UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GEORGE CATALANO, on behalf of himself and all others similarly situated,

Plaintiff,

v.

BMW of NORTH AMERICA, LLC, a New Jersey limited liability company; and BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT, a corporation organized under the laws of the Federal Republic of Germany,

Defendants.

Case No. 1:15-cv-04889-KBF

AMENDED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR (1) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; (2) PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS; (3) APPOINTMENT OF CLASS COUNSEL; (4) APPROVAL OF CLASS NOTICE, CLAIM FORM AND DISSEMINATION OF CLASS NOTICE; AND (5) SETTING A HEARING FOR FINAL APPROVAL

I. INTRODUCTION

After roughly four years of multi-state litigation in California and New York, including against a foreign defendant, the parties have agreed to settle these actions. Plaintiffs were prepared to litigate their claims through trial and appeal and undertake discovery efforts that included deposing company executives in Germany. Likewise, Defendants BMW of North America, LLC ("BMW NA") and Bayerische Motoren Werke Aktiengesellschaft ("BMW AG") (collectively or "Defendants") were prepared to continue their aggressive defense against Plaintiffs' claims at class certification and on the merits. Both parties, however, recognized the cost and risk of continuing litigation and the potential benefits of settlement and agreed to participate in settlement discussions before a well-respected mediator.

After an extended and intensive arm's-length mediation in New York City on November 4, 2016, conducted by Bradley A. Winters, Esq., the parties were able to agree on a resolution to the two underlying actions—the above-titled case, *Catalano v. BMW of North America, LLC, et al.* ("*Catalano* Action"), and *Sharma v. BMW of North America, LLC*, Case No. 3:13-cv-02274-MMC, pending in the United States District Court for the Northern District of California ("*Sharma* Action") (collectively, the "Actions"). A copy of the executed Settlement Agreement and Release ("Settlement Agreement" or "Settlement") is attached as Exhibit A to the accompanying Declaration of Amy E. Keller in support of Plaintiff's unopposed preliminary approval motion ("Keller Decl.").[1]

As detailed below, the Court should preliminarily approve the Settlement Agreement, provisionally certify the class for settlement purposes, appoint undersigned counsel as Class Counsel, approve the proposed Claim Form and Notice, and order dissemination of Notice. The

[1] The proposed claim form ("Claim Form") is attached as Exhibit A to the Settlement Agreement and proposed notice to settlement class members ("Notice") is attached as Exhibit B to the Settlement Agreement.

proposed settlement provides substantial benefits to settlement class members, is fair, reasonable and adequate and satisfies requirements under Federal Rule of Civil Procedure ("Rule") 23(e).

II. THE LITIGATION

A. Plaintiffs' Underlying Allegations

The *Sharma* Action was filed on June 23, 2013, on behalf of current and former owners and lessees with Model Year ("MY") 1999-2006 BMW X5, MY 2003-2010 BMW X3, and MY 2004-2010 5-Series vehicles in California. The *Catalano* Action was filed on June 23, 2015, on behalf of current and former owners and lessees with MY 1999-2006 BMW X5, MY 2003-2010 BMW X3[2], and MY 2004-2010 5-Series vehicles in the State of New York, and included an additional defendant, BMW AG.[3] In both cases, Plaintiffs[4] alleged a uniform design defect where sensitive electronic components were located in vehicle trunk compartments and subjected to damage by water intrusion ("Defect"). In support of these allegations, Plaintiffs referred to a BMW NA technical service bulletin, SI B61 13 06 ("TSB"), which stated that water could infiltrate the luggage compartment and cause electrical problems or faults with, for example, RDC, PDC, MPM, TCU, LOGIC-7, and SDARS modules. The TSB not only described the

[2] Plaintiffs later modified the proposed class of vehicles to include MY 2000-2006 BMW X5s and MY 2004-2010 X3s. (*See, e.g.*, *Catalano* Second Am. Compl. ("SAC") ¶ 67 (*Catalano* Dkt. No. 67).) Per docket entry on September 16, 2016, the case became limited to 5-Series vehicles, only (*Catalano* Dkt. No. 98). Plaintiff has filed a Third Amended Complaint ("TAC") that asserts a nationwide class for settlement purposes of "[a]ll persons in the United States or Puerto Rico who currently own or lease, or previously owned or leased, a model year 2004-2010 U.S. specification BMW 5 series (E60 and E61) vehicle purchased in the United States or Puerto Rico." (TAC ¶ 77.)

[3] Plaintiff Catalano also sued BMW Manufacturing Company, LLC ("BMW Manufacturing"), but his causes of action against that defendant were dismissed as he had not purchased a BMW X3 or X5 model vehicle, which were manufactured by BMW Manufacturing.

[4] Because the proposed settlement resolves both the *Catalano* Action and *Sharma* Action, the term "Plaintiffs" collectively refers to Plaintiff George Catalano and Plaintiff Eric Anderson. "Plaintiffs" is also defined in the proposed Settlement Agreement as the "Class Representatives Eric Anderson and George Catalano." (Keller Decl., Ex. 1 (Settlement Agreement) § I.Y.) Monita Sharma and Eric Anderson were both named plaintiffs in the *Sharma* Action. However, as discussed more fully below, Plaintiff Sharma's claims were dismissed through the August 18, 2016 summary judgment order in the *Sharma* Action. Accordingly, the *Sharma* Action now consists of Plaintiff Anderson's claims on behalf of California owners and lessees of MY 2004-2010 BMW 5-series vehicles.

alleged water intrusion problem, it provided repair procedures for addressing it and referred to a trunk warning label by part number that should be installed to notify customers of the fact that liquids should not be present in the trunk "due to the sensitive nature of the electronic control units located in the spare tire well." (*Catalano* TAC ¶ 6.)

