UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

BRIGHTK CONSULTING INC., on behalf of itself and all others similarly situated, and the general public, **Plaintiff,** **v.** **BMW OF NORTH AMERICA, LLC, and DOES 1 through 10, inclusive** **Defendants.**	**Case No.: SACV 21-02063-CJC (JDEx)** **ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS [Dkt. 31]**

I. INTRODUCTION

Plaintiff Brightk Consulting Inc. brought this putative class action against Defendant BMW of North America, LLC ("BMW NA") and unnamed Does for claims arising out of an alleged defect in the front console cupholder of certain BMW models. (*See* Dkt. 1 [Complaint] ¶ 1.) Due to the defect, liquid spilled in the cupholders may seep

through and cause damage to the components below the console. (*See* Dkt. 31 [Notice of Motion and Motion for Settlement Approval of Class Settlement, hereinafter "Mot."] at 9.) According to Plaintiff, BMW NA's warranty does not cover the costs of repairing damage caused by liquid that seeps through the front console cupholders, because the damage is caused by an "outside influence." (*Id.*) Plaintiff's Complaint alleges claims for (1) fraud and deceit, (2) breach of express warranty, (3) breach of implied warranty, (4) breach of warranty pursuant to the Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790–95.8, (5) violation of the California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750–84, (6) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200–10, (7) violation of the California False Advertisement Law, Cal. Bus. & Prof. Code §§ 17500–09, (8) strict liability, and (9) negligence. (*See* Complaint at 1.)

The parties have reached an agreement to settle the case (the "Settlement Agreement"). Now before the Court is Plaintiff's motion for preliminary approval of the Settlement Agreement and conditional certification of a settlement class. (*See* Mot. at 1.) For the following reasons, Plaintiff's motion is **GRANTED**.[1]

II. BACKGROUND

Plaintiff initiated this class action on December 16, 2021. (Mot. at 9.) On March 28, 2022, the Parties requested that the Court enter an order to stay the case pending a mediation scheduled for May 9, 2022. (Dkt. 17 [Joint Stipulation to Stay Case pending Mediation].) The parties were unable to reach a settlement agreement during that mediation, but continued the settlement dialogue until a second mediation session was

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for January 9, 2023, at 1:30 p.m. is hereby vacated and off calendar.

held on July 12, 2022. (Mot. at 10.) At that session, the parties reached an agreement and signed the Settlement Agreement. (*Id.*)

Under the Settlement Agreement, the class includes "all current and former owners and lessees of a Class Vehicle purchased in the United States, including the District of Columbia and Puerto Rico who do not exclude themselves from (opt-out of) the class." (Dkt. 31-1 [Declaration of Hovanes Margarian, hereinafter "Decl."] Ex. A [Settlement Agreement, hereinafter "SA"] § 1(HH).) The phrase "Class Vehicles" refers to the following model year and model BMW brand motor vehicles: 2019–2022 BMW X5 (G05); 2020–2022 X6 (G06); 2019–2022 X7 (G07); 2020–2022 X5M (F95); and 2020–2022 X6M (F96). (*Id.* § 1(I).)

The Settlement Agreement has two primary benefits for the Class Members. First, BMW NA will implement an Extended Warranty Period (7 years or 75,000 miles, whichever comes first), during which time any Class Vehicle that requires an Eligible Repair will be repaired by a BMW Center free of charge. (*Id.* § 3.) An "Eligible Repair" is a repair performed "to address or remedy a customer complaint of an SRS warning light illumination and/or damage to other components (if any) below the cupholder that the BMW Center determines or determined was caused by liquid that spilled or that otherwise seeped through the cupholder(s) on the front center console of a Class Vehicle." (*Id.* § 1(N).) Second, Class Members who have incurred out-of-pocket costs on such repairs may receive reimbursement after submitting a valid and timely Claim Form. (*Id.* §§ 4–5.)

The parties also negotiated Class Counsel's attorneys' fees and litigation expenses. They agreed that Class Counsel may apply for an award of up to $375,000. (*Id.* § 29.) BMW NA has also agreed to a service award of $3,000 to Plaintiff in its role as the Class

Representative. (*Id.*) Both the service award and the attorneys' fees and expenses will be paid separate and apart from any relief provided to the Settlement Class. (*Id.* § 29–30.)

