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Co-Lead Plaintiffs' Counsel for Economic Loss Cases

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: TOYOTA MOTOR CORP. UNINTENDED ACCELERATION MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATES TO:

ALL ECONOMIC LOSS CASES

Case No. 8:10ML2151 JVS (FMOx)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF *EX PARTE* APPLICATION FOR CERTIFICATION OF SETTLEMENT CLASS, PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, AND APPROVAL OF CLASS NOTICE

Judge: Hon. James V. Selna

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I. INTRODUCTION

Plaintiffs' Class Counsel respectfully submit this Memorandum in Support of Plaintiffs' *Ex Parte* Application for Certification of Settlement Class, Preliminary Approval of Class Action Settlement, and Approval of Class Notice (the "Motion"). After three-years of intensely fought litigation involving hundreds of depositions, extensive expert discovery, nearly endless motion practice, appeals, and coming only three months from the close of discovery, Plaintiffs submit a proposed Settlement to the Court for preliminary approval.

The Settlement resolves all economic loss Class claims against Toyota in exchange for the following primary benefits:

1. ***Diminished Value Fund***. Toyota will pay $250,000,000 into a fund for distribution to Class Members filing valid claims for payment for alleged diminished value incurred in association with vehicle sales, trade-ins, early lease terminations, total loss, and residual guarantee payments during the period from September 1, 2009 to December 31, 2010, and for early lease terminations following a reported unintended acceleration event.
2. ***Brake Override System ("BOS") Installation***. Class Members who own or lease certain BOS-Eligible Vehicles may have a BOS installed by Toyota Dealers at no cost. The BOS will automatically reduce engine power when the brake pedal and the accelerator pedal are applied simultaneously under certain driving conditions. The estimated aggregate value of this benefit to the Class exceeds $406,000,000.
3. ***BOS-Ineligible Fund***. Toyota will pay $250,000,000 into a fund for distribution to Class Members who own or lease a Subject Vehicle as of the

date of the Preliminary Approval Order, unless: (i) their Subject Vehicle is a hybrid vehicle; (ii) they already actually received BOS on their Subject Vehicle; or (iii) they are eligible to receive BOS on their Subject Vehicle as described above.

4. ***Customer Support Program***. For all Class Members who own or lease their Subject Vehicles as of the date of Final Order and Final Judgment, Toyota will implement a Customer Support Program providing prospective coverage for repairs and adjustments needed to correct any defects in materials or workmanship in any of the following components related to the acceleration system in each Subject Vehicle: (i) Engine Control Module; (ii) Cruise Control Switch; (iii) Accelerator Pedal Assembly; (iv) Stop Lamp Switch; and (v) Throttle Body Assembly. The coverage period is the lesser of 10 years from the expiration of the existing warranty for each of these parts or 150,000 miles, subject to a minimum of three years of coverage. The aggregate value to the Class of the Customer Support Program should exceed $200,000,000.

5. ***Automobile Safety Research and Education Program***. Toyota will contribute $30,000,000 to fund automobile safety research and education related to issues in the litigation. The fund will be divided between contributions to university-based automobile and transportation research institutes and an education and information program for automobile drivers. Details associated with these planned programs and the university organizations that will lead them are provided in the Settlement.

Other benefits of the Settlement include Toyota's agreement to pay the costs of notice and administration, subject to potential reimbursement from unclaimed

settlement funds; Toyota's agreement to pay any Attorneys' Fee and Expense award up to $200 million in fees and $27 million in costs; and Toyota's agreement to pay any Plaintiff and Class Representative awards of up to $100 per hour per Plaintiff and Class Representative for their time devoted to the case, subject to a $2,000 minimum.

When these benefits are added to the cash payments to Class Members, the estimated aggregate values of the BOS installations and the Customer Support Program, and the Automobile Safety Research and Education Fund, the Settlement as a whole is conservatively valued by Plaintiffs at over **$1.3 Billion** – a landmark, if not a record, settlement in automobile defect class action litigation in the United States.

The Settlement will be communicated to the Class through a robust and intensive direct mail and national media Notice Plan coordinated by media experts. And the Settlement terms also ensure that Class Members will be able to claim their benefits easily. In order to take advantage of the Customer Support Program, if needed, and the BOS installations, if eligible, Class Members need only take their Subject Vehicles to a Toyota Dealer. Eligible Class Members will receive cash payments from the Diminished Value and BOS-Ineligible Funds after completing a simple, consumer-friendly Claim Form that can be submitted online.

The proposed Settlement is fair, reasonable, and adequate. It has been reached after extensive arm's-length, intensely fought negotiation, all of which were conducted under the auspices of Court appointed Settlement Special Master Patrick A. Juneau. Accordingly, Plaintiffs seek preliminary approval of the Settlement and certification of the Class for settlement purposes and request, *inter alia*, that the

Court order that notice of the Settlement be disseminated to the Class, and that the Court schedule a Fairness Hearing to determine whether final approval of the Settlement should be granted. A Proposed Preliminary Approval Order is attached as Exhibit 7 to the Settlement Agreement filed with the Motion.

II. DESCRIPTION OF THE PROPOSED SETTLEMENT

The Settlement Agreement filed with the Court (the "Agreement") and the exhibits thereto provide all of the material details of the Settlement terms. Below is a summary of the more salient provisions contained in those documents.[1]

A. The Proposed Settlement Class

The proposed settlement Class is defined as:

> All persons, entities or organizations who, at any time as of or before the entry of the Preliminary Approval Order, own or owned, purchase(d), lease(d) and/or insure(d) the residual value, as a Residual Value Insurer, of all Subject Vehicles equipped or installed with an ETCS (as listed in Exhibit 10 to the Settlement Agreement) distributed for sale or lease in any of the fifty States, the District of Columbia, Puerto Rico and all other United States territories and/or possessions. Excluded from the Class are: (a) Toyota, their officers, directors and employees; their affiliates and affiliates' officers, directors and employees; their distributors and distributors' officers, directors and employees; and Toyota Dealers and Toyota Dealers' officers and directors; (b) Plaintiffs' Class Counsel, Allocation Counsel and their employees; (c) judicial officers and their immediate family members and associated court staff assigned to this case; and (d) persons or entities who or which timely and properly exclude themselves from the Class as provided in this Agreement.[2]

[1] Terms capitalized herein have the meanings ascribed to them in the Agreement. If there is any conflict between the description of the Settlement terms in this brief and the terms set forth in the Agreement, the Agreement controls.

[2] Agreement at 5-6.

The List of Subject Vehicles, set forth at Exhibit 10 to the Settlement Agreement, identifies 26 Toyota models, 12 Lexus models, and three Scion models spanning specified model years. All of these vehicles, which are referred to as the "Subject Vehicles," have been at issue in this litigation.

The proposed Class Representatives are: Karina Brazdys, John Moscicki, Dale Baldisseri, Peggie Perkin, Kathleen Atwater, Georgann Whelan, Ann Fleming-Weaver, Nancy Seamons, Linda Savoy, Donald Graham, Shirley Ward, John and Mary Ann Laidlaw, Judy Veitz, Victoria and Barry Karlin, Elizabeth Van Zyl, Green Spot Motors Co., Deluxe Holdings Inc., and Auto Lenders Liquidation Center, Inc. Each of these proposed Class Representatives is a Plaintiff named in the Third Amended Economic Loss Master Consolidated Complaint.

B. The Settlement Benefits

In consideration for the dismissal of the Actions with prejudice and a full and complete release of claims by all Plaintiffs, Class Representatives, and Class Members, Toyota agrees to provide the following Settlement benefits.[3]

1. Cash payment for alleged diminished value.

Within 30 days of the Final Effective Date,[4] Toyota will deposit $250,000,000 into the Escrow Account for payment for alleged diminished value (the "Diminished Value Fund"). This will be available to distribution to eligible Class Members who:

[3] In addition to these benefits, as discussed below, Toyota has also agreed to (i) advance the costs of notice and claims administration, and (ii) separately pay any attorneys' fee and expense award and any awards to individual Plaintiffs and Class Representatives.

[4] "Final Effective Date" means the latest date on which the Final Order or Final Judgment approving the Agreement becomes final. Agreement at 7-8.

1. Sold or traded in a Subject Vehicle they owned during the period from September 1, 2009 to December 31, 2010, inclusive;
2. Returned a Subject Vehicle before the lease termination date during the period from September 1, 2009 to December 31, 2010, inclusive;
3. Insured and/or guaranteed the residual value of a Subject Vehicle as of September 1, 2009, and with respect to such Subject Vehicle, thereafter either made payment to an insured, or sold the Subject Vehicle, provided such payment or sale was made by a Residual Value Insurer on or before December 31, 2010;
4. Returned a leased Subject Vehicle before the lease termination date after having reported an alleged unintended acceleration event to Toyota, a Toyota Dealer, or the National Highway Transportation Safety Administration ("NHTSA"), before December 1, 2012; or
5. Had a Subject Vehicle that was declared a total loss by an insurer during the period from September 1, 2009 to December 31, 2010, inclusive.[5]

The period September 1, 2009 to December 31, 2010 is significant because this is the period for which Plaintiffs' expert witness has determined that the Subject Vehicles suffered a loss in value due to publicity associated with UA events. Plaintiffs' expert found no economic harm associated with sales before and after this period, except for instances of early lease terminations following a UA event.

