UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SHARON CHENG, CRISTINA DIAS, RHONDA SANFILIPO, BRUCE PULEO, ZINA PRUITT, RON ZIMMERMAN, CHERYL SILVERSTEIN, TINA FENG, ROBERT HAKIM, BERNADETTE GRIMES, ELIZABETH GENDRON, ROGER CARTER, MARLENE RUDOLPH, PATRICIA BARLOW, TERESA EDWARDS, ISAAC TORDJMAN, JAMES HETTINGER, DIEU LE, CHRIS BOHN, DANIEL DEWEERDT, CRAIG BOXER, BETTY DENDY, ELIZABETH PERSAK, KRISTI ROCK, JENNIFER CHALAL, JOHN TORRANCE, LENARD SHOEMAKER, MICHAEL MITCHELL, ROBERT SKELTON, JEFFREY JONES, ISABEL MARQUES, PAYAM RASTEGAR, and SYED ABDUL NAFAY, individually and on behalf of all others similarly situated, Plaintiffs, v. TOYOTA MOTOR CORPORATION, TOYOTA MOTOR NORTH AMERICA, INC., and DENSO INTERNATIONAL AMERICA, INC., Defendants.	Case No: 1:20-cv-00629-WFK-JRC

TOYOTA MOTOR CORPORATION AND TOYOTA MOTOR NORTH AMERICA, INC.'S MEMORANDUM OF LAW IN SUPPORT FOR ENTRY OF AN ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Defendants Toyota Motor North America, Inc. ("TMNA") and Toyota Motor Corporation ("TMC," together with TMNA, "Toyota") respectfully request that this Court finds that: (1) this Court has jurisdiction over the subject matter and Parties to these proceedings; (2) the proposed Class meets the requirements of Rule 23 of the Federal Rules of Civil Procedure[1] and should be preliminarily certified for settlement purposes only; (3) the persons and entities identified below should be appointed Class Representatives and Class Counsel; (4) the Settlement is the result of informed, good-faith, arm's-length negotiations between the Parties and their capable and experienced counsel and is not the result of collusion; (5) the Settlement is fair, reasonable, and adequate and should be preliminarily approved; (6) the proposed Settlement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Class; (7) the proposed Notice Program and proposed forms of notice satisfy Rule 23 and Constitutional Due Process requirements and are reasonably calculated under the circumstances to apprise the Class of (i) the pendency of the Action, (ii) preliminary class certification for settlement purposes only, (iii) the terms of the Settlement, (iv) Class Counsel's application for an award of attorneys' fees and expenses ("Fee Application") and request for Class Representative service awards, (v) the Class Members' rights to opt-out of the Class and object to the Settlement, and (vi) the process for submitting a Claim to request a payment from the Settlement Fund; (8) good cause exists to schedule and conduct a Fairness Hearing, pursuant to Rule 23(e), to assist the Court in determining whether to grant final approval of the Settlement, certify the Class, for settlement purposes only, and issue a Final Order and Final Judgment, and whether to grant Class Counsel's Fee Application and request for Class Representative service awards; (9) order the establishment of a Qualified

[1] All citations to the Rules shall refer to the Federal Rules of Civil Procedure.

Settlement Fund; (10) issue a preliminary injunction as to the Class; and (11) the other related matters pertinent to the preliminary approval of the Settlement should also be approved.[2]

I. PRELIMINARY STATEMENT

As a result of extensive discovery and arm's-length negotiations by experienced counsel and with the assistance of a highly-experienced Court-appointed Settlement Special Master Patrick A. Juneau, Toyota, Denso International America, Inc. ("DIAM"), and Plaintiffs' Counsel, the last acting on behalf of the Named Plaintiffs and the Class Members, have executed a Settlement Agreement (Dkt. No. 162) to resolve this Action. The specific vehicles at issue ("Covered Vehicles") are attached to the Settlement Agreement at Exhibits 1a, 1b, and 2 and include SSC Vehicles, Additional Vehicles, and Subject Vehicles, respectively. The lawsuit asserts claims premised upon, *inter alia*, violations of various state consumer protection statutes. *See* Third Amended Consolidated Class Action Complaint ("Class Action Complaint") (Dkt. No. 160). Toyota denies any and all liability and wrongdoing.

Under the Settlement Agreement, Defendants have agreed to provide the following relief: (1) Customer Support Program for Additional Vehicles, which will provide prospective warranty coverage for repairs (including parts and labor), if needed, and a Loaner/Towing Program for vehicles undergoing such repairs; (2) an Extended New Parts Warranty for Subject Vehicles and SSC Vehicles, and a Loaner/Towing Program for vehicles undergoing such repairs; (3) reimbursement of certain out-of-pocket expenses; (4) a reconsideration procedure; and (5) settlement oversight by Settlement Special Master Juneau. Thus, to avoid the burden, expense, risk and uncertainty of litigating this action, and for the purpose of putting to rest all issues with

[2] All capitalized terms shall have the meaning ascribed to them in the Settlement Agreement unless otherwise specified herein.

the Class and this Action, without any admission of liability or wrongdoing, the Parties desire to enter into this Settlement.[3]

II. BACKGROUND

A. Plaintiff's Allegations and Claims and Parties' Motion Practice

The Parties have engaged in litigation for over two years. On February 4, 2020, Plaintiff Sharon Cheng filed a class action complaint in the United States District Court for the Eastern District of New York, *Sharon Cheng, et al. v. Toyota Motor Corporation, et al.*, Case No. 1:20-cv-00629-WFK-JRC (E.D.N.Y.), asserting claims related to Toyota's January 13, 2020 Recall 20V-012 report (the "Recall Report") to NHTSA voluntarily recalling nearly 700,000 Toyota and Lexus vehicles manufactured between August 1, 2018 through January 31, 2019 with low-pressure Denso fuel pumps (together with the expansions referenced in Section II.A.41, the "Recall"). The Recall Report states:

> These fuel pumps contain an impeller that could deform due to excessive fuel absorption. Although the cause is unknown, if impeller deformation occurs, the impeller may interfere with the fuel pump body, and this could result in illumination of check engine and master warning indicators, rough engine running, engine no start and/or vehicle stall while driving at low speed. However, in rare instances, vehicle stall could occur while driving at higher speeds, increasing the risk of crash.

"Recall(s)" are defined as Toyota's recalls of the Subject Vehicles, namely, Toyota's Recall 20V-012 submitted to NHTSA on or about January 13, 2020, the amendments submitted for Recall 20V-682 on or about November 4, 2020, and the amendments submitted for Recall 21V-617 on or about August 6, 2021, as identified in Exhibit 2 of the Settlement Agreement, and any

[3] This Memorandum of Law discusses certain aspects of the Settlement Agreement, which is incorporated by reference herein. If there is any contradiction or inconsistency between this Memorandum of Law and the Settlement Agreement, the Settlement Agreement shall control.

changes related thereto prior to Preliminary Approval. The Recall currently encompasses approximately 3.36 million Toyota and Lexus vehicles.

