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 SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT FOR ENTRY OF AN ORDER GRANTING APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendants Toyota Motor Corporation ("TMC") and Toyota Motor North America, Inc. ("TMC," together with "TMNA", "Toyota") file this supplemental memo of law in support of Final Approval to address the objections, exclusions, and results of the dissemination of Notice.[1]

The extraordinary notice plan was effectively and efficiently implemented, consistent with the Preliminary Approval Order, and estimated to have reached over **99 percent** of the Class, on **average 3.2 times**, readily satisfying due process. *See* Declaration of Jeanne C. Finegan of Kroll Notice Media Solutions LLC in Connection with Final Approval of Settlement ("Finegan Decl."), Dkt. No. 181, at ¶ 36. This reach and frequency is consistent with the reach of other class action settlements that have received final approval. *See e.g. In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 59, fn.49 (E.D.N.Y. 2019) (finally approving a settlement where "[t]he combined, measured media notice effort is estimated to reach 80.4% all U.S. Adults aged 18+ with an average frequency of 2.8 times, 84.2% of all US Business Owners with an average frequency of 3.2 times; and 84.4% of all US Adults in Business and Finance Occupations, with an average frequency of 3.4 times.")

The tremendously positive response from the Class puts in context the mere two timely objections[2] filed to the settlement and the very small number of Class Members who have opted out of the settlement, particularly when over 6.4 million Direct Mail Notices were sent. *Id.* at ¶ 5.

The Class has also overwhelmingly supported the Settlement as, out of the over 6.4 million Direct Mail Notices that have been mailed, only 103 individuals to date are reported timely to have sought exclusion from the Class, amounting to an infinitesimally small figure of less than 0.002%

[1] All capitalized terms used in this Memorandum shall have the meanings assigned in the Settlement Agreement, unless otherwise defined herein.

[2] Two untimely and otherwise deficient objections were mailed to the Settlement Notice Administrator. These objections are also discussed in Section II.D.2.

of the Class. *See* Declaration of Matthew Neylon on Behalf of Kroll Settlement Administration LLC Regarding Reporting of Timely Requests to Opt Out Received to Date in Connection with Final Approval of Settlement ("Neylon Decl."), Dkt. No. 182 at ¶ 5. There have also been only two timely objections that have complied with the Court's requirements for objections in the Preliminary Approval Order, one of which was from a person who opted out of the settlement and, thus, has no standing to object to the settlement. These two (in fact, one) objections also raise a strong presumption that the terms of a proposed class settlement action are favorable to the class members. *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (noting eighteen objections out of five million individuals notified of settlement and stating that "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

Based upon the comprehensive, multi-faceted settlement, the successful dissemination of Notice, and the overwhelmingly positive response from the Class, this settlement should be finally approved because it more than satisfies the remaining factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

I. BACKGROUND

A. This Court Preliminarily Approved the Settlement and Notice Was Successfully Disseminated to the Class

This Court held that the Settlement was "fair, reasonable, and adequate under Rule 23(e)(2)." Preliminary Approval Order, Dkt. No. 167, ¶10. In so holding, this Court determined that the "Settlement was reached in the absence of collusion and is the product of informed, good-faith, arm's-length negotiations between the Parties." *Id.* The Court also found that the Parties "submitted sufficient information for the Court to support that Notice should be disseminated as

'the proposed settlement will likely earn final approval.'" *Id.* (citing Fed. R. Civ. P. 23(e) Advisory Committee's note to 2007 amendment.)

The Court's Preliminary Approval Order approved the form and content of the notices which included: Long Form Notice (Dkt. No. 162-6, Settlement Agreement, Exh. 5); Direct Mail Notice (Dkt. No. 162-7, Settlement Agreement, Exh. 6); and Publication Notice (Dkt. No. 162-8, Settlement Agreement, Exh. 7). *See id.*, ¶ 10.

In light of the Court's Preliminary Approval Order, the Settlement Notice Administrator began disseminating notice to the individual Class Members on September 19, 2022. The Class Notice consisted of CAFA Notice, Direct Mail Notice, Publication Notice including: a press release, digital and social media, newspapers, and magazines, a settlement website, and a toll-free interactive voice response ("IVR") phone number. *See* Finegan Decl., ¶ 7.

