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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 JONAS SUGARMAN and QUANG LE, on behalf
14 of themselves and all others similarly situated,

15 Plaintiffs,

16 vs.

17 DUCATI NORTH AMERICA, INC.,

18 Defendant.

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

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS
SETTLEMENT; AND PLAINTIFFS'
MEMORANDUM IN SUPPORT**

Date: January 06, 2012

Time: 2:00 p.m.

Judge: Hon. Jeremy Fogel

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on January 06, 2012, at 2:00 p.m. before the Honorable Jeremy Fogel in Courtroom 3, 5th Floor of the United States District Court for the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, California 95113, Plaintiffs Jonas Sugarman and Quang Le will and hereby do move for an order granting final approval of the parties' proposed class settlement.

Plaintiffs' motion is based on this notice; the accompanying Memorandum of Points and Authorities, Declaration of Eric H. Gibbs, and Proposed Order Granting Final Approval of Class Settlement; and all other papers filed and proceedings had in this action.

DATED: December 06, 2011

Respectfully submitted,

GIRARD GIBBS LLP

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Jonas Sugarman and Quang Le filed this class action to address the expansion of the
4 plastic fuel tanks on Ducati motorcycles. Based on a review of over 300 complaints to the National
5 Highway Traffic Safety Administration (NHTSA), numerous detailed interviews with Ducati owners
6 who had contacted Plaintiffs' counsel, and other sources, Plaintiffs' counsel initially identified three
7 primary concerns with fuel tank expansion. First, fuel tanks on certain models were leaking fuel.
8 Second, expanded tanks could potentially interfere with the full range of steering on certain models.
9 And third, expanded tanks could come loose from their front mounting brackets on certain models.
10 Plaintiffs and other Ducati owners across the nation were concerned about what was happening to their
11 tanks, the potential safety implications and the need for meaningful information about the issue.

12 The settlement now before the Court provides the primary relief Plaintiffs were seeking—notice
13 of the fuel tank issues and corrective repairs—and it does so in a timely manner. Ducati owners who
14 were not previously aware that their fuel tanks were expanding—and class counsel have already heard
15 from several—are now aware of the issue and can take action to alleviate any safety concerns. And the
16 corrective repairs provided under the settlement have been tailored to address the specific instability,
17 steering impingement, and fuel leak issues that have been reported for each model of motorcycle
18 involved in the settlement. Plaintiffs have compiled and analyzed multiple sources of data to ensure
19 that the repairs address the issues owners of each of these models are experiencing—including Ducati's
20 internal warranty data, field reports, and failure analysis; consumer reports posted on NHTSA's
21 website; and class member accounts provided directly to Plaintiffs' counsel through written feedback
22 and telephone interviews. Plaintiffs have also consulted throughout this litigation with a materials
23 scientist who has also reviewed the data, inspected several failed fuel tanks, and offered his expertise
24 analyzing failed plastic components; he agrees that the repairs provided by the settlement are a
25 reasonable solution to the problems reported by class members. Plaintiffs' counsel and their expert
26 consultant even traveled to Italy to meet directly with Ducati's executives and engineers regarding class
27 members' fuel tank problems and appropriate repairs.

1 The corrective repairs provided by the settlement for any fuel tank expansion problem that is not
2 purely cosmetic will continue to be available to class members for six years from the date of sale—
3 three times the length of Ducati’s 2-year standard warranty—or 18 months after the settlement becomes
4 effective, whichever time period is longer. The repairs themselves will be warranted for an additional
5 12 months, even if this provides coverage after the end of the extended warranty period—another added
6 protection not included in Ducati’s standard warranty. The settlement also extends the standard 2-year
7 warranty to 5 years for purely cosmetic repairs and provides an objective protocol under which Ducati
8 dealers and class members will know when a fuel tank should be replaced because of surface
9 imperfections. The settlement will extend the cosmetic warranty to 18 months after the settlement
10 becomes effective if that provides longer than 5 years of coverage, and the repairs themselves will be
11 warranted for an additional 6 months. Legal claims for purely cosmetic issues that manifest themselves
12 outside of the warranty period are not particularly strong claims, as the trend in warranty and consumer
13 protection law has been to focus on safety-related defects and place the risk of other defects outside the
14 warranty period on consumers. The fact that Plaintiffs were able to negotiate significant relief for these
15 relatively weak cosmetic claims speaks to the overall strength of the settlement and the work Plaintiffs
16 and their counsel have done on behalf of the class. Finally, in the event that class members are
17 unsatisfied with Ducati’s response to requests for repairs under the settlement, the settlement also
18 incorporates an individualized dispute resolution process that class members may pursue.

19 The Court preliminarily approved the proposed class settlement on September 16, 2011, finding
20 that the terms appeared sufficiently fair, reasonable, and adequate to inform the class and proceed to a
21 formal fairness determination. (*See* Dkt No. 72 (Order).) Plaintiffs now request that the Court finally
22 approve the class settlement.

23 **II. BACKGROUND**

24 **A. The Claims Being Settled**

25 Plaintiffs alleged that that the plastic material used in certain Ducati motorcycles’ fuel tanks is
26 incompatible with the motorcycles’ fuel, leading to fuel tank expansion that presented three potential
27 safety hazards: sudden shifts in weight due to unstable tanks, interference with the full range of
28 steering, and fuel leakage. (*See* Dkt. No. 23 (Am. Compl.) ¶¶ 1, 13-18.)

1 On behalf of a proposed class of individuals who purchased Ducati motorcycles equipped with
2 plastic fuel tanks, Plaintiffs pled that Ducati had violated California consumer protection laws by
3 concealing the fuel tank defect from class members. (*See id.* ¶ 4, 79, 86-87.). Plaintiffs also claimed
4 that Ducati had breached its general 2-year limited warranty and its 5-year emissions warranty by
5 failing to adequately repair class members' deformed (expanded) fuel tanks and instead installing
6 replacement tanks made of the same material subject to the same risk of deformation. (*See id.* ¶¶ 3, 56,
7 58, 66, & 68.) For relief, Plaintiffs requested that Ducati inform its customers of its fuel tank problems
8 and attendant safety risks, and then correct those issues going forward by installing suitable
9 replacement tanks. (*See id.*, ¶ 4, p. 17-18) .

