UNITED STATES DISTRICT COURT
FOR THE 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, ERHAN ARAT, ANDRE MALSKE, CRAIG LASH, NICOLE GUY, DAVID RICHARDSON, KAREN HENDERSON, and ERIC T. ZINN, individually and on behalf of all others similarly situated, *Plaintiffs*, v. BEYERISCHE MOTOREN WERKE AKTIENGESELLSHAFT and BMW OF NORTH AMERICA, LLC, *Defendants*.	:	Civil Action No. 2:17-cv-07386-SDW-CLW

DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARDS

Christopher J. Dalton
Argia J. DiMarco
Jacqueline Weyand
BUCHANAN INGERSOLL & ROONEY PC
Incorporated in Pennsylvania
550 Broad Street, Suite 810
Newark, New Jersey 07102
973-273-9800
Attorneys for Defendant,
BMW of North America, LLC

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PRELIMINARY STATEMENT

The Parties' Settlement Agreement sets a "high-low" range for attorneys' fees, costs, and expenses, the precise amount of which the Court will determine. BMW of North America, LLC ("BMW NA") agreed not to object to an application for attorneys' fees, costs, and expenses up to $1.5 million, and Plaintiffs agreed not to seek more than $3.7 million. BMW NA will pay those amounts to Class Counsel "without reducing the relief being made available to Class members," since they "will be paid separate and apart from any relief provided to the Settlement Class." (DE 89-3, Settlement Agreement, Section IV. E.4. and Section VIII. A.) BMW NA reserved the right to object to any application over $1.5 million. (Settlement Agreement, Section VIII. B.)

Plaintiffs now ask this Court to award their attorneys $3.7 million—the highest amount they could possibly collect. It should not.

Plaintiffs' fee application should be determined using the lodestar method—reasonable billing rates times hours reasonably expended. But Class Counsel haven't given the Court the information needed for it to make that determination. Instead, they've provided only conclusory and summary information about the time they claim to have spent litigating this case, terse charts with general categories of tasks performed without the slightest indication of what those tasks were, when they were performed, and why they were performed. This information is woefully insufficient to allow the Court to make the required evaluation of the reasonableness of the fees sought.

But even that summary doesn't get them to the $3.7 million they seek.

So, to do that, Plaintiffs contend they're entitled to a fee "multiplier"—a kicker that courts have tacked on to fee awards—to reward class counsel for their work. But the claims here were brought under consumer-protection laws that already provide for fee shifting. And that's the purpose of a statutory fee-shifting mechanism: to attract competent counsel to pursue those claims

and then to reward them if they prevail. None of the consumer-protection statutes invoked in this action provide a kicker—which oftentimes "rewards" the same factors already encompassed in the fee-shifting analysis—and this Court shouldn't either.

Finally, Plaintiffs try to liken this claims-made settlement to a "common-fund" settlement. They provide the Court with their estimate of what it might cost BMW NA to provide the benefits under the settlement, then tell the Court that their $3.7 million fee application is but a fraction of that amount, a rounding error, a trifle. Why do they do that? To increase what the Court might award, of course. But this isn't a common-fund settlement. There's no pot of money to pay for these benefits. There's no cap on what BMW NA might pay out for claims. There's no limit to the costs BMW NA might bear for future repairs. And there's no reason to adopt Plaintiffs' theory that this claims-made settlement is really a common-fund settlement.

ARGUMENT

Point I

The Court Should Award Attorneys' Fees At The Lower End Of The High-Low Range Using The Lodestar Method.

This is a claims-made settlement. The only appropriate measure of fees in a claims-made settlement is the lodestar method.

As this Court has stated, a "settlement with an indefinite total value and no upper cap on relief" is a claims-made settlement. *McLennan v. LG Electronics USA, Inc*., 2012 WL 686020, at *26 (D.N.J. Mar. 2, 2012). In a claims-made settlement, the lodestar method is the appropriate way to evaluate an attorneys' fee application. *Ibid.; see also Granillo v. FCA US LLC*, 2019 WL 4052432, at *8 (D.N.J. Aug. 27, 2019) ("Because the benefits, like those offered in other class action settlements against automobile manufacturers, are not derived from a common fund and, at

this juncture, cannot be calculated precisely, the Court finds that a lodestar method is appropriate.").

