UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THOMAS ISLEY, JEFFERY QUINN, VIPUL KHANNA, WALINGTON URENA, DANIEL GULICK, MICHAEL HENCHY JR., ANGELA BOVENZI, JONATHAN YEHUDA, and PAUL HOFFNER on behalf of themselves and all others similarly situated, Plaintiffs, v. BMW OF NORTH AMERICA, LLC, Defendant.	Civil Action No.: 2:19-cv-12680-ESK **ELECTRONICALLY FILED**

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

On August 3, 2021, this Court (i) entered an Order preliminarily approving the within class action settlement between Plaintiffs Thomas Isley, Jeffery Quinn, Vipul Khanna, Walington Urena, Daniel Gulick, Michael Henchy Jr., Angela Bovenzi, Jonathan Yehuda, and Paul Hoffner (hereinafter "Plaintiffs" or "Class Representatives"), on behalf of themselves and all others similarly situated, and Defendant BMW of North America, LLC (hereinafter "BMW" or "Defendant"), by and through their counsel, and (ii) preliminarily certified the class for settlement purposes. Dkt. 55.[1] The Court also preliminarily approved the Plaintiffs and their counsel Bursor & Fisher, as Settlement Class representatives and Settlement Class Counsel, respectively, and Atticus as the Settlement Claims Administrator. The Court also approved the Parties' proposed Class Notice and Plan for its dissemination (the "Notice Plan"), and directed the implementation of the Notice Plan to the Settlement Class accordingly.

The Notice Plan has now been properly implemented. As discussed below, only four objections have been received, and Plaintiffs respectfully request that this Court grant final approval of the Class Settlement and certification of the Settlement Class in accordance with the Settlement terms. These Settlement benefits serve as consideration for the dismissal with prejudice of this Action against Defendant, and the release of all claims by Plaintiffs and Settlement Class Members against the Released Parties which takes effect on the Effective Date as set forth in section VIII of the Agreement. Dkt. 57-1. For the reasons discussed below and in Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Approval of Class Representative Service Awards, the proposed Class Settlement is fair, reasonable and adequate, and complies in all respect with Fed. R. Civ. P. 23 ("Rule 23"). The Court, having

[1] A copy of the Settlement Agreement was previously filed at Dkt. 54-2. All Defined Terms referred to in this submission shall have the same meaning as those set forth in the Settlement Agreement.

granted preliminary approval, should grant final approval of this Class Settlement accordingly.

II. PROCEDURAL BACKGROUND

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 complaint against BMW in the U.S. District Court for the District of New Jersey. The individual complaint included claims for breach of express warranty, breach of implied warranty, unjust enrichment, fraud by omission, violation of Magnuson-Moss Warranty Act, violation of the New Jersey Consumer Fraud Act. 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-Beverley Act in place of their UCC implied warranty claim. Additionally, Plaintiffs added claims for violation of California's Unfair Competition Law and New York's General Business Law §§ 349-350. 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 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. The September 22, 2020 mediation session concluded with the parties agreeing on many 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. SUMMARY OF THE SETTLEMENT

A. The Proposed Settlement Class

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: 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).

B. Service Action And Other Prospective Relief

A significant benefit of this Settlement is the Service Action that enables all current owners and lessees of Settlement Class Vehicles to 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 a schedule ranging from 5% for Class Vehicles with 50,001-60,000 miles, to 85% for Class Vehicles with 115,000-120,000 miles. Importantly, this aspect of the Settlement *does not require Settlement Class members to submit a claim to receive the benefit* – all he/she must do is to bring the Settlement Class Vehicle to an authorized BMW dealer within 1 year of the Settlement's Effective Date.

Present owners or lessees of a Settlement Class Vehicle will also receive two free quarts of oil for top-offs 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.

C. Reimbursements For Past Paid Out-Of-Pocket Expenses

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 Class Member. Specifically, Class Members will 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.[2] 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.

Subject to said proofs, Class Members will also 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.

D. Future Purchase / Lease Credits

The Settlement also provides that 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

[2] "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.

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.

E. The Class Notice Plan

The Class Notice has been timely disseminated in accordance with the schedule and procedure directed in the Preliminary Approval Order. *See* Dkt. 55; Klorczyk Decl. ¶ 4. Class Notices were timely mailed to 182,808 Settlement Class Members identified using DMV records based on the Vehicle Identification Numbers for the approximately 70,000 Class Vehicles (as is typical of many automotive class settlements, the number of Class Members exceeds the number of Class Vehicles because some vehicles have had multiple owners and/or lessees during their history in service). With respect to any returned Notices, efforts were made to locate updated address information and re-mail such Notices, consistent with the Settlement Agreement.

In addition, the Settlement Administrator has established a Settlement website (www.isleysettlement.com) with substantial information including: (1) details regarding the lawsuit, the Settlement and its benefits, and the Settlement Class Members' legal rights and options including objecting to or requesting to be excluded from the Settlement and/or not doing anything; (2) instructions on how and when to submit a claim for reimbursement; (3) instructions on how to contact the Settlement Administrator by e-mail, mail or (toll-free) telephone; (4) copies of the Class Notice, Claim Form, Settlement Agreement, and important submissions relative to the Settlement approval process including the Preliminary Approval Motion and Order, the Motion for Class Counsel Fees and Expenses and Class Representative Service awards, this Motion for Final Approval (once filed) and submissions relating thereto; (5) important dates pertaining to the Settlement including the deadline to opt-out of or object to the

Settlement, the claim submission deadline, the Fairness Hearing date, place and time; and also (6) answers to Frequently Asked Questions (FAQs).