10 **B. Ducati's Arguments and Perspective**

11 In the parties' Joint Case Management Statement, Ducati acknowledged that ethanol, which
12 has been increasingly added to fuel in the United States in recent years, can, in limited circumstances,
13 cause plastic fuel tanks to slightly expand. (Dkt. No. 42 (JCMS) 2.) Ducati nevertheless maintained
14 (and continues to maintain) that (1) its plastic fuel tanks are compatible with the fuel sold in the United
15 States, (2) any fuel tank expansion is generally minimal, measured in just millimeters, and does not
16 affect rider safety in any way, (3) any problems are limited to a very small percentage of motorcycles,
17 and (4) it had fairly treated its customers by fully honoring its applicable warranty obligations. (*Id.*)

18 Ducati filed a motion to dismiss Plaintiffs' claims in February 2011, and requested a partial stay
19 of discovery until that motion was resolved. (Dkt. No. 37 (Mot. to Dismiss); Dkt. No. 40 (Mot. for
20 Limited Stay).) Ducati's motion argued (1) that fuel tank expansion does not pose any safety risk, (2)
21 that Ducati did not know of the alleged defect—safety or otherwise—before selling most class
22 members their motorcycles, and (3) that the Ducati fuel tank expansion issue has been heavily
23 publicized on the internet in recent years, thus negating any non-disclosure by Ducati. (Mot. to Dismiss
24 at 2, 12-14.) Both the motion to dismiss and motion for a limited stay were fully briefed by both sides.

25 **C. Discovery and Settlement Negotiations**

26 In a court conference on March 3, 2011, the parties were able to resolve Ducati's motion to stay
27 discovery by an in-court stipulated compromise that allowed for immediate, targeted discovery. (Gibbs
28 Decl. ¶¶ 7 & 22.) As Ducati began to produce documents, it became increasingly apparent that the

1 issue Plaintiffs were grappling with was best characterized as plastic fuel tank expansion from ethanol
2 in combination with certain other factors that can potentially lead to different problems in different
3 models. After learning that Ducati had developed a possible solution to address the problems on one
4 model, Plaintiffs approached Ducati about discussing that solution and possible remedies for the
5 remaining models that might address their safety concerns, including solutions that would not require
6 altering the fuel tank material. Ducati continued to assert its positions that it had acted fairly and that
7 Plaintiffs had failed to identify safety issues,¹ but nonetheless agreed to explore possible repairs that
8 would remedy any identified problems. (*Id.* ¶¶ 8 & 23.)

9 By late April 2011, Ducati had provided Plaintiffs' counsel detailed warranty data about fuel
10 tank claims. The parties were able to closely match the warranty data to the complaints reported to
11 both NHTSA and Plaintiffs' counsel and thus pinpoint the concerns relevant to the different motorcycle
12 models. In connection with their on-going discussions, Plaintiffs' and defense counsel, accompanied
13 by expert consultants, met at Ducati's Italian production facility on May 9, 2011 to discuss model-
14 specific fuel tank problems, whether or not directly related to fuel tank expansion, and possible fixes.
15 Ducati presented a number of model-specific proposed repairs that it believed would resolve Plaintiffs'
16 concerns, including all of the concerns that Plaintiffs framed as safety-related, although Ducati disputed
17 there being any safety issue. (*Id.* ¶¶ 10 & 23.)

18 After careful consideration and expert review of the proposed repairs along with past warranty
19 claims, consumer complaints, and mechanical data, Plaintiffs' counsel ultimately concluded that the
20 repairs developed by Ducati appropriately address the alleged fuel tank expansion problems, whether
21 allegedly safety-related or not. This conclusion was guided by input from an experienced materials
22 engineering expert, Dr. Anand Kasbekar, retained by Plaintiffs who was involved throughout the case
23 and attended the meetings at the Ducati plant. Valuable information was also gleaned from three in-
24 depth inspections of Class member vehicles exhibiting fuel tank expansion and an electronic scan of a
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27
28 ¹ In support of its argument that fuel tank expansion did not present safety issues, Ducati
pointed to NHTSA's February 28, 2011 finding that fuel leaks on Ducati Multistrada models did not
appear to result from fuel tank expansion and that Ducati Monster models had "fail[ed] to exhibit a
current safety defect trend." (Dkt. No. 58 (Defs. Mot. to Dismiss Reply) 5 n.3.)

1 fourth Class member's expanded fuel tank. The three inspections took place in Florida, Illinois, and
 2 California and were attended by counsel and expert consultants for each side. (*Id.* ¶ 6, 10-12, & 21, 22-
 3 23.)

4 **D. The Terms of the Settlement**

5 The terms of the proposed settlement are set forth in the Class Settlement Agreement and
 6 Release ("Settlement Agreement") attached to the declaration of Eric H. Gibbs as Exhibit 1. The
 7 principal provisions, which are intended to address the First Amended Complaint's request for a class-
 8 wide disclosure of fuel tank problems and corrective repairs, are summarized below.

