**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| 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*, | : | Civil Action No. 2:17-cv-7386-SDW-CLW |
| v. | : | |
| BMW OF NORTH AMERICA, LLC, *Defendant*. | : | |

**DECLARATION OF GARY S. GRAIFMAN**
**IN SUPPORT OF PRELIMINARY APPROVAL**

GARY S. GRAIFMAN, declares under the penalties of perjury as follows:

1. I am an attorney licensed to practice in the states of New Jersey and New York and a partner at the law firm Kantrowitz, Goldhamer & Graifman, P.C. ("KGG") and make this declaration in support of the within Motion For Preliminary Approval of the class action settlement in the above-titled action. I have been involved in the prosecution of this action throughout and am familiar with the proceedings herein and have personal knowledge of the matters set forth herein.

2. After substantial litigation, including Plaintiffs' sustaining most claims in the complaint against the motion to dismiss and engaging in discovery with Defendant, the parties have reached an agreement to resolve claims in the action resulting in settlement being submitted to this Court.

3. Attached hereto as **Exhibit 1** is a true and accurate copy of the executed Settlement Agreement together with exhibits comprised of Exh. A (proposed class notice of settlement ("Class Settlement Notice")); Exh. B (the proposed claim form); Exhibit C (the preliminary approval order).

4. The terms of this settlement are laid out in the memorandum of law in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement. It involves an extension of the warranty for the timing chain components in the class vehicles, with partial reimbursement for repairs up to 100,000 miles. The reimbursement terms briefly are as follows:

- Class members who submit valid claims establishing they paid for the diagnosis, repair and/or replacement for a failed timing chain module and/or failed oil pump drive chain module and whose failure occurred within 7 years and 70,000 miles will receive reimbursement of 100% of the invoice amount for work performed at an authorized BMW dealer and for work performed at an independent service center of up to $3,000 for the timing chain module/oil pump drive chain module and up to $7,500 for engine failure directly related to the timing chain failure.
- For vehicles after 7 years/70,000 miles but before 8 years/100,000 miles, if the work is performed at an authorized BMW dealer, the work will be reimbursed according to the following reimbursement schedule:
    i. Up to 80,000 miles: 75% paid by BMW/25% paid by customer contribution;
    ii. 80,001 to 90,000 miles: 55% paid by BMW/45% paid by customer contribution;

iii. 90,001 to 100,000 miles: 40% paid by BMW/60% paid by customer contributions

iv. 100,001 miles and above: 0% paid by BMW.

- There is also a prospective repair program which requires the work be performed by an authorized BMW dealership. The repair or replacement of the defective parts (timing chain module, oil pump drive chain module, engine) in class vehicles up to 8 years/100,000 miles (whichever comes first) subject to the above referenced contribution schedule.

5. 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, due to timing chain module or oil pump drive chain module failure, may go to an authorized BMW center for repair, subject to the above-referenced contribution schedule.

6. The class definition and description of class vehicles that are involved in this action, are as follows:

**The definition of the Class:**

> 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.*

7. There are approximately 575,024 class vehicles included in the action.

8. As the Court knows, the essence of the claims in this case are that BMW sold the class vehicles with defective components in the timing chain system which were prone to fail prematurely. The class vehicles, which contain the defective components was sold to class members without their knowledge of the defect and at the time of failure, will result in a repair which equaled or exceeded $1,500.

9. The settlement negotiated in this case was negotiated at arm's length and was the result of extensive negotiations with the assistance of a neutral, mediator, retired Judge Stephen M. Orlofsky.

10. Counsel submit that the within Settlement is an excellent result and is fair, reasonable, and adequate and should be preliminarily approved by the Court.

11. As set forth in the Settlement Agreement, the notice program here will be similar to the notices used in many automobile defect class action settlements and is also similar to the methodology used in NHTSA-mandated recalls. That includes the Claims Administrator obtaining, through a third-party, the information as to the registered owners of the BMW class vehicles from the Department of Motor Vehicles ("DMV") in the fifty states involved in this Settlement. In addition, BMW will utilize its registration records in its database to be added to the notice program to notify Class members. The Class Settlement Notice will be sent individually, via U.S. mail, to the current or last known addresses of the absent Class members for which Class members' identities and addresses are reasonably ascertainable from those DMV records and the records of BMW.

12. The Settlement Agreement also calls for the Claims Administrator to establish a settlement website, which among other things will provide additional information pertaining to the Settlement, as it will contain copies of the Class Settlement Notice as well as pertinent settlement documents, orders, deadlines, and an online portal to file claims, as well as instructions on how to submit a claim, opt-out, or object to the Settlement, FAQ's and answers and other information. See Settlement Agreement ¶ IV(B). The website will also contain a toll-free number for class members to reach the Settlement Administrator with any questions they may have. *Id.*

13. The Class Settlement Notice will also identify the settlement website and provide contact information for the Settlement Administrator in the event of questions by class members. The Class Settlement Notice will also provide the specific dates by which objections must be filed and copies post marked and also the date by which proposed class members can exclude

themselves from the Settlement, which date would be 130 days after entry of the Preliminary Approval Order. (Settlement Agreement, ¶ II(A)(2)(k).

