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Kieva Myers, individually, and on behalf of a class
10 of similarly situated individuals

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

14 KIEVA MYERS, individually, and on
behalf of a class of similarly situated
15 individuals,

16 Plaintiff,

17 v.

18 BMW OF NORTH AMERICA, LLC,
BAYERISCHE MOTOREN WERKE
19 AKTIENGESELLSCHAFT,

20 Defendants.
21
22

) NO.
) CLASS ACTION
)
) COMPLAINT FOR
)
) 1. Violations of Business and
) Professions Code 17200
) 2. Fraud
) 3. Breach of Implied Warranty
) 4. Violation of Consumer Legal
) Remedies Act

1 **INTRODUCTION**

2 1. Kieva Myers (“Myers”) brings this action for herself and on behalf all
3 persons in California (“Class Members”) who purchased or leased model year 2008
4 through 2015 BMW X5 vehicles equipped with the comfort access feature (“Class
5 Vehicles”) which were manufactured, distributed, and sold by BMW OF NORTH
6 AMERICA, LLC, a New Jersey limited liability company (BMW NA) and
7 BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT, a corporation
8 organized under the law of the federal republic of Germany (BMW AG). BMW NA
9 and BMW AG are sometimes referred to collectively as Defendants.

10
11 **PARTIES**

12 **KIEVA MYERS**

13 2. Myers resides in California. Myers is the owner of a 2013 BMW X5
14 equipped with the comfort access feature (“Kieva Vehicle”). Kieva purchased the
15 Kieva Vehicle in San Francisco, California. The Kieva Vehicle was purchased
16 primarily for personal, family and household non-commercial purposes. The Kieva
17 Vehicle was manufactured, sold, distributed, advertised, marketed and warranted by
18 Defendants, and bears the Vehicle Identification Number 5UXZW0C50D0B95201.

19 **Defendants**

20 3. BMW OF NORTH AMERICA, LLC (BMW NA) is a limited liability
21 company, organized and in existence under the laws of the State of New Jersey and
22 registered with the Secretary of State to conduct business in California. BMW NA
23 is and at all times herein relevant was engaged in the business of designing,
24 manufacturing, constructing, assembling, marketing, distributing, and selling
25 automobiles and other motor vehicles and motor vehicle components throughout
26 the United States of America.

1 4. BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT, a
2 corporation organized under the law of the federal republic of Germany (BMW
3 AG) is a corporation organized under the laws of the federal republic of Germany.
4 BMW AG is and at all times herein relevant was engaged in the business of
5 designing, manufacturing, constructing, assembling, marketing, distributing, and
6 selling automobiles and other motor vehicles and motor vehicle components for
7 sale throughout the United States of America.

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9
10 **JURISDICTION**

11 5. This is a class action that is subject to the Class Action Fairness Act,
12 and diversity jurisdiction under 28 USC § 1332 since plaintiff is a citizen of
13 California, BMW NA is incorporated in New Jersey, and BMW AG is incorporated
14 in Germany and the amount in controversy exceeds \$5,000,000.

15 6. Kieva resides at 363 10th Avenue, San Francisco, California 94118.

16 7. Kieva purchased the Kieva Vehicle in San Francisco, California.

17 8. Due to the Kieva Vehicle being purchased in San Francisco,
18 California, and due to Kieva residing in San Francisco, California, jurisdiction is
19 proper in the Northern District.

20
21 **INTRADISTRICT ASSIGNMENT**

22 9. A substantial part of the events or omissions giving rise to these claims
23 and a substantial part of the property that is the subject of this action occurred in
24 San Francisco County pursuant to Local Rule 3-5(b).

25
26 **APPLICABLE LAW**

27 10. California State law applies to all claims in this action.
28

FACTUAL ALLEGATIONS

1
2 11. The Class Vehicles consist of all model year 2008 through 2015 BMW
3 X5 vehicles equipped with the comfort access feature, sold or leased to consumers
4 in California.

5 12. The comfort access feature is a convenience feature integrated into the
6 Class Vehicles, and their remote controls. With regard to the functionality of the
7 comfort access feature, the BMW NA owners' manual states, "The concept: The
8 vehicle can be accessed without activating the remote control. All you need to do is
9 to have the remote control with you, e.g., in your jacket pocket. The vehicle
10 automatically detects the remote control when it is nearby or in the passenger
11 compartment. Comfort access supports the following functions: Unlocking/locking
12 of the vehicle." The owners' manual goes on to say, "Functional requirement: To
13 lock the vehicle, the remote control must be located outside of the vehicle." The
14 owners' manual clearly instructs operators of Class Vehicles that in order to lock
15 the vehicle, the remote control must be located outside of the vehicle, and thus, if
16 the remote control is located inside of the vehicle, the vehicle cannot lock.