[5] Agreement at 13.

2. Brake Override System ("BOS") for BOS-Eligible Vehicles.

Class Members who, as of the date the Preliminary Approval Order is entered, own or lease any of the BOS-Eligible Vehicles listed in Exhibit 11 to the Agreement, may have BOS installed by Toyota Dealers at no cost. The BOS will automatically reduce engine power when the brake pedal and the accelerator pedal are applied simultaneously under certain driving conditions. This benefit will be transferable with the Subject Vehicle. The Vehicle Identification Numbers ("VINs") for all eligible Subject Vehicles will be identified in Toyota's systems so that an eligible Subject Vehicle taken to a Toyota Dealer can be identified and have BOS installed. Toyota will begin to offer this benefit over time, beginning after final approval by the Court, and the benefit will be available for two years from the date Toyota gives notice on the Settlement website that BOS is available for that Subject Vehicle.[6]

It is estimated that over 2.7 million Subject Vehicles have not previously been offered BOS and will now be eligible to receive BOS pursuant to the Settlement. In addition, beginning in 2010, Toyota offered the installation of BOS with respect to approximately 3.2 million models and model years identified in Exhibit 11 to the Agreement, of which approximately 550,000 have not yet received BOS. Toyota will continue to offer to install BOS on those BOS-Eligible Vehicles that have not yet received BOS, and Toyota will send those Class Members a reminder of this benefit.[7] Thus, a total of 3,250,000 Subject Vehicles will be eligible to receive BOS under the Settlement, providing an estimated aggregate value of $406,250,000 to

[6] *Id.* at 14-15.

[7] *Id.* In addition, hybrid Subject Vehicles already have Parts Protection Logic that, among other things, performs a similar function as BOS. *Id.* at 15.

these Class Members based on Plaintiffs' expert's estimate that it would cost these Class Members an average of $125 to have the BOS installed if they were to pay for it outside of the Settlement.

3. Cash payment in lieu of BOS.

Within 30 days of the Final Effective Date, Toyota will deposit another $250,000,000 into the Escrow Account. This "BOS-Ineligible Fund" will be available to distribution to eligible Class Members who own or lease a Subject Vehicle as of the date the Preliminary Approval Order, unless: (i) their Subject Vehicle is a hybrid vehicle; (ii) they already actually received BOS on their Subject Vehicle; or (iii) they are eligible to receive BOS on their Subject Vehicle as described above.[8]

4. Customer Support Program.

If the Settlement is finally approved, Toyota will offer a Customer Support Program to all Class Members who own or lease their Subject Vehicles as of the date of Final Order and Final Judgment. The Customer Support Program will provide prospective coverage for repairs and adjustments needed to correct defects in materials or workmanship in any of the following components that Plaintiffs allege are related to instances of UA: (i) Engine Control Module; (ii) Cruise Control Switch; (iii) Accelerator Pedal Assembly; (iv) Stop Lamp Switch; and (v) Throttle Body Assembly.[9]

The duration of prospective coverage will begin following the date of Final Order and Final Judgment and will be calculated based on 10 years from the

[8] *Id.*

[9] *Id.* at 16.

expiration of the existing warranty for each of these parts, with a maximum limit of 150,000 miles from the vehicle's in-service date, which is the first date the vehicle is either delivered to an ultimate purchaser, leased, or used as a company car or demonstrator. Regardless of mileage or warranty expiration, each eligible Subject Vehicle will receive no less than three years of coverage from the date of Final Order and Final Judgment. The VIN numbers for the Subject Vehicles will be identified in Toyota systems so that eligible Subject Vehicles taken to Toyota Dealers can be identified and the benefit provided, if needed, free-of-charge.[10]

It is estimated that approximately 16.3 million Subject Vehicles are eligible for this benefit,[11] providing an aggregate benefit to the Class exceeding $200,000,000 based on estimates of the retail value of the coverage provided by the program.

5. Automobile Safety Research and Education Program.

Within 30 days of the Final Effective Date, and for the benefit of all Class Members, Toyota will contribute $30,000,000 to fund automobile safety research and education related to issues in the litigation. The fund will be divided between contributions to university-based automobile/transportation research institutes and an education/information program for automobile drivers. Additional funding for the automobile safety research and education fund may come from unclaimed Settlement monies as further discussed below.[12]

[10] *Id.* at 16-17.
[11] *Id.* at 17.
[12] *Id.*

The research and education program will have the following three components.

a. Research focused on consumer knowledge and use of defensive driving techniques.

The program will start with a new national consumer study, to be undertaken by a leading U.S. university, focused on driver attitudes, behaviors and levels of understanding concerning defensive driving techniques and the proper use of new automotive technology. We expect that the study will be conducted by the University of Iowa Public Policy Center.[13] Approximately $800,000 will be budgeted to fund the study.

The study will focus on identifying critical gaps in awareness and practice regarding defensive driving skills, as well as on pinpointing the messages and techniques most effective in encouraging safer driver behavior and improving awareness and use of active safety technologies. Specific driver behaviors to be studied will include, but not be limited to, techniques for controlling and stopping vehicles in emergency situations; driver distraction; issues relating to driver pedal misapplication; and proper use by drivers of anti-lock brakes and other advanced technologies made possible by electronic throttle control systems, such as brake override systems, vehicle stability control, and radar cruise control.

The study will be an academically rigorous field study intended to inform the National Driver Safety Education campaign described below; inform ongoing and future research by other institutions, safety agencies, and industry; and support other national and community-based driver safety education campaigns. The selected

[13] If, prior to Final Approval, the parties select another leading university to conduct the study, we will inform the Court.

university may choose to retain a survey firm to help to develop and implement the field portions of the study.[14]

b. National driver safety education campaign.

The National Driver Safety Education campaign will follow the research described above and will be guided by its results. The campaign will include a combination of print, television, digital, and radio advertising to deliver the content of the program with the goal of reaching 90 percent of adults in key target markets 12 times over the length of the campaign. Approximately $14.2 million will be budgeted for this campaign, which would cover all costs of the campaign, including, but not limited to, the cost of producing the advertisements and buying the media space.[15]

The parties expect the campaign to be undertaken by the University of Iowa Public Policy Center, but the parties may select another leading university or national safety organization prior to the Final Approval Order. The selected education organization will develop and suggest a plan, describing in detail the content, components and implementation of the campaign, subject to review by Plaintiffs' Class Counsel and Toyota's Negotiating Counsel, with the Settlement Special Master, as needed, resolving any disagreements. The campaign may utilize consumer research data to inform messaging designed to change public attitudes and improve driving behaviors. The campaign would be supported by digital assets such as a website and social media to provide insights about common driving errors taken from the survey and tools/videos/tests/classroom materials to help educators instruct

[14] Agreement, Exhibit 15 at 1-2.

[15] *Id.* at 2.

drivers about what to do in an emergency. Safety experts from Toyota's Collaborative Safety Research Center may be engaged to help educate consumers about defensive driving techniques and active safety technologies as part of this campaign, but shall not be paid from the fund to do so.[16]

c. Safety research.

The third component of the program will fund university-based public research to develop advances in active safety features, vehicle control, and driver attention. Leading U.S. universities will conduct research for the public benefit with a multi-year mandate to pursue research programs into existing, new or emerging active safety technologies, based around national and regulatory safety priorities, as well as to develop a better understanding of key safety-related behaviors, with findings to be shared broadly across the automotive industry.[17]

Approximately $15 million will be budgeted for this research program. Each of the following universities has expressed interest in conducting the research under this program: Stanford University (CARS), University of Michigan (UMTRI), Texas A&M University (TTI), MIT (Age Lab), and the University of Iowa Public Policy Center. The parties will choose some or all of these institutions to conduct the research and may add or substitute one or more similar universities prior to the Final Approval Order. Based on further discussion with the potential grant recipients, funding will occur either by direct grants to the institutions or by establishing a research consortium of multiple universities, with one university chosen to administer the research and meet the mandate defined by the program.

[16] *Id.* at 2-3.

[17] *Id.* at 3.

Research topics for the research initiatives will benefit Class Members nationwide and will include, but not be limited to, general approaches to crash avoidance, human interface design, and lane departure warning/prevention and driver distraction.[18]

d. Use of any remainder from Settlement cash funds.

