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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSHUA SKEEN and LAURIE FREEMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. BMW OF NORTH AMERICA, LLC, a Delaware limited liability company; BMW (U.S.) HOLDING CORP., a Delaware corporation; and BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT, a foreign corporation, Defendants.	Civil Action No.: 2:13-cv-01531-WHW-CLW

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND NOTICE PROGRAM

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I. INTRODUCTION

This action alleges that certain MINI Cooper vehicles marketed and sold by Defendants BMW of North America, LLC and Bayerische Motoren Werke Aktiengesellschaft (collectively, "Defendants" or "BMW") contain a defect in a component part known as the "Timing Chain Tensioner," which causes the engine to malfunction and eventually, if left unrepaired, to fail. After multiple challenges to the pleadings, lengthy negotiations among the parties, a full-day mediation before the Honorable Theodore H. Katz, U.S.M.J. (Ret.), and a settlement conference with the Honorable Cathy L. Waldor, the Magistrate presiding over this matter, the parties reached a proposed settlement of this action (the "Settlement"). Only after the class benefits were negotiated, did the parties discuss attorney's fees and expenses and did so with the assistance of the Honorable Cathy L. Waldor, and then with the Honorable Joel A. Pisano (Ret.). The Settlement fully resolves all claims that were asserted in this matter relating to class vehicles, as more fully explained below. A copy of the fully executed Settlement Agreement and Release (the "Settlement Agreement") is attached to the concurrently filed Declaration of Raymond P. Boucher ("Boucher Decl.") as Exhibit 1.

The Settlement was the result of a fully informed decision by Plaintiffs' Counsel who had, before the filing of the action, consulted extensively with an independent automotive expert who explained the nature of the timing chain issue, and an expert in material sciences who performed analysis on the differences between the original part used at manufacture and the subsequently introduced part. In addition, during the course of the litigation, Plaintiffs' Counsel not only had the benefit of the input and service records from their approximately two dozen clients but also communicated with hundreds of consumers all across the country, and sometimes outside of it, who had experienced the defect. As a result, Plaintiffs' Counsel were well versed before negotiating, and ultimately agreeing to, the details of the Settlement.

In sum, Plaintiffs' Counsel believe the Settlement to be fair, reasonable, and adequate, and in the best interests of the class. Accordingly, Plaintiffs now respectfully move this Court to: (1) preliminarily approve the Settlement; (2) conditionally certify the proposed class for settlement purposes; (3) approve the form and manner of notice that the settling parties propose so as to inform the settlement class of the Settlement and right to object or opt out; and (4) set a hearing date for consideration of the final approval of the Settlement and payment of Plaintiffs' Counsel's fees and costs as well as the requested service awards to the named Plaintiffs.

II. BACKGROUND

A. Plaintiffs' Counsels' Investigation and the Allegedly Defective Timing Chain Tensioner

This action involves the following turbocharge-equipped MINI Cooper automobiles equipped with "N14" engines and manufactured at any time from start of production in November 2006 through July 2010 (the "Class Vehicles"):

- model-year 2007 through 2009 MINI Cooper 'S' Hardtop (R56);
- model-year 2008 through 2009 MINI Cooper 'S' Clubman (R55); and
- model-year 2009 through 2010 MINI Cooper 'S' Convertible (R57).

B. Defendants' Marketing of the MINI

The MINI is a small, distinctive car originally made by the British Motor Company and its successors from 1959 until 2000. Except for a very small number of MINI vehicles exported to the United States in the 1960s, the original MINI was only available on the European market. Its distinctive design made it an icon of 1960s England, much the same as the Volkswagen Beetle in the United States. Defendants acquired MINI and, in 2002, introduced the First Generation MINI in the United States.

Defendants marketed the First Generation MINI as a new class of high-end vehicle – stylish, high performance, and affordable. As part of this marketing, Defendants employed

aggressive, unconventional tactics aimed at creating fanfare and excitement over the MINI's design and performance features. For example, the MINI was featured in the 2003 remake of the movie "The Italian Job". The MINI marketing campaign was so successful that the car received the J.D. Power and Associates Automotive Performance, Execution and Layout award, based on a survey of owners' perceptions of eight categories of vehicle performance and design, including the engine. Car and Driver Magazine described the MINI as "fun to drive and feels of high quality enough to wear the BMW badge." As a result, the First Generation MINI was so popular that supply could not keep up with demand.

Beginning with the 2007 model year and then 2008 and 2009, MINI released the Second Generation of MINI Coopers in the United States that are the subject of this litigation. Although the Second Generation model looks similar to its predecessor, it was based on a completely re-engineered platform incorporating the all-new "N14" engine. The Second Generation MINI, marketed as a stylish and high-performance vehicle from the BMW family, enjoyed the same popularity and acclaim of its predecessors.

C. The MINI's Engine and Function of the Timing Chain

Four-stroke automobile engines use pistons and valves to produce energy. The crankshaft controls the up and down movement of the pistons. The camshaft controls the opening and closing of the engine's valves. The valves must open and close once per revolution of the crankshaft. Accordingly, the camshaft is geared to turn at one-half the rate of the crankshaft. The timing chain, or belt, links the crankshaft to the camshaft so that the valves are in sync with the pistons. If the valve and piston movements are not properly synchronized, the valves will collide with the pistons. A timing chain or belt that is not properly tensioned and synchronized will cause serious damage ultimately resulting in catastrophic engine failure. Most automobile engines are designed with a rubber-composite timing belt located outside the engine block (the

cast metal block containing the cylinders). As such, timing belts are normally protected only by a belt cover that can be easily and quickly removed for belt inspection or replacement. Class Vehicles, however, do not have timing belts, rather, they utilize timing chains. A timing chain and its components were considered more durable than timing belts.

