UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ARTEM V. GELIS, BHAWAR PATEL, ROBERT MCDONALD, JAMES V. OLSON, GREGORY HEYMAN, SUSAN HEYMAN, DEBRA P. WARD, DARRIAN STOVALL, ALEX MARTINEZ, AMANDA GOREY, CHRIS WILLIAMS, ASHOK PATEL, KENNETH GAGNON, MICHAEL CERNY, MARIA MEZA, ANDRE MALSKE, NICOLE GUY, DAVID RICHARDSON, STACEY TURNER and ERIC T. ZINN, individually and on behalf of all others similarly situated, **Plaintiffs,** **v.** **BMW OF NORTH AMERICA, LLC,** **Defendant.**	**Civil Action No. 17-cv-7386 SDW-CLW**

PLAINTIFFS' BRIEF IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. PRELIMINARY STATEMENT

This brief is submitted in support of the unopposed motion for preliminary approval of a class action Settlement Agreement (the "Agreement"[1]) between Plaintiffs Artem V. Gelis, Bhawar Patel, Robert McDonald, James V. Olson, Gregory Heyman, Susan Heyman, Debra P. Ward, Darrian Stovall, Alex Martinez, Amanda Gorey, Chris Williams, Ashok Patel, Kenneth Gagnon, Michael Cerny, Maria Meza, Andre Malske, Nicole Guy, David Richardson, Stacey Turner and Eric T. Zinn (herein "Plaintiffs" or "Class Representatives" and BMW Of North America, LLC. (herein "BMW NA"). As detailed below, this Settlement, involving a nationwide settlement class, includes both a reimbursement and warranty extension as Settlement benefits. The Settlement satisfies the requirements of Fed. R. Civ. Proc. 23 and is fair, reasonable and adequate. Consequently, the Court should grant this motion, preliminarily approve the Settlement, approve the form of notice together with the notice program and set a schedule for the final fairness hearing. A copy of the Agreement is annexed to the Declaration of Gary Graifman as Exhibit 1.

The underlying litigation arises from Plaintiffs' allegations that BMW NA sold passenger motor vehicles utilizing series N20/N26 engines that incorporated timing and oil pump drive chain assemblies (herein the "chain assemblies" or "chain modules") that prematurely failed. Manifestation of either chain failure can result in an unanticipated loss of power and/or catastrophic failure, stalling and a limited ability to accelerate or maintain vehicle speed and in some instances sudden and catastrophic engine self-destruction. BMW NA's German parent company Bayerische Motoren Werke Aktiengesellschaft ("BMW AG") designed and constructed the class engine with chain assemblies that allegedly prematurely fail shortly after

[1] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the Agreement.

expiration of the 4 year / 50,000-mile limited powertrain warranty. BMW NA extended the engine warranty for the chain assembly components to 7 years / 70,000 miles in late 2017 shortly after the initial Complaint in this action was filed. Replacement of chain assembly components involves considerable expense. Replacement of both chain assemblies (primary timing chain, tensioner and rails / guides together with the oil pump / counter balance shaft chain and sprockets) costs approximately $4,500.00-$5,000.00 if there is no engine damage. Plaintiffs and putative class members received estimates upwards of $12,000.00 for engine replacement with a BMW remanufactured engine where chain assembly failure destroyed the engine.

This Settlement addresses the conduct complained of in the litigation and provides valuable benefits to current and former owners and lessees (putative Class Members) of approximately 575,024 Class Vehicles in the United States. The Settlement contains two components to the benefits provided. First, there is a reimbursement program available to Class Members who incurred eligible out-of-pocket expense(s) for costs (parts and labor) not previously reimbursed to repair or replace one failed timing chain module and/or one failed oil pump drive chain module. If either chain assembly failure occurred within 7 years/ 70,000 miles of the Class Vehicle's in-service date, the reimbursement rate is 100% for repairs including any associated engine damage. Chain module failures occurring subsequent to 7 years and up to and including 8 years and 100,000 miles are also subject to reimbursement in accordance with a contribution schedule. Second, the Settlement provides, prospective relief in the form of an extended warranty. Under the Settlement's further extended warranty, class members who experience an engine chain failure prospectively, are entitled to repair or replacement of affected parts (timing chain module, oil pump drive chain module, engine) in Class Vehicles, up to 8 years/100,000 miles (whichever comes first) at an authorized BMW Center subject to the contribution schedule after 7

years/70,000 miles. Additionally, for one year from the Effective Date of the Settlement, ANY Class Vehicle with less than 100,000 miles, regardless of the Class Vehicle's age, that experiences timing chain module failure, oil pump drive chain module failure, or engine damage/failure due to timing chain module or oil pump drive chain module failure, may go to an authorized BMW Center for repair, subject to the contribution schedule detailed below.

