

**UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI**

**Katherine Golson, on behalf  
of herself and all others similarly  
situated,**

**Plaintiffs,**

**v.**

**Case No. 4:20-CV-632  
DEMAND FOR JURY TRIAL**

**GENERAL MOTORS LLC, a  
Delaware limited liability company,**

**Defendant.**

**COMPLAINT FOR DECLARATORY RELIEF**

COMES NOW, Plaintiff Katherine Golson, by and through Counsel, and on behalf of herself, and all others similarly situated, for her Complaint for Declaratory Relief against Defendant General Motors LLC, alleges as follows:

**NATURE OF THE CASE**

1. This is a class action complaint seeking declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiff Katherine Golson seeks a determination that she and all others similarly situated are neither precluded nor otherwise barred from pursuing claims against Defendant General Motors LLC (hereinafter “General Motors” or “GM”) stemming from oil consumption issues concerning certain 2013 model year Chevrolet Equinox and GMC Terrain vehicles as a result of the settlement agreement and judgment of a previous class action lawsuit, as any such preclusive effect would violate Plaintiff’s and the proposed class members’ due process rights.

2. Plaintiff and proposed class members were absent class members of a previous class action lawsuit (Case No. 2-18-CV-14371, *Berman et al v. General Motors LLC*) against Defendant General Motors arising out of oil consumption issues affecting certain GM vehicles

filed in the United States District Court for the Southern District of Florida (hereinafter “the Florida Court”).<sup>1</sup>

3. The class representative plaintiff (hereinafter “Berman”) of the previous class action lawsuit (hereinafter “*Berman* class action”) entered into a proposed settlement with Defendant General Motors and such proposed settlement was submitted to the Florida Court for preliminary approval.

4. Upon the Florida Court’s preliminary approval and pursuant to due process, the parties of the *Berman* class action were required and ordered to send to the absent *Berman* class members (which included Plaintiff and the proposed class members) notice of the proposed settlement with such notice being provided to each individual class member and with such notice advising of all of the following:

- a. The Class Notice shall contain a plain and concise description of the nature of the Action and the proposed Settlement, including information on the definition of the Settlement Class, how the proposed Settlement would provide relief to Class Members, what claims are released under the proposed Settlement, and other relevant information.
- b. The Class Notice shall inform Class Members that they have the right to opt out of the Settlement. The Class Notice shall provide the deadlines and procedures for exercising this right.
- c. The Class Notice shall inform Class Members of their right to object to the proposed Settlement and appear at the Fairness Hearing. The Class

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<sup>1</sup> Throughout this Complaint, “proposed class members” refers to that group of individuals which Plaintiff seeks to have certified as a class through this declaratory action as defined in Paragraph 25. When referencing the class/class members as certified for settlement purposes in the *Berman* class action, this Complaint uses “*Berman* class” or “*Berman* class members.”

Notice shall provide the deadlines and procedures for exercising these rights.

- d. The Class Notice shall inform Class Members of the total estimated Notice and Administration Costs and the maximum amounts to be sought by Class Counsel in the Fee Application and shall also explain that the fees and expenses awarded to Class Counsel (if any) and Service Payments to Plaintiffs (if any), are in addition to Settlement benefits and consideration being made available to Class Members.

5. To effectuate the sending of the notices, Defendant General Motors agreed to provide a list of the VINs for each *Berman* class vehicle to a third-party company and the third-party company was then to use the list of VINs to develop a class mailing list using vehicle registration data and U.S Postal Change of Address information. The class mailing list was then to be provided to the settlement administrator for dissemination of the class notices to the individual *Berman* class members.

6. Defendant General Motors was required to provide the list of *Berman* class VINs to the third-party company by May 9, 2019.

7. Defendant General Motors did not include the VINs corresponding to Plaintiff's vehicle or the vehicles of the proposed class members in the list of class VINs, and accordingly, the third-party company did not obtain address/contact information for Plaintiff or the proposed class members at the time required by the settlement agreement and Florida Court's order.

8. Accordingly, the parties of the *Berman* class action failed to send out notices to Plaintiff and the proposed class members at the time required by the Florida court's preliminary approval order, due process, and the Federal Rules of Civil Procedure.

9. The parties of the *Berman* class action failed to send out notices to Plaintiff and the proposed class members that afforded Plaintiff and the proposed class members the procedural rights and protections required by the Florida Court's preliminary approval order, due process, and the Federal Rules of Civil Procedure.

10. Notwithstanding, the parties of the *Berman* litigation attended a Fairness Hearing with the Florida Court on October 4, 2019.

11. Upon information and belief, it was not until sometime in February 2020, that Defendant General Motors realized that the VINs corresponding to Plaintiff's vehicle and the vehicles of the proposed class members had been omitted from the VIN list it provided to the third-party.

12. "Notices" were not sent to Plaintiff and the proposed class members until after the Florida Court held a fairness hearing, certified the *Berman* class for purposes of approving the proposed settlement, approved of the proposed settlement, entered judgment, and awarded attorney fees to the *Berman* class counsel.