Plaintiffs' Counsel, through consultations with class members, consulting experts, and their own expertise from work in other cases involving defective automobiles and consumer products, believed that the issues relating to the MINI's timing chain were likely due to a weakening of the spring that is contained inside the timing chain tensioner as shown in Figure A.

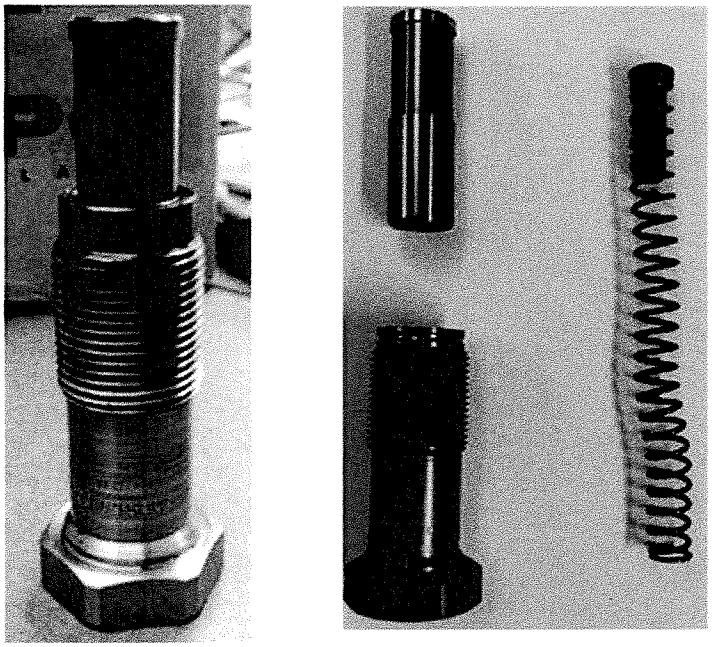

Figure A: Timing Chain Tensioner Assembled (left) and Disassembled (right)

As shown in Figure B, the timing chain tensioner maintains proper tension of the guide rails against the timing chain:

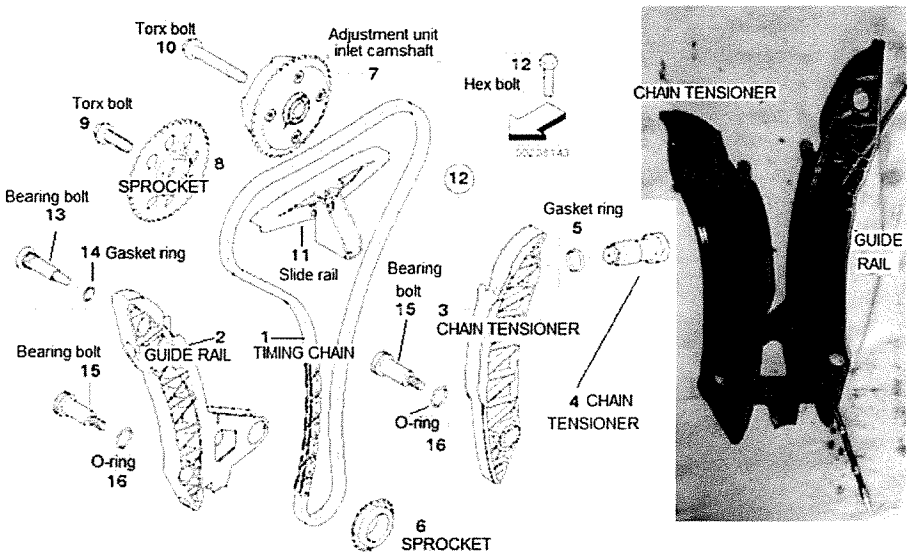

Figure B: Timing Components

The guide rails ensure the timing chain maintains proper synchronization between the camshaft and crankshaft. When the timing chain tensioner begins to fail, as it did for each of the named Plaintiffs, the guide rails loosen and the timing chain will stretch out of place. Due to the precise synchronization of engine components, even a small deviation in timing chain tension can result in serious damage to the engine. When the timing chain tensioner fails completely, the timing chain disconnects from its guides. Without the timing chain coordinating the rotations of the crankshaft and camshaft, the pistons and valves collide with great force. The engine components suffer so much damage that the engine seizes and all power to the vehicle is lost. This failure of the timing chain tensioner does not occur suddenly, rather, it slowly develops over time due to Class members' ordinary and intended use of the Class Vehicles, *i.e.*, driving.