The lodestar method is all the more appropriate here because Plaintiffs' claims were brought under a slew of fee-shifting statutes: the Magnuson-Moss Warranty Act; the New Jersey Consumer Fraud Act; the Illinois Consumer Fraud and Deceptive Trade Practices Act; Massachusetts General Law Ch. 93A; the Texas Deceptive Trade Practices Act; California's Consumer Legal Remedies Act, False Advertising Law, Unfair Competition Law, and Song-Beverly Warranty Act; the Wisconsin Deceptive Trade Practices Act; the Oregon Unlawful Trade Practices Act; New York General Business Law § 349; the Florida Unfair and Deceptive Trade Practices Act; the Colorado Consumer Protection Act; the Alabama Deceptive Trade Practices Act; the Utah Consumer Sales Practices Act; and Oklahoma's Consumer Protection Act and Deceptive Trade Practices Act; (Consolidated Amended Complaint, Counts III to XIX). The appropriate method for determining an award of attorneys' fees in a statutory fee-shifting action is the lodestar method. *AmeriSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 128 (D.N.J. 2002). Indeed, the law is clear that "[t]he lodestar method … is more typically applied in statutory fee-shifting cases." *In re Diet Drugs*, 582 F.2d 524, 540 (3d Cir. 2009); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F. 3d 768, 821 (3d Cir. 1995) ("Courts generally regard the lodestar method…as the appropriate method in statutory fee shifting cases. Because the lodestar award is decoupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class."); *Gray v. BMW of North America, LLC*, 2017 WL 36387713 (D.N.J. Aug. 24, 2017) (applying lodestar method in

disputed fee application in class-action settlement where claims were brought under fee-shifting statutes, rejecting plaintiffs' contention that percentage-of-common-fund method should apply).

This is a claims-made settlement. The lodestar method applies.

Point II

Plaintiffs' Submissions Are Inadequate To Allow The Court To Determine Whether The Hours Expended Were Reasonable And Necessary. The Court Should Not Award Them Their Requested Lodestar.

The Third Circuit has directed that a "through judicial review of fee applications is required in all class action settlements." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F. 3d at 819. But Class Counsel have submitted nothing more than summary charts to support their fee application. (DE 89-4 at Ex. 1; DE 89-5 at Ex. 1; DE 89-6 at Ex. 1). That's not sufficient to permit a "thorough review" of their fee application.

The summary charts do not detail in any definite way how the total hours worked—some 2,182 of 'em—were generated.[1] No dates are provided to inform the Court when something was done. No information is submitted showing how much time was devoted to any specific activity on any specific date by any specific individual at any particular rate. Indeed, tasks are described only in the broadest terms—"Pre-Litigation Investigation and Fact Analysis," "Case Development and Case Administration," "Motion Practice, Drafting Memoranda and Legal Research." Without specifics—dates, tasks, time expended—there's no way for the Court to determine whether the work was or was not necessary, was or was not duplicative, was or was not appropriate. In the

[1] That's like one person billing 8 hours a day, every day, for 273 days straight.

real world, no client would accept such a summary recitation of three years' work and no attorney would expect to be paid based on the summary charts Plaintiffs have submitted to this Court.[2]

A fee application seeking compensation must document the hours for which payment is sought "with sufficient specificity." *Keenan v. City of Philadelphia*, 983 F.2d 459, 472 (3d Cir. 1992). The application must be "specific enough to allow the district court to 'determine if the hours claimed are unreasonable for the work performed.'" *Rode v. Dellarciprete*, 892 F.2d 1177, 1190 (3d Cir. 1988) (quoting *Pawlak v. Greenawalt*, 713 F.2d 972, 978 (3d Cir. 1983)). This information is more critical in a class-action settlement, where Rule 23(h) requires the Court to review and approve the fee award.