The Settlement Agreement also offers a provisional plan for distributing the Class Notice. (*Id.* § 16.) Within ninety days after receiving preliminary approval from the Court, BMW NA will email notice to Class Members whose email address is known to BMW NA through its customer database or send notice via First Class Mail when an email address is not available. (*Id.*) When updated contact information is required for Class Members, BMW NA will retain a third party to obtain mailing addresses from the applicable state motor vehicle agencies' registration databases or other available sources. (*Id.*) The Claims Administrator will also establish a Settlement Website, as well as an email address and a toll-free number to provide further information about the settlement. (*Id.*)

Class Members can obtain a copy of the Claim Form via the Settlement Website. (*Id.*) A copy will also be attached to the Class Notice. (*Id.* § 16(E)(v).) Claim Forms may be submitted via mail or electronically through the online claim submission portal. (*Id.*) Each claim will require the Class Member to submit a "legible repair order from a BMW Center," "proof of payment," the mileage of the car at the time of the repair, the date of the repair, and "a description of the Eligible Repair performed with indications as to the parts and labor for the repair." (*Id.* §§ 5(A)–(E).)

Class Members who do not wish to participate in the settlement may opt-out by mailing or delivering a written request to the Claims Administrator. (*Id.* § 17.) The Class Notice will also provide information about how to object to final approval of the Settlement Agreement. (*Id.* § 23.)

In exchange for the consideration in the Settlement Agreement, Plaintiff and each Class Member shall be deemed to have fully, finally, and forever released, relinquished, and discharged all "Released Claims," including unknown claims. (*Id.* § 27.) The "Released Claims" are those that were asserted or could have been asserted by any Class Member against BMW NA and its related entities in this action related to complaints or concerns that led to or may lead to an Eligible Repair, excluding claims for property damage or personal injury. (*Id.*)

III. DISCUSSION

A. Class Certification Requirements

When a plaintiff seeks provisional class certification for the purpose of settlement, a court must ensure that the four requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b) are met. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Staton v. Boeing Co.*, 327 F.3d 938, 952–53 (9th Cir. 2003). Under Rule 23(a), the plaintiff must show that the class is sufficiently numerous, that there are questions of law or fact common to the class, that the claims or defenses of the representative parties are typical of those of the class, and that the representative parties will fairly and adequately protect the class's interests. Under Rule 23(b), the plaintiff must show that the action falls within one of the three authorized categories. Here, Plaintiff seeks certification pursuant to Rule 23(b)(3). Rule 23(b)(3) allows certification where (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Rule 23(a) Requirements

a. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." "No exact numerical cut-off is required; rather, the specific facts of each case must be considered." *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009) (citing *Gen. Tel. Co. of Nw., Inc. v. E.E.O.C.*, 446 U.S. 318, 330 (1980)). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members." *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 602–03 (C.D. Cal. 2015); *see Tait v. BSH Home Appliances Corp.,* 289 F.R.D. 466, 473–74 (C.D. Cal. 2012).

BMW NA has established that there are approximately 300,000 Class Vehicles included in the Settlement Class. (*See* Mot. at 20.) Such a large class size would make joinder impracticable, and proceeding as a class would promote the efficiency and economy of this action. This is sufficient to satisfy Rule 23(a)'s numerosity requirement.

b. Common Questions of Law and Fact

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." The plaintiff must "demonstrate that the class members 'have suffered the same injury,'" which "does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Rather, the plaintiff's claim must depend on a "common contention" that is capable of class-wide resolution. *Id.* This 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." *Id.*

Plaintiff asserts that commonality is satisfied because all the claims being settled "are rooted in common questions of fact as to whether the front console cupholders in the Class Vehicles are defective." (Mot. at 20.) The claims turn on whether BMW NA knew about the defects in the Class Vehicles, evidence of which would not vary from person to person and thus can be fairly resolved for the entire class at once. The Court agrees. Because the vehicle defect and BMW NA's knowledge of said defect are common causes of all the Class Members' alleged injuries, the allegations give rise to common questions of law and fact. Therefore, commonality is satisfied.

c. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Representative claims are "typical" if they are "reasonably coextensive with those of the absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Here, Plaintiff alleges that, like every other class member, it purchased or leased a vehicle with the alleged defect. Plaintiff's claims are thus "reasonably coextensive," *id.*, with those of the class.

d. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This factor requires (1) a lack of conflicts of interest between the proposed class and the proposed representative plaintiffs, and (2) representation by qualified and competent counsel that will prosecute the action vigorously on behalf of the class. *See Staton*, 327 F.3d at 957. The focus is on ensuring that there is no collusion between the defendant, class counsel, and the class

representatives pursuing their own interests at the expense of the interests of the class. *See id.* at 958 n.12.

