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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSHUA HU, *et al.*, Plaintiffs, vs. BMW OF NORTH AMERICA LLC, *et al.*, Defendants.	Case No. 2:18-cv-4363 (EP) (JBC) Hon. Evelyn Padin, U.S.D.J. Hon. James B. Clark, III, U.S.M.J.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS, AND APPROVAL OF THE PROPOSED CLASS NOTICE.

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Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs respectfully move for preliminary approval of the proposed Settlement with Defendants BMW of North America, LLC ("BMW NA") and Bayerische Motoren Werke Aktiengesellschaft ("BMW AG," collectively with BMW NA, the "BMW Defendants"), preliminary certification of the Class defined in the Settlement, and approval of proposed Class Notice.[1]

I. INTRODUCTION

Plaintiffs, on behalf of themselves and other members of the proposed settlement Class, present to the Court their proposed Settlement with the BMW Defendants. Plaintiffs are current and/or former owners/lessees of certain defined BMW "Subject Vehicles"—that is, model year 2009-2013 BMW X5 xDrive35d ("X5") and 2009-2011 BMW 335d diesel vehicles sold or leased in the United States that allegedly exceeded emissions standards at times when the vehicles were in normal operation and not in a regulatory

[1] The Settlement Agreement is Exhibit A to the Declaration of James E. Cecchi in Support of Motion for Preliminary Approval ("Cecchi Decl."). Capitalized terms not defined herein have the same definitions and meanings ascribed to them in the Settlement Agreement.

testing environment. The Settlement, reached after over five years of hard-fought litigation, will resolve Plaintiffs' and Class Members' claims against the BMW Defendants.

The Settlement before the Court provides a $6,000,000 benefit to the Class, from which Class Members who submit a Claim are eligible to receive a Cash Award. The Settlement Amount shall be used to pay Cash Awards, minus Notice and Administration Costs (including the Deposit Amount), Attorneys' Fees and Costs, Service Awards, Taxes and Tax Expenses.

The proposed Settlement is a favorable resolution for the Class that avoids the substantial risks and expense of continued litigation, including the serious risk of recovering nothing at all. The proposed Settlement Agreement resulted from arm's-length, good faith negotiations between and among experienced counsel under the auspices of a respected and experienced mediator, the Honorable Wayne Andersen. It provides a fair, reasonable, and adequate resolution of this litigation, which will substantially reduce costs and the expenditure of resources, eliminate the

risk of uncertain litigation outcomes, and prevent further delay in remedying the harms suffered by Class Members.

The Settlement is fair, reasonable, and the Court will likely approve the proposal under Rule 23(e)(2) and certify the Class for purposes of judgment on the Settlement.

Accordingly, Plaintiffs respectfully request that the Court enter a Preliminary Approval Order, substantially in the form attached as Exhibit A to the Settlement Agreement that: (1) grants preliminary approval of the proposed Settlement Agreement entered into between the Parties; (2) finds that the Court, at the final approval stage, will likely certify the Class as defined in the Settlement Agreement; (3) directs that notice be provided to proposed Class Members in the form and manner specified in the Settlement Agreement; (4) appoints Plaintiffs as representatives of the proposed Class; (5) appoints Carella, Byrne, Cecchi, Brody & Agnello, P.C. ("Carella Byrne"), Hagens Berman Sobol Shapiro LLP, and Seeger Weiss LLP as Class Counsel for the proposed Class ("Class Counsel"); (6) establishes certain dates and procedures in connection with final approval of the Settlement Agreement,

including, but not limited to, deadlines and procedures for Settlement objections, Opt-Outs, and Claims; and (7) schedules a Fairness Hearing to determine whether the Settlement is fair, reasonable, and adequate under Rule 23(e)(2), and whether the Class should be certified.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This litigation commenced with the filing of the initial complaint in March 2018. The complaint asserted claims for violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(C), (D), along with violations of various state-law consumer protection laws and common law claims, and generally alleged that the BMW Defendants defrauded consumers by developing, advertising and selling Subject Vehicles that exceeded emissions limits during normal operation on the road.

