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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VOLKSWAGEN GROUP OF AMERICA, INC., a New Jersey Corporation,

Plaintiff,

v.

ON-LINE ADMINISTRATORS, INC., DBA PEAK PERFORMANCE MARKETING SOLUTIONS, a California Corporation; ON-LINE ADMINISTRATORS, LLC., a California Limited Liability Company; AFFINITIV, INC., a Delaware Corporation,

Defendants.

Case No. 2:23-cv-06599-CAS-JC

Hon. Christina A. Snyder

DEFENDANT'S ANSWERING BRIEF REGARDING DAMAGES

Date: May 19, 2025

Time: 10 a.m.

Ct. Rm.: 8D

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Defendant On-Line Administrators, Inc. dba Peak Performance Marketing Solutions, nka Defendant On-Line Administrators, LLC ("Peak") respectfully submits this Answering Brief to the Opening Brief Regarding Damages ("Motion"), filed by Plaintiff Volkswagen Group of America, Inc. ("VWGoA").

I. INTRODUCTION AND BACKGROUND

The amount of damages sought by VWGoA is grossly excessive and inappropriate. For the reasons explained below, the Court should deny the Motion and find that VWGoA is entitled to an amount in damages that it finds appropriate and permissible and, in any event, in an amount no more than $1,102,770.44.

From approximately 2008 to 2016, VWGoA hired Peak to call Volkswagen and Audi owners to remind them to service their vehicles at Volkswagen and Audi dealerships. The calls were part of VWGoA's Target and Retain After Sales Customers ("TRAC") program. Peak performed under the contract and placed the calls without complaint from VWGoA and without any claim (even to this day) that Peak did anything wrong. Unfortunately, the calls requested by VWGoA got both VWGoA and Peak sued in a class action alleging violations of the Telephone Consumer Protection Act (the "TCPA"). That suit was titled *Trenz et al. v. On-Line Administrators, Inc. et al*, Case No. 2:15-cv-08356 (the "*Trenz* Litigation").

The allegations in the *Trenz* Litigation were run-of-the-mill TCPA allegations, and were ultimately proven meritless. VWGoA and Peak were each defendants, faced with the same claims and legal issues, the same discovery, and the same litigation, but each were represented by different firms. VWGoA and Peak prevailed, entirely. Of the four named Plaintiffs, two dismissed their claims with prejudice, and the other two lost on summary judgment. One of the two that lost on summary judgment filed an appeal, and VWGoA settled with that plaintiff for a nominal sum.

In this case, VWGoA seeks reimbursement for its settlement costs and costs of defense from Peak. Peak maintains that VWGoA is not entitled to any relief

whatsoever – in its view, the parties' contract does not require Peak to defend or indemnify VWGoA and neither does any other legal doctrine. But, as a result of the Court's order granting VWGoA's Motion for Partial Summary Judgment, the primary issue remaining for the trial court to resolve is the amount that VWGoA is entitled to receive to reimburse it for the attorneys' fees and costs it incurred to defend itself in the *Trenz* Litigation. Under the set of Terms and Conditions relied on by VWGoA, assuming defense and indemnification is owed, VWGoA is entitled only to its "***reasonable*** attorneys' fees and other professional fees." (*See* Compl. Ex. D, § 8.1 (emphasis added).)

To help assess whether VWGoA's fees were "reasonable," Peak engaged John S. Pierce—a well-known, well-respected expert in the field, who regularly testifies and opines on the reasonableness of attorneys' fees. Mr. Pierce is eminently qualified. A long-time trial lawyer himself, he lectures on issues germane to the reasonableness of attorneys' fees, and—for the past 34 years—has served as an arbitrator, litigator, consultant, and/or expert witness in a range of legal fee disputes, including toxic tort and pollution cases, trade secret matters, complex environmental contamination and coverage disputes, securities litigation, intellectual property litigation, class action litigation, product liability matters, contract disputes, mass tort litigation, asbestos litigation, complex commercial and business disputes, recording royalty disputes, fee shifting cases, and construction defect cases. Since 1989, he has reviewed and analyzed well over $4.5 billion in law firm invoices reflecting legal fees and costs generated in litigation matters. (*See* Declaration of Jack S. Pierce ("Pierce"), Expert Report attached thereto ("Pierce Report"), at 7.) Not surprisingly, VWGoA has not challenged Mr. Pierce's qualifications.