13. Plaintiff contends that the failure to provide procedurally adequate notice that comported with the Florida court's preliminary order of approval, due process, and the Federal Rules of Civil Procedure, to Plaintiff and the proposed class members as the absent class members of the *Berman* class action means that Plaintiff and the proposed class members are not bound by the settlement agreement or judgment of the *Berman* class action, and that Plaintiff and the proposed class members are free to litigate their claims in subsequent litigation.

14. Additionally, Plaintiff contends that Plaintiff and the proposed class members were not provided adequate representation in the *Berman* class action such that Plaintiff and the proposed class members are not bound by the settlement agreement or judgment of the *Berman*

class action and Plaintiff and the proposed class members are not preempted from litigating their claims in subsequent litigation.

15. Additionally, Plaintiff contends that offensive non-mutual collateral estoppel prevents Defendant General Motors from relitigating the damages of Plaintiff and the proposed class, damages which have already been determined and adjudged to be Six Million Seventy-Five Thousand Dollars (\$6,075,000.00).

### **PARTIES**

16. Plaintiff Katherine Golson is a citizen of the State of Kansas and is domiciled in Lenexa, Kansas.

17. Defendant General Motors LLC is a Delaware limited liability company with its principal place of business located at 300 Renaissance Center, Detroit, Michigan. General Motors LLC is a citizen of the States of Delaware and Michigan.

18. The sole member and owner of General Motors LLC is General Motors Holdings LLC. General Motors Holdings LLC is a Delaware limited liability company with its principal place of business in the State of Michigan. General Motors Holdings LLC is a citizen of the States of Delaware and Michigan.

19. The sole member and owner of General Motors Holdings LLC is General Motors Company. General Motors Company is a Delaware corporation with its principal place of business in the State of Michigan. General Motors Company is a citizen of the States of Delaware and Michigan.

20. GM, through its various entities, including Chevrolet, designs, manufactures, markets, distributes, and sells its vehicles in this District and multiple other locations in the United States and worldwide. GM and/or its agents designed, manufactured, and installed the GM engine

systems in the Class Vehicles. GM also developed and disseminated the owner's manuals, warranty booklets, advertisements, and other promotional materials pertaining to the Class Vehicles.

### **JURISDICTION AND VENUE**

21. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

22. Venue is proper in this Court pursuant to 28 U.S.C. §1391 in that a substantial part of the events giving rise to the claim occurred in Johnson County, Missouri, within this judicial district, including but not limited to Plaintiff Katherine's Golson's vehicle was purchased in Johnson County, Missouri and Plaintiff should have received constitutionally adequate notice in Johnson County, Missouri and constitutionally deficient notice was sent to Johnson County, Missouri.

23. An actual justiciable controversy between Plaintiff, and all others similarly situated, and Defendant exists within the meaning of 28 U.S.C. § 2201 regarding whether the claims of Plaintiff, and all others similarly situated, are subject to the settlement agreement and judgment of Case No. 2-18-CV-14371, as more particularly described below.

24. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 as this action arises under the United States' Constitution and laws.

### **CLASS ACTION ALLEGATIONS**

25. Plaintiff brings this action on behalf of herself and all others similarly situated pursuant to Federal Rule of Civil Procedure 23(b)(1) and/or (2).

26. Plaintiff sets forth the following definition of the proposed class for certification:

All persons within the United States who purchased or leased, at any time before May 16, 2019, a new retail or used model year 2013 Chevrolet Equinox or GMC

Terrain vehicle equipped with 2.4 liter Ecotec engines, manufactured prior to the General Motors production change which introduced 525 piston ring, and who were not mailed individual notice of the proposed settlement agreement until after the fairness hearing occurred on October 4, 2019, in Case No. 2-18-CV-14371, *Berman et al v. General Motors LLC*, in the United State District Court of the Southern District of Florida.

27. This action satisfies the requirements of Rule 23(a) in that:
- a. The class is so numerous that joinder of all members is impracticable, as the class members total at least 41,000.<sup>2</sup>
  - b. There are questions of law or fact common to the class, including, but not limited to, the primary issue in dispute, that is whether Plaintiff and the proposed class are precluded or otherwise barred from pursuing claims against Defendant GM stemming from oil consumption issues concerning the subject 2013 model year vehicles.
  - c. The claims of the representative party are typical of the claims of the class, such that Plaintiff and all proposed class members received constitutionally deficient notice of the proposed class action settlement in the *Berman* class action based on the untimeliness of the “Consolidated Class Notice” and the insufficient procedural due process protections such “Consolidated Class Notice” provided to the proposed class members. Plaintiff and all proposed class members were further inadequately represented by the *Berman* class counsel.

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<sup>2</sup> This estimate is based on the representation of Defendant General Motors that the VINs of approximately 41,000 vehicles were omitted from receiving adequate notice as required. Each VIN may correspond to one or more potential class members. Such information, including the individual identities of the proposed class members is known to General Motors and is readily discoverable.

- d. The representative party will fairly and adequately protect the interests of the class.