Additionally, BMW NA will pay the cost of notice to the class and for claims administration. Although the parties have not agreed on attorneys' fees and case expenses, they have established a high/low formula under which Plaintiffs' Counsel will not apply for a fee award greater than $3.7 million and defense counsel have agreed not to contest any fee below $1.5 million. In addition, the parties have agreed that the Settlement Class Representatives may receive Service Payments in the amount of $1,000 each for each Settlement Class Representative ($20,000 in the aggregate) which will come out of the amount awarded as Attorneys' Fees and Costs under Section VIII C of the Agreement.

The proposed Settlement provides valuable relief to the Class and should be approved.

II. PROCEDURAL HISTORY OF THE CASE

On September 9, 2017, after months of pre-suit investigation, speaking with potential class members, and ascertaining the nature of the class vehicle engine defects, Plaintiffs Artem V. Gelis and Bhawar Patel filed the initial class action complaint against BMW NA and BMW AG[2] in the U.S. District Court for the District of New Jersey. In November 2017, a second related class action was filed in New Jersey that was later consolidated with *Gelis* on January 24, 2018. On February 27, 2018 the Court granted a motion to appoint Nagel Rice, LLP, Kantrowitz,

[2] Plaintiffs voluntarily dismissed BMW AG without prejudice on September 24, 2018 in exchange for their cooperation in discovery including production of design drawing and technical information.

Goldhamer & Graifman, P.C. and Thomas P. Sobran, P.C. as Interim Class Counsel pursuant to Rule 23(g).

A Consolidated Amended Complaint ("CAC") was filed in March of 2018. On April 17, 2018, BMW NA filed a motion to dismiss which the Plaintiffs opposed on June 7, 2018, with a reply brief filed on June 22, 2018. The Court issued its Opinion and Order on Oct. 30, 2018, declining to dismiss substantially all of Plaintiffs' claims. *See Gelis, et al. v. BMW of N. Am., LLC*, 2018 WL 6804506 (D.N.J. Oct. 30, 2018). Plaintiffs thereafter filed their Consolidated Second Amended Class Action Complaint on February 4, 2019. BMW NA filed an Answer to the Consolidated Second Amended Class Action Complaint on March 8. 2019.

The operative Complaint incorporates claims for a proposed nationwide class, and in the alternative, state classes representing New Jersey, Illinois, Florida, New York, Utah, Colorado, Texas, Alabama, Oklahoma, Massachusetts, California, Wisconsin, Oregon, and North Carolina vehicle owners / lessees. The Complaint includes claims for breach of express warranty; breach of implied warranty of merchantability; violation of Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1(A); violation of the consumer fraud/deceptive trade practices statutes of the states with named Class Representatives; unjust enrichment; and a request for injunctive and declaratory relief.

The parties participated in several Case Management Conferences and exchanged formal discovery in the form of Interrogatories, Requests for Production of Documents and Requests for Admissions. BMW NA provided a rolling production of voluminous documents and produced materials provided by BMW AG. The parties then decided to attempt an amicable resolution and exchanged additional informal discovery in furtherance of a settlement. That was followed by two full-day mediations with retired United States District Judge Stephen Orlofsky. The first session

occurred on July 31, 2019 and a term sheet regarding the substantive terms was executed on November 12, 2019. A second mediation was held with Judge Orlofsky on November 18, 2019 to address the open issue of legal fees. Additionally, Magistrate Judge Cathy L. Waldor conducted an in-person settlement conference on February 14, 2020.