Following this Court's rulings on BMW NA's motion to dismiss and BMW AG's motion to dismiss for lack of personal jurisdiction, the BMW Defendants filed answers to the First Amended Complaint. The Parties subsequently engaged in extensive fact discovery for two years, including

production by the BMW Defendants of more than 1.3 million pages of documents; production by Plaintiffs of approximately 28,000 pages of documents; responses to several sets of document requests, interrogatories and requests to admit; third party document subpoenas and government record requests; depositions of BMW Defendant fact witnesses and corporate representatives under Rule 30(b)(6); depositions of Plaintiffs; and inspections of Plaintiffs' vehicles.

Beginning on June 22, 2023, with the benefit of a fulsome record, the Parties began exploring a potential resolution to this Action. The parties continued to engage in active settlement discussions and agreed to pause further discovery to further these discussions. On August 21, 2023, the Parties agreed to engage in formal mediation.

On September 15, 2023, the Parties participated in an in-person mediation before the Honorable Wayne Andersen (Ret.), who assisted the Parties in arm's-length negotiations concerning a proposed class-wide settlement. The Parties reached an agreement on a settlement in principle at the mediation and later signed a term sheet on September 29, 2023. The

Parties had an arm's-length exchange of sufficient information and data, most notably through the extensive discovery outlined above, to permit Plaintiffs and their counsel to evaluate the claims and potential defenses and to meaningfully conduct informed settlement discussions, and for the BMW Defendants to do the same.

Class Counsel (as defined below) have analyzed and evaluated the factual and legal issues presented in the Action, the merits of the claims made against the BMW Defendants and the impact of this Agreement on the Settlement Class Representatives and the Settlement Class. Based upon their analysis and evaluation of several factors, including Class Counsel's significant experience in successfully litigating and resolving analogous actions across the country, Settlement Class Representatives and Class Counsel recognize the substantial risks of continued litigation, including the possibility that the Action, if not settled now, might not result in any recovery or might result in a recovery that is less favorable and that would not occur for several years.

Class Counsel and the Settlement Class Representatives, after taking into account the foregoing, along with the risks and costs of further litigation, are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that a settlement of the Action and the prompt provision of effective relief to the Settlement Class are in the best interests of the Settlement Class Members.

III. SUMMARY OF SETTLEMENT TERMS

A. The Settlement Class Definition.

The Class includes all Persons who purchased or leased a model year 2009–2013 BMW X5 xDrive35d or 2009–2011 BMW 335d vehicle (defined as the "Subject Vehicles") on or before the Preliminary Approval Date.[2]

[2] Excluded from the Class are: (i) the BMW Defendants and their officers, directors, and employees; and the BMW Defendants' corporate affiliates and corporate affiliates' officers, directors, and employees; (ii) Class Counsel; (iii) the judges who have presided over the Action; (iv) Persons who have settled with, released, or otherwise had claims dismissed with prejudice or had claims adjudicated on the merits against the BMW Defendants arising from the same allegations or circumstances as the Action; and (v) all other Persons who timely elect to become opt-outs from the Settlement Class in accordance with the Court's Orders and as approved by the Court. Explicitly not excluded from the class are those Plaintiffs whose claims were dismissed from the Action with prejudice to refiling their claims

IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

A. The Standard and Procedures for Granting Preliminary Approval.

Rule 23(e) provides that the Court should direct notice for the settlement in a reasonable manner and may approve a class action settlement after a hearing and upon finding that the settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). At the preliminary approval stage, a hearing is neither necessary nor required under Rule 23(e), but "[t]he parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class," and a court is to direct notice to prospective class members "who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to . . . (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(A)-(B); *see also Ward v. Flagship Credit Acceptance LLC*, 2020 WL 759389, at *4 (E.D.

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against the BMW Defendants as an individual or on behalf of a putative class but without prejudice to their claims as an absent putative class member. *See* Dkt. Nos. [] (voluntary dismissal orders).

Pa. Feb. 13, 2020) (discussing revised preliminary approval test under Dec. 1, 2018 revisions to Rule 23(e)).

The Third Circuit has long encouraged the 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."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged");

As shown below, the Settlement warrants preliminary approval and dissemination of notice to the Class.

B. There is a Strong Basis to Conclude that the Settlement Is Fair, Reasonable, and Adequate and that the Rule 23(e)(2) Standards for Approval Will Be Met.

1. The proposed Settlement was reached after substantial litigation, including fulsome discovery and motion practice, and the benefits of the proposed Settlement far outweigh the risks of continued litigation.