Furthermore, Plaintiffs alleged that the vehicles were equipped with sunroof drain tubes, two of which were routed to the rear of the vehicles in close proximity to the modules located in the vehicle trunk compartments. Plaintiffs asserted that these drain tubes were prone to clogging and leaking within the body of the car, and were a frequent source of water in the trunk.

Plaintiffs argued that the alleged water intrusion Defect caused the electronics to malfunction, short and fail, and posed a safety risk to consumers. For example, one of the affected modules relates to the tire pressure monitor (RDC), which is a safety-related device according to the National Highway Safety Administration ("NHTSA"). In addition, Plaintiffs contended that Defendants were aware of the Defect based in part on complaints filed with NHTSA, customer inquiries and complaints, warranty claims, and technical service bulletins from as early as 2004. Despite this knowledge, Plaintiffs contended that Defendants failed to disclose the Defect and its attendant safety risks to Plaintiffs and putative class members.

Based on these allegations, Plaintiffs asserted claims for fraudulent concealment and violation of N.Y. G.B.L. § 349 in the *Catalano* Action[5] and violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq*. ("CLRA"), Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*. ("UCL"), and Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1791, *et seq.* for breach of implied warranty of merchantability in the *Sharma* Action.

[5] Plaintiff's Third Amended Complaint asserts claims for fraudulent concealment as well as violations of N.Y. G.B.L. § 349 and similar state consumer protection laws for purposes of settlement. (*See, e.g.*, TAC ¶¶ 86-115.)

B. Procedural History

1. *Sharma v. BMW of North America, LLC*

The parties in the *Sharma* action engaged in extensive motion practice, including: three motions to dismiss and strike class allegations; several motions to compel; and motions for reconsideration and summary judgment. The parties also conducted significant discovery.

BMW NA served requests for admission, requests for production of documents, and interrogatories on each named plaintiff. Plaintiffs served BMW NA with four sets of document requests, and one set of interrogatories and requests for admission. Plaintiffs also submitted Freedom of Information Act ("FOIA") requests to NHTSA regarding safety recalls of Mercedes and Jeep Cherokee vehicles for water intrusion into power lift gate control modules and high resistance short circuiting that could result in fires.

In addition, Plaintiffs subpoenaed records from two BMW dealerships and Plaintiffs' counsel and the parties and their respective experts/consultants performed vehicle inspections of the named plaintiffs' vehicles. The parties also took seven depositions in the case: Plaintiffs deposed a BMW Technical Service Engineer, two of BMW NA's Rule 30(b)(6) designees, a Director of Service for three BMW dealerships, and a former Technical Representative for BMW. BMW NA deposed Plaintiffs Sharma and Anderson.

The parties also produced a significant number of documents. Altogether, Plaintiffs produced approximately 760 pages of documents. BMW NA produced approximately 2,500 pages of documents and roughly 100 additional pages were produced by BMW of Santa Rosa pursuant to subpoena. BMW NA also produced numerous Excel spreadsheets containing warranty and customer complaint data, and other information. The parties were engaged in discovery disputes throughout the discovery period.

On January 28, 2016, BMW NA filed a motion to dismiss plaintiffs' claims for lack of standing and motion for summary judgment ("MSJ"). (*Sharma* Dkt. No. 119.) In addition, on May 20, 2016, BMW NA filed a motion to strike the expert declaration submitted by plaintiffs in opposition to BMW NA's MSJ. (*Sharma* Dkt. No. 168.) These motions were fully briefed.

On August 18, 2016, the Court entered an order granting in part and denying in part BMW NA's MSJ. As to both of the named plaintiffs, the Court eliminated claims relating to components that were not located in the lowest part of the trunk compartment of class vehicles. It also granted summary judgment with respect to electronic components that did not implicate safety issues. Specifically, with respect to Plaintiff Sharma, the Court recognized that the HKL module (power lift gate component) that allegedly malfunctioned due to water intrusion was located at the bottom of the trunk compartment in her 2008 BMW X5 vehicle, but held that it did not constitute a material safety defect as required under the UCL and CLRA.

However, the Court denied summary judgment as to Plaintiff Eric Anderson and causes of action relating to the tire pressure monitor (RDC) in his 2007 BMW 5-series vehicle. The Court found that "a trier of fact could reasonably conclude that driving on significantly under-inflated tires could cause an unreasonable safety hazard, given the dangers of driving on such tires, coupled with the common practice of drivers not checking tire pressure on a regular basis." (Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment; Directions to Parties ("MSJ Order") 15 (*Sharma* Dkt. No. 177).) The Court found that BMW NA was not entitled to summary judgment as to Plaintiff Anderson's claims under the CLRA, UCL and for breach of implied warranty.[6]

[6] BMW NA's motion to strike the declaration of plaintiffs' expert was denied as moot. (MSJ Order 17 n.9 (*Sharma* Dkt. No. 177).)

