

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

GARNER RICKMAN, et al., individually  
and on behalf of all others similarly  
situated,

Plaintiffs,

v.

BMW OF NORTH AMERICA, LLC, a  
Delaware corporation; and BAYERISCHE  
MOTOREN WERKE  
AKTIENGESELLSCHAFT (BMW AG),

Defendants.

Civ. Action No. 2:18-cv-04363 (EP) (JBC)

~~Hon. Evelyn Padin, U.S.D.J.~~  
James B. Clark III, USMJ  
JBC

~~PROPOSED~~ ORDER GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs Charles Rogers, Brian Beckner, Chad Maccanelli, Werner Rogmans, Garner Rickman, Darshan Patel, Alexander VanDamme, Irving Cohen, Angela Hughes, Charles Chapman, Miguel Fragoso, Tom Hoffman, Salomon Campos, Dean Werner, Alfredo Arias, Kyle Kern, Erica Olson, and Eric Stenglein (collectively, the “Settlement Class Representatives” and, collectively, with the members of the Settlement Class, the “Settlement Class Members”), on the one hand, and BMW of North America, LLC and Bayerische Motoren Werke Aktiengesellschaft (the “BMW Defendants”), on the other hand, have entered into a Class Action Settlement Agreement and Release entered into as of November 17, 2023 (the “Settlement Agreement”) to settle the above-captioned litigation (the “Action”). The Settlement Agreement, together with its exhibits incorporated herein, sets forth the terms and conditions for a proposed settlement and dismissal with prejudice of the Action. Additionally, Class Counsel has filed a Motion for

Preliminary Approval of Class Action Settlement, Preliminary Certification, and Approval of Notice Plan Pursuant to Federal Rule of Civil Procedure 23(e)(1) (the "Motion").<sup>1</sup>

Having thoroughly reviewed the Settlement Agreement and its exhibits, the Motion, the pleadings and other papers on file in this action and statements of counsel, *and additionally for the reasons set forth during the hearing of February 27, 2024,* the Court finds that the Motion should be GRANTED and that this Preliminary Approval Order should be entered.

NOW, THEREFORE, THE COURT HEREBY FINDS, CONCLUDES AND ORDERS THE FOLLOWING:

1. The Parties have agreed to a class action settlement of all Released Claims. Plaintiffs seek, and for purposes of settlement only the BMW Defendants do not object to, certification of a Settlement Class defined as follows:

All Persons who purchased or leased a model year 2009–2013 BMW X5 xDrive35d or 2009–2011 BMW 335d vehicle on or before the Preliminary Approval Date.

Specifically excluded from the Settlement Class are the following persons:

- (i) the BMW Defendants and their officers, directors, and employees; and the BMW Defendants' corporate affiliates and corporate affiliates' officers, directors, and employees; 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

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<sup>1</sup> Terms used herein shall have the meaning accorded to them in the Settlement Agreement except to the extent otherwise specified herein.

- (v) All other persons who have timely elected to become Opt-Outs from the Settlement Class in accordance with the Court's Orders.

The Court expressly reserves the right to determine, should the occasion arise, whether Plaintiffs' proposed claims may be certified as a class action for purposes other than settlement, and the BMW Defendants hereby retain all rights to argue that Plaintiffs' proposed claims may not be certified for class treatment except for settlement purposes.

2. For purposes of preliminary approval, this Court assesses the Settlement Agreement under Rule 23(e). Under Rule 23(e)(1)(B), the Court "must direct notice in a reasonable manner" to proposed Settlement Class Members "if giving notice is justified by the parties' showing that the court will likely be able to (i) approve the proposal [as fair, reasonable, and adequate] under Rule 23(e)(2) and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B).

**Likely Approval As Fair, Reasonable And Adequate**

3. To determine whether the Settlement Agreement is fair, reasonable and adequate, Rule 23(e)(2) directs the Court to consider whether:

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

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

4. The Settlement Class Representatives are adequately representing the proposed Settlement Class: they share the same alleged injury (that they owned or leased vehicles that were allegedly equipped with so-called "defeat devices" that turned off or down emissions controls when the vehicles were in normal operation and not in a regulatory testing environment) and the

same interest. Steve Berman of Hagens Berman Sobol Shapiro, LLP, James E. Cecchi of Carella, Byrne, Cecchi, Brody & Agnello, P.C., and Christopher A. Seeger of Seeger Weiss LLP are experienced class counsel who are adequately representing the proposed Settlement Class.