17 13. Unfortunately, the comfort access feature is defective. The defect is
18 that sometimes while the remote control is located inside a Class Vehicle, the Class
19 Vehicle spontaneously locks (Comfort Access Defect). Numerous owners and
20 lessees of 2008 through 2015 BMW X5 vehicles, including but not limited to
21 Kieva, have reported that their vehicles have automatically locked while the remote
22 control has been inside of their vehicles, at times trapping children inside their
23 vehicles. Examples of consumer complaints submitted to the National Highway
24 Traffic Safety Administration are as follows:

1 -Date Complaint filed 7/8/2011, NHTSA ID Number 10411500
2 2009 BMW X5

3 MY DAUGHTER WAS PUT IN THE BACKSEAT IN A HOT (100F) CAR
4 AND STRAPPED IN. MY WIFE PLACED HER PURSE (KEYS IN IT) ON
5 THE MIDDLE CONSOLE. THE DOOR WAS SHUT AND LOCKED ON
6 ITS OWN, LOCKING MY CHILD IN THE CAR. WE CALLED BMW
7 ASSIST TO REMOTELY UNLOCK THE CAR. THIS DID NOT WORK.
8 POLICE AND FIRE WAS CALLED AND SHOWED UP ON SEEN. A
9 NEIGHBOR FIREMAN CAME AND BROKE THE WINDOW. THE CAR
10 STILL WOULD NOT UNLOCK AND MY WIFE CRAWLED THROUGH
11 THE BROKEN WINDOW CUTTING HER LEG TO GET MY NOW HOT,
12 RED AND LETHARGIC CHILD OUT OF THE CAR. AFTERWARD, THE
13 CAR STILL WOULD NOT UNLOCK FOR 2 HOURS.

14 -Date complaint filed 6/21/2010, NHTSA ID Number 10339251
15 2009 BMW X5

16 MY WIFE HAD A HARROWING EXPERIENCE WITH THE 09 BMW-X5
17 LOCKING ITSELF WITH THE KEY IN THE CAR. REMOTE KEY WAS
18 INSIDE THE CAR IN HER PURSE ON THE PASSENGER SEAT-
19 UNTOUCHED BY ANYONE. CAR WAS PARKED WITH ENGINE OFF.
20 CAR LOCKED ITSELF AFTER OUR TWO KIDS WERE SECURED IN
21 THE BACKSEATS AND THEIR DOORS SHUT WITH MY WIFE
22 OUTSIDE! IT WAS OVER 90 DEGREES OUTSIDE AND SHE DID NOT
23 HAVE MUCH TIME TO CALL FOR HELP. MY 5 YEAR OLD'S
24 ATTEMPTS TO OPEN THE DOOR RESULTED IN ALARM GOING OFF
25 AND EVERYTHING SHUT DOWN. FINALLY, BY LUCK, SHE WAS
26 ABLE TO GUIDE THE 5 YEAR OLD TO GET TO THE FRONT SEAT
27 AND LOCATE THE KEY FROM THE PURSE AND UNLOCK THE CAR.
28 IF IT WAS ONLY THE 2 YEAR OLD INSIDE, SHE HAD NO OPTION
BUT TO BREAK THE WINDOW! THIS IS A REALLY SCARY
SITUATION FOR A LUXURY CAR AND A BRAND NEW ONE. IT HAD
NEVER HAPPENED TO US. SURELY WE DO NOT WANT TO
EXPERIENCE THIS AGAIN AND WISH IT ON NO ONE ELSE! WE
SUSPECT THAT IT HAD TO BE SOMETHING TO DO WITH THE
ELECTRONICS. IT HAS NOT OCCURRED AGAIN IN THE LAST 3
DAYS. THE REMOTE KEY IN THESE CARS ARE DESIGNED IN SUCH
A WAY THAT THE CAR SHOULD NOT BE ABLE TO LOCK ITSELF
WITH THE KEY INSIDE THE CAR AND THE DRIVER OUT!