Based on the Court's ruling, the *Sharma* Action is limited to California owners and lessees of MY 2004-2010 BMW 5-series vehicles and the defective location of the RDC module.

2. *Catalano v. BMW NA and BMW AG*

The parties in the *Catalano* Action also engaged in significant motion practice and discovery disputes. BMW NA and BMW AG filed and Plaintiff Catalano opposed two motions to dismiss. The parties engaged in extensive briefing over jurisdictional issues.

Discovery was contested for several months in 2016. On April 20, 2016, Plaintiff Catalano filed a motion to compel BMW AG to respond to discovery. (*Catalano* Dkt. No. 69.) On June 16, 2016, the Court granted Plaintiff Catalano's motion in part and ordered the parties to meet and confer over document requests. (*Catalano* Dkt. No. 91.) The Court further ordered that BMW AG was to produce documents no later than October 17, 2016, and that the parties should schedule the deposition of BMW AG, as well as exchange search terms to produce documents pursuant to Plaintiff Catalano's discovery requests. (*Catalano* Dkt. No. 98.)

Consistent with the rulings in the *Sharma* Action, Plaintiff Catalano agreed to limit his claims to the allegedly defective location of the RDC module on behalf of a putative class of persons who purchased or leased MY 2004-2010 BMW 5-series vehicles in New York.

III. THE SETTLEMENT

Plaintiffs and Defendants, by virtue of the foregoing, have conducted a thorough examination and investigation of the facts and law relating to the matters in both the *Sharma* Action and the *Catalano* Action. As a result, the parties agreed to and did conduct a full day of in-person settlement negotiations with mediator Bradley A. Winters, Esq. on November 4, 2016, and were able to agree to a resolution of the case as outlined here. The negotiations resulted in an agreement to resolve the litigation, which was formally executed on January 31, 2017. All of

the terms of the Settlement Agreement are the result of extensive, adversarial, and arm's length negotiations between experienced counsel for both sides.

A. Available Relief Under the Settlement and the Claims Process

As set forth in the Settlement Agreement, Plaintiffs' counsel and Defendants' counsel negotiated a proposed Settlement that, if approved, will provide substantial benefits to the following Class: "[A]ll persons or entities in the United States and Puerto Rico who currently own or lease, or previously owned or leased, a model year 2004 to 2010 U.S. specification BMW 5 Series (E60 and E61) vehicle" ("Settlement Class"). (Keller Decl., Ex. 1 (Settlement Agreement) § I.FF.)[7]

The Settlement makes available valuable benefits that squarely address the issues raised in the litigation. Pursuant to the terms of the Settlement, and consistent with technical service bulletin SI B61 13 06, Defendants have, *inter alia*, agreed to extend benefits to a nationwide class consisting of inspecting and relocating RDC, PDC, MPM, TCU, LOGIC-7, and SDARS modules at an authorized BMW Center. In addition, if the authorized BMW Center determines that any of these modules have suffered water damage, subject to certain exclusions, they will be repaired and replaced. These inspections, relocations, and repairs or replacements are provided to Settlement Class Members *free of charge*. Any replacement parts installed during the appointment will be covered by BMW NA's 2-year/unlimited mileage replacement-parts warranty. Furthermore, during the appointment, the above-referenced warning label PN 71 24 6 777 721, which informs owners and lessees of the Class Vehicles against spilling liquids in the trunk, will be affixed to the trunk of the Class Vehicle.[8]

[7] Persons and entities specifically excluded from the Settlement Class are also detailed in the Settlement Agreement at section I.FF.

[8] "Class Vehicles" are defined as "model year 2004 to 2010 U.S. specification BMW 5 Series (E60 and E61) vehicles, imported and distributed for sale or lease in the United States and Puerto Rico." (Settlement Agreement

The Settlement also provides for an *up to $1,500* reimbursement for eligible out-of-pocket expenses incurred at a BMW Center or third-party repair shop for relocation, repair, or replacement of the RDC, PDC, MPM, TCU, LOGIC-7, and SDARS modules due to water intrusion. There are approximately 318,000 vehicles in the Settlement Class. It is unclear how many Settlement Class Members incurred out-of-pocket costs to repair a Class Vehicle and how many of them will submit claims for reimbursement; nevertheless, the Settlement provides for up to $1,500 in value per Class Vehicle. Settlement Class Members do not need to submit a Claim Form[9] to receive inspection, relocation, and repair or replacement services. However, a Claim Form is required to request *reimbursement* for eligible out-of-pocket expenses. The service campaign and reimbursement program are described at section III, subsections A-B of the Settlement Agreement.

Claims must be supported with adequate documentation that: identifies the Vehicle Identification Number ("VIN"); consists of repair orders or invoices describing the repair, cause of failure, parts used, labor time and costs, and mileage at the time of repair; and shows proof of payment for the repair. (Settlement Agreement § III.B.2.) Settlement Class Members can submit their claims by U.S. Mail or through the settlement website. (*Id.* § IV.A.3.)