Plaintiff asserted claims asserts claims on behalf of a statewide class for: (1) violations of New York's consumer protection statute, New York General Business Law § 349; (2) breach of express warranty; (3) breach of implied warranty; (4) negligent recall/undertaking; (5) unjust enrichment; and, on behalf of a nationwide class, (6) a claim for violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. Plaintiff also alleged that the Recall was deficient because additional Toyota and Lexus vehicles shared the same fuel pump that gave rise to the Recall.

On April 14, 2020, Plaintiff Cheng filed her first amended complaint adding as plaintiffs Rhonda SanFilipo, Cristina Dias, Zina Pruitt, Marlene Rudolph, Patricia Barlow, and Kristi Rock; adding as defendants Denso Corporation and DIAM, the supplier and manufacturer of the defective fuel pumps; and allegations from Toyota's March 4, 2020 expansion of the Recall to nearly 1.8 million affected Toyota and Lexus vehicles.

Between March 20, 2020 and April 2020, three other putative class actions were filed in other federal courts making substantially similar allegations as those in *Cheng*. These other cases were: (i) *Tina Feng, et al. v. Toyota Motor North America, Inc., et al.,* No. 20-cv-0534-CAB-BLM (S.D. Cal.); (ii) *Jennifer Chalal v. Toyota Motor Corporation, et al.,* No. 2:20-cv-01867-CJD (E.D. Pa.); and (iii) *Elizabeth Gendron v. Toyota Motor Corp. et al.,* No. 8:20-cv-775-DOC-KES (C.D. Cal.). These three cases were voluntarily transferred to the United States District Court for the Eastern District of New York. On June 26, 2020, the Court ordered the consolidation of *Feng* and *Chalal* with *Cheng*. On July 31, 2020, the Court ordered the consolidation of *Gendron* with *Cheng*.

After the four cases cited above were filed, four other putative class actions were filed making similar allegations. These cases are: (i) *Lenard Shoemaker v. Toyota Motor North*

America, Inc., et al., 3:20-cv-00869-RDM (M.D. Pa.); (ii) *Isaac Tordjman v. Toyota Motor North America, Inc., et al.,* 9:20-cv-80871 (S.D. Fla.); (iii) *Yang Zuo v. Toyota Motor North America, Inc., et al.*, 2:20-cv-06607 (D.N.J.); and (iv) *Isabel Marques, et al. v. Toyota Motor North America, Inc., et al.,* 1:20-cv-00665 (E.D. Va.).[4]

On June 16, 2020, plaintiffs in these four later-filed cases filed a motion before the Judicial Panel on Multidistrict Litigation ("JPML") to centralize their cases and the consolidated *Cheng*, *Feng*, *Chalal*, and *Gendron* cases in the Eastern District of Michigan. *In re Denso-Manufactured Toyota Fuel Pump Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2956 (J.P.M.L.). TMNA, DIAM and plaintiffs in the four early filed cases opposed the motion, which was set to be heard by the JPML on September 24, 2020. On September 15, 2020, the moving plaintiffs withdrew their motion and the JPML's Order Deeming the Motion Withdrawn and Vacating the September 24, 2020 Hearing Session Order was docketed the same day.

On July 3, 2020, Plaintiffs in *Cheng* filed their consolidated amended class action complaint adding as plaintiffs Bruce Puleo, Eon Zimmerman, Tina Feng, Robert Hakim, Bernadette Grimes, Teresa Edwards, Dieu Le, Chris Bohn, Daniel Deweerdt, Betty Dendy, Jennifer Chalal, John Torrance, and Michael Mitchell, as well as refined allegations related to the scope of affected vehicles and the defect and countermeasure.

Plaintiffs in *Shoemaker*, *Zuo*, *Tordjman*, and *Marques* then filed motions to voluntarily transfer their cases to the Eastern District of New York. These motions were granted and these cases were transferred into the Eastern District of New York and consolidated with the *Cheng* action on October 8 and 15, 2020.

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[4] One additional complaint, *Jose Ruis, et al. v. Toyota Motor North America, Inc. et al.*, 2:20-cv-12600 (D.N.J.), was filed on September 11, 2020, and made similar allegations to the cases above. *Ruis* was dismissed without prejudice on September 23, 2020.

On December 14, 2020, Plaintiffs filed their Second Amended Consolidated Complaint alleging that plaintiffs sustained damages relating to the Recall. Plaintiffs named TMC, TMNA, Denso Corporation, and DIAM as the defendants. There were 33 plaintiffs named and 97 counts alleged, with plaintiffs seeking various state and nationwide classes.

On January 15, 2021, TMNA and DIAM served their motions to dismiss. TMNA and DIAM made numerous arguments. Plaintiffs' opposition was served on March 30, 2021. TMNA and DIAM filed their replies on May 28, 2021.

Denso Corporation was served on May 27, 2021 and dismissed without prejudice from the Action on August 16, 2021. TMC was served on May 11, 2021. On August 16, 2021, TMC filed its pre-motion letter to dismiss Plaintiffs' consolidated complaint. On August 23, 2021, Plaintiffs filed their opposition to TMC's pre-motion letter. Plaintiffs filed their Third Amended Class Action Complaint on September 7, 2022.

B. Discovery and Settlement Negotiations

Plaintiffs, TMNA, and DIAM submitted a Discovery Plan, which was approved by the Court dated October 28, 2020. The Court So Ordered the Parties' Protective Order re: Confidential Treatment of Documents, Stipulated Order Regarding the Protocol for Producing Documents and Electronically Stored Information, and Order Regarding the Disclosure of Privileged Information on November 30, 2020. Plaintiffs, TMNA, and DIAM each served their written initial disclosures on November 2, 2020, October 30, 2020, and November 2, 2020, respectively. Plaintiffs served extensive requests for production of documents on TMNA and DIAM on January 22, 2021. DIAM served their responses to plaintiffs' requests on March 15, 2021. TMNA served their responses to Plaintiffs' requests on April 7, 2021. On September 9, 2021, TMC served its Initial Disclosures, Responses to Plaintiffs' Requests for Production, and Response to Plaintiffs' Interrogatory, which Plaintiffs served on June 28, 2021. Also on September 9, 2021, TMNA served its Response to

Plaintiffs' Interrogatory with verification. Defendants have produced documents responsive to Plaintiffs' requests.

As a part of formal discovery, Defendants produced, and Plaintiffs processed and reviewed, about 655,000 documents containing approximately 1.5 million pages of documents related to the Recall, the design and operation of the subject fuel pumps, warranty data, failure modes attributed to the subject fuel pumps, Defendants' investigation into the defect, and the defect countermeasure development and implementation. Toyota produced documents including, for example, Owner's Manuals, Sales Brochures, Dealer Letters, Technical Instructions, New Car Feature Manuals, Warranty Service Guides/Manuals, NHTSA Filings, Repair Manuals, confidential root cause documents, and Field Technical Reports.