Additional funds remaining after expiration of the Claim Period may be available for further contribution to research and education as provided in the Agreement. Plaintiffs' Class Counsel and Toyota's Negotiating Counsel will meet and confer to determine, in writing, the specifics regarding the optimal use of any such remainder. Although the specifics will be resolved through the meet-and-confer process, the parties agree that any such remainder will be used to: (i) fund scientific research by leading academic institutions into the development of new active safety technologies and/or standards and testing guidelines for emerging technologies and/or driving behaviors; and/or (ii) fund an expansion or addition to the national multi-media and community-based public-education campaign that works to inform, enhance and promote safer driving among consumers. The Settlement Special Master will be called upon to resolve any disagreements.[19]

C. The Claims Process

In order to be eligible for reimbursement from the Diminished Value Fund and the BOS-Ineligible Fund, qualifying Class Members must submit a validly completed Claim Form and, in some instances, supporting documentation.[20] The parties have designed a claims process that places minimum burdens on Class

[18] *Id.* at 3-4.

[19] *Id.* at 4.

[20] Agreement at 18.

Members who are eligible to receive cash compensation from the Settlement funds. The Claim Form will be available for viewing and downloading at the Settlement website and will be mailed to any Class Member who requests one (or who requests a Long Form Notice).

The Claim Form for Subject Vehicles Not Eligible to Receive the Brake Override System is found at Exhibit 3 to the Settlement Agreement. It simply asks the Class Member to provide their name, address and telephone number; the make, model, model year, and VIN number of their vehicle(s); and to check a box if they incurred an unintended acceleration ("UA") event.[21] If the Class Member completes the Claim Form online and types in his or her VIN number, some of the identifying information blanks will be automatically filled in for the Class Member.

The Claim Form for Alleged Diminished Value is found at Exhibit 2 to the Settlement Agreement. It asks the Class Member to provide their name, address and telephone number; the make, model, model year, and VIN number of their vehicle(s); and to check a box if they incurred an unintended acceleration event. The Claim Form also requests additional information depending on the category in which the claimant falls:

[21] UA for this purpose is defined as one or more of the following symptoms exhibited by the Subject Vehicle: an unintended acceleration-related symptom as to which Toyota inspected the vehicle and was unable to identify the cause of the symptom; the possible loss of brake vacuum assist; an accelerator pedal that was slow to return or stuck in a partially depressed position; interference with the vehicle's accelerator pedal with an incompatible or unsecured floor mat; increasing acceleration of the vehicle despite depressing only the brake pedal; acceleration (or failure to decelerate) when both the brake and accelerator pedals were depressed; rough or otherwise undesirable transmission shift sensation; the brakes did not respond as expected; unfamiliarity with the push-button on/off button; unexpected operation of the cruise control system; one or more drivability concerns (e.g., hesitation, surging, lurching, etc.); or high engine RPM at idle.

- Class Members who sold or traded in a Subject Vehicle they owned during the period from September 1, to December 31, 2010, must provide the month and year of sale or trade in and relevant supporting documentation consisting of the vehicle sale contract, trade-in documentation, state department of motor vehicle purchase/registration form, or other documents evidencing the sale or why the Class Member is unable to provide the documents.
- Class Members who returned or traded in a Subject Vehicle before the regular lease termination date must provide the month and year of lease termination and relevant supporting documentation consisting of a lease termination contract, trade-in documentation reflecting early lease termination, state department of motor vehicle purchase/registration form reflecting early lease termination, or other documents evidencing the early lease termination or why the Class Member is unable to provide the documents.
- Class Members that insured or guaranteed the residual value of a Subject Vehicle as of September 1, 2009 and thereafter made a payment to the insured or sold the Subject Vehicle on or before December 31, 2010 must provide the month and year of the lease termination or payment and relevant documents indicating the payment or sale.
- Class Members who returned a Subject Vehicle before lease termination and after reporting an unintended acceleration event before December 1, 2012 must provide the month and year of lease termination and supporting documentation consisting of lease termination contract,

trade-in documentation reflecting early lease termination, state department of motor vehicle purchase/registration form reflecting early lease termination, or other documents evidencing the early lease termination or why the Class Member is unable to provide the documents.

- And Class Members who had a Subject Vehicle declared a total loss by an insurer during the period from September 1, 2009 to December 31, 2010 must provide the month and year of total loss and documentation evidencing the total loss payment.

Completed Claim Forms can be submitted electronically at the Settlement website, or e-mailed or mailed to the Class Action Settlement Administrator on or before July 29, 2013. Claims can be denied if the Class Member does not timely and fully complete the Claim Form and/or is unable to timely produce documents to substantiate and/or verify the information on the Claim Forms. In no event will a Class Member or affiliate or representative of the Class Member receive more than one payment per Subject Vehicle.[22]

D. Calculation Of Payments From The Diminished Value And BOS-Ineligible Funds

The payments to which each eligible claiming Class Member will be entitled to receive from the Diminished Value and BOS-Ineligible Funds are calculated pursuant to the Plan of Allocation attached as Exhibit 16 to the Agreement and summarized below.

[22] Agreement at 18.

1. Payments from the Diminished Value Fund.

Using sales data collected during the relevant time period, Plaintiffs' expert has estimated economic loss for Class Members who sold or returned their vehicles between September 1, 2009 and December 31, 2010. Losses were measured using multiple regression equations estimating the extent to which wholesale and retail prices of Class Vehicles actually declined after widespread publicity beginning in September 2009 concerning UA issues with the vehicles. Matrices setting forth the estimated loss by model, month, and year will be attached to the Plan of Allocation and made available to Class Members at the Settlement website. These model- and time-specific loss estimates provide the base amount for calculating the payments for eligible claimants to the Diminished Value Fund. The base amounts will be in the range of hundreds-of-dollars to over a thousand dollars, depending on the vehicle model, model year, and month and year of disposition.

A discount may be applied to the base amount depending on the state in which the claiming Class Member resides. The law in various jurisdictions differs on the issue of whether, in order to bring claims, a Class Member's Subject Vehicle must have manifested a UA event. Accordingly, each Class Member's base recovery will be adjusted as follows:[23]

- If the eligible Class Member purchased, leased, now resides or insured the residual value of a Subject Vehicle in a Non-Manifestation State, his

[23] Agreement, Exhibit 16 at 2.

or her base payment will be 100 percent of the amount appearing in the matrix.[24]

- If the eligible Class Member purchased, leased, now resides or insured the residual value of a Subject Vehicle in a Manifestation State, his or her base payment will be 30 percent of the amount appearing in the matrix.[25]
- If the eligible Class Member purchased, leased, now resides or insured the residual value of a Subject Vehicle in an Unclear State, his or her base payment will be 70 percent of the amount appearing in the matrix.[26]

However, Class Members in Manifestation States and Unclear States will be entitled to the same payment as Class Members in a Non-Manifestation State if such Class Members, on or before December 1, 2012, reported to Toyota, a Toyota Dealer, or NHTSA that they believed they incurred a UA.[27]

[24] Plaintiffs' Class Counsel grouped the states based on extensive legal research and were prepared to submit these groupings to the Court in support of certification of a litigation class. The Non-Manifestation States are: Alaska, Arizona, California, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York (only if Subject Vehicle was sold during the period September 1, 2009 through December 31, 2010), Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, and West Virginia. Agreement, Exhibit 16 at 3.

[25] The Manifestation States are: Arkansas, District of Columbia, Indiana, Mississippi, New Hampshire, North Carolina, North Dakota, South Carolina, Utah, and Wisconsin. *Id.* at 4.

[26] The Unclear States are: Alabama, Colorado, Delaware, Florida, Georgia, New York (if Subject Vehicle not sold during the period September 1, 2009 through December 31, 2010), Virginia, and Wyoming. *Id.*

[27] *Id.* at 2.