F. Claims Process

As noted above, no claims process is required for the current owners of the Class Vehicles to benefit from the Service Action. As for reimbursements, Settlement Class Members are entitled to submit a claim, pursuant to the applicable deadline and requirements that are clearly specified in the Class Notice. With regards to required proof, Settlement Class Members must provide a properly completed claim form (a copy of which accompanied the Class Notice), signed under penalty of perjury and accompanied by appropriate documentary proof. The Settlement has a very claimant-friendly process. If, for example, a reimbursement claim is found to be deficient, the claimant shall receive a letter or notice of the deficiency and will have 30 days from the letter/notice to cure the deficiency. Further, a Settlement Class Member may seek an attorney review of a denial by so requesting it from the Claim Administrator within 30 days of the date of the mailing of the decision. If timely requested, Class Counsel and defense counsel will confer and attempt in good faith to resolve the dispute.

G. Release of Claims Against Defendant And Associated Parties

As set forth in full in the Settlement Agreement, *see* § VII (A), Settlement Class Members will release all Released Claims against the Released Parties, including claims and counterclaims arising out of the litigation and the facts, circumstances and claims/potential claims that were or could have been alleged in the litigation. *See* Dkt. 54-2. The release 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.

H. Opt-Out Rights

Pursuant to the Settlement Agreement and Preliminary Approval Order, any Settlement Class Member who wished to opt-out of the Settlement Class was required to do so in accordance with the procedure and deadline set forth therein. *See* Dkt. 55 ¶ 9. The opt-out deadline was November 30, 2021. Significantly, however, of the more than 180,000 Settlement Class Members, only 52 Class Members opted out. Settlement Class Members who did not submit timely and proper opt-out requests are deemed to be part of the Settlement Class, and thus bound by all subsequent proceedings, orders and judgments.

I. Objections And Settlement Approval

Pursuant to the Settlement Agreement and Preliminary Approval Order, any Settlement Class Member who did not request to opt-out of the Settlement was duly afforded the right to object to the Settlement and/or to the requested Class Counsel Fee and Expense award and Class Representative Service awards. To object, the Settlement Class Member was required to comply with the procedures and deadline set forth therein. *See* Dkt. 55 ¶ 10. The written objection was required to be filed with the Court and mailed to Class Counsel, defense counsel, and the Claims Administrator no later than November 30, 2021. Significantly, of the more than 180,000 Settlement Class Members, only four have filed objections to this proposed Settlement.

IV. LEGAL ARGUMENT

A. The Settlement Is Fair, Reasonable, And Adequate, And Should Be Approved

Rule 23(e) requires a determination by the district court that the proposed settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e); *In re Warfarin Sodium Antitrust Litig.*, 391 F. 3d 516, 534 (3d Cir. 2004) ("*In re Warfarin Sodium II*"). There is a strong judicial policy

in favor of resolution of litigation before trial particularly in "class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.,* 269 F.R.D. 468, 484 (E.D. Pa. 2010).

> The presumption is especially strong in "class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *GMC Truck,* 55 F.3d at 784. The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings … 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 [and] the parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial.

Ehrheart, 609 F.3d at 594-95.

Moreover, under established Third Circuit law, Class Settlements enjoy a presumption that they are fair and reasonable when they are the product of arms' length negotiations conducted by experienced class action counsel. *See, e.g., In re General Motors*, 55 F.3d at 785; *Sullivan v. DB Invs.,* 667 F.3d 273, 320 (3d Cir. 2011). It is equally well-settled that a fair, reasonable, and adequate settlement does not have to be an "ideal settlement," nor does it have to satisfy the individual desires of every Class Member. A settlement is, after all, "a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 962 F. Supp. 450, 534 (D.N.J. 1997) ("*In re Prudential*").

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned… The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 630 (9th Cir. 1982).

The Third Circuit has adopted a nine-factor test to determine whether a settlement is "fair, reasonable, and adequate." The elements of this test – known as the "*Girsh* factors" – are:

> (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

GM Trucks, 55 F.3d at 785 (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enterprises*, 256 B.R. 377, 418 (D.N.J. 2000). This Settlement easily meets each of these factors, and thus, should be granted final approval.

B. The *Girsh* Factors Weigh In Favor Of Approval

1. Continued Litigation Would Be Long, Complex, And Expensive

The first *Girsh* factor is whether the Settlement avoids a lengthy, complex and expensive continuation of litigation. This factor "captures the probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig.,* 264 F.3d 201, 233-34 (3rd Cir. 2001) (internal quotation marks omitted) ("*In re Cendant*"). "Where the complexity, expense, and duration of litigation are significant, the Court will view this factor as favoring settlement." *Bredbenner,* 2011 WL 1344745, at *11. Courts have consistently held that the expense and possible duration of litigation are factors to be considered in evaluating the reasonableness of a settlement. *Lake v. First Nationwide Bank,* 900 F. Supp. 726, 732 (E.D. Pa. 1995); *Slade v. Shearson, Hammil & Co*., 79 F.R.D. 309, 313 (S.D.N.Y. 1978); *see also GM Trucks,* 55 F.3d at 812 (concluding that lengthy discovery and ardent opposition from the defendant were facts favoring settlements, which offer immediate benefits and avoid delay and expense). This factor undoubtedly weighs

in favor of the proposed Class Settlement.