1 -Date complaint filed 12/3/2014, NHTSA ID Number 10662059
2 2013 BMW X5

3 ON 3 SEPARATE OCCASIONS THE ELECTRIC DOOR LOCKS HAVE
4 LOCKED THE CAR WITH THE KEY FOB INSIDE THE CAR. ON THE
5 1ST OCCASION , A 2 Y/O CHILD HAD JUST BEEN STRAPPED INTO
6 HIS CAR SEAT , A PURSE WITH THE KEY INSIDE THE PURSE , WAS
7 PLACED ON THE FLOOR BEHIND THE DRIVER'S SEAT , THE REAR
8 DOOR WAS CLOSED & ALL LOCKS WERE ACTIVATED . THIS
9 OCCURRED IN THE HEAT OF SUMMER & REQUIRED ANOTHER
10 DRIVER WITH A SPARE FOB TO QUICKLY DRIVE TO THE SITE OF
11 THE PARKED CAR & AVOID HAVING TO BREAK A WINDOW . THIS
12 WAS A VERY SCARY MOMENT ! SAME THING HAPPENED (NO
13 CHILD IN CAR) ; ALL DOORS LOCKED WHEN A BRIEFCASE
14 CONTAINING BOTH KEY FOBS WAS PLACED ON BACK SEAT &
15 REAR DOOR WAS CLOSED . A CALL TO BMW HOT LINE RESULTED
16 IN THE DOORS BEING UNLOCKED VIA THE AIRWAYS .THE SAME
17 INCIDENT OCCURED THIS WEEK WITH ONLY ONE KEY FOB IN
18 THE CAR . THE VEHICLE WAS CHECKED BY THE LOCAL DEALER
19 & NO PROBLEMS WERE FOUND . IT SEEMS THERE IS A POTENTIAL
20 PROBLEM & I WISH TO DOCUMENT SUCH FACT SO AS TO
21 HOPEFULLY PREVENT UNEXPECTED DOOR LOCK ACTIVATION
22 WITH SMALL CHILDREN IN THE CAR.

17 14. Complaint ID Number 1041150 clearly indicates that on or before July
18 8, 2011, a consumer called BMW NA, and advised BMW NA of a Class Vehicle
19 spontaneously locking, while the Class Vehicle's remote was located inside the
20 Class Vehicle.

21 15. On October 19, 2015, Kieva experienced the Comfort Access Defect.
22 Kieva opened the rear door of the Kieva Vehicle, placed Kieva's child inside the
23 Kieva Vehicle, placed the remote inside the Kieva Vehicle, and shut rear door of
24 the Kieva Vehicle. Next, Kieva walked around to the driver's door, and attempted
25 to open the driver's door. Prior to Kieva getting to the driver's door, the Kieva
26 Vehicle locked, locking Kieva out of the Kieva Vehicle, and locking her very
27 young child inside the Kieva Vehicle. Kieva's child was too young to know how to
28 open the door to the Kieva Vehicle, and was trapped inside the Kieva Vehicle.

1 16. To summarize, the Kieva Vehicle locked even though the Kieva
2 Vehicle's remote was located inside the Kieva Vehicle. This resulted in Kieva's
3 child being locked inside the Kieva Vehicle. In order to rescue Kieva's child, it was
4 necessary to break one of the Kieva Vehicle's windows, doing damage to the Kieva
5 Vehicle, and terrifying Kieva's child.

6 17. From 1998 to 2015, every year at least 24 children have died from
7 heatstroke as the result of being locked inside vehicles. A child being locked inside
8 of a vehicle creates a very serious threat to human life. Class Vehicles locking by
9 themselves is extremely unsafe. The Class Vehicles' owners' manual states that a
10 Class Vehicle cannot be locked if the Class Vehicle's remote is located inside the
11 Class Vehicle. Shockingly, Class Vehicles have locked while their remotes, as well
12 as children, have been located inside the Class Vehicles, placing these children at
13 risk of being killed.

14 18. Following Kieva's harrowing occurrence of October 19, 2015, a
15 complaint was made by Kieva's family to BMW NA regarding the October 19,
16 2015 occurrence. In response to this complaint, on November 4, 2015, Jay Hanson
17 of BMW NA wrote an email to the Kieva family. An excerpt of Mr. Hanson's email
18 reads as follows, "Therefore, we must be dealing either with a malfunction of the
19 locking system or an inadvertent activation of the locking system via either the
20 remote transmitter or the Comfort Access System. Again, it is not impossible to
21 lock a key in the vehicle – and to do so is not necessarily indicative of a
22 malfunction. For example, if a door other than the driver's door is open and the
23 locking button on the transmitter is pressed, the vehicle will lock when the open
24 door is closed. If the user is unaware of having pressed the locking button, then it
25 would certainly appear that it had somehow locked itself." Mr. Hanson's email
26 completely contradicts the BMW NA owner's manual, which states, "To lock the
27 vehicle, the remote control must be located outside of the vehicle."
28

1 19. BMW NA widely advertises, publishes, publicizes, and disseminates to
2 the public that the Class Vehicles are extremely safe vehicles, and are in fact, “The
3 Ultimate Driving Machine.” Furthermore, BMW NA’s owners manual written for
4 the Class Vehicles clearly advises consumers that, “To lock the vehicle, the remote
5 must be outside the vehicle.” Contrary to these representations, the Class Vehicles
6 are not safe, and have a defect which has resulted in children being locked inside
7 Class Vehicles. Furthermore, contrary to the representations in the owner’s manual
8 relating to the Class Vehicles, BMW has actually confirmed that it is possible to
9 lock a Class Vehicle with the remote being located inside the Class Vehicle.