In this case, Mr. Pierce prepared an extremely detailed report, with substantial supporting exhibits, all of which are attached to the Pierce Declaration. He did so after reviewing pleadings and documents from the *Trenz* Litigation, the billing entries by VWGoA's attorneys in that matter, the billing entries by Peak's attorneys

in that matter, and other materials. VWGoA is also not challenging Mr. Pierce's opinions based on the materials he considered.

In the end, after reviewing the records relating to the *Trenz* Litigation, Mr. Pierce opines that, of the more than $2.2 million billed by VWGoA's attorneys in the underlying litigation, at least $1.05 million was unreasonable. This conclusion is not surprising. As detailed in Mr. Pierce's report and the exhibits thereto, VWGoA employed two separate law firms in the *Trenz* Litigation, and those two firms, combined, staffed the matter with 29 timekeepers. (Pierce Report at 15–16.) The staffing was also top heavy—there were at least 11 partners to just five associates. (*Id.*, Exs. B-1P and B-2P.) And the number of hours was extraordinarily high—the two firms, together, billed 4,720 hours to the matter. (*Id.* at 15–16.) Many of those entries were redacted, were vague, or were block billed. (*Id.* at 20–38.)

Notably, part of Mr. Pierce's analysis was to compare the time incurred by VWGoA's two law firms in the *Trenz* Litigation (Baker & Hostetler LLP and Faegre Drinker Biddle & Reath LLP) to the time incurred by Peak's law firm in the *Trenz* Litigation (Sheppard, Mullin, Richter & Hampton LLP). As detailed in Mr. Pierce's report, VWGoA and Peak were sued for the same claims based on the same set of facts; they each engaged in the same or similar discovery and depositions; and they each filed the same or similar pleadings. Despite facing substantially same amount of labor as VWGoA, Peak's firm staffed the matter with just 15 total time keepers—about half the number of time keepers as VWGoA's attorneys. Peak's firm also staffed the matter more appropriately, with just two partners and the rest either associates or paralegals. (*Id.* Ex. B-3P.) And, overall, Peak's attorneys billed just 1,823 hours to the matter. (*Id.* at 16.) The differences are astounding: VWGoA employed twice the number of firms, who staffed the matter with about twice the number of timekeepers, all of whom billed, in the aggregate, about 2.5 times more hours, ultimately resulting in fees that were about twice as much. (*Id.* at 16–17.)

Despite VWGoA's fees being twice as much or more as Peak's on nearly every metric, in the end, based on his review, Mr. Pierce opines that VWGoA's hours should be reduced, not by half, but by 85% of half (or 42.5%).

As a result, Mr. Pierce concludes that, of the more than $2.2 million in legal fees and costs claimed by VWGoA, **no more than $1,096,770.44 should be allowed**. As set forth below, the Court should concur with Mr. Pierce's opinions and reduce the fee request accordingly. In addition, as explained below, VWGoA should be awarded no more than $6,000 for the settlement of the matter, and should not be awarded pre-judgment interest. As a result, Peak respectfully requests that the Court deny the Motion and find that VWGoA is entitled to an amount in damages that it finds appropriate and permissible and, in any event, in an amount no more than **$1,102,770.44.**

II. THE COURT SHOULD REDUCE VWGOA'S FEE REQUEST

A. Applicable Legal Standard

The parties generally agree on the legal standard applicable to the Court's determination of the "reasonable" amount of fees that VWGoA can be awarded. As set forth in the Michigan Rules of Professional Conduct, Rule 1.5(a): "The factors to be considered in determining the reasonableness of a fee include the following: (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." (emphasis added)).