As a result of arm's-length negotiations, both before, during and after the mediation, counsel for the parties reached an agreement to settle this case. Counsel for the parties did not discuss the appropriateness or amount of any application by Plaintiff's Counsel for an award of attorneys' fees and expenses until the substantive terms of the Settlement had been negotiated at arm's-length and agreed upon.

The finalization of the merits Settlement and accompanying Exhibits now presented to the Court for approval was achieved on November 12, 2019. The issue of attorneys' fees and expenses remains open.

III. THE SETTLEMENT TERMS ARE FAIR, REASONABLE AND ADEQUATE

The Settlement Class herein is defined as follows:

> All current (as of the Effective Date) and former owners and lessees in the United States, including the District of Columbia and Puerto Rico, of certain of the following U.S.-specification BMW vehicles distributed for sale, registered, and operated in the United States, including the District of Columbia and Puerto Rico:

Model Description	Model Years
X1 SAV	2012 - 2015
X3 SAV	2013 - 2015
X4 SAV	2015
Z4	2012 - 2015
228i Coupe, Convertible	2014 - 2015
320i Sedan	2012 - 2015
328i Sedan, Sports Wagon, Gran Turismo	2012 - 2015
428i Coupe, Convertible, Gran Coupe	2014 - 2015

428i xDrive	2014 - 2015
528i Sedan	2012 - 2015

**Model Years are not fully indicative of actual Class Vehicles, which will depend on production ranges.*

Excluded from the Class: Defendant, as well as Defendant's affiliates, employees, officers, and directors, attorneys, agents, insurers, third-party providers of extended warranty/service contracts, franchised dealers and their owners and immediate family members, independent repair/service facilities and their owners and immediate family members, fleet owners and operators, rental companies and vehicles, the attorneys representing Defendant in this case, the Judges and Mediator to whom this case is assigned and their immediate family members, all persons who request exclusion from (opt-out of) the Settlement, vehicles with a salvage title or deemed a total loss, vehicles purchased from salvage yards/junkyards/recyclers, anyone claiming personal injury or property damage other than to a Class Vehicle or through subrogation, all persons who previously released any claims encompassed in this Settlement, and vehicles transported outside the United States.

A. THE BENEFITS TO THE CLASS UNDER THE SETTLEMENT

Under the Settlement, there is no upper limit to the amount that will be available to pay Settlement Class Members' valid claims. To qualify for a benefit under this Settlement, Settlement Class Members must timely submit a completed Claim Form by the Claim Deadline. (*See* Section IV (5) and Exhibit B). This can be done through a portal on the Settlement Website or by mail.

The relief offered is multi-faceted. BMW NA will continue to honor the previously extended 7 year/70,000 mile engine chain assemblies warranty extension in place. This warranty extension was implemented in late 2017, shortly after this class action was initially filed. It extended the warranty for the class engine timing chain assembly and oil pump drive chain assembly from the original 4 year/50,000 miles. There is also a reimbursement program for

otherwise unreimbursed past chain assemblies repair, costs incurred prior to the earlier of 8 years/100,000 miles before the Effective Date.

For vehicles with less than 7 years/70,000 miles whose owners paid to have the chain assembly and related engine repairs performed prior to the extension of the warranty, BMW will reimburse 100% of invoice for work performed at an authorized BMW Center, and for work performed at an independent service center up to $3,000 for the timing chain module/oil pump drive chain module and up to $7,500 for engine failure.

For vehicles over the 7 years/70,000 mile period but with less than 8 years/100,000 miles, if the work was performed at an authorized BMW Center the work will be reimbursed according to the following reimbursement schedule:

- Up to 80,000 miles: 75% BMW/25% customer contribution;
- 80,001 to 90,000 miles: 55 % BMW/45% customer contribution;
- 90,001 to 100,000 miles: 40% BMW/60% customer contribution;
- 100,001 miles and above: 0% BMW/100% customer contribution.

If the repair or replacement of the covered chain assembly components was performed at an independent service center, the same reimbursement schedule applies, but the reimbursement is also subject to (i) a cap of $3,000 in the reimbursement amount for the timing chain module, oil pump drive chain module repairs and (ii) a cap of $7,500 for the engine failure repairs.