10 20. One complaint submitted to the National Highway Traffic Safety
11 Administration indicates that on or before July 8, 2011, a consumer specifically
12 advised BMW NA that a 2009 BMW X5 spontaneously locked while the the 2009
13 BMW X5’s remote was located inside the vehicle. BMW NA and BMW AG share
14 information regarding consumer complaints. As such, BMW NA and BMW AG
15 have known about this complaint dating back to July 8, 2011, and probably even
16 before that date. Notwithstanding, BMW NA and BMW AG have refused to make
17 repairs in order to resolve the Comfort Access Defect, have refused to advise
18 consumers of the Comfort Access Defect, have refused to modify Class Vehicle
19 owner’s manuals so that they are accurate, and have refused to pay for damage
20 suffered to consumers as a result of the Comfort Access Defect.

21 21. Furthermore, Mr. Hanson’s email of November 4, 2015 acknowledges
22 that a Class Vehicle can be locked while the Class Vehicle’s remote is inside the
23 Class Vehicle, and confirms BMW’s knowledge that the Class Vehicle’s owner’s
24 manual is false and misleading.

1 22. BMW NA has been advised of the damages sustained as a result of the
2 Kieva Vehicle experiencing the Comfort Access Defect, however BMW has failed
3 to unconditionally reimburse Kieva for all of the damages that have resulted from
4 the Comfort Access Defect.

5 23. As a result of BMW NA's misconduct, Kieva and the other owners and
6 lessees of Class Vehicles have been harmed and have suffered actual damages. The
7 actual damages include but are not limited to the fact that Class Vehicles continue
8 to experience the Comfort Access Defect, that Class Members have suffered
9 unreimbursed out of pocket expenses as a result of the Comfort Access Defect, and
10 that the Class Vehicles continue to have inaccurate owner's manuals.

11 24. BMW NA and BMW AG knew or should have known that the Class
12 Vehicles were defective and not fit for their intended purpose of providing
13 consumers with safe and reliable transportation. Nevertheless, BMW NA and
14 BMW AG actively concealed and failed to disclose this defect to Kieva and the
15 Class Members at the time of purchase or lease and thereafter.

16 25. BMW NA and BMW AG have failed to notify Class Members of the
17 Comfort Access Defect, placing consumers at risk of suffering injury and financial
18 loss.

19 26. It is Kieva's information and belief that the Comfort Access Defect is a
20 pervasive defect affecting every single Class Vehicle, and posing a serious safety
21 hazard for the general public.

22 27. BMW NA and BMW AG have superior and exclusive knowledge of
23 the Comfort Access Defect. BMW NA and BMW AG knew that the defect was not
24 known or reasonably discoverable by Kieva and Class Members prior to their
25 purchase or lease of the Class Vehicles.

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1 28. Only BMW NA and BMW AG had access to information about the
2 significant risks associated with the Comfort Access Defect, through BMW NA's
3 dealerships, pre-release testing data, warranty data, customer complaint data, and
4 replacement part sales data, among other internal sources of aggregate information
5 about the problem.

6 29. While BMW NA and BMW AG have been fully aware of the Comfort
7 Access Defect in the Class Vehicles, BMW NA and BMW AG have actively
8 concealed the existence and nature of the Comfort Access Defect from Kieva and
9 Class Members at the time purchase or sale and thereafter. Specifically, BMW NA
10 and BMW AG have:

11 a. failed to disclose, at and after the time of purchase or lease and
12 repair, any and all known material defects or material nonconformity of the Class
13 Vehicles, including the Comfort Access Defect;

14 b. failed to disclose at the time of purchase or lease that the Class
15 Vehicles were not in good in working order, were defective, and were not fit for
16 their intended purposes; and

17 c. not properly instructed BMW NA authorized repair facilities
18 regarding the true nature of the Comfort Access Defect. BMW NA has instead
19 made false statements that that there is nothing wrong with the Class Vehicles, and
20 that Class Vehicles cannot be locked if the Class Vehicles' remotes are inside the
21 Class Vehicles. Consequently, this misinformation provided by BMW NA has
22 resulted in complaining consumers being told that there is nothing wrong with their
23 Class Vehicles.