The Claims Administrator[10] will review all claims submitted by Settlement Class Members. Claimants whose claims are rejected as incomplete will receive a written explanation from the Claims Administrator by first-class mail, describing the reasons for denial and any steps for curing the deficiencies.[11] Claimants will also have the ability to appeal claims rejected by the

---

§ I.M.)

[9] The proposed Claim Form is attached as Exhibit A to the Settlement Agreement.

[10] The proposed Claims Administrator is Kurtzman Carson Consultants, LLC ("KCC"). (Settlement Agreement § I.E.)

[11] Defendants may also object to claims where there is "evidence that: (1) the vehicle's warranty was voided because (a) the VIN has been altered or cannot be read or otherwise determined, (b) the odometer has been

Claims Administrator. Class Counsel[12] and Defense Counsel[13] will meet and confer over disputed claims and, if the parties are unable to resolve the dispute, it will be submitted to the Special Master, Ronald J. Hedges, U.S.M.J. (ret.). (*Id.* § I.II.) The claim review and appeal process are described in detail at section III, subsections C.1 and C.4 of the Settlement.

Service benefits are available for MY 2007-2010 Class Vehicles that have been in service for less than 120,000 miles. Reimbursement benefits are available to Class Vehicles that have been repaired within 10 years of service or when it had less than 120,000 miles, whichever comes first. The service campaign benefits are unavailable to Settlement Class Members whose Class Vehicles have already undergone an SI B61 13 06 repair at an authorized BMW Center that was covered under the New Vehicle Limited Warranty or as a goodwill repair. In addition, these benefits do not cover Class Vehicles where the Defect[14] resulted from operator misuse (*i.e.*, (1) failing to comply with any state's applicable traffic laws, ordinances, or regulations; (2) transporting any hazardous materials including, but not limited to, chemical, biological and medical materials; or (3) using the Class Vehicle in any competitive event that may have caused damage to the Vehicle), or by an improper taillight repair, such as after a motor vehicle accident. (Settlement Agreement §§ III.A.2 and B.3.)

---

replaced or altered and the true mileage cannot be determined, (c) the vehicle has been declared a total loss or sold for salvage purposes (for reasons unrelated to the Defect), or (d) the vehicle has been used in any competitive event that may have damaged the vehicle; (2) the VIN number associated with the claim does not match the Settlement Class Member's Vehicle's VIN number; (3) the Settlement Class Member has received "goodwill" or other pricing adjustment, coupon, reimbursement, or refund from BMW NA, an authorized BMW Center, or any person or entity, equal to the amount of the claim submitted; (4) the claim for reimbursement is for an item or service that is not covered under this Settlement Agreement; or (5) the claim is fraudulently submitted." (Settlement Agreement § III.C.2.)

[12] Proposed Class Counsel consists of Kershaw, Cook & Talley PC; Wexler Wallace LLP; The Law Office of Robert L. Starr; and The Law Offices of Stephen M. Harris, P.C. ("Class Counsel"). (*Id.* § I.H.)

[13] Defense Counsel or Defendants' Counsel consists of Buchanan Ingersoll & Rooney PC. (*Id.* § I.Q.)

[14] The term, "Defect" in the Settlement Agreement means "damage to electronic components located in the spare tire well of the trunk in the Class Vehicles, caused either by clogged sunroof drainage tubes or by some other means of water ingress, subject to certain exclusions as set forth [in the Settlement Agreement]." (Settlement Agreement § I.O.)

Class Members are provided the right to opt out of or object to the Settlement. (*Id.* §§ V-VI.) And, as set forth more fully in section VII of the Settlement Agreement, Defendants obtain a release of claims related to the Class Vehicles' Defect that were alleged or could have been alleged in the *Catalano* and *Sharma* Actions, except for personal injury or property damage other than to a Class Vehicle or subrogation of such claims. (*Id.* § VII.)

B. Notification to Settlement Class Members

The Settlement Agreement also provides for a robust notice and administration plan. The Claims Administrator will provide direct Class Notice by first-class mail in substantially the same form as that attached as Exhibit B to the Settlement Agreement. Class Notice will include the Claim Form for reimbursement. (Settlement Agreement § IV.) A third-party will be retained to search vehicle registration databases to identify last known mailing addresses for Settlement Class Members. (*Id.*) The Claims Administrator will re-send any returned notices if an address correction or forwarding address appear on a returned envelope. (*Id.*) In addition to direct mail notification, notice will be published on a dedicated settlement website to be maintained by the Claims Administrator. (*Id.*) The Claims Administrator is required to disseminate Class Notice within sixty days after entry of the Preliminary Approval Order. (*Id.*)

In addition, the Claims Administrator is required to submit an affidavit to be filed with the Court attesting that Class Notice was disseminated in a manner consistent with the terms of the Settlement Agreement, or as otherwise required by the Court. (*Id.*) It must also prepare a final report of all claims submitted, accepted, and rejected along with a basis for rejection. (*Id.*) Furthermore, the Claims Administrator will be required to file a declaration reporting names of all individuals who have submitted valid requests for exclusion (*id.* § V.C) and provide monthly reports to Class Counsel and Defendants' Counsel describing the number of Class Notices

disseminated, completion percentages, claims information, as well as requests for exclusion and objections. (*Id.* § III.C.6.)

