

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

THOMAS ISLEY, JEFFERY QUINN, VIPUL KHANNA, WALINGTON URENA, DANIEL GULICK, and MICHAEL HENCHY JR., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BMW OF NORTH AMERICA, LLC and
BAVARIAN MOTOR WORKS AG,

Defendants.

Civil Action No.: 2:19-cv-12680(ESK)(MAH)

ELECTRONICALLY FILED

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

BURSOR & FISHER, P.A.

Frederick J. Klorczyk III
888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7150
Facsimile: (212) 989-9163
Email: fklorczyk@bursor.com

BURSOR & FISHER, P.A.

Joel D. Smith (*pro hac vice*)
1990 North California Blvd., Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
Email: jsmith@bursor.com

*Attorneys for Plaintiffs and the
Proposed Settlement Class*

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I. PRELIMINARY STATEMENT

This case is largely a sequel to an earlier class action called *Bang v. BMW of N. Am. LLC*, D.N.J. Case No. 2:15-cv-06945, which culminated in a class settlement approved by Judge Arleo. The oil consumption issue here is the same issue as in *Bang* but involves later model year cars. The *Bang* settlement was fair and reasonable and approved by the Court. Plaintiffs' goal here was to reach a deal that provided benefits to those BMW owners who suffered from the same oil issue as in *Bang*, but were otherwise excluded from the approved class in *Bang*. The settlement benefits here do that.

Accordingly, this brief is submitted in support of the unopposed motion for preliminary approval of a class action Settlement Agreement (“Agreement”) between Plaintiffs Thomas Isley, Jeffery Quinn, Vipul Khanna, Walington Urena, Daniel Gulick, Michael Henchy Jr., Angela Bovenzi, Jonathan Yehuda, and Paul Hoffner (herein “Plaintiffs” or “Class Representatives”) and Defendant BMW of North America, LLC (“Defendant” or “BMW NA”). As described below, this Settlement includes a service action, reimbursement, and future purchase / lease credit.

The Settlement satisfies the requirements of Fed. R. Civ. P. 23 and is fair, reasonable, and adequate. Consequently, the Court should grant this motion, preliminarily approve the Settlement, approve the form of Notice and the notice program, and set the schedule for a Final Approval Hearing. A copy of the Agreement is attached to the Declaration of Frederick J. Klorczyk III (“Klorczyk Declaration”) as Exhibit 1.

The underlying litigation arises from the sale of BMW automobiles manufactured between 2013-2019 and which were equipped with an N63TU1 engine (the “Class Vehicles”).¹ Specifically, the Class Vehicles were equipped with BMW’s hot-vee configuration that saved space under the hood, but which caused excessive heat-soak to the N63TU1 engine and surrounding components. As a result, the N63TU1 engines consumed excessive amounts of engine

¹ The Class Vehicles include the following BMW models: 2013-2019 650i/xi (TU1), 2013-2018 650i/xi Conv (TU1), 2013-2017 650 i/xi Coupe (TU1), 2013-2015 750i/xi (TU1), 2013-2015 750Li/Lxi (TU1), 2013-2017 550i/xi (TU1), 2014-2016 550i/xi GT (TU1), 2014-2018 X5 (TU1), and 2015-2019 X6 (TU1).

oil between regularly scheduled service visits, leading to an increased need for engine repairs or replacements – such as replacement of valve stem seals – as compared to other, similar vehicles not containing the N63TU1 engine.

The Settlement addresses the conduct complained of in the class action complaint and provides valuable benefits to the owners (putative Class Members) of approximately 70,000 Class Vehicles in the United States. The Settlement contains three benefit components.

First, there is a service action available to the Settlement Class Vehicles, that will enable a present owner or lessee of a Settlement Class Vehicle to secure the following services. For each future oil change at a BMW Center (pursuant to Condition-Based Service indicator) for the earlier of 10 years or 120,000 miles from the in-service date (whichever comes first), but in no event less than one year from the Effective Date of the settlement, Settlement Class Members will receive two free quarts of oil for top-offs between oil changes. Additionally, Settlement Class Members may receive up to three free Oil Consumption Tests in the earlier of 10 years or 120,000 miles from the in-service date (whichever comes first) but in no event less than one year from the Effective Date of the Settlement Class. After one failed Oil Consumption Test, BMW can, at its discretion, authorize the BMW Center to make one repair attempt or offer the customer an engine replacement pursuant to the schedule set out below. Likewise, if the vehicle is repaired and has a second Oil-Consumption Test failure, the customer will be offered an engine replacement per the schedule below.