There is no evidence of a conflict of interest between Plaintiff and the class. Plaintiff's claims are identical to those of the other Class Members, and it has every incentive to vigorously pursue those claims. Nor is there any evidence that Plaintiff's counsel, the Margarian Law Firm, will not adequately represent or protect the interests of the class. Plaintiff's attorneys are active practitioners who are experienced in class action and automotive defect cases. (*See* Decl. ¶ 2.)

2. Rule 23(b) Requirements

In addition to the requirements of Rule 23(a), Plaintiff must satisfy the requirements of Rule 23(b). Rule 23(b)(3) allows for certification when (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

a. Predominance

Although the predominance requirement overlaps with Rule 23(a)(2)'s commonality requirement, it is a more demanding inquiry. *See Hanlon*, 150 F.3d at 1019. The "main concern in the predominance inquiry . . . [is] the balance between individual and common issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009). The predominance inquiry asks "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (cleaned up). The plaintiff must show that "questions common to the class predominate, not that those

questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013).

Plaintiff submits that common questions predominate because the primary issues in this case are whether "Class Vehicles have a common defect" and whether "BMW NA was aware of the defect and concealed it." (Mot. at 23). The Court agrees that these constitute questions common to all the Class Members and can be resolved for all members in a single adjudication. Accordingly, the Court finds that the putative class is "sufficiently cohesive," *In re Wells Fargo*, 571 F.3d at 957, and that common questions of law and fact predominate.

b. Superiority

Under Rule 23(b)(3), a class action must also be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Courts consider four nonexclusive factors in evaluating whether a class action is the superior method for adjudicating a plaintiff's claims: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class, (3) the desirability of concentrating the litigation of the claims in the particular forum, and (4) the difficulties likely to be encountered in the management of a class action. *Id.*

In this case, proceeding as a class is superior to other methods of resolving Plaintiff's claims. A class action may be superior "[w]here classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). A class action may also be superior when "no realistic alternative" to a class action exists. *Id*. at 1234–35. Here, as

Plaintiff asserts, the "efforts and funds required to marshal the evidence necessary to establish liability against BMW NA would discourage Class Members from pursuing individual litigation." (Mot. at 23.) And given the common issues presented by all Class Members, adjudicating these claims on an individual basis for hundreds of thousands of potential plaintiffs would be not only inefficient, but also unrealistic. Although the Court foresees no management problems from litigating this dispute as a class action, the Supreme Court has held that a district court "need not inquire whether the case, if tried, would present intractable management problems" in a "settlement-only class certification." *Amchem*, 521 U.S. at 620.

Accordingly, Plaintiff has satisfied the requirements of Rule 23(a) and Rule 23(b)(3). The Court thus grants provisional certification of the class for settlement purposes.

B. Class Settlement Agreement Requirements

Approval of class action settlements is governed by Federal Rule of Civil Procedure 23(e). A district court may approve class action settlements only when they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts must 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[,] and (D) the proposal treats class members equitably relative to each other." *Id.* 23(e)(2)(A–D). In determining whether the class's relief is "adequate," courts must analyze "(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)." *Id.* 23(e)(2)(C).[2]

In analyzing these considerations, courts must be wary of "subtle signs" of collusion such as "(1) when counsel receive a disproportionate distribution of the settlement[,] (2) when the parties negotiate a 'clear sailing' arrangement (*i.e.*, an arrangement where defendant will not object to a certain fee request by class counsel)[,] and (3) when the parties create a reverter that returns unclaimed [funds] to the defendant." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 (9th Cir. 2019); *see also Briseno v. ConAgra Foods, Inc.*, 998 F.3d 1014, 1022 (9th Cir. 2021). The Court "cannot, however, fully assess such factors until the final approval hearing." *Dixon v. Cushman & Wakefield W., Inc*, 2021 WL 3861465, at *10 (N.D. Cal. Aug. 30, 2021).

1. Adequacy of Class Representative and Counsel

As stated in the Court's analysis of the Rule 23(a) factors, Plaintiff and Class Counsel have ably represented the class. There is no evidence of a conflict of interest between Plaintiff and the class. Plaintiff's claims are identical to those of the class, and it has every incentive to vigorously pursue those claims. Nor is there any evidence that Plaintiff's counsel will not adequately represent or protect the interests of the class. Plaintiff's attorneys are active practitioners who are experienced in class action and automotive defect cases. (*See* Decl. ¶ 2.)