9 **1. The Settlement Class**

10 The settlement would provide benefits to a class defined as: All residents of the United
 11 States who, as of September 16, 2011, own any Ducati 2003-2011 Monster, Multistrada,
 12 SportClassic, Streetfighter, Superbike or Hypermotard model family motorcycle manufactured
 13 with a plastic fuel tank (collectively, "Class Vehicles"), including but not limited to the
 14 following model and model year motorcycles:

- 15 • 2003-2008 Monster 620, 620 dark, 620 i.e. dark, 620 i.e., M 695, M 695 dark, 800, S2R, S4R,
 16 S4R S Tricolore, S2R dark, S2R1000, and S4RS motorcycles;
- 17 • 2009-2011 Monster 696, 696+, 696+ ABS, 796, 796 ABS, 1100, 1100S, 1100 ABS, 1100 evo
 18 ABS, 1100S ABS, M696, M1100, and M1100S motorcycles;
- 19 • 2003-2009 Multistrada 1000, 1000S, 1000 DS, 1000S DS, 1100 DS, 1100S DS, 620, 620 dark,
 20 MTS 1000, MTS 1000S, MTS 1100 and MTS 1100S motorcycles;
- 21 • 2010-2011 Multistrada 1200, 1200S Sport, 1200S Touring and 1200S Pikes Peak motorcycles;
- 22 • 2006-2010 SportClassic Sport 1000, Paul Smart 1000, Paul Smart 1000 LE, GT Touring, GT
 23 1000, GT 1000 Touring, GT 1000 Bicolore, Sport 1000S, Sport 1000 Biposto and Sport 1000
 24 Monoposto motorcycles;
- 25 • 2009-2011 Streetfighter and Streetfighter S motorcycles;
- 26 • 2007-2011 Superbike 848, 848 NH, 848 Hayden Limited, 848 evo, 1098, 1098S, 1098
 27 Tricolore, 1098R, 1098R Bayliss, 1198R, 1198, 1198S, 1198R corse SE, 1198S corse SE and
 1198SP motorcycles; and
- 28 • 2007-2011 Hypermotard 796 matt, 796 red, 1100, 1100 evo, 1100 evo SP, 1100S, 1100E and
 1100SP motorcycles.

1 Excluded from the Settlement Class are Ducati; any affiliate, parent, or subsidiary of Ducati; any entity
2 in which Ducati has a controlling interest; any officer, director, or employee of Ducati; any successor or
3 assign of Ducati; anyone employed by counsel for Plaintiffs in this action; and any Judge to whom this
4 case is assigned as well as his or her immediate family. (Settlement Agreement, II.11; Dkt. No. 72
5 (Order) 1-2.)

6 This class, which encompasses approximately 39,000 registered vehicles, has previously been
7 certified by the Court for settlement purposes as part of the settlement approval process.

8 **2. Notice of Fuel Tank Issues.**

9 The portion of the settlement that addresses Plaintiffs' request for class-wide notice of
10 Ducati fuel tank problems has already been implemented. Included in the notice of the proposed
11 settlement mailed to class members was a description of the fuel tank problems that affect each Ducati
12 model equipped with a plastic fuel tank. (*See id.* III.A.1; IV.B; Blake Decl., Exh. 3 (Pelc Decl.), Exh.A
13 (Class Notice).) While Ducati does not agree that any of the problems pose safety hazards, the notice
14 informs class members that fuel tank expansion exists; advises class members to be on the look-out for
15 expansion (which can be difficult to see unless one is looking for it); conveys Plaintiffs' position that
16 fuel tank expansion can possibly result in three potentially hazardous conditions; and notifies class
17 members that corrective repairs exist and are available under a new extended warranty.

18 **3. Extended Warranty Periods**

19 The settlement addresses Plaintiffs' request for corrective repairs by extending Ducati's
20 standard 2-year limited warranty to cover agreed-upon plastic fuel tank repairs for both non-cosmetic
21 issues (including all those related to Plaintiffs' alleged safety concerns) and for purely cosmetic issues
22 unrelated to any safety concerns. The extended warranties will cover non-cosmetic repairs until the
23 longer of 6 years after the date of original purchase, or until 18 months after the settlement's effective
24 date. (Settlement Agreement, III.B.1.) In addition, any non-cosmetic repairs made under the extended
25 warranty will themselves be warranted for 12 months, even if that coverage extends beyond the
26 extended warranty period. (*Id.*) Purely cosmetic repairs will be covered until the longer of 5 years
27 after the date of original new motorcycle purchase or until 18 months after the settlement's effective
28

1 date; and any repairs made under the cosmetic extended warranty will themselves be warranted for 6
2 months. (*Id.* III.B.2.)

3 **a) Warranty Repairs for Non-Cosmetic Problems**

4 Ducati will provide the following repairs during the extended warranty period for non-cosmetic
5 fuel tank problems. The repairs are specified by motorcycle model because the fuel tanks, though all
6 made of similar polyamide 6 thermoplastic material, come in different shapes, sizes, and configurations
7 to fit the different models, which can result in different potential fuel tank problems.

8 *2004-2008 Monster Class Vehicles:* Fuel tank expansion on these models with painted, exposed
9 tanks can on some motorcycles cause (1) pressure against the ignition unit, impeded access to the tank
10 latch, and difficulty raising and lowering the fuel tank and (2) contact between the motorcycle
11 handlebars and an expanded fuel tank when at full turn.² As necessary to address any such problem,
12 Ducati will (i) adjust the steering stoppers to prevent any fuel tank interference with the handlebars; (ii)
13 reposition the tank with a new fitting kit to provide sufficient space for expansion while keeping the
14 tank firmly attached and aligned with the frame; and if necessary (iii) install a shorter seat to
15 accommodate the repositioned tank without affecting rider comfort. In addition, in any cases of fuel
16 leakage where the fuel pump connects to the tank, Ducati will replace the O-ring installed at the fuel
17 pump flange seal with an X-ring designed to prevent leakage. (Settlement Agreement I.6.a.; III.C.)

18 *2009-2011 Monster Class Vehicles:* The unpainted, covered fuel tanks on some of these
19 motorcycles have leaked fuel where the fuel pump connects to the fuel tank. For vehicles presented
20 with fuel leakage caused by an original manufacturing defect or any functional interference between the
21 fuel tank and any other motorcycle part due to fuel tank expansion, Ducati will provide the appropriate
22 repairs or tank replacement. (*Id.* I.6.f.; III.H.)

23 *2003-2009 Multistrada Class Vehicles:* The painted, exposed fuel tanks on these models can
24 leak fuel where the fuel pump connects to the tank. In accordance with a previously-issued recall,
25 Ducati will replace the O-ring installed at the full pump flange seal with an X-ring designed to prevent
26

27 ² The fuel tank on some Monster models is designed to pivot on the rear tank mount to allow
28 access to other components. A latch at the front of such tanks locks them in place for normal operation.
If a fuel tank expands forward toward the ignition unit, it can become difficult to properly latch the tank.
The repair provided for in the settlement will correct this problem.