As noted above, the Settlement comes after over five years of spirited litigation. That litigation saw extensive motion practice and entailed

fulsome discovery. Over the course of the litigation, the Parties exchanged formal, comprehensive discovery requests and responses, negotiated ESI search terms, retained and consulted with experts, and further exchanged extensive data and information related to the Settlement Class Vehicles. Class Counsel have a clear view of the strengths and weaknesses of the Class's claims. Sufficient discovery has been conducted here. As a result, the Parties are sufficiently well informed as to the factual and legal issues relevant to this action.

In addition, the risk, expense, complexity, and duration of further litigation is significant. Nor has a litigation class been certified. Were the Court to certify one, Defendants would no doubt pursue a Rule 23(f) petition to the Third Circuit for immediate review. The risk of maintaining class action status through trial is real. Moreover, if Plaintiffs prevailed at trial, a long appeal period would certainly result. The litigation road has been arduous and promises to be harder absent settlement. In sum, this case was far from a "slam dunk" and, considering the substantial future risks posed by trial and appeals, this is a laudable recovery that offers Settlement Class

Members an immediate recovery upon approval, rather than the uncertainties of further litigation. All these considerations allow counsel to unhesitatingly recommend the Settlement for the Court's approval.

2. The Settlement negotiations occurred at arm's-length.

The Parties negotiated arduously and at arm's-length under the supervision and aid of Judge Andersen. This factor supports preliminary approval. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) ("The participation of an independent mediator in settlement negotiations 'virtually insures that the negotiations were conducted at arm's-length and without collusion between the parties.'").

The Parties worked long and hard to resolve this matter. It is Class Counsel's reasoned opinion that, given the alternative of long and complex litigation, and the risks involved in such litigation, including a preemption battle, class certification, trial on the merits, and appeals, the availability of relief under the Settlement weighs heavily in favor of preliminary approval. *See In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 259 (3d Cir. 2009) (a

settlement that would eliminate delay and expenses and provides immediate benefit to the class strongly favors approval).

3. The proponents of the Settlement are experienced in similar litigation.

Class Counsel are highly experienced class action litigators. Throughout the course of negotiations, Class Members were represented by a team of attorneys who have considerable experience (and success) in prosecuting (and settling) class actions. Their decision to settle after more than five years of hard-fought litigation and evaluation of the claims weighs in favor of the Court granting preliminary approval. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997) ("the Court credits the judgment of Plaintiffs' Counsel, all of whom are active, respected, and accomplished in this type of litigation."); *Varacallo v. Massachusetts Mut. Life Ins.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("[T]he Court puts credence in the fact that Class Counsel consider the Proposed Settlement to be fair, reasonable and adequate."); *Alves*, 2012 WL 6043272, at *22 ("[C]ourts in this Circuit traditionally attribute significant weight to the belief of experienced

counsel that settlement is in the best interest of the class.") (citation and internal quotation marks omitted).

V. THE COURT SHOULD CERTIFY THE PROPOSED CLASS FOR SETTLEMENT PURPOSES

Plaintiffs request, in accordance with Rule 23(e)(1)(B)(ii), that the Court preliminarily certify a Settlement Class and direct dissemination of notice about the action and the Settlement. The BMW Defendants do not object to certification of the Settlement Class for purposes of settlement only, and the Supreme Court has long acknowledged the propriety of certifying a class solely for settlement purposes. *See, e.g., Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). In conducting this task, a court's "dominant concern" is "whether a proposed class has sufficient unity so that the absent members can fairly be bound by the decisions of class representatives." *Id.* at 621. To be certified under Rule 23, a putative class must satisfy, by a preponderance of the evidence, each of the four requirements of Rule 23(a) as well as the requirements of one of the three subsections of Rule 23(b). *See, e.g., Wragg v. Ortiz*, 2020 WL 2745247, at *27 (D.N.J. May 27, 2020).

A. The Rule 23(a) Requirements Are Satisfied.

Plaintiffs must satisfy the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a). As shown below, the proposed Class readily satisfies all four elements.

1. Rule 23(a)(1) – Numerosity is present.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[G]enerally, where the potential number of plaintiffs is likely to exceed forty members, the Rule 23(a) numerosity requirement will be met." *Martinez-Santiago v. Public Storage*, 312 F.R.D. 380, 388 (D.N.J. 2015) (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012)). With approximately 55,000 Subject Vehicles included, there can be no dispute that the members of the proposed Class are so numerous as to make their joinder impractical. *See, e.g., Wragg*, 2020 WL 2745247, at * 27 (numerosity "must be based on common sense") (citation and internal quotation marks omitted). Indeed, courts routinely find numerosity in automotive class actions, as should be the case here. *See, e.g., In re Chrysler-Dodge Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*,

2019 WL 536661, at *5 (N.D. Cal. Feb. 11, 2019) (numerosity satisfied for comparable diesel emissions settlement). The numerosity test is readily satisfied.