[2] Before Congress codified these factors in 2018, the Ninth Circuit instructed district courts to apply the following factors in determining whether a settlement agreement was fair, reasonable, and accurate: "[1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019); *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). The Court still considers these factors to the extent that they shed light on the inquiry mandated by Rule 23(e).

When analyzing motions for preliminary approval, courts also evaluate whether Class Counsel has sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, Class Counsel asserts that they have done "pre-filing investigation and mediation related discovery," which allowed them to "develop[ ] substantial evidence." (Mot. at 15.) This investigation, combined with Class Counsel's experience litigating automotive defect class actions, helps ensure that Plaintiff has a firm grasp on the complexity of proving liability and damages in this action. Additionally, the Settlement Agreement "is also informed by facts collected by the Class Counsel and shared by BMW NA as part of confirmatory discovery." (*Id.* at 18.) The thorough research and investigation undertaken by Class Counsel weighs in favor of approval.

2. Arm's Length Negotiation

At this stage, the Court has found no evidence of collusion during the parties' settlement negotiations. The Settlement Agreement is the product of months of negotiations, (*see id.* at 16), facilitated by an experienced mediator, which increases the likelihood that the settlement was negotiated at arm's length. *See Hashemi v. Bosley, Inc.*, 2022 WL 2155117, at *6 (C.D. Cal. Feb. 22, 2022) ("The parties extensively negotiated the Settlement over several months prior to mediation and ultimately reached a final agreement only after arms-length negotiations before mediator Mr. Picker."); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (explaining that although the "mere presence of a neutral mediator . . . is not on its own dispositive," it is "a factor weighing in favor of a finding of non-collusiveness").

The parties reached this settlement after two lengthy mediation sessions with JAMS Mediator and Special Master Jed D. Melnick, an experienced complex business

litigation mediator who has resolved over 1,000 disputes in his career. (*See* Decl. Ex. B [Declaration of Jed D. Melnick] at 2.) Mr. Melnick also remained involved with the parties' ongoing settlement dialogue after the first mediation was unsuccessful. (*Id.* at 3.) At this time, the Court is sufficiently satisfied that the Settlement Agreement was negotiated at arm's length. However, at the final approval stage, the Court will closely examine the issues identified below regarding the clear sailing agreement and possibility of reverter, which could shed light on whether the Settlement Agreement was truly negotiated at arm's length.

3. Adequacy of Relief for the Class

In determining whether the class's relief is "adequate," courts consider "(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)." Fed. R. Civ. P. 23(e)(2)(C). As discussed below, the Court finds the proposed relief to be adequate at this stage.

a. Cost, Risks, and Delay of Trial and Appeal

The Settlement Agreement reflects a substantial outcome for the thousands of people potentially affected by the defect in the front console cupholder. The extended warranty ensures that going forward, Class Members can have any damage caused by the defect repaired free of charge. (SA § 3.) And Class Members who have previously incurred out-of-pocket costs on such repairs will be able to receive reimbursement from BMW NA for those costs. (*Id.* §§ 4–5.) Together, these benefits go a long way towards

remedying the past and future financial injury to Class Members stemming from the defect.

The benefits Class Members will receive present a fair compromise given the costs, risks, and delay of trial and appeal. Proceeding in this litigation in the absence of settlement poses risks to Plaintiff, such as failing to certify a class, having summary judgment granted against it, or losing at trial. Such considerations weigh heavily in favor of approving the settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc*., 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Even if Plaintiff is able to certify a class, there is also a risk that the Court could later decertify the class. *See In re Netflix Privacy Litig*., 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.").

The Settlement Agreement offers Class Members an opportunity to obtain relief at an early stage in the litigation, eliminating the risks posed by proceeding further in the action. It ensures that Class Members receive a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery . . . at all." *Fulford v. Logitech, Inc*., 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

b. Effectiveness of Proposed Method of Distributing Relief to The Class

Next, the Court must consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C). "Often it will be important for the court to scrutinize the

method of claims processing to ensure that it facilitates filing legitimate claims." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Id.*

Under the Settlement Agreement, Class Members will be able to easily complete and submit a Claim Form. Claim Forms will be sent out with the class notice and will also be available to download from the Settlement Website. (*See* SA § 5(B).) Class Members may mail in the Claim Form attached to the notice they receive in the mail, mail in a Claim Form downloaded from the Settlement Website, or submit a Claim Form online. (*See id.*) This procedure for filing claims is not unduly demanding.