1 leakage. For these models, Ducati will also replace expanded fuel tanks that cannot be removed
2 without damage during motorcycle repairs. (*Id.* I.6.b.; III.D.)

3 *2010-2011 Multistrada Class Vehicles:* The fuel tanks on these models are unpainted and
4 covered by separate panels. For vehicles presented with fuel leakage caused by an original
5 manufacturing defect or any functional interference between the fuel tank and any other motorcycle
6 part due to fuel tank expansion, Ducati will provide the appropriate repairs or tank replacement. (*Id.*
7 I.6.h.; III.H.)

8 *2006-2010 SportClassic Class Vehicles:* Fuel tank expansion on these models can on some
9 motorcycles cause (1) the painted, exposed fuel tanks to come loose from one or both front mounting
10 brackets and (2) contact between the fuel tank and the handlebar switch gear at a full turn. As
11 necessary to address any such problem, Ducati will install a new fastener kit at the front mounting
12 brackets to keep any expanded tank fully attached at the front mounting brackets and will adjust the
13 steering stoppers or the handlebar to prevent any interference with the handlebar switch gear. (*Id.*
14 I.6.c.; III.E.)

15 *2009-2011 Streetfighter Class Vehicles:* Fuel tank expansion on these models can on some
16 motorcycles cause the painted, exposed tanks to contact the upper triple clamp³ and the radiator cap.
17 As necessary to address any such problem, Ducati will install a newly-designed fuel tank with slightly
18 reduced dimensions to accommodate expansion and prevent such contact. (*Id.* I.6.d.; III.F.)

19 *2007-2011 Superbike Class Vehicles:* Fuel tank expansion on these models can on some
20 motorcycles cause the painted, exposed tanks to contact the steering damper support.⁴ As necessary to
21 address such problems, Ducati will install a newly-designed fuel tank with slightly reduced dimensions
22 to accommodate expansion and prevent contact with the steering damper support. Additionally, due to
23 an unrelated and now corrected defect in the metal fittings for the fuel overflow hose, very small
24 amounts of fuel can on some motorcycles leak beneath the motorcycle. For motorcycles presented with
25 this problem, Ducati will install a replacement fuel tank. (*Id.* I.6.e.; III.G.)

26 ³ The upper triple clamp attaches the handlebars to the motorcycle's fork.

27 ⁴ The steering damper is a hydraulic component that helps stabilize the handlebars against sudden
28 movements. The support attaches the steering damper to the motorcycle frame and is not a moving part.
Fuel tank expansion does not interfere with the steering damper itself.

1 2007-2011 *Hypermotard Class Vehicles*: The fuel tanks on these models are unpainted and
2 covered by separate panels. For motorcycles presented with fuel leakage caused by an original
3 manufacturing defect or any functional interference between the fuel tank and any other motorcycle
4 part due to fuel tank expansion, Ducati will provide the appropriate repairs or tank replacement. (*Id.*
5 I.6.g.; III.H.)

6 **b) Warranty Repairs for Cosmetic Problems**

7 The fuel tanks on Ducati models with painted, exposed plastic fuel tanks can exhibit purely
8 cosmetic distortions such as blistering, bubbling, rippling, dimpling, flattening or spreading due to fuel
9 tank expansion or other original manufacturing defect. These cosmetic problems do not appear on the
10 models with unpainted tanks covered by separate panels. If the fuel tank on a Class Vehicle exhibits
11 cosmetic problems during the cosmetic extended warranty period, Ducati will replace the tank under
12 the following conditions: (i) the cosmetic problems are the result of fuel tank expansion or an original
13 manufacturing defect; (ii) the cosmetic problems are greater than three millimeters in size and easily
14 and clearly visible to a passerby; and (iii) the fuel tank has not suffered some greater damage not
15 caused by fuel tank expansion or an original manufacturing defect (such as damage from an accident,
16 fall, other impact or wear and tear). (Settlement Agreement III.I.)

17 **c) Repair and Replacement of Other Affected Parts**

18 In addition to the repairs identified above for non-cosmetic and purely cosmetic fuel tank
19 problems, during the applicable extended warranty period Ducati will also repair or replace original
20 Ducati OEM parts and accessories that are damaged or no longer fit on a Class Vehicle due to fuel tank
21 expansion. (*Id.* III.J.)

22 **d) Transferability of Extended Warranties**

23 In the event that a Settlement Class Member transfers title to his/her motorcycle during the
24 extended warranty periods, Ducati will honor the extended warranties for the transferee, provided that
25 the transferee agrees to be subject to all of the other terms of the settlement. (*Id.* III.B.3.)

26 **e) Dispute Resolution Process**

27 The extended warranty program is designed to address all the expansion-related problems
28 observed in class vehicles, NHTSA reports, customer feedback, and warranty data, among other things.

1 The parties nonetheless recognize that some class members may be dissatisfied with the repairs
2 provided (or not provided) by a Ducati dealer under the extended warranties. The settlement thus
3 provides for a dispute resolution process to protect class members in those situations. As an initial step,
4 Ducati will make a good faith effort through its customer service department to resolve disputes
5 relating to the extended warranties. After contacting Ducati customer service, a class member may
6 initiate binding arbitration by BBB Auto Line of any unresolved disputes about the application of the
7 Settlement Agreement. Class counsel will be notified of any arbitration requests and will be available
8 to assist class members seeking arbitration. (Settlement Agreement III.L.)

9 **4. Mutual Release**

10 In exchange for the benefits provided by Ducati under the proposed settlement, class members
11 will release Ducati and its related entities from all known and unknown claims that relate to the fuel
12 tank problems alleged or that could have been alleged in the complaint or identified in the settlement
13 agreement. (*Id.* IV.D.1.) Ducati will in turn release Plaintiffs and class counsel from any claims
14 related to this litigation or settlement. (*Id.* IV.E.)