The proper measure of a fee application in a claims-made settlement—like this one— is the lodestar method. "A lodestar award is calculated by multiplying the number of hours [the attorney] reasonably worked on a client's case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." *Oh v. AT & T Corp.*, 225 F.R.D. 142, 153 (D.N.J. 2004). However, "[h]ours that are 'excessive, redundant, or otherwise unnecessary' are not reasonably expended on the litigation and must be excluded from the lodestar calculation." *Port Drivers Federation 18, Inc. v. All Saints*, 2011 WL 3610100, at *1 (D.N.J. Aug. 16, 2011) (quoting *Pennsylvania Environmental Defense Fund v. Canon–McMillan School District*, 152 F.3d 228, 231 (3d Cir. 1998)). Ultimately, the documentation submitted must provide enough information as to what hours were spent on what activities by whom at what rate to determine if the fees sought are reasonable.

[2] Legend has it that attorneys used to submit annual bills to clients with little more than "for services rendered." If ever those days existed, they're long gone. All the more so in the context of a contested fee application in a claims-made class-action settlement.

In *Rode*, the Third Circuit found documentation in which each time entry provided the general nature of the activity, the subject matter of the activity (where possible), the date of the activity, and the amount of time spent on the activity to be sufficient:

> Appellants submitted a computer-generated time sheet for each attorney, paralegal and law clerk who worked on the case. In each instance, the time sheet was in chronological order. Each entry provided the general nature of the activity and the subject matter of the activity where possible, e.g., T (Dusman); CF (client); R (re appeals), the date the activity took place and the amount of time worked on the activity. In some instances, appellants aggregated the work in a day on various activities. Lastly, appellants, from October, 1985 to February, 1987, submitted monthly time reports to the district court. These reports were very specific and did not include the abbreviations which the district court had difficulty interpreting. These various submissions provided enough information as to what hours were devoted to various activities and by whom for the district court to determine if the claimed fees are reasonable.

Rode, 892 F.2d at 1191 (footnotes omitted).

In *Washington v. Phila. Cnty. Court of Common Pleas*, 89 F.3d 1031, 1037 (3d Cir. 1996), the Third Circuit found the documentation was sufficient under the *Rode* standard because the submission provided enough information to determine if the fees claimed were reasonable. *Id.* at 1038. The court suggested that fee applications with words such as "review," "research," "prepare," "letter to," and "conference with" are acceptable, so long as they provide enough information as to what hours were devoted to various activities and by whom. *Ibid.* (citing *Rode*, 892 F.2d at 1191).

Other examples of acceptable supporting documentation include:

- Time entries for bills consisting of almost 60 pages chronologically listing the dates when the work was performed, the initials of the individual attorney or staff that performed the work, the nature of the work, the time spent on the work, the hourly rate charged, and the total billable cost for each time entry was sufficient. *Neena S. v. Sch. Dist. of Philadelphia*, 2009 WL 2245066, at *4 (E.D. Pa. July 27, 2009).

- A 50 page document chronologically listing the dates when the work was performed, the initials of the attorney performing the work, the time spent by each attorney on each task, and a brief description of the work performed was found to be sufficiently specific. *Mary Courtney T. v. Sch. Dist. of Phila.*, 2009 WL 185426, at *3-4 (E.D. Pa. Jan. 22, 2009), *aff'd in part, rev'd in part sub nom. Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235 (3d Cir. 2009).

- Plaintiffs' itemized, chronological list of "the dates when the work was performed, the nature of the work, the time spent by individual attorney or staff, the hourly rate charged, and the total billable cost for that time entry" was sufficiently specific. *Damian J. v. Sch. Dist. of Phila.*, 2008 WL 1815302, at *4 (E.D. Pa. Apr. 22, 2008).

- Summaries showing the daily activities of attorneys and paralegals, with one summary in chronological order with the date, time expended, and a general description of the activities provided by each attorney, and a second summary with attorneys' time spent in various general activities such as arbitration, pretrial preparation, and trial, met the specificity standard. *Keenan v. City of Philadelphia*, 983 F.2d 459, 473 (3d Cir. 1992). However, a separate portion of the fee application for an attorney's hours from 1987-1989 which only included monthly cumulative hours was found to be insufficiently specific. *Id.* at 473-74.