24 30. Kieva and Class Members have expended money to make repairs as a
25 result of the Comfort Access Defect, despite BMW NA and BMS AG's knowledge
26 of the defect.

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1 31. The Members of the Class have not received the value for which they
2 bargained when they purchased or leased the Class Vehicles.

3 32. As a result of the defects, the value of the Class Vehicles has
4 diminished, including without limitation re-sale value.

5
6 **TOLLING OF THE STATUTE OF LIMITATIONS**

7 33. Since the defects in the design or manufacture of the Class Vehicles
8 cannot be detected until the defect manifests itself, Kieva and the Class Members
9 were not reasonably able to discover the problem until after purchasing or leasing
10 the Class Vehicles, despite their exercise of due diligence.

11 34. Kieva and the Class Members had no realistic ability to discern that the
12 Class Vehicles were defective until after Kieva and the Class Members experienced
13 the Comfort Access Defect. In addition, despite their due diligence, Kieva and the
14 Class Members could not reasonably have been expected to learn or discover that
15 they were deceived and that material information concerning the Class Vehicles
16 had been concealed from them until manifestation of the Comfort Access Defect.
17 Therefore, the discovery rule is applicable to the claims asserted by Kieva and the
18 Class Members.

19 35. BMW NA and BMW AG have known of the defect in the Class
20 Vehicles, and have concealed from or failed to alert owners and lessees of the Class
21 Vehicles of the full and complete nature of the Comfort Access Defect.

22 36. Any applicable statute of limitation was tolled by BMW NA and BMW
23 AG's knowledge, active concealment, and denial of the facts alleged herein. BMW
24 NA and BMW AG are further estopped from relying on any statute of limitation
25 because of its concealment of the defective nature of the Class Vehicles.

CLASS ACTION ALLEGATIONS

1
2 37. Kieva brings this lawsuit as a class action on behalf of herself and all
3 other Class Members similarly situated pursuant to Federal Rule of Civil Procedure
4 23. This action satisfies the numerosity, commonality, typicality, adequacy,
5 predominance, and superiority requirements of those provisions.

6 38. The Class and Sub-Class are defined as:

7 Class: All Persons in the State of California who purchased
8 or leased a Class Vehicle.

9 Sub-Class: All Class Members who are “consumers” within
10 the meaning of California Civil Code § 1761(d). Excluded
11 from the Class and Sub-Classes are: (1) Defendants, any
12 entity or division in which Defendants has a controlling
13 interest, and its legal representatives, officers, directors,
14 assigns, and successors; (2) the Judge to whom this case is
15 assigned and the Judge’s staff; and (3) those persons who
16 have suffered personal injuries as a result of the facts alleged
17 herein. Kieva reserves the right to amend the Class and Sub-
18 Classes definitions if discovery and further investigation
19 reveal that the Class and Sub-Classes should be expanded or
20 otherwise modified.

21 39. Numerosity: Although the exact number of Class Members is uncertain
22 and can only be ascertained through appropriate discovery, the number is great
23 enough such that joinder is impracticable. The disposition of the claims of these
24 Class Members in a single action will provide substantial benefits to all parties and
25 to the Court. The Class Members are readily identifiable from information and
26 records in Defendants’ possession, custody, or control, as well as from records kept
27 by the Department of Motor Vehicles.

1 40. Typicality: The claims of the representative Kieva are typical of the
2 claims of the Class in that the representative Kieva, like all Class Members,
3 purchased and/or leased a Class Vehicle designed, manufactured, and distributed by
4 BMW NA and BMW AG. The representative Kieva, like all Class Members, has
5 been damaged by Defendants' misconduct in that she has incurred or will incur the
6 cost of repairs relating to the Comfort Access Defect. Furthermore, the factual
7 bases of BMW NA and BMW AG's misconduct are common to all Class Members
8 and represent a common thread of fraudulent, deliberate, and negligent misconduct
9 resulting in injury to all Class Members.

10 41. Commonality: There are numerous questions of law and fact common
11 to Kieva and the Class that predominate over any question affecting only individual
12 Class Members. These common legal and factual issues include the following:

- 13 a. whether the Class Vehicles suffer from the Comfort Access
14 Defect;
- 15 b. whether the Comfort Access Defect constitutes an unreasonable
16 safety risk;
- 17 c. whether Defendants know about the Comfort Access Defect and,
18 if so, how long Defendants have known of the defect;
- 19 d. whether the defective nature of the Class Vehicles constitutes a
20 material fact;
- 21 e. whether Defendants have a duty to disclose the defective nature
22 of the Class Vehicles to Kieva and Class Members;
- 23 f. whether Kieva and the other Class Members are entitled to
24 equitable relief, including but not limited to a preliminary and/or permanent
25 injunction.