2. Rule 23(a)(2) – There are issues common to all Class Members.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and that the class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 369 (2011) (citation omitted and emphasis added). In other words, the class's claims must "depend upon a common contention ... capable of class-wide resolution." *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 137 (E.D. Pa. 2011) (citing *Wal-Mart*, 564 U.S. at 350). "A contention is capable of class-wide resolution if determination of its truth or falsity will resolve an issue that is central to the validity the claims 'in one stroke.'" *Id.* (quoting *Wal-Mart*, 564 U.S. at 350).

The commonality inquiry focuses on the defendant's conduct. *Sullivan v. DB Invs., Inc*, 667 F.3d 273, 297 (3d Cir. 2011) (*en banc*) ("commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members"). Not all questions of fact

and law need to be common if there are common questions at the heart of the case. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 530 (3d Cir. 2004) (quotation omitted); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 310 (3d Cir. 1998). "For purposes of Rule 23(a)(2), even a single [common] question will do." *Wal-Mart*, 564 U.S. at 359 (brackets in original; citation omitted).

The claims of all Class Members involve the same common questions involving, among other issues, advertising, the same vehicles, and the same emissions control technology and software, all of which focus on the BMW Defendants' conduct and not individual Class members. These issues are at the heart of the case and are enough to satisfy the Rule 23(a)(2) commonality element.

4. Rule 23(a)(3) – Typicality is satisfied.

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. The Third Circuit has explained that "the named plaintiffs' claims must merely be 'typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are

aligned with those of the class.'" *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009) (citation omitted); *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 184 (3d Cir. 2001) (citation omitted). Rule 23(a)(3), however, "does not require that all putative class members share identical claims." *HBO*, 265 F.3d at 184.

Under the permissive standards of this rule, representative claims are "typical" if they are reasonably coextensive with those of absent class members and they need not be identical. Indeed, when it is alleged that the defendant engaged in conduct common to all members of the class, "there is a strong presumption that the claims of the representative parties will be typical of the absent class members." *In re Merck & Co., Vytorin/Zetia Sec. Litig.*, No. 08-cv-2177, 2012 WL 4482041, at *4 (D.N.J, Sept. 25, 2012) (citation omitted). Likewise, "[w]hen a class includes purchasers of a variety of different products, a named plaintiff that purchases only one type of product satisfies the typicality requirement if the alleged misrepresentations or omissions apply uniformly across the different product types." *Marcus*, 687 F.3d at 599; *see also Yaeger v. Subaru of Am., Inc.*, 2016 WL 4541861, at *6 (D.N.J.

Aug. 31, 2016) (finding typicality where "plaintiffs allege that the class claims arise out of the same conduct of the defendants related to their design, manufacture, and sale of the class vehicles that suffered from an alleged oil consumption defect, and defendants' alleged failure to disclose that material fact").

The named Plaintiffs' claims, and those of absent members of the Settlement Class, arise from a common alleged course of conduct and under common legal theories. Plaintiffs allege that the BMW Defendants engaged in false advertising in violation of consumer protection laws and committed fraud by (i) selling vehicles that allegedly emit harmful pollutants at excessively high levels; (ii) not informing consumers of the excessive emissions; and (iii) making material misstatements and omissions about the vehicles' performance, fuel-efficiency, and emissions output, and whether the vehicles were environmentally friendly and met emissions limits under everyday driving conditions. Plaintiffs further allege that their vehicles and all other Class Vehicles emit excessive "real world" emissions. The BMW Defendants dispute these claims. However, taken together, these claims are

typical of the claims of every member of the Class. *See In re: Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2016 WL 4010049 (N.D. Cal. July 26, 2016), at *11 (typicality satisfied for diesel emissions settlement class); *In re Chrysler-Dodge Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 2019 WL 536661, at *5-6 (N.D. Cal. Feb. 11, 2019) (same).