Thus, the critical inquiry is whether the materials submitted contain enough specificity to permit the court to determine whether the "'the hours claimed are unreasonable for the work performed.'" *Rode* 845 F.2d at 1190 (quoting *Pawlak*, 713 F.2d at 978). Class Counsel's summaries don't meet the Third Circuit's requirements.

Nor do those summaries comply with this District's requirements for fee applications. Consistent with Third Circuit case law, the District of New Jersey has adopted a local rule governing applications for attorneys' fees, costs, and expenses. *See* L. Civ. R. 54.2. That Local Rule provides, in relevant part, that the affidavits or other documents supporting a fee application must include the following:

1. the nature of the services rendered, the amount of the estate or fund in court, if any, the responsibility assumed, the results obtained, any particular novelty or difficulty about the matter, and other factors pertinent to the evaluation of the services rendered;
2. a record of the dates of services rendered;

3. a description of the services rendered on each of such dates by each person of that firm including the identity of the person rendering the service and a brief description of that person's professional experience;
4. the time spent in the rendering of each of such services; and
5. the normal billing rate for each of said persons for the type of work performed.

L. Civ. R. 54.2(a). Our Local Rule further provides that "[c]omputerized time sheets, to the extent that they reflect the above, may be utilized and attached to any such affidavit or other document showing the time units expended. Reimbursement for actual, not estimated, expenses may be granted if properly itemized." *Ibid*.

Plaintiffs' submissions here don't meet that standard—they don't provide the specific information required under both Third Circuit case law and this District's Local Rule. Rather, the documentation Plaintiffs submit is merely a summary (for three-years' work) consisting of: (1) the name and title of the person performing the task; (2) the general category of work; (3) the total number of hours spent performing each category of work (as one number for the entire three years); and (4) the total billable amount for the work performed in each category. The documentation does not include the dates when each task was performed, the amount of time spent on each task, or any indication of what the task was.

Indeed, Plaintiffs' submissions provide no detail about what was actually done or when. (DE 89-4 at Ex. 1; DE 89-5 at Ex. 1; DE 89-6 at Ex. 1). For example, in three separate summary charts counsel seek fees for "post-filing investigation and communication with class members" totaling (exactly) 250 hours spread across 11 timekeepers ranging from 0.7 hours to 158 hours—yet there is simply no explanation of what exactly was done, when, or for how long across those 250 hours. Similarly, there are 272 hours in fees attributable to the vague category of "case development and case administration" and nearly 400 hours (373.9) in fees attributable to the broad category of "discovery."

It's up to the *Court* to determine whether the "work performed was reasonable." But Plaintiffs have given the Court *nothing* upon which to make that determination. Plaintiffs' summary charts are insufficient to support an award—not, indeed, the high-end request in the present fee application. Because they haven't given the Court the information necessary to determine the propriety of their $1,690,042 lodestar—let alone the $3.7 million they seek—Plaintiffs should be awarded the $1.5 million BMW NA agreed to pay without question.

Point III

A Fee Multiplier is Not Warranted.

Plaintiffs seek a 2.18 multiplier on their (unsupported) lodestar in order to arrive at the sought-after $3.7 million award. But Plaintiffs' application doesn't justify their lodestar or their request for a 2.18 multiplier. Their submissions support no more than the $1.5 million that BMW NA has agreed to pay. Even if the Court was inclined to award a multiplier based on an insufficient lodestar—and it shouldn't—no multiplier is justified here.

After determining the appropriate lodestar figure for attorneys' fees, "the court may either increase or decrease the lodestar amount through the use of a multiplier." *In re Johnson & Johnson Derivative Litig*., 2013 WL 6163858 (D.N.J. Nov. 25, 2013) (finding that a multiplier was not warranted). This multiplier is discretionary, *ibid*., and is only warranted in "special circumstances." *Ibid.*, n.9 (citing *Perdue v. Kenny A.*, 559 U.S. 542, 552-53 (2010)). A multiplier attempts to "account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Diet Drugs*, 582 F.3d 524, 540 n. 33 (3rd Cir. 2009).