All costs for administration of the proposed Settlement will be paid by the Defendants. (*Id.*) Defendants will also provide notice of the proposed Settlement to appropriate state and federal officials consistent with the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA Notice"). (Settlement Agreement § II.A.2.e.)

IV. LEGAL ANALYSIS

Before a settlement of a class action can be finally approved, the Court must determine that it is "fair, reasonable, and adequate." Rule 23(e)(2); *see also In re Elec. Books Antitrust Litig.*, 639 Fed. Appx. 724, 726-27 (2d Cir. 2016). The Court must also "direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1).

However, "[i]n evaluating a proposed settlement for preliminary approval . . . the Court is required to determine only whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007) (citations omitted). *See also In re Prudential Sec. Inc. Ltd. P'ships. Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (preliminary approval should be granted if there are no grounds to doubt settlement's fairness or other obvious deficiencies) (quoting Fed. Jud. Ctr., Manual for Complex Litig., § 30.41, at 236-37 (3rd ed. 1995)). "In reviewing a proposed settlement for preliminary approval, rather than final approval, the Court need only determine whether the proposed settlement is possibly fair, adequate, and reasonable." *In re*

Take Two Interactive Secs. Litig., No. 06 Civ. 803 (RJS), 2010 U.S. Dist. LEXIS 143837, at *31 (S.D.N.Y. June 29, 2010).

The law favors compromise and settlement of class action suits. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context") (quotations omitted). The approval of a proposed class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623 (PAC), 04 Civ. 4488 (PAC), 06 Civ. 5672 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citation omitted). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Clark*, 2009 WL 6615729, at *3 (quotations and citation omitted).

Preliminary approval, which is what Plaintiffs seek here, requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Clark*, 2009 WL 6615729, at *3 (citing Newberg § 11.25). To grant preliminary approval, the court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980). "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached

in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (quotations omitted).

If the settlement was achieved through experienced counsels' arm's-length negotiations, "[a]bsent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007); *see also In re Top Tankers, Inc. Sec. Litig.*, No. 06 Civ. 13761, 2008 WL 2944620, at *3 (S.D.N.Y. July 31, 2008) (same).

There are no "obvious deficiencies" in the proposed Settlement Agreement, nor any "grounds to doubt its fairness." The Settlement achieves what the Plaintiffs set out to accomplish in this lawsuit. The standards for granting preliminary approval are readily satisfied. Plaintiffs respectfully submit that this Settlement is fair, adequate, and reasonable; that the requirements for final approval will be satisfied; and that Class Members will be provided with notice in a manner that satisfies the requirements of due process and Rule 23(e). Therefore, this Court should enter the proposed order attached as Exhibit C to the Settlement Agreement, which will: (i) grant preliminary approval of the proposed Settlement; (ii) certify the Settlement Class pursuant to Rule 23; (iii) schedule a Final Approval Hearing to consider final approval of the proposed Settlement; and (iv) direct that notice of the proposed Settlement and hearing be provided to Settlement Class Members in a manner consistent with the agreed-upon Notice Plan in the Settlement Agreement.

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

"[A] court determines the fairness of a settlement by looking at both the negotiating process leading to the settlement and the terms of the settlement itself. . . . In reviewing a

proposed settlement for preliminary approval, rather than final approval, the Court need only determine whether the proposed settlement is possibly fair, adequate, and reasonable." *In re Take Two Interactive Secs. Litig.*, 2010 U.S. Dist. LEXIS 143837, at *31 (citations and quotations omitted).

District courts in the Second Circuit generally consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) in determining whether to approve a class action settlement. The *Grinnell* factors are (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463. While courts are "not required to make a finding of fairness as to the underlying settlement at [preliminary approval], the *Grinnell* factors are instructive." *Slobodan Karic v. Major Auto. Cos.*, No. 09 CV 5708 (ENV), 2015 U.S. Dist. LEXIS 171730, at *24 (E.D.N.Y. Dec. 22, 2015).[15] At this stage, even brief consideration of the applicable *Grinnell* factors weigh in favor of preliminarily approving the proposed Settlement Agreement and show that the proposed Settlement is well within the reasonable range of approval to proceed.

A. Complexity, Expense, and Duration of the Case

The parties have already spent close to four years litigating these cases. By reaching a favorable settlement prior to trial, the parties have avoided the prospect of engaging in protracted

[15] Clearly, some of these factors are not applicable at preliminary approval and cannot be weighed prior to dissemination of Class Notice.

litigation over the course of several additional years, through trial and likely appeals. The proposed Settlement avoids incurring substantial costs in the face of significant risks to Plaintiffs' and Class Members' claims, and instead ensures a remarkable recovery for the Settlement Class. Indeed, "[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), aff'd sub. nom. *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). This case is no exception; extensive discovery and motion practice have already taken place over the previous four years, in litigation involving complex legal and factual issues related to electronic modules located in close to 320,000 vehicles spanning at least seven model years. In contrast, the proposed Settlement makes both non-monetary and monetary relief available to Settlement Class Members in a prompt and efficient manner.

B. Reaction of the Class

This factor cannot be evaluated until Class Notice has been disseminated and the time for objections and exclusion requests has concluded. The Court need not address this issue at this time.