Under this plan, no customer will be required to contribute to the costs of the replacement if the Class Vehicle engine is covered under warranty – either the New Vehicle Limited Warranty term or the Certified Pre-Owned Vehicle Warranty term. Otherwise, customer contribution for parts and labor will be pursuant to the following schedule:

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Odometer Mileage at time of failed Oil Consumption Test resulting in engine replacement		Customer Contribution (parts & labor)
Below	50,000	0%
50,001	60,000	5%
60,001	70,000	15%
70,001	80,000	27%
80,001	90,000	42%
90,001	100,000	55%
100,001	105,000	65%
105,001	110,000	70%
110,001	115,000	75%
115,001	120,000	85%
120,001	Above	100%

Second, there is a reimbursement program available to Settlement Class Members that will entitle them to reimbursement of the following expenses actually paid for by the Settlement Class Member. Class Members will be eligible to secure reimbursement for the cost of up to four oil changes (not to exceed \$95 each) with receipts or other appropriate proofs,² so long as the oil change took place within 12 months of the previous oil change. Class Members will also be eligible for reimbursement stemming from oil top offs, including \$10 per quart with receipts for a limit of 9 quarts per Class Member. Class Members will be required to demonstrate that they

² In accordance with the Agreement, “appropriate proofs” includes (1) a legible repair order from an authorized BMW Center or independent repair facility licensed to perform such repairs that identifies the Class Vehicle and VIN, the part number(s) used, and the cost of the repair, with parts and labor separated; (2) proof of payment, in the form of a canceled check, credit-card receipt, credit-card statement, or receipt from the repairing entity demonstrating that the Settlement Class Member paid for the amount(s) sought for reimbursement; (3) the mileage of the Class Vehicle at the time of repair; (4) the nature of the repair and the part(s) used in the repair; and (5) the date of the repair.

purchased their vehicle within the earlier of 10 years or 120,000 miles from the in-service date and must show proof of prior oil consumption complaint to BMW NA.

Subject to appropriate proofs, Class Members will also be eligible for reimbursement for engine replacements in accordance with the above schedule if, prior to the Effective Date, and within the earlier of 10 years or 120,000 miles from in-service, a Settlement Class Member's vehicle failed one or more Oil Consumption Tests at a BMW Center, the BMW Center confirmed the oil consumption issue, and the customer replaced the engine at a BMW Center after the last failed Oil Consumption Test. Furthermore, each Settlement Class Member will be entitled to reimbursement of up to \$900 for a failed oil consumption test and subsequent repairs resulting therefrom at a BMW Center upon appropriate proof of the amounts that were actually paid by a Settlement Class Member prior to the Effective Date of the settlement.

Third, each Settlement Class Member may file a claim that will entitle them to one future purchase / lease credit subject to the following terms. Class Members may apply for a \$1,500 credit applicable for BMW 6 Series, 7 Series, X5, X6, or X7. Alternatively, Class Members may apply for a \$1,000 credit applicable to all other BMW models. Such credits will be valid for 1 year from the Effective Date and cannot not be used retroactively. These credits are also transferable to Class Members' immediate family or members of their household and are combinable with other applicable and then available and qualifying BMW purchase / lease incentives.

In addition to these terms, BMW NA will pay the costs of notice to the Class and for administration of claims. Pursuant to the Agreement, Settlement Class Counsel may apply for an award of attorney's fees, costs, and expenses of not more than \$1,900,000.00. This amount will be inclusive of incentive payments for Class Representatives of not more than \$3,000 each.

For these reasons, the proposed Settlement provides valuable relief to the Class and should be approved.

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II. PROCEDURAL HISTORY OF THE CASE

On May 17, 2019, after months of pre-suit investigation, speaking with potential class members, and ascertaining the nature of the alleged Class Vehicle defects, Plaintiff Thomas Isley filed the initial class action complaints against BMW NA and Bayerische Motoren Werke Aktiengesellschaft (“BMW AG”) in the U.S. District Court for the District of New Jersey. The individual complaint counts included: Count I: Breach of Uniform Commercial Code § 2-313: Express Warranty; Count II: Breach of Uniform Commercial Code § 2-314: Implied Warranty; Count III: Unjust Enrichment; Count IV: Fraud by Omission; Count V: Violation of Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1); Count VI: Violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2; Count VII: Violation of State Consumer Fraud Acts;³ and Count VIII: Breach of Uniform Commercial Code § 1-304: Breach of Implied Covenant of Good Faith and Fair Dealing.

On July 10, 2019, BMW NA filed a Motion to Dismiss. On July 22, 2019, Plaintiffs filed their First Amended Complaint, adding Jeffrey Quinn, Vipul Khanna, Walington Urena, Daniel Gulick, and Michael Henchy, Jr., as additional named parties. Plaintiffs also substituted in breach of California’s Song-Beverly Act, Cal. Civ. Code § 1790 et seq. and California Commercial Code § 2314 in place of Count II: Breach of Uniform Commercial Code § 2-314: Implied Warranty. Additionally, Plaintiffs added Count VIII: Violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210, Count IX: Deceptive Acts or Practices under New York General Business Law § 349, and Count X: False Advertising under New York General Business Law § 350.