In *Perdue v. Kenny A.*, the Supreme Court set forth six "important rules" regarding fee-shifting statutes and multipliers:

1. A "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious case.

2. The lodestar method yields a fee that is presumptively sufficient to achieve this objective.
3. Multipliers may be awarded in "rare" and "exceptional" circumstances.
4. The lodestar figure includes most, if not all, of the relevant factors constituting a reasonable attorney's fee, and a multiplier may not be awarded based on a factor that is subsumed in the lodestar calculation.
5. The applicant bears the burden of proving that a multiplier is necessary.
6. A fee applicant seeking an enhancement must produce "specific evidence" that supports the award.

559 U.S. at 552-54. Since 2010, courts in the Third Circuit and this District have applied these rules when determining whether a multiplier was warranted and have found that a multiplier should only be granted, if at all, after a critical review of the lodestar. Specifically, Chief Judge Freda L. Wolfson correctly applied these principles in *In re Johnson & Johnson Derivative Litig*.

In *Johnson & Johnson*, Judge Wolfson stated that "in order to receive an upward adjustment, the fee applicant must show some basis that such an adjustment is necessary to provide fair and reasonable compensation." *In re Johnson & Johnson Derivative Litig*., 2013 WL 6163858, at *31 (citing *In Re: Prudential Ins. Co. Am. Sales Practice Litig*., 148 F.3d 283, 340 (3d Cir. 1998)). Any upward adjustment may not be based on factors already accounted for in the lodestar calculation, such as the novelty and complexity of the issues, the quality of the representation, and the skill of the attorneys. *Ibid.* That's because "those factors have been accounted for in determining the number of billable hours and the reasonable hourly rate." *Ibid*. (quotation omitted) (citation omitted).

The quality of Class Counsel is already reflected in their lodestar calculation—with partners charging an average rate of $800. The novelty and complexity of the issues are already tied into the reasonable (subject to the Court's determination) hours expended prosecuting the action. The results achieved must account for the various pre-lawsuit measures that BMW NA took to address the timing-chain and oil-pump drive-chain issues—including that BMW NA offered Class Members significant relief before the lawsuit was filed, long before this settlement

was achieved. The measures that BMW NA took prior to the lawsuit should be reflected in any fee the Court awards to Class Counsel. *Cf. Linneman v. Vita-Mix Corp*., 970 F.3d 621, 634 (6th Cir. 2020) (on remand, when assessing attorneys' fee award, "the district court should consider the various pre-lawsuit measures that Vita-Mix took to address the [] problem."). Additionally, Class Counsel mitigated the risks of litigation by proceeding with mediation at an early juncture. There's just no need for a multiplier.

And, to be clear, let's say it again: This is *not* a "common-fund" settlement. The Court shouldn't rely on the line of cases Plaintiffs cite analyzing fee multipliers in that context—all but two of which predate the Supreme Court's *Perdue* decision. (DE 89-1, p.24-26). And the two that post-date *Perdue* were *not* claims-made settlements. In *Doherty v. Hertz Corp*., 2014 WL 2916494 (D.N.J. June 25, 2014), the court permitted a multiplier after requiring supplemental briefing on an *unopposed* motion for attorneys' fees in a common-fund settlement. And in *Milliron v. T-Mobile United States*, 423 Fed. Appx. 131 (3d Cir. 2011), the court considered the multiplier to determine whether the award was in the range of reasonableness in the context of a common-fund settlement.

This Court should award a multiplier only if it finds that the lodestar "insufficiently accounts for the risks of litigation, the contingent nature of the case, the results achieved and the quality of representation." *In re Johnson & Johnson Derivative Litig*., 2013 WL 6163858 at *34; *see e.g., Fessler v. Porcelana Corona De Mexico*, 2020 WL 1974246 (E.D. Tex. Apr. 24, 2020) ("the Court finds that neither enhancement nor reduction of the lodestar is appropriate."). Plaintiffs' $1.69 million lodestar amount is unsupported and the Court shouldn't award it. The $1.5 million award to which BMW NA agreed more than adequately compensates Class Counsel for the work performed.

