UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF THE PARTIES' JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS, AND PLAINTIFFS' CORRECTED UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES

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Plaintiffs respectfully submit this supplemental memorandum in further support of the Parties' Joint Motion for Final Approval of the Settlement and Certification of the Settlement Class ("Final Approval Motion") (ECF 171) and Plaintiffs' Corrected Unopposed Motion for Attorneys' Fees, Expenses, and Service Awards to the Class Representatives ("Fee/Expense/Service Award Motion"). ECF 179. Plaintiffs respectfully request that the Court finally approve the Settlement as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23, overrule the four objections to the Settlement, and grant Plaintiffs' Fee/Expense/Service Award Motion to which no objection has been filed.

I. Preliminary Statement

After a nearly three-month long superlative Notice Program, the reaction of the Class to the Settlement has been overwhelmingly positive. Of nearly 6.5 million Class Members who were provided Direct Mail Notice, only 103 excluded themselves from the Class and ***four*** individuals objected to the Settlement, only ***one*** of which is procedurally proper and is cognizable by the Court. ECF 169; ECF 170; ECF 182, Declaration of Matthew Neylon ("Neylon Decl."), at ¶ 5, Ex. B).[1] No member of the Class objected to the Fee/Expense/Service Award Motion. The minimal number of exclusions in relation to the size of the Class and that ***one objection*** was properly filed by a Class Member demonstrates immense public support for the Settlement and the immediate and valuable benefits it provides, warranting its final approval. *See* ECF 174, §§ IV-VI.

II. The State-of-the-Art Notice Program Reached 99% of the Class

The Notice Program designed by Jeanne Finegan, APR of Kroll Notice Media Solutions, and approved by this Court on September 16, 2022 (ECF 167), has now been implemented and far

[1] For the Court's convenience, these are attached as Exhibits B, D, E and F to the concurrently filed Joint Declaration of Wilson Daniel "Dee" Miles, III and Demet Basar in Further Support of Final Approval of the Settlement ("Joint Declaration").

exceeded Ms. Finegan's initial estimate of reaching 90% percent of Class Members with an average frequency of three times. ECF 162-5. Instead, ***the Notice Program reached 99% of the Class with Class Members being exposed to Notice an estimated 3.2 times***. ECF 181, Declaration of Jeanne C. Finegan, APR ("Finegan Decl."), ¶¶ 5, 36. As part of Direct Mail Notice, 6,472,514 postcards were successfully delivered to the reasonably identifiable members of the Class of approximately 6,492,542, or 99% of Class Members. ECF 181, Finegan Decl., ¶¶ 5, 9-14. Direct Mail Notice commenced on September 21, 2022 and was substantially completed well before the November 11, 2021 deadline in the Preliminary Approval Order (ECF 167 at 15-17), with 96% of Direct Mail Notices having been sent by October 19, 2022. *Id.*, ¶¶ 12. In short, the Direct Mail Notice, which sets forth the benefits of the Settlement, the rights of Class Members and all applicable dates in clear, plain English (*see id.*, Ex. B), has been outstanding.

Notice of the Settlement was also distributed using the Supplemental Notice Plan. Publication Notice was provided in a number of targeted publications with wide circulation, in English and Spanish, including in the October 31, 2022 issue of People Magazine, which has a circulation of over 2.5 million with nearly 18 million readers. *Id.*, ¶¶ 15-17, Ex. C; ¶¶ 18-20, Ex. D. Notice was also given online using targeting methods, via Facebook, Instagram, and Twitter (*id.*, ¶¶ 21-26, Ex. E), Google keywords (*id.*, ¶ 27), and, on September 19, 2022, via press release on PR Newswire. *Id*., ¶¶ 28-29, Ex. F). The toll-free information line for the Settlement and the Settlement website www.toyotafuelpumpssettlement.com, which are referenced in the Notice documents, went live on September 18 and September 19, 2022, respectively. The Settlement website, which was visited by nearly 350,000 individuals, includes the Long Form Notice, Frequently Asked Questions, the Claim Form, and the key filings in this litigation concerning the Settlement, including the final approval motion and Plaintiffs' request for attorneys' fees, expenses

and Class Representative service awards. *Id.*, 30-33. The website has a VIN lookup feature that can be used by individuals to determine if their vehicles are covered by the Settlement, and a user-friendly online Claim submission procedure.

Ms. Finegan's excellent Notice Program more than satisfies the requirements for sufficient notice in the Second Circuit. *See Ferrick v. Spotify USA Inc.*, No. 16-CV-8412 (AJN), 2018 WL 2324076, at *2 (S.D.N.Y. May 22, 2018) (finding the notice program appropriate where notice was provided to putative class members via direct mail, email, publication, internet ads, social media, press releases and a settlement website.); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *4 (E.D.N.Y. Dec. 16, 2019) (finding notice sufficient where class members were notified via direct mail, media notice, publication, and long form notice.). Notice of the Settlement thus satisfies Rule 23(c) and due process.