On August 26, 2019, BMW NA filed a Motion to Dismiss Plaintiffs’ First Amended Complaint. The parties then stipulated to extend Plaintiff’s briefing schedule and filed an

³ Plaintiff alleged violation of the following Consumer Fraud Acts: California (Cal. Bus. & Prof. Code § 17200, *et seq.*); Florida (Fla. Stat. § 501.201, *et seq.*); Illinois (815 Ill. Comp. Stat. 505.1, *et seq.*); Massachusetts (Mass. Gen. Laws Ch. 93A, *et seq.*); Michigan (Mich. Comp. Laws § 445.901, *et seq.*); Minnesota (Minn. Stat. § 325F.67, *et seq.*); Missouri (Mo. Rev. Stat. § 407.010, *et seq.*); New Jersey (N.J. Stat. § 56:8-1, *et seq.*); New York (N.Y. Gen. Bus. Law § 349, *et seq.*); and Washington (Wash. Rev. Code § 19.86.010, *et seq.*).

application with the Court to this effect on September 20, 2019. Plaintiffs filed an opposition on September 23, 2019 and BMW NA replied on October 7, 2019.

On December 2, 2019, the parties submitted their Joint Discovery Plan followed by the Court's Pretrial Scheduling Order issued on December 4, 2019, setting a telephone conference for March 11, 2020. However, on February 14, 2020, the parties agreed to conduct a class mediation on March 24, 2020 before the Honorable Jose L. Linares, U.S.D.J. (Ret.). On February 19, 2020, the Court administratively terminated the Motion to Dismiss. On February 26, 2020, the parties jointly requested a stay of all deadlines pending completion of the mediation.

Notwithstanding the stay, the parties conducted discovery and exchanged documents and information.

On March 13, 2020, the onset of the COVID-19 pandemic and associated travel restrictions required the parties to re-schedule the mediation. The parties requested an additional 30 day stay in light of COVID-19 travel restrictions limiting various participants' ability to travel to attend mediation. The Court granted the joint request and rescheduled the telephonic status conference to May 11, 2020.

On April 17, 2020, the parties exchanged initial mediation statements. The parties also participated in an initial teleconference with Judge Linares on April 22, 2020. At that time, Judge Linares directed the parties to engage in direct negotiations and narrow the issues, which, as described further below, the parties did successfully over the coming months. On May 5, 2020, the parties filed a letter with the Court, apprising the Court of the parties' productive telephone conferences with Judge Linares.

On July 10, 2020, the parties exchanged updated mediation statements in advance of the July 21, 2020 Zoom mediation. However, on August 5, 2020, the parties informed the Court that the mediation that had been scheduled for July 21, 2020 had to be rescheduled to September 22, 2020.⁴ The September 22, 2020 mediation session concluded with the parties agreeing on many

⁴ The mediation was rescheduled by the Honorable Jose L. Linares due to personal reasons.

terms, but a few remained outstanding. Over the coming months, the parties continued to negotiate the terms. On December 9, 2020, the parties wrote to the Court, advising that the parties had a further mediation session scheduled with Judge Linares to resolve one or two outstanding issues and requesting that the Court adjourn the telephone conference scheduled for December 14, 2020 until after the parties December 18, 2020 mediation session. On January 12, 2021, the Court held a telephonic status conference, and scheduled a follow up conference on February 26, 2021. At the parties' request, the Court converted this February conference into a settlement conference. With the Court's assistance, the parties were able to agree on all material terms of the settlement agreement that day.

All told, the parties engaged in extensive, vigorous discussions and arm's-length negotiations together with numerous exchanges of information and settlement proposals. As discussed, the parties also engaged the services of Judge Linares, an experienced and well-respected jurist, and participated in mediations on April 22, 2020, September 22, 2020, December 18, 2020, and then a settlement conference before the Court on February 26, 2021. Consequently, the parties were able to reach an agreement to resolve the case and disputes between them. Counsel for the parties did not discuss the appropriateness or amount of any application by Class Counsel for an award of attorney's fees and expenses until after the substantive terms of the Settlement had been negotiated at arm's-length and agreed upon.