5. There is no question that the Parties are at arm's length. The Settlement Agreement appears to be the result of extensive, non-collusive, arm's-length negotiations between experienced counsel who were thoroughly informed of the strengths and weaknesses of the case through extensive pre-mediation discovery and whose negotiations were supervised by respected class action mediator, the Honorable Wayne Anderson (Ret.) of JAMS.

6. The Settlement Agreement provides adequate relief to the proposed Settlement Class. The BMW Defendants have agreed to pay \$6,000,000 to cover Cash Awards, Notice and Administrative Costs, Attorneys' Fees and Costs, Service Awards, Taxes and Tax Expenses. From that amount, Settlement Class Members who submit a Valid Claim Form are eligible to receive a Cash Award consisting of a *pro rata* share of the Net Settlement Fund in an amount proportional to their length of ownership and/or lease of their Class Vehicle. If the Settlement Agreement had not been reached, the Parties planned to vigorously contest this matter, including the BMW Defendants' expected motion for summary judgment as well as class certification, and Plaintiffs' chances at trial also would have been uncertain. In light of the costs, risks and delay of trial and appeal, this relief is at least adequate for purposes of Rule 23(e)(1).

7. There is no reason to doubt the effectiveness of distributing relief under the Settlement Agreement. As further addressed below, the Parties propose a Class Notice Program, which is detailed in the Settlement Agreement, which the Court finds is reasonably calculated to reach nearly all members of the proposed Settlement Class.

8. This Court will fully assess the request of Class Counsel for Attorneys' Fees and Costs and Service Awards after receiving their motion supporting such request. At this stage, the Court finds that the plan to request fees to be paid from the Net Settlement Fund creates no reason not to direct notice to the proposed Settlement Class. In particular, should the Court find any aspect of the requested Attorneys' Fees and Costs unsupported or unwarranted, such funds will instead be returned to Settlement Class Members, not the BMW Defendants, and therefore the Settlement Class would not be prejudiced by directing notice at this time.

9. No agreements exist between the Parties aside from the Settlement Agreement, with the exception of an agreement described generally in the Settlement Agreement that allows the BMW Defendants and Class Counsel to terminate the Settlement Agreement in certain defined circumstances.

10. The Settlement Agreement treats members of the proposed Settlement Class equitably relative to each other because all members of the proposed Settlement Class are eligible for a *pro rata* amount of the Net Settlement Fund. These are equitable terms.

11. Having thoroughly reviewed the Settlement Agreement, the supporting exhibits and the Parties' arguments, this Court finds that the Settlement Agreement is fair, reasonable and adequate to warrant providing notice to the Settlement Class, and thus likely to be approved, subject to further consideration at the Fairness Hearing to be conducted as described below.

12. The Court preliminarily approves the Settlement Agreement subject to the Fairness Hearing for purposes of deciding whether to grant final approval to the Settlement. This determination permitting notice to the Settlement Class is not a final finding, but a determination that there is probable cause to submit the proposed Settlement Agreement to the Settlement Class

Members and to hold a Fairness Hearing to consider the fairness, reasonableness, and adequacy of the proposed Settlement.

**Likely Certification Of Settlement Class**

13. The Court assesses the likelihood that it will be able to certify the proposed Settlement Class under Rules 23(a) and 23(b)(3) (because this Settlement Class seeks damages). See Fed. R. Civ. P. 23(a)-(b). The Court makes this assessment for the purposes of settlement only at this time.

14. As to the requirements of Rule 23(a) for settlement purposes only, (i) the Settlement Class provisionally certified herein includes thousands of individuals, and joinder of all would be impracticable, (ii) there are questions of law and fact common to the Settlement Class, (iii) the Settlement Class Representatives' claims are typical of the claims of the Settlement Class they seek to represent for purposes of settlement and (iv) the Settlement Class Representatives are adequate representatives of the Settlement Class. As to the requirements of Rule 23(b)(3) for settlement purposes only, questions of law and fact common to the Settlement Class predominate over any questions affecting any individual Settlement Class Member, and a class action on behalf of the Settlement Class is superior to other available means of settling and disposing of this dispute. Because the Settlement Agreement contemplates that no trial of the claims asserted in the Consolidated Class Action Complaint will be necessary, however, the Court makes no finding as to the manageability of adjudicating those claims on a class basis. See Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

15. For these reasons, pursuant to Rule 23, and for settlement purposes only, the Court finds it will likely certify the Settlement Class defined above in Paragraph 1 of this Order and preliminarily certifies the Settlement Class. This finding is subject to further consideration at the Fairness Hearing to be conducted as described below.