15 **5. Attorneys' Fees, Expenses, and Service Awards**

16 Ducati has agreed to pay up to, and class counsel has agreed not to seek nor accept more than,
17 \$835,000 in attorney fees and expenses and \$1,500 in service awards for each named plaintiff and each
18 class member who provided a declaration and submitted to a vehicle inspection. (Settlement
19 Agreement IV.F.1.) These awards are subject to Court approval and will not in any way reduce the
20 benefits provided to the class. (*Id.* IV.F.1 & 3.)

21 **III. ARGUMENT**

22 A proposed class action settlement may be approved if the Court, after allowing absent class
23 members an opportunity to be heard, finds that the settlement is "fair, reasonable, and adequate." Fed.
24 R. Civ. P. 23(e)(2). When assessing a proposed settlement, "the court's intrusion upon what is
25 otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to
26 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
27 overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a whole, is
28 fair, reasonable and adequate to all concerned." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965

1 (9th Cir. 2009) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)); *see also*
2 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982) (“[V]oluntary conciliation
3 and settlement are the preferred means of dispute resolution. This is especially true in complex class
4 action litigation . . .”).

5 Although the decision whether to grant final approval of the parties’ proposed settlement is
6 committed to the sound discretion of the trial judge, the Ninth Circuit has set forth the following list of
7 non-exclusive factors that a district court should consider:

- 8 (1) The strength of the plaintiffs’ case;
- 9 (2) The risk, expense, complexity, and likely duration of further litigation;
- 10 (3) The risk of maintaining class action status throughout trial;
- 11 (4) The amount offered in settlement;
- 12 (5) The extent of discovery completed, and the stage of the proceedings;
- 13 (6) The experience and views of counsel;
- 14 (7) The presence of a governmental participant; and
- 15 (8) The reaction of the class members to the proposed settlement.

16 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (referred hereafter as the
17 “*Churchill* factors”)

18 “Basic to the process of deciding whether a proposed settlement is fair, reasonable and adequate
19 is the need to compare the terms of the compromise with the likely rewards of litigation.” *In re TD*
20 *Ameritrade Accountholder Litigation*, No. C-07-2852, 2009 WL 6057238, at *4 (N.D. Cal. Oct. 23,
21 2009) (quoting from *Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc. v.*
22 *Anderson*, 390 U.S. 414, 424-25 (1968)) (brackets and ellipsis removed). The first four *Churchill*
23 factors are designed to assist the Court in making this comparison. By evaluating the strength of the
24 Plaintiffs’ case; the risk, expense, complexity, and delay associated with further proceedings; and the
25 risk of maintaining class certification through trial, the Court can get a good idea of the value of class
26 members’ claims. The Court can then evaluate the relief offered by the parties’ proposed settlement in
27 context to determine whether it provides fair compensation for those claims—or, stated another way,
28 “whether the interests of the class are better served by the settlement than by further litigation.” Manual

1 for Complex Litigation (Fourth) § 21.61 (2004). The remaining *Churchill* factors offer additional
2 perspective on whether the relief offered by the settlement is fair, with the fifth factor designed to
3 ensure that the parties and the Court have sufficient information to intelligently assess the value of class
4 members' claims, the sixth and eighth factors taking into account class counsel's and individual class
5 members' opinions about the settlement, and the seventh factor accounting for the position or views of
6 any governmental participant.

7 A thorough evaluation of the *Churchill* factors in this case shows that the proposed settlement
8 provides immediate relief to class members, in the form of notice and extended warranty repairs, that
9 approximates, if not exceeds, what class members could realistically expect to obtain after several years
10 of litigation—if they obtained anything at all. The parties' proposed settlement should thus be approved
11 as a fair, adequate, and reasonable resolution of the class claims against Ducati.

12 **1. The Strength of the Plaintiffs' Claims**

13 Plaintiffs asserted three types of claims for relief in this lawsuit, each with different strengths
14 and weaknesses. The strongest claims, in Plaintiffs' view, are the claims Ducati most strenuously
15 denies: those based on Ducati's alleged failure to disclose potential safety-related issues with its
16 motorcycles. Even the cases that take the narrowest view of the material facts a manufacturer is
17 obliged to disclose under California consumer protection law agree that a duty to disclose exists "when
18 there are safety concerns associated with the product's use." *Morgan v. Harmonix Music Sys., Inc.*, No.
19 C08-5211BZ, 2009 WL 2031765, at *4 (N.D. Cal. July 7, 2009) (citing cases). Nonetheless, Ducati
20 had raised potentially valid legal defenses to these claims that conceivably could have prevailed,
21 whether as part of Ducati's now-stayed motion to dismiss, on summary judgment, or at trial. These
22 defenses include: (1) that fuel tank expansion does not pose a safety risk, (2) that Ducati did not know
23 of the alleged defect—safety or otherwise—before selling most class members their motorcycles, and
24 (3) that the Ducati fuel tank expansion issue has been heavily publicized on the internet in recent years,
25 thus negating any non-disclosure by Ducati. (*See Mot. to Dismiss at 2, 12-14.*) The first of these
26 defenses is of particular concern, as California consumer protection law's focus on safety (as opposed
27 to materiality more generally) is a fairly recent development, and it remains unclear precisely what
28 level of safety risk is required. To date, Plaintiffs' counsel have interviewed 193 Ducati owners,

1 received reports or complaints from 295 others, culled hundreds of reports posted on NHTSA's
2 website, and scrutinized Ducati's internal data, but have not encountered anyone who suffered personal
3 injury or an accident as a result of fuel tank expansion. Whether it is enough that class members have
4 expressed concerns for their safety is an issue that has not been definitively addressed by the courts.