Defendants issued a new timing chain tensioner to replace the one that was installed at the time of manufacture. Plaintiffs' Counsel took various tensioners, old and new, to a consulting

metallurgical expert who confirmed that while the new and old timing chain tensioners were made from the same materials, the internal spring in the revised tensioner was more robust. As set out in the following table, the analysis showed the redesigned timing chain tensioner spring included significant revisions to the spring diameter, coil diameter, total length, and pitch[1]:

	Spring Diameter	Coil Diameter	Total Length	Pitch
Original	**1.27 mm**	**9.94 mm**	**8.2 cm**	**3.77 mm**
Redesigned	**1.39 mm**	**10.50 mm**	**12.0 cm**	**5.35 mm**

Thus, Plaintiffs alleged that an integral component of the engines in the Class Vehicles was prone to failure and if not replaced early enough, would result in the complete failure of the engine necessitating the replacement of the engine at a significant cost. Early intervention still cost the consumer out of pocket anywhere from a few hundred to almost one thousand dollars depending on the severity of the damage.

D. The Claims Asserted

On March 12, 2013, Plaintiffs Joshua Skeen and Laurie Freeman filed this action alleging that Defendants knew or should have known of the issues with the timing chain and its components at the time the Class Vehicles were put into the stream of commerce in this jurisdiction and throughout the United States. (ECF No. 1.) Nonetheless, Defendants marketed the Class Vehicles as having sophisticated on board computers which were always monitoring the vehicles to alert the owner of when service was required and, yet, Plaintiffs allege that this system failed to alert consumers to the issues with the timing chain. Plaintiffs further alleged that Defendants compounded its improper sale of the Class Vehicles by refusing to honor its obligation to repair the timing chain and its components without cost to members of the class

[1] "Pitch" is the space between coils as measured from the center of each wire.

despite the issue being present on delivery and within the original vehicle warranty period.

Multiple other similar putative class actions were eventually filed in the United States District Court for the: District of New Jersey (*Curran v. BMW of North America, LLC*, Civil Action No. 2:13-cv-4625-WHW-CLW); Southern District of California (*Brown v. BMW of North America, LLC*, Civil Action No. 3:14-cv-00950-JLS-BLM); Eastern District of New York (*Kahn v. BMW of North America, LLC*, Civil Action No. 2:14-cv-02463-ADS-ARL); and, Southern District of Ohio (*Quinlan v. BMW of North America, LLC*, Civil Action No. 1:14-cv-00485-MRB) (collectively, the "Federal Actions"). The Federal Actions asserted a number of claims, all of which sought relief, like this action, under various state and federal laws.

E. Defendants' Motions to Dismiss, Discovery, and Plaintiffs' Continuing Investigation

On April 23, 2013, Defendants filed a motion to dismiss the first-filed complaint on various grounds (ECF No. 5). In response, the parties agreed to the filing of the First Amended Complaint, which named five Plaintiffs from three states (ECF No. 13; "FAC"). Defendants then moved again, on July 23, 2013, and sought to dismiss the FAC (ECF No. 15) to which Plaintiffs filed their Opposition (ECF No. 28). By order dated January 24, 2014, this Court denied in part and granted in part Defendants' motion. (ECF No. 39.) On May 2, 2014, a Second Amended Complaint was filed on behalf of 21 plaintiffs from 12 states (ECF No. 53), to which Defendants ultimately filed their Answer (ECF No. 58).

After the parties exchanged initial disclosures, Plaintiffs continued to investigate the timing chain failures being reported to them from consumers across the country. This included not only conversations with those consumers but also, in many instances, obtaining their service, and other, records relating to their MINIs. Further, the parties exchanged extensive written discovery requests and noticed various depositions.

F. The Settlement Negotiations

The Settlement was the culmination of lengthy negotiations among the parties, which involved a full-day mediation with the Honorable Theodore Katz (Ret.), a settlement conference with the Honorable Cathy L. Waldor, and multiple in-person, telephonic, and written communications between the parties. Such negotiations, which occurred over the span of more than one year, did not take place until after the above-referenced dispositive motions were filed and ruled upon. Further, and as explained above, Plaintiffs' Counsel were fully informed regarding the claims made as to the timing chain tensioner due to their interactions with their own clients, conversations and meetings with mechanical and metallurgical experts, and information and records received from the hundreds of consumers who had contacted them during the pendency of this action.

In addition to their case-specific knowledge, Plaintiffs' Counsel in this case are, or have been, counsel of record in many other putative class actions pending in this, and other, districts and state courts throughout the country relating to automobiles and consumers products. *See* Boucher Decl. ¶ 35. As a result, Plaintiffs' Counsel were well versed in what would be an appropriate resolution of this matter and the hurdles to be faced if the litigation continued. So too, if an appropriate resolution were not achieved, as a result of their past experiences, they more than had the resources and know-how to continue the litigation through to its conclusion.

III. SETTLEMENT TERMS

The Settlement provides, in sum, the following relief to each Class Member: (a) a warranty extension for the Timing-Chain Tensioner and related parts; (b) reimbursement to all Class Members who repaired or replaced a Timing Chain or Timing-Chain Tensioner before the Effective Date of the Settlement; (c) reimbursement to all Class Members who repaired or replaced a damaged or failed engine due to a Timing Chain or Timing-Chain Tensioner failure

before the Effective Date of Settlement; and, (d) compensation to all Class Members whose Class Vehicles were sold at a loss due to a failed engine resulting from a failed Timing Chain or Timing-Chain Tensioner. The specifics of each component of the Settlement are as follows:

A. Warranty Extension for Covered Parts

All Class Vehicles will receive a warranty extension for the following parts all of which are part of the timing chain and its components: timing-chain tensioner; sealing ring; timing chain; guide rail; tensioner rail; sliding rail; sprocket on the crankshaft; bearing bolts for the tensioner and guide rails ("Covered Parts"). All Class Vehicles were originally covered by the MINI New Vehicle Limited Warranty for a period of 4 years or 50,000 miles from the date the vehicle was first placed into service, whichever comes first. The Settlement extends the warranty period for Covered Parts to 7 years or 100,000 miles from the vehicle's original in-service date, whichever comes first, and will otherwise be subject to the terms and conditions of the standard MINI New Vehicle Limited Warranty. This extension is in addition to any other warranties applicable to the Class Vehicles. *See* Settlement Agreement ¶ III.A.