C. Stage of the Proceedings and Discovery Completed

The parties have conducted significant discovery and motion practice. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). "The pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [but] an aggressive effort to ferret out facts helpful to the prosecution of

the suit." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 (internal quotations omitted).

Here, the parties undertook substantial discovery efforts in the form of written discovery, document productions consisting of thousands of pages of documents, and seven depositions. In addition, experts for both parties inspected named plaintiffs' vehicles. Discovery and factual disputes were also heavily litigated through BMW NA's motion for summary judgment and Plaintiffs' several motions to compel in the *Sharma* Action. The parties were readily familiar with the merits of the underlying cases before settlement discussions commenced.

D. Litigation Risks (Factors 4-6)

Plaintiffs faced real risks going forward with these cases through trials and appeals. When weighing the risks of establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 177 (quotations omitted).

Class certification and a trial on the merits would involve significant risks to Plaintiffs in part because of the parties' disputes regarding class members' experiences with and reactions to tire pressure monitor malfunctions.[16] Furthermore, a large number of vehicles in the proposed class were at least nine years old (some, a decade) by the time the *Sharma* Action commenced: the *Sharma* Action was filed in 2013 and the earliest model year in the class was thirteen years prior, in 2000. The potential variations in vehicle designs across numerous model years and causation of RDC module malfunctions could also significantly undermine Plaintiffs' ability to certify the proposed classes in these cases. These issues, among others, pose formidable hurdles for establishing liability and damages.

[16](*See, e.g.*, *Sharma* MSJ Order 15 n.8 (although a driver might be aware of the need to service his or her vehicle to fix the RDC module, it is unclear based on the evidence "how quickly such a driver ordinarily would do so.") (*Sharma* Dkt. No. 177).

In contrast, the proposed Settlement achieves nationwide relief and provides certain and immediate non-monetary and monetary benefits to Settlement Class Members. Considering the risks of proceeding through trials and appeals and the prolonged nature of this litigation, these factors weigh in favor of preliminarily approving the proposed Settlement.

E. Ability of Defendants to Withstand A Larger Judgment

While Defendants may be able to withstand a larger judgment than the relief made available through the proposed Settlement, "defendants' ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian and German Bank Holocaust Litigation*, 80 F. Supp. 2d at 178 and n. 9. Under the Settlement, Defendants have committed to providing substantive and extensive non-monetary and monetary relief that directly mirrors the claims alleged in the underlying litigation. Such relief through settlement eliminates the risks and difficulty of achieving it through uncertain and protracted litigation. This factor weighs in favor of preliminary approval, or should be deemed neutral.

F. Range of Recovery Issues and Settlement Benefits Support the Settlement

Grinnell factors 8-9 are also satisfied for preliminary approval. The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank*, 228 F.R.D. at 186 (quoting In re *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Frank*, 228 F.R.D. at 186 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

The benefits offered through the proposed Settlement are generous and meaningful: they include free inspection, repair, and module relocation or replacement services as well as substantial monetary reimbursements *up to $1,500*. The proposed Settlement also offers extensive protections to Settlement Class Members who wish to challenge any denial of settlement benefits. Furthermore, while the *Catalano* and *Sharma* Actions were ultimately limited to claims involving the RDC module, the proposed Settlement covers relief for *five additional modules*; non-monetary and monetary relief covers the RDC, PDC, MPM, TCU, LOGIC-7 and SDARS modules. Given the attendant risks of litigation and expansion of relief to a nationwide Settlement Class covering five additional electrical components in the trunk compartment of Settlement Class Vehicles, this settlement is an excellent result for the Class.

These factors, along with the other *Grinnell* factors discussed above, favor preliminary approval of the proposed Settlement.

G. Procedural Fairness of the Settlement

Importantly, a settlement like this one, reached with the help of a third-party neutral, enjoys a "presumption that the settlement achieved meets the requirements of due process." *Johnson v. Brennan*, 10 Civ. 4712 CM, 2011 WL 4357376, at *8 (S.D.N.Y. Sept. 16, 2011) (citations omitted); *see also In re Penthouse Executive Club Compensation Litig.*, No. 10 Civ. 1145 (KMW), 2013 WL 1828598, at *2 (S.D.N.Y. April 30, 2013) (granting preliminary approval in part based on the participation of neutral). Because the settlement, on its face, is "'fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000)), the Court should grant preliminary approval.

The Settlement was reached as a result of extensive, arm's-length negotiations between experienced counsel with the assistance of a well-respected mediator, well-versed in consumer class actions, Bradley A. Winters. A deal in principle was reached on November 4, 2016 only after numerous hours of hard-fought mediation efforts that ran well into the evening and threatened to fall apart on several occasions. The proposed Settlement also entailed continuous post-mediation negotiations between Class Counsel and Defense Counsel.

As discussed above, the parties have exchanged voluminous information in this case, and Plaintiffs have conducted an extensive investigation into their claims, which has confirmed that the proposed Settlement is fair and reasonable to Settlement Class Members. Moreover, Class Counsel, which consists of experienced, capable law firms with decades of experience in consumer class action lawsuits, believe the Settlement is firmly in the best interests of Plaintiffs and the Class. Preliminary approval should be granted.