16. The Court hereby preliminarily appoints, for settlement purposes only, Settlement Class Representatives as representatives of the Settlement Class. Pursuant to Fed. R. Civ. P. 23(g), the Court hereby preliminarily appoints, for settlement purposes only, Steve Berman of Hagens Berman Sobol Shapiro, LLP, James Cecchi of Carella, Byrne, Cecchi, Brody & Agnello, P.C., and Christopher A. Seeger of Seeger Weiss LLP as Class Counsel for the Settlement Class.

**Approval Of The Manner And Form Of Notice**

17. Epiq has been selected to serve as the Settlement Administrator under the terms of the Settlement Agreement. The Court hereby appoints Epiq to serve as the Settlement Administrator in accordance with the provisions of Section VII of the Settlement Agreement.

18. The Court approves the Class Notice Program, the content of which is without material alteration from Exhibits B, C and D to the Settlement Agreement.

19. The Court approves the creation of the Settlement Website, as defined in Section II(UU) of the Settlement Agreement, that shall include, at a minimum, copies of the Settlement Agreement and the Class Notice, and shall be maintained in accordance with the provisions of Section VIII(C) of the Settlement Agreement.

20. The Court finds that the Class Notice Program as set forth in the Settlement Agreement, filed concurrently with Plaintiffs' Motion for Preliminary Approval, (a) is the best practicable notice, (b) is reasonable and constitutes due, adequate and sufficient notice to all Persons entitled to receive notice, (c) is reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Action and of their right to object to or to exclude themselves from the Settlement and (d) meets all applicable requirements of applicable law. The Class Notice Program satisfies the requirements of Fed. R. Civ. P. 23(c)(2)(B) and due process. The Court therefore approves the Class Notice Program and the notice documents substantially in the form attached as the exhibits to Plaintiffs' Motion.

21. The Court orders the Settlement Administrator to file proof of compliance with the Class Notice Program at least twenty-one (21) days before the Fairness Hearing.

**Participation In, Exclusion From Or Objection To The Settlement**

22. Each form described in this section shall be deemed to be submitted when postmarked or when electronically received by the Settlement Administrator if submitted electronically.

23. Settlement Class Members must complete, sign and submit a Claim Form in accordance with the instructions contained therein. All Claim Forms must be submitted or postmarked no later than ninety (90) Days after the Fairness Hearing.

24. To be valid, a Claim Form must be properly completed and signed and timely submitted in accordance with the preceding paragraph.

25. The Court finds that the Claim Form attached to the Settlement Agreement as Exhibit \_\_, and the amount of time provided to Settlement Class Members to submit Valid Claims for Cash Awards, are fair, reasonable, and adequate.

26. The Court orders any Person who wishes to exclude himself or herself from the Settlement Class to submit an appropriate, timely request for exclusion that:

- a. Has the signature of the member of the Settlement Class, even if represented by counsel;
- b. States the name, address and telephone number of the Settlement Class Member requesting exclusion;
- c. Includes the VIN of the Class Vehicle forming the basis of the Person's inclusion in the Settlement Class definition and a statement as to whether the Person owns/owned or leases/leased the Class Vehicle and the beginning and



end dates (if applicable) of the Settlement Class Member's ownership or lease of the Class Vehicle; and

d. Contains a clear and unambiguous statement communicating that such Person elects to be excluded from the Settlement Class, does not wish to be a Settlement Class Member and elects to be excluded from any judgment entered pursuant to the Settlement.

27. Members of the Settlement Class who wish to be excluded from the Settlement Class must do so with respect all claims against the BMW Defendants. A member of the Settlement Class may opt out on an individual basis only; so-called "mass" or "class" opt outs shall not be allowed.