In this case, Peak is not challenging the reasonableness of VWGoA's requested fees under factors (2) through (8). Rather, Peak's challenge is to the first factor – "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." *Id.* Not surprisingly, excepting the hourly rates of attorneys (which are not at issue), the most relevant factor in the Court's decision is the "skill, time, and labor" involved in defending the *Trenz* Litigation. *Wood v. Detroit Auto Inter-Ins. Exch.,* 413 Mich. 573, 588 (1982), *Smith v. Khouri,* 481 Mich. 519, 531 (2008).

B. The *Trenz* Litigation Was A Standard TCPA Action That Did Not Present Novel Or Difficult Questions

In their Motion, VWGoA asserts that the *Trenz* Litigation was "large and burdensome in scope," suggesting that the case presented novel or difficult issues. That is not correct. It was a standard TCPA case, alleging that class members were contacted with an autodialer. The two main issues were (1) whether an autodialer was used; and (2) whether class members consented. TCPA cases, particularly back then, were a dime a dozen, and the law was well-developed. Ultimately, summary judgment was entered in favor of Defendants as to two of the named-Plaintiffs, and the other two named-Plaintiffs dismissed their claims with prejudice. (*See* Declaration of Jay T. Ramsey ("Ramsey Decl.") ¶¶ 2-4.)

The case lasted almost seven years – a long time for a TPCA case – but that was because some of the initial rulings by the judge originally assigned to the matter (Birotte) were later reconsidered and re-ruled upon by the re-assigned judge (Staton). (Ramsey Decl. ¶¶ 2-5.) There was also the start of the pandemic in 2020. (*Id.*) Further, while there were many docket entries in the *Trenz* Litigation (271), that is not particularly large, and there were only 12 substantive noticed motions. (*Id.*) By comparison, in the case that VWGoA relies on throughout its brief – *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB SHX, 2015 WL 1746484,

at *1 (C.D. Cal. Mar. 24, 2015), aff'd, 847 F.3d 657 (9th Cir. 2017) – there were 30 noticed motions and nearly 700 docket entries.

Discovery in the *Trenz* Litigation was also fairly limited, at least by the standards of major litigation in federal court. There were ten depositions total (Karlsgodt Decl. ¶ 25) – *not* ten per side – and those included depositions of named-plaintiffs in a TCPA case, which are generally straightforward, and were straightforward in this case. (Ramsey Decl. ¶¶ 6-7.) VWGoA notes that it produced approximately 5,000 pages of documents (Karlsgodt Decl. ¶ 28), but that is small compared to litigation these days – indeed, that production, printed in full, fills just two bankers' boxes. (*Id.*) In addition, the 5,000 page production consists of just 1,985 documents total. (*Id.*)

The point is, the underlying *Trenz* Litigation lasted a long time, and perhaps involved more litigation than many TCPA actions, but it was not a large, cumbersome litigation, with numerous witnesses, many parties, novel legal issues, or really anything else of note.

C. <u>The Time And Labor Spent By VWGoA Was Unreasonably High</u>

The Pierce Report details the excessive billing by VWGoA's attorneys. (Pierce Report pgs. 15-20.) In the end, he opines that, of the more than $2.2 million in legal fees and costs sought by VWGoA, no more than $1,096,770.44 should be categorized as reasonable. In summary:

(1) VWGoA employed two separate law firms in the *Trenz* Litigation – Baker Hostetler ("Baker") and Faegre Drinker Biddle & Reath LLP ("Faegre").

(2) Baker Hostetler staffed the matter with 19 total time keepers, and Faegre staffed the matter with 10 timekeepers. There were thus 29 total time keepers on the matter for VWGoA. That is unreasonable and excessive for almost any action, and certainly a TCPA litigation.

(3) The staffing was also partner heavy. According to the Karlsgodt Declaration (¶¶ 37-48), Baker's staffing included five partners (Karlsgodt, Forsheit,

Colton, Flink, and Donley), five associates (Goldberg, Henderson, Holder, Hooper, Pearson), and two non-attorneys. According to the Van Oort Declaration (¶¶19-24), Faegre's staffing included at least three partners (Van Oort, McCann, Sole) and three associates (Washburn, Murphy, and Koehler). There were thus at least eight partners on the matter for VWGoA. Again, that is unreasonable.