The factual and legal complexities involved in this case together with continued litigation into the later stages would necessarily be extremely expensive and time-consuming. In Class Counsel's experience, automotive class actions like this one can be complex, extraordinarily time consuming and expensive when litigated through class certification or beyond, and the results are often uncertain. *Cf. e.g.*, *Henderson v. Volvo Cars of N. Am., LLC*, 2013 WL 1192479, at *10 (D.N.J. Mar. 22, 2013) ("The Court notes that this case has been vigorously litigated for more than three years.").

This Settlement is an arm's length compromise of vigorously disputed claims. Litigating this action through a motion for class certification, expert class certification and merits discovery, summary judgment motions, *Daubert* and other pretrial motions, and through trial and potential appeal, would each add significantly more time, expense, and risk to this case where the outcome is uncertain. Indeed, the risks of substantial delay are considerable here, especially considering the current congestion of cases in this Court and its burdens on the judiciary. There would certainly be extensive pretrial motion practice involving complex questions of law and fact, and the trial itself would be lengthy and complicated. *See Weiss v. Mercedes-Benz of North America,* 899 F. Supp. 1297, 1301 (D.N.J. 1995) ("*Weiss*") (approving settlement that was the "result of an arm's length negotiation between two very capable parties" and where "Mercedes was prepared to contest this class action vigorously."). Post-trial motions and appeal would further delay resolution and increase costs. *Id.* at 536. In contrast, the Class Settlement here affords substantial benefits to the Class now, without having to wait for what would likely be years for a potential recovery which, itself, is uncertain. The first *Girsh* factor thus weighs heavily in favor of granting final approval.

2. The Reaction Of The Class To The Settlement

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement," *In re Prudential*, 148 F.3d at 318, and the Class's support "creates a strong presumption . . . in favor of the Settlement." *In re Cendant*, 264 F.3d at 235. A "small number of objections by Class Members to the Settlement weighs in favor of approval." *In re Ins. Brokerage Antitrust Litig*., 282 F.R.D. 92, 103 (D.N.J. 2012) (citations omitted); *see also Schwartz v. Avis Rent a Car Sys., LLC*, 2016 WL 3457160, at *7 (D.N.J. June 21, 2016) ("Where the number of objectors relevant to the number of class members is small, this factor militates in favor of the settlement.") (internal quotation omitted). As discussed below, this factor supports approval of the Settlement here.

i. Overall Response From The Settlement Class

The deadline to object to the Settlement or opt out was November 30, 2021. Only four people objected to the Settlement, and 52 class members opted out. *See* Dkt. 59 (Redeemer Objection); Dkt. 61 (Li Objection); Klorczyk Decl. Ex. A (Highland Objection), Klorczyk Decl. Ex. B (Lay Objection).[3] Nobody objected to the award or amount of attorney's fees, costs, or service awards. When compared to the 182,808 Settlement Class Members in the United States, only .002% of the class objected to the Settlement, and only .028% opted out. "[S]uch a low level of objection is a rare phenomenon" supporting approval. *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005).

The small number of objections and exclusions also compares favorably to other settlements that were approved despite a higher percentage of objections and exclusions. This case is similar to an earlier class action called *Bang v. BMW of N. Am.*, D.N.J. Case No. 2:15-cv-

[3] Of the four objectors, only Mr. Redeemer said he intended to appear at the Final Approval Hearing. *See* Dkt. 59.

06945-MCA-SCM, which involved the same alleged oil consumption issue here, but involved earlier model year cars. In that case, Judge Arleo granted final approval of the settlement where there were nineteen objections, which was .0073% of the settlement class, and 336 requests for exclusion, which was approximately .1308% of the settlement class.[4] In another case alleging excessive oil consumption, *Yaeger v. Subaru of Am., Inc.*, 2016 WL 4541861 at *9 (D.N.J. Aug. 31, 2016), the court granted final approval where approximately .005% of the class members objected, and .35% of class members opted out, both of which are higher than this case. Finally, in *Skeen v. BMW of N. Am., LLC*, 2016 WL 4033969, at *4, 8 (D.N.J. July 26, 2016), Judge Walls approved the settlement where "[t]wenty-three Class members, or approximately 0.01 percent of Class, objected to the settlement," and 123 class members opted out of the settlement. *See also id.* at *15 ("the relatively small number of objections and exclusions compared with the total number of Class members … supports a finding of fairness."). These three cases—*Bang*, *Yaeger*, and *Skeen*—demonstrate that the small number of objections and exclusions supports granting final approval here.

ii. The Objections

As a preliminary matter, three of the four objectors (Highland, Li, and Redeemer) overlooked certain required information, such as whether they have objected to other class action settlements, and only two of the objectors (Li and Redeemer) sent their objections to the Court, as required under the Preliminary Approval Order. Dkt. 55 ¶¶ 10(a), 11. Class Counsel nonetheless addresses the substance of the objections below.