28. All requests for exclusion must be postmarked no later than one hundred sixty (160) days after the entrance of this Order. Any member of the Settlement Class who submits a timely request for exclusion may not file an objection to the Settlement and shall be deemed to have waived any rights or benefits under the Settlement Agreement.

29. Any Settlement Class Member who fails to submit a timely and complete request for exclusion sent to the proper address shall be subject to and bound by the Settlement Agreement and every order or judgment entered pursuant to the Settlement Agreement. Any purported request for exclusion or other communication sent to such address that is unclear or internally inconsistent with respect to the desire of the member of the Settlement Class to be excluded from the Settlement Class will be deemed invalid unless determined otherwise by the Court. Requests for exclusion signed only by counsel or another representative shall not be permitted.

30. Any Settlement Class Member who wishes to object to the Settlement Agreement or the proposed settlement or to the Attorneys' Fees and Costs must file with the Court a written

objection no later than one hundred sixty (160) days after the entrance of this Order. Such objection must:

- a. State the printed name, address and telephone number of the Settlement Class Member objecting;
- b. Include the VIN of the Class Vehicle forming the basis of the Settlement Class Member's inclusion in the Settlement Class and the beginning and end dates (if applicable) of the Settlement Class Member's ownership or lease of the Class Vehicle;
- c. State whether the Settlement Class Member is represented by counsel and, if so, the name and contact information of counsel;
- d. Contain a detailed written statement of each objection asserted, including the grounds for objection, any legal authority in support of such objection and reasons for appearing and being heard;
- e. Contain copies of any papers, briefs, declarations, affidavits or other documents upon which the objection is based;
- f. Contain a statement indicating whether the objector intends to appear at the Fairness Hearing (either personally or through counsel who files an appearance with the Court in accordance with the Local Rules), and a list of all persons, if any, who will be called to testify in support of the objection;
- g. Contain a list of all cases in which the Settlement Class Member or Settlement Class Member's counsel filed an objection or in any way participated — financially or otherwise—in objecting to a class settlement during the preceding five years; and

h. Contain the Settlement Class Member's signature, in addition to the signature of the objector's attorney (if any). An attorney's signature alone shall not be deemed sufficient to satisfy this requirement.

31. The Settlement Class Member must also serve by mail or hand delivery the Settlement Class Member's objection, including all papers or evidence in support thereof, upon the Settlement Administrator, Class Counsel and Counsel for the BMW Defendants, at the addresses set forth in the Class Notice.

32. Any Settlement Class Member who fails to properly and timely file a written objection with the Court, along with the required information and documentation set forth in Paragraph 30 above, or to serve them as required in Paragraph 31 above, shall not be heard during the Fairness Hearing, shall not have his or her objections be considered by the Court and shall be foreclosed from seeking any adjudication or review of the Settlement by appeal or otherwise.

33. Class Counsel and Counsel for the BMW Defendants may respond to any objection filed by a Settlement Class Member, and must file such a response with the Court no later than seven (7) days prior to the Fairness Hearing.

34. Settlement Class Members may not both object and opt out. If a member of the Settlement Class submits both a request for exclusion and an objection, the request for exclusion shall be controlling.

35. Any attorney hired by a Settlement Class Member for the purpose of objecting to the Settlement Agreement, the proposed Settlement, or the Attorneys' Fees and Costs will be at the Settlement Class Member's expense.

36. Any attorney hired by a Settlement Class Member for the purpose of objecting to the proposed Settlement or to the Attorneys' Fees and Costs and who intends to make an

appearance at the Fairness Hearing must provide to the Settlement Administrator (who shall forward it to Class Counsel and Counsel for the BMW Defendants) and file with the Clerk of the Court a notice of intention to appear no later than one hundred sixty (160) days after the entrance of this Order.

37. Any Settlement Class Member who files and serves a written objection and who intends to make an appearance at the Fairness Hearing must provide to the Settlement Administrator (who shall forward it to Class Counsel and Counsel for the BMW Defendants) and file with the Court a notice of intention to appear no later than one hundred sixty (160) days after the entrance of this Order.

38. The Court orders the Settlement Administrator to establish a post office box in the name of the Settlement Administrator to be used for receiving requests for exclusion, objections, notices of intention to appear and any other communications. Only the Settlement Administrator, Class Counsel, the BMW Defendants' Counsel, the BMW Defendants, the Court, the Clerk of the Court and their designated agents shall have access to this post office box, except as otherwise provided in the Settlement Agreement.