Allocation Counsel was appointed to represent the interests of Class Members in Manifestation States, Non-Manifestation States, and states where the law is unclear, respectively. The following lawyers were appointed as Allocation Counsel: Michael Kelly was appointed for Non-Manifestation States; Jayne Conroy for Manifestation States; and Ben Bailey for Unclear States. The allocation percentages set forth above resulted from an allocation mediation supervised by Settlement Special Master Patrick Juneau.[28]

If the total allocation exceeds the amount of money available to pay eligible claims against the Diminished Value Fund, payments to eligible Class Members will be reduced pro rata.[29] If unclaimed funds remain after the Claim Period has expired and the unclaimed funds are sufficient to bring all eligible Manifestation States and Unclear States claimants up to 100% of eligible payment, the unclaimed funds shall be applied for those purposes.[30] Any remaining unclaimed funds will be distributed equally to: (i) reimburse the fees and costs paid by Toyota to the Class Action Settlement Administrator, Settlement Notice Administrator, or any other third-party vendor; and (ii) the automobile safety research and education fund. If the administrative and/or notice costs are fully reimbursed, 100% of the further remaining amounts will be applied to contribute to the automobile safety research and education fund.[31] If unclaimed funds remain after the Claim Period has expired and the amount of unclaimed funds is insufficient to bring all eligible Manifestation States and Unclear States claimants up to 100% of eligible payment, the remainder

[28] *Id.* at 1.
[29] Agreement at 13-14.
[30] Agreement, Exhibit 16 at 3.
[31] Agreement at 14.

will be split 50% to Manifestation States claimants and 50% to Unclear States claimants. In the event that either group of claimants is brought up to 100%, the balance of unclaimed funds will be applied to the other group of claimants.[32]

2. Payments from the BOS-Ineligible Fund.

Plaintiffs' expert has estimated the average value of a brake override system, if such a system were available, to be $125. This estimated average value provides the base amount for calculating the payments for eligible claimants to the BOS-Ineligible Fund.[33]

As with payments from the Diminished Value Fund, a discount may be applied to this base amount depending on the state in which the claiming Class Member resides. The same percentages determined by Allocation Counsel for distributing the Diminished Value Fund apply here. Subject to any pro rata reductions if the total allocation exceeds the amount of money available to pay eligible claims against the BOS-Ineligible Fund, the maximum payment from the fund to a Class Member in a Non-Manifestation state will be $125 (100% of $125); eligible Class Members in an Unclear State will receive $87.50 (70% of $125); and eligible Class Members in a Manifestation State will receive $37.50 (30% of $125).[34] However, Class Members in Manifestation States and Unclear States will be entitled to the same $125 maximum payment as Class Members in a Non-Manifestation State

[32] Agreement, Exhibit 16 at 3.
[33] *Id.* at 5.
[34] *Id.* at 5-6.

if such Class Members, on or before December 1, 2012, reported to Toyota, a Toyota Dealer, or NHTSA that they believed they incurred a UA.[35]

As with the distribution of monies from the Diminished Value Fund, if unclaimed funds remain in the BOS-Ineligible Fund after the Claim Period has expired and the unclaimed funds are sufficient to bring all eligible Manifestation States and Unclear States claimants up to 100% of eligible payment, the unclaimed funds will be applied for those purposes.[36] Any remaining unclaimed funds will be distributed equally to: (i) reimburse the fees and costs paid by Toyota to the Class Action Settlement Administrator, Settlement Notice Administrator, or any other third-party vendor; and (ii) the automobile safety research and education fund. If the administrative and/or notice costs are fully reimbursed, 100% of the further remaining amounts will be applied to contribute to the automobile safety research and education fund.[37] If unclaimed funds remain after the Claim Period has expired and the amount of unclaimed funds is insufficient to bring all eligible Manifestation States and Unclear States claimants up to 100% of eligible payment, the remainder will be split 50% to Manifestation States claimants and 50% to Unclear States claimants. In the event that either group of claimants is brought up to 100%, the balance of unclaimed funds will be applied to the other group of claimants.[38]

E. Release And Waiver

In consideration for the Settlement, Class Representatives, Plaintiffs and each Class Member, on behalf of themselves and any other legal or natural persons who

[35] *Id.* at 6-7.
[36] *Id.* at 7.
[37] Agreement at 14.
[38] Agreement, Exhibit 16 at 7.

may claim by, through or under them, will be subject to the following release and waiver of rights:

> to fully, finally and forever release, relinquish, acquit, discharge and hold harmless the Released Parties from any and all claims, demands, suits, petitions, liabilities, causes of action, rights, and damages of any kind and/or type regarding the subject matter of the Actions, including, but not limited to, compensatory, exemplary, punitive, expert and/or attorneys' fees or by multipliers, whether past, present, or future, mature, or not yet mature, known or unknown, suspected or unsuspected, contingent or non-contingent, derivative or direct, asserted or un-asserted, whether based on federal, state or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim of any kind related arising from, related to, connected with, and/or in any way involving the Actions, the Subject Vehicles, any and all claims involving the ETCS, any and all claims of unintended acceleration in any manner that are, or could have been, defined, alleged or described in the Economic Loss Master Consolidated Complaint, the Amended Economic Loss Master Consolidated Complaint, the Second Amended Economic Loss Master Consolidated Complaint, the Third Amended Economic Loss Master Consolidated Complaint, the TAMCC, the Actions or any amendments of the Actions, including, but not limited to, the design, manufacturing, advertising, testing, marketing, functionality, servicing, sale, lease or resale of the Subject Vehicles.[39]

This Release, which will be made part of the Final Order and Final Judgment but which will not apply to claims for personal injury, wrongful death, or physical property damage arising from an accident involving a Subject Vehicle, will be attached to the Long Form Notice and also made available at the Settlement website.

[39] Agreement at 28-29.

F. Attorneys' Fees And Expenses And Plaintiff And Class Representative Compensation

After agreeing to the principal terms set forth in the Agreement, Plaintiffs' Class Counsel and Toyota's Negotiating Counsel negotiated the amount of Attorneys' Fees and Expenses that, following application to the Court and subject to Court approval, would be paid as the fee award and costs award to plaintiffs' counsel. As a result of negotiations that were overseen by the Settlement Special Master, Plaintiffs' Class Counsel, on behalf of all plaintiffs' counsel, will apply for an award of Attorneys' Fees and Expenses in the Actions in the amount of $200 million in fees, plus up to an additional $27 million in expenses incurred prior to the Fairness Hearing in the Actions. Toyota agrees not to oppose an application for these amounts.[40]

If awarded, the Attorneys' Fees and Expenses would be paid, collectively, to the 25 plaintiffs' firms and approximately 85 attorneys who worked on the litigation. Subject to Court approval, the Attorneys' Fees and Expenses will be allocated by Plaintiffs' Class Counsel among other plaintiffs' counsel in a manner that Plaintiffs' Class Counsel in good faith believes reflects the contributions of plaintiffs' counsel to the prosecution and settlement of the claims against Toyota in the Action.[41]

The Attorneys' Fees and Expenses awarded by the Court and payable to Plaintiffs' Class Counsel will not be paid from the settlement funds. In the event that the Court awards an amount less than $200 million in fees and up to $27 million in

[40] Agreement at 32-33.

[41] *Id.* at 33.

expenses, Toyota agrees to pay the remainder to the Automobile Safety Research and Education Fund.[42]

Plaintiffs' Class Counsel may petition the Court for incentive awards of up to $100 per hour per Plaintiff and per Class Representative for their time invested in connection with the Actions, with a $2,000 minimum award. The purpose of such awards will be to compensate the Plaintiffs and Class Representatives for efforts undertaken by them on behalf of the Class. Toyota will pay any incentive awards made by the Court. Any disputes regarding the amount of time for which Plaintiffs' Class Counsel are seeking compensation for Plaintiffs and Class Representatives will be resolved by the Settlement Special Master in writing, whose decision will be final and binding as to the Parties, although subject to review by the Court.[43]

III. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO CERTIFY THE CLASS FOR SETTLEMENT PURPOSES AND GRANT PRELIMINARY APPROVAL

A. The Court Should Certify the Proposed Class Pursuant to Rule 23(a) and 23(b)(3) for Purposes of Settlement

Plaintiffs seeking class certification bear the burden of demonstrating that each element of Rule 23 is satisfied.[44] "While the Court's analysis must be rigorous, Rule 23 confers to the district court 'broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court.'"[45] Although plaintiffs must offer facts sufficient to satisfy the Rule 23

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[42] *Id.*

[43] *Id.* at 34.

[44] *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended*, 273 F.3d 1266 (9th Cir. 2001).

[45] *Galvan v. KDI Distrib. Inc.*, 2011 U.S. Dist. LEXIS 127602, at *7 (C.D. Cal. Oct. 25, 2011).

requirements,[46] the Court "need only form a 'reasonable judgment' on each certification requirement," taking the complaint's allegations as true and declining to make merits determinations.[47]

1. The proposed Class is ascertainable.

Although not specified in Rule 23, courts, including this Court, imply a prerequisite that the proposed class be ascertainable.[48] "A class definition should be precise, objective, and presently ascertainable."[49] Ascertainability is satisfied when it is "administratively feasible for the court to determine whether a particular individual is a member."[50]

The Class definition utilizes objective criteria that make class membership objectively verifiable. The purchase or lease of a Toyota vehicle specified by model and model year is easily demonstrated, and Class Members will be readily identified via the R.L. Polk Registration data. Those Class Members not identified in the Polk data can self-identify after being reached via the robust and extensive notice media campaign. California federal courts have routinely found similar classes to be ascertainable.[51] Accordingly, the ascertainability requirement is met here.

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[46] *In re First Am. Corp. ERISA Litig.*, 258 F.R.D. 610, 616 (C.D. Cal. 2009).

[47] *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *7 (quoting *Gable v. Land Rover N. Am., Inc.*, 2011 U.S. Dist. LEXIS 90774, at *9 (C.D. Cal. July 25, 2011)).

[48] *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *8; *In re Northrop Grumman Corp. ERISA Litig.*, 2011 U.S. Dist. LEXIS 94451, at *26 n.61 (C.D. Cal. Mar. 29, 2011).