1 g. Whether Defendants knew or reasonably should have known of
2 the Comfort Access Defect in the Class Vehicles before the Class Vehicles were
3 sold or leased them to Class Members;

4 h. Whether Defendants should be declared financially responsible
5 for notifying all Class Members of the problems with the Class Vehicles and for the
6 costs and expenses of repair and replacement of the Class Vehicles;

7 i. Whether Defendants breached the express terms of the BMW
8 NA warranty by refusing to pay for repairs relating to the Comfort Access Defect
9 during the term of the warranty;

10 j. Whether Defendants concealed and refused to disclose the
11 nature of the Comfort Access Defect from purchasers and lessees of Class Vehicles
12 at the time of sale and otherwise;

13 k. Whether Class Members have suffered loss as a result of the
14 Comfort Access Defect, and to what extent BMW NA and BMW AG are obligated
15 to compensate the Class Members for any and all losses.

16 42. Adequate Representation: Kieva will fairly and adequately protect the
17 interests of the Class Members. Kieva has retained attorneys experienced in the
18 prosecution of class actions, including consumer and product defect class actions,
19 and Kieva intends to prosecute this action vigorously.

20 43. Predominance and Superiority: Kieva and the Class Members have all
21 suffered and will continue to suffer harm and damages as a result of Defendants'
22 unlawful and wrongful conduct. A class action is superior to other available
23 methods for the fair and efficient adjudication of the controversy. Absent a class
24 action, most Class Members would likely find the cost of litigating their claims
25 prohibitively high and would therefore have no effective remedy at law. Because of
26 the relatively small size of the individual Class Members' claims, it is likely that
27 only a few Class Members could afford to seek legal redress for Defendants'
28

1 misconduct. Absent a class action, Class Members will continue to incur damages,
2 and Defendants' misconduct will continue without remedy. Class treatment of
3 common questions of law and fact would also be a superior method to multiple
4 individual actions or piecemeal litigation in that class treatment will conserve the
5 resources of the courts and the litigants, and will promote consistency and
6 efficiency of adjudication.

7
8 **FIRST CAUSE OF ACTION**

9 Violation of Business & Professions Code § 17200, et seq.

10 Against All Defendants

11 44. Kieva hereby incorporates by reference the allegations contained in the
12 preceding paragraphs of this Complaint.

13 45. Business & Professions Code § 17200 prohibits acts of "unfair
14 competition," including any "unlawful, unfair or fraudulent business act or
15 practice" and "unfair, deceptive, untrue or misleading advertising."

16 46. Kieva and the Class Members are reasonable consumers who do not
17 expect their Class Vehicles to experience the Comfort Access Defect, who expect
18 their owner's manuals to be accurate, and who do not expect their Class Vehicles to
19 spontaneously lock. These are reasonable and objective consumer expectations
20 relating to the Class Vehicles.

21 47. Defendants know and have known that the Class Vehicles suffer from
22 an inherent defect, were defectively designed or manufactured, would experience
23 the Comfort Access Defect, and were not suitable for their intended use.

24 48. In failing to disclose the Comfort Access Defect, Defendants have
25 knowingly and intentionally concealed material facts and breached their duty not to
26 do so.

1 49. Defendants were under a duty to Kieva and the Class Members to
2 disclose the defective nature of the Class Vehicles because:

3 a. Defendants were in a superior position to know the true state of
4 facts about the Comfort Access Defect in the Class Vehicles;

5 b. Defendants made partial disclosures about the quality of the
6 Class Vehicles without revealing the defective nature of the Class Vehicles; and,

7 c. Defendants actively concealed the defective nature of the Class
8 Vehicles from Kieva and the Class Members.

9 50. The facts concealed and not disclosed by Defendants to Kieva and the
10 Class Members are material in that a reasonable person would have considered
11 them to be important in deciding whether to purchase the Class Vehicles. Had
12 Kieva and other Class Members known that the Class Vehicles had the Comfort
13 Access Defect, Kieva and the Class Members would not have purchased Class
14 Vehicles.

15 51. Defendants continued to conceal the defective nature of the Class
16 Vehicles even after Class Members began to report problems. Indeed, Defendants
17 continue to cover up and conceal the true nature of the Comfort Access Defect.
18 Defendants did not disclose to consumers that the Comfort Access Defect exists,
19 did not reimburse consumers for costs incurred in connection with the Comfort
20 Access Defect, and did not correct mistakes in Class Vehicles' owner's manuals.

21 52. Defendants have engaged in unfair competition and unlawful, unfair,
22 and fraudulent business practices.