There is also a prospective repair program which requires the work be performed by an authorized BMW Center. Repair or replacement of affected parts (timing chain module, oil pump drive chain module, engine) in Class Vehicles up to 8 years/100,000 miles (whichever occurs first) is subject to the following contribution schedule:

More than 7 years/70,000 miles but less than 8 years/100,000 miles:

- Up to 80,000 miles: 75% BMW/25% customer contribution;
- 80,001 to 90,000 miles: 55 % BMW/45% customer contribution;
- 90,001 to 100,000 miles: 40% BMW/60% customer contribution.

As an additional benefit negotiated by Plaintiffs' Counsel, for one year from the Effective Date of the Settlement, ANY Class Vehicle with less than 100,000 miles, regardless of Class Vehicle age, that experiences timing chain module failure, oil pump drive chain module failure, or engine damage/failure due to timing chain module or oil pump drive chain module failure may receive repairs at an authorized BMW Center, subject to the following contribution schedule:

- Less than 7 years/70,000 miles (whichever comes first): 100% (under existing Component Warranty Extension).
- More than 7 years/70,000 miles but less than 100,000 miles:
- Up to 80,000 miles: 75% BMW/25% customer contribution;
- 80,001 to 90,000 miles: 55 % BMW/45% customer contribution;
- 90,001 to 100,000 miles: 40% BMW/60% customer contribution.

This relief is limited to one repair per Owner of a Class Vehicle and the relief is subject to evidence of adherence to regular scheduled oil changes. The parties have also agreed to an appeal process to resolve disputes over claims denials. *See* Agreement Sections III.A., III.B., III.C. and III.D.

These Settlement benefits serve as consideration for the dismissal with prejudice of this action against BMW NA, and the release of all claims by Plaintiffs and Settlement Class Members which takes effect on the Effective Date as set forth in Section VII of the Agreement. Released Claims are defined in Section VII.A. of the Agreement.

BMW NA is solely responsible for the cost of the Claims Administrator and will pay all administration expenses (Section IV) which includes effectuating the notice plan and administration of the Settlement.

Finally, BMW NA agreed it will be responsible to pay the amount awarded by the Court for Class Counsel's Attorneys' Fees and Costs, provided it is within the range of between $1.5 million and $3.7 million, as determined on motion before Magistrate Judge Cathy L. Waldor, as

well as named Plaintiff service awards which will be paid out of the total Attorney's Fees and Costs awarded. *See* Agreement, Section VIII.

B. NOTICE TO THE SETTLEMENT CLASS

The parties have negotiated and agreed upon a notice program which provides the best practicable notice under the circumstances. Within seventy-five (75) days after entry of the Preliminary Approval Order, the Claims Administrator will retain a third party to obtain mailing addresses from the applicable state motor vehicle agencies' registration databases to identify the last known addresses of all Settlement Class Members and provide the mailing addresses to the Claims Administrator. The Claims Administrator will use current U.S. Postal Service software and the National Change of Address database to update the address records so that Settlement Class Members' most recent addresses will be used to provide a Settlement Class Notice to those Settlement Class Members by a direct first-class mailing. A copy of the proposed Class Settlement Notice is annexed to the Settlement Agreement as Exhibit A. Also within the seventy-five (75) day period, the Claims Administrator will establish, maintain, and administer a toll-free telephone number dedicated to the Settlement which will provide information about the Settlement, including a mechanism to submit questions to the Claims Administrator and (b) establish and maintain a website dedicated to the Settlement that will provide: (i) information about the Settlement and all relevant documents, including the Claim Form available for download and a portal for online filing of claims; (ii) an email address for Class Members to ask the Claims Administrator questions; (iii) information on how Settlement Class Members may submit their claims by U.S. Mail or by filing online. The website and toll-free telephone number will remain available until all claim decisions by the Claims Administrator and payment to claimants have been made. (Agreement, Section IVB).

The Notice (annexed to the Settlement Agreement as Exhibit A) contains a plain and concise description of the nature of the class action, the history of the action, the preliminary certification of the Settlement Class, and the proposed Settlement, including how the proposed Settlement would provide relief to the Settlement Class Members, what claims are released under the proposed Settlement, and other relevant terms and conditions. It also explains how to opt-out of the settlement or present objections, provides details as to Attorneys' Fees and Service Awards to the Class Representatives, and includes the Claim Form (Exhibit B to the Settlement Agreement) and the time and manner of completing the Claim Form to be eligible for relief. (Agreement, Section IV.E.1-5).