(4) The total hours for the two firms were excessive. For its part, Faegre billed 260.54 hours, and according to the Van Oort Declaration, they assisted with a Rule 23(f) petition, two mediations, and follow-on settlement discussions. (Van Oort Decl. ¶ 9.) Assuming 60 hours for the Rule 23(f) petition, that's 100 hours from Faegre, *per mediation*. Of course, Baker also incurred time attending the same settlement conferences, and so there is an unavoidable duplication of effort.

(5) Baker's hours were astronomical. They billed a total of 4,460.10 hours to the matter. By comparison, Sheppard Mullin (counsel for Peak in the underlying case), billed a total of just 1,823.50. The attorneys for VWGoA thus billed almost 2.5 times more hours than the attorneys for Peak. (Pierce Report, pgs. 15-20.) In fact, by every metric, VWGoA's attorneys staffed the matter and/or billed hours more than double Peak's attorneys. Below is a chart from Pierce's Report (pg. 19), detailing the overall staffing, the total hours, and the associated fees. In each case, VWGoA's attorneys were at least double.

Excessive Staffing, Hours, and Fees
[Percentage Comparison of VW to Peak's Numbers]

	Party	Peak	VW	Difference	VW Percent Greater
1.	**Staffing**	15	29	**14**	**193.33 %**
2.	**Hours**	1,823.50 hrs.	4,720.64 hrs.	**2,897.14 hrs.**	**258.88%**
3.	**Computed Fees**	$1,010,714.50	$2,054,292.45	**$1,043,577.95**	**203.25%**

(6) Pierce did more than look at the total hours. Pierce looked at two major projects in the case – briefing on a Motion to Decertify and Supplemental Briefing on the same motion. He analyzed the billing entries of each firm, confirming the hours spent on the project, and confirming that the work was the same or similar. In each case, VWGoA's attorneys, in total, spent at least 2.5 more hours than Peak's, generating about double the total fees. (Pierce Report, pgs. 17-18.)

(7) VWGoA attempts to blunt the force of these comparisons, claiming that VWGoA's attorneys took on vastly more work. That is false:

- Pierce analyzed the billings of Baker, Faegre, and Sheppard Mullin, concluding that counsel for VWGoA and Peak performed largely the same tasks, assisted in preparing the same motions, engaged in the same discovery, and so on. While there may be some variability in the amount different firms spend on the same activities, a multiple of 2.5 times is unreasonable.
- Pierce specifically analyzed the billings of different motions, where counsel for each party worked jointly on the projects. That review confirmed that the same work was done by both sets of attorneys.
- In his declaration, Karlsgodt claims that "attorneys at Baker were tasked with drafting the motion for certification and preparing lengthy support documents" (Karlsgodt Decl. ¶ 17), suggesting that Peak's attorneys were not involved. Both side's attorneys were involved equally in the preparation of documents. In this instance, Baker provided an initial draft (dated October 11, 2018), and then Peak's attorneys provided a substantial re-write (dated October 12, 2018). The parties then worked together to draft declarations (from each of their clients), and prepare documents (again, from each of their clients). (Ramsey Decl. ¶

9.) Again, Pierce recognizes that different firms and attorneys can staff and work on a matter differently, but VWGoA's attorneys spending more than double the time as Peak's is unreasonable.

- Karlsgodt similarly claims that "VWGoA took the laboring oar with preparing a majority of the supplemental brief and supporting documents." (Karlsgodt Decl. ¶ 19.) Again, both sides participated in preparing the draft. In this case, VWGoA's attorneys and Peak's attorneys had different views on how the supplemental briefing should be done, and so each worked on competing drafts. Ultimately, the two drafts were merged together and then edited by each side. (Ramsey Decl. ¶ 10.) Again, Pierce recognizes that different firms and attorneys can staff and work on a matter differently, but VWGoA's attorneys spending more than double the time as Peak's is unreasonable.
- Karlsgodt notes that the case "involved extensive third party investigations, discovery and fact gathering from numerous dealers across the country." (Karlsgodt Decl. ¶¶ 26-27.) That was true, but because VWGoA didn't want to be seen as subpoenaing its own dealers, Peak's counsel handled all of those subpoenas. Bridget Russell, an associate at Sheppard Mullin at the time (now special counsel), took the laboring oar on those subpoenas and follow-up. Sheppard Mullin's records reflect that she billed approximately 150 hours to that task. (Ramsey Decl. ¶ 11.) VWGoA's attorneys would also have been involved, including in reviewing the records, but to suggest that VWGoA's attorneys handled it, to the exclusion of Peak's, is false.