B. Reimbursement of Out of Pocket Expenses for Repair and/or Replacement of Timing Chain/Timing-Chain Tensioner Before Effective Date of Settlement

All Class Members who repaired or replaced a Timing Chain or Timing-Chain Tensioner before the Effective Date of the Settlement and who submit a valid Claim (as set forth below) are entitled to be reimbursed as follows:

Timing Chain Tensioner Repair/Replacement:

(a) If the timing-chain tensioner was repaired or replaced at an Authorized MINI Dealer: 100% of the Dealer invoice amount for the Covered Part(s) and labor limited to one repair per Class Member/Vehicle Identification Number.

(b) If the timing-chain tensioner was repaired or replaced at a third-party service center other than an Authorized MINI Dealer: 100% of the invoice for Covered Part(s) and labor, but no more than $120 (the equivalent cost

as if performed at an Authorized MINI Dealer).

Timing Chain Repair/Replacement:

(a) If the timing chain was repaired or replaced at an Authorized MINI Dealer: 100% of the Dealer invoice amount for the Covered Part(s) and labor limited to one repair per Class Member/Vehicle Identification Number.

(b) If the timing chain was repaired or replaced at a third-party service center other than an Authorized MINI Dealer: 100% of the invoice for Covered Part(s), but no more than $850 (the equivalent cost as if performed at an Authorized MINI Dealer).

(c) Where the timing chain is replaced, "Covered Parts" includes oil change, oil filter, and cleaning of oil pan.

Limitations on Reimbursement:

(a) Any reimbursement will be reduced by the amount of any goodwill payments/credits or other concession paid by MINI or any other entity (including insurers and providers of extended warranties), up to the full amount of any reimbursement if Class Member received free replacement or repair.

(b) Defendants will only pay for labor and parts for one initial repair per Class Member/Vehicle Identification Number by a third-party service center; Defendants will not be responsible for, and will not warrant, repair/replacement work performed at a third-party service center. *Subsequent Failure*: If any replacement Covered Part(s), purchased by the customer or a third-party service center from an Authorized MINI Dealer, fails within two (2) years of installation in a Class Vehicle, Defendants will provide a free replacement of Covered Part(s) only.

See Settlement Agreement ¶ III.B.

C. Reimbursement for Out-of-Pocket Expenses to Repair or Replace Failed Engine due to Timing-Chain Tensioner and/or Timing Chain Failure Before Effective Date of Settlement

All Class Members whose Class Vehicle suffered a failed engine due to the failure of the Timing-Chain or Timing Chain Tensioner in their Class Vehicle and who submit a valid Claim (as set forth below) are entitled to be reimbursed for out-of-pocket expenses as follows:

Reimbursement Parameters

(a) If the engine was repaired or replaced at an Authorized MINI Dealer, a refund of the invoice amount subject to time/mileage parameters set out in Table 1.

(b) If the engine was replaced at a third-party service center other than an Authorized MINI Dealer, a refund of the invoice amount up to a maximum of $5,400.00, subject to the time/mileage parameters set out in Table 1:

TABLE 1: Reimbursement for Out-of-Pocket Expenses for Failed Engine Due to Timing Chain Tensioner/Timing Chain Failure

Time from in-service date	Less than 50,000 Miles	50,001 to 62,500 Miles	62,501 to 75,000 Miles	75,001 to 87,500 Miles	87,501 to 100,000 Miles	100,001 to 112,500 Miles
4 years	100% (under original warranty)	85%	70%	60%	40%	25%
4-5 years	85%	75%	60%	40%	30%	15%
5-6 years	75%	60%	50%	30%	20%	10%
6-7 years	50%	30%	30%	15%	10%	0%
7-10 years	25%	10%	10%	5%	0%	0%
10+ years	0%	0%	0%	0%	0%	0%

For illustration purposes, if a Class Member had the repair or replacement performed at an Authorized MINI Dealer when the Class Vehicle was 4½ years old and had been driven for 70,000 miles, the Class Member will be entitled to a 60% return of the documented out-of-pocket expenses if a valid claim is submitted. The same limitations on reimbursement apply to the repair or replacement of the timing chain/timing-chain tensioner as set out above. *See* Settlement Agreement ¶ III.C.