III. SETTLEMENT TERMS ARE FAIR, REASONABLE AND ADEQUATE

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

Model Description	Model Years
650i/xi (TU1)	2013 - 2019

650i/xi Convertible (TU1)	2013 - 2018
650i/xi Coupe (TU1)	2013 - 2017
750i/xi (TU1)	2013 - 2015
750Li/LXi (TU1)	2013 - 2015
550i/xi (TU1)	2014 - 2016
X5 (TU1)	2014 - 2018
X6 (TU1)	2015 - 2019

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

A. THE BENEFITS TO THE CLASS UNDER THE SETTLEMENT

Under the Settlement terms, present owners or lessees of a Settlement Class Vehicle may secure the following services. For each future oil change at a BMW Center (pursuant to Condition-Based Service indicator) for the earlier of 10 years or 120,000 miles from the in-service date, but in no event less than one year from the Effective Date of the settlement, Settlement Class Members will receive two free quarts of oil for top-offs between oil changes. Additionally, Settlement Class Members may receive up to three free Oil Consumption Tests in the earlier of 10 years or 120,000 miles from in-service date, but in no event less than one year from the Effective Date of the Settlement Class. After one failed Oil Consumption Test, BMW can, at its discretion, authorize the BMW Center to make one repair attempt or offer the customer with an engine replacement pursuant to the schedule set out above. Likewise, if the vehicle is repaired and has a second Oil Consumption Test failure, the customer will be offered an engine replacement per the schedule set out above.

Under this plan, no customer will be required to contribute to the costs of the replacement if the Class Vehicle engine is covered under warranty – either the New Vehicle Limited Warranty term or the Certified Pre-Owned Vehicle Warranty term. Otherwise, customer contribution for parts and labor will be pursuant to the schedule set out above.

Additionally, there is a reimbursement program available to Settlement Class Members that will entitle them to reimbursement of the following expenses actually paid for by the Settlement Class Member. Class Members will be eligible to secure reimbursement for the cost of up to four oil changes (not to exceed \$95 each) with receipts or other appropriate proofs, so long

as the oil change took place within 12 months of the previous oil change. Class Members will also be eligible for reimbursement stemming from oil top offs, including \$10 per quart with receipts for a limit of 9 quarts per Class Member. Class Members will be required to demonstrate that they purchased their vehicle within the earlier of 10 years / 120,000 miles from the in-service date and must show proof of a prior oil consumption complaint to BMW NA.

In accordance with the Agreement, “appropriate proofs” include (1) a legible repair order from an authorized BMW Center or independent repair facility licensed to perform such repairs that identifies the Class Vehicle and VIN, the part number(s) used, and the cost of the repair, with parts and labor separated; (2) proof of payment, in the form of a canceled check, credit-card receipt, credit-card statement, or receipt from the repairing entity demonstrating that the Settlement Class Member paid for the amount(s) sought for reimbursement; (3) the mileage of the Class Vehicle at the time of repair; (4) the nature of the repair and the part(s) used in the repair; and (5) the date of the repair.

Subject to said proofs, Class Members will also be eligible for reimbursement for engine replacements in accordance with the above schedule if, prior to the Effective Date, and within the earlier of 10 years or 120,000 miles from in-service, a Settlement Class Member’s vehicle failed one or more Oil Consumption Tests at a BMW Center, the BMW Center confirmed the oil consumption issue, and the customer replaced the engine at a BMW Center after the last failed Oil Consumption Test. Furthermore, each Settlement Class Member will be entitled to reimbursement in the aggregate of up to \$900 for a failed oil consumption test and subsequent repairs resulting therefrom at a BMW Center upon appropriate proof of the amounts that were actually paid by a Settlement Class Member prior to the Effective Date of the settlement.

Moreover, each Settlement Class Member may file a claim that will entitle them to one future purchase / lease credit subject to the following terms. Class Members may apply for a \$1,500 credit applicable for BMW 6 Series, 7 Series, X5, X6, or X7. Alternatively, Class Members may apply for a \$1,000 credit applicable to all other BMW models. Such credits will be valid for 1 year from the Effective Date and cannot not be used retroactively. These credits are also

transferable to Class Members' immediate family or members of their household and are combinable with other applicable and then available and qualifying BMW purchase / lease incentives.

In addition to these terms, BMW NA will pay the costs of notice to the Class and for administration of claims. Pursuant to the Agreement, Settlement Class Counsel may apply for an award of attorney's fees, costs, and expenses of not more than \$1,900,000.00. This amount will be inclusive of incentive payments for Class Representatives of not more than \$3,000 each.

These Settlement benefits serve as consideration for the dismissal of this Action against BMW NA,⁵ and the release of all claims by Plaintiffs and Settlement Class Members which takes effect on the Effective Date defined as the earliest of the following dates: (1) the date on which the time for appeal from the Final Judgment approving the Settlement has elapsed without any appeals being filed; or (2) the date on which all appeals from the Final Judgment approving this Settlement or from any appellate court decisions affirming the Final Judgment have been exhausted, and no further appeal may be taken.