[49] *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 574 (C.D. Cal. 2007) (internal quotations omitted).

[50] *In re Northrop Grumman*, 2011 U.S. Dist. LEXIS 94451, at *26 n.61 (internal quotation omitted).

[51] *See, e.g.*, *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 594 (C.D. Cal. 2008) (finding a class ascertainable when, *inter alia*, the class definition identified a particular make, model, and production period for the class vehicle); *Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 336 (N.D. Cal. 2010) (finding the class

2. The Rule 23(a) requirements are satisfied.

a. The Class is so numerous that joinder is impracticable.

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable.[52] The size of the proposed class need not be exactly determined and may proceed based on reasonable estimates.[53] "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied."[54] Courts routinely find numerosity in auto defect class actions,[55] as should be the case here, where it is estimated that the Class contains over 16 million members nationwide.

b. Numerous common issues exist.

Plaintiffs must demonstrate that there are questions of fact and law that are common to the class in order to satisfy Rule 23(a)(2). "[A] common question 'must be of such a nature that it is capable of classwide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.'"[56] Commonality is a permissive requirement,

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ascertainable when unnamed plaintiffs would be able to identify the allegedly defective goods themselves).

[52] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

[53] *Tchoboian v. Parking Concepts, Inc.*, 2009 U.S. Dist. LEXIS 62122, at *12 (C.D. Cal. July 16, 2009).

[54] *Costelo v. Chertoff*, 258 F.R.D. 600, 607 (C.D. Cal. 2009) (quoting *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982)).

[55] *See, e.g., Keegan v. American Honda Motor Co.*, 284 F.R.D. 504, 522 (C.D. Cal. 2012) (certifying class of 620,000 vehicles that were the subject of Honda's TSB); *Rosen v. J.M. Auto Inc.*, 270 F.R.D. 675, 680 (S.D. Fla. 2009) (certifying class of thousands of Lexus ES 350 owners).

[56] *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *17 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

and not all questions of fact and law need be common to satisfy the rule.[57] The "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."[58] In automobile defect cases, commonality is often found when the most significant question concerns the existence of a defect.[59]

The relatively low commonality hurdle is satisfied here. The claims of all prospective Class Members involve the same advertising and warranties and the same alleged vehicle defects. These issues are central to this case and are sufficient to establish commonality.

c. The Class Representatives' claims are typical of those of other Class Members.

Rule 23(a)(3) requires that the class representatives' claims are typical of the class. "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'"[60] "Typicality refers to the nature of the claim or defense of the class

[57] *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011).

[58] *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 U.S. Dist. LEXIS 95083, at *15 (C.D. Cal. Nov. 13, 2008) (quoting *Hanlon*, 150 F.3d at 1019).

[59] *See, e.g.*, *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (finding commonality requirement easily satisfied where prospective class members' claims involved same alleged defect found in vehicles of the same make and model); *Keegan*, 284 F.R.D. at 524 (finding commonality where uniform rear suspension defect was alleged and noting that "[t]he fact that some vehicles have not yet manifested premature or excessive tire wear is not sufficient, standing alone, to defeat commonality"); *Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 526 (N.D. Cal. 2004) (finding commonality satisfied when Ford knew that there was a risk that the plastic intake manifolds would crack prematurely, but concealed that information from ordinary consumers).

[60] *Ellis*, 657 F.3d at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

representative, and not to the specific facts from which it arose or the relief sought."[61] "Under the 'permissive standards' of this Rule, 'representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.'"[62] The "focus should be on the defendants' conduct and plaintiff's legal theory, not the injury caused to the plaintiff."[63]

The proposed Class Representatives' claims here arise from a common course of conduct and legal theory. They have asserted during this litigation that Toyota engaged in false advertising in violation of consumer protection laws and breached express and implied warranties to Class Members by selling vehicles with defects, failing to inform consumers of the defects, and failing to properly repair the defects pursuant to its warranties. The Class Representatives allege that their vehicles have the same defects as all other Class Vehicles. These claims are typical of the claims of every member of the Class.[64]

d. The Class Representatives and their counsel adequately represent the interests of the Class.

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. The relevant inquiries are: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members

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[61] *Id.*

[62] *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *18 (quoting *Hanlon*, 150 F.3d at 1020).

[63] *Costelo*, 258 F.R.D. at 608 (quoting *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005)).

[64] *See, e.g., Wolin*, 617 F.3d at 1175.

and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?"[65]

The proposed Class Representatives have suffered economic loss from the same alleged defects as members of the proposed Class. They have all kept abreast of the litigation, assisted in discovery, willingly agreed to submit to depositions, and made their vehicles available for inspection. There can be no reasoned argument that any of the Class Representatives have conflicts antagonistic to the Class, and the Court should conclude that they will adequately represent the Class.

Likewise, Plaintiffs' Class Counsel satisfy the adequacy requirement. In retaining Steve Berman of Hagens Berman, Marc Seltzer of Susman Godfrey, and Frank Pitre of Cotchett, Pitre & McCarthy, Plaintiffs have employed counsel with the necessary qualifications, experience, and resources. With the litany of experience in class action and other complex litigation that Plaintiffs' Class Counsel bring, coupled with their zealous prosecution of Plaintiffs' claims to date, there can be no question that they are adequate.

3. The Rule 23(b)(3) requirements are satisfied.

Certification is warranted under Rule 23(b)(3) because "the questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently" settling the controversy.

[65] *Ellis*, 657 F.3d at 985 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)); *see also Galvan*, 2011 U.S. Dist. LEXIS 127602, at *20.

a. Common issues of fact and law predominate because legal and factual questions will be resolved with proof common to all plaintiffs and Class Members.

"There is no definitive test for determining whether common issues predominate, however, in general, predominance is met when there exists generalized evidence which proves or disproves an [issue or] element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position."[66] The main concern is "the balance between individual and common issues."[67]

Common issues predominate here. The salient evidence necessary to establish Plaintiffs' claims is common to both the Class Representatives and all members of the Class – they would all seek to prove that Toyota's vehicles have common defects and that Toyota's conduct was wrongful. And the evidentiary presentation changes little if there are 100 Class members or 16,000,000: in either instance, Plaintiffs would present the ***same*** evidence of Toyota's marketing and promised warranties, and the ***same*** evidence of the Subject Vehicles' alleged defects.[68] In the words of the Ninth Circuit, these common questions – and more – "present a significant aspect of the case and they can be resolved for all members of the class in a single

[66] *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *24-25 (quoting *Withers v. eHarmony, Inc.*, CV 09-2266-GHK (RCx), Order Denying Mot. to Cert. Class, Docket No. 13 (June 2, 2010) (quoting *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002) (internal quotation marks omitted))).

[67] *In re Wells Fargo Home Mortg.*, 571 F.3d 953, 959 (9th Cir. 2009).

[68] *See, e.g., Wolin*, 617 F.3d at 1172-73 (common defects were susceptible to proof by generalized evidence).

adjudication."[69] Courts often find that such issues predominate in auto defect class actions.[70]

b. A class action is a superior method of resolving this dispute.

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy."[71] Rule 23(b)(3)'s non-exclusive factors are: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be

[69] *Hanlon*, 150 F.3d at 1022.

[70] *See, e.g.*, *Wolin*, 617 F.3d at 1173 (common issues predominate such as whether Land Rover was aware of the existence of the alleged defect, had a duty to disclose its knowledge and whether it violated consumer protection laws when it failed to do so); *Keegan*, 284 F.R.D. at 532-34 (predominance found under UCL and CLRA based on common evidence of the nature of the defect, the likely effect of the defect on class vehicles and on vehicle safety, what Honda knew or did not know, and what Honda disclosed or did not disclose to consumers); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. at 596-97 (predominating common issues under the CLRA and UCL include: (i) whether defendant was aware of the alleged defect; (ii) whether defendant had a duty to disclose its knowledge; (iii) whether defendant failed to do so; (iv) whether the alleged failure to disclose would be material to a reasonable consumer; and (v) whether defendant's actions violated the CLRA and UCL); *Chamberlan v. Ford Motor Co.*, 223 F.R.D. at 526-27 (common questions predominate such as "whether the design of the plastic intake manifold was defective, whether Ford was aware of the alleged design defects, whether Ford had a duty to disclose its knowledge, whether it failed to do so, whether the facts that Ford allegedly failed to disclose were material, and whether the alleged failure to disclose violated the CLRA."); *Rosen v. J.M. Auto Inc.*, 270 F.R.D. at 681-82 (the "critical issue of whether the [airbag system] in 2007 Lexus ES 350s was defective is common to all putative class members," and "this issue predominates over the individual issues").

[71] *Wolin*, 617 F.3d at 1175 (quoting 7AA CHARLES WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1779, at 174 (3d ed. 2005)).

encountered in the management of a class action."[72] All of these factors are present here.