D. Compensation for Sale of Class Vehicle at a Loss Due to Unrepaired Damaged or Failed Engine as a Result of Failed Timing Chain/Timing-Chain Tensioner Before Effective Date of Settlement

All Class Members whose Class Vehicles were sold at a loss due to an unrepaired failed

or damaged engine caused by a failed Timing Chain or Timing-Chain Tensioner, and who submit a valid Claim (as set forth below), are entitled to compensation as follows:

TABLE 2: Compensation for Sale of Class Vehicle at Loss Due to Unrepaired Damaged or Failed Engine as a Result of Failed Timing Chain/Timing-Chain Tensioner

Time from in-service date	Less than 50,000 Miles	50,001 to 62,500 Miles	62,501 to 75,000 Miles	75,001 to 87,500 Miles	87,501 to 100,000 Miles	100,001 to 112,500 Miles
4 years	$0 because 100% covered under original warranty	$2,250	$1,500	$1,300	$1,000	$500
4-5 years	$2,250	$1,500	$1,200	$1,000	$600	$0
5-6 years	$1,500	$1,200	$900	$600	$450	$0
6-7 years	$1,000	$750	$600	$450	$300	$0
7-10 years	$750	$500	$0	$0	$0	$0
10+ years	$0	$0	$0	$0	$0	$0

See Settlement Agreement ¶ III.D.

E. Claim Form

In order to obtain reimbursement under the Settlement, the Class Member must complete and submit a claim form that seeks information and documents relating to the Class Member and Class Vehicle. That information generally includes the claimant's name and contact information, VIN, make and model of Class Vehicle, name and address of all dealer or servicing centers, date of repair, mileage at repair, cost of repair/replacement and proof of payment of same, information about the sale of the vehicle, and documents evidencing claimant's adherence to the vehicle maintenance schedule, in particular, regular oil changes (within 2,000 miles of the recommended schedule), up to date/mileage of replacement/repair. If maintenance records are

not available, a "Mechanic's Attestation" may be submitted instead. *See* Settlement Agreement ¶ III.B.4, III.C.4, III.D.2.

F. Payment of Notice and Administrative Costs by Defendants

The Settlement requires that almost all notice and administrative costs be paid separate and apart from any benefits to Class Members. Defendants will pay all of the notice and administrative costs associated with implementing the Settlement, except that Class Counsel will pay for the cost of individual email notice. Notice to the Class will be given as follows: (1) individual direct mail (first class) notice regarding the Settlement will be sent to all current and former owners and lessees of Class Vehicles using BMW NA's database and/or RL Polk data; (2) individual email notice regarding the Settlement will be sent to all current and former owners and lessees of Class Vehicles using BMW NA's database and RL Polk data for whom a valid email address exists; (3) publication on a website maintained by the Settlement Administrator; (4) maintaining a toll-free telephone line to respond to inquiries regarding the Settlement; and, (5) sending notice to governmental agencies as required by the Class Action Fairness Act. Almost the entire cost of notice and of administering the Settlement will be paid by BMW in addition to, and will not in any way reduce, the benefit to be provided the Class. *See* Settlement Agreement ¶ IV.

All claims submitted for reimbursement or compensation will be reviewed by the Settlement Administrator, which will be responsible for ensuring all information required under the Settlement Agreement has been submitted. Any Claimant whose claim is deemed incomplete, or whose claim is denied in whole or in part, will receive from the Settlement Administrator by first-class mail a written explanation stating the reasons for denial, including steps the Claimant can take to cure the deficiencies. The Claimant receiving such notice will be allowed to submit materials to cure the deficiencies. *See* Settlement Agreement ¶ III.E.1.

All claims accepted by the Settlement Administrator as complying with the requirements of the Settlement Agreement will be submitted to Defendants who may challenge the submission based on evidence that: (1) the vehicle's warranty was voided; (2) the VIN number associated with the claim does not match the Settlement Class Member's VIN number; (3) the Settlement Class Member has received "goodwill" or other pricing adjustment, coupon, reimbursement, or refund from BMW NA, a MINI Dealer, or any person or entity equal to the amount of the claim submitted; and/or (4) the claim for reimbursement is for an item or service that is not covered under the Settlement Agreement. *See* Settlement Agreement ¶ III.E.2.

If the Settlement Administrator rejects a claim and the Settlement Class Member is unable to cure the reason for rejection, or if Defendants object to the claim based on evidence of the above-listed disqualification criteria, and the Settlement Class Member disagrees, the Settlement Class Member may notify Class Counsel that the Settlement Class Member wishes to appeal the denial. In such cases, the Parties will meet and confer in an effort to resolve the dispute. If the Parties are unable to resolve any dispute, the claim will be submitted to an agreed-upon Special Master, whose determination will be final and binding. Any other dispute regarding relief under the terms of the Settlement, including the validity of any Claim Form submitted, will also be submitted to the Special Master. *See* Settlement Agreement ¶ III.E.3.

G. Payment of Plaintiffs' Attorneys' Fees and Expenses

Only after the parties negotiated the relief to the Class did they negotiate the attorney fees. Unable to agree, the parties retained Judge Joel A. Pisano (Ret.) and mediated the issue in person after written submissions. Class Counsel and Defendants have agreed that Class Counsel may apply to the Court for an award of Class Counsel fees and expenses and that Defendants may object to or oppose that application, although Defendants will not object to Class Counsel's application for an award of fees and expenses up to $1,820,000. While not agreeing to the total

amount of such an award, the Parties have agreed that Class Counsel may apply for an award of fees and expenses not to exceed $2,320,000. The Parties have further agreed that Class Counsel shall not seek payment of any amount in excess of $2,320,000 if awarded by the Court. Like notice and administration costs, the payment of Class Counsel fees and expenses will be paid by Defendants in addition to, and will not reduce in any way, the Settlement benefit to Class Members. *See* Settlement Agreement ¶ VIII.A-B.