4. Attorneys' Fees

The Court must also consider "the terms of any proposed award of attorneys' fees, including timing of payment," in determining whether the class's relief is adequate. Fed. R. Civ. P. 23(e)(2)(c). In considering the proposed award of attorneys' fees, the Court must scrutinize the Settlement Agreement for three factors that tend to show collusion: (1) when counsel receives a disproportionate distribution of the settlement, (2) when the parties negotiate a "clear sailing arrangement," under which the defendant agrees not to challenge a request for agreed-upon attorney fees, and (3) when the agreement contains a "kicker" or "reverter" clause that returns unawarded fees to the defendant, rather than the class. *Briseno v. ConAgra Foods, Inc.*, 998 F.3d 1014, 1022 (9th Cir. 2021). The Court "cannot, however, fully assess such factors until the final approval hearing." *Dixon v. Cushman & Wakefield W., Inc*, 2021 WL 3861465, at *10 (N.D. Cal. Aug. 30, 2021).

Beginning with the markers of collusion, the Settlement Agreement does have a clear sailing arrangement. (*See* SA ¶ 29 ["Defendant does not oppose, and will not

encourage or assist any third party in opposing, Settlement Class Counsel's request for attorneys' fees, costs and expenses up to and not exceeding $375,000.00, nor will Defendant contest the reasonableness of the amounts requested under this Agreement."].) This is not a "death knell" for approval, but rather means that the Court must scrutinize the Settlement Agreement for signs that the fees counsel requests are unreasonably high. *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610 (9th Cir. 2021). Specifically, the Court must "peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class" even when the settlement has been negotiated "with a neutral mediator before turning to fees." *Kim v. Allison*, 8 F.4th 1170, 1180 (9th Cir. 2021).

The Settlement Agreement also contains the functional equivalent of a reverter clause. A reverter clause is one "in which [the defendant], not the class members, receives the remaining funds if the court reduces the agreed-upon attorneys' fees." *Briseno*, 998 F.3d at 1027. In a common fund settlement with a reverter clause, unawarded fees 'revert' to the defendant rather than being deposited back into the common fund for the benefit of the class. Here, the settlement is structured as a claims-made settlement, meaning there is no common fund and BMW NA will pay out only for the claims that are submitted. Under that structure, if the Court awards an amount less than $375,000 in attorneys' fees, the difference is simply money that stays in BMW NA's pocket instead of benefiting the class. As a result, the Settlement Agreement contains the functional equivalent of a reverter clause. *See Tait v. BSH Home App. Corp.*, 2015 WL 4537463, at *6 (C.D. Cal. July 27, 2015) ("Although the claims-made settlement does not contain a reverter provision, '[a] claims-made settlement is . . . the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant.'" (citation omitted)). Given this structure and the presence of a clear sailing arrangement, the Court must closely analyze the Settlement Agreement for any signs of collusion.

At this time, the Court finds that the possibility of reversion and clear sailing arrangement do not sufficiently indicate the presence of collusion to deny preliminary approval. The parties are forewarned, however, that if it appears at final approval that BMW NA is likely to receive an unwarranted windfall from the reversion, the Court is unlikely to grant final approval of the settlement. *See Wilson v. Metals USA, Inc*., 2019 WL 1129117, at *7 (E.D. Cal. Mar. 12, 2019) (warning that if it appears that "defendants stand to receive a windfall from the reversion, the court is unlikely to grant final approval").

Turning to the reasonableness of the requested attorneys' fees, Plaintiff states that Class Counsel will seek an award of fees and expenses not to exceed $375,000, with the final amount to be determined and awarded by the Court. (*See* SA § 29.) As noted above, the Court must look closely at the value of the Settlement Agreement to ensure that there are no signs that the amount requested by Class Counsel is unreasonably high, examining in particular the relationship between attorneys' fees and the benefit to the class, especially in light of the possibility of reversion and the clear sailing arrangement. *See McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610 (9th Cir. 2021).