5 Also reasonably strong, in Plaintiffs' opinion, were their safety-related warranty claims. These
6 claims asserted that Ducati was obliged by both its 2-year limited warranty and 5-year emissions
7 warranty to make repairs that permanently resolve—and not just postpone—fuel tank expansion. In
8 response, Ducati argued that it was fully honoring its 2-year limited warranty to “repair or replace” any
9 part manifesting a defect during the warranty period. (*See Mot. to Dismiss at 6-8* (citing, among other
10 cases, *Brothers v. Hewlett-Packard Co.*, No. 06-2254, 2007 WL 485979, at *4 (N.D. Cal. Feb. 12,
11 2007).) The 2-year warranty claim thus hinged on whether Ducati's warranty practice of replacing
12 class members' fuel tanks under its “repair or replace” limited warranties with a similar plastic tank
13 was “appropriate” under the circumstances—an inherently factual question that could go either way at
14 trial or even, in Ducati's view, entitle it to judgment as a matter of law. Ducati also argued that the
15 alleged fuel tank expansion problems were not covered by the federally mandated 5-year emissions
16 warranty because none of the alleged problems involved exhaust emissions. (*See Mot. to Dismiss at 7-*
17 *8.*) Whether the 5-year emissions warranty does indeed apply is an issue of statutory interpretation that
18 has not been addressed by any reported decision and would depend on the Court's reading of the Clean
19 Air Act and related regulations. And even if Plaintiffs' interpretation were to prevail, Plaintiffs would
20 still need to demonstrate at trial that the fuel tanks “result in any unsafe condition.” (*See Dkt. No. 54*
21 *(Pls. Opp. to Mot. to Dismiss)* at 3-4, 7.) As discussed in connection with Plaintiffs' consumer
22 protection claims, the safety issue remains a hotly contested issue that depends in part on whether a
23 history of personal injury or accidents is necessary before an automotive component can be deemed
24 unsafe.

25 Lastly, Plaintiffs claimed that Ducati was obligated to repair cosmetic distortions caused by fuel
26 tank expansion. Aesthetics are a central selling point for Ducati motorcycles, so Plaintiffs argued that a
27 materials defect that is present at purchase and leads to noticeable blistering or distortion of the fuel
28 tank surface later is an important fact that Ducati was obliged to either disclose or address through a

1 warranty repair that eliminates the possibility of further cosmetic distortions. *See, e.g., Limandri v.*
2 *Judkins*, 52 Cal. App. 4th 326, 337 (1997). Ducati argued that it replaced any tank with cosmetic
3 problems during its two-year warranty period, that it did not have prior knowledge of the issue when
4 most class motorcycles were sold and that there was significant publication over the internet of the
5 issue in recent years. While Plaintiffs believe that the better reading of California warranty and
6 consumer protection law would afford class members a recovery, a number of courts of late have read
7 the law to foreclose liability for defects outside the warranty period unless the defect is safety-related.
8 *See, e.g., Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 972 (N.D. Cal. 2008); *Morgan*, 2009
9 WL 2031765, at *4. If these courts' reading of the law were followed, class members would not be
10 entitled to cosmetic repairs that manifested themselves outside of Ducati's 2-year warranty period. *See*
11 *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 832 (2006) (finding warranty
12 coverage did not extend to latent defects that manifested outside the warranty period).

13 **2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

14 The preceding discussion of Plaintiffs' claims conveys some of the risk and complexity
15 associated with further litigation, with Ducati's motion to dismiss papers and Plaintiffs' opposition
16 papers offering further perspective on the many legal and factual disputes in play. (*See* Mot. to Dismiss;
17 Dkt. No. 43 (Response re Mot. to Stay); Dkt. No. 58 (Reply re Mot. to Dismiss).) Were this case to
18 proceed rather than settle, Plaintiffs would have a reasonable chance of showing that Ducati failed to
19 disclose fuel tank expansion issues to at least some of its customers and that Ducati's warranty repairs
20 did not do enough to foreclose recurring safety-related issues. But it is also possible that Ducati would
21 prevail on the safety-related claims and the class would not receive notice or better repairs. And it is
22 unlikely that the class would receive any cosmetic-related repairs outside of the 2-year warranty period.

23 The risk to class members of unsuccessful litigation is appreciable and, as is usually the case,
24 warrants consideration as part of the settlement approval process. What is somewhat unique to this case
25 is that *any* further litigation—even successful litigation—carries risk to class members. The relief class
26 members' are seeking in this action—notice and better repairs—become less valuable to class members
27 with the passage of time. Notice is more valuable and effective the earlier it is given, so that class
28 members can take appropriate action and avoid discovering for themselves the fuel tank related

1 problems that Plaintiffs maintain expose them to unreasonable risk. And both safety-related and
2 cosmetic repairs are less valuable to class members the longer they are put off and the more their
3 motorcycles age.

4 **3. The Risk of Maintaining Class Action Status Throughout the Trial**

5 Were litigation to continue, Plaintiffs would also face risk at the class certification stage. Even
6 prior to formal class certification proceedings, Ducati had alternatively moved to dismiss the class
7 allegations in its motion to dismiss and, if that motion were denied in whole or in part, would have
8 opposed class certification. *See* Mot. to Dismiss; JCMS at 9-11. Although Plaintiffs claim that all
9 class members' plastic fuel tanks are prone to expansion from the same underlying cause, different tank
10 shapes and designs on the eight affected model families mean that an appropriate warranty repair can
11 vary depending on the model involved or the circumstances of the individual class member's use of the
12 product. Managing a case designed to compel Ducati to provide repairs that are appropriate under the
13 circumstances, as warranty law requires, could prove too challenging when eight different model
14 families are involved. One virtue of resolving class members' claims by settlement rather than by trial
15 is that manageability issues like these that sometimes preclude certification cease to be a problem, "for
16 the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 593 (1997).

17 Another risk is that the class could be certified for California residents only, an issue raised by
18 Ducati in its motion to dismiss or, alternatively, strike the class allegations. The Court has not yet
19 decided whether California law should be applied to the claims asserted by out-of-state class members
20 or whether their home state's laws should instead apply; recent automotive defect cases show that both
21 results are possible. *See Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 599 (C.D. Cal. 2008)
22 (applying California law to out-of-state vehicle owners' claims); *In re Toyota Motor Corp. Unintended*
23 *Acceleration Mktg., Sales Practices, and Products Liab. Litig.*, 785 F. Supp. 2d 925, 932-34 (declining
24 to apply California law to out-of-state vehicle owners' claims). If the Court decided that out-of-state
25 class members' claims should be decided using their home states' laws, they would almost certainly be
26 excluded from any certified class. *See In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036,
27 1041 (N.D. Cal. 2008) ("If the Court were to refuse certification, the unrepresented potential plaintiffs
28 would likely lose their chance at recovery entirely.")