[4] *See* Mtn. for Final Approval in *Bang v. BMW of N. Am.*, D.N.J. Case No. 2:15-cv-06945-MCA-SCM, Dkt. No. 111-1 at p. 25 (describing number and percentage of objectors).

First, three of the objectors appear to seek additional relief in the form of a trade-in credit for a new BMW,[5] greater reimbursement for past oil replacement costs,[6] or greater reimbursement for past repair costs.[7] Objections seeking relief over and above the terms of the settlement, however, do not establish that the Settlement itself is not fair and reasonable. *See Hall v. AT&T Mobility LLC*, 2010 WL 4053547, at *8 (D.N.J. Oct. 13, 2010) (The settlement "negotiations resulted in a compromise.... Thus, the fact that the Harter Objectors would prefer that all Class Members receive greater cash benefits ... has no bearing on whether the terms of the Settlement Agreement itself are fair and reasonable. After all, a settlement is, by its very nature, a compromise that naturally involves mutual concessions."); *Henderson v. Volvo Cars of N. Am., LLC*, 2013 WL 1192479, at *9 (D.N.J. Mar. 22, 2013) ("This Court's role is to determine whether the proposed relief is fair, reasonable, and adequate, not whether some other relief would be more lucrative to the Class. A settlement is, after all, not full relief but an acceptable compromise."); *Asghari v. Volkswagen Grp. of Am., Inc.*, 2015 WL 12732462, at *26 (C.D. Cal. May 29, 2015) ("the possibility that a 'better' settlement might have been reached" is insufficient to conclude that an agreement is unfair.) Moreover, as Judge Cecchi correctly noted in *Henderson*, "any Class Member who objected to the adequacy of relief had the option of opting out of the Settlement and pursuing his or her own case against [BMW]." *Henderson*, 2013 WL 1192479 at *9. Their objections should be overruled.

Second, two objections pertain to work done by independent repair shops, as opposed to authorized BMW mechanics. Specifically, although objector Li used an authorized BMW mechanic in the past, Li does not want to do so anymore, and objects that only authorized BMW

[5] Klorczyk Decl. Ex. B, Lay Objection at 2.

[6] Li Objection at 1 (Dkt. 61).

[7] *See* Redeemer Objection at 1 (Dkt. 59).

mechanics will provide the future oil consumption tests and engine replacements described in Section III.A of the Settlement Agreement. *See* Li Objection at 2 (Dkt. 61). Similarly, objector Highland objects that to be reimbursable, past repairs or diagnostic tests related to oil consumption must have been done by an authorized BMW mechanic, whereas he prefers to employ his independent local repair shop. *See* Klorczyk Decl. Ex. A, Highland Objection.

Courts have approved settlements over the same or similar objections. *See Eisen v. Porsche Cars N. Am., Inc.*, 2014 WL 439006, at *2 (C.D. Cal. Jan. 30, 2014) (approving settlement over objection that "owners should not be required to obtain repairs from authorized Porsche dealers"); *Asghari*, 2015 WL 12732462, at *7 (granting final approval where, as here, the settlement provided for reimbursement for past repairs related to oil consumption at authorized dealers). As one court explained when overruling similar objections, "authorized dealerships with the full support of [the car manufacturer's] sophisticated technical guidance and equipment can most effectively perform …engine repairs, and [car manufacturers] [have] an unquestionable interest in seeing that these repairs are conducted correctly." *Eisen*, 2014 WL 439006 at *6.

Equally important, neither objector appears to have reimbursable past repairs anyway, so the distinction between independent repair shops and BMW-approved mechanics is irrelevant to them. The repair documents that Li and Highland submitted with their objections do not show payment for a failed oil consumption test and related subsequent repairs, which are the types of past repairs that are eligible for reimbursement under Section III.B.1.c-d of the Settlement Agreement. *See generally* Li Objection (attached repair records) (Dkt. 61); Klorczyk Decl. Ex. A, Highland Objection (attached repair records).

Moreover, to the extent Li and Highland wish to be reimbursed for past oil changes or engine oil purchases (as opposed to repairs), their objections are misplaced because class members can be reimbursed for those things *regardless* of whether the oil changes or engine oil were purchased from an authorized BMW mechanic or an independent mechanic. *See* Settlement ¶ B(1)(a)-(b).[8]

Third, Mr. Lay expresses concern about the requirement to fail an oil consumption tests before receiving a future engine replacement. *See* Klorczyk Decl. Ex. B. This provision is included in the Settlement Agreement because the only way to confirm that the Settlement Class Vehicle is experiencing the alleged defect covered by the Settlement is to perform an oil consumption test. Otherwise, fraudulent claims could be submitted and unnecessary repairs could be performed. *Cf.*, *e.g.*, *In re Groupon, Inc. Marketing and Sales Practice Litig.*, 2012 WL 13175871 at *5 (S.D. Cal. Sept. 28, 2012) (rejecting objection to proof-of-purchase requirement and stating "proof of purchase serves 'to ensure that money is fairly distributed for valid claims.'"). Moreover, the future oil consumption tests provided under Section III.A.1.b are provided free to class members.