With respect to factors (A) and (C), the cost to repair the alleged defects is too low to incentivize many Class Members to litigate their claims individually and weighs in favor of concentrating the claims in a single forum. This is especially true here given the high cost of marshaling the evidence (expert and otherwise) necessary to litigate the claims at issue, the disparity in resources between the typical Class Member and a well-funded, litigation-savvy defendant like Toyota.[73] Certification thus conserves both individual and already-strapped judicial resources.[74]

Plaintiffs' Class Counsel have already devoted significant resources to this class litigation, including multiple rounds of motions to dismiss and discovery briefing, deposing approximately 91 Toyota witnesses (79 Toyota employees and 12 experts), orchestrating a labor-intensive written-discovery and document-review effort, presenting Plaintiffs' vehicles to Toyota for inspection, retaining experts, and engaging in significant motion practice on other issues. It is folly to suggest that an

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[72] *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *35-36.

[73] *Wolin*, 617 F.3d at 1176 (finding that the amount of damages suffered by each class member is not large and that forcing individual vehicle owners to litigate their cases is an inferior method of adjudication); *see also Keegan*, 284 F.R.D. at 549 ("The funds required to marshal the type of evidence, including expert testimony, that will be necessary to pursue these claims against well-represented corporate defendants would discourage individual class members from filing suit when the expected return is so small."); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 639 (S.D. Cal. 2011) (observing that cost of securing expert testimony would render individual lawsuits cost prohibitive), *aff'd*, 473 Fed. Appx. 716 (9th Cir. 2012).

[74] *See Wolin*, 617 F.3d at 1176 ("It is far more efficient to litigate this . . . on a classwide basis rather than in thousands of individual and overlapping lawsuits."); *Parkinson*, 258 F.R.D. at 597 (finding a class action superior when the burden on the judiciary would be significant and unnecessary, given the existence of multiple common questions); *Hartless*, 273 F.R.D. at 639 (observing that "multiple individual claims could overburden the judiciary").

individual litigant pursuing a purely economic loss case could invest the same resources.

Factor (B) – the extent and nature of any similar litigation – also favors class certification. Numerous class action lawsuits based on the same facts at issue here have been filed against Toyota. Through the MDL process, those cases were transferred to this Court and are part of this consolidated litigation. That the Judicial Panel on Multidistrict Litigation chose this Court to be the transferee court is one indication that having a single case – as opposed to multiple cases – makes sense.

The final superiority factor – manageability – focuses on whether "the complexities of class action treatment outweigh the benefits of considering common issues in one trial. . . ."[75] The question is whether multiple individual lawsuits would be more manageable than a class action, and not whether a single disposition is easy.[76] Indeed, this fourth factor "will rarely, if ever, be in itself sufficient to prevent certification,"[77] particularly in a proposed settlement. Here, Plaintiffs cannot foresee any serious manageability problems and certainly none that make thousands of individual actions a better alternative.

B. Preliminary Approval Is Appropriate

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims. There are three steps to be taken by the Court in considering approval of a tentative class-action settlement: (i) the Court

[75] *McKenzie v. Federal Express Corp.*, 275 F.R.D. 290, 302 (C.D. Cal. 2011) (quoting *Zinser*, 253 F.3d at 1192).

[76] *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004).

[77] *Id.* at 1272; *see also In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (refusal to certify a class solely on grounds of manageability is disfavored and "should be the exception rather than the rule").

must preliminarily approve the proposed Settlement; (ii) members of the Class must be given notice of it; and (iii) a final hearing must be held, after which the Court must decide whether the tentative Settlement is fair, reasonable, and adequate.[78] Approval of a proposed class-action settlement is a matter within the sound discretion of the district court.[79]

Preliminary approval does not require the Court to answer the ultimate question of whether a tentative settlement is fair, reasonable and adequate. That decision is instead made only at the final-approval stage, after notice of the Settlement has been given to the Class Members and they have had an opportunity to voice their views.[80] Preliminary approval is merely the prerequisite to giving notice so that members of a class have "a full and fair opportunity to consider the proposed [settlement] and develop a response."[81]

Courts have consistently noted that the standard for preliminary approval is ***less rigorous*** than the analysis at final approval. Preliminary approval is appropriate as long as the tentative settlement falls "within the range of possible judicial approval."[82] Courts employ a "threshold of plausibility" standard intended to

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[78] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632, at 320-21 (4th ed. 2004) (the "MANUAL").

[79] *E.g.*, *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Create-A-Card, Inc. v. INTUIT, Inc.*, 2009 U.S. Dist. LEXIS 93989, at *7 (N.D. Cal. Sept. 22, 2009) (addressing final approval).

[80] *See* 5 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 23.83(1), at 23-336.2 to 23-339 (3d ed. 2002).

[81] *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

[82] A. Conte & H.B. Newberg, NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2002) (quoting MANUAL FOR COMPLEX LITIGATION THIRD § 30.41 (1997)); MANUAL, § 21.632 at 321.

identify conspicuous defects.[83] Unless the Court's initial examination "disclose[s] grounds to doubt its fairness or other obvious deficiencies," the Court should order that notice of a formal fairness hearing be given to settlement class members under Rule 23(e).[84]

1. The proposed Settlement is sufficiently fair, reasonable, and adequate for preliminary approval.

To determine whether a settlement is fair, adequate, and reasonable, "a district court must [ultimately] consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant;[85] and the reaction of the class members to the proposed settlement."[86]

On a preliminary basis, the proposed Settlement meets these standards.

a. The strength of Plaintiffs' case and the amount offered in settlement.

The proposed Settlement has high value and provides substantial economic and non-monetary benefits to the Class in comparison to what Plaintiffs could achieve through a successful trial.

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[83] *See, e.g.*, *Kakani v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 47515, at *16 (N.D. Cal. June 19, 2007); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 337-38 (N.D. Ohio 2001).

[84] *See* MANUAL, § 21.633 at 321-22.

[85] This factor does not apply here.

[86] *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted).

Plaintiffs have steadfastly sought reimbursement for economic damages, and, as a result, Class Members will receive substantial cash payments from the Diminished Value and BOS-Ineligible Funds. With respect to the Diminished Value Fund, Plaintiffs' expert estimates total Class damage due to diminished value to be no more than $600 million and possibly less if certain defense arguments are accepted.[87] Thus, at a minimum, Toyota's $250 million contribution to the Diminished Value Fund represents at least 42 percent of likely diminished value damages but likely more – an excellent recovery.

The $250 million contribution to the BOS-Ineligible Fund is equally impressive given that, depending on the volume of claims, eligible Class Members in Non-Manifestation States will likely receive the full retail value of a brake override system installation ($125), with Class Members in other states that require or may require a UA receiving substantial percentages of $125 with the potential for increases depending on claims volume.

The non-monetary benefits provided by the Settlement are also extensive. The BOS installation for eligible Class Members provides a significant enhancement for 3.25 million vehicles so that engine power is automatically reduced when both the brake and accelerator pedals are applied simultaneously under certain driving conditions. Under the Customer Support Program, Toyota will guarantee the reliability of certain parts related to the acceleration system (and targeted in the litigation) for at least three years and, in some instances, as long as 10 years. As

[87] Toyota's expert maintains, among other things, that there is no evidence that the prices of the Subject Vehicles were affected by publicity surrounding UA events, and that Plaintiffs are unable to prove that most Class Members were impacted by any drop in the value of the Subject Vehicles.

noted, Plaintiffs preliminarily estimate that the Customer Support Program provides at least $200 million of value to the Class.

The $30 million contribution to the Automobile Safety Research and Education Fund to fund university-based research and a public education campaign related to the issues invoked by the Actions also provides a substantial benefit to all Class Members. This program has been specifically designed to target the Class and has a tight nexus with the objectives of the lawsuit.[88]

The Settlement benefits are substantial and, in large part, encompass or exceed the relief that could be obtained through a jury verdict in favor of the Class.

b. The risk, expense, complexity, and likely duration of further litigation.

This factor also weighs heavily in favor of preliminary (and, ultimately, final) approval of the Settlement. The risk, expense, complexity, and likely duration of further litigation can only be characterized as monumental.

The dizzying array of defense arguments on a variety of issues that could spell the death knell for this case or certain segments of the Class are harrowing and include: preemption; choice of law; variations in law; arbitration clause enforcement; lack of aggregate damage; and the preclusion of recovery for Class Members whose vehicles have not incurred a UA. Two of the foregoing issues – choice of law and enforcement of arbitration clauses – are already on appeal with the Ninth Circuit.

[88] *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

Pending before the Court are motions to exclude material components of Plaintiffs' evidence of liability and damages contained in expert reports. Many of these motions, if granted, have the potential to undermine Plaintiffs' entire case.

Perhaps most importantly, like experts at NASA, Plaintiffs have been unable to reproduce a UA in a Subject Vehicle under driving conditions. This fact, coupled with admissions that Toyota obtained from some of Plaintiffs' technical experts,[89] provide sufficient evidence that the risks of further litigation weigh heavily in support of Settlement approval.