1 **4. The Amount Offered in Settlement**

2 The first three *Churchill* factors give the Court a perspective from which to assess the fourth and
3 most important factor: the relief offered by the settlement. In general, if the settlement offers class
4 members relief that appropriately responds to the claims asserted in the lawsuit—especially when the
5 relative strength of those claims is weighed against the risk and delay associated with further litigation—
6 the Court should find the settlement reasonable. *See* Manual for Complex Litigation, § 21.62
7 (“Reasonableness depends on an analysis of the class allegations and claims and the responsiveness of
8 the settlement to those claims.”).

9 Here, the relief offered by the proposed settlement accomplishes the primary goals of Plaintiffs’
10 claims. First, it has already addressed Plaintiffs claim that Ducati failed to disclose fuel tank
11 problems—by alerting Ducati owners through the class notice that their fuel tanks may expand, possibly
12 leading to specific problems that Plaintiffs contend pose safety risks, and that repairs are available to
13 address those problems. By settling now, class members who were unaware of the fuel-tank expansion
14 issues and the attendant safety risks alleged by Plaintiffs have been alerted sooner rather than later—a
15 valuable remedy that exceeds the belated notice that Plaintiffs might have obtained through further
16 litigation.

17 Second, the settlement offers corrective repairs that are tailored to address the specific
18 expansion-related and other problems observed in each of the eight model families with plastic fuel
19 tanks. These new warranty repairs will be available to class members free of charge for non-cosmetic
20 problems until either six years after the date of sale or eighteen months after the settlement becomes
21 final, whichever provides longer coverage, and any repair made during the extended period will be
22 warranted for 12 months—even if that period runs *after* the extended period. The repairs do not stop
23 potential fuel tank expansion, which does not occur on most tanks, but they do alleviate all of the
24 potential safety issues that Plaintiffs allege—whether fuel tank instability, steering impingement, or fuel
25 leaks. (*See* Gibbs Decl. ¶ 10.)

26 Plaintiffs had originally believed that Ducati was developing an aluminum tank to be used in
27 future model years, and thus suggested that both cosmetic and safety-related expansion issues could be
28 addressed by using that tank to repair class vehicles. (*See* Am. Compl., ¶¶ 3, 22.) That turned out not to

1 be the case, as the aluminum tank is designed for production on only one motorcycle in one particular
2 model family (although it can be purchased as an optional aftermarket accessory for other motorcycles
3 in that one model family) and susceptible to its own issues, such as denting. Most of the models covered
4 by the settlement were designed for use only with a plastic fuel tank, and designing and testing metal
5 tanks for those models, some of which are longer in production, would be difficult, time-consuming, and
6 largely infeasible. Nor is it something Ducati would agree to do. So while Plaintiffs acknowledge that
7 the corrective repairs the settlement provides may not be viewed as perfect by every owner, a better
8 practical solution is not available. And given that Plaintiffs' consumer protection claims and warranty
9 claims hinge largely on an alleged unreasonable safety risk, it is difficult to see how Plaintiffs could
10 obtain a better result at trial than the repairs provided in the settlement, which address all of the very
11 safety risks they allege.

12 With all of the safety and functional issues fully addressed by the settlement repairs, some class
13 members may nonetheless experience cosmetic issues with their fuel tanks *after* their standard 2-year
14 limited warranty period expires. As previously discussed, cosmetic-based claims are relatively weak
15 under existing law, but Plaintiffs have nonetheless been able to negotiate a five-year extended warranty
16 (or 18 months after the effective date of the settlement, whichever is longer) that will cover cosmetic
17 issues. And if cosmetic issues recur within six months of a settlement repair, class members will be
18 entitled to a further cosmetic repair even if they are then outside of the 5-year extended warranty—a
19 benefit that is not extended under Ducati's 2-year warranty.

20 **5. The Extent of Discovery Completed, and the Stage of the Proceedings**

21 The corrective repairs provided under the settlement benefitted from thorough investigation and
22 targeted discovery. Plaintiffs spent a considerable amount of time analyzing Ducati's internal failure
23 analyses, warranty data, and dealer reports to determine the precise problems associated with each
24 model. Plaintiffs also culled through hundreds of consumer reports posted by the National Highway
25 Traffic Safety Administration (NHTSA), as well as dozens of written accounts they had received
26 directly from class members, and interviewed over 150 class members about their fuel tank problems.
27 Plaintiffs compiled the resulting data by model and model year and confirmed that each source of data—
28 whether from Ducati's records, NHTSA's reports, class member written accounts, or class member

1 interviews—exhibited agreement. Plaintiffs used this data throughout their settlement negotiations to
2 ensure that the various problems reported by owners of each model family would be addressed. They
3 also consulted throughout the process with Dr. Anand Kasbekar, a forensic engineer and materials
4 scientist who has extensive experience analyzing failed plastic components. Plaintiffs and Dr. Kasbekar
5 even traveled to Italy to meet with Ducati’s executives and engineers to speak with them about the fuel
6 tank problems and potential repairs. (Gibbs Decl. ¶¶ 4-5, 8, 10-12, & 20-25.)

7 Plaintiffs’ investigation, coupled with the parties’ motion to dismiss briefing, Rule 26 efforts,
8 and experience in other automotive class actions, allowed both sides to intelligently assess the merits of
9 their respective positions and reach a sensible compromise. *See Rodriguez*, 563 F.3d at 967 (counsel
10 should have a good grasp on the merits before settlement talks begin).

