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October 30, 2020

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, et al. v. BMW of North America, LLC*., United States District Court for the District of New Jersey, Civil Action No. 17-cv-7386 WHW-CLW
Joint Letter Regarding Post-Settlement Discovery Dispute

Dear Magistrate Waldor:

Pursuant to this Court's Civil Case Management Order, the parties submit this joint letter over an impasse concerning post-settlement discovery recently requested by plaintiffs' counsel's expert witness in the subject matter of case settlement valuation.[1] The requested documents and information sought by plaintiffs have a dual purpose. First, the information will assist the court in determining whether the class action settlement is fair, reasonable and adequate. Second, the materials will assist the court in awarding plaintiffs' counsel appropriate attorneys' fees based on the substantial settlement benefits obtained for class members.[2]

[1] Plaintiffs' counsel spoke with defense counsel via telephone on October 8, 2020 in an unsuccessful good faith attempt to resolve by agreement the discovery issues without the intervention of the Court.

[2] Last year, this Court convened a conference for resolution of the attorney fees issue. Although the conference did not resolve the fee dispute entirely, the issue was subsequently narrowed with an agreement that plaintiffs' counsel will not apply for a fee award greater than $3.7 million and defendant will not contest any fee award below $1.5 million.

This automotive class action involves a warranty extension for some 575,000 BMW passenger vehicles sold in the United States from 2011 to 2015 utilizing the N20/N26 engine. The warranty extension enlarged the engine powertrain warranty from 4 years/50,000 miles to 8 years/100,000 miles for the engine timing chain system and oil pump drive chain.[3] Given that the typical N20/N26 engine timing chain system/oil pump drive chain failure requires the installation of a replacement engine, repairs range between $7,500.00 (used engine) and $16,000.00 (factory remanufactured installed by an authorized dealer). Under the terms of the settlement, BMW of North America, LLC ("BMW NA") has agreed to pay up to $3,000.00 for the timing chain module/oil pump drive chain module replacement and up to $7,500.00 for engine failure that is not repairable and requires replacement.

Plaintiffs' Position Regarding the Documents Requested Relating to Valuation of the Warranty Extension[4]

The indisputable fact is that neither defendant BMW NA nor its German parent would agree to the terms of the class action settlement reached here (or any other class settlement) without knowing how much it was going to cost. Any contention that appropriate failure rate data was not collected and a detailed cost analysis was not performed is simply nonsensical given the expertise and sophistication of both BMW entities. The requested materials (and precursor data) exist and plaintiff's counsel should be allowed immediate access. Those materials are:

I. Model year and model of all class vehicles originally sold and an estimate of the percentage of the class vehicles excluded under the settlement agreement.

II. BMW NA's current or recent U.S. average dealer warranty claim dollars and labor time for each BMW service code for repairs to be covered under both the warranty extensions including a list of separate warranty claim amounts for each of labor, parts and other costs.

III. Excel spreadsheet databases of class vehicles claims/reimbursements for each of New Passenger Vehicle Limited Warranty, component warranty extension, goodwill and certified-preowned vehicles. The databases should include nature of claim repair, dollars paid segregated into major categories (e.g., parts, labor, other costs, and total), labor time and rate, claim number and claim repair order number, vehicle model year, vehicle identification number, vehicle warranty start date, repair date and odometer reading.

IV. The U.S. average per hour dealer warranty labor reimbursement rate for the most recent annual period available.

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[3] Three months after this suit was commenced, BMW in December of 2017 announced that it was implementing a warranty extension whereby the N20/N26 engine timing chain and oil pump drive chain warranty was extended to 7 years/70,000 miles. Under California law and other jurisdictions counsel is entitled to credit in the award of fees for this extension under a catalyst theory.

[4] BMW NA declined to produce any documents responsive to the enumerated requests and instead referred plaintiffs counsel to documents produced during litigation that focused on technical/mechanical issues and not damages.

V. The current average consumer retail purchase price for each class vehicle model for BMW NA's 100,000-mile Platinum coverage option.

VI. BMW NA's estimated new vehicle warranty cost rate (%) for class vehicles (estimated average per vehicle warranty costs divided by the average vehicle sale price to U.S. dealers) and estimated warranty costs including both warranty and goodwill claims expected to be paid by BMW NA to U.S. dealers at dealer warranty reimbursement rates.