14. Accordingly, as the notice program provides the best notice practicable, the proposed Class Settlement Notice and plan of dissemination should therefore be approved by the Court.

15. Based on the schedule proposed, the Court should set the fairness hearing approximately 160 days after the date of entry of the Preliminary Approval Order. Settlement Agreement, ¶ II (A)(2)(h). The time for the Class Settlement Notice to be disseminated is approximately 90 days after the entry of the Preliminary Approval Order. Settlement Agreement, ¶ II (A)(2)(f).

16. A separate copy of the Preliminary Approval Order is also submitted herewith as a separate filing.

17. With regard to appointment of Class Counsel herein, all three firms have significant experience and success in litigation of consumer class actions. With regard to Mr. Graifman and KGG, several recent consumer class action cases in which Mr. Graifman and KGG have served as lead counsel or co-lead counsel have resulted in decisions officially reported or on Westlaw which have refined the law in consumer class actions. These include:

- *In Re Volkswagen Timing Chain Product Liability Litigation* 16-CV-2765-JLL-JAD (D.N.J.) (Mr. Graifman and the firm was appointed co-lead counsel in the case brought on behalf of a multistate class consisting of twenty-seven states in the District of New Jersey, which was given final approval of a nationwide class settlement in December, 2018. The case involved approximately 477,000 class vehicles and was valued at approximately $50 million);

- *Seifi, et al. v. Mercedes-Benz USA, LLC*, 2014 WL 8370026 (N.D.Ca. Dec. 17, 2014) (KG&G was co-lead counsel and the matter settled on a nationwide basis at the class certification stage);

- *Seifi, et al. v. Mercedes-Benz USA, LLC*, 2013 WL 5568499 (N.D.Ca. Oct. 9, 2015);

- *In re Nissan Radiator Transmission Cooler Litigation*, 2013 WL 4080946 (S.D.N.Y. May 30, 2013) (referred to as "Nissan Radiator Transmission Cooler Litig.") (KG&G was co-lead counsel and the matter settled on a nationwide basis at the class certification stage);

- *In re Nissan Radiator Transmission Cooler Litig.,* 2012 WL 1877306 (S.D.N.Y. May 15, 2012);

- *In re Nissan Radiator Transmission Cooler Litig*., 2011 WL 7095432 (S.D.N.Y. Dec. 16, 2011);

- *Marshall v. Hyundai Motor America*, 51 F.Supp.3d 451 (S.D.N.Y. Sept. 30, 2014);

- *Sheris v. Nissan North America, Inc.*, 2008 WL 2354908 (D.N.J. June 3, 2008);

- *Chiarelli v. Nissan North America, Inc*., 2015 WL 5686507 (E.D.N.Y. Sept. 25, 2015).

- *Jermyn v. Best Buy Stores, LP*, 08-cv-0214 (CM), 256 F.R.D. 418 (S.D.N.Y. 2009) (class certified on behalf of thousands of New York consumers alleging false advertising and consumer protection law violations).

A copy of the firm resume of KGG is annexed hereto as **Exhibit 2**.

18. With respect to Thomas P. Sobran, Mr. Sobran has more than 35 years of experience concentrating on automotive and consumer product defect cases. He also has significant experience in consumer product class actions including leadership roles as class counsel or served on executive committees including the following:

- *In Re Volkswagen Timing Chain Product Liability Litigation* 16-CV-2765-JLL-JAD (D.N.J.) (Mr. Sobran was appointed to the Executive Committee in the case brought on behalf of a multistate class consisting of twenty-seven states in the District of New Jersey, which was given final approval of a nationwide class settlement in December, 2018. The case involved approximately 477,000 class vehicles and was valued at approximately $50 million);

- *Coffeng, et al. v. Volkswagenwerk Aktiengesellschaft, et al.*, United States District Court for the District of Northern California, Civil Action No. 3:17-cv-01825-JD (Mr. Sobran was co-lead counsel for over 874,781 class vehicle owners where repair reimbursements paid and warranty extension was valued in excess of $33 million);

- *Salcedo, et al. v. Subaru of America , Inc.,* United States District Court for the District of New Jersey, Civil Action No. 3:17-cv-01825-JD (Mr. Sobran was a member of the executive committee in a case involving hundreds of thousands of vehicles with potentially defective engines that prematurely catastrophically failed); and,

- *Fisher, et al. v. Mitsubishi Electric Corporation, et al.,* United States District Court, District of Connecticut Civil Action No. 3:09-cv-1899-RNC (Mr. Sobran was lead counsel involving defective consumer products that resulted in tens of millions of dollars in monetary relief and warranty extensions to consumers).[1]

A copy of Mr. Sobran's resume is annexed hereto as **Exhibit 3**.