Class Counsel claim to have undertaken this litigation on a contingent-fee basis, but proffer no evidence to support this assertion. Indeed, the details of the contingent nature of the engagement are not discussed in any of the Class Counsels' Declarations, nor have they provided a single retainer agreement from their score of Plaintiffs in their submissions. *See Vines v. Welspun Pipes*, 2020 WL 3062384 (E.D. Ark., June 9, 2020) (denying first, and second, request for settlement approval because plaintiff's counsel failed to submit detailed billing records and the contingency fee agreement).

The action was in its preliminary stages when the Parties settled: No depositions were taken, no motions to compel were filed, and no expert reports were prepared. Rather, the Parties had engaged in limited paper discovery and the production of documents, and then the substantive issue were resolved on the merits after one day of mediation.[3] For a case that barely progressed beyond the motion-to-dismiss stage, $1.5 million in fees is pretty decent coin. *See Charles v. Goodyear Tire and Rubber Co*., 976 F. Supp. 321, 325 (D.N.J. 1997) ("a positive multiplier is not warranted as the fee award is more than reasonable and already accounts for the risks of litigation, the contingent nature of the case, the results achieved and the quality of representation."). A fee multiplier on top of the $1.5 million which BMW NA agreed to pay is unjustified here.[4]

[3] The parties spent another day of mediation trying to resolve the attorneys'-fees issue. They didn't, so that's why they're here.

[4] That said, if the Court is inclined to grant a multiplier—ensuring that the lodestar factors are not double-counted—BMW NA submits that a multiplier of 1 (or less) is appropriate. *See Granillo*, 2019 WL 4052432 at * 20 (awarding a multiplier of 1.11).

Point IV

Plaintiffs Have Not Submitted Any "Expert Report" Regarding Settlement Valuation And The Court Should Disregard Any Subsequent Submission.

To substantiate their otherwise defective and unjustifiable request for the highest possible amount of fees under the Parties' high-low agreement, Plaintiffs tell us they'll rely on an "expert report" on settlement valuation that they haven't yet submitted to the Court. (DE 89-1, p.10-14). That's all well and good, but it's irrelevant, because this is a claims-made settlement.

Yet even if the Court considered this a common-fund settlement (it isn't), and even if the Court is inclined to accept Plaintiffs' arguments as though they were experts (they're not), and even if the Court permits Plaintiffs to submit an "expert report" supporting their alleged valuation with their reply (it shouldn't), Plaintiffs' valuation is overstated and wrong.

Plaintiffs attempt to downplay the fact that BMW NA had already repaired a goodly number of potential class vehicles under warranty before this action was filed or the settlement was reached. Indeed, as Plaintiffs admit, BMW NA was in the process of implementing an extended warranty when the *Gelis* action was filed. (DE 89-1, p.6, n.6.) That warranty extension covers the same components and vehicles at issue here, and has already been in effect for years. Plaintiffs' analysis thus overestimates the number of Class Vehicles on the road that may need the benefits of the settlement's prospective relief.

Plaintiffs' calculation also overvalues that prospective relief. Plaintiffs place a dollar value on the "extended warranty" and multiply that by the number of class vehicles to arrive at a "value" of $115 million to $139 million — *even though the vast majority of Class Vehicles will never need to take advantage of the warranty extension*. This "value" is simply illusory—it's made up.

To be clear: This isn't a common-fund settlement, and the Court should reject Plaintiffs' attempts to convince it otherwise.

CONCLUSION

Without doubt litigation is costly and unpredictable—for both plaintiffs *and defendants*. Both sides here have incurred substantial costs and taken significant risks. Our Local Rules and case law allow for an award of reasonable fees to class counsel, but they also require Plaintiffs to make a certain showing to substantiate and justify the amount of that award. And Plaintiffs here have not made that required showing. They've failed to support or justify their application to be compensated (for fees, costs, and expenses) at a level above that which Defendant has agreed to compensate their counsel. Accordingly, the Court should reject Plaintiffs' efforts to obtain compensation above the $1.5 million minimum to which Defendant agreed.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

By /s/_____
CHRISTOPHER J. DALTON
Attorneys for Defendant,
BMW of North America, LLC

Dated: December 31, 2020

4850-0662-2165, v. 1