If this matter went to verdict, a lengthy appeal period would certainly result. The litigation road has been arduous and promises to be even more difficult absent settlement. Plaintiffs' counsel have already collectively incurred and advanced $27 million in out-of-pocket expenses pursuing Plaintiffs' claims. We expect to invest at least $50 million more in time and expenses to conclude expert discovery, move for class certification, brief summary judgment motions, conduct trial and handle appeals. Settlement will conserve the resources of the parties and the Court. The proposed Settlement guarantees a substantial recovery for the Class now while obviating the need for a lengthy, complex, and uncertain trial. *See Create-A-Card, Inc. v. INTUIT, Inc.*, 2009 U.S. Dist. LEXIS 93989, at *13 (N.D. Cal. Sept. 22, 2009).

c. The risk of maintaining class action status throughout the trial.

A litigation class has not been certified, and the Settlement was reached shortly before the motion to certify bellwether classes was due. As the Court is well

[89] The Court will recall Toyota's cry of "unintended exoneration."

aware, class certification in this matter is a complex undertaking, and, consequently, the Court had already decided to proceed incrementally by first entertaining a motion to certify bellwether classes of California, Florida, and New York residents after denying Plaintiffs' motion to apply California law to all putative class members nationwide. Had the Court agreed to certify bellwether classes, Toyota would undoubtedly have pursued a Rule 23(f) appeal with the Ninth Circuit. The risk of maintaining class action status through trial is great, as is further evinced by many recent decisions denying class certification in automobile defect cases.[90]

d. The extent of discovery completed and the stage of proceedings.

This matter has been intensely litigated, as even a cursory review of the 229-page Court docket sheet reveals. This Settlement is reached near the end of the discovery period. All bellwether and expert discovery is scheduled to close in May 2013, with trial scheduled in July 31 2013. Hundreds of depositions have been taken of Plaintiffs, current and former employees of Toyota, third-parties, and the parties' respective experts. Toyota witnesses alone accounted for approximately 91 depositions (79 Toyota employees and 12 experts). Toyota has produced millions of documents. Plaintiffs' Class Counsel organized the productions into a sophisticated document review database and reviewed all of the documents. Documents from

[90] *See, e.g., Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012); *Daigle v. Ford Motor Co.*, 2012 U.S. Dist. LEXIS 106172 (D. Minn. July 31, 2012); *Corder v. Ford Motor Co.*, 283 F.R.D. 337 (W.D. Ky. 2012); *Edwards v. Ford Motor Co.*, 2012 U.S. Dist. LEXIS 81330 (C.D. Cal. June 12, 2012); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534 (C.D. Cal. 2012); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 13887 (D.N.J. Feb. 6, 2012); *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012); *American Honda Motor Co., Inc. v. Superior Court*, 199 Cal. App. 4th 1367 (Cal. App. 2d Dist. 2011); *Lloyd v. GMC*, 275 F.R.D. 224 (D. Md. 2011), 266 F.R.D. 98 (D. Md. 2010); *Oscar v. BMW of N. Am.*, 274 F.R.D. 498 (S.D.N.Y. 2011), 2012 U.S. Dist. LEXIS 84922 (S.D.N.Y. June 19, 2012).

third parties such as NHTSA and advertising firms have been produced and reviewed, and Plaintiffs have had their vehicles inspected.

Plaintiffs designated 24 experts, each of whom produced at least one report, with many preparing both an initial and rebuttal report. Toyota's 16 designated experts did the same. Most of the expert reports were filed with the Court.

In addition to extensive discovery, a blizzard of motions were filed with the Court, including multiple motions to dismiss and strike various complaints; scheduling motions; a myriad of discovery motions; and motions to strike experts. Plaintiffs' Class Counsel had prepared the motion for class certification, and it was ready for filing when the Settlement was reached.

Given the advanced stage of these proceedings, there can be no question that Plaintiffs' Class Counsel have a clear view of the strengths and weaknesses of the Class's claims and damage approaches. Sufficient discovery has been conducted in this matter to allow counsel to fairly investigate the pertinent legal and factual issues and fully recommend the Settlement.

e. The experience and views of counsel.

Plaintiffs' Class Counsel have substantial experience serving as class counsel in hundreds of actions, and we fully endorse the Settlement as fair, reasonable, and adequate.

f. The reaction of the Class Members to the proposed Settlement.

Because Class Members have not yet received notice of the Settlement and been provided an opportunity to comment, this factor cannot yet be evaluated other than to observe that the Class Members themselves support the Settlement.

2. The proposed Settlement is the result of arduous, arm's-length negotiations conducted by highly experienced counsel.

In addition to the factors just discussed, the Court must also be satisfied that "the settlement is not the product of collusion among the negotiating parties" when, as here, "the settlement agreement is negotiated prior to formal class certification." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011). Factors considered here include whether the settlement resulted from arm's-length negotiations between experienced, capable counsel;[91] the end result achieved;[92] and whether counsel are to receive a disproportionate distribution of the settlement under a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds where fees not awarded revert to defendants rather than to the class.[93]

The parties here actively engaged in many rounds of negotiations for over a year. The parties negotiated arduously and at arm's-length under the supervision and assistance of the Court-appointed Settlement Special Master Patrick Juneau. The negotiations involved submissions of proposals and counter-proposals, and the

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[91] *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) (a presumption of correctness attached to a class settlement reached in arm's-length negotiations between experienced, capable counsel); *see also Hawkins v. Comm'r of the N.H. HHS*, 2004 U.S. Dist. LEXIS 807, at *15 (D.N.H. 2004); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) ("While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the proposed settlement."); *see also* NEWBERG § 11.41, at 87-89.

[92] *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987) ("[r]ather than attempt to prescribe the modalities of negotiation, the district judge permissibly focused on the end result of the negotiation. . . . The proof of the pudding was indeed in the eating."); *see also In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) (most important concern for the court in reviewing a settlement of a class action is the strength of the plaintiffs' case if it were fully litigated), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

[93] *In re Bluetooth*, 654 F.3d at 947.

evaluation of all fact and expert discovery and competing factual and legal arguments. The parties worked long and hard to reach a resolution of this matter. The end result – a Settlement conservatively valued at over $1.3 billion – speaks for itself. It is fair, appropriate, and in the best interests of the Class Members.

Although Toyota has agreed to separately pay any award of Attorneys' Fees and Expenses up to a maximum of $200 million and $27 million, respectively, Attorneys' Fee and Expenses were not negotiated until ***after*** the parties had agreed on all principal terms of the Settlement. Thus, these fees and expenses did not influence the course of negotiations regarding the Settlement benefits to the Class. Further, the Attorneys' Fees that Plaintiffs' Class Counsel will ask the Court to approve represent approximately 14.7 percent of the total value of all Settlement benefits – a very reasonable request given the risks of the case and the results achieved. And, if the Court elects to award less than $200 million in fees and up to $27 million in expenses, Toyota has agreed to pay the remainder to the Automobile Safety Research and Education Fund for the benefit of the Class; the remainder will not revert back to Toyota.[94]

IV. THE COURT SHOULD APPROVE THE NOTICE PLAN AND SCHEDULE A FAIRNESS HEARING

A. The Court Should Order Notice Be Provided To The Class

Reasonable notice must be provided to Class Members to allow them an opportunity to object to the proposed Settlement.[95] Rule 23(e) requires notice of a proposed settlement "in such manner as the court directs." In a settlement Class

[94] *Cf. id.* (adversely characterizing fee reverters to the defendant as depriving the class of that full potential benefit).

[95] *See Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990).

maintained under Rule 23(b)(3), Class notice must meet the requirements of both the Federal Rules of Civil Procedure 23(c)(2) and 23(e).[96] Under Rule 23(c)(2), notice to the Class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,"[97] although actual notice is not required.[98]

The MANUAL sets forth several elements of the "proper" content of notice. If these requirements are met, a notice satisfies Fed. R. Civ. P. 23(c)(2), Fed. R. Civ. P. 23(e) and due process, and binds all members of the Class. The Notice must:

1. Describe the essential terms of the Settlement;
2. Disclose any special benefits or incentives to the Class Representatives;
3. Provide information regarding attorneys' fees;
4. Indicate the time and place of the hearing to consider approval of the Settlement, and the method for objection to and/or opting out of the Settlement;
5. Explain the procedures for allocating and distributing Settlement funds; and
6. Prominently display the address of Class counsel and the procedure for making inquiries.[99]

The proposed Long Form Notice, attached as Exhibit 4 to the Agreement, is clear, precise, informative, and meets the foregoing standards.[100]

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[96] *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324-25 (E.D. Pa. 1993) (stating that requirements of Rule 23(c)(2) are stricter than requirements of Rule 23(e) and arguably stricter than the due process clause).