Plaintiffs request that the Court preliminarily certify a Settlement Class and preliminarily approve the proposed Settlement, permitting the Settlement Class to be given notice of the terms of the Settlement so that they can make an informed decision as to its merits. As explained in detail below, the Settlement is fair, reasonable and adequate. Accordingly, Plaintiffs request that the Court enter the [Proposed] Preliminary Approval Order (See Exhibit C to Settlement Agreement):

(1) Preliminarily approving the Settlement as set forth in the Settlement Agreement;

(2) Preliminarily certifying the Settlement Class;

(3) Preliminarily appointing Interim Class Counsel as Settlement Class Counsel;

(4) Approving the proposed Notice Plan, and

(5) Scheduling a Final Fairness Hearing.

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE CLASS SETTLEMENT

A. THE STANDARD FOR PRELIMINARY APPROVAL OF A SETTLEMENT CLASS

The Third Circuit favors settlement of class action litigation. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-595 (3d Cir. 2010) ("Settlement Agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts."). Where the parties can resolve the litigation through good faith and arms-length negotiations, judicial resources can be preserved and the public interest is furthered. *Bell Atlantic v. Bolger*, 2 F.3d 1304 (3d Cir. 1993); *In re Pet Food Prods. Liab. Litig*., 629 F.3d 333 (3d Cir. 2010)(" ... we reaffirm the overriding public interest is settling class action litigation.").

Judicial review of a proposed class action settlement consists of a two-step process. First, the court determines whether it should grant preliminary approval to the settlement. Second, after notice of the settlement is provided to the class, the court conducts a fairness hearing to determine whether it may grant final approval of the settlement. Under the amendment to Fed. R. Civ. P. 23(e) which became effective December 1, 2018, preliminary approval requires that the parties proposing the settlement make a showing that the Court is likely able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal. See Fed. R. Civ. P. 23(e)(1)(B). Approval of the proposed settlement requires that the Court find that the settlement is "fair, reasonable and adequate after considering whether:

(A) The class representatives and Class Counsel have adequately represented the class;

(B) The proposal was negotiated at arm's length;

(C) The relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including

the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other."

Fed. R. Civ. P. 23(e)(2).

These factors are essentially a combination of the factors considered under *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) and *In re Prudential Insurance Company America Sales Practice Litigation*, 148 F.3d 283, 323-24 (3d Cir. 1998). Each of these factors favor granting preliminary approval to the Settlement in this case.

B. THE SETTLEMENT OCCURRED AFTER ARM'S-LENGTH NEGOTIATIONS CONDUCTED IN GOOD FAITH BY WELL-INFORMED AND EXPERIENCED COUNSEL

In this case, the Settlement did not occur until counsel conducted a thorough investigation, engaged in motion practice and conducted substantial discovery. Thereafter, the parties engaged the services of a well-respected mediator who spent two full days engaged in mediation, which fostered a resolution of the case. Plaintiffs' attorneys are well-seasoned trial and class action attorneys with substantial experience in automobile class actions. (*See* firm resumes annexed to Graifman Decl. as Exhibits 2, 3 and 4). These factors establish that subpoints A and B above have been satisfied. *See Glaberson v. Comcast Corp.*, 2014 WL 7008539, at *4 (E.D. Pa. Dec. 12, 2014) (a settlement is presumed to be fair "when the negotiations were at arm's length, there was sufficient discovery, and the proponents of the settlement are experienced in similar litigation"); *Alves v. Main*, No. 01-cv-789, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) *aff'd*, 559 F. App'x 151 (3d Cir. 2014) ("The participation of an independent mediator in settlement negotiations virtually

[e]nsures that the negotiations were conducted at arm's length and without collusion between the parties.")..

The Class Representatives have no conflict of interest with the remainder of the Class, and they share the Class's interest in obtaining recovery for themselves and the other Class Vehicle owners experiencing chain assembly failures. These Class Representatives have cooperated fully in providing relevant documents and discovery and have been actively engaged in the litigation.