11 **6. The Experience and Views of Counsel**

12 Plaintiffs’ counsel specialize in class action litigation and have extensive experience with motor
13 vehicle defect actions, including *Parkinson v. Hyundai* (defective flywheel systems), *Browne v.*
14 *American Honda Motor Co.* (defective braking systems), and *Bacca v. BMW* (defective sub-frames), all
15 of which were resolved by settlement. (See Gibbs Decl. ¶¶ 29-32 & 35.) The extended warranties
16 available under the proposed settlement are about as favorable as Plaintiffs’ counsel have seen in an
17 automotive case and likely provide as much or more coverage as could reasonably be expected from a
18 successful trial verdict. (See *id.*) Especially in light of the potentially viable defenses Ducati has raised
19 and the detriment class members would suffer from further delay, Plaintiffs’ counsel believe the
20 settlement to be in class members’ best interests and recommend its approval. *In re Omnivision*
21 *Technologies, Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (the recommendation of plaintiffs’
22 counsel weighs in favor of approval).

23 **7. The Presence of a Governmental Participant**

24 No governmental agency is directly involved in this lawsuit, though the National Highway
25 Safety Administration (NHTSA) did conduct a preliminary investigation into some of the same issues.
26 NHTSA ultimately concluded that no further action was warranted; in its view, the 2004-2007 Monster
27 motorcycles did not exhibit a “current safety defect trend” and that fuel leakage on 2004-2007
28 Multistrada motorcycles was unrelated to fuel tank deformation. (Dkt No. 44 (Decl.), Exh. 1 (Opening

1 ODI Resume); Dkt. No. 59 (Decl.), Exh. E (Closing ODI Resume).) The government's decision not to
2 act on class members' complaints casts Plaintiffs' proposed settlement in an even more favorable light.
3 It not only means that class members cannot expect better relief through government intervention, but
4 also is a reminder that the Court or a jury could very well reach the same conclusion that NHTSA did
5 and find that no unreasonable safety hazard exists, leaving class members with no relief.

6 The Attorney General of the United States and Attorneys General of each of the States have been
7 notified of the proposed settlement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, and to
8 date no governmental entity has raised objections or concerns about the proposed settlement with either
9 Plaintiffs or Ducati.

10 **8. The Reaction of the Class Members to the Proposed Settlement**

11 Class members have until December 27, 2011 to comment on the proposed settlement, so this
12 final *Churchill* factor cannot be fully evaluated until that time. Preliminary class reaction is mixed, with
13 some class members concerned that the settlement does not sufficiently address the cosmetic issues
14 associated with fuel tank expansion and stating a desire for a tank made of a material that will never
15 expand, even minimally, or an even longer extended warranty. As the cosmetic claims stand on
16 relatively weak legal footing, Plaintiffs do not believe that they could obtain better relief through further
17 litigation and so continue to believe the settlement should be approved. In addition, the positive
18 feedback received from class members who were not aware of any fuel tank problems and only
19 discovered that their motorcycle's fuel tank was expanding when they received the parties' notice of
20 settlement illustrates the value of immediate relief. (*See* Gibbs Decl. ¶¶ 25 & 26.)

21 Plaintiffs will provide the Court with a complete record of all comments and criticisms received
22 from class members with their reply filing, which is due after the objection and opt-out deadlines. At
23 that time, Plaintiffs and the Court will be in a position to evaluate whether this factor weighs in favor of
24 or against settlement.

25 **9. Evidence of Collusion or Other Conflicts of Interest**

26 Where a proposed settlement is negotiated prior to class certification, as was the case here, the
27 Ninth Circuit has recently emphasized that "consideration of th[e] eight *Churchill* factors alone is not
28 enough to survive appellate review." *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946

1 (9th Cir. 2011). The Court must also scrutinize the settlement “for evidence of collusion or conflicts of
2 interest,” including “more subtle signs that class counsel have allowed pursuit of their own self-interest
3 and that of certain class members to infect the negotiations.” *Id.*

4 One of the warning signs of implicit collusion is when the class receives relief of little value but
5 class counsel receives a hefty fee. Here, Plaintiffs believe that the quality of the settlement they
6 negotiated and the reasonableness of the fees they are asking the Court to award collectively show that
7 Class Counsel did not exchange potential class benefits for increased attorney fees. Class members are
8 receiving valuable repairs—replacement of a new fuel tank alone retails for between \$1000 and \$2000
9 while the other repairs under the settlement can cost hundreds of dollars—and those repairs directly
10 address all the safety problems alleged in Plaintiffs’ complaint. Class members will also receive
11 significantly extended non-cosmetic and cosmetic warranties. There is no indication that counsel sold
12 the class short; rather, class counsel have negotiated a practical solution for class members and did so
13 relatively quickly, recognizing that any delay would reduce the value of the notice and corrective repairs
14 they were seeking. In addition, there is no evidence that class counsel negotiated an inflated fee award
15 for itself. As addressed more fully in the accompanying fee application, the fee cap that counsel
16 negotiated with Ducati and is requesting that the Court award represents a fair compromise of Plaintiffs’
17 statutory right to fees. They are being compensated purely for their time and are not receiving any fee
18 multiplier, as one might expect had counsel betrayed the class’s interests to line their own pockets.

19 Another possible indication of collusion is when class counsel negotiates a “clear sailing”
20 arrangement, under which the defendant will not object to an award of attorney fees up to a certain
21 amount. This may be a sign that the attorney fee request could not withstand a contested motion and so
22 class counsel traded class rights for the defendant’s agreement to a higher fee than ordinary motion
23 practice would permit. Here, Ducati has agreed not to oppose class counsel’s request for fees up to a
24 capped amount, provided that the fees were based solely on the time actually worked by Plaintiffs’
25 counsel on the case, but that was a result of a fee negotiation that Ducati insisted on before it would
26 settle the case—as is its right. *See Staton v. Boeing Co.*, 327 F.3d 938, 971 (9th Cir. 2003) (defendants
27 have a right to assurance as to the limits of their liability exposure, including exposure to any attorney
28 fee award). Class counsel believes their work in this case and the results obtained would justify the fee