VII. BMW NA most recent estimated out of pocket costs for the class action settlement.

There is simply no reason why the requested material should not be produced particularly where these materials are necessary for case valuation both by the court and plaintiffs' counsel. As assurance against disclosure of "trade secrets" and similar considerations, the material requested is capable of protection via a confidentiality order and filing under seal.

For example, in the class action *Gray, et al. v. BMW of North America, LLC*, Civ. Action No. 2:13-cv-3417-WJM-MF (U.S.D.C. N.J.), involved defects that prevented the convertible top from functioning properly, Kirk Kleckner, the expert in that case for valuation of the warranty extension, received the following relevant information for his analysis:

> (i) Letter from Christopher J. Dalton, Buchanan Ingersoll Rooney PC, April 10, 2015 and subsequent related email chain disclosing information including that there were 11,225 warranty claims and 1,148 goodwill claims relating to the convertible top defect in class vehicles;
>
> (ii) Letter from Christopher J. Dalton, Buchanan Ingersoll Rooney PC, July 6, 2016 providing the national BMW average cost of applicable repairs and replacements;
>
> (iii) BMW dealer average convertible top defect repair claim cost of $355.54 from BMW's warranty database; and,
>
> (iv) BMW's United States average warranty reimbursement rates in dollars.[5]

Notably, a valuation report by Mr. Kleckner in support of the reasonableness of a class settlement was submitted and determined to be helpful in the recently settled consumer class action captioned *Coffing, et al. v. Volkswagen Group of America, Inc.*, Civ. Action No. 17-cv-01825-JD (N.D. Cal.) alleging a defective engine water pump in a class encompassing 874,781 vehicles. The

[5] *See* Declaration of Kirk Kleckner, dated June 22, 2017, in *Gray, et al.* v. *BMW North America, LLC., et al.* at ECF Doc.77-5. Mr. Kleckner is also the warranty extension valuation expert in this class action. *See also Gray* v. *BMW North America, LLC,* 2017 WL 3638771, at *5-6 (D.N.J. Aug 8, 2017) (case valuation useful in assisting court in determining appropriate multiplier *vel non* for enhancement of lodestar award). Given the case developments in *Gelis* and the settlement trajectory, plaintiffs did not have the opportunity for valuation discovery.

legal fee was agreed upon shortly after settlement. The report was nonetheless useful evidence as to the reasonableness of the settlement.

There is simply no reason why the requested analogous material should not be produced in this proceeding particularly where these materials are necessary for case valuation both by the court and plaintiffs' counsel. As assurance against disclosure of "trade secrets" and similar considerations, the material requested is capable of protection via a confidentiality order and filing under seal.

Defendant's Position Regarding Plaintiffs' Request for "Valuation" Information.

A fair day's wages for a fair day's work.[6]

Let's be clear what this whole exercise is about: Attempting to maximize Plaintiffs' attorneys' fee application. As noted above, BMW NA has agreed to pay Plaintiffs' attorneys *at least* $1,500,000 for their time and work in this action. At the same time, BMW NA has agreed to pay Plaintiffs' attorneys up to $3,700,000 *if the Court awards that amount*. Of course, where, as here, the fee application is made pursuant to various consumer-protection statutes' fee-shifting provisions, the application must be supported by appropriate proofs, like attorney billing records and evidence of reasonable rates in the same area for the same work. And then, if the billing records don't amount to the agreed-upon fees (or, here, range of fees), there will be the inevitable request for a "multiplier." Then, at the end of it all, the attorneys will compare their requested fee with the "value" of the settlement in an effort to demonstrate that it is reasonable.[7]

Let's also be clear what this whole exercise *isn't* about: It's not about demonstrating that the settlement is fair, adequate, and reasonable. Indeed, the significant reimbursements for past repairs and an additional 1 year and 30,000 miles of prospective repair coverage are clearly valuable to Class Members—and relief which would not be available to them absent this settlement.

Let's also be clear about this: BMW NA provided the valuation information in *Gray v. BMW of North America, LLC* referenced above *prior* to the parties seeking approval of a class settlement. The motion for preliminary approval in *Gray* was filed on November 14, 2016. *See Gray,* ECF Doc. 66. The information referenced above was provided months before that, not—like here—after the parties had moved for preliminary approval of a class-action settlement. However, as here, the attorneys in *Gray* tried to use Mr. Kleckner's "expert report" to bolster their attorneys' fee application. *See Gray,* ECF Doc. 77-1, "Plaintiffs Brief in Support of Motion for

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[6] Frederick Engels, *The Labour Standard* (London), May 7, 1881.