- Karlsgodt states that Billy Donley and Rachel Hooper, at Baker, were brought on to "focus[] on trial preparations." (Karlsgodt Decl. ¶ 30.) The matter never got close to trial – in fact, although a class was certified, class notice never went out. (Ramsey Decl. ¶ 11.) In total, VWGoA's "trial team" – Donley and Hooper – billed 1,519.5 hours to the matter. (*See* Pierce Report, Exhibit B-1P.) It's unclear why so much of their time would have been needed, or why it would not have been duplicative of what Karlsgodt and Pearson were "focused on briefing and TCPA issues." (Karlsgodt ¶ 30.) Worse, each of them billed over 700 hours to the matter (721.4 for Donley; 798.1 for Hooper), which was roughly the same as Karlsgodt (726.9 hours), who was lead counsel on the case for VWGoA. (*See* Pierce Report, Exhibit B-1P.) All of this duplication was unreasonable.

(8) In the end, although VWGoA's attorneys billed more than 2.58 times the hours as Peak's attorneys, resulting in billings about double of Peak's attorneys, Pierce opines that a reduction of just 85% of the difference (or about 42.5% of the total) is appropriate. As Pierce notes, in his opinion, "the 15% difference is a recognition that firms may approach the same legal tasks differently." (Pierce Report, pgs. 19-20.)

(9) In addition to the excessive, duplicative billing, VWGoA's billing entries are littered with vague entries, block billing, and redactions. (*See* Pierce Report, pgs. 20-37.) Pierce opines that reducing the hours on these entries is appropriate and necessary. These reductions are relatively small, resulting in reduced fees of just $160,132.57.

(10) Finally, Pierce's report details that there are fee discrepancies in what was actually performed, compared to what was actually billed, resulting in overbilling of $87,172.05. (Pierce Report, pg. 40, Exhibits D-1 and D-2.)

* * *

In total, after reducing VWGoA's fees for the unreasonable number of hours, and further reducing time based on vague entries, block billing, and redactions (all without double counting the reductions), and further reducing fees based on incorrect billings, Pierce concludes that, of the more than $2.2 million requested by VWGoA, no more than $1,096,770.44 should be categorized as reasonable. (Pierce Report, pg. 40.)

D. VWGoA's Expected Attacks On Pierce's Report Are Either Meritless Or Immaterial

VWGoA filed a motion in limine to exclude or limit Pierce's opinions. The Court denied the motion as moot, but Peak expects that VWGoA will reargue those points. According, Peak addresses those arguments below.

1. VWGoA Has Wrongly Argued That Mr. Pierce's Opinions, Comparing VWGoA's Fees To Peak's Fees Is Irrelevant Under Michigan Law

VWGoA has argued that Pierce's comparisons of the hours spent by VWGoA's attorneys to Peak's attorneys are not appropriate. This argument should be rejected. As explained above, time and labor is a primary factor in determining the reasonable of a fee request. Of course, if the time and labor is a factor to be examined, evaluating one law firm's fees with the fees of another law firm representing a different party in the same case is relevant. How could it not be? VWGoA and Peak were sued for the ***same*** thing, based on the ***same*** facts; they each engaged in the ***same or similar*** discovery and depositions; and they each filed the ***same or similar*** pleadings. The fact that Peak's counsel incurred fees and costs that were, by all measures, ***half*** of those incurred by VWGoA's counsel—despite the

