10 **D. Objection #4: Class Counsel’s Fees**

11 Based in part on his mistaken belief that the settlement will shorten the warranty period
12 available to class members, Mr. Hurley posits that “this case is being settled in this wholly
13 unsatisfactory manner because of the monetary gain by class counsel Girard Gibbs LLP” and “strongly
14 object[s] to the grounds for settling this case being payment to the lawyers.” (*See* Hurley Objection.)
15 Class counsel’s request for an attorney fee award is addressed in both their opening papers and in their
16 separate fee application, but it is worth repeating that the parties’ agreement on fees does not suggest
17 that class counsel compromised the class’s rights in exchange for an enhanced fee award. The amount
18 class counsel is requesting is a pure lodestar figure, bereft of a multiplier, and well within the range that
19 could be awarded under California’s fee-shifting statutes. The only reason that the amount of class
20 counsel’s fees is included in the settlement agreement is not because class counsel insisted on an agreed
21 fee award amount, but rather because Ducati insisted on resolving class counsel’s statutory claim to
22 fees as a condition to implementing the class settlement. Class counsel would have agreed to sever the
23 fee award from the settlement agreement and instead litigate the question of fees, but Ducati insisted on
24 resolving class counsel’s fee claim with a cap, consistent with its right to an assurance that its liability
25 for attorney fees will be capped at a certain amount. *Staton v. Boeing Co.*, 327 F.3d 938, 971 (9th Cir.
26 2003). Mr. Hurley’s supposition that the fee is driving the settlement is thus incorrect; in fact, it is the
27 settlement that is driving the fee. In addition, despite the parties’ agreement, it is well-settled that the
28 Court maintains ultimate discretion over the reasonableness of the fee. If Mr. Hurley were correct that

1 the settlement actually hurts class members rather than helps them, which he isn't, then the Court can
2 consider that in the exercise of its discretion. But Plaintiffs believe they have demonstrated, above and
3 in their previously-filed papers, that they have delivered a beneficial settlement that meets their
4 litigation goals, namely, providing notice of potentially unsafe conditions along with repairs that
5 address those conditions, and thus have earned the agreed-upon fee.

6 One other class member who objects to class counsel's fee request suggests that Girard Gibbs
7 should be paid \$45.66 per hour because that is what the U.S. President makes if you presume that he
8 works all of the 8,760 hours in a year. (*See Zeman Decl., Exh. 2 (Sheffield Objection).*) This amount
9 would be insufficient, however, to incentivize attorneys to enforce consumer protection laws through
10 the courts, which is the reason for California's fee-shifting statutes. *See, e.g., Hayward v. Ventura*
11 *Volvo*, 108 Cal. App. 4th 509, 512 (2003); *Jefferson v. Chase Home Fin.*, C 06-6510 TEH, 2009 WL
12 2051424, at *3 (N.D. Cal. July 10, 2009). Class counsel are entitled to be compensated at the
13 prevailing market rates that attorneys charge for similar services, and they have previously submitted
14 evidence that such an hourly rate would be significantly higher than \$45.66 for each of the attorneys
15 involved in the case. *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001).

16 **E. Miscellaneous Objections**

17 Mr. Hurley raises two other objections that are worth briefly clarifying. First, Mr. Hurley
18 writes:

19 [T]he settlement states that motorcycles that have tanks that are covered by body panels
20 will not have cosmetic issues. They do have cosmetic issues; the expanding tank pushes
21 on the body panels causing an unsightly separation at the seams and may preclude the
panels from being properly fastened together or fastened to the motorcycle.

22 (Hurley Objection.) Mr. Hurley is correct that in a small number of cases the plastic panel over the fuel
23 tanks in 2007-2011 Hypermotard motorcycles has broken, but he is incorrect in asserting that it is a
24 cosmetic issue or that the settlement does not address this problem. The settlement agreement
25 explicitly acknowledges the problem in Hypermotard motorcycles. (*See Settlement Agreement I.6.g.*)
26 And for all motorcycles with separate painted panels around them (*i.e.*, the Hypermotard, New
27 Monster, and New Multistrada Class Vehicles), the settlement prescribes extended warranty repairs or
28

1 replacement for this condition—as well as for any other instance where the fuel tank might interfere
2 with a nearby part. (Settlement III.H.)

3 Second, Mr. Hurley worries that the settlement will limit or exclude Ducati’s ability to take
4 other steps to solve the problem in the future—a concern that another class member also voices.
5 (Hurley Objection; *see also* Gilbride Objection (“the settlement would close the door on forcing Ducati
6 to own up to the problem and design a suitable replacement fuel cell”)) While the settlement
7 prescribes repairs that Ducati must offer class members, it does not preclude Ducati from developing
8 another solution and offering that to class members instead. Nor does it preclude class members from
9 opting out and seeking different injunctive relief, however unlikely it may be that a court would force
10 Ducati to re-design its fuel tank.

11 Another three class members object that the settlement does not provide reimbursement for
12 expenses each incurred when they decided to apply an epoxy coating to their fuel tanks. (Davies
13 Objection; Stanton Objection; Brechner Objection.) As discussed in section III.B. above, testing of
14 such epoxy coatings indicates they are not effective at preventing tank expansion and risk causing other
15 problems by introducing a foreign material into the fuel system, and thus Ducati has refused to
16 reimburse those who paid to coat the inside of their fuel tanks. While class counsel pressed for such a
17 remedy throughout the parties’ negotiations, Ducati refused, and Plaintiffs could not justify
18 jeopardizing the overall settlement to provide reimbursements for an unproven and likely ineffective
19 repair implemented by a small number of class members. However, Ducati is now willing to allow an
20 exception to its warranty exclusion for motorcycles in which non-Ducati parts or materials are used and
21 provide the settlement warranty repairs on motorcycles with coated tanks so long as the coating did not
22 cause the problem for which the repair is sought. (*See* Forni Decl. ¶ 14.)