VI. CLASS CERTIFICATION IS APPROPRIATE FOR SETTLEMENT PURPOSES

The Supreme Court and various circuit courts have recognized that the benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). As such, Plaintiffs seek the conditional certification of the Settlement Class set forth above and in the Settlement Agreement.

"For the Court to certify a class, the plaintiffs must satisfy all of the requirements of Rule 23(a), and one of the requirements of Rule 23(b)." *see Amchem*, 521 U.S. at 620. The four requirements of Rule 23(a) are numerosity, commonality, typicality, and adequacy. Plaintiffs also seek certification of the Settlement Class pursuant to Rule 23(b)(3), which provides that certification is appropriate where "the court finds that the questions of law or fact common to

class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). As discussed below, these requirements are met for purposes of settlement in this case.

A. Numerosity

The numerosity requirement is satisfied when the class is "so numerous that joinder of all members is impracticable." Rule 23(a)(1); *see also In re Take Two*, 2010 U.S. Dist. LEXIS 143837, at *18. "Impracticable does not mean impossible." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). "Precise calculation of the number of class members is not required before certifying a class; in fact, numbers in excess of forty generally satisfy the numerosity requirement." *In re Take Two*, 210 U.S. Dist. LEXIS 143837, at **18-19. Here, close to 320,000 Class Vehicles were distributed for sale or lease throughout the United States and Puerto Rico. Numerosity is therefore easily satisfied

B. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Rule 23(a)(2). The Supreme Court has stated that Rule 23(a)(2)'s commonality requirement is satisfied where the plaintiffs assert claims that "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). Both the majority and dissenting opinions in that case agreed that "for purposes of Rule 23(a)(2) even a single common question will do." *Id*. at 2556.

In this case, there are a myriad of common questions of law and fact, such as whether the Class Vehicles suffer from a uniform Defect, whether Defendants had a duty to disclose this alleged Defect to Plaintiffs and putative Class Members, whether the Defect is a safety risk, and whether Defendants failed to disclose or concealed the Defect. Commonality is satisfied.

C. Typicality

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. "Plaintiffs' claims are typical if they arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *In re Prudential*, 163 F.R.D. at 207-08. Here, all of Plaintiffs' claims arise out of the same alleged conduct involving Defendants' design, manufacture, and sale of the allegedly defective Class Vehicles (and their alleged failure to disclose material facts). Plaintiffs' claims, as with those of the putative Class, involve the defective location of sensitive electronic components in the trunk compartments of Class Vehicles where they are subject to damage by water intrusion. Typicality is met.

D. Adequacy of Representation

The final requirement of Rule 23(a) is that "the representative part[y] will fairly and adequately protect the interests of the class." Rule 23(a)(4). In *Flag*, the Second Circuit explained that "[a]dequacy entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." 574 F.3d at 35 (quotations omitted). Here, both Class Representatives are adequate, in that they purchased or leased one of the Class Vehicles and were allegedly injured in the same manner as putative Class members based on the same alleged underlying Defect. They have also each actively participated in the investigation of their cases

and Plaintiff Eric Anderson was deposed by BMW NA. The Class Representatives have been in constant communication with their attorneys over the course of the litigation.

With respect to the adequacy of Plaintiffs' counsel, they have dedicated considerable time and resources to the prosecution of these Actions. Plaintiffs' counsel tenaciously and simultaneously litigated these Actions in two states over the course of several years. Each of the four firms representing the Plaintiffs and putative Class—Kershaw, Cook & Talley PC; Wexler Wallace LLP; The Law Office of Robert L. Starr; and The Law Offices of Stephen M. Harris, P.C.— has decades of experience litigating complex consumer class action lawsuits, including on behalf of vehicle owners and lessees asserting claims for design and manufacturing defects. For these reasons, Plaintiffs' counsel respectfully request to be appointed Class Counsel for purposes of the proposed Settlement.

E. Predominance and Superiority Are Met

Plaintiffs seek to certify the proposed Settlement Class under Rule 23(b)(3), which has two components: predominance and superiority. *See* Rule 23(b)(3). "The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Pursuant to this inquiry, "plaintiffs [must] establish the existence of legal and factual issues common to class members, . . . they must also show that those common issues predominate for certification pursuant to Rule 23(b)(3)." *In re Take Two*, 2010 U.S. Dist. LEXIS 143837, at *25-26. When assessing predominance and superiority, the court may consider that the class will be certified for settlement purposes only, and that a showing of manageability at trial is not required. *See, e.g.*, *Amchem*, 521 U.S. at 618 ("Confronted with a request for settlement-only class certification, a district court need not

inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.").

Plaintiffs must demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Marriott v. County of Montgomery*, 227 F.R.D. 159, 173 (N.D.N.Y. 2005) (quoting *In re Visa Check/MasterMoney Antitrust Litig*, 280 F.3d 124, 139 (2d Cir. 2001)).

"[T]he class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968); *Amchem*, 521 U.S. at 617. Rule 23(b)(3) provides a non-exhaustive list of factors to be considered when making this determination. These factors include: (i) the class members' interests in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the likely difficulties in managing a class action. *Amchem*, 521 U.S. at 615-16 (citing Rule 23(b)(3)).