two parties having engaged in nearly identical discovery and motion practice—is relevant and probative evidence of whether VWGoA's fees were reasonable. Consistent with this, the law, including in Michigan, holds that comparisons between firms in the same matter is relevant to whether the fees of one firm were reasonable. *See, e.g.*, *Poly-Flex Const., Inc. v. Neyer, Tiseo & Hindo, Ltd.*, 600 F. Supp. 2d 897, 919 (W.D. Mich. 2009) (noting that the "great disparity between the fees paid by the two parties" is relevant to the reasonableness of a fee request); *see also In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984) (concluding that evidence of fees and expenditures of other parties may be relevant to the issue of the reasonableness of the petitioner's fees and leaves questions of discovery on this issue to the informed discretion of the district court); *Naismith v. Professional Golfers Asso.*, 85 F.R.D. 552, 563 (N.D. Ga. 1979) (concluding that the number of hours spent by defendants counsel, their billing rates, and the total fees are relevant to assessing reasonableness of plaintiff's fees); *Stastny v. S. Bell Tel. & Tel. Co.*, 77 F.R.D. 662, 663–64 (W.D.N.C. 1978) ("In a contest over what time was reasonably and necessarily spent in the preparation of a case, it is obvious that the time that the opposition found necessary to prepare its case would be probative. Each party must prepare to question the same witnesses, must review the same documents and other evidence, and must anticipate a presentation by the opposition of a complexity related to the facts in issue.").

2. VWGoA Has Wrongly Argued That Mr. Pierce's Testimony Challenging Redacted, Vague, and Block Billed Time Entries Is Inadmissible

In part of his opinion, Mr. Pierce opines that the fees incurred by VWGoA's attorneys should be reduced based on vague billing entries, redactions in the entries (rendering them vague or intelligible), and/or block billing. (*See* Pierce Report, at 20–38.) In the end, the total amount that Mr. Pierce opines should be reduced is about $60,000 for vague billing entries; $15,000 for block-billed entries; and

$86,000 for redacted billing entries (for a total reduction of about $161,000). (*Id.* at 38–39.) Such reductions are standard fare and are made by courts all the time, including in Michigan. *See, e.g.*, *Int'l-Matex Tank Terminals-Ill. v. Chem. Bank*, No. 1:08-CV-1200, 2010 WL 3222515, at *8 (W.D. Mich. June 16, 2010), *report and recommendation adopted sub nom. Int'l-Matez Tank Terminals-Ill. v. Chem. Bank*, No. 1:08-CV-1200, 2010 WL 3238917 (W.D. Mich. Aug. 16, 2010); *Gratz v. Bollinger*, 353 F. Supp. 2d 929, 939 (E.D. Mich. 2005); *see also, e.g.*, *Vicki Welch v. Metropolitan Life Insurance Co*. 480 F.3d 942 (9th Cir. 2007); *Apple, Inc. v. Samsung Elec. Co., Ltd*., No. C 11–1846 LHK (PSG), 2012 WL 5451411, at *5 (N.D. Cal. Nov. 7, 2012); *Ctr. for Food Safety v. Vilsack*, No. C–08–00484 JSW (EDL), 2011 WL 6259891, at *8 (N.D. Cal. Oct. 13, 2011).

Despite the above, VWGoA previously relied on a single Michigan case, *Lakeside Retreats LLC v. Camp No Counselors LLC*, 340 Mich. App. 79, 98 (Mich. Ct. App. 2022), to support its contention that the format of billing entries is not relevant to the reasonable fee analysis. In *Lakeside Retreats*, the court declined to reduce a fee request based on certain time entries being challenged in that case. But that does not mean, in a different case, with different time entries, reductions would not be appropriate. Indeed, as noted above, federal courts applying Michigan law have considered the format of billing entries in determining the reasonableness of the claimed fees, and have discounted those fees where, as here, block billing was used. *See, e.g.*, *Int'l-Matex Tank Terminals-Ill.*, 2010 WL 3222515, at *8 (discounting various billing entries and noting that "[b]ecause the . . . activities are 'block billed' with other, proper charges, it is not possible to excise with precision the time improperly billed for th[ese] activit[ies]. Any risk of imprecision in this regard should fall on plaintiff, because of the inadequate time records in this regard."); *Gratz*, 353 F. Supp. 2d at 939 ("The Court believes that a ten percent (10%) reduction in Maslon's requested fees is appropriate due to its attorneys' block billing and vague entries.").