23 53. The unfair or deceptive acts or practices occurred repeatedly in
24 Defendants' trade or business, and were capable of deceiving a substantial portion
25 of the purchasing public.

26 54. As a direct and proximate result of Defendants' unfair and deceptive
27 practices, Kieva and the Class have suffered and will continue to suffer damages.

28

1 55. Defendants were unjustly enriched and should be required to make
2 restitution to Kieva and the Class pursuant to §§ 17203 and 17204 of the Business
3 & Professions Code.

4
5 **SECOND CAUSE OF ACTION**

6 Fraud by Omission

7 Against All Defendants

8 56. Kieva hereby incorporates by reference the allegations contained in the
9 preceding paragraphs of this Complaint.

10 57. It is Kieva's information and belief that BMW NA and BMW AG
11 knew or should have known that the Comfort Access Defect in the Class Vehicles
12 was a condition rendering the Class Vehicles defectively designed or manufactured,
13 causing the Class Vehicles to be unsafe, and rendering the Class Vehicles not
14 suitable for their intended use.

15 58. Defendants concealed from and failed to disclose to Kieva and the
16 Class the defective nature of the Class Vehicles.

17 59. Defendants concealed from and failed to disclose to Kieva and the
18 Class the inaccuracies in the Class Vehicles' owner's manuals.

19 60. Defendants were under a duty to Kieva and the Class to disclose the
20 defective nature of the Comfort Access Defect because:

21 a. Defendants were in a superior position to know the true state of
22 facts about the Comfort Access Defect in the Class Vehicles;

23 b. Defendants made partial disclosures about the quality of the
24 Class Vehicles without revealing the defective nature of the Class Vehicles;

25 c. Defendants actively concealed the defective nature of the Class
26 Vehicles from Kieva and the Class;

1 d. The Comfort Access Defect posed a serious safety hazard for
2 Class Members, as well as the general public.

3 61. The facts concealed or not disclosed by Defendants to Kieva and the
4 Class Members are material in that a reasonable person would have considered
5 them to be important in deciding whether to purchase the Class Vehicles. Had
6 Kieva and other Class Members known that the Class Vehicles had the Comfort
7 Access Defect, Kieva and the Class Members would not have purchased and leased
8 Class Vehicles, or would have paid less for them.

9 62. Defendants continued to conceal the defective nature of the Class
10 Vehicles even after Class Members began to report problems. Indeed, Defendants
11 continue to cover up and conceal the true nature of the problem.

12 63. Defendants concealed or failed to disclose the true nature of the design
13 or manufacturing defect consisting of the Comfort Access Defect existing in its
14 Class Vehicles, in order to induce Kieva and the Class to act thereon. Kieva and the
15 Class Members justifiably relied on the omission to their detriment. This detriment
16 is evident from Kieva's and Class Members' purchase or lease of Defendants' Class
17 Vehicles.

18 64. Defendants continued to conceal the defective nature of the Class
19 Vehicles even after Members of the Class began to report problems. Indeed,
20 Defendants continue to cover up and conceal the true nature of the problem today,
21 including denying reimbursement of repair costs related to repairs that have been
22 necessary due to the Comfort Access Defect.

23 65. As a direct and proximate result of Defendants' misconduct, Kieva and
24 the Class Members have suffered and will continue to suffer actual damages
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THIRD CAUSE OF ACTION

Breach of Implied Warranty

Against All Defendants

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2
3
4 66. Kieva hereby incorporates by reference the allegations contained in the
5 preceding paragraphs of this Complaint.

6 67. BMW NA and BMW AG were the manufacturer, distributor,
7 warrantor, and seller of the Class Vehicles. BMW NA and BMW AG knew or had
8 reason to know of the specific use for which the Class Vehicles were purchased or
9 leased.

10 68. BMW NA and BMW AG provided Kieva and the Class Members with
11 an implied warranty that the Class Vehicles and their components and parts were
12 merchantable and fit for the ordinary purposes for which they were sold. However,
13 the Class vehicles were and are not fit for their ordinary purpose of providing
14 reasonably reliable and safe transportation, because the Comfort Access Defect
15 results in the Class Vehicles being unsafe.

16 69. BMW NA and BMW AG impliedly warranted that the Class Vehicles
17 were of merchantable quality and fit for such use. This implied warranty included a
18 warranty that the Class Vehicles were safe and fit for their intended use. However,
19 the Class vehicles were and are not fit for their ordinary purpose of providing
20 reasonably reliable and safe transportation, because the Comfort Access Defect
21 results in the Class Vehicles being unsafe.