In sum, the dearth of objections and lack of meritorious objections support final approval of the Settlement. *See, e.g.*, *Henderson*, 2013 WL 1192479, at *9 ("In sum, the small number of objections presented are without merit and do not alter the Court's finding that the Settlement Agreement is fair, adequate and reasonable.").

[8] Objector Li also objects that "there are [m]any car owners like me who have additional BMW insurance sold at BMW dealers, and now they cannot use the maintenance and warranty service promised by BMW insurance at BMW dealers." Li Objection, p. 1 (Dkt. 61). However, Li does not explain this objection, and nothing in the Settlement Agreement impacts any obligations by BMW concerning warranty service or insurance. *See* Settlement § III.A.1.c.i ("No Settlement Class Member contribution applies if the Class Vehicle engine is still covered under either the New Vehicle Limited Warranty term or the BMW Certified Pre-Owned warranty term.").

3. The Stage Of The Proceedings

The stage of the proceedings and the amount of discovery completed is another factor that courts may consider in determining the fairness, reasonableness and adequacy of a settlement. *GM Trucks,* 55 F.3d at 785; *Girsh*, 521 F.2d at 157. "This factor considers the degree of case development accomplished by counsel prior to settlement." *Bredbenner*, 2011 WL 1344745, at *12. "Through this lens … courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *GM Trucks,* 55 F.3d at 813.

Nevertheless, even settlements reached at a very early stage and prior to formal discovery are appropriate if there is no evidence of collusion and the settlement represents reasonable concessions by both sides. *See, e.g., Weiss*, 899 F. Supp. at 1301 ("Admittedly, the case is still in the early stages of discovery."). A fair, reasonable, and adequate class settlement, entered into at an early stage, has significant benefits to the Class, the judicial system and the administration of justice. *See also Weiss*, 899 F. Supp. at 1301 ("early settlements [can] maximize the value for the class members while adhering to class action requirements.")

Most importantly, the appropriateness of a class settlement is not measured by the thickness of the file or an assessment of the amount of formal discovery taken. *See In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 211 (5th Cir. 1981); *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1394 (S.D.N.Y. 1985); *In re Cendant*, 264 F.3d at 235-36; *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 241 (5th Cir. 1982). Such a rule, of course, would offend public policy – which encourages the early and effective resolution of complicated cases such as this. Here, Class Counsel had more than adequate information to evaluate settlement through the exchange of over 38,000 pages of information with Defendant, analyses of repair documents from people who experienced excessive oil consumption, extensive research and analysis, and evaluation of other publicly available information concerning the

engineering issues in this case. Klorczyk Decl. ¶ 5. With their experience in automotive class actions such as this, Class Counsel were able to understand the strengths and weaknesses of the current litigation, the risks/benefits of proceeding through the litigation process, and to negotiate Settlement terms that are fair, reasonable and adequate. Class Counsel recognized the advantages of an early settlement that would immediately benefit the thousands of vehicle owners, and this Settlement provides substantial benefits to them now, without incurring the risks, expense and delays of further litigation.

4. The Risks Of Establishing Liability

This factor should be considered to "examine what potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *In re Cendant*, 264 F.3d at 237 (quoting *GM Trucks,* 55 F.3d at 814). "The inquiry requires a balancing of the likelihood of success if the case were taken to trial against the benefits of immediate settlement." *In re Safety Components, Inc. Sec. Litig.,* 166 F. Supp. 2d 72, 89 (D.N.J. 2001).

Although Class Counsel believe that the claims presented in this litigation are meritorious, they are experienced class action and litigation counsel who understand that "the risks surrounding a trial on the merits are always considerable." *Weiss,* 899 F. Supp. At 1301. Defendant has zealously defended against these claims, and would surely continue to do so if the case proceeds to discovery and eventually trial. Indeed, Defendant has raised a number of substantial defenses, some of which are reflected in their Motion to Dismiss, the determination of which has been deferred due to this Settlement. Defendant also asserts there are also potential statute of limitations, lack of privity, economic loss rule, failure to establish a defect, and other defenses that could preclude recovery as to many of the Settlement Class Members, and will assert potential factual and legal defenses to the issue of class certification. The proposed

Settlement is not only fair, reasonable and adequate in and of itself, but it is even more so when viewed in terms of the risks of non-recovery, the costs and risks of surviving class certification of a nationwide class, a potential summary judgment motion, a battle of the experts and Daubert motions, a potentially lengthy trial in which the outcome is uncertain, and appeals to class certification or a trial outcome.

In contrast, the Settlement here presents the Class with real and substantial benefits now. Although Plaintiffs are confident their claims are legally sound, there is always the possibility that the Court or a jury may ultimately disagree. The inherently unpredictable risks in establishing liability through a motion to dismiss, summary judgment and ultimately, a trial and appeals, weigh heavily in favor of settlement, particularly here, where the Settlement provides the Class with substantial benefits that are fair, reasonable, and adequate.