3. VWGoA's Other Prior Attacks On Mr. Pierce's Opinions Are Immaterial

VWGoA also previously quibbled with certain aspects of Mr. Pierce's testimony and analysis. However, errors, weaknesses, or challenges to a calculation go "to the weight of an expert opinion, not its admissibility." *Rodriguez v. JLG Indus., Inc.*, No. CV1104586MMMSHX, 2012 WL 12883784, at *11 (C.D. Cal. Aug. 3, 2012) (citing *United States v. Prime*, 431 F.3d 1147, 1153 (9th Cir. 2005)). The Court should therefore reject any argument by VWGoA to exclude Mr. Pierce's testimony and report. A few examples bear this out.

First, in a handful of places, VWGoA previously argued that Mr. Pierce's analysis is flawed because he should have included certain hours in part of his analysis, when he did not, or excluded other hours when he included them. Such challenges are properly a rebuttal expert. Such challenges do not go to whether Mr. Pierce's testimony is admissible. In any event, a few entries here and there is not material in the scope of this case, or call into question Mr. Pierce's opinions.

Second, in the past, VWGoA cherry picked a few stray lines from Mr. Pierce's deposition testimony, citing them in an effort to suggest that Mr. Pierce could not explain his analysis. But even a cursory review of just the few pages of his deposition testimony that VWGoA included shows that Mr. Pierce explained his analysis and what went into it. The fact that counsel can pluck one line out of testimony and misconstrue it out of context is not a basis to conclude that Pierce's testimony is inadmissible, and it certainly is not enough to discredit the opinions.

III. THE COURT SHOULD AWARD ONLY $6,000 WITH RESPECT TO VWGOA'S SETTLEMENT OF THE *TRENZ* LITIGATION

VWGoA settled with ***one*** named-plaintiff in the underlying *Trenz* Litigation, agreeing to pay $6,000 to Plaintiff Trenz and the remainder ($269,000) to Trenz's attorneys. (*See* Motion at pgs. 26-27.) This settlement was entered into after the trial court had entered summary judgment on Trenz's individual claims, in a case

that had been de-certified. Trenz was appealing the entry of summary judgment. Either way, there was no basis that Trenz could recover any attorneys' fees, even if he prevailed on appeal and prevailed in the trial court thereafter. The TCPA does not include any provision for the award of attorneys' fees, and there was no class action.

As VWGoA notes, the indemnity provision requires indemnification of "***reasonable***…. settlements." VWGoA's decision to enter into a wholly unreasonable settlement, in an action where it had already prevailed, and then to pay $269,000 to the plaintiff's attorney, when there was no right to such fees at all, does not give it a right to get that unreasonable amount from Peak. Accordingly, the Court should award VWGoA no more than $6,000 with respect to the settlement.

IV. THE COURT SHOULD NOT AWARD PRE-JUDGMENT INTEREST

VWGoA requests interest under M.C.L. § 600.6013(3). But VWGoA does not explain how it calculates the prejudgment interest at all and, of course, any such calculation would need to be modified, depending on the Court's ultimate award. Accordingly, VWGoA's request for prejudgment interest should be denied.

V. CONCLUSION

For the foregoing reasons, Peak respectfully requests that the Court deny the Motion and find that VWGoA is entitled to an amount in damages that it finds appropriate and permissible and, in any event, in an amount no more than $1,102,770.44. That consists of $1,096,770.44 in attorneys' fees and costs, and $6,000 in settlement costs.

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Dated: May 2, 2025

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Jay T. Ramsey*
JAY T. RAMSEY
KEVIN MURPHY

Attorney for Defendant
On-Line Administrators, Inc., n/k/a On-Line Administrators, LLC