5. Rule 23(a)(4) – Adequacy is satisfied.

The final requirement of Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In the Third Circuit, the relevant inquiries are (1) whether the named plaintiffs have any interests antagonistic with other class members and (2) whether the named plaintiffs' counsel are qualified, experienced, and able to conduct the proposed litigation based on factors set forth in Rule 23(g). *In re Schering Plough Corp.*, 589 F.3d at 602; *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010).[3] Plaintiffs satisfy both prongs.

[3] "The adequacy of representation requirement tends to merge with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and

First, the proposed Class Representatives interests "are entirely aligned [with those of the proposed Class] in their interest in proving that [Defendants] misled them and share the common goal of obtaining redress for their injuries." *Volkswagen*, 2016 WL 4010049, at *11; *see also In re Chrysler-Dodge Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 2019 WL 536661, at *6 (same). The Class Representatives have had every incentive to vigorously prosecute this litigation against BMW because, as discussed above, their claims are typical of the absent Class Members. *E.g., Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008) ("The fact that plaintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class.").

The Class Representatives also understand their duties: they have all kept abreast of the litigation and aided in discovery, including producing documents and responding to written discovery, submitting to depositions,

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adequately protected in their absence. The adequacy heading also factors in competency and conflicts of class counsel." *Amchem Prods., Inc.*, 521 U.S. at 626 n.20 (citation and internal quotation marks omitted).

and having their Class Vehicles inspected if they remained in their possession. There can be no reasoned argument that any of the Class Representatives have conflicts antagonistic to the Class, and the Court should conclude that they will—and have—adequately represented the Class.

Likewise, Plaintiffs' choice of counsel further underscores their adequacy. *See In re Cmty. Bank of N. Va.*, 622 F.3d 275, 292 (3d Cir. 2010) ("Realistically, for purposes of determining adequate representation, the performance of class counsel is intertwined with that of the class representative." (citation and internal quotation marks omitted). In retaining, Carella Byrne, Hagens Berman, and Seeger Weiss, Plaintiffs have employed counsel who are qualified and experienced in complex class litigation and who have the resources, zeal, and successful record in class cases.[4] There can be no genuine question that the proposed Class Representatives are adequate.

[4] The fitness of these three firms to adequately represent the Class is further addressed in Section V-C below in connection with their qualifications for appointment as Class Counsel under Rule 23(g).

6. The proposed Class is ascertainable.

Although not specified in the text of Rule 23, courts, including this District, imply a prerequisite that the proposed class be ascertainable. *E.g.*, *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015). "The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (citations omitted); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 439 (3d Cir. 2017).

Here, the Class definition uses objective criteria that make class membership objectively verifiable, and there is a reliable and administratively feasible mechanism through which qualified Class Members will be readily identified: registration data available from State DMV's and third-party vendors. *See* [].

B. As Required by Rule 23(b)(3), Common Issues Predominate and Class Treatment is Superior to a Multiplicity of Individual Lawsuits.

Under Rule 23(b)(3), a class should be certified when the court finds that common questions of law or fact predominate over individual issues and a class action would be superior to other methods of resolving the controversy.

The predominance element "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods, Inc.*, 521 U.S. at 623. At its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). The superiority component requires the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods' of adjudication." *Prudential*, 148 F.3d at 316 (citation omitted). Here, the Class readily meets both requirements.

First, common issues predominate. The predominance inquiry focuses on liability issues. *E.g., In re Novo Nordisk Sec. Litig.*, 2020 WL 502176, at *8 (D.N.J. Jan. 31, 2020) ("In determining whether common questions

predominate, courts have focused on the claims of liability against defendants.") (citing cases). The common questions discussed above with respect to the Rule 23(a)(2) commonality element are overarching and thus tower over issues relating to individual Class Members. Factual and legal questions aside, the salient evidence necessary to prove Plaintiffs' claims is common to both the Class Representatives and all Class Members. Moreover, the necessary proof would be generalized, and changes little, if at all, whether there are dozens or thousands of Class Members. In either instance, Plaintiffs would present the same evidence of the BMW Defendants' marketing, and the same evidence of alleged wrongdoing. *See Volkswagen*, 2016 WL 4010049, at *12; *see also In re Chrysler-Dodge Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 2019 WL 536661, at *7. In other words, the Class's claims depend on the same factual circumstances, *In re Valeant Pharm. Int'l, Inc. Sec. Litig.*, 2020 WL 3166456, at *5 (D.N.J. June 15, 2020), and "the claims present common operative facts and common questions of law that predominate" over any factual variations. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("When 'one or more of

the central Issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'"). The predominance test is thus satisfied.