5. The Risks Of Establishing Damages

"Like the fourth factor, 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *In re Cendant,* 264 F.3d at 238 (quoting *GM Trucks,* 55 F.3d at 816). The court looks at the potential damage award if the case were taken to trial against the benefits of immediate settlement. *Prudential,* 148 F.3d at 319. In *In re Warfarin Sodium,* the trial court found that the risk of establishing damages strongly favored settlement, observing that "[d]amages would likely be established at trial through 'a "battle of experts," with each side presenting its figures to the jury and with no guarantee whom the jury would believe.'" *In re Warfarin Sodium Antitrust Litig.,* 212 F.R.D. 231, 256 (D. Del. 2002), *aff'd* 391 F.3d 516, 537 (3d Cir. 2004). Similarly, in *Cendant,* the Third Circuit reasoned that there was no compelling reason to think that "a jury confronted with competing expert opinions" would accept the plaintiff's damages theory rather than that of the defendant, and thus the risk in establishing damages weighed in favor of approval of the settlement. 264 F.3d at 239. The same

is true here and this factor weighs in favor of final approval.

6. The Risks Of Maintaining The Class Action Through Trial

Because the prospects of obtaining class certification have a profound impact upon the ability to recover or the potential recovery, *GM Trucks*, 55 F.3d at 817, the Court must measure the likelihood of obtaining and maintaining a certified class if the action were to proceed to trial. *Girsh*, 521 F.2d at 157. Class Counsel believe that this case is wholly appropriate for class certification in the litigation context. However, there is always risk that a Court would find this action not suitable for class certification or find it not suitable for litigation on a nationwide or multi-state basis. Indeed, Defendant would invariably raise significant defenses to class certification, including arguments that the myriad of individualized issues involved here could readily be found to predominate, such as the individual facts and circumstances of each Settlement Class Member's purchase or lease transactions, what if anything each Class Member may have viewed and relied upon in making his/her purchase/lease decisions, the condition, maintenance, manner of driving and other factors unique to each Class Member's vehicle, and whether and to what extent certain particular vehicles may have experienced excessive oil consumption, and if so, the root cause(s) of each vehicle's alleged excessive oil consumption. These, together with other individual defenses that may apply to various members within the putative class, and the many differences in the applicable laws among the fifty states, would create substantial factual and legal obstacles to certifying a nationwide class in the litigation context. Yet, those obstacles are not present in the context of a class settlement, where a nationwide settlement class can be certified because the Court does not have to be concerned with intractable manageability issues at trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Thus, the ability to obtain class certification in this action, and particularly certification of a nationwide litigation class, is uncertain.

7. Defendant's Ability To Withstand Greater Judgment

Although there is no dispute that Defendant has ample resources, countless settlements have been approved even though a settling defendant might have had the ability to pay greater amounts. The Third Circuit has noted that this fact alone does not weigh against settlement approval, *In re Warfarin Sodium II*, 391 F.3d at 538, and in any event, this factor is generally neutral when, as in this case, the defendant's ability to pay greatly exceeds the potential liability and was not a factor in settlement negotiations here. *In re CertainTeed*, 269 F.R.D. at 538 ("fact that [defendant] could afford to pay more does not mean that it is obligated to pay any more than what the … class members are entitled to under the theories of liability that existed at the time the settlement was reached"); *Bredbenner*, 2011 WL 1344745, at *15 ("courts in this district regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts").

8. Reasonableness Of The Settlement In Light Of The Best Possible Recovery And All Attendant Risks Of Litigation

The final two *Girsh* factors are the reasonableness of the Settlement in light of the best possible recovery, and all the attendant risks of litigation. These factors support final approval of this Class Settlement. This Settlement offers real and robust technical and economic benefits to Settlement Class Members. Indeed, for the alleged vehicle components at issue, the Settlement offers a Service Action to address excessive oil consumption in Class Vehicles exhibiting the issue, as well as reimbursement for qualifying past repairs by qualifying Settlement Class Members, subject to certain reasonable limitations, discussed *supra.* Settlement Class Members are present and former owners and lessees of the Settlement Class Vehicles nationwide, and thus the Settlement benefits are not limited to some smaller group of Settlement Class Vehicle owners, such as those defined by a state of purchase only. These two factors clearly weigh in

favor of final approval of the Settlement.

C. NOTICE IS CONSTITUTIONALLY SOUND AND FULLY IMPLEMENTED

Class Notice must be the best practicable notice under the circumstances. *See* Fed. Rule Civ. P. 23(e)(1)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

The notice of class settlement should: define the class; describe clearly the options open to Class Members and the deadlines for taking action; describe essential terms of the proposed settlement; disclose any special benefits provided to the class representatives; provide attorneys' fees information; indicate the time and place of the hearing considering approval of the settlement; explain the method for objecting to or opting out of the settlement; explain procedures for entitlement to payment of claims; provide information that will enable Class Members to calculate or at least estimate their individual recoveries; and, display the contact information for inquiries. MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.312 (2004); *see also Cendant,* 109 F. Supp. at 254. Here, the form and content of the Class Notice was negotiated and agreed upon by the Parties, and approved by this Court as meeting all of these requirements. The direct mail Notice Plan, which was approved by this Court, involved the mailing of 182,808 Class Notices, with accompanying Claim Forms, directly to Settlement Class Members based on updated DMV records. Prior to mailing, the Settlement Administrator processed the Class Notice mailing list through the USPS National Change of Address database to identify updated addresses for individuals who have moved within the last four years and who filed a change of address card with the USPS. In addition, Class Notice packets that were

returned by the USPS as undeliverable with a forwarding address were re-mailed to that forwarding address, and those that were returned without a forwarding address were subjected to an address verification search ("skip trace") in an attempt to locate an updated address.[9]