[7] That's not to say that such a comparison is appropriate. It's not. Rather, in a claims-made settlement where attorneys' fees are sought pursuant to a statutory fee-shifting provision, the appropriate measure of an award of attorneys' fees is the lodestar calculation, plain and simple. *See In re Diet Drugs*, 582 F.2d 524, 540 (3d Cir. 2009); *McLennan v LG Electronics USA, Inc*., No. 2:10-cv-03604 (WJM), 2012 WL 686020, at *24-25 (D.N.J. Mar. 2, 2012).

Award of Attorneys' Fees, Expenses And Incentive Awards" (noting that plaintiffs had retained Mr. Kleckner to provide an estimate of the value of the settlement when arguing that the "requested fees are reasonable based on the value of the settlement"). Judge Martini rejected plaintiffs' attorneys' argument in *Gray* that Mr. Kleckner's estimated value of the settlement somehow transformed that claims-made settlement into a common-fund settlement by which their attorneys' fee application was to be measured; rather, he held that the lodestar method was appropriate for measuring attorneys' fees to be awarded under a statutory fee-shifting provision in a claims-made settlement. *See Gray v. BMW of North America, LLC*, 2017 U.S. Dist. LEXIS 135593, at *14-15 (D.N.J. Aug. 14, 2017).[8]

Let's bear this in mind: In February 2020, when it appeared the parties had been unable to resolve this matter, Your Honor entered an order directing the parties to submit *all* outstanding discovery issues to you by February 24, 2020. *See* ECF Doc. 60. Plaintiffs provided their summary of outstanding discovery (ECF Doc. No 61), and none of the "valuation" information referenced above was identified as being outstanding. Plaintiffs could have sought this "valuation" information in discovery, but didn't. And, moreover, BMW NA *did* direct Plaintiffs to information that *had* been provided in discovery which was responsive to Plaintiffs' "valuation" requests.[9]

This, too, should be kept in mind: In other class-action settlements in this District involving Plaintiffs' attorneys here, where the parties had agreed upon a sum certain for attorneys' fees, costs, and the like, these attorneys did *not* submit a "valuation" report. *See, e.g., In re Volkswagen Timing Chain Prod. Liab. Litig.*, Case No. 2:16-cv-2765-SDW-JAD, ECF Doc. 106-1 (seeking final approval of class-action settlement and award of agreed-upon attorneys' fees without reliance on outside expert report), ECF Doc. No. 235 (order granting final approval of settlement and agreed-upon attorneys' fees); *Salcedo v. Subaru of America, Inc.*, Case No. 1:17-cv-8173-JHR-AMD, ECF Doc. 38-1 (seeking approval of unopposed motion for agreed-upon attorneys' fees without reliance on outside expert report), ECF Doc. No. 47 (order granting unopposed motion for attorneys' fees).[10]

Simply put, this so-called "valuation" information is unnecessary and irrelevant. The settlement provides real and valuable benefits to the class. And Plaintiffs' attorneys' fee

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[8] Plaintiffs' also believe their attorneys are entitled to additional attorneys' fees under a "catalyst theory." *See* n. 3, *above*. Not so. This action was filed on September 22, 2017. (ECF Doc. 1). However, BMW NA issued a service bulletin to its dealers on September 18, 2017 advising of the warranty extension (a copy of which was produced in discovery as BMW_000020 to BMW_000028), and informed customers of the warranty extension by letter in November 2017. Development of the warranty-extension program had already been long underway when this lawsuit was filed. It was not a "catalyst."

[9] *See* Exhibit A (Plaintiffs' September 9, 2020 Letter); Exhibit B (Defendant's September 24, 2020 Letter).

[10] Indeed, in neither of those cases did the plaintiffs submit an expert report purporting to value the settlements to "assist the court in determining whether the class action settlement is fair, reasonable and adequate."

application will rise or fall on the work—reasonable hours times reasonable rates—they did for the class. Plaintiffs' request for "valuation" information should be denied.

Respectfully submitted,

Gary S. Graifman

GSG/mp

Cc: All Counsel of Record (*via ECF and Email Transmission*)