Second, certification of the Class under Rule 23 is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R Civ. P. 23(b)(3). The Settlement affords benefits to Class Members who, absent a class settlement, may not have known about their legal rights or had too little an incentive to pursue an individual suit involving their vehicles. The high cost of marshaling the evidence (experts, sophisticated electronic discovery, discovery in foreign languages, and so on) necessary to pursue the claims at issue dwarfs any individual consumer's potential recovery and the disparity in resources between individuals and well-funded, litigation-savvy defendants like the BMW Defendants. This Court has recognized that the existence of so-called "negative value" claims—"meaning it costs more to litigate than you would get if you won," *Stolt-*

Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 675 n.7 (2010) (citation and internal quotation marks omitted)—is typically "the most compelling rationale for finding superiority" of class treatment. *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 550 (D.N.J. 2001) (citation and internal quotation marks omitted; emphasis added).

Indeed, Class Counsel have already devoted significant time and resources to this litigation, including expert testing for purposes of the complaint, multiple rounds of motions to dismiss, discovery briefing, depositions, document review, and engaging in other significant efforts on many other issues. It is inconceivable that an individual vehicle owner pursuing a purely economic loss case could or would invest the same resources. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[O]nly a lunatic or a fanatic sues for $30.").

Certification also serves the interest of judicial economy by avoiding multiple similar lawsuits and resolving claims affecting thousands of vehicles in one proceeding. Even a few duplicative individual suits would needlessly burden the courts and risk inconsistent adjudications. *See In re*

Neurontin Antitrust Litig., 2011 WL 286118, at *11 (D.N.J. Jan. 25, 2011) ("The class action mechanism ... avoids the specter of inconsistent adjudications.") (citation and internal quotation marks omitted).

Thus, class action treatment is far superior to individual adjudication. Moreover, because this is a class certified only for settlement purposes, manageability concerns associated with a litigation class are irrelevant. *Amchem Prods, Inc.*, 521 U.S. at 620. The Rule 23(b)(3) superiority component is thus also met here.

C. Proposed Class Counsel Satisfy Rule 23(g).

Pursuant to Rule 23(g), Plaintiffs also move for appointment of the law firms of Carella Byrne, Hagens Berman Sobol Shapiro LLP, and Seeger Weiss LLP as Class Counsel. Rule 23(g) focuses on the qualifications of class counsel, complementing the requirement of Rule 23(a)(4) that the representative parties adequately represent the interests of the class members. *See Sorensen*, 606 F.3d at 132-3 ("Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) of the Federal

Rules of Civil Procedure, those questions have, since 2003, been governed by Rule 23(g).”). Although a court may consider any factor concerning the proposed class counsel’s ability to “fairly and adequately represent the interest of the class,” Rule 23(g) specifically instructs a court to consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A).

Here, each of the Rule 23(g)(1)(A)’s considerations weigh strongly in favor of finding Class Counsel adequate. Class Counsel did substantial work identifying and investigating potential claims and properly supporting the allegations in the Complaints. As part of their investigation and work, Class Counsel retained and consulted with experts in different fields, and carefully reviewed public materials along with all documents and information produced by all Defendants and third parties in discovery.

As the Court is aware, Class Counsel have substantial experience, individually and collectively, successfully prosecuting class actions and

other complex litigation, including claims of the type asserted in this action. *See* Declaration of James E. Cecchi in Support of Preliminary Approval. Class Counsel's extensive efforts in prosecuting this case, combined with their in-depth knowledge of the subject area, amply satisfy the criteria for appointment under Rule 23(g).

VI. THE FORM AND MANNER OF NOTICE ARE PROPER

Reasonable notice must be provided to Class Members to allow them an opportunity to object to the proposed Settlement or to opt out of the Class if they do desire. The way that class notice is distributed, as well as its content, must satisfy Rule 23(c)(2) (governing class certification notice), Rule 23(e)(1) (governing settlement notice), and due process. *See In re Ocean Power Techs, Inc.*, 2016 WL 6778218, at *9 (D.N.J. Nov. 15, 2016); *Kaplan v. Chertoff*, 2008 WL 200108, at *12-3 (E.D. Pa. Jan. 24, 2008).