As a part of confirmatory discovery, Defendants have produced a substantial number of additional documents, tangible things, and information requested by Class Counsel related to the design and operation of the original equipment fuel pump; the design, operation, development, implementation, the effectiveness of the countermeasure fuel pump, and the Recalls. Also as a part of confirmatory discovery, Denso and Toyota each provided Plaintiffs with a confirmatory witness interview on July 19, 2022 and August 17, 2022, respectively.

During the negotiations, the Parties participated in several in-person negotiations and countless telephone conversations and emails. In order to help facilitate the negotiations, the Parties jointly moved the Court to appoint Patrick A. Juneau as Settlement Special Master. The Court granted the joint motion and So Ordered Patrick A. Juneau on November 3, 2021. The Parties also had numerous communications with the Settlement Special Master regarding the negotiations, terms, timing, and related issues.

Toyota denies any and all wrongdoing in connection with any and all of Plaintiffs' claims, but nevertheless considers it desirable to settle them because the settlement will: (i) provide substantial benefits to the Class Members; and (ii) avoid the substantial expense, burden and uncertainty associated with the continued litigation of the Plaintiffs' claims.

C. Settlement Terms

Under the terms of the Settlement Agreement, Toyota and Denso have agreed to make substantial relief available to Class Members, subject to the terms and conditions detailed in the Settlement Agreement. This relief includes: (1) Customer Support Program ("CSP") for all Class Members who own or lease Additional Vehicles providing prospective coverage for 15 years, measured from the date of original sale, for repairs (including parts and labor) needed to correct defects, if any, in materials or workmanship in the Fuel Pumps for the Additional Vehicles and a Loaner/Towing Program where, without cost to and upon request from Class Members who own or lease Additional Vehicles whose fuel pumps are being replaced pursuant to the Customer Support Program, shall be provided with the same loaner or rental vehicles and/or towing options provided to the Subject Vehicles under the Recall(s); (2) an extension of the new parts warranty coverage for the fuel pump kit replaced on the Subject Vehicles or SSC Vehicles for 15 years, measured from July 15, 2021, and up to 150,000 miles and a Loaner/Towing Program where, without cost to and upon request from Class Members who own or lease Subject Vehicles or the SSC Vehicles whose fuel pumps are being replaced pursuant to the Extended Warranty, shall be provided with the same loaner or rental vehicles and/or towing options provided to the Subject Vehicles under the Recall(s); (3) an Out-of-Pocket Class Process where Class Members, during the Claim Submission Period, may submit Claims for previously paid out-of-pocket expenses incurred to repair or replace a Fuel Pump of Covered Vehicles that were not otherwise reimbursed and that were either (a) incurred prior to the date of the Initial Notice Date; or (b) incurred after

the Initial Notice Date and before the Final Effective Date[5]; (4) a procedure for reconsideration for Class Members that are denied benefits under the CSP or the Extended New Parts Warranty; and (5) oversight by Settlement Special Master Juneau.

The "Class," for settlement purposes only, is broadly defined as: all individuals or legal entities who, at any time as of the entry of the Initial Notice Date, own or owned, purchase(d) or lease(d) Covered Vehicles 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, its officers, directors and employees; its affiliates and affiliates' officers, directors and employees; its distributors and distributors' officers, directors and employees; and Toyota Dealers and Toyota Dealers' officers and directors; (b) Denso, its officers, directors and employees; its affiliates and affiliates' officers, directors and employees; its distributors and distributors' officers, directors and employees; (c) Plaintiffs' Counsel; and (d) judicial officers and their immediate family members and associated court staff assigned to this case. In addition, persons or entities are not Class Members once they timely and properly exclude themselves from the Class, as provided in this Settlement Agreement, and once the exclusion request is finally approved by the Court.

In order to fund a portion of the Settlement, the Parties, through their respective counsel, shall establish and move the Court to establish and create a QSF, pursuant to Internal Revenue Code § 468B and the Regulations issued thereto, with the QSF to be held by the Escrow Agent. The QSF will hold Class Counsel's Attorneys' Fees, Costs, and Expenses and Class Representative service awards. Following the Court's grant of final approval, Settlement Special Master Juneau may distribute funds from the QSF. If the Court does not grant final approval, any funds remaining

[5] For costs that were incurred after the Initial Notice Date and before the Final Effective Date, the Class Member must provide proof that they were denied coverage by the Toyota dealer prior to incurring the cost.

in the QSF shall revert to Defendants, as per their contributions. Defendants agree to deposit the amounts of Attorneys' Fees, Costs, and Expenses and Class Representative service awards granted by the Court no later than 90 days from the date of the issuance of the preliminary approval order by the Court.

In consideration for the Settlement Agreement, Class Representatives, and each Class Member, on behalf of themselves and any other legal or natural persons who may claim by, through, or under them, agree to fully, finally, and forever release, relinquish, acquit, and discharge 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 Action, 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, violations of any state's deceptive, unlawful, or unfair business or trade practices, false, misleading or fraudulent advertising, consumer fraud or consumer protection statutes, any breaches of express, implied or any other warranties, RICO, or the Magnuson-Moss Warranty Act, or any other source, or any claim of any kind arising from, related to, connected with, and/or in any way involving the Action, the Covered Vehicles' Fuel Pumps, and/or associated parts that are, or could have been, defined, alleged, or described in the Class Action Complaint, the Action, or any amendments of the Class Action Complaint.

Notwithstanding the foregoing, Class Representatives and the other Class Members are not releasing claims for personal injury, wrongful death or physical property damage (except to the Fuel Pump in the Covered Vehicle itself) from the Covered Vehicle. Notwithstanding the

foregoing, Class Representatives and/or the other Class Members shall hold Released Parties harmless for all Released Claims that may be asserted by another legal or natural person (including but not limited to legal guardians and estate administrators) who claim by, through, or under that Class Representative or Class Member.

III. THE MOTION FOR PRELIMINARY APPROVAL SHOULD BE GRANTED BECAUSE OF THE FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE SETTLEMENT

The Second Circuit has long recognized "the strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (internal quotation marks omitted); *see also* 4 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 11.41, at 87 (4th ed. 2002) ("Newberg") ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). The approval of a class action settlement is a matter of discretion for the trial court. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995).

"Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation." MANUAL FOR COMPLEX LITIGATION, FOURTH ("MCL 4th"), § 21.632, at 320 (Fed. Judicial Center 2004) (footnote omitted). "If the court finds at the preliminary approval stage that it 'will likely be able to ... approve the proposal under Rule 23(e)(2)" and 'certify the class for purposes of judgment on the proposal,' it 'must direct notice in a reasonable manner to all class members who would be bound by the proposal." *See Mikhlin v. Oasmia Pharm. AB*, No. 19CV4349NGGRER, 2021 WL 1259559, at *2 (E.D.N.Y. Jan. 6, 2021) (citing to the 2018 amendments to Rule 23). If the settlement passes muster at the preliminary approval stage, the court sets a formal fairness hearing to determine whether the settlement should be granted final

approval, and notice of the settlement and hearing is given to the class. MCL 4th § 21.633; *see also* Newberg § 11.25, at 38-39 (endorsing two-step process);

At the preliminary-approval stage, "[t]he judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms . . . ." MCL 4th § 21.632, at 321; *Mikhlin*, 2021 WL 1259559, at *2. The judge should review the settlement for concerns "such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the class, the need for subclasses, or excessive compensation for attorneys." MCL 4th § 21.632, at 321 "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible [final] approval, preliminary approval is granted." *Nieves v. Community Choice Health Plan of Westchester, Inc.*, No. 08 Civ. 321 (VB) (PED), 2012 WL 857891, at *4 (S.D.N.Y. Feb. 24, 2012) (internal quotation marks omitted); *accord In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007).