"In this circuit, there are two primary methods to calculate attorneys' fees: the lodestar method and the percentage-of-recovery method." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). For claims-made settlements, the lodestar method is often appropriate; however, courts often conduct a cross-check on the reasonableness of the attorneys' fee award using the percentage-of-recovery method. *See Ronald Chintz et al. v. Intero Real Estate Services*, 2022 WL 16528137, at *6 (N.D. Cal. Oct. 28, 2022); *Online DVD-Rental*, 779 F.3d at 949 ("One way that a court may demonstrate that its use of a particular method or the amount awarded is reasonable is by conducting a cross-check using the other method.").

In making the percentage of recovery calculation, the Ninth Circuit has held that 25% of the common fund is the "benchmark" for a reasonable fee award, and courts must provide adequate explanation in the record of any "special circumstances" to justify a departure from this benchmark. *Bluetooth*, 654 F.3d at 942–43; *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) ("We note with approval that one court has concluded that the 'bench mark' percentage for the fee award should be 25 percent. That percentage amount can then be adjusted upward or downward to account for any unusual circumstances involved in this case." (citation omitted)). "If there is no common fund, the Court uses a constructive fund." *Chintz*, 2022 WL 16528137 at *6.

In its supplemental brief, Plaintiff values the settlement benefit conferred on the class at $30,600,000. (*See* Dkt. 34 [Response] at 4.) It asserts that "a conservative estimated value of the automatic warranty extension benefit for Eligible Repairs is $30,000,000." (*Id.*) To reach this figure, Plaintiff points to a typical 7 year/75,000-mile warranty extension for a BMW X7, which costs $5,279 if purchased in the marketplace. (*Id.* at 3.) That warranty, however, covers multiple systems, while the warranty extension under the Settlement Agreement is limited to the Eligible Repairs; therefore, Plaintiff offers a value of 1/50th of the price ($100) for the approximately 300,000 Class Vehicles. (*Id.* at 4.) Because Class Members "will get th[e] warranty extension benefit automatically added to their cars without having to claim it," (*id.* at 3), Plaintiff asserts that the value of the warranty extension should not be viewed on a claims-made basis. Plaintiff also asserts that based on "information adduced in confirmatory discovery," the estimated value of the reimbursement benefit is $600,000. (*Id.* at 4.)

The Court has concerns regarding Plaintiff's valuation. If Plaintiff's valuation of $30,600,000 is accurate, the requested attorneys' fees of $375,000 would amount to approximately 1.2% of the settlement value, which is clearly well below the 25%

benchmark. But the Court believes that the $30,000,000 estimate may be artificially inflated. At final approval, Plaintiff must put forth case law indicating that its proposed methodology is indeed an appropriate way to calculate the value of an automatic warranty extension. In light of its concerns regarding the valuation, the Court will require Class Counsel to submit detailed billing records at the final approval stage so that the Court may perform a lodestar calculation. The Court will evaluate closely the ultimate award that Class Counsel requests to ensure that it is commensurate with the Ninth Circuit's standards for awarding attorneys' fees.

Although the Court has some concern about the reverter provision, the clear sailing arrangement, and the possibly inflated valuation of the settlement, the Court will not deny preliminary approval based on its concerns. But at the final approval stage, the Court will further scrutinize the asserted value of the benefits to Class Members in deciding an appropriate fee award, and expects Class Counsel to provide data sufficient to perform a lodestar calculation, further information about the value of the warranty extension (with reference to cases in which courts have used a similar method to value a warranty extension), and any other provision or fact bearing on the propriety of the negotiations.

In addition to the amount of counsel's fees and costs, the Court must also scrutinize the timing of payment. *See* Fed. R. Civ. P. 23(e)(2)(c); *see also Salas Razo v. AT&T Mobility Servs., LLC*, 2022 WL 4586229, at *13 (E.D. Cal. Sept. 29, 2022) ("[C]ounsel will receive payment at the same time as Class Members, and the timing of payment does not weigh against preliminary approval of the Class Settlement."). A significant disparity in timing between payment for the class and payment for Class Counsel can cast a shadow on the proposed fee and cost arrangements. Here, the Settlement Agreement provides that Class Counsel will be paid no later than thirty days after the Effective Date. (*See* SA § 31.) That date is in advance of when Class Members can expect to be reimbursed for their out-of-pocket expenses. (*See id.* § 15 [providing

that "[s]tarting sixty (60) days after the Effective Date, the Claims Administrator will issue checks on a rolling basis for approved and validated Claims"].) But "the gap between payments does not appear so significant as to weigh against preliminary approval of the Class Settlement." *Martinez v. Semi-Tropic Coop. Gin & Almond Huller, Inc.*, 2022 WL 11329840, at *14 (E.D. Cal. Oct. 19, 2022)

5. Any Agreement Required to Be Identified Under Rule 23(e)(3)

The Court must also consider whether there is "any agreement required to be identified under Rule 23(e)(3)," Fed. R. Civ. P. 23(e)(2)(C)(iv)—that is, "any agreement made in connection with the proposal," *id.* 23(e)(3). The parties have not identified any agreements other than the proposed Settlement Agreement.