B. NOTICE TO THE SETTLEMENT CLASS

The parties negotiated and agreed upon a notice program that provides the best practicable notice under the circumstances. The Claim Administrator is to be selected and paid for by BMW NA. Within 10 days from the date of the Preliminary Approval Order, Defendants' Counsel will provide notice under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715 to the States' Attorneys General.

Within 30 days after entry of the Preliminary Approval Order, the Claims Administrator will be responsible for establishing, maintaining, and administering a toll-free telephone number

⁵ The released parties include BMW NA and its direct and indirect parents, subsidiaries, affiliates, officers, directors, agents, authorized BMW dealers, attorneys, and all other persons or entities acting on their behalf, suppliers, licensees, distributors, assemblers, partners, component part designers, manufacturers, holding companies, joint ventures, and any individuals or entities involved in the chain of design, development, testing, manufacture, sale, assembly, distribution, marketing, advertising, financing, warranty, repair and maintenance of the Class Vehicles and their component parts.

dedicated to the Settlement which will provide information about the Settlement. The Claims Administrator will also establish and maintain a website dedicated to the Settlement which will provide (a) information about the Settlement and all relevant documents, including the Claim Form available for download; (b) an email address for Class Members to ask the Claims Administrator questions; and (c) an online claims submission portal and instructions on how Settlement Class Members may submit their claims by U.S. Mail or via the online submission portal. The website and toll-free telephone number will remain available until all claims decisions by the Claims Administrator and payment to claimants have been made.

Within 45 days after entry of the Preliminary Approval Order, BMW NA will also retain a third party to obtain mailing addresses from the applicable state motor vehicle agencies' registration databases to identify the last known addresses of all Settlement Class Members and provide the mailing addresses to the Claims Administrator. The Claims Administrator or the DMV records provider will use current U.S. Postal Service software and the National Change of Address database to update the address records so that Settlement Class Members' most recent addresses will be used to provide a Settlement Class Notice to those Settlement Class Members by a direct first-class mailing. If a Settlement Class Notice is returned to the Claims Administrator by the U.S. Postal Service because the address of the recipient is no longer valid, and the envelop contains a forwarding address, the Claims Administrator will re-send the Settlement Class Notice to the forwarding address within seven days of receiving the turned Settlement Class Notice.

The Settlement Class Notice will contain a plain and concise description of the nature of the Action, the history of the Action, the preliminary certification of the Settlement Class, and the proposed Settlement, including information on the identity of Settlement Class Members, how the proposed Settlement will provide relief to the Settlement Class Members, what claims are released under the proposed Settlement, and other relevant terms and conditions.

This Notice will also inform Settlement Class Members that they have the right to request exclusion from (opt out of) the Settlement. The Settlement Class Notice will also provide the deadlines and procedures for exercising this right. Similarly, the Notice will inform Settlement

Class Members of their right to object to the proposed Settlement and to appear at the Final Approval Hearing. The Settlement Notice will provide the deadlines and procedures for exercising these rights. Finally, the Settlement Notice will inform the Settlement Class Members about the amounts being sought by Settlement Class Counsel as attorneys' fees and expenses, as well as service payments to Settlement Class Representatives, and will explain what Defendant will pay and that such payment is in addition to, and will not reduce, the relief being made available to Settlement Class Members.

Plaintiffs request that the Court preliminarily certify a Settlement Class and preliminarily approve the proposed Settlement, permitting the Settlement Class to be given notice of the terms of the Settlement so that they can make an informed decision as to its merits. Accordingly, Plaintiffs request that the Court enter an order:

- (1) Preliminarily approving the Settlement as set forth in the Settlement Agreement;
- (2) Preliminarily certifying the Settlement Class;
- (3) Preliminarily appointing Interim Class Counsel as Settlement Class Counsel;
- (4) Approving the proposed Notice Plan; and
- (5) Scheduling a Final Fairness Hearing

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. THE STANDARD FOR PRELIMINARY APPROVAL OF A SETTLEMENT CLASS

The Third Circuit favors settlement of class action litigation. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) (“Settlement Agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts.”). Where the parties can resolve the litigation through good faith and arms-length negotiations, judicial resources can be preserved, and the public interest is furthered. *Bell*

Atlantic v. Bolger, 2 F.3d 1304, 1314 n.16 (3d Cir. 1993); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333 (3d Cir. 2010) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004)) (“We reaffirm the ‘overriding public interest is settling class action litigation.’”).

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

- (A) The Class Representatives and Class Counsel have adequately represented the Class;
- (B) The Settlement was negotiated at arm’s length;
- (C) The relief provided for the Class is adequate, taking into account:
 - (i) the costs, risks, and delay or trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3);
- (D) The proposal treats class members equitably relative to each other.