If the court determines that notice to class members is "justified by the parties' showing that the court will likely be able to" approve the proposed settlement and certify the class, it "must direct notice in a reasonable manner to all class members who will be bound by the proposal." *Mikhlin*, 2021 WL 1259559, at *3. As further discussed below, there is probable cause for the Court to grant preliminary approval of the Settlement Agreement and schedule the Fairness Hearing.

A. The Settlement Falls Within the Range of Possible Approval

The settlement falls within the range of possible approval. At the preliminary approval stage, "the [c]ourt need only find that the proposed settlement fits within the range of possible approval to proceed." *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515(WHP), 2008 WL

5110904, at *2, (S.D.N.Y. Nov. 20, 2008). Although the court's task at the preliminary approval stage is merely to perform an initial evaluation, it can be useful for the Court to consider preliminarily the criteria on which it will ultimately judge the settlement. *See Long*, 2015 WL 5444651, at *3. In evaluating a class action settlement, courts in the Second Circuit have traditionally considered the nine factors[6] set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). *Mikhlin*, 2021 WL 1259559, at *2; *see also In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) ("The Advisory Committee Notes to the 2018 amendments indicate that the four new Rule 23 factors were intended to supplement rather than displace these '*Grinnell'* factors.").

In 2018, Rule 23 was amended to set forth specific factors relating to the court's approval of a class settlement. Subject to Rule 23(e)(2), as amended, the court may grant final approval of a proposed class action settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate" after considering whether:

(A) the class representatives and class counsel have adequately represented the class;[7]

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

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[6] The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See In re Warner*, 2008 WL 5110904, at *2; *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000); *Long v. HSBC USA Inc.*, No. 14 Civ. 6233(HBP), 2015 WL 5444651, at *3 n.2 (S.D.N.Y Sept. 11, 2015).

[7] Toyota refers the Court to Plaintiffs' brief for a discussion of the first factor under amended Rule 23(e), "the class representatives and class counsel have adequately represented the class."

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.[8]

See Mikhlin, 2021 WL 1259559, at *2–3. Rule 23 also requires that the court consider whether "giving notice is justified by the parties' showing that the court will likely be able to ... certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii). Thus, "[b]efore approving a class settlement agreement, a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." *In re Am. Intern. Grp., Inc. Sec. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012).

Here, taking account of the factors set forth in Rule 23(e)(2), as well as the *Grinnell* factors, the Court should find that the proposed settlement is fair, reasonable, and adequate.[9]

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[8] Toyota refers the Court to Plaintiffs' brief for a discussion of the reasonableness of the proposed award of attorneys' fees.

[9] Notably, *Grinnell* factors two, four, five and seven are, to the extent applicable, are neutral. For example, factor 2 (i.e., the reaction of the Class to the settlement) is difficult to gauge at this time since the Class has not been provided any notice of the settlement. However, the fact that eligible Class Members will benefit from Customer Support Program(s) which include a Loaner/Towing Program, reimbursements of certain costs through the out-of-pocket claims process, and, depending on the vehicle, an extended new part warranty suggests that the settlement will be likely favorably received by the Class. Similarly, *Grinnell* factors four and five (*i.e.,* the risks of establishing liability and damages), courts have recognized the difficulty of assessing these factors at the preliminary approval stage. "The Court cannot and need not determine the merits of the contested facts and legal issues at this stage, and to the extent courts assess this factor, it is to determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case." *Misra v. Decision One Mortg. Co.*, No. CV 07-0994, 2009 WL 4581276, at *7 (C.D. Cal. Apr. 13, 2009). Toyota believes it has strong defenses on the merits. Finally, *Grinnell* factor seven (*i.e.*, the ability of the defendants to withstand a greater judgment) is neutral. Although Toyota could likely withstand a greater judgment, courts recognize that this

1. The Proposal Was Negotiated at Arm's-Length

A class settlement, such as the one here, "reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation" is entitled to a "presumption of fairness." *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2019 WL 6842332, at *2 (S.D.N.Y. Dec. 16, 2019). A court may also consider whether the settlement was reached with the assistance of a judicial officer or other experienced neutral. *See id.*; *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012) (noting involvement of "an experienced and well-known employment and class action mediator," which was "a strong indicator of procedural fairness"); *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (noting that settlement was "facilitated by a respected mediator").

Here, there should be little doubt that the settlement between the Toyota and the Class was the product of serious, informed, non-collusive negotiations. The settlement was negotiated by experienced, informed counsel for several months, where each side thoughtfully considered each other's positions and diligently worked to reach a resolution of this matter. Given counsel's experience, the negotiations took place at arm's-length, were adversarial, and included the involvement of Patrick A. Juneau, the Court-appointed Settlement Special Master as a mediator.[10] The fact that the settlement was assisted by an experienced judicial officer is further evidence that the Settlement was the product of serious, informed, non-collusive negotiations. *See Morris*, 859 F. Supp. 2d at 618.

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factor, "standing alone does not suggest that the settlement is unfair." *In re Austrian & German Bank Holocaust Litig.*, at 178 n.9.

[10] Among many distinctions, Mr. Juneau has served as the court appointed Special Master in numerous other federal and state cases including the following complex and multi-party matters, including, among others, in the "Deepwater Horizon" Multi-District Litigation, pending in the U.S. District Court for the Eastern District of Louisiana. *See In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 Section J (E.D. La.).

In addition, the material settlement terms were not reached before the Defendants provided Class Counsel ample opportunity to thoroughly review, research, investigate and analyze the matter, which included, *inter alia*, the Defendants' productions of over 655,000 relevant, responsive, and confidential documents containing approximately 1.5 million pages of documents, Toyota and Denso each also provided a key corporate representative for an interview by Plaintiffs' Counsel, and the Parties' counsel participated in numerous in-person and telephone meetings. As a result of all of these efforts, Plaintiffs' Counsel had an unfettered opportunity to develop the facts concerning Defendants' potential liability, defenses and potential likelihood of success. Because the Parties were willing to share significant information about this matter during the litigation, the Parties were capable of making – and did make – a well-informed decision regarding the Settlement.

2. The Relief Provided For The Class Is Adequate

In evaluating whether the settlement provides adequate relief for the putative class, the court must consider the following factors, which overlap significantly with a number of the *Grinell* factors, "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class ...; (iii) the terms of any proposed award of attorney's fees ...; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). As further explained below, each of these factors weigh in favor of preliminary approval. *Mikhlin*, 2021 WL 1259559, at *5.