Further, on September 8, 2022, CAFA Notice (ECF 181, Finegan Decl., Ex. A) was provided to states attorneys general and other federal officials via Certified Mail and posting on www.cafanotice.com. No responses were received. ECF 181, Finegan Decl., ¶ 8. Because the requisite 90 days has passed, the Settlement can be finally approved. *See Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd,* No. 08-CV-42 JG VVP, 2015 WL 6964973, at *8 n.24 (E.D.N.Y. Nov. 10, 2015) (holding the granting of final approval in abeyance until the 90-day CAFA notice period expires).

III. The Positive Reaction of the Class Supports Final Approval

Plaintiffs' memorandum in support of the Final Approval Motion demonstrates that the Settlement amply satisfies the requirements of Rule 23(e)(5) and eight of the nine factors in *City of Detroit v. Grinnell Corp.*[2] Now that Class Members have had an opportunity to respond to the

[2] 495 F.2d 448, 463 (2d Cir. 1974).

Settlement, it is clear the Settlement also satisfies the final *Grinnell* factor, which considers the reaction of the class to a proposed settlement. *See Grinnell*, 495 F.2d at 463.

As courts in this District have previously noted, "[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019), judgment entered, 2022 WL 2803352 (E.D.N.Y. July 18, 2022). Where, as here, "only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *16, citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (quoting Conte & Newberg, Newberg on Class Actions § 11.41, at 108) (approximately 176 objections out of the estimated 12 million class members); *see also Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) (finding the reaction of the class overwhelmingly positive where of the 11,800,514 class members only 127 opted out and 24 objected.).

Here, after a robust Notice Program that commenced on September 19, 2022 and included Direct Mail Notice that reached 99% of an estimated 6,492,542 Class Members and a Supplemental Notice Program exposing Class Members to Notice of the Settlement an average of 3.2 times (ECF 181, Finegan Decl., ¶¶ 5-6, 8-33, 36), only ***four*** objections have been filed (ECF Nos. 169, 170), only ***one*** of which is procedurally proper and can be considered by the Court. Even if all four objections were to be counted, this amounts to approximately 0.000062% of all Class Members. This extremely small number of objections strongly favors approval of the Settlement. *See Wal-Mart*, 396 F.3d at 118*; see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d Cir. 2001) (18 objections from a class of 27,883 weighed in favor of settlement). Moreover, as

described below, all of the objections lack merit. In further support of final approval, only 103 exclusion requests were received by the Settlement Notice Administrator. *See* Neylon Decl., ¶ 5. This exceedingly small number of exclusions in relation to the size of the Class (only 0.001586% percent of approximately 6,492,542 million Class Members), as well as the absence of *any* substantive objections, provides powerful support for final approval of the Settlement. "'The fact that the vast majority of [C]lass [M]embers neither objected nor opted out is a strong indication' of fairness." *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (quoting *Wright v. Stern*, 553 F. Supp. 2d 337, 344–45 (S.D.N.Y. 2008).

IV. The Four Objections Should Be Overruled

The objection filed with the Court on October 5, 2022 (ECF 169) should not be considered at all because the objector *also* opted out of the Settlement. *See* Joint Declaration, Exhibits A and B. Class Members were clearly informed that they cannot object and also opt out of the Settlement. *See* ECF Nos. 162-6, 162-7, 162-8. A class member cannot both object to and opt out of a settlement because the settlement, if approved, will not be binding on him or her. Therefore, Daniel M. Sivilich, who filed an objection *and* excluded himself from the Settlement, lacks standing to object to the Settlement. *See, e.g., Reid v. SuperShuttle Intern., Inc.*, 2012 WL 3288816, *3, n.1 (E.D.N.Y. 2012) (citing Newberg on Class Actions) ("Some of the class members who have opted out filed letters with the Court objecting in general terms to the settlement. However, by opting out, these class members relinquished their standing to formally object to the settlement."). Mr. Sivilich's "objection" should be overruled on that ground alone.

Mr. Sivilich's complaint is that his permission should have been obtained prior to his being included in the Class and that he had to waste time, effort, cost of envelopes and stamps to opt out. He appears to believe that his having received notice informing him of his right to *opt out* of a

provisionally certified settlement Class is a means for attorneys to benefit at the expense of class members, which he believes should be "ILLEGAL." ECF 169. Mr. Sivilich's beliefs are so strongly held that, on July 29, 2021, he wrote a letter to the Committee on Rules of Practice and Procedure to request that Rule 23 be reviewed as a violation of his First Amendment right to petition the government for redress of grievances.[3] This letter makes clear that Mr. Sivilich holds an exceedingly negative view of class actions in general and class settlements in particular. In his objection letter, Mr. Sivilich points to no infirmities specific to this Settlement although he sees "no need for this action" because his vehicle already received the Recall repair. While that may be a reason to opt out of the Settlement as Mr. Sivilich has done, it is not a valid objection to the Settlement. Thus, Mr. Sivilich's objection, even if it could be properly considered, should be overruled.