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

These factors are essentially a combination of the factors considered under *Girsh v. Jepsen*, 521 F.2d 153, 157 (3d Cir. 1975) and *In re Prudential Insurance Company America Sales Practice*

Litigation, 148 F.3d 283, 323-24 (3d Cir. 1998). Each of these factors favor granting preliminary approval of the Settlement in this case.

B. THE SETTLEMENT FOLLOWED ARM’S-LENGTH NEGOTIATIONS CONDUCTED IN GOOD FAITH BY WELL-INFORMED AND EXPERIENCED COUNSEL

In this case, the Settlement did not occur until counsel conducted a thorough investigation of the underlying claims. Thereafter, the parties engaged in extensive, vigorous discussions and arm’s-length negotiations together with numerous exchanges of information and settlement proposals. The parties engaged the services of the Honorable Jose L. Linares, a well-respected mediator, and participated in multiple rounds of mediation, including on April 22, 2020, September 22, 2020, December 18, 2020, and then a settlement conference before the Court on February 26, 2021. Each of these sessions contributed to a resolution of the case.

Plaintiffs’ attorneys are well-seasoned trial and class action attorneys with substantial experience in class actions, including automobile class actions. *See* Klorczyk Decl. Ex. 2 (Bursor & Fisher, P.A. firm resume). These factors establish that subpoints A and B above have been satisfied. *See Glaberson v. Comcast Corp.*, 2014 WL 7008539, at *4 (E.D. Pa. Dec. 12, 2014) (a settlement is presumed to be fair “when the negotiations were at arm’s length, there was sufficient discovery, and the proponents of the settlement are experienced in similar litigation”); *Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2013) (“The participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm’s length and without collusion between the parties.”), *aff’d*, 559 F. App’x 151 (3d Cir. 2014).

The Class Representatives have no conflict of interest with the remainder of the class, and they share the Class’s interest in obtaining recovery for themselves and other class members experiencing the N63TU1 engine’s excessive oil consumption. The Class Representatives have cooperated fully in providing relevant documents and discovery and have been actively engaged in the litigation.

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

The relief provided in the Settlement constitutes a valuable and substantial benefit to Class Members. The terms of the Settlement provide for a service action that will enable a present owner or lessee of a Settlement Class Vehicle with the earlier of up to 10 years or 120,000 miles to secure two free quarts of oil for top offs between oil changes and up to three free Oil Consumption Tests. Additionally, after one failed Oil Consumption Test, BMW NA can, at its discretion, authorize a BMW Center to make one repair attempt or offer the Class Member an engine replacement pursuant to the schedule outlined above. And, if the Settlement Class Vehicle is repaired and has a second Oil-Consumption Test failure, the Class Member will be entitled to an engine replacement as outlined in the schedule above. Furthermore, Settlement Class Members may file a claim with the required proofs which will entitle them to reimbursement for the costs of up to four oil changes (not to exceed \$95 each), reimbursement for top-offs (\$10 per quart with receipts and a 9-quart cap), as well as reimbursement for an engine replacement performed at a BMW Center and reimbursement in the aggregate of up to \$900 for a failed Oil Consumption Test and subsequent repair resulting therefrom at a BMW Center and supported by appropriate proof. Finally, Settlement Class Members will be entitled to one future purchase/lease credit of \$1,500 for a BMW 6 Series, 7 Series, X5, X6, or X7; or \$1,000 for all other BMW models.

Thus, the relief provided to the Class is more than adequate. Particularly given the costs and risks of surviving class certification of a nationwide class, a potential summary judgment motion, a battle of the experts and *Daubert* motion, deposing BMW AG's officials over-seas, a costly and potentially lengthy trial, and almost certain appeals. Hence, this factor is satisfied.

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

The Settlement Administrator, paid for by BMW NA, is an experienced and well-respected Claims Administrator. Within 60 days after entry of the Preliminary Approval Order, the Claims Administrator will be responsible for establishing, maintaining, and administering a toll-free

telephone number dedicated to the Settlement which will provide information about the Settlement. The Claims Administrator will also establish and maintain a website dedicated to the Settlement which will provide (a) information about the Settlement and all relevant documents, including the Claim Form available for download; (b) an email address for Class Members to ask the Claims Administrator questions; and (c) an online claims submission portal and instructions on how Settlement Class Members may submit their claims by U.S. Mail or via the online submission portal. The website and toll-free telephone number will remain available until all claims decisions by the Claims Administrator and payment to claimants have been made.