1) Costs, Risks, and Delay of Trial and Appeal

Litigation through trial would be complex, costly, and long. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 174; In *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 36 (E.D.N.Y.

2019) ("Class action suits in general have a well-deserved reputation as being most complex."). Courts have consistently held that, unless the settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *See TBK Partners, Ltd. v. W. Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456, 460 (2d Cir. 1982).

This case is no exception. As discussed above, the Parties have engaged in extensive formal discovery. To engage in contested discovery and pre-trial motion practice in this action – which would include extensive written discovery, numerous fact and expert depositions, contested motions for class certification and summary judgment – would be a costly and time-consuming process for the Parties and the Court. Settlement, on the other hand, permits a prompt resolution of this action on terms that are fair, reasonable, and adequate to the Class. This result will be accomplished years earlier than if the case proceeded to judgment through trial and/or appeals.

2) Effectiveness of Proposed Method of Distributing Relief

Rule 23(e)(2)(C)(ii) requires that the court consider the effectiveness of the parties' "proposed method of distributing relief to the class, including the method of processing class-member claims." An adequate method is one that can "deter or defeat unjustified claims" without imposing an undue demand on class members. Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. A plan for allocating settlement funds "need not be perfect." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-cv-10240 (CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007). Rather, it "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005).

Here, in order for a Class Member to benefit from a Customer Support Program and/or Extended Parts Warranty, the Class Member only has to look up their vehicle's VIN on the

Settlement Website or bring their Subject Vehicle to a Toyota Dealer where the dealer can confirm that the vehicle is a Subject Vehicle. *See* Long Form Notice Exhibit to the Settlement Agreement, pp. 8, 9-10. Similarly, without cost to and upon request from Class Members, who (i) own or lease Additional Vehicles whose fuel pumps are being replaced pursuant to the CSP or (ii) own or lease SSC Vehicles or Subject Vehicles whose fuel pumps are being replaced pursuant to the Extended Warranty, the Class Member shall be provided with the same loaner or rental vehicles and/or towing options provided to the owners or lessees of the Subject Vehicles under the Recall(s).

Additionally, Class Members, as part of the Out-of-Pocket Claims Process, may submit Claims during the Claim Submission Period to the Settlement Claims Administrator for previously paid out-of-pocket expenses[11] incurred to repair or replace a Fuel Pump of Covered Vehicles that were not otherwise reimbursed and that were either (a) incurred prior to the date of the execution of the Settlement Agreement; or (b) incurred after the date of the execution of the Settlement Agreement and before the Final Effective Date. *See* Settlement Agreement § III.C.1. For costs that were incurred after the execution of the Settlement Agreement and before the Final Effective Date, the Class Member must provide proof that they were denied coverage by the Toyota dealer prior to incurring the cost. *See id.* This method will not only deter or defeat unjustified claims, it does so without imposing an undue demand on class members. *See* Claim Form Exhibit to the Settlement Agreement.

[11] The following types of reasonable expenses, with Supporting Documentation and directly related to the repair and/or replacement of a Fuel Pump to a Covered Vehicle, may be reimbursed: (i) rental vehicles; (ii) towing; and (iii) any unreimbursed repairs or part replacements. *See* Settlement Agreement § III.C.2.

3) Other Agreements by the Parties

Rule 23(e)(3) requires that the parties "identify[ ] any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(3). There are no agreements made in addition to the Settlement Agreement.

3. Equitable Treatment of Class Members Relative to Each Other

The settlement does not provide "unduly preferential treatment of class representatives or segments of the class." MCL 4th § 21.632, at 321. As a preliminary matter, a class need not provide the exact same settlement to every class member in order for a court to approve the settlement. *See Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 237-42 (E.D.N.Y. 2010) (granting approval to settlement class in which different groups within the class received varying amounts of relief); *Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 351 (E.D.N.Y. 2010) ("Unless the court reviewing settlement finds stark conflicts of interest, a settlement which contains class members who may recover different amounts is acceptable.") (internal quotation and citations omitted); *In re Veeco Instruments Inc. Sec. Litig*, 05-MDL-165, 2007 WL 4115809, at *13 (S.D.N.Y. Nov. 7, 2007) ("[T]here is no rule that settlements benefit all class members equally") (internal punctuation and citations omitted).

Here, there is no basis to believe that there are obvious deficiencies in the settlement or that certain members of the Class received preferential treatment. The Settlement Agreement provides valuable programs (CSP for Additional Vehicles and an Extended New Parts Warranty for Subject Vehicles or the SSC Vehicles – both of which include a Loaner/Towing Program) and an Out-of-Pocket Class Process where Class Members may be reimbursed for previously paid out-of-pocket expenses incurred to repair or replace a Fuel Pump of Covered Vehicles that were not otherwise reimbursed. *See* Settlement Agreement, § III. In return for this relief, Class Members

are releasing potential claims against the Released Parties named in the Settlement Agreement. *Id.*, §VII.

Moreover, the Settlement Agreement grants Class Counsel the right to petition the Court for incentive awards of up to $3,500.00 per Class Representative[12]. *See* Settlement Agreement § IX. This award is within the Court's discretion and, thus, will not be unreasonable in light of the Class Representatives' role in this case. *See Jermyn v. Best Buy Stores, L. P.*, No. 08 Civ. 214 (CM), 2012 WL 2505644, at *8 (S.D.N.Y. June 27, 2012) ("Courts in this district and elsewhere routinely approve incentive awards of the type sought here."); *see also Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, No. 08 Civ. 7670 (BSJ) (JCF), 2010 WL 532960, at *1 (S.D.N.Y. Feb. 9, 2010) ("Enhancement awards for class representatives serve the dual functions of recognizing the risks incurred by named plaintiffs and compensating them for their additional efforts.").

4. Additional Grinnell Factors Support Approval

Under *Grinnell* factor three (*i.e.*, stage of the proceedings and the amount of discovery completed), discovery has advanced far enough to allow the Parties to responsibly resolve the case. Plaintiffs, TMNA, and DIAM jointly submitted a Discovery Plan and proposed discovery orders including Parties' Protective Order re: Confidential Treatment of Documents, Stipulated Order Regarding the Protocol for Producing Documents and Electronically Stored Information, and Order Regarding the Disclosure of Privileged Information, which were all approved by the Court. Plaintiffs, TMNA, and DIAM have each served their written initial disclosures and requests and responses to written discovery.

[12] Of the 33 Class Representatives, 4 of them have submitted their vehicles for an inspection and will petition for a service award of $3,500.00. The remaining 29 Class Representatives will petition for a service award of $2,500.00.

Defendants have also produced over 655,000 documents including highly confidential documents, related to the Recall, the design and operation of the subject fuel pumps, warranty data, failure modes attributed to the subject fuel pumps, the Defendants' investigation into the defect, and the defect countermeasure development and implementation. The effort made by counsel on both sides confirms that the Parties are sufficiently well-apprised of the facts of this Action, and the strengths and weaknesses of their respective cases, to make an intelligent analysis of the settlement. *See Torres v. Gristede's Operating Corp.*, No. 04-CV-3316 (PAC), 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010) ("The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating") (internal quotations omitted); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 ("[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . but an aggressive effort to ferret out facts helpful to the prosecution of the suit.") (internal quotations omitted).