39. The Court orders the Settlement Administrator to promptly furnish Class Counsel and Counsel for the BMW Defendants with copies of any and all written requests for exclusion, notices of intention to appear or other communications that come into its possession, except as expressly provided in the Settlement Agreement.

40. The Court orders that Class Counsel shall file their applications for the Attorneys' Fees and Costs and Settlement Class Representatives' Service Awards in accordance with the terms set forth in Section XI of the Settlement Agreement.

41. The Court orders the Settlement Administrator to provide Class Counsel and Counsel for the BMW Defendants with copies of all requests for exclusion on a weekly basis by email and to provide the Opt-Out List to Class Counsel and Counsel for the BMW Defendants no later than seven (7) days after the Opt-Out and Objection Date. The Court further orders Class Counsel to file with the Court the Opt-Out List with an affidavit from the Settlement Administrator attesting to the completeness and accuracy thereof no later than three (3) business days thereafter or on such other date as the Parties may direct.

**Final Approval Hearing And Related Deadlines**

JBC  
September 19, 2024 at 1 PM

42. This Court will hold a Fairness Hearing, on [ - ] at [ - ], in the United States District Court for District of New Jersey, Courtroom MLK 4C, 50 Walnut Street, Newark, New Jersey 07102 or by remote means as ordered by the Court. The purposes of the Fairness Hearing will be to consider the fairness, reasonableness and adequacy of the proposed Settlement and the application for an award of Attorneys' Fees and Expenses, and to consider whether the Court should issue a Final Order and Judgment approving the Settlement, granting Class Counsel's application for Attorneys' Fees and Expenses, granting the Service Awards application by Settlement Class Representatives and dismissing the claims against the BMW Defendants with prejudice.

43. The Court reserves the right to adjourn the Fairness Hearing without further notice to Settlement Class Members, or to approve the Settlement with modification without further notice to Settlement Class Members.

44. Class Counsel's papers in support of any application for Attorneys' Fees and Expenses and/or Service Awards shall be filed no later than thirty (30) days after the entrance of this Order.

45. Class Counsel's papers in support of final approval of the Settlement shall be filed no later than one hundred seventy-four (174) days after the entrance of this Order.

**Effects Of This Preliminary Approval Order**

46. All members of the Settlement Class, unless and until they have timely and properly excluded themselves from the Settlement Class, are preliminarily enjoined from (a) filing, commencing, prosecuting, intervening in or participating as plaintiff, claimant, participant or class member in any other lawsuit or administrative, regulatory, arbitration or other proceeding in any jurisdiction based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Action and/or the Released Claims, (b) filing, commencing, participating in or prosecuting a lawsuit or administrative, regulatory, arbitration or other proceeding as a class action on behalf of any member of the Settlement Class, regardless of whether or not they have been excluded from the Settlement Class, based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Action and/or the Released Claims and (c) attempting to effect Opt-Outs of a class of individuals in this lawsuit or any other lawsuit or administrative, regulatory, arbitration or other proceeding based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Action and/or the Released Claims. Entry of the Preliminary Approval Order is not intended to prevent Settlement Class Members from participating in any action or investigation initiated by a state or federal agency.

47. Any member of the Settlement Class who does not submit a timely, written request for exclusion from the Settlement Class (i.e., become an Opt-Out) will be bound by all proceedings, orders and judgments in the Action, even if such Settlement Class Member has previously initiated or subsequently initiates individual litigation or other proceedings encompassed by the Release.

48. If for any reason the Settlement fails to become effective in accordance with its terms, or if the judgment is not entered or is reversed, vacated or materially modified on appeal (and, in the event of material modification (which shall not include any reduction to an award of Attorneys' Fees and Costs or to the Service Awards), if either party elects to terminate the Settlement), this Order shall be null and void, the Settlement Agreement shall be deemed terminated (except for any paragraphs that, pursuant to the terms of the Settlement Agreement, survive termination of the Settlement Agreement), and the Parties shall return to their positions without prejudice in any way, as provided for in the Settlement Agreement.

Dated: \_\_\_\_\_

2/27/24



/s/

James B. Clark  
United States District Judge  
Magistrate