H. Payment of Service Awards to the Class Representatives

Subject to Court approval, each class representative will receive a service award of $4,000 for their assistance in this litigation and participation in discovery. This amount will be paid by Defendants in addition to any benefits to be paid under the Settlement to the Class. *See* Settlement Agreement ¶ VIII.C.

I. Narrowly Tailored Release

The Settlement Agreement contains a narrowly tailored release that is specifically limited to claims arising out of the allegations in this case relating to the timing chain and its components in the Class Vehicles. *See* Settlement Agreement ¶ VII. Expressly excluded are claims relating to personal injury or subrogation.

IV. ARGUMENT

A. The Standard for Preliminary Approval of a Class Action Settlement

It is well-settled that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). This is especially true "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (noting also that, "[t]he parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial"); *see also Rodriguez v. Nat'l City*

Bank, 726 F.3d 372, 378 (3d Cir. 2013) (confirming that Third Circuit has "on several occasions, articulated a policy preference favoring voluntary settlement in class actions").

As this Court recently observed, approval of class action settlements involves a two-step process: (1) a "preliminary fairness evaluation" of the settlement; and, (2) "final fairness hearing" of the settlement after notice of the settlement is provided to the class and a hearing to consider the fairness of the proposed settlement has been held. *Weissman v. Gutworth*, No. 2:14-cv-00666, 2015 U.S. Dist. LEXIS 8543, at *3-4 (D.N.J. Jan. 23, 2015) (Walls, J.); Manual for Complex Litigation, Fourth, §§21.632-35 (2004).

The purpose of preliminary approval of a settlement is to determine whether to notify class members of the proposed settlement and to proceed with a fairness hearing. The purpose is not to determine ultimately whether the settlement is fair, reasonable, and adequate. *See In re Gen. Motors*, 55 F.3d at 785 (holding that the "preliminary determination establishes an initial presumption of fairness"). Indeed, "[t]he Court's preliminary approval is not binding and is granted unless the proposed settlement is obviously deficient." *Weissman*, 2015 U.S. Dist. LEXIS 8543, at *4. Furthermore, "the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement." *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, *16 (D.N.J. Sept. 13, 2005).

B. Preliminary Approval of the Settlement Should Be Granted

In deciding whether to grant preliminary approval, "the court generally considers whether '(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.' *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)." *Weissman*, 2015 U.S. Dist. LEXIS 8543, at * 4.

The Settlement more than satisfies the criteria for preliminary approval. The Settlement is the product of arms' length negotiations between counsel who have extensive experience in class actions and those related to automobiles and other allegedly defective consumer products. Accordingly, a presumption of correctness should attach to the proposed Settlement. *In re Gen. Motors Corp.*, 55 F.3d at 796 ("the court determines whether negotiations were conducted at arms' length by experienced counsel after adequate discovery, in which case there is a presumption that the results of the process adequately vindicate the interests of the absentees."); *O'Brien v. Brain Research Labs, LLC*, 2012 U.S. Dist. LEXIS 113809, *36 (D.N.J. Aug. 8, 2012) ("The opinion of experienced counsel, based upon their familiarity with the facts and law and understanding of the strengths and weaknesses of their positions, is entitled to considerable weight and favors finding that the settlement is fair."). Further, as in the settlement before this Court in *Martina*, settlement negotiations occurred after extensive investigation by Plaintiffs' Counsel, after the exchange of initial disclosures, and were negotiated with the help of two Judges. *Martina v. L.A. Fitness Int'l, Inc.*, No. 2:12-cv-2063, 2013 U.S. Dist. LEXIS 145285, *16 (D.N.J. Oct. 8, 2013). Finally, all of the terms of the Settlement relating to the relief to be provided to the Class were agreed upon by the parties prior to negotiations concerning the proposed attorneys' fees and expenses to be paid to Class Counsel by Defendants.

The relief to be provided to Class Members directly addresses the issues they have experienced, or might experience, relating to the timing-chain tensioner. To wit, it provides an additional warranty on the parts at issue and it seeks to reimburse for out-of-pocket losses that resulted from the timing-chain tensioner failure. Additionally, the Settlement provides that Plaintiffs' Counsel may apply to the Court for an award of attorneys' fees and costs, payable by Defendants separate and apart from the relief provided the Class. Settlement Agreement ¶

VIII.A-B. Further, the language of the release is narrowly tailored and limited to the claims at issue. *Id.* at ¶ VII. The release comports with the applicable law, which holds that a class action lawsuit may release all claims "that may arise out of the transactions or events pleaded in the complaint." *See* Conte & Newberg, 4 *Newberg on Class Actions* (4th ed. 2010) § 12:15, at 312; *see also Nat'l Super Spuds, Inc. v. New York Mercantile Exch.,* 660 F.2d 9, 16-18 (2d Cir. 1981).