**THE *BERMAN* CLASS ACTION LITIGATION AND  
PROPOSED SETTLEMENT (CASE NO. 2-18-CV-14371)**

28. On September 10, 2018, in Case No. 2:18-cv-14371, Berman, as plaintiff class representative, brought a class action lawsuit against Defendant GM in the United States District Court for the Southern District of Florida for (1) Breach of Written Warranties under the Magnuson-Moss Warranty Act; (2) Breach of Implied Warranty; (3) Breach of Contract/Express Warranties; and (4) Violation of Florida’s Unfair & Deceptive Trade Practices Act, all arising from excessive motor oil consumption issues and GM’s overt efforts to conceal such issues concerning certain GM vehicles.<sup>3</sup>

29. Eventually, Berman and Defendant GM entered into a proposed settlement and on April 26, 2019, pursuant to Federal Rule of Civil Procedure 23, Berman filed with the Florida Court “Plaintiff’s Unopposed Motion for Preliminary Approval of the Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Class Notice and Incorporated Memorandum of Law.”

30. Specifically, such Motion provided that:

Plaintiff Ellen Berman (“Plaintiff”), individually and on behalf of all others similarly situated, and Defendant General Motors LLC (“Defendant” or “GM”) have entered into a Class Action Settlement Agreement (the “Settlement,” “Agreement,” or “Settlement Agreement”) to resolve Plaintiff’s claims that Defendant’s 2010, 2011, 2012, and 2013 model Chevrolet Equinox and GMC Terrain vehicles equipped with 2.4 liter Ecotec engines are defective and prone to excessive oil consumption and/or piston or engine damage. While Defendant denies these allegations, the Parties have reached an agreement to resolve the litigation.

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<sup>3</sup> Parallel litigation was filed by other plaintiff class representatives in at least two other jurisdictions, California and Illinois, but both cases were consolidated with *Berman* for settlement purposes.



31. With respect to model year 2013 vehicles, the proposed settlement allegedly provided the class members the benefit of a newly issued 2013 “Special Coverage Adjustment” (“SCA”) (effectively an extended warranty) under which the *Berman* class members with 2013 vehicles could present their vehicles to Defendant General Motors for free diagnosis and repair of the underlying oil consumption issue if the vehicles met a mileage limitation (under 120,000 miles) and an in-service time limitation (before seven and a half years from the in-service date i.e. date of first retail sale or lease). *Berman* class members with 2013 vehicles could also submit claim forms for full reimbursement of out-of-pocket expenses previously paid for oil consumption repairs if such expenses were incurred prior to the mileage limitation and in-service time limitation.

32. *Berman*’s “Unopposed Motion for Preliminary Approval” further provided that:

In exchange for the benefits allowed under the Settlement Agreement, upon the Effective Date, Settlement Class Members who did not timely and validly opt out of the Settlement Class will release and discharge the Released Claims against the Released Persons.

33. Such Motion further provided the following details concerning the parties’ proposed “Notice Plan”:

The proposed Class Notice (Exhibit A to the Settlement Agreement) is designed to apprise the Settlement Class of the certification of the Settlement Class, the proposed Settlement Agreement, the Opt-Out Procedure, Opt-out Deadline, the procedure for filing objections, the Objection Deadline, and the date and place of the Fairness Hearing.

GM will provide to IHS Markit/R.L. Polk & Co. a list of the VINs for each Class Vehicle. IHS/Polk will develop the Class mailing list (“Class List”) using state motor vehicle registration data and U.S. Postal Change of Address information and provide it to the Settlement Administrator. All information in the Class List shall be protected as confidential and will not be disclosed to anyone, except to Class Counsel, except as required by applicable tax authorities, pursuant to the express written consent of an authorized representative of GM, or by order of the District Court. The Class List shall be used only for the purpose of administering this Settlement. This list shall include the first and last names and physical mailing addresses of Settlement Class Members.

The Notice Plan provides Settlement Class Members the best notice that is practicable under the circumstances, satisfying the requirements of Fed. R. Civ. P. 23(c)(2)(b), and due process, and consists of the following: (i) the Class Notice will be mailed, by first class or priority United States Mail, to the last known address of Settlement Class Members as identified by GM and IHS/Polk, an automotive business and marketing information firm, and U.S. Postal Change of Address data, (ii) the Class Notice will be mailed, by first class or priority United States Mail, to the last known address of Settlement Class Members that can reasonably be identified by GM and IHS/Polk following entry of the Preliminary Approval Order; and (iii) prior to the dissemination of the Class Notice, the Settlement Administrator shall establish a toll-free telephone number, through which Settlement Class Members may (a) obtain information about the Action, (b) submit inquiries regarding the Class Notice and claims procedures, and (c) request a mailed copy of the Class Notice at any time and/or the Claim Form after the Effective Date, pursuant to the terms and conditions of the Agreement.

Among other things, the Class Notice provides a description of the nature of the Action and the proposed Settlement, including information on the definition of the Settlement Class, how the proposed Settlement would provide relief to Settlement Class Members, what claims are released under the proposed Settlement, and other relevant information. The Class Notice informs Settlement Class Members of the time, date and place set by the Court for the Fairness hearing to determine whether the Settlement Agreement should receive final approval as fair and adequate, whether the certification of the Settlement Class should be re-affirmed, whether Service Payments should be issued and in what amount, whether the Fee and Expense Award should be awarded to Class Counsel and in what amounts, and whether the Final Order and Judgment should be entered.

The Class Notice also provides instructions to individuals who wish to exclude themselves from the Settlement Class regarding the Opt-Out Procedure, as well as directions for objecting to or opposing the Settlement Agreement.