C. THE RELIEF PROVIDED TO THE CLASS IS ADEQUATE GIVEN THE COSTS, RISKS, AND DELAY OF TRIAL AND APPEAL

The relief provided in this Settlement constitutes a valuable and substantial benefit to Class Members. Class Members who have already paid to have the repairs made at a BMW Center will receive anywhere from 100% reimbursement to a minimum of 40% reimbursement of repair costs depending on the Class Vehicle age and mileage up to 8 years and 100,000 miles. If the work was performed at an independent repair shop, Class Members will receive up to $3,000 for the chain assemblies or $7,500 for a necessary engine replacement caused by failed chain assemblies. Additionally, there is an extension of the engine warranty for the chain assemblies which applies to the contribution schedules but requires the work performed occur at a BMW Center. Finally, for one year from the Effective Date of the Settlement, ANY Class Vehicle with less than 100,000 miles, regardless of Class Vehicle age, that experiences timing chain module failure, oil pump drive chain module failure, and/or engine damage/failure due to timing chain module or oil pump drive chain module failure, may go to an authorized BMW Center for repair, subject to the same contribution schedule.

Thus, the relief provided to the Class is more than adequate. This is particularly so given the cost and risks of surviving class certification of a nationwide class, a potential summary judgment motion, a battle of the experts and *Daubert* motion, deposing BMW AG officials over-

seas, a costly and potentially lengthy trial, and almost certain appeals. Hence, this factor is satisfied.

D. THE PROPOSED METHOD OF DISTRIBUTING RELIEF TO THE CLASS, INCLUDING THE METHOD OF PROCESSING CLASS-MEMBER CLAIMS IS EFFICIENT AND EFFECTIVE AND TREATS CLASS MEMBERS EQUALLY

The Claims Administrator, paid for by BMW NA, is an experienced and well-respected Claims Administrator. This Administrator will provide direct Class Notice based upon VIN number searches conducted by a third party retained for this purpose, and class members will file Claims Forms and documentation with the Claims Administrator during the Claims Period. Payments will be made by the Claims Administrator and there is also an appeals process set forth in the Settlement for those Class Members who contest the Claims Administrator's determination. This is an efficient and effective way of providing Class Members the relief they need and deserve. Moreover, there are no sub-classes and all class members have the ability to file claims equally.

E. THE TERMS OF ANY PROPOSED AWARD OF ATTORNEY'S FEES, INCLUDING TIMING OF PAYMENT

Under the terms of the Settlement, attorney's fees will be paid to Settlement Class Counsel within 30 days of the Effective Date. The amount of attorney's fees, expenses and Class Representative service payments will be determined by Magistrate Judge Waldor in an amount between $1,500,000 and $3,700,000. Plaintiffs will file their Motion for Attorney's Fees, Expenses, and Settlement Class Representative Service Payments 21 days after the date Class Notice is disseminated. The Agreement contemplates opposition by BMW NA and a reply by Plaintiffs. (Agreement, Section VIII C, D, E).

V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

A class may be preliminarily certified for settlement purposes if it conforms to the requirements of Fed. R. Civ. P. 23. *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y.

1984); 4 Herbert B. Newberg, *Newberg on Class Actions*, § 13:64. *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Prudential Ins. Co. v. America Sales Litigation*, 148 F.3d 283, 307-308 (3d. Cir. 1998); *In re Ins. Brokerage Antitrust Litig*., 2007 WL 2589950 (D.N.J. 2007), aff'd, 579 F.3d 241 (3d Cir. 2009). The Settlement satisfies each of the four requirements for class certification under Rule 23(a) and Rule 23(b)(3).

A. NUMEROSITY

The numerosity requirement under Rule 23(a)(1) is satisfied where the class is so numerous that joinder of all class members is impracticable. *In re Prudential Ins. Co*., 148 F.3d at 309; *Zinberg v. Washington Bancorp, Inc*., 138 F.R.D. 397, 406 (D.N.J. 1990). Here, approximately 575,024 Class Vehicles were distributed by BMW NA. Clearly, numerosity has been established.