Last, Plaintiffs will also be allowed to make an application to the Court for a service award of $4,000 each, which is intended as compensation for instituting, prosecuting and bearing the laboring oar and risk of this litigation as Class Representatives. Settlement Agreement ¶ VIII.C. "[P]laintiffs who serve as the representatives provide assistance and incur risks during the litigation not imposed upon any other putative class member. Incentive awards are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff." *O'Brien*, 2012 U.S. Dist. LEXIS 113809, at *100 (internal quotations and citations omitted); *see also*, *Martina*, 2013 U.S. Dist. LEXIS 145285, at *26 (noting, "It is perfectly appropriate to compensate a named plaintiff in a class action"). In light of the above, the Settlement should be preliminarily approved.

C. Certification of the Settlement Class Is Appropriate

Pursuant to the Settlement Agreement, the parties have stipulated, for settlement purposes only, to the following class: "All persons or entities in the United States, the District of Columbia, and Puerto Rico who currently own or lease, or previously owned or leased, a model-year 2007 through 2009 MINI Cooper 'S' Hardtop (R56), a model-year 2008 through 2009 MINI Cooper 'S' Clubman (R55), or a model-year 2009 through 2010 MINI Cooper 'S' Convertible (R57) vehicle, manufactured at any time from start of production in November 2006 through July 2010."

Both the Supreme Court and various circuit courts have recognized that the benefits of a proposed settlement can be realized only through the certification of a settlement class. *See Amchem Prods v. Windsor*, 521 U.S. 591 (1997); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions* ("*Prudential II*"), 148 F.3d 283 (3d Cir. 1998). Here, for settlement purposes only, Plaintiffs submit that the elements of Rule 23 are met with respect to the proposed settlement, which, accordingly, warrants settlement class certification. *See*, *e.g.*, *Rodriguez*, 726 F.2d at 377-78 (stating settlement class must satisfy Rule 23); *Martina,* 2013 U.S. Dist. LEXIS 145285 (noting settlement class must satisfy "the general requirements of Rule 23").

1. The Elements of Rule 23(a) Are Satisfied for Settlement Purposes in the Present Case

In order for a lawsuit to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, a named plaintiff must establish each of the four threshold requirements of subsection (a) of the Rule, which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see, also, Prudential II,* 148 F. 3d at 308-09. Here, all four elements are satisfied for purposes of certifying the settlement class.

a. Numerosity Under Rule 23(a)(1)

Rule 23 (a)(1) requires that the class be "so numerous that joinder of all members is

impracticable." And, as this Court has noted, "there is 'no minimum number of members needed for a suit to proceed as a class action.'" *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012). Rule 23(a)(1) requires examination of the specific facts of each case,' but 'generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.' *Id.* (citations omitted)." *Weissman*, 2015 U.S. Dist. LEXIS 8543, at *7. Numerosity is satisfied in the pending matter as tens of thousands of Class Vehicles were sold to consumers. Boucher Decl. ¶ 30.

b. Commonality Under Rule 23(a)(2)

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Class members' claims "must depend upon a common contention . . . that is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2545. "What matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* at 2551. The commonality requirement is met if Plaintiffs' grievances share common questions of law or of fact. *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994). The Third Circuit has itself observed this "bar is not a high one." *Rodriguez*, 726 F.3d at 382. A plaintiff is not required to show that all class members' claims are identical to each other as long as there are common questions at the heart of the case. And, "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal,* 43 F.3d at 56; *Prudential II,* 148 F.3d 283. Indeed, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2). *Baby Neal*, 43

F.3d at 56. Commonality focuses on Defendant's conduct. *Rodriguez*, 726 F.3d at 382. Additionally, commonality is satisfied when the harm suffered by all class members is the same. *Baby Neal*, 43 F.3d at 56.

Commonality is met here because Defendants' conduct toward all members of the class was the same. All Class Vehicles had the allegedly defective timing chain tensioner installed. And, the claims of the Class Representatives and the Settlement Class are predicated on the core common issue as to whether Defendants are liable for the damages suffered by the Class as a result. This is sufficient to meet the Rule 23(a)(2) standard of commonality.

c. Typicality Under Rule 23(a)(3)

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. The commonality and typicality requirements of Rule 23(a) "tend to merge." *Gen. Tel. Co.*, 457 U.S. at 157, n.13. The requirement of this subdivision of the rule, along with the adequacy of representation requirements set forth in subsection (a)(4), is designed to assure that the interests of unnamed class members will be protected adequately by the named class representative. *Id.; Prudential II,* 148 F.3d at 311; *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006); *Gutierrez v. Johnson & Johnson*, Case No. 01-5302, 2010 U.S. Dist. LEXIS 77123, *13 (D.N.J. July 30, 2010) (Walls, J.). The typicality requirement is satisfied "if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Baby Neal,* 43 F.3d at 58. "[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Hoxworth v. Blinder, Robinson & Co. Inc.,* 980 F.2d 912, 923 (3d Cir. 1992). In other words, typicality is demonstrated where a plaintiff can "show that the issues of law or fact he or she shares in common with the class occupy 'the same degree of centrality' to his or

her claims as to those of unnamed class members." *Weiss v. York Hosp.,* 745 F.2d 786, 810 n.36 (3d Cir. 1984).

Here, this requirement is met by the proposed settlement class to the extent that the claims, for settlement purposes only, arise from a common course of conduct by Defendants. All Class Members assert that Defendants knowingly placed Class Vehicles containing the alleged defect into the stream of commerce and refused to honor its warranty obligations. Also, all Class Members assert the same or similar legal theories of liability against Defendants. Hence, typicality is satisfied.

d. Adequacy Under Rule 23(a)(4)

The final requirement of Rule 23(a) is set forth in subsection (a)(4), which requires that "the representative parties will fairly and adequately protect the interests of the class." The Third Circuit has ruled that:

> Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the class.