Within 30 days of receipt of the Class List the Settlement Administrator will commence dissemination of the Class Notice to the Settlement Class in a manner so ordered. The reasonable costs for the Notice Plan will be paid for by GM. Thereafter, if the Court grants final approval, an additional Notice and Claim Form will be sent to the Class Members. In summary, Class Members will receive direct notice on two separate occasions - after Preliminary Approval and after Final Approval.

#### **PRELIMINARY APPROVAL OF *BERMAN* SETTLEMENT AND PRELIMINARY APPROVAL NOTICE**

34. On May 16, 2019, the Florida Court entered its Order granting the Motion for Preliminary Approval.

35. Such Order provisionally certified a nationwide Settlement Class consisting of:

All persons within the United States who purchased or leased, at any time before the Preliminary Approval Date, a new retail or used model year 2010, 2011, 2012 or 2013 Chevrolet Equinox or GMC Terrain vehicle equipped with 2.4 liter Ecotec engines, manufactured prior to the Production Change, and who have not experienced engine failure or executed a prior release of the claims set forth in the Action or Related Actions in favor of GM.

36. Such Order found that the *Berman* settlement class satisfied the requirements of Federal Rule of Civil Procedure 23(b)(3).

37. Such Order provided as follows regarding the proposed “Notice Plan”:

1. The Settlement Agreement is attached as Exhibit A to Plaintiff’s Memorandum in Support of Preliminary Approval of the Class Action Settlement and Related Matters. The Court approves the proposed Class Notice that is submitted as Exhibit A to the Settlement Agreement.
2. The Court finds that the manner of mailing and dissemination of the Notices and related Settlement information as described in Part V of the Settlement Agreement and the Declaration of Richard Simmons of Analytics Consulting LLC constitutes the best practicable notice under the circumstances as well as valid, due and sufficient notice to all persons entitled thereto, and that the Notice Plan complies with the requirements of Fed. R. Civ. P. 23 and provides Settlement Class Members due process under the United States Constitution. The Class Notice is subject to further modification to insert the proper deadlines and as determined appropriate by the Settlement Administrator.
3. Promptly following the entry of this Order, the Parties and Settlement Administrator shall prepare the final version of the Class Notice, incorporating into it the Fairness Hearing date and the Objection and Opt Out deadlines based on the actual date determined by the Parties and the Settlement Administrator to be the Notice Commencement Date as set forth below.
4. The Notice Date is the date on which the Class Notice is disseminated to the Class. The Notice Date should occur no later than 30 days after the Settlement Administrator receives the Class list from IHS/Polk, or by the next following Business Day if the deadline falls on a weekend or legal holiday.
5. The Court appoints Analytics Consulting, LLC as the Settlement Administrator.

6. The fees and costs of the Settlement Administrator shall be paid by GM.
7. The Settlement Administrator shall implement the Parties' Notice Plan which is set forth in the Declaration of Richard Simmons of Analytics Consulting LLC and described in Part V of the Settlement Agreement. The payment of fees and costs to the Settlement Administrator shall not be contingent upon any further action of the Court, including, without limitation, any decision on a Motion for Final Approval of the Settlement Agreement.

38. The Order further provided that the Final Approval Hearing/Fairness Hearing was scheduled for October 4, 2019 at 1:00 p.m.

39. On July 22, 2019, *Berman* class notices were mailed out to the proposed *Berman* class members advising of the Florida Court's preliminary approval of the proposed settlement and the court hearing on the proposed class certification and settlement.

40. The July 22, 2019 *Berman* class notices included the following table, which purported to describe the "legal rights" of the *Berman* class members with respect to the proposed settlement:

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT</b>	
<b>REMAIN IN THE CLASS AND RECEIVE THE BENEFITS OF THE SETTLEMENT</b>	<b>Stay in the Action. You will receive the benefits of the proposed Settlement if it is approved, as detailed in paragraph 6 below.</b>
<b>ASK TO BE EXCLUDED</b>	<p>If you wish to be excluded from the Action, receive no benefits from the Settlement, and retain your legal rights, <b>MAIL A REQUEST FOR EXCLUSION</b>, also known as an Opt-Out, to the Settlement Administrator by <b>September 20, 2019</b>.</p> <p>If you ask to be excluded, you will not share in any benefits of the Settlement. But you will keep any rights you have to sue GM separately concerning the legal claims asserted in the Action.</p>
<b>OBJECT</b>	<p>If you wish to object to the terms of the proposed Settlement, you must (1) stay in the Action, and (2) file your objection papers by <b>September 20, 2019</b>. You must comply with the instructions in Question 10 below to object.</p> <p>You are also free to attend the hearing on <b>October 4, 2019</b> where the Court will consider your objection. You are free to hire an attorney at your own expense to represent you at the hearing. You or your attorney cannot speak at the hearing unless you comply with the instructions below in Question 10.</p>

41. The July 22, 2019 *Berman* class notices provided further details of these legal rights including sections discussing how to file an objection to the settlement, the right to retain separate counsel, and the right to attend the fairness hearing.

42. The July 22, 2019 *Berman* class notices provided the *Berman* class members sixty (60) days during which to file an opt-out of the settlement.

43. The July 22, 2019 *Berman* class notices provided the *Berman* class members with sixty (60) days during which to file an objection to the settlement.