Rule 23(e) requires that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). As for due process, the notice must be "'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.'" *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 446 (3d Cir. 2016) (citation omitted).

Additionally, Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Therefore, such notice should contain sufficient information "'to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class.'" *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *10 (quoting *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 435). Furthermore, "[i]t is well settled that in the usual situation first-class mail and publication fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause." *Id.* (quoting *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985)).

Here, the content of the Class Notice satisfies all requirements. The proposed Class Notice is written in plain English and is easy to read. It

includes: (1) a description of the Class; (2) a description of the claims asserted in the action; (3) a description of the Settlement and release of claims; (4) the deadlines for exercising the right to opt-out; (5) the identity of counsel for the Class; (6) the Final Approval Hearing date; (7) an explanation of eligibility for appearing at the Final Approval Hearing; and (8) the deadline for objecting to the Settlement. The Class Notice provides Settlement Class Members with clear and correct information about the nature and principal terms of the Settlement Agreement to make an informed and intelligent decision whether to object to the Settlement or opt out. In addition, under Rule 23(h), the proposed Class Notice sets forth the maximum amount of Attorneys' Fees and Expenses and Awards that may be awarded under the Settlement Agreement.

The proposed plan for dissemination of the Class Notice likewise satisfies all Rule 23 and due process requirements, as set forth in the Settlement Administrator's (Epiq) declaration. The proposed Notice Program was designed to reach the greatest practicable number of Class Members. Direct mail notice via U.S. mail and email notice (where available)

will be the principal methods of notice, providing Class Members with an opportunity to read, review, and understand their rights and options in this Class Action Settlement. Under the Settlement Agreement, the Settlement Administrator will send individualized Class Notices and Claims Forms to Settlement Class Members by first-class mail. Mail Notice will be sent to the last known address reflected in state DMV registration records for each Class Member. Additionally, before the mailing of the Class Notice, an address search through the National Change of Address database will be conducted.

For any mailed notice returned as undeliverable, the Settlement Administrator will re-mail the Class Notice where a forwarding address has been provided. For any remaining undeliverable notice packets, the Settlement Administrator will perform an advanced address search (*e.g.*, a skip trace) and re-mail any undeliverable Class Notices if any new and current address are found. Notice will also be provided through publication and emailed to all Class Members for whom a valid email address is obtained. See Declaration of Cameron R. Azari Regarding Proposed Notice Program ("Azari Decl.").

In addition, a dedicated website, toll free number, email account, and post office box will soon be established so that Class Members can readily direct any questions, obtain additional copies of materials sent by the Settlement Administrator, and find instructions on how to submit a Claim. See Azari Decl.

The proposed Class Notice and notice program comply with the standards of fairness, completeness, and neutrality required of a settlement class notice distributed under authority of the Court. *See, e.g., In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *10. The Parties respectfully ask that the Court approve retention of Epiq as the Settlement Administrator to oversee notice and claims administration for this Settlement. Epiq, which has successfully administered numerous complex class action settlements, has been retained on competitive and favorable terms.

VII. THE COURT SHOULD SET SETTLEMENT DEADLINES AND SCHEDULE A FAIRNESS HEARING

If it preliminarily approves the proposed Settlement, the Court should also set a final approval hearing date, dates for mailing the Notices, and deadlines for objecting to the Settlement and filing papers in support of the

Settlement. Plaintiffs propose the following schedule, which the Parties believe will provide ample time and opportunity for Class Members to decide whether to request exclusion or object. The schedule provided in the proposed Preliminary Approval order is driven by the date on which preliminary approval of the Settlement is granted and the date selected for the final approval hearing.

To allow adequate time to obtain necessary information from the state DMVs and for mailing notices, Plaintiffs request that the Court promptly enter the proposed Preliminary Approval Order. If the Court enters the Preliminary Approval Order this week, Plaintiffs respectfully submit that the Fairness Hearing can be scheduled at a date and time convenient to the Court within 195 days of Preliminary Approval, or as soon thereafter as convenient for the Court. The parties will inform the Court of the calendar date that should be considered the Notice Date as soon it becomes known.

VIII. CONCLUSION

For all these reasons, the Court should grant preliminary approval of the proposed Settlement and enter the accompanying proposed Preliminary Approval Order.

Dated: November 17, 2023

Respectfully submitted:

/s/ James E. Cecchi

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