Under *Grinnell* factor six (*i.e.*, the risks of maintaining the class action through the trial), Plaintiffs face the risk of adverse rulings or findings if the action is maintained through trial. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) ("If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome.") (internal citation omitted). If the case were to proceed on a litigation basis, Toyota expects to argue, at least, that individual questions preclude certification of a litigation class and that a litigation class is not manageable or a superior method to resolve Plaintiffs' claims. Should the Court certify the Class for litigation purposes, Toyota would likely challenge certification and move to decertify, forcing another round of briefing. Toyota may also

seek permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). In other words, risk, expense, and delay permeate such a process, and the settlement eliminates those possibilities.

Finally, under *Grinnell* factors eight and nine (*i.e.*, the range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation), the settlement amount is reasonable. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("Instead, there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.") (internal citation omitted). The settlement relief provided here is more than reasonable in light of the potential recovery. Defendants have agreed to provide (1) a CSP for all Class Members who own or lease Additional Vehicles providing prospective warranty coverage for repairs (including parts and labor) needed to correct defects, if any, in materials or workmanship in the Fuel Pumps for the Additional Vehicles and a Loaner/Towing Program where, without cost to and upon request from Class Members who own or lease Additional Vehicles whose fuel pumps are being replaced pursuant to the Extended Warranty, shall be provided with the same loaner or rental vehicles and/or towing options provided to the Subject Vehicles under the Recall(s); (2) an extension of the new parts warranty coverage for the fuel pump kit replaced on the Subject Vehicles or the SSC Vehicles for 15 years and up to 150,000 miles and a Loaner/Towing Program where, without cost to and upon request from Class Members who own or lease Subject Vehicles or the SSC Vehicles whose fuel pumps are being replaced pursuant to the Extended Warranty, shall be provided with the same loaner or rental vehicles and/or towing options provided to the Subject Vehicles under the Recall(s); (3) an Out-of-Pocket Class Process where Class Members, during the Claim Submission Period, may submit Claims for previously paid out-of-pocket expenses incurred to repair or replace

a Fuel Pump of Covered Vehicles that were not otherwise reimbursed and that were either (a) incurred prior to the date of the execution of the Settlement Agreement; or (b) incurred after the date of the execution of the Settlement Agreement and before the Final Effective Date; (4) a reconsideration procedure; and (5) settlement oversight by Settlement Special Master Juneau. Moreover, the broad definition of Class ensures every person who own or owned, purchase(d) or lease(d) a Covered Vehicle, not just people who currently own or lease a Covered Vehicle, are eligible for the settlement relief. *See* Settlement Agreement §§ II.A.10.; III. Thus, the settlement fits within the range of possible approval. *See Simerlein v. Toyota Motor Corp.*, No. 3:17-CV-1091 (VAB), 2019 WL 1435055, at *7-8 (D. Conn. Jan. 14, 2019) (preliminary approving a settlement that provided a Customer Confidence Program that covered inspections and repairs and an out-of-pocket claims process); *Udeen v. Subaru of Am., Inc.*, No. 18-17334 (RBK/JS), 2019 WL 4894568, at *7 (D.N.J. Oct. 4, 2019) (finding that preliminary approval of the settlement was appropriate where the settlement provided a warranty extension and fulfillment and claim process). Accordingly, the *Grinnell* factors also weigh in favor of preliminary approval.

IV. PROPOSED CLASS NOTICE AND NOTIFICATION PROCEDURES

A. Notice Dissemination

If a court grants preliminary approval of a class action settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Where, as here, class certification is sought under Rule 23(b)(3) for purposes of the settlement, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) ("[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous

requirement of Rule 23."); *see also In re Elec. Books Antitrust Litig.*, No. 11 MD 2293 DLC, 2014 WL 1641699, at *2 (S.D.N.Y. Apr. 24, 2014) (noting that the court had approved a notice plan that included, *inter alia*, notices to affected persons, a dedicated website, internet banner advertising, press releases and postcards); *In re W. Union Money Transfer Litig.*, No. CV-01 0335 (CPS), 2004 WL 3709932, at *5 (E.D.N.Y. Oct. 19, 2004) (noting that the court had approved a notice plan that included, *inter alia*, direct mail, internet banner advertising, press releases and a dedicated website and toll-free telephone hotline).

Here, the Parties have selected a qualified third-party Settlement Notice Administrator with particular expertise in targeting Class Members, Jeanne Finegan of Kroll Notice Media, to disseminate the notice. As detailed in the Settlement Agreement, notice is to be accomplished through a combination of Direct Mail Notice, Publication Notice, Long Form Notice, notice through a settlement website, toll-free telephone number, Internet banner notification and other applicable notice, all of which is detailed further below. The Settlement Notice Administrator estimates that the Notice Program will reach approximately 90 percent of the Class with an average frequency of three times.

The Notice Program in greater particularity is as follows:

Direct Mail Notice. Consistent with the timeline specified in the Preliminary Approval Order, the Settlement Notice Administrator shall begin to send the Direct Mail Notice, substantially in the form attached as Exhibit 6 to the Settlement Agreement, by U.S. Mail, proper postage prepaid, to the current and former registered owners of Covered Vehicles, as identified by data to be forwarded to the Settlement Notice Administrator by IHS Automotive, Driven by Polk. The Direct Mail Notice shall inform those persons of how to obtain the Long Form Notice via the settlement website, via regular mail or via a toll-free telephone number, pursuant to Sections IV.D

through F, below. In addition, the Settlement Notice Administrator shall: (a) re-mail any notices returned by the United States Postal Service with a forwarding address; (b) 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, research such returned mail for better addresses and promptly mail copies of the applicable notice to any updated addresses so found. The QR code associated with the Direct Notice shall remain active and the link associated with the QR code shall be maintained in proper working order by the Settlement Notice Administrator for the duration of the Customer Support Program. *See* Settlement Agreement § IV.B

The Direct Mail Notice is in addition to the other interlocking and overlapping notice being disseminated to the Class, including, for example, the Publication Notice, internet website, and banner advertising, which are further discussed below. The Settlement Notice Administrator estimates that the "Class Notice is estimated to reach 90%" of the Class "on average [of] three times." Exhibit 4 to Settlement Agreement, Notice Plan at 1.

As of the date of the filing of this memorandum of law, the Settlement Notice Administrator has already requested from Polk the names and addresses associated with approximately 3.4 million VINs. *See id.* at 2. These names and addresses correspond to current and former owners and lessees that may be Class Members who own(ed) and/or lease(d) the Subject Vehicles and the SSC Vehicles. *Id.* As of August 26, 2022, Polk reported to the Settlement Notice Administrator that there is a total count of approximately 5.4 million associated name and address records related to those vehicles. *Id.*

Publication Notice. Consistent with the timeline specified in the Preliminary Approval Order, the Settlement Notice Administrator shall cause the publication of the Publication Notice, substantially in the form attached as Exhibit 7 to the Settlement Agreement, in newspapers,

magazines and/or other media outlets as shall be agreed upon by the Parties. *See* Settlement Agreement § IV.C.