6. Equitable Class Member Treatment

The final Rule 23(e) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

Under the Settlement Agreement, Class Members may receive differing payouts depending on what documentation they have of their out-of-pocket costs. This difference in treatment is appropriate and reasonable. Further, "each Class Member will receive automatic benefits under the Agreement (in the form of a warranty extension)." (Mot. at 19.) The release is also the same for all Class Members. (*See* SA § 27.) The Court finds that the Settlement Agreement treats Class Members equitably.

7. Class Representative Incentive Award

Next, the Settlement Agreement provides for an incentive payment to the Class Representative "not to exceed three thousand dollars ($3,000.00)." (*Id.* § (1)KK.) Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. *See Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013). Courts routinely approve this type of award to compensate representative plaintiffs for the services they provide and the risks they incur during class action litigation. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 499 (E.D. Cal. 2010). Incentive awards in this district typically range from $3,000 to $5,000. *See In re Toys R Us-Del., Inc.-Fair & Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014) (collecting cases). While the proposed $3,000 incentive award is at the low end of this range, Plaintiff has not provided any details about the tasks it undertook as Class Representative. The Settlement Agreement states only that the service award is "for [Plaintiff's] effort, service, time, and expenses in connection with pursuing the case." (SA § 30.) The Court will grant preliminary approval of the incentive payment, but at final approval Plaintiff must explain more fully the role it played in the litigation.

In sum, based on the Rule 23(e)(2) factors, the Court preliminarily concludes that the Settlement Agreement is "fair, reasonable, and accurate." However, a fuller showing on the issues identified above will be required at the final approval stage.

C. Notice of Proposed Settlement

Plaintiff also seeks approval of the proposed manner and form of the notice that will be sent to the class members. For Rule 23(b)(3) classes, courts "must direct to class

members the best notice that is 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). Rule 23(e)(1) also requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." When a court is presented with class notice pursuant to a settlement, the class certification notice and the notice of settlement may be combined in the same notice.

The Court finds that the proposed manner of notice is adequate. The Settlement Agreement offers a provisional plan for Class Notice: within ninety days after preliminary approval by the Court, the proposed Claims Administrator, Kroll Settlement Administration ("Kroll"), will email notice to Class Members whose email address is known to BMW NA through its customer database or send notice via First Class Mail when an email address is not available. (SA § 16.) When updated contact information is required for Class Members, BMW NA will retain a third party to obtain mailing addresses from the applicable state motor vehicle agencies' registration databases or other available sources. (*Id.*) Kroll will also establish a Settlement Website, as well as an email address and a toll-free number to provide further information about the settlement. (*Id.*)

The form of notice also meets the requirements of Rule 23(c)(2)(B). Notice to the class members must "clearly and concisely state, in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that the class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). Here, the proposed notice provides clear information about the definition of the class, the nature of the action, a summary of the terms of the proposed

settlement, the process for objecting to the settlement, and the consequences of inaction. (SA Ex. A.) The notice will also provide specific details regarding the date, time, and place of the final approval hearing and inform Class Members that they may enter an appearance. (*See id.*)

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for preliminarily approval of the Settlement Agreement and **ORDERS** the following:

A. The Court appoints Brightk Consulting Inc. as the Settlement Class Representative.

B. The Court appoints the Margarian Law Firm as Settlement Class Counsel.

C. The Court appoints Kroll Settlement Administration as Claims Administrator.

D. The Court preliminarily approves the Settlement Agreement and the terms and conditions of settlement set forth therein, subject to further consideration at a Final Approval Hearing.

E. The Court approves the form of the notice and directs the parties and the Claims Administrator to carry out their obligations under this order and the Settlement Agreement.

F. The Court sets the Final Approval Hearing for **Monday, April 17, 2023, at 1:30 p.m.**

DATED: January 3, 2023

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE