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January 23, 2021

VIA ECF
Cathy L. Waldor, M.J.
United States District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *Gelis v. BMW of North America, LLC,*
Case No. 17-cv-7386-SDW-CLW (D.N.J.)

Dear Judge Waldor:

As you know, we represent Defendant BMW of North America, LLC ("BMW NA") in this matter. We write regarding Plaintiffs' reply submissions in further support of their application for attorneys' fees and costs (DE 113). In particular, BMW NA objects to Plaintiffs' submission of new evidence, in the form of the Declaration of Kurt Kleckner (DE 113-4), and the arguments in their reply brief based on that new evidence.

Mr. Kleckner is a self-described expert in "valuing" automotive settlements. Plaintiffs have submitted Mr. Kleckner's declaration in an effort to bolster their demand for the high end of the parties' agreed-upon range of attorneys' fees, expenses, and class-representative service payments. BMW NA submits that the Court should strike the Kleckner Declaration and the arguments based upon it.

First, as the Court is aware, it is improper to introduce new evidence or arguments in reply papers. That's because it's "axiomatic that reply briefs should respond to the respondent's arguments or explain a position in the initial brief that the respondent has refuted." *Elizabethtown Water Co. v. Hartford Casualty Ins. Co.*, 998 F. Supp. 447, 458 (D.N.J. 1998). "The rationale for this rule is self-evident—because the local rules do not permit sur-reply briefs, see L. Civ. R. 7.1(d), a party opposing [a motion] has no opportunity to respond to newly minted arguments contained in reply briefs." *Bayer AG v. Schein Pharmaceutical, Inc.*, 129 F. Supp. 2d 705, 716

(D.N.J. 2001) (citing *Santiago v. City of Vineland*, 107 F. Supp. 2d 512, 553 (D.N.J. 2000)). For this reason alone, the Kleckner Declaration should be stricken.[1]

Second, this is not a common-fund settlement and the Kleckner Declaration is inapplicable. It's self-evident that Plaintiffs have submitted the Kleckner Declaration solely for the purpose of buttressing their demand for $3,700,000 in attorneys' fees, expenses, and service awards—the high end of the parties' "high-low" agreement. Plaintiffs have—as BMW NA predicted (DE 78, at 4)—introduced Mr. Kleckner's "valuation" to justify the $3,700,000 demand and proclaim that his report "provides a solid basis for the valuation of the settlement to conduct a percentage of recovery calculation to cross-check the lodestar." (DE 113 at 9). However, as BMW NA has clearly demonstrated in its opposition brief, *this is not a common-fund case, and percentage-of-recovery is irrelevant*. (DE 96 at 2-5.) For this reason, as well, the Court should strike the Kleckner Declaration.[2]

Finally, if the Court is inclined to consider the Kleckner Declaration—and it shouldn't—BMW NA should be permitted an opportunity to retain its own expert, depose Mr. Kleckner, and submit a rebuttal report and sur-reply brief. Doing so will, of course, take time and result in the postponement of the Final Approval Hearing and delay providing substantial relief to the Class if the Court grants Final Approval. Or, the Court could simply strike the Kleckner Declaration and determine Plaintiffs' fee award under the (appropriate) lodestar method.

We thank the Court for its consideration and await its response to this request.

Respectfully,

Christopher J. Dalton

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[1] Plaintiffs contend they were unable to submit the Kleckner Declaration with their moving papers because BMW NA was not able to provide certain "valuation" information that the Court had ordered until December 8, 2020. (DE 113 at 9 n.6.) Plaintiffs fail to note that BMW NA told them, several days earlier, that the information was being gathered, and BMW NA would agree to extend their filing date in order to allow them to provide that information to their proposed expert—as, indeed, the Court had suggested. *See* Exhibit A, attached. Plaintiffs chose instead to spring their "expert report" in *reply*. The Court should not permit motion-by-surprise.

[2] Applying Plaintiffs' logic, however, shows that the Kleckner Declaration supports that an award of $1,500,000 is a *really* good deal for the class—after all, if Plaintiffs want to call this a common-fund, then more of the fund should go to the class. But it's not a common-fund settlement, and Plaintiffs' counsel don't get a piece of the action.

EXHIBIT A

Dalton, Christopher

From: Dalton, Christopher
Sent: Friday, December 04, 2020 4:49 PM
To: Gary Graifman; DiMarco, Argia J.
Cc: Randee Matloff (rmatloff@nagelrice.com); Thomas P. Sobran
Subject: RE: Gelis v. BMW Settlement Agreement

Hello Gary,

[redacted]

We should have the valuation information that Judge Waldor ordered the beginning of next week. If that presents a timing problem on the fee application, we can work with you, as Judge Waldor indicated.

[redacted]

Kind regards,

Chris

Christopher (Chris) Dalton

Newark Office Managing Shareholder
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