23 **F. Bozof Objections**

24 Objector Alexander I. Bozof is an attorney licensed to practice law in Connecticut, Maryland,
25 and the District of Columbia. He has been attempting to force Ducati to acknowledge and address
26 problems in their plastic tanks for over two years, but to no avail. (*See* Bozof Objection at 3.) He had
27 threatened to sue Ducati in a class action in November 2010 but never pursued any lawsuit. Now, after
28 Plaintiffs brought and aggressively prosecuted this nationwide class action, Mr. Bozof seeks to object

1 to the settlement class counsel have achieved. Though Mr. Bozof’s Ducati Yahoo group consists of
2 438 Ducati owners and other online forums in which he has actively solicited supporters are even more
3 populated, only 15 other Ducati owners signed onto Mr. Bozof’s objections, using a form he provided.
4 (*See* Bozof Objection at 57-70; DeLeon Objection); Ducati Plastic Tanks,
5 <http://autos.groups.yahoo.com/group/ducatiplastictanks/> (last visited Dec. 27, 2011).

6 1. **First Bozof Objection**

7 Mr. Bozof’s first objection is that the extended warranty is “too short to show the defect,” since
8 “it has been observed that the expansion symptoms occur 2-3 years after the bike is bought.” (Bozof
9 Objection at 4.) But under the settlement, every class member will have at least 5 years from the date
10 the bike is bought (6 years for non-cosmetic problems) to manifest expansion symptoms and obtain a
11 corrective repair. The extended warranty will be two-and-a-half to three times the length of Ducati’s
12 standard 2-year limited warranty.

13 2. **Second Bozof Objection**

14 Mr. Bozof’s second objection is his scientifically unsupported assertion that ethanol is not
15 responsible for tank expansion. The materials scientist retained by Plaintiffs disagrees. (*See* Kasbekar
16 Decl. ¶ 3.) As does Ducati and the scientific literature that is appended to Mr. Bozof’s own objection.
17 (*See* Forni Decl. ¶¶ 4 & 5; *id.*, Exh. A (Minn. Study); Scott Decl. ¶¶ 7-11; Bozof Objection at 29-50.)

18 3. **Third Bozof Objection**

19 Mr. Bozof’s third objection is that the actual defect is that the fuel tanks absorb water, a fact that
20 “[f]or some reason, defendant Ducati did not bring . . . up in its defense.” Ducati did not bring that fact
21 up because it is not true; while water absorption plays a role, the underlying problem causing fuel tank
22 expansion is the ethanol content in gasoline. (*See* Kasbekar Decl. ¶ 3; Forni Decl. ¶¶ 4, 5 & 15; Scott
23 Decl. ¶¶ 7-11 & 28.) More fundamentally, the settlement addresses any fuel tank expansion, whether
24 caused by ethanol, water, or anything else.

25 4. **Fourth Bozof Objection**

26 Mr. Bozof’s fourth objection repeats that of certain other class members—that Ducati should
27 use a material that will not allow any fuel tank expansion whatsoever, rather than make repairs that
28 accommodate any expansion and alleviate known conditions that could potentially affect safety. The

1 infeasibility of that request and the benefit to class members from instead accepting a practical solution
2 has been addressed in response to other objectors' comments and thus is not repeated here. (*See*
3 Section III.B. above.)

4 **5. Fifth Bozof Objection**

5 Mr. Bozof's fifth objection is that tank expansion causes fuel leaks. Ducati has strenuously
6 disputed this contention and NHTSA has agreed with Ducati. (*See* Forni Decl., Exh. F (NHTSA ODI
7 Resume) ("[S]ubject leakage is limited to the Multistrada line alone and is unrelated to composite fuel
8 tank deformation.")) Nonetheless, Plaintiffs have negotiated corrective repairs that address each type
9 of fuel leak reported for the various motorcycle models in the class. (*See* Settlement Agreement I.6.a-h
10 & III.C-H.)

11 **6. Sixth Bozof Objection**

12 Mr. Bozof's sixth objection is that fuel tanks can expand by up to 20%, upsetting the
13 motorcycle's balance profile and weakening the tank's strength. In fact, the expansion is only a matter
14 of millimeters and does not weaken the tank. While Plaintiffs brought this action because such
15 expansion could result in problems such as tank instability and tank interference with other motorcycle
16 parts, the settlement solves each such problem by providing newly-designed fasteners capable of
17 securely holding an expanding SportClassic tank, new fitment kits for older Monster models and
18 slightly shortened fuel tanks for Streetfighter and Superbike models to prevent interference with other
19 motorcycle parts, and other repairs designed to correct the fuel tank problems identified through
20 Plaintiffs' investigation and discovery. (*See* Forni Decl. ¶¶ 4, 11, 15 & 17; Scott Decl. ¶¶ 7-10 & 31;
21 Kasbekar Decl. ¶¶ 4 & 5.)

22 **7. Seventh Bozof Objection**

23 Mr. Bozof's seventh objection is that fuel tank expansion "destroys the aesthetic of the
24 motorcycle," and that the safety-related repairs would also impact the aesthetic. As previously
25 discussed, however, warranty and consumer protection claims for purely aesthetic concerns are
26 relatively weak and not likely to lead to a better litigated resolution. The settlement provides at least 5
27 years of protection during which, if cosmetic irregularities larger than 3 millimeters (1/8 inch) arise,
28 class members will receive a corrective repair or replacement. As the photographs attached to the