44. The July 22, 2019 *Berman* class notices advised the *Berman* class members of their right to attend the October 4, 2019 Fairness Hearing.

45. The July 22, 2019 *Berman* class notices advised the *Berman* class members of their right to retain their own counsel to represent them in the *Berman* litigation.

46. The July 22, 2019 *Berman* class notices advised the *Berman* class members of their right to have their own counsel attend the October 4, 2019 Fairness Hearing on their behalf.

47. However, the July 22, 2019 *Berman* class notices were never mailed to Plaintiff or the proposed class members.

48. Throughout the settlement approval process, even through entry of the final judgment, the parties of the *Berman* class action, and in particular Defendant General Motors, represented to the Florida Court that the parties had fully complied with the Florida Court's notice plan and had sent individual notice to all identifiable *Berman* class members, including Plaintiff and the proposed class members.

#### **FINAL SUGGESTIONS SEEKING APPROVAL OF THE *BERMAN* SETTLEMENT**

49. On September 20, 2019, Berman filed "Plaintiff's Motion for Final Approval of Class Action Settlement" seeking the Florida Court's full and final approval of the proposed settlement.

50. "Plaintiff's Motion for Final Approval" acknowledged the Florida's Court's previous finding "that the Settlement Class should be given notice" and represented that the approved notice plan had been "fully implemented" and touted that the class notice had a reach rate of 96.58%.

51. In a later filing responding to various objections that had been raised to the settlement by *Berman* class members who had received constitutionally adequate notice, Berman stated that "the New SCA for 2013 Class Vehicles also confers a substantial benefit in that Class Members will be notified directly of their eligibility for free repairs, and the opportunity to file claims for reimbursement of out-of-pocket costs incurred or obtain repairs. As detailed in the Final

Approval Motion, the value of the Settlement with this aspect of the Settlement alone is more than \$40 million.”

52. On September 26, 2019, Defendant General Motors filed its Response to Plaintiff’s Motion for Final Approval and joined Berman’s request that the Court give final approval to the proposed settlement and enter judgment.

53. With its Response, Defendant General Motors filed a Declaration of the settlement administrator which provided that class notices advising the *Berman* class members of their “legal rights” and upcoming Fairness Hearing had been mailed to all *Berman* class members on July 22, 2019, as described above, even though such notice had not been mailed to Plaintiff or the proposed class members.

#### **THE *BERMAN* FAIRNESS HEARING**

54. The Florida Court held a Fairness Hearing on October 4, 2019, at which time the specific content of the notices advising of the final approval of settlement was addressed, culminating in a specific request by the Florida Court for the parties to submit a new proposed final order and judgment to the Florida Court, explicitly including the actual notice that would be sent out if the Florida Court approved the settlement.

55. On November 1, 2019, Berman filed the requested new proposed final order and judgment which included as Exhibit C the “Second Notice and Claim Form for 2013 Model Class Vehicles.”

56. At the Fairness Hearing, Counsel for Defendant General Motors, Joseph Lines, advised the Florida Court that at the mediation which resulted in the proposed *Berman* settlement, he had “vigorously argued” against providing any relief for the 2013 Model Year class vehicles and against issuing a SCA for the 2013 vehicles.

57. However, when asked directly by the Florida Court as to whether Defendant General Motors acknowledged that there was a problem with the 2013 class vehicles, Mr. Lines admitted “there is an issue...” and “yes, there are incidents of problems” but “[he] didn’t feel it was class wide or something that would be a defect that would be susceptible of being shown as a class-wide defect.”

58. During the Fairness Hearing, Mr. Lines stressed that Defendant General Motors already had to spend one million two hundred thousand dollars (\$1,200,000.00) to pay for the mailing of the preliminary approval notices to the *Berman* class members (albeit excluding Plaintiff and the proposed class).

#### **FINAL APPROVAL OF *BERMAN* SETTLEMENT AND APPROVAL NOTICE**

59. After holding the Fairness Hearing, the Florida Court entered its “Final Approval Order and Judgment” on November 18, 2019 which approved of the Settlement Agreement, released the claims of all “Settlement Class Members who have not requested exclusion from the Settlement Class,” and approved of an award of attorney’s fees to Berman’s counsel.

60. In its “Final Approval Order and Judgment”, the Florida Court also noted that, as it had been represented to the Florida Court, the parties’ “Notice Plan” satisfied Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process as “the best notice practicable under the circumstances.”

61. The “Final Approval Order and Judgment” also approved of the “Second Notice and Claim Form for 2013 Model Class Vehicles”.

62. The “Second Notice” was purportedly mailed to the *Berman* class members on January 17, 2020.



63. The “Second Notice and Claim Form for 2013 Model Class Vehicles” was never mailed to Plaintiff or the proposed class members.

#### **CONSTITUTIONALLY DEFICIENT NOTICE**

64. On April 1, 2020, one hundred and thirty-five (135) days after the Florida Court had entered judgment, the parties in the *Berman* class action filed a “Joint Stipulated Motion for Entry of Order Permitting Supplemental Mailing of Class Notice.”