19. With regard to Bruce H. Nagel and Nagel Rice, LLP, several class actions in which Mr. Nagel or the firm served as lead or co-lead counsel have resulted in decisions officially reported or on Westlaw which have shaped the relevant area of the law, including:

- *Donnenfeld v. Petro Inc. d/b/a/ Petro Home Services*, 333 F. Supp. 3d 208 (E.D.N.Y. 2018) ( Nagel Rice appointed lead counsel in nationwide class action settlement involving Petro's marketing and sale of "ceiling price plan" contracts to its home heating oil customers and providing monetary relief to each of the 92,546 Ceiling Plan customers)

- *Kuzian v. Electrolux Home Products*, 937 F.Supp. 2d 599 (D.N.J. 2013)(Co-lead counsel in case that settled on nationwide basis at class certification stage).

[1] Mr. Sobran is currently serving as interim co-lead counsel in four other complex automotive products liability class actions pending in the United States District Court for the District of New Jersey.

- *Edwards v. Horizon Blue Cross Blue Shield of New Jersey*, No. 08-CV-6160(KM), 2018 WL 10133574 (D.N.J. June 29, 2018) (court appointed co-lead counsel in $160 million class action settlement involving ERISA claims and under reimbursement of surgery center fees.)
- *In re Citigroup Capital Accumulation Plan*, 150 F.Supp.2d 274 (D.Mass. 2001).Court-Appointed Lead Counsel in class action involving deferred compensation plan of major brokerage firm for the states of Florida, Nebraska, Colorado, Louisiana, Georgia, and Michigan. Class certification granted for the states of Florida, Colorado and Louisiana. Claims in excess of $300 million. Referenced in Farr, *The Manuel for Complex Litigation*, Fourth Ed. (2004), Appendix.
- *In re Ski Train Fire in Kaprun, Austria*, 220 F.R.D. 195 (S.D.N.Y. 2003) rev'd *Kern v. Siemens Corp*., 393 F.3d. 120 (2d Cir. 2004) (Court appointed co-lead counsel in multi-district certified class action involving the death of 153 individuals in a train fire in Austria. Class certification reversed on appeal. Settlement of $16 million on behalf of the American plaintiffs.)
- *Drazin v. Horizon Blue Cross Blue Shield of NJ*, 832 F.Supp. 2d 432 (D.N.J. 2011), aff'd. 528 Fed. Appx. 211 (3d. Cir. 2013) (Court appointed Lead Counsel in class action for injunctive relief and damages relating to coverage of eating disorders as biologically based mental illnesses under the New Jersey Mental Health Parity Act; resulting in settlement of $19 million and multiple business reforms affecting 1.5 million class members.)

- *Motwani v. Marina Dist. Dev. Co., LLC*, No. CIV.A. 15-2069 JLL, 2015 WL 3448171, (D.N.J. May 29, 2015) (Lead counsel in consumer class action, including New Jersey Consumer Fraud Act and New Jersey Truth in Consumer Warranty and Notice Act claims where court granted final approval of class action settlement)
- *Rosen v. Smith Barney*, 393 N.J. Super. 578 (App. Div. 2007) aff'd 195 N.J. 423 (2008)( Lead counsel in certified class action against brokerage firm involving deferred compensation plan, resulting in $9 million judgment against the firm, reversed on appeal, and affirmed by the New Jersey Supreme Court.)
- *In re African American Slave Descendants' Litig*., 304 F.Supp.2d 1027 (N.D. Ill. 2004); *In re African American Slave Descendants' Litig*., 307 F.Supp.2d 977 (N.D. Ill. 2004); *In re African American Slave Descendants' Litig*., 272 F.Supp.2d 755 (N.D. Ill. 2003); and *In re African American Slave Descendants' Litig*., 231 F.Supp.2d 1357 (J.P.M.L. 2002). Court appointed co-lead counsel in landmark reparation cases.

20. A copy of the firm resume of Nagel Rice is annexed hereto as **Exhibit 4**.

21. For the reasons set forth herein, and in the Plaintiffs' Memorandum of Law in Support of Preliminary Approval, the parties request that the Court grant Preliminary Approval of the Class Action Settlement and (i) order that the Class Notice in the form contained in Exhibit A to the Settlement Agreement to be disseminated to Class members; (ii) that the Court conditionally certify the putative nationwide Class of owners and lessees of the class vehicles; (iii) that Preliminary Approval of the proposed Settlement be given; (iv) that the Court appoint the proposed class representatives as class representatives for the Class; (v) that the Court

appoint Kantrowitz, Goldhamer & Graifman, P.C., Thomas P. Sobran and Nagel Rice LLP as Class Counsel for the class; and (vi) that the Court set the Fairness Hearing Date for determination of whether this Class Action Settlement should be finally approved.

Declared and executed under the penalties of perjury this 26th day of August 2020.

GARY S. GRAIFMAN