Weiss, 745 F.2d at 811 (*quoting Wetzel*, 508 F.2d at 247); *see also Prudential II,* 148 F.3d at 312. These two components are designed to ensure that absentee class members' interests are fully pursued. The existence of the elements of adequate representation are presumed and "[t]he burden is on the defendant to demonstrate that the representation will be inadequate." *Lewis v. Curtis,* 671 F.2d 779, 788 (3d Cir. 1982).

Adequacy is easily met here with regard to Class Counsel's qualifications. Plaintiffs' attorneys, as shown by the Firm Biographies attached to the Declarations of Class Counsel submitted with this filing, are exceedingly experienced and competent in complex litigation and have an established track record in litigating complex class action suits. In addition, the Class

Representatives have no interests antagonistic to the class. Boucher Decl. ¶ 33.

In light of the above, it is submitted that each of the Rule 23(a) requirements is satisfied.

2. Superiority and Predominance Under Rule 23(b)(3)

Plaintiffs' proposed class also meets the requirements of Rule 23(b)(3). Under 23(b)(3) a class action may be maintained if:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Although Rule 23(b)(3) requires that common issues of law and fact predominate, it does not require that there be an absence of any individual issues. *In re Gen. Motors Corp.*, 55 F.3d at 817 ("a number of mass tort class actions have been certified notwithstanding individual issues of causation, reliance, and damages"); *Prudential II*, 148 F.3d at 315 ("presence of individual questions as to the reliance of each [plaintiff] does not mean that the common questions of law and fact do not predominate"). Further, Rule 23(b)(3) does not require that all questions of law or fact be common. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 301 (3d Cir. 2011).

The Rule 23(b)(3) superiority requirement asks the court to weigh the fairness and

efficiency of a class action against alternative methods of adjudication. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533-34 (3d Cir. 2004); *see also*, *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 159-50 (3d Cir. 2008) (setting out "four nonexclusive factors" of Rule 23(b)(3)). Here, common questions of law and fact predominate. All of Plaintiffs' claims arise out of Defendants having placed into the stream of commerce Class Vehicles containing the alleged defect. Common questions of law and fact include, but are not limited to: (a) whether Defendants knew or should have known that the Class Vehicles contained the alleged defect when it placed them into the stream of commerce; (b) whether Defendants have a duty to honor its warranty on the Class Vehicles; and, (c) whether Defendants, in refusing to honor the Class Vehicles' warranty, violated applicable federal and state consumer protection laws. This suffices, for the purpose of a settlement class, to present a predominance of common issues.

Superiority is met because this settlement will resolve that pending lawsuits against Defendants in a single, consolidated proceeding – obviating the need for multiple trials in multiple venues. Given the relatively small individual claims at issue relating to the alleged defect, there would be little or no interest for each class member to proceed with their own cases. Finally, settlement would relieve judicial burdens that would be caused by adjudication of the same issues in what could be many separate trials, including trial in each of the Federal Actions being settled herein. Accordingly, a class should be certified for settlement purposes only.

D. The Proposed Notices and Notice Program Satisfy Rule 23

Rule 23(e)(1) states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound" by "a proposed settlement, voluntary dismissal, or compromise." Notice to the class must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Amchem*, 521 U.S. at 617 (1997). Actual

notice is not required; only a method that is reasonably likely to provide actual notice. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231-32 (D.N.J. 1997) ("Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties [....] Similarly, Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members").

The proposed methods to be used to disseminate the notice in this case – individual notice by U.S. Post, individual email notice and a dedicated website – provide the best notice practicable under the circumstances and satisfy the requirements of Rule 23(c)(2) and Rule 23(e). In addition to the manner of giving notice to the Class, the contents of the notice itself satisfy Rule 23(c)(2)(B), as the notice includes all required elements: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." *See* Class Notice, attached as Exhibit B to the Settlement Agreement.

Accordingly, the form of notice and the manner of giving notice should be approved.

E. A Final Fairness Hearing Should be Scheduled

The Court should schedule a final fairness hearing to determine that final approval of the Settlement is proper. The fairness hearing will provide a forum to explain, describe or challenge the terms and conditions of the Settlement, including the fairness, adequacy and reasonableness of the Settlement. At that time, Class Counsel will present their application for their fees and expenses pursuant to Rule 23(h) as well as for the award to the named Class Representatives. Accordingly, the parties request that the Court schedule the final fairness hearing no earlier than

210 days after this Court grants Preliminary Approval, which will also be after the expiration of the waiting period required by 28 U.S.C. section 1715(d).

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court: (1) preliminarily approve the proposed Settlement; (2) certify the Class for settlement purposes only;

(3) appoint the named Plaintiffs' to represent the Class and their counsel as Class Counsel; (4) approve the form and manner of notice to be given the Class to inform the members of the Settlement and the right to object or opt out; (5) direct distribution of the proposed Notice to all members of the Class regarding settlement of the claims against Defendants; and (6) set a hearing date for the final fairness hearing for no earlier than 210 days after this Court grants Preliminary Approval. The Defendants do not oppose this Motion.

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By: _____

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