65. In that Joint Stipulated Motion, the parties stated as follows:

GM has discovered that there was an inadvertent error in compiling the listing of model year 2013 Vehicle Identification Numbers (“VINs”) that was used to generate the mailing list that the Settlement Administrator used for initial class notice and notice of the Court’s order approving the class action settlement in this matter (“Settlement”). Due to this error, approximately 41,000 VINs were not included on the original model year 2013 VIN list, and as a result a number of owners of model year 2013 vehicles who are covered by the Settlement did not receive class notice or notice of the final approval of the Settlement.

66. The Joint Stipulated Motion further stated:

GM wishes to rectify its error by mailing a Consolidated Class Notice to all model year 2013 owners whose vehicles were omitted from the initial VIN list. GM has consulted with plaintiffs’ counsel who agree with GM that the Court should enter an order permitting and directing the mailing of a Consolidated Class Notice in the form attached hereto as Exhibit 2.

67. The Joint Stipulated Motion and its included exhibits provided that Defendant General Motors had learned about the omission of Plaintiff and the proposed class members in Mid-February 2020, but did not state why it took Defendant General Motors a month and a half to bring the issue to the Florida Court’s attention.

68. On April 2, 2020, the Florida Court entered a Docket Order requesting the parties file a supplemental memorandum addressing why a court order was necessary and whether the Florida Court had jurisdiction to enter such an order.

69. On April 9, 2020, the parties filed their Joint Response to the Court’s April 2, 2020 Order and stated they did not believe court involvement was necessary.

70. On April 17, 2020, the Florida Court entered a Docket Order denying the Joint Motion without prejudice.

71. Based on information and belief, Defendant General Motors then waited until May 8, 2020 to send out a “Consolidated Class Notice” to Plaintiff and the proposed class members.

**ALLEGATIONS RELATING TO PLAINTIFF KATHERINE GOLSON**

72. On May 14, 2020, Plaintiff received a “Consolidated Class Notice” dated May 8, 2020, which provided:

You are receiving this notice now because your Vehicle Identification Number (“VIN”) inadvertently was omitted from the list of involved model year 2013 vehicles compiled by GM. GM has now augmented the list and obtained names and addresses of all owners and lessees who register the Class Vehicles that were inadvertently omitted from the initial model year 2013 VIN list and Class Notice mailings.

73. The “Consolidated Class Notice” advised that the recipient had two “legal rights”: (1) “remain in the class and receive the benefits of the settlement” and (2) “ask to be excluded.”

74. The May 8, 2020 “Consolidated Class Notice” included the following table:

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT</b>	
<b>REMAIN IN THE CLASS AND RECEIVE THE BENEFITS OF THE SETTLEMENT</b>	<b>Stay in the Action. You will receive the benefits of the proposed Settlement. If you wish to obtain the benefits of the Settlement you do not need to take any further action.</b>
<b>ASK TO BE EXCLUDED</b>	If you wish to be excluded from the Action, receive no benefits from the Settlement, and retain your legal rights, <b>MAIL A REQUEST FOR EXCLUSION</b> , also known as an Opt-Out, to the Settlement Administrator by <b>June 8, 2020</b> at the following address:  <div style="text-align: center;">                     2.4 Liter Oil Consumption Litigation                      c/o Analytics Consulting LLC                      P.O. Box 2003                      Chanhassen MN 55317-2003                 </div>

75. The May 8, 2020 “Consolidated Class Notice” provided that “the benefits of the settlement” were described in a “Special Coverage Adjustment” (“SCA”) which covered model year 2013 vehicles for seven years and six months from the vehicle’s in-service date or 120,000 miles, whichever came first.<sup>4</sup>

76. No SCA was included with the May 8, 2020 “Consolidated Class Notice.”

77. The May 8, 2020 “Consolidated Class Notice” did not describe or advise of any right of Plaintiff “to object to the proposed Settlement” or to “appear at the Fairness Hearing” or to retain counsel to represent her in the *Berman* litigation.

78. The May 8, 2020 “Consolidated Class Notice” advised that Plaintiff had until June 8, 2020 to exercise her right to be excluded from the settlement.

79. On approximately May 21, 2020, Plaintiff called Hendrick Chevrolet Shawnee Mission, to inquire about the purported “settlement benefits” indicated in the May 8, 2020 “Consolidated Class Notice” as Hendrick Chevrolet Shawnee Mission had diagnosed Plaintiff’s vehicle with excessive oil consumption related to the vehicle’s piston rings on October 10, 2019, six (6) days after the Florida Court held the *Berman* fairness hearing.

80. Due to the associated cost to repair the underlying oil consumption issue, Plaintiff was not in a position to afford those repairs on October 10, 2019.

81. However, on October 10, 2019, Defendant General Motors already knew that the Florida Court had granted preliminary approval of the *Berman* settlement and that Plaintiff and the proposed class members’ class vehicles were included within the preliminarily approved *Berman* class.

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<sup>4</sup> Accordingly, even on the date the May 8, 2020 “consolidated class notice” was purportedly sent, any model year 2013 vehicles with an in-service date prior to November 8, 2012 were no longer covered by the SCA.

82. By October 10, 2019, both Plaintiff class representative Berman and Defendant General Motors had already represented to the Florida Court that Plaintiff and the proposed class members had been mailed notice of the Florida's Court's preliminary approval of the settlement on July 22, 2019.