B. COMMONALITY

To satisfy the commonality requirement under Rule 23(a)(2), Plaintiffs must demonstrate that "'at least one question of fact or law' is common to each member of [the] prospective class." *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). Class members do not have to share identical claims or claims arising from the same operative facts. *See In re Prudential Ins*., 148 F.3d at 310; *Baby Neal v. Casey*, 43 F.3d. 48, 57 (3d Cir. 1994) (factual differences in the claims of class members do not defeat certification). The commonality standard of Rule 23(a)(2) is not a high bar. *Chiang v. Veneman*, 385 F.3d 256, 265 (3d. Cir. 2004). Here, there are numerous common questions of law and fact, including:

(a) Whether class engines were defectively designed or manufactured, including workmanship and materials, so as to subject the engine to premature failure of the primary and secondary chain assemblies;

(b) Whether class engines sustained damage directly or indirectly by premature failure of the primary and secondary chain assemblies;

(c) Whether Class Vehicles were sold with an owner's manual and/or Service and Warranty Information pamphlet and other materials that incorporated incorrect inspection and

service intervals for the primary and secondary chain assemblies;

Thus, commonality is satisfied.

C. TYPICALITY

In order to satisfy the typicality requirement of Rule 23(a) (3), the claims or defenses of the representative parties must be typical of the claims or defenses of the class. *See Georgine v. Amchem Product, Inc.*, 83 F.3d 610, 631 (3d Cir. 1996). Typicality seeks to insure that there are no conflicts between the class representative claims and the claims of the class members so that the "named plaintiffs have incentives that align with those of absent class members." *Baby Neal v. Casey*, 43 F.3d at 57.

Class claims arise out of ownership or lease of Class Vehicles which share the N20/N26 engine and experience premature failure of chain assemblies. All Class Representatives purchased or leased Class Vehicles. There are no defenses to Plaintiffs' claims that may be asserted by BMW NA that are unique to them or different from other proposed Class Members. Class Representatives were all exposed to the same acts and/or omissions. The factual basis of BMW's alleged misconduct is common to the members of the class and represent a common thread of fraudulent misconduct and deceptive trade practices resulting in injury to all proposed Class Members. As there is no conflict between the Plaintiffs' claims and those of the class, the typicality requirement is satisfied.

D. ADEQUACY OF REPRESENTATION

Adequacy of representation is a two-part inquiry that applies to both Plaintiffs' Counsel and Plaintiffs. First, adequacy of representation asks whether Plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation. *In re Prudential*, 148 F.3d at 312 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 800 (3d Cir. 1995)). Second, adequacy of representation "serves to uncover conflicts of interest between named parties

and the class they seek to represent." *In re Prudential*, 148 F.3d at 312 (citing *Amchem Products v. Windsor*, 521 U.S. 591, 594 (1997)). Proposed Class Counsel have, in aggregate, over 60 years of experience concentrating in complex automotive products liability, and have been appointed Class Counsel in other automotive class action proceedings. Neither Plaintiffs nor their attorneys have any interests that are contrary to or conflicting with the class members. Under these facts, the adequacy of representation prong has been satisfied.

E. THE REQUIREMENTS OF RULE 23(b)(3) ARE SATISFIED

The proposed class also meets the requirements of Rule 23(b)(3). Rule 23(b)(3) allows class certification of settlement classes where common questions of law and fact predominate over individual questions and class treatment is superior to individual litigation. When assessing predominance and superiority, the court may consider that the class will be certified for settlement purposes only, and need not consider whether the case would be manageable if actually brought to trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1998); *Prudential*, 148 F.3d 283 at 321. In discussing predominance, the Third Circuit has reiterated that the focus of the "inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 298 (3d Cir. 2011) (*en banc*). *See also In re Mercedes-Benz Antitrust Litig*., 213 F.R.D. 180, 187 (D.N.J. 2003); *In re Community Bank of N. Va*., 418 F.3d 277, 309 (3d Cir. 2005). As indicated by the Supreme Court in *Amchem*, "predominance is a test readily met in certain cases alleging consumer fraud. . ." 521 U.S. at 625.

Here, the core questions relate to allegations of uniform defects in Class Vehicle engines that can result in expensive repairs or catastrophic engine failure, BMW NA's alleged failure to disclose these engine defects, and BMW NA's purported deceptive advertising and marketing in

violation of state consumer protection laws. Accordingly, the predominance prong of Rule 23(b)(3) is satisfied.