The Settlement Administrator also established a national toll-free number to further assist Settlement Class Members, as well as dedicated physical and email addresses. The Settlement Website features downloadable Class Notice, Claim Forms, the Settlement Agreement, the Preliminary Approval and other approval Motions and Orders, and detailed information and instructions relating to the terms and benefits of the Settlement, how and when to opt-out or object, frequently asked questions, important dates including the final fairness hearing, and other helpful guidance. Klorczyk Decl. ¶ 6.

The Notice Plan that this Court preliminarily approved was timely and properly implemented. As the Court already determined in the Preliminary Approval Order, this Notice Plan provided the best notice practicable under the circumstances and complied in all respects with Rule 23(c)(2) and due process. It allowed Settlement Class Members a full and fair opportunity to consider the terms of the Settlement and make a fully informed decision as to whether to participate, object, or opt-out of the Settlement. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (noting that individual notice is preferred method where addresses of class members can be ascertained through reasonable effort). "CAFA" Notice of the proposed Settlement was also timely provided to the Attorney General of the United States and to the Attorneys General of the states where Class Members reside pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715. No Attorney General has objected to or taken issue with any

[9] Pursuant to the preliminary approval order, at least "fifteen (15) days before the Final Approval Hearing, the Settlement Administrator will provide an affidavit to the Court attesting that Settlement Class Notice was disseminated in a manner consistent with the terms of the Settlement." Dkt. 55 ¶ 8.

aspect of this Settlement.

D. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

Class certification under Rule 23 has two primary components. First, the party seeking class certification must establish the four requirements of Rule 23(a): "(1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical … of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *In re Warfarin Sodium II*, 391 F.3d at 527. Second, the Court must find that the class fits within one of the three categories of class actions set forth in Rule 23(b). *In re Community Bank of Northern Virginia*, 418 F.3d 277, 302 (3d Cir. 2005).

Here, Plaintiffs seek final certification under Rule 23(b)(3), "the customary vehicle for damage actions." *Id.* Rule 23(b)(3) requires that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 592-93 (1997). As discussed in detail below, all Rule 23 requirements for certification of the proposed Settlement Class are satisfied here. The Court was correct in preliminarily certifying the Class for settlement purposes pursuant to Rules 23(a) and (b)(3), and nothing has changed to alter the propriety of the Court's certification.

1. The Rule 23(a) Factors Are Met

As discussed below, the proposed Settlement meets the requirements of Rule 23(a), which are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *See In re Warfarin Sodium II*, 391 F.3d at 527.

a. *Numerosity*

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

"impracticable." *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp*., 149 F.R.D. 65, 73 (D.N.J. 1993). For purposes of Rule 23(a)(1), "impracticable" does not mean impossible, "only that common sense suggests that it would be difficult or inconvenient to join all class members." *See Prudential,* 962 F. Supp. at 510, *see also Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (numerosity requirement satisfied "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40"). Here, the Settlement Class includes 182,808 Settlement Class Members who are present and former owners and lessees of the approximately 70,000 Settlement Class Vehicles throughout the United States. Individual joinder of all Settlement Class Members would be impracticable, and the proposed Settlement Class easily satisfies Rule 23's numerosity requirement. *Liberty*, 149 F.R.D. at 73.

b. *Commonality*

"Rule 23(a)(2)'s commonality element requires that the proposed class members share at least one question of fact or law in common with each other." *Warfarin Sodium II*, 391 F.3d at 527-28. "Commonality does not require perfect identity of questions of law or fact among all class members. Rather, even a single common issue will do." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015) (internal quotation marks omitted). Here, the Settlement Class Members share overlapping common issues of both law and fact. In the context of consumer fraud and warranty-based class actions, a class asserting claims based on a common course of conduct and common warranty satisfies the commonality requirement. *Prudential,* 962 F. Supp. at 511-14. The common questions include whether the engines in the Settlement Class Vehicles are defective; whether BMW had prior knowledge of the alleged defect; whether BMW had, and breached, a duty to disclose the alleged defect and/or misrepresented its condition; and whether Plaintiffs and the Class were economically harmed as a result. Accordingly, Rule 23(a)(2)'s requirement of a common question of law or fact is satisfied.