83. The July 22, 2019 preliminary approval and fairness hearing notices were never mailed to Plaintiff or the proposed class members.

84. Due to Defendant General Motors' failure to include the VINs of Plaintiff's vehicle and the proposed class members' vehicles in the VIN list that was used to generate both the July 22, 2019 preliminary approval and fairness hearing notice and the subsequent approval notice, Plaintiff was entirely unaware of her potential rights under the proposed *Berman* settlement on October 10, 2019, and only became aware of the *Berman* litigation and settlement on May 14, 2020.

85. On approximately May 21, 2020, Scott Phegley, Service Advisor at Hendrick Chevrolet Shawnee Mission, advised Plaintiff that the paperwork she had received was for an expired offer and Plaintiff was not entitled to repair of any oil consumption at no cost.

86. On approximately May 22, 2020, Plaintiff called the telephone number for Chevrolet's "Customer Assistance Center" as listed in the correspondence from Defendant GM that was included with the "Consolidated Class Notice" to discuss her eligibility for the purported benefits listed in the "Consolidated Class Notice."

87. On approximately May 22, 2020, the operator of the "Customer Assistance Center" told Plaintiff that he could not help Plaintiff and that she needed to speak with the "Analytic

Administrator”<sup>5</sup> and further gave Plaintiff the name of JP Bustamante, Service Manager at Hendrick Chevrolet Shawnee Mission.

88. On approximately May 22, 2020, Plaintiff called Analytics Consulting, LLC and was told that they could not help her with obtaining the purported settlement benefits and that she would need to discuss the matter with Hendrick Chevrolet Shawnee Mission.

89. On approximately May 22, 2020, Plaintiff called Hendrick Chevrolet Shawnee Mission and again spoke with Mr. Phegley and Mr. Phegley advised Plaintiff that her vehicle’s “in-service date” was August 28, 2012, and that the purported benefits listed in the correspondence Plaintiff had expired based on that date.<sup>6</sup>

90. On approximately May 22, 2020, Plaintiff spoke with Mr. Bustamante and Mr. Bustamante advised Plaintiff that he had direct communication from GM that Plaintiff was not entitled to the benefits as listed in the paperwork she received.

91. Plaintiff explained to Mr. Phegley and Mr. Bustamante that she had not even received notice of the *Berman* settlement until May 14, 2020, but Mr. Phegley and Mr. Bustamante advised that they would not diagnosis and repair Plaintiff’s vehicle free of charge because Hendrick Chevrolet Shawnee Mission would not be fully reimbursed for the repairs by Defendant General Motors.

92. Based on the “in-service date” provided to Plaintiff by Mr. Phegley, Plaintiff was only entitled to claim the purported settlement benefits by making such a claim prior to February 28, 2020, seventy-six (76) days before she had even received any notice of the *Berman* litigation and settlement.

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<sup>5</sup> Based on the telephone number provided to Plaintiff, it is believed that “Analytic Administrator” was a mistaken reference to the *Berman* Settlement Administrator, Analytics Consulting LLC.

### **ILLUSORY RELIEF AND INADEQUATE LEGAL REPRESENTATION**

93. *Berman* class counsel was aware of the procedural protections required by due process and the Federal Rules of Civil Procedure and the role of notice in advising of and providing those protections.

94. Upon notice that Defendant General Motors had failed to comply with due process requirements, Federal Rule 23, the *Berman* Settlement Agreement, and the Florida Court's approved notice plan, *Berman* class counsel did not ensure that class members due process rights were protected in that *Berman* class counsel:

- a. Failed to ensure that Plaintiff and the proposed class members were afforded all of the due process rights previously recognized by *Berman* class counsel;
- b. Agreed to the sending of a deficient class action proposed settlement "notice" to Plaintiff and the proposed class members that failed to comport with due process for failure to provide the right and opportunity to participate in the fairness hearing;
- c. Agreed to the sending of a deficient class action proposed settlement "notice" to Plaintiff and the proposed class members that failed to comport with due process for failure to provide the right and opportunity to obtain separate counsel to represent them in the *Berman* litigation;
- d. Agreed to the sending of a deficient class action proposed settlement "notice" to Plaintiff and the proposed class members that failed to comport with due process for failure to provide the right and opportunity to have separate counsel attend the fairness hearing on their behalf;

- e. Agreed to the sending of a deficient class action proposed settlement “notice” to Plaintiff and the proposed class members that failed to comport with due process for failure to provide the right and opportunity to object to the proposed *Berman* settlement;
- f. Agreed to the sending of a deficient class action proposed settlement “notice” to Plaintiff and the proposed class members that failed to comport with the Federal Rules of Civil Procedure;
- g. Agreed to the sending of a deficient class action proposed settlement “notice” to Plaintiff and the proposed class members that failed to comport with the Florida Court’s approved notice plan;
- h. Agreed to the sending of a deficient class action proposed settlement “notice” which provided Plaintiff and the proposed class members with substantially different rights than the *Berman* class members who had received timely and procedurally adequate notice;
- i. Agreed to the sending of a deficient class action proposed settlement “notice” which provided Plaintiff and the proposed class members with drastically limited rights compared to the majority of *Berman* class members, including, but not limited to a reduction of an “opt out” period to 30 days, when prior court order established the “best notice practicable” included an “opt out” period of at least 60 days;
- j. Agreed to the sending of a deficient class action proposed settlement “notice” which provided the proposed class members with illusory relief in that Plaintiff and proposed class members were not notified of

“entitlement” to settlement benefits until after the time that class members could make a claim for and purportedly recover any settlement benefits.