Within 45 days after entry of the Preliminary Approval Order, BMW NA will also retain a third party to obtain mailing addresses from the applicable state motor vehicle agencies' registration databases to identify the last known addresses of all Settlement Class Members and provide the mailing addresses to the Claims Administrator. The Claims Administrator or the DMV records provider will use current U.S. Postal Service software and the National Change of Address database to update the address records so that Settlement Class Members' most recent addresses will be used to provide a Settlement Class Notice to those Settlement Class Members by a direct first-class mailing. If a Settlement Class Notice is returned to the Claims Administrator by the U.S. Postal Service because the address of the recipient is no longer valid, and the envelop contains a forwarding address, the Claims Administrator will re-send the Settlement Class Notice to the forwarding address within seven days of receiving the turned Settlement Class Notice.

The Settlement Class Notice will contain a plain and concise description of the nature of the Action, the history of the Action, the preliminary certification of the Settlement Class, and the proposed Settlement, including information on the identity of Settlement Class Members, how the proposed Settlement will provide relief to the Settlement Class Members, what claims are released under the proposed Settlement, and other relevant terms and conditions.

This Notice will also inform Settlement Class Members that they have the right to request exclusion from (opt out of) the Settlement. The Settlement Class Notice will also provide the deadlines and procedures for exercising this right. Similarly, the Notice will inform Settlement

Class Members of their right to object to the proposed Settlement and to appear at the Final Approval Hearing. The Settlement Notice will provide the deadlines and procedures for exercising these rights. Finally, the Settlement Notice will inform the Settlement Class Members about the amounts being sought by Settlement Class Counsel as attorneys' fees and expenses, as well as service payments to Settlement Class Representatives, and will explain what BMW NA will pay and that such payment is in addition to, and will not reduce, the relief being made available to Settlement Class Members.

This process is an efficient and effective way of providing Class Members the relief they need and deserve. Moreover, there are no sub-classes, and all class members have the ability to file claims equally.

E. THE TERMS RELATED TO ATTORNEY'S FEES, TIMING OF PAYMENT, AND CLASS REPRESENTATIVE INCENTIVE AWARDS

Under the terms of the Settlement, BMW NA will pay reasonable attorney's fees to Class Counsel within 30 days following the Court's order approving the Settlement and incentive payments for Class Representatives. The amount of attorney's fees, costs, and expenses will be determined by Magistrate Judge Kiel in an amount not to exceed \$1,900,000.00. This amount will be inclusive of the incentive payments for Class Representatives of not more than \$3,000 each (not to exceed \$27,000 in all).

V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

A class may be preliminarily certified for purposes of settlement if it conforms to the requirements of Fed. R. Civ. P. 23. *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984); Newberg at § 13:64. *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997); *In re Prudential Ins. Co. v. America Sales Litigation*, 148 F.3d 283, 307-308 (3d Cir. 1998); *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2589950 (D.N.J. 2007), *aff'd*, 579 F.3d 241 (3d Cir. 2009). The Settlement satisfies each of the four requirements for class certification under Rule 23(a) and Rule 23(b)(3).

A. NUMEROSITY

The numerosity requirement under Rule 23(a)(1) is satisfied where the class is so numerous that joinder of all class members is impracticable. *In re Prudential Ins.*, 148 F.3d at 309; *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 406 (D.N.J. 1990). Here, there were approximately 70,230 Class Vehicles sold by BMW NA in the United States and Puerto Rico. Clearly, numerosity has been established.

B. COMMONALITY

To satisfy the commonality requirement under Rule 23(a)(2), Plaintiffs must demonstrate that “‘at least one question of fact or law’ is common to each member of [the] prospective class.” *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). Class members do not have to share identical claims or claims arising from the same operative facts. *See In re Prudential Ins.*, 148 F.3d at 319; *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (“Rule 23 [does] not require all plaintiffs actually to suffer the same injury; rather, the fact that the plaintiffs were subject to the injury, that they faced the immediate threat of these injuries, suffice[s] for Rule 23.”). The commonality standard of Rule 23(a)(2) is not a high bar. *Chiang v. Veneman*, 385 F.3d 256, 265 (3d Cir. 2004). Here, there are numerous common questions of law and fact, including:

- a) Whether the Class Vehicles are defective because they frequently burn, leak, and/or otherwise consume excessive amounts of engine oil;
- b) Whether the Oil Consumption Defect constitutes an unreasonable safety risk;
- c) Whether the Class Vehicles are defective because they are unreliable and in need or frequent repair;
- d) Whether the N63TU1 was defectively designed and/or manufactured;
- e) Whether BMW NA knew or should have known the Class Vehicles were defective before they were first sold to consumers;
- f) Whether BMW NA misrepresented or omitted material information regarding the quality and/or reliability of the Class Vehicles;
- g) Whether the Class Vehicles have conformed to reasonable buyers’ expectations;

- h) Whether BMW NA had a duty to inform purchasers of the Class Vehicles about the Oil Consumption Defect prior to sale;
- i) Whether as a result of BMW NA's concealment or failure to disclose material facts, Plaintiffs and Class Members acted to their detriment by purchasing Class Vehicles;
- j) Whether BMW NA breached the New Vehicle Limited Warranty; and
- k) Whether BMW NA breached the promises set forth in the BMW Maintenance Program.