The second prong of Rule 23(b)(3) is also readily satisfied. Here, class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. *See In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 533 (3d Cir. 2004). The superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those alternative available methods of adjudication." *Id*. at 534.

Rule 23(b)(3) sets forth certain factors that may be pertinent in considering whether a class action is a superior method by which to adjudicate a controversy. *See In re Mercedes-Benz*, 213 F.R.D at 186 ("The Rule sets forth a non-exhaustive list of factors to be weighed."). The factors include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigations of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

The Settlement Class satisfies the superiority requirements because of the large number of Class Members, and the relatively small value of each claim in relation to the expenses of prosecuting a lawsuit. The alternative to class treatment would be numerous individual lawsuits and/or multiple lawsuits for relatively small amounts of damages. This would be uneconomical for potential plaintiffs because litigation costs would dwarf any potential recovery. Absent class action treatment, Class Members here probably would not obtain any relief and BMW NA would not be held accountable for its alleged wrongful acts. In contrast, a class action "facilitates spreading of the litigation costs among the numerous injured parties and encourages private enforcement of the statutes." *Prudential*, 148 F.3d 283 at 315-316.

In the Third Circuit, there is an additional requirement of ascertainability; the class must be currently and readily ascertainable based on objective criteria. There must be a reliable and administratively feasible way to identify class members. *Coleman v. Commonwealth Land Title Ins. Co*., 318 F.R.D. 275 (E.D. Pa. 2016). In this litigation, Class Members can be easily identified by VIN and registration records which establish the current ownership of Class Vehicles. Claim forms, which require proof of ownership and other records for reimbursement claims further establish that this class is ascertainable under the Third Circuit's requirements.

In sum, certification of the proposed Settlement Class is appropriate under Federal Rules of Civil Procedure 23(a) and 23(b)(3). This Court should certify the proposed class for settlement purposes.

F. THE FORM AND MANNER OF NOTICE SHOULD BE APPROVED BY THE COURT

Under Fed. R. Civ. P. 23(e), class members are entitled to notice of any proposed settlement before it is ultimately approved by the Court. *Manual For Complex Litigation Fourth* § 21.633. Under Rule 23(e) and relevant due process requirements, adequate notice must be given to all absent class members and potential class members to enable them to make an intelligent choice as to whether to opt-out of the class. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 at 326-27. Neither Rule 23 nor due process considerations require actual notice to every class member in every case. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Rather, "notice reasonably certain to reach most of those interested in objecting" is required "to safeguard the interests of all." *Id*.

In this case, the parties have negotiated and agreed upon a comprehensive notice program consisting of several types of notice, including: mailed notice and long-form notice on the

Settlement Website, as well as a toll-free number to address questions to the Claims Administrator. Through these efforts, absent class members will receive adequate notice of the Settlement.

Finally, the Notice satisfies all legal requirements and provides a comprehensive explanation of the Settlement in simple, non-legalistic terms. The Notice contains all the information required by Rule 23(c); including, the nature of the action; the definition of the class; the class claims, issues, or defenses; details informing Class Members that they may enter an appearance though an attorney if they desire; how to object; the time and manner of requesting exclusion, and the binding effect of the class judgment on members under Rule 23 (c)(3).

Under Rule 23(c), the Court should consider the contents of class notice as well as the method of dissemination. *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 328 (E.D. Pa. 2007); *In re Prudential*, 148 F.3d 283 at 327. The requirements for the content and dissemination of the Notice have been satisfied and the Notice should be approved.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order that: (a) conditionally certifies the class for purposes of settlement pursuant to Rule 23(b)(3); (b) appoints the named Plaintiffs as Class Representatives and their attorneys, previously named as Interim Class Counsel, as Class Counsel; (c) grants preliminary approval and enters the Preliminary Approval Order annexed to the Settlement Agreement as Exhibit C; (d) directs notice to Settlement Class Members be provided in the manner contemplated by the Settlement Agreement; (e) approves the Claims Administrator; and, (f) schedules a final fairness hearing for purposes of determining final approval of the Settlement, attorneys' fees and Class Representative Service Awards.

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