95. Prior to the discovery that notice had never been sent to Plaintiff and the proposed class members, on November 18, 2019, *Berman* class counsel was awarded three million five hundred thousand dollars (\$3,500,000.00) in attorney’s fees and expenses for its representation of the *Berman* class with such payment due to *Berman* class counsel within 7 days of December 18, 2019.

96. *Berman* class counsel effectively agreed to settlement terms and post-hoc constitutionally deficient notice that rendered Plaintiff’s and the proposed class members’ claims worthless while also obtaining a sizeable fee for this “representation.”

#### **COUNT I – DECLARATORY JUDGMENT**

97. Plaintiff hereby incorporates and re-alleges the allegations set forth in paragraphs 1 through 96 as if fully set forth herein.

98. There is a genuine and bona fide dispute and an actual controversy and disagreement between Plaintiff and the proposed class members and Defendant regarding whether the settlement agreement and judgment of Case No. 2-18-CV-14371, *Berman et al. v. General Motors LLC*, precludes the claims of Plaintiff the proposed class members in light of Plaintiff and the proposed class members not receiving constitutionally adequate notice.

99. Pursuant to the 28 U.S.C. §§ 2201 and 2202, Plaintiff requests that the Court enter judgment declaring all of the following:

- a. Pursuant to Federal Rule 23(c)(1), the proposed class is certified under Federal Rule 23(b)(1) and/or 23(b)(2) and such class is defined as:



All persons within the United States who purchased or leased, at any time before May 16, 2019, a new retail or used model year 2013 Chevrolet Equinox or GMC Terrain vehicle equipped with 2.4 liter Ecotec engines, manufactured prior to the General Motors production change which introduced 525 piston ring, and who were not mailed individual notice of the proposed settlement agreement until after the fairness hearing occurred on October 4, 2019, in Case No. 2-18-CV-14371, *Berman et al. v. General Motors LLC*, in the United States District Court for the Southern District of Florida.

- b. Pursuant to Federal Rule 23(c)(1) and 23(g), Plaintiff's Counsel is appointed as class counsel.
- c. Due Process and Federal Rule 23 establish that class members were entitled to individual notice of the proposed settlement, at the *Berman* class was certified under Rule 23(b)(3).
- d. Due Process and Federal Rule 23 required, among other procedural protections, that such individual notice provide the *Berman* class members with notice of the proposed *Berman* settlement, the pendency of the *Berman* action, and an opportunity to be heard and participate in the *Berman* litigation, whether in person or through counsel, and an opportunity to present their objections, and an opportunity to attend the fairness hearing, whether in person or through counsel.
- e. Due Process and Federal Rule 23 required, among other procedural protections, that class members of the proposed settlement be provided at least a 60-day period during which to exercise any opt-out rights.
- f. The May 8, 2020 "Consolidated Class Notice" sent to Plaintiff and the class members did not satisfy due process requirements, Federal Rule 23, the *Berman* Settlement Agreement, or the Florida Court's approved notice plan.

- g. Plaintiff and class members are not bound by the *Berman* settlement agreement or judgment of Case No. 2-18-CV-14371, *Berman et al. v. General Motors LLC*, as applying res judicata to their potential claims would violate due process.
- h. Plaintiff and class members are not bound by the *Berman* settlement agreement or judgment of Case No. 2-18-CV-14371, *Berman et al. v. General Motors LLC*, as they did not receive adequate legal representation from *Berman* class counsel.
- i. Defendant General Motors is collateral estopped from arguing that the cost of repair damages of Plaintiff and the proposed class members for their class vehicles, in the aggregate, totals any amount less than \$6,075,000.00.

100. Pursuant to 28 U.S.C. §§ 2201 and 2202, Plaintiff requests the Court award Plaintiff and class members compensatory damages, nominal damages, and punitive damages.

101. Pursuant to 28 U.S.C. §§ 2201 and 2202, Plaintiff requests the Court award Plaintiff Katherine Golson an incentive award for the bringing of this action and serving as the named Plaintiff.

102. Pursuant to 28 U.S.C. §§ 2201 and 2202, Plaintiff requests the Court award Plaintiff and class members the reasonable costs and expenses incurred in this prosecution of this action, including attorneys' fees.

103. Pursuant to 28 U.S.C. §§ 2201 and 2202, Plaintiff requests the Court award any such further relief as necessary or proper.

WHEREFORE, Plaintiff Katherine Golson, on behalf of herself and all others similarly situated, respectfully requests that this Court enter declaratory judgment pursuant to the terms

described herein, award Plaintiff and class members compensatory damages, nominal damages, and punitive damages, and the reasonable costs and expenses incurred in the prosecution of this action, including attorney's fees, an incentive award to Plaintiff Katherine Golson and any such further relief as necessary or proper.

Respectfully submitted,

**AMK LAW LLC**

*/s/ Thomas J. Golson*

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