c. *Typicality*

In considering typicality under Rule 23(a)(3), the court must determine whether "the named plaintiffs[‘] individual circumstances are markedly different or … the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Johnston v. HBO Film Mgmt., Inc*., 265 F.3d 178, 184 (3d Cir. 2001). Typicality does not require that all class members share identical claims. *Id.* So long as "the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is usually established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 183-84 (3d Cir. 2001). The typicality requirement is satisfied here, since the proposed Class Representatives each possessed a Class Vehicle and experienced the same alleged injury as a result of the same alleged defect which is claimed to exist in all of the Class Vehicles. Specifically, Class claims arise out of ownership or lease of Class Vehicles which were equipped with BMW's N63TU1 engines that 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 steam seals – as compared to other, similar vehicles not containing the N63TU1 engine. The factual basis of BMW's alleged misconduct is common to the members of the class and represent a common thread deceptive trade practices resulting in injury to all proposed Class Members.

d. *Adequacy*

The adequacy requirement has two components intended to ensure that the absent class members interests are protected: (a) the named plaintiffs' interests must be sufficiently aligned with the interests of the class, and (b) the plaintiffs' counsel must be qualified to represent the class. *GM Trucks,* 55 F.3d at 800. Here, the requirements for adequacy are satisfied.

As for the first component, the court must determine whether "the representatives'

interests conflict with those of the class." *Johnston*, 265 F.3d at 185. Here, there is no conflict between the proposed Class Representatives and the Settlement Class, because, as with all members of the Settlement Class, Plaintiffs seek compensation for the same alleged defect claimed to exist in the Settlement Class Vehicles. The Plaintiffs have no interests that are antagonistic to or in conflict with the Settlement Class they seek to represent, and their alleged damages are the same or similar. *See Amchem*, 521 U.S. at 625-27 (courts look at whether the representatives' interest are antagonistic to or in conflict with those of the class members).

As far as the adequacy of counsel is concerned, the Settlement Class is represented by Bursor & Fisher, P.A., which possesses a national reputation in the class action field. (*See* Exhibit 13 of the Declaration of Frederick J. Klorczyk III in Support of Plaintiffs' Motion for Award of Attorneys' Fees and Reimbursement Expenses, Dkt. 57-2). Accordingly, both prongs of the adequacy inquiry are satisfied.

2. The Rule 23(b)(3) Factors Are Met

In addition to meeting the requirements of Rule 23(a), the Settlement Class also must satisfy Rule 23(b)(3). As set forth in more detail below, the rule is satisfied here.

a. *Predominance*

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." As the Supreme Court explained in *Amchem,* "[p]redominance is a test readily met in certain cases alleging consumer fraud …" 521 U.S. at 625. "Common issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class members." *In re Mercedes-Benz Antitrust Litig*., 213 F.R.D. 180, 187 (D.N.J. 2003); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S. Ct. 1184, 1196 (2013) ("Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that every element of her claim is susceptible to classwide

proof.") (internal quotation marks and alterations omitted).

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 steam 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. The common legal and factual questions, are at the core of the litigation and are focused on the actions of BMW, not Plaintiffs. Accordingly, the predominance prong of Rule 23(b)(3) is satisfied.

b. *Superiority*

Rule 23(b)(3) also requires that class resolution be "superior to other available methods for fairly and efficiently adjudicating the controversy." The following factors are relevant to the superiority inquiry:

> (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; (D) the likely difficulties in managing a class action.

Id.; Danvers Motor Co, Inc. v. Ford Motor Co., 543 F.3d 141, 149 (3d Cir. 2008).

The superiority inquiry is simplified in the settlement context, because when certifying a settlement only class, the Court need not inquire whether the case, if tried, would pose intractable management problems, for the purpose of the settlement is to not have a trial. *Amchem*, 521 U.S. at 620. *In re Warfarin Sodium II*, 391 F.3d at 529 ("When dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a

settlement class."). Moreover, "[f]or the purposes of settlement, concentrating litigation in one forum is desirable." *Varacallo v. Mass. Mutual Life Ins. Co.*, 226 F.R.D. 207, 234 (D.N.J. 2005).

Here, for settlement purposes a class action is the superior method of resolving the Settlement Class Members' claims. All of the Settlement Class Members' claims are based upon the same basic operative facts, legal standards and alleged economic damages. It would be a far better use of judicial resources to address these identical issues once, on a common basis, then repeatedly, in individual litigations involving more than 70,000 Class Vehicles and over 180,000 Class Members. In addition, individualized litigation carries with it great uncertainty, risk, and costs, and provides no guaranty that injured Settlement Class Members will recover anything, much less obtain anything near the substantial benefits that this Settlement provides. And clearly, any damages that might potentially be available to each Class Member are relatively small in comparison with the substantial expense that would be incurred in prosecuting an individual action attempting to prove the existence of an automotive design or manufacturing defect and/or a violation of a consumer statute, rendering such individual actions cost-prohibitive. *See*, *e.g.*, *Phillips*, 472 U.S. at 809 (class action plaintiffs' claims are uneconomical to litigate individually); *Varacallo*, 226 F.R.D. at 234 ("Without question, class adjudication of this matter will achieve an appreciable savings of effort, time and expense, and will promote uniformity of decision on the issues resolved and to which the parties will be bound.").

V. CONCLUSION

This Court should enter an order and judgment granting final approval of the Class Settlement under the terms set forth in the Settlement Agreement. A proposed Final Order and Judgment will be submitted prior to the Final Fairness Hearing scheduled for January 10, 2022.

Dated: December 16, 2021

Respectfully submitted,

BURSOR & FISHER, P.A.

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