Thus, commonality is satisfied.

C. TYPICALITY

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

Class claims arise out of ownership or lease of Class Vehicles which were equipped with BMW's hot-vee configuration that saved space under the hood, but which caused excessive heat-soak to the N63TU1 engine and surrounding components. As a result, the N63TU1 engines consumed excessive amounts of engine oil between regularly scheduled service visits, leading to an increased need for engine repairs or replacements – such as replacement of valve stem seals – as compared to other, similar vehicles not containing the N63TU1 engine. There are no defenses to Plaintiffs' claims that may be asserted by BMW NA that are unique or different from other proposed class members. Class Representatives were all exposed to the same acts and/or omissions. The factual basis of BMW NA's alleged misconduct is common to the members of the class and represent a common thread of fraudulent misconduct and deceptive trade practices

resulting in injury to all proposed Class Members. As there is no conflict between the Plaintiffs' claims and those of the class, the typicality requirement is satisfied.

D. ADEQUACY OF REPRESENTATION

Adequacy of representation is a two-part inquiry that applies to both Plaintiffs' Counsel and Plaintiffs. First, adequacy of representation asks whether Plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation. *In re Prudential*, 148 F.3d at 312 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 800 (3d Cir. 1995)). Second, adequacy of representation "serves to uncover conflicts of interest between named parties and the class they seek to represent." *In re Prudential*, 148 F.3d at 312 (citing *Amchem Products v. Windsor*, 521 U.S. 591, 594 (1997)). Proposed Class Counsel have, in aggregate, nearly 22 years of experience concentrating in consumer class actions and have been appointed Class Counsel in numerous other class action proceedings. *See* Klorczyk Decl. Ex. 2 (Bursor & Fisher, P.A. firm resume). Neither Plaintiffs nor their attorneys have any interests that are contrary to or conflicting with the class members. Under these facts, the adequacy of representation prong has been satisfied.

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

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

indicated by the Supreme Court in *Amchem*, “predominance is a test readily met in certain cases alleging consumer fraud . . .” 521 U.S. at 625.

Here, the core questions relate to whether alleged uniform defects in the Class Vehicles result in the consumption of excessive amounts of engine oil between regularly scheduled service visits, leading to an increased need for engine repairs or replacements – such as replacement of valve stem seals – as compared to other, similar vehicles not containing the N63TU1 engine, BMW NA’s alleged failure to disclose these purported defects, and its alleged deceptive advertising and marketing in violation of state consumer protection law. Accordingly, the predominance prong of Rule 23(b)(3) is satisfied.

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

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

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

The Settlement Class satisfies the superiority requirements because of the large number of class members, and the relatively small value of each claim in relation to the expenses of prosecuting a lawsuit. The alternative to class treatment would be numerous individual lawsuits and/or multiple lawsuits for relatively small amounts of damages. This would be uneconomical

for potential plaintiffs because litigation costs would dwarf any potential recovery. Absent class action treatment, class members here probably would not obtain any relief. In contrast, a class action “facilitates spreading of the litigation costs among the numerous injured parties and encourages private enforcement of the statutes.” *Prudential*, 148 F.3d 283 at 315-316.

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

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

VI. THE FORM AND MANNER OF NOTICE SHOULD BE APPROVED

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

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

Settlement Website. Through these efforts, absent Class Members will receive adequate notice of the Settlement.

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

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

VII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order that: (a) conditionally certifies a class for purposes of settlement pursuant to Rule 23(b)(3); (b) appoints the named Plaintiffs as Class Representatives and their attorneys, previously named as Interim Class Counsel, as Class Counsel; (c) grants preliminary approval and enters the Preliminary Approval Order attached to the Settlement Agreement as Exhibit 1; (d) directs notice to Settlement Class Members be provided in the manner contemplated by the Settlement Agreement; (e) approves the Claims Administrator; and (f) schedules a final fairness hearing for purposes of determining final approval of the Settlement, attorney's fees, and Class Representative Service Awards.

Dated: July 23, 2021

Respectfully submitted,

BURSOR & FISHER, P.A.

By: /s/ Frederick J. Klorczyk III
Frederick J. Klorczyk III

Frederick J. Klorczyk III

888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7150
Facsimile: (212) 989-9163
Email: fklorczyk@bursor.com

BURSOR & FISHER, P.A.

Joel D. Smith
1990 North California Blvd., Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
Email: jsmith@bursor.com

*Attorneys for Plaintiffs and the
Proposed Settlement Class*