The only cognizable objection to the Settlement was filed by Rod Kovel on November 7, 2022 (ECF 170), but it is not an objection to the adequacy of the Settlement.[4] The "upshot" of Mr. Kovel's objection is that "owners should not only get repairs, extended warranties, additional promises," and "out of pocket costs" under the Settlement, but "some amount of compensation for their lost time too, not to mention wasted energy; and risk of exposure [to Covid]" *in connection with getting the Recall Repair*. *Id*. at 3. The objection is based on Mr. Kovel's description of his wife's experience while the Recall Repair on their vehicle was being performed, which reportedly included waiting 3 hours, either indoors or outdoors (his wife did not recall which), and his conjecture that "[i]f her experience was anything like mine when I was in for repairs, it was unpleasant, and quite possibly dangerous given the nature of the contagion." Mr. Kovel does not

[3] *See https*://www.uscourts.gov/sites/default/files/21-cv-s_suggestion_from_daniel_m._sivilich_-_rule_23_1.pdf; *see also* Joint Declaration, Exhibit C.

[4] Joint Declaration, Exhibit D.

report whether his wife asked the dealership for a loaner car, whether she is employed, and whether and how she herself lost compensable time in connection with the Recall Repair. In any case, Mr. Kovel's objection has nothing to with the substance of the Settlement, which he clearly likes. *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2019 WL 6875472, *17 (observing that "courts consider not only quantity of objections and opt outs, but 'quality' as well").

Moreover, if Mr. Kovel believed the Settlement was deficient in any way, the proper course would have been to exclude himself from the Settlement Class. *See Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-CV-09405-CAS, 2014 WL 439006, *8 (C.D. Cal. Jan. 30, 2014) ("Federal courts routinely hold that the opt-out remedy is sufficient to protect class members who are unhappy with the negotiated class action settlement terms."); *see also New Jersey Carpenters Health Fund v. NovaStar Mortg., Inc.*, 28 F.4th 357, 377 (2d Cir. 2022) ("the opportunity for an absent class member to opt out of the litigation is sufficient to protect its right to due process."). Class members cannot both benefit from a settlement and object because, in their view, a better deal could have been struck. *See Mathes v. Roberts*, 85 F.R.D. 710, 715 (S.D.N.Y. 1980) ("while the objectants [sic] may have preferred a different resolution, such a preference is neither a ground for rejecting the instant proposal as unfair and inequitable nor is it evidence of the inappropriateness of the benefits to be accorded to plaintiffs"); *Messier v. Southbury Training School*, No. 3:94-CV-1706, Dkt. No. 1055, p. 11 (D. Conn. 2010) (finding objections requesting "additions or modifications to the terms of the settlement agreement are untenable because the Court does not have the power or authority to make changes or additions to the parties' agreement."). Thus, Mr. Kovel's objection should be overruled.

Another objection, received by the Settlement Notice Administrator on December 6, 2022, is procedurally improper and the premise is factually incorrect.[5] *See* Neylon Decl., at ¶ 6. The objection is untimely because it was not mailed to or received by the Court by the November 25, 2022 deadline clearly set forth in the Direct Mail Notice and other Notice documents (ECF 181, Finegan Decl., Exhibits B, C, D, F; ECF 162-6, at 16; 162-7; 162-8), and therefore does not comply with the Preliminary Approval Order. ECF 167. In addition, the objection does not include the information required to state a valid objection, as set forth in the Notice documents and the Preliminary Approval Order.[6] ECF 162-6, at 16; 162-7; 162-8; ECF 167 at ¶¶ 23-26. It does not even include enough information such as the vehicle's VIN to enable the Settlement Notice Administrator and the Parties to determine whether the author of the letter is a Class Member. Thus, the objection should be overruled on procedural grounds. *See Willix v. Healthfirst, Inc*., 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (overruling untimely and meritless objections to the settlement.); *see also Sykes v. Harris*, 2016 WL 3030156, at *20 (S.D.N.Y. May 24, 2016) (finding objections submitted after the deadline were untimely and meritless considering the objector failed express any specific objection to the settlement.).

Moreover, the objector, Kent C. Aggers, either did not read the benefits under the Settlement as described in the Notice or grossly misapprehends the Settlement. Mr. Aggers claims to have a Covered Vehicle and, if that is correct, he is entitled to a new fuel pump either as part of

[5] Joint Declaration, Exhibit E.