Internet Website. The Settlement Notice Administrator shall also establish a settlement website that will inform Class Members of the terms of this Settlement Agreement, their rights, dates and deadlines and related information. *See* Settlement Agreement § IV.D. The website shall include, in .pdf format, materials agreed upon by the Parties and/or required by the Court, including, but not limited to, the Long Form Notice, the Settlement Agreement, Frequently Asked Questions and Answers, and Court documents that may be of interest to most Class Members. *Id.*

Long Form Notice. The Long Form Notice shall be in a form substantially similar to the document attached to the Settlement Agreement as Exhibit 5, and shall contain a plain and concise description of the nature of the action, the rights of Class Members, deadlines for events to occur or to exercise certain rights, the preliminary certification of the Class for settlement purposes, and the terms of the Settlement Agreement, including information on the identity of Class Members, how the Settlement Agreement would provide relief to the Class and Class Members, what claims are released under the Settlement Agreement and other relevant terms and conditions. *See* Settlement Agreement § IV.E.

The Class Action Settlement Administrator shall send the Long Form Notice via first-class mail to those persons who request it in writing or through the toll-free telephone number detailed below. *Id.*

Toll-Free Telephone Number. The Settlement Notice Administrator shall, pursuant to the Parties' agreement, establish a toll-free telephone number that will provide settlement-related information to Class Members using an automated voice response system. *See* Settlement Agreement § IV.F.

Internet Banner Notifications. The Settlement Notice Administrator shall, pursuant to the Parties' agreement, establish banner notifications on the Internet that will provide settlement-related information to Class Members and shall utilize additional Internet-based notice efforts as to be agreed to by the Parties. *See* Settlement Agreement § IV.G.

Class Action Fairness Act Notice. The Settlement Notice Administrator shall send to each appropriate State and Federal official, the materials specified in 28 U.S.C. § 1715, and shall otherwise comply with its terms. *See* Settlement Agreement § IV.H. The identities of such officials and the content of the materials shall be mutually agreeable to the Parties and in all respects comport with statutory obligations. *Id.*

B. The Parties' Proposed Notices Satisfy the Federal Judicial Center's Requirements

The Parties' proposed notices are neutral, written in an easy-to-understand clear language, eye-catching, and mirror the exemplar notices published by the Federal Judicial Center ("FJC"). *See* FJC's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide; *see also* Exhibit 9 to the Settlement Agreement, Declaration of Jeanne C. Finegan, APR Exhibit to the Settlement Agreement, p. 12 ("[Jeanne Finegan] was an early pioneer of plain language in notice. . . and continues to set the standard for modern outreach as the first notice expert to integrate social and mobile media into court approved legal notice programs.") (citation Deborah R. Hensler et al., CLASS ACTION DILEMMAS, PURSUING PUBLIC GOALS FOR PRIVATE GAIN. RAND (2000).). The notices provide potential Class Members: (1) basic information about the lawsuit; (2) a description of the benefits provided by the settlement; (3) an explanation of how Class Members can exercise their right to object to the settlement; (4) an explanation that any claims against Defendant that could have been litigated in this action will be released; (5) the names of counsel for the Class and information regarding attorney's fees, costs and incentive

awards; (6) the fairness hearing date, along with an explanation of eligibility for appearing; and (7) the settlement web site for additional information. *See* Fed. R. Civ. P. 23 ("The notice must clearly and concisely state in plain, easily understood language" information about the settlement); *Long*, 2015 WL 5444651, at *10; *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 105 (2010). Thus, the proposed notices are consistent with, and indeed exceed, other similar court-approved notices, the requirements of Fed. Civ. P. 23(c)(2)(B) and the FJC's guidelines.

As the foregoing demonstrates, the Notice Program provides interlocking methods that both aim to reach each Class Member individually and directly using reasonably-available address information but also provides multiple alternative forms of notice through which Class Members may learn of the settlement or obtain further information about their rights. The Notice Program follows well-recognized and established procedures for class action notice. Thus, the procedure for providing notice and the content of the notice constitute the best practicable notice to Class Members. In light of the foregoing, the Court should approve the form of notice detailed in the Settlement Agreement, the manner of notice detailed in the Settlement Agreement, and the Settlement Notice Administrator and Class Action Settlement Administrator.

V. THE COURT SHOULD FIND THAT THE ESCROW ACCOUNT IS TO BE A "QUALIFIED SETTLEMENT FUND"

The Parties request that the Court find that the Escrow Account is to be a "qualified settlement fund" as defined in Section 1.468B-1(c) of the Treasury Regulations in that it satisfies each of the following requirements:

> (a) The Escrow Account is to be established pursuant to an Order of this Court and is subject to the continuing jurisdiction of this Court;
>
> (b) The Escrow Account is to be established to resolve or satisfy one or more claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liabilities; and

> (c) The assets of the Escrow Account are to be segregated from other assets of Defendants, the transferor of the payment to the Settlement Funds and controlled by an Escrow Agreement.

See 26 CFR § 1.468B-1.

> A QSF is a simple trust designed to hold funds after defendants settle a case but before the plaintiffs receive the money. In a departure from usual tax rules, defendants can take a tax deduction for payments into the QSF, even though the plaintiffs—and the plaintiffs' lawyers—do not have taxable income until the money is actually distributed. Tax deductions are usually reciprocal—the payer can deduct a payment only when the recipient of the payment recognizes it as income. Yet a QSF allows payers and recipients of settlement funds to break this rule. Congress thought defendants needed assurance of their tax deductions even though there might be complexities or delays regarding the timing and the amount of distributions to plaintiffs and their counsel.

Robert W. Wood, Qualified Settlement Funds Cut Taxes and Disputes, 38 LITIG. (2011) (available on Westlaw and at http://woodllp.com/Publications/Articles/pdf/QSFs_Cut.pdf).

Courts have frequently approved QSFs to resolve class action cases, including courts in this circuit. For example, in *Elkind v. Revlon Consumer Prods. Corp.*, CV 14-2484 (JS) (AKT), 2017 WL 9480894, at *3 (E.D.N.Y. March 9, 2017), the Magistrate Judge recommended preliminary approval of the settlement and the establishment of the QSF. *See also In re: Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 1:13-cv-07789-LGS, 2017 WL 11598170, at *4 (S.D.N.Y. Sept. 8, 2017) (preliminarily approving a class action settlement and ordering the creation of a QSF); *In re Thalomid and Revlimid Antitrust Litigation,* Civ. No. 14-6997 (MCA) (MAH), 2020 WL 4197092, at *2 (D.N.J. May 26, 2020) (preliminarily approving a class action settlement and ordering the creation of a QSF); *In re: Polyurethane Foam Antitrust Litigation, Direct Purchasers Action*, 135 F. Supp. 3d 679, 695 (N.D. Ohio 2015) (same); *In re: Packaged Ice Antitrust Litigation, Direct Purchasers Action*, No. 08–MD–01952, 2011 WL 717519 (E.D. Mich. Feb. 22, 2011) (same).