[97] *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997); *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56 (1st Cir. 2004).

[98] *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

[99] MANUAL, ¶ 30.212 (3d ed. 1995); *see also, e.g., Air Lines Stewards & Stewardesses Ass'n Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 108 (7th Cir. 1972) (notice that provided summary of proceedings to date, notified of significance of judicial approval of settlement and informed of opportunity to object at the hearing satisfied due process).

Further, the proposed notice program provides "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." As reflected in the proposed notice plan created by a recognized expert and detailed in the Agreement at pages 19-23 and in Exhibit 9 to the Agreement, the notice plan will have three components: (i) direct notice, (ii) publication via Settlement website, and (iii) paid media publication via newspapers and magazines and internet banner advertising. The parties will also be issuing independent press releases announcing the Settlement and directing interested persons to the Settlement website and toll-free call center. Notice via first class mail, publication in nationwide papers and magazines, and website publication are all avenues for notice that have been approved by various courts.[101]

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[100] The Notice is also written in plain English and is easy to read and includes other information such as the case caption; a description of the Class; a description of the claims; a description of the Settlement; the names of counsel for the Class; a statement of the maximum amount of attorneys' fees that may be sought by Plaintiffs' Class Counsel; the Fairness Hearing date; a description of Class Members' opportunity to appear at the hearing; a statement of the procedures and deadlines for requesting exclusion and filing objections to the Settlement; and the manner in which to obtain further information. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 496 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998). *See also* MANUAL § 30.212 (Rule23(e) notice designed to be only a summary of the litigation and settlement to apprise Class members of the right and opportunity to inspect the complete settlement documents, papers and pleadings filed in the litigation).

[101] *See, e.g.*, *White v. NFL*, 822 F. Supp. 1389, 1400 (D. Minn. 1993) (notice by mail to identified Class members and publication once in *USA Today* "clearly satisfy both Rule 23 and due process requirements"); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (approving as reasonable notice by third class mail to identified Class members and publication two times in the national edition of USA Today); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice by mail to identified Class members and publication in USA Today); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."); *see also In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 669-70 (E.D. Va. 2001) (approving publication of summary notice in nationwide newspapers and posting full notice on websites maintained by co-lead counsel); *Henry v. Sears Roebuck & Co.*, 1999 WL 33496080 (N.D. Ill. July 23, 1999) (the Court directed that the class Action Settlement Notice be mailed by first

1. Direct notice.

Beginning not later than March 1, 2013, the Class Action Settlement Administrator will begin sending the Short Form Notices, substantially in the form attached as Exhibits 12-13 to the Agreement, by U.S. Mail, proper postage prepaid, to two categories of Class Members as identified by data to be forwarded to the Class Action Settlement Administrator by R.L. Polk & Co.: (i) current registered owners of Subject Vehicles, and (ii) registered owners of Subject Vehicles during the period September 1, 2009 through December 31, 2010 (this latter effort is made to help notify Class Members who may be eligible for payments from the Diminished Value Fund).[102]

The Short Form Notices inform potential Class Members on how to obtain the Long Form Notice via the Settlement website, via regular mail or via a toll-free telephone number. For Class Members who are current owners and lessees, the Short Form Notice will also include a tear-off portion summarizing the Customer Support Program and intended for placement in the glove box of the Class Member's Subject Vehicle. The Class Action Settlement Administrator will: (i) re-mail any notices returned by the United States Postal Service with a forwarding address; and (ii) by itself or using one or more address research firms, as soon as practicable following receipt of any returned notices that do not include a forwarding address,

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class mail to all identified Class members, and the Summary Notice be published twice in the national edition of USA Today); *Mangone v. First USA Bank*, 206 F.R.D. 222 (S.D. Ill. 2001) (the Court approved Class Notice mailed to the last known address of all Class Members identified through reasonable effort by Defendant, published a Summary Notice on three separate days in a nationally published newspaper, *USA Today*, published the Class Notice and other pertinent information on the internet).

[102] Agreement at 17, 19-20.

research such returned mail for better addresses and promptly mail copies of the Short Form Notice to any better addresses so found.[103]

2. Publication via dedicated Settlement website.

The Class Action Settlement Administrator will maintain the Settlement website at www.Toyotaelsettlement.com, where the Long Form Notice, Claim Forms, and the Agreement will be posted, among other important information about the Settlement, including all relevant deadlines.[104] The Long Form Notice can be printed from the Settlement website, and the Class Action Settlement Administrator will send the Long Form Notice via first-class mail to those persons who request it in writing or through the toll-free telephone number.[105]

3. Paid media publication.

A targeted paid media campaign will be employed and will consist of publishing the Summary Settlement Notice, attached at Exhibit 8 to the Agreement, in (i) two national newspaper supplements, *Parade* and *USA Weekend*, which will be inserted in over 1,300 newspapers across the country; (ii) 10 national consumer magazines (*Better Homes and Gardens*, *ESPN The Magazine*, *Good Housekeeping*, *National Geographic*, *Parents*, *People*, *People en Espanol*, *Popular Science*, *Reader's Digest*, and *Time*); and (iii) 10 newspapers in U.S. territories.[106] In

[103] *Id.* at 20.
[104] *Id.*
[105] *Id.* at 22.
[106] Agreement, Exhibit 9 at 5-7.

addition, Internet banner advertising will be published on thousands of Internet and social media sites.[107]

This paid media plan was developed to reach the following target audience: adults who have purchased any Toyota, Lexus, or Scion make and model as measured by two nationally accredited media and marketing research firms.[108] The Settlement Notice Administrator estimates this paid media publication plan will reach an estimated 90 percent of Toyota, Lexus, and Scion owners three times, on average.[109]

* * *

The parties have selected Kinsella Media, LLC ("Kinsella") as the Settlement Notice Administrator. Kinsella has many years of experience in developing publication notice campaigns and has directed some of the largest and most complex national notification programs in the country.[110] Kinsella has carefully crafted a detailed Notice Plan, and has taken all necessary steps to ensure that the proposed Notice Plan meets the requisite due process requirements. The parties have selected Gilardi & Company, LLC ("Gilardi") as the Class Action Settlement Administrator. Gilardi is one of the premier settlement administrator firms in the country and also has years of experience in crafting notice plans. Plaintiffs believe that the proposed

[107] *Id.* at 7-9. Particularly in recent years, courts have recognized the ability of the Internet to reach class members and provide them with the required notice under Rule 23. *See, e.g., In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 482 (E.D. Pa. 2010) (approving notice program which "made extensive use of the Internet").

[108] Agreement, Exhibit 9 at 5.

[109] *Id.* at 9.

[110] *Id.* at 1.

Notice will fairly apprise Class Members of the Settlement and their options, and therefore should be approved by the Court.

B. The Court Should Set Settlement Deadlines And Schedule A Fairness Hearing

In connection with preliminary approval of the Settlement, the Court must set a final approval hearing date, dates for mailing the Notices and publication of the Publication Notice, and deadlines for objecting to the Settlement and filing papers in support of the Settlement. Plaintiffs propose the following schedule, which the parties believe will provide ample time and opportunity for Class Members to decide whether to request exclusion or object. The proposed schedule assumes that the Court timely approves the Settlement on a preliminary basis and that R.L. Polk begins providing vehicle owner registration data to Gilardi by January 25, 2013:

Date	Event
December 26, 2012	Settlement website established and basic Settlement documents posted.
March 1, 2013	Mailing of Short Form Notices begins, Publication Notice published, call center established, notice via social media begins, 150-day Claim Period begins.
April 5, 2013	Due date for substantial completion of Short Form Notice mailing.
April 23, 2013	Due date for Plaintiffs' Class Counsel's papers in support of final approval of the Settlement, including a declaration of proof of mailing and publishing notice, and papers in support of the request for an award of attorneys' fees and expenses.
May 6, 2013	Due date for postmark or delivery of requests for exclusion. Due date for delivery and filing of objections and intents to appear at the Fairness Hearing.
May 28, 2013	Due date to file reply papers, if any, in support

	of final approval of the Settlement and request for an award of attorneys' fees and expenses.
June 2, 2013	Due date for filing of declarations of Class Action Settlement Administrator and Settlement Notice Administrator.
June 12, 2013, 10:00 a.m.	Fairness Hearing
July 29, 2013	Due date for postmark and online submission of Claim Forms.

V. CONCLUSION

For all the above-stated reasons, Plaintiffs respectfully request that the Motion be granted and the Court enter an order: (i) granting Preliminary Approval of the Settlement; (ii) scheduling a Fairness Hearing and establishing all related deadlines; (iii) directing that Notice be provided to the Class in accordance with the Notice Plan; and (iv) ordering a stay of all proceedings in this action until the Court renders a final decision regarding the approval of this Settlement.

DATED: December 26, 2012

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Steve W. Berman
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PROOF OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on December 26, 2012.

/s/ Steve W. Berman
Steve W. Berman