[6] Among other things, for an objection to be considered by the Court, it must be received by the Court on or before the deadline set in the Preliminary Approval, and must include: the case number and name of the Action; contact information and sufficient information to determine whether the objector is a Class Member and owns or leases a Covered Vehicle; whether the objection applies to the objector or the Class or a subset of the Class; the number of times the objector has objected to a settlement in the last five years and identifying; and all grounds for the objection; and the objector's dated signature. ECF 167 at pgs. 13-15; ECF 162-6, at 16; 162-7; 162-8.

the Recall or the Special Service Campaign or, since he did not exclude himself from the Settlement, potentially as part of the Customer Support Program. (Because Mr. Aggers does not provide his vehicle's VIN, it is not possible to determine if he has a Subject Vehicle or an Additional Vehicle.) Yet Mr. Aggers' entire objection is based on the mistaken belief that Defendants have been "ignoring the proper action of replacing the pumps," which he claims will "save [Defendants] money but it will seriously affect people's lives." In this economic relief settlement, Defendants are paying "money" specifically to replace the defective Denso fuel pumps and, in addition, providing an extended warranty on the fuel pumps that have already been replaced, as well as other valuable relief. This untimely, procedurally improper, and meritless objection should be overruled.

Finally, on December 6, 2022, the Settlement Administrator received an "Offer of Settlement Demand" dated November 19, 2022, that is not objection but a threat to take legal action unless Defendants accept an "offer of $12,000.00 to have this settled today." Joint Declaration, Exhibit F. Even if this letter sent by Kevin Kennedy set forth an objection to the terms of the Settlement, which it does not, the Court cannot consider it because it is irremediably infirm procedurally. Mr. Kennedy's "last and final attempt to settlement the matter [of the] Denso fuel pump class action," among other things, does not identify his vehicle's VIN and *is not even signed*. *Id.*; ECF No. 167 at ¶ 25; ECF 162-6, at 16; 162-7; 162-8. That is understandable because Mr. Kennedy is attempting to extort money: he wants $12,000 "to trade in the Toyota and not hav[e] to worry with all the excess actions you are putting forward. It's much easier to trade or sell and get out." Mr. Kennedy's letter should not be countenanced by the Court. *See In re Petrobras Sec. Litig.*, No. 14-CV-9662 (JSR), 2018 WL 4521211, at *1 (S.D.N.Y. Sept. 21, 2018), aff'd, 778 F. App'x 46 (2d Cir. 2019) (noting "that some objectors seek to pervert the process by filing frivolous

objections and appeals, not for the purpose of improving the settlement for the class, but of extorting personal payments in exchange for voluntarily dismissing their appeals."); *see also In re Initial Public Offering Sec. Litig.*, 728 F.Supp.2d 289, 295 (S.D.N.Y. 2010) ("recognized that [] objectors undermine the administration of justice by [objecting to a] settlement in the hopes of extorting a greater share of the settlement for themselves. . .."). To the extent this "offer of demand" can be considered an objection, it should be overruled as frivolous.

V. No Class Member Objected to Plaintiffs' Request for Attorneys' Fees

Significantly, no Class Member filed an objection to Plaintiffs' request for attorneys' fees, reimbursement of expenses, and service awards to the Class Representatives, further supporting final approval of the Settlement and the Fee/Expense/Service Award Motion. In fact, Mr. Kovel, who objected to the Settlement because it did not compensate Class Members, specifically stated in his objection that "[t]he Settlement promises the plaintiff's attorneys $28,000,000, and I don't begrudge them getting paid for their time and expertise." ECF 170 at 3.

As detailed in Plaintiffs' memorandum in support of their Fee/Expense/Service Award Motion (ECF 179), the amount of attorneys' fees requested is indeed reasonable given the time and effort expended by Class Counsel in their zealous prosecution of this litigation and the excellent results achieved in the Settlement. The fee request satisfies all of the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). *See* ECF 180 at 21-37. Further, based on an independent expert valuation of the CSP and the Extended New Parts Warranty alone, the requested fee of $28,500,000 represents just 13.4% of $212,000,000, the lowest estimated value of the CSP and the Extended Warranty, and only 9.9% of the highest estimated value of $287,000,000, which places Class Counsel's request well under the low end of the range awarded in this Circuit. ECF 180, at 2; *In re Warner Communications Sec. Litig.*, 618 F.

Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions."). This, coupled with the lack of an objection to the fee request, strongly supports approval of Plaintiffs' unopposed Fee/Expense/Service Award Motion.

VI. Conclusion

For all of these reasons, as well as those set forth in the Parties' memoranda in support of the Final Approval Motion and Plaintiffs' memorandum in support of the Unopposed Fee/Expense/Service Award Motion, Plaintiffs respectfully request that both motions should be granted in their entirety.

Dated: December 9, 2022

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