Furthermore, the Parties request that, under the "relation back" rule provided under Section 1.468B-1(j)(2)(i) of the Treasury Regulations, the Court find that (i) Toyota may elect to treat the Escrow Account as coming into existence as a "qualified settlement fund" on the latter of the date the Escrow Account meets the above requirement in this Section IV or January 1 of the calendar year in which all of the requirements of Section 1.468B-1(c) of the Treasury Regulations are met, and (ii) if such a relation-back election is made, the assets held by the Settlement Funds on such date shall be treated as having been transferred to the Escrow Account on that date.

VI. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

It is common for most, if not all, federal courts to issue preliminary injunctions after granting preliminary approval to class action settlements and while notice is being disseminated to the class. Federal courts have recognized that injunctions against filed parallel actions may be particularly appropriate in the context of complex litigation, which "makes special demands on the court that may justify an injunction otherwise prohibited." *In re Diet Drugs*, 282 F.3d 220, 235 (3rd Cir. 2002) (affirming issuance of an injunction, after conditional certification and before the fairness hearing, preventing the mass opt out of class members pursuing a parallel Texas state court action). Moreover, within the context of complex litigation, "[t]he threat to the federal court's jurisdiction posed by parallel state actions is particularly significant where there are conditional class certifications and impending settlements in federal actions." *Id*. at 236 (citing *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 203 (3rd Cir. 1993)). Where, as here, substantial negotiations have progressed to the point of settlement, competing actions, if they are filed and/or allowed to proceed, would jeopardize the realization of a nationwide settlement, interfere with this Court's ability to manage the settlement, and potentially confuse Class Members to the point where it would "cause havoc." *Id*. at 204.

This Court has the authority to issue a preliminary injunction pursuant to the "necessary in aid of" exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651(a). *See In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) ("Federal courts have authority under the All-Writs Act, 28 U.S.C. § 1651 (1982), to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *Simerlein v. Toyota Motor Cor*p., No. 3:17-cv-1091 (VAB), 2019 WL 1435055, at *17 (D. Conn. Jan. 14, 2019) (citing *In re Baldwin United Corp.*, 770 F.2d 328, 335-339 (2d Cir. 1985)) ("The Second Circuit has recognized that injunctions under the All Writs Act may be necessary or appropriate to prevent third parties from thwarting the court's ability to reach and resolve the merits of the federal suit before it. . . [and] these injunctions may be issued after a settlement has been reached but prior to final court approval, to prevent third parties' filing (or threat of filing) parallel state court actions from jeopardizing the settlement"); *Standard Microsys. Corp. v. Tex. Instruments Inc.*, 916 F.2d 58, 60 (2d Cir. 1990) (finding that an exception to the Anti-Injunction Act includes where a federal court is on the verge of settling a complex matter and state court proceedings could undermine its ability to achieve that objective).

Courts may issue a preliminary injunction pursuant to the "necessary in aid of" exception to the Anti-Injunction Act to effectively prevent its jurisdiction over a settlement from being undermined by pending parallel litigation in state courts. *See In re Sch. Asbestos Litig.*, No. 83-0268, 1991 WL 61156, at *2 (E.D. Pa. Apr. 16, 1991), *aff'd*, 950 F.2d 723 (3rd Cir. 1991) ("A stay against state proceedings is thus proper under the 'necessary in aid of jurisdiction' exception to the Anti–Injunction Act, and pursuant to the All–Writs Act where a federal court is on the verge of settling a complex matter, and state court proceedings undermine its ability to achieve that objective.") Additionally, courts are permitted to issue injunctions as an exception to the Anti-

Injunction Act where it is necessary 'to protect or effectuate [a court's] judgment[].' *Id*. at *1. Federal courts have issued similar injunctions in other class action settlements. *See, e.g.*, *In re Diet Drugs*, 282 F.3d at 235; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 487-88 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3rd Cir. 1998); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985); *In re Linerboard Antitrust Litig.*, 361 Fed. Appx. 392, 395 (3rd Cir. 2010).

This Court also has the authority to issue the requested injunction under the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act permits this Court to issue "all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act permits a federal district court to protect its jurisdiction by enjoining parallel actions by class members that would interfere with the court's ability to oversee a class action settlement. *See In re Linerboard Antitrust Litig.*, 361 Fed. Appx. at 396 (3rd Cir. 2010) (noting the "in aid of jurisdiction" exception typically is invoked in class actions where proceedings in state court threaten to undermine the pending settlement of a complex case); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). The Court may issue an injunction as soon as "the litigation reaches the settlement stage" in order to "effectuate a final settlement." *In re Mexico Money Transfer Litig.*, Nos. 98-C-2407 and 98-C-2408, 1999 WL 1011788, at *3 (N.D. Ill. Oct. 19, 1999); *see also In re Baldwin-United Corp.*, 770 F.2d at 338 (affirming issuance of injunction to protect class action settlement).

The rights and interests of Class Members and the jurisdiction of the Court will be impaired if, during the notice period, any parallel actions are filed alleging virtually identical claims to those asserted in the instant action were allowed to be filed and then to proceed. It is imperative that Class Members be allowed to evaluate their options under the settlement without receipt of

potentially confusing competing notices or communications. Class Members could potentially be subject to confusion arising from the potential pendency of competing lawsuits. To avoid this confusion and to protect the rights and interests of Class Members, as well as the Court's own jurisdiction, the Court should issue a preliminary injunction pending final approval of the settlement, enjoining Class Members and their representatives from pursuing claims that are similar to those alleged in the Complaint. The present circumstances warrant the Court's issuance of a preliminary injunction pursuant to the All Writs Act and the exceptions to the Anti-Injunction Act. The notice plan and notice materials will be disseminated to the Class and will discuss the terms of the settlement and their rights as Class Members. Accordingly, this Court should issue a preliminary injunction to permit Class Members to review the notice materials and assess their options without any distractions engendered by the possible filing and prosecution of competing actions.

VII. CONCLUSION

For the foregoing reasons, the Settlement Agreement represents a reasonable and fair way to end the controversy, as measured by all the applicable standards. As such, Toyota respectfully requests that this Court enter the accompanying proposed Order that, *inter alia*, grants preliminary approval of the settlement, including the Settlement Agreement and all exhibits, directs notice to the Class, and scheduling the hearing on final settlement approval and set related deadlines.

Dated: New York, New York
September 7, 2022

Respectfully submitted,

/s/ John P. Hooper

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2022, the above and foregoing document was electronically filed on the CM/ECF system and served in accordance with the Federal Rules of Civil Procedure, the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, and/or the United States District Court for the Eastern District's Rules on Electronic Service, which will send notification of such filing to all counsel of record.

/s/ John P. Hooper
John P. Hooper