Here, there are several common questions of law and fact that predominate over any questions that may affect individual Class Members. For example, were this case to proceed, the primary issue would be whether Defendants are liable to the Class under the claims pled in the lawsuits based on the alleged existence of a uniform Defect and nondisclosure or concealment of that Defect. Plaintiffs assert that the RDC module is in the same location of every Class Vehicle

and subject to damage by water intrusion based on the common design and location of that component across Class Vehicles. Accordingly, predominance is satisfied.

The second prong of Rule 23(b)(3)—that a class action be superior to other available methods for the fair and efficient adjudication of the controversy—is also readily satisfied. The class mechanism provides Settlement Class Members in this case with the ability to efficiently resolve their underlying claims and, through the proposed Settlement, provides prompt, predictable, and certain relief. Moreover, proceeding as a class action will achieve economies of scale for the Class members and conserve judicial resources by adjudicating common issues of fact and law rather than having to preside over numerous individualized trials.

Finally, the Parties are not aware of any other pending lawsuit—class action or otherwise—brought by a Class Member against Defendants for the conduct alleged in this case. Therefore, "class status here is not only the superior means, but probably the only feasible [way]. . . to establish liability and perhaps damages." *Augustin v. Jablonsky*, 461 F.3d 219, 229 (2d Cir. 2006) (quotation omitted). In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, certification of the proposed Settlement Class is appropriate.

VII. THE COURT SHOULD APPROVE THE NOTICE PLAN

Under Rule 23(e), class members who would be bound by a settlement are entitled to reasonable notice of it before the settlement is ultimately approved by the Court. *See* Fed. Jud. Ctr., *Manual for Complex Litig. Fourth*, § 30.212 (2004). And because Plaintiffs here seek certification of the Settlement Class under Rule 23(b)(3), "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal." *Berkson v. Gogo, LLC*, 147 F. Supp. 3d 123, 130 (E.D.N.Y. 2015) (citing Rule 23(c)(2)(B)).

The Class Notice proposed in this case is the best notice practicable under the circumstances for reaching all Settlement Class Members. Addresses for Settlement Class Member will be compiled from vehicle registration databases and provided to the Claims Administrator. The Claims Administrator will then administer direct notice to Settlement Class Members by first-class mail and forward any Notices that are returned where a corrected or forwarding address appears on the returned envelope. (Settlement Agreement § IV.) Notice will also be published on a dedicated website maintained by the Claims Administrator. (*Id.*)

Finally, the substance of the proposed Class Notice—which is attached as Exhibit B to the Settlement Agreement—will provide a comprehensive explanation of the Settlement in simple, non-legalistic terms, as well as inform Settlement Class Members of their ability to request exclusion and object to the proposed Settlement. Accordingly, Plaintiffs respectfully request that the Court approve and order dissemination of the Class Notice and Claim Form.

VIII. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED

Finally, the Court should schedule a final fairness hearing to decide whether to grant final approval to the Settlement, address Class Counsel's request for attorneys' fees and reimbursement of expenses (which will be subject to a separate motion in accordance with the proposed schedule, and supported with adequate documentation) and service awards for the Class Representatives, and determine whether to dismiss this action with prejudice. *See Manual for Complex Litig. Fourth*, § 30.44 (2004). Plaintiffs respectfully request that the final approval hearing be scheduled for a date convenient for the Court's calendar and consistent with the proposed Settlement Agreement.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order: (1) preliminarily approving the Settlement; (2) conditionally certifying the class for settlement purposes; (3) appointing Class Counsel; (4) approving and directing dissemination of the Class Notice and Claim Form; and (5) scheduling a final approval hearing. A proposed order is submitted herewith as Exhibit C to the Settlement Agreement.

Dated: February 22, 2017

By: /s/ Amy E. Keller
Amy E. Keller

WEXLER WALLACE LLP
Edward A. Wallace
Amy E. Keller
eaw@wexlerwallace.com
aek@wexlerwallace.com
55 West Monroe Street, Suite 3300
Chicago, Illinois 60603
Telephone: (312) 346-2222
Facsimile: (312) 346-0022

KERSHAW, COOK & TALLEY PC
William A. Kershaw
Stuart C. Talley
Ian J. Barlow
bill@kctlegal.com
stuart@kctlegal.com
ian@kctlegal.com
401 Watt Avenue
Sacramento, California 95864
Telephone: (916) 779-7000
Facsimile: (916) 721-2501

THE LAW OFFICES OF STEPHEN M. HARRIS, P.C.
Stephen M. Harris
stephen@smh-legal.com
6320 Canoga Avenue, Suite 1500
Woodland Hills, California 91367
Telephone: (818) 924-3103
Facsimile: (818) 924-3079

THE LAW OFFICES OF ROBERT L. STARR
Robert L. Starr
robert@starrlawmail.com
23277 Ventura Boulevard
Woodland Hills, California 91364
Telephone: (818) 225-9040
Facsimile: (818) 225-9042

THE LAW OFFICES OF JOSEPH R. SANTOLI
josephsantoli@aol.com
340 Devon Court
Ridgewood, New Jersey 07450
Telephone: (201) 926-9200
Facsimile: (201) 575-2184

Attorneys for Plaintiff and the Putative Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed using this Court's CM/ECF notification service, which sent notification of such filing to all counsel of record February 22, 2017.

/s/ Amy E. Keller
Amy E. Keller