22 70. As a result of BMW NA's and BMW AG's breach of the applicable
23 implied warranties, owners and lessees of Class Vehicles have suffered
24 ascertainable loss of money, property and value of the Class Vehicles, as well as
25 suffering other damage.

FOURTH CAUSE OF ACTION

Violation of Consumer Legal Remedies Act

Against All Defendants

71. Kieva incorporates by reference the preceding paragraphs of this Complaint.

72. Civil Code section 1780(a) provides that any consumer who suffers damage as a result of a CLRA violation may bring an action to recover: 1) actual damages, but in no case shall the total award of damages in a class action be less than \$1,000, 2) an order enjoining the methods, acts, or practices, 3) restitution of property, 4) punitive damages, and 5) any other relief that the court deems proper.

73. Civil Code section 1781 provides that Kieva may pursue this case as a class action.

74. Kieva requests injunctive relief pursuant to Civil Code 1782(d).

75. Kieva is entitled to attorney fees pursuant to Civil Code section 1780(e).

RELIEF REQUESTED

76. Kieva, on behalf of herself, and all others similarly situated, requests the Court to enter judgment against Defendants, as follows:

a. An order certifying the proposed Class and Sub-Classes, designating Kieva as named representatives of the Class, and designating the Kieva's Counsel as Class Counsel;

b. A declaration that Defendants are financially responsible for notifying all Class Members about the defective nature of the Class Vehicles;

c. An order enjoining Defendants from further deceptive distribution, sales, and lease practices with respect to the Class Vehicles, and to

1 repair the Class Vehicles so that they will no longer possess the Comfort Access
2 Defect;

3 d. An award to Kieva and the Class of compensatory, exemplary,
4 and statutory damages, including interest, in an amount to be proven at trial;

5 e. An award to Kieva and the Class of any repair costs they are
6 owed;

7 f. A declaration that Defendants must disgorge, for the benefit of
8 the Class, all or part of the ill-gotten profits it received from the sale or lease of the
9 Class Vehicles, or make full restitution to Kieva and Class Members;

10 g. An award of attorneys' fees and costs, as allowed by law;

11 h. An award of attorneys' fees and costs pursuant to California
12 Code of Civil Procedure § 1021.5;

13 i. An award of pre-judgment and post-judgment interest;

14 j. Leave to amend the Complaint to conform to the evidence
15 produced at trial; and

16 k. Other relief as may be appropriate under the circumstances.
17

18 Date: January 24, 2016

The Law Office of Robert L. Starr

19
20 By: /s/ Robert Starr

21 Robert Starr
22 Attorney for Plaintiff
23 Kieva Myers, individually, and on
behalf of a class of similarly situated
individuals

24 DEMAND FOR JURY TRIAL

25 Plaintiff demands a jury trial pursuant to Federal Rule of Civil Procedure 38.
26

27 Date: January 24, 2016

/s/ Robert Starr

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and sub-categories with checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

05/4+

(Place an "X" in One Box Only) () SAN FRANCISCO/OAKLAND () SAN JOSE () EUREKA

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

1 Robert L. Starr, Bar No. 183052
robert@starrlawmail.com
2 THE LAW OFFICE OF ROBERT L. STARR, APC
23901 Calabasas Road, #20272
3 Calabasas, California 91302
Telephone: (818) 225-9040
4 Facsimile: (818) 225-9042

5 Stephen M. Harris, Bar No. 110626
stephen@smh-legal.com
6 THE LAW OFFICE OF STEPHEN M. HARRIS, APC
6320 Canoga Avenue, Suite 1500
7 Woodland Hills, California 91367
Telephone: (818) 924-3103
8 Facsimile: (818) 924-3079

9 Attorneys for Plaintiff
Kieva Myers, individually, and on behalf of a class
10 of similarly situated individuals

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

14 KIEVA MYERS, individually, and on
behalf of a class of similarly situated
15 individuals,

16 Plaintiff,

17 v.

18 BMW OF NORTH AMERICA, LLC, ,
BAYERISCHE MOTOREN WERKE
19 AKTIENGESELLSCHAFT,

20 Defendantss.
21
22

) NO.
) CLASS ACTION
)
) VENUE DECLARATION

23
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26
27
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1 I, Robert Starr, declare the following:

2 1. I am one of the attorneys representing plaintiff Kieva Myers in this action. I
3 have personal knowledge of the facts in this declaration and if called on to testify
4 about the facts I could and would competently do so.

5 2. Pursuant to Civil Code section 1780(d), the transaction that is the subject of
6 this action occurred in San Francisco County.

7 I declare under penalty of perjury under the laws of the United States of America
8 that the foregoing is true and correct.

9 Date: January 24, 2016

/s/ Robert Starr

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