1. Direct Mail Notice

The Direct Mail Notice informed potential Class Members of the proposed settlement including their potential remedies and the web address for the informative settlement website. The first mailings of the Direct Mail Notice began five days after the Court issued its Preliminary Approval Order. *Id.* at ¶ 11. As of November 4, 2022, over 6.4 million Direct Mail Notices were mailed, with only about 268,251 marked as undeliverable. *Id.* at ¶¶ 11, 13. Over 96% of the Direct Mail Notices were sent by October 19, 2022, approximately three weeks before Notice was required to be substantially completed pursuant to the Preliminary Approval Order. *Compare id.* ¶ 11 *with* Dkt. No. 167, at p. 16 of 20.

Of those, over 248,992 Direct Mail Notices were forwarded and/or re-mailed with only 159 marked as undeliverable as of November 30, 2022. Finegan Decl., at ¶ 14. The extensive and intensive efforts made by the Settlement Notice Administrator to timely disseminate notice to the

Class resulted in over 99% of the Class receiving Direct Mail Notice. *See id.*

2. Website and Toll-Free IVR Telephone Number

Pursuant to the terms of the Settlement Agreement, the Settlement Notice Administrator created a dedicated website, also available in Spanish, and an IVR telephone number as part of Class Notice. Persons who visit the website can, among other things, (i) review important documents, including the Long Form Notice; (ii) review responses to frequently asked questions, (iii) submit out-of-pocket claims for reimbursement; (iv) confirm whether they are a Class Member; (v) find the number for the IVR; and (vi) the address for the Settlement Notice Administrator for Claim submission purposes. As of December 2, 2022, the website has been visited by over 346,000 users. *Id.* at ¶ 34.

As of November 30, 2022, there have been 15,962 calls to the IVR toll-free number. *Id.* at ¶ 33. Of these callers 2,044 requested to speak with a live operator. *Id.*

3. Notice Has Been Published and Disseminated on Other Media

In addition to the notice disseminated above, the Settlement Notice Administrator has also published notice and placed notice on other electronic media. Notice was placed in United States magazines,[3] Territory newspapers,[4] Online Display Ads (United States and U.S. Territories), Social Media Ads, Key Word Search Ads, and Press Release. *See id.* at ¶¶ 9 – 33.

4. Notice Has Successfully Informed Class Members of the Settlement

The Notice Plan provided interlocking methods that both aimed to reach each Class Member individually and directly using reasonably available address information, and also provided multiple alternative forms of notice through which Class Members may have learned of

[3] Combined, the U.S. magazines have a total circulation of over 2,500,000 with over 17,825,000 readers. *Id.*, at ¶ 15.
[4] Together, the U.S. Territories newspapers and magazines have a total circulation of over 562,000. *Id.*, at ¶ 19.

the settlement or obtained further information about their rights. The program followed well-recognized and established procedures for class action notice. Thus, the procedure for providing notice and the content of the class notice constituted the best practicable notice to Class Members. The Notice Administrator has informed the Court that Notice reached an **estimated 99% of the Class on average 3.2 times**. *Id.* at ¶ 36.

B. The Class Action Fairness Act Notice Was Distributed

On September 8, 2022, Kroll Notice Media timely and properly caused the required CAFA Notice to be sent to the United States Attorney General and all "Appropriate" Federal and State Officials. *See* Finegan Declaration at ¶ 8. None of the foregoing CAFA Notices were returned as undeliverable. *Id.* As of December 7, 2022, more than 90 days passed from "the dates on which the appropriate Federal office and the appropriate State official [were] served." *See* 28 U.S.C. § l715(d); *Emeterio v. A & P Restaurant Corp.*, No. 1:20-cv-00970, 2022 WL 252065, at *2 (S.D.N.Y. Jan. 26, 2022) (finding 90-day notice requirement had been met and granting final approval); *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). At this time, there have been no substantive requests or responses from state and federal officials on this matter.

II. ARGUMENT

A. This Court Has Jurisdiction to Consider and Rule on the Settlement

Toyota's memorandum in support of Final Approval, Dkt. No. 172, stated that this Court has personal jurisdiction over the Plaintiffs, who are parties to this class action and have agreed to serve as representatives for the Class. Based upon the successful widespread Notice to the Class, the Court also has personal jurisdiction over absent Class Members because due process compliant

notice has been provided to the Class. The Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-12 (1985), held that a court properly exercises personal jurisdiction over absent, out-of-state class members where the court and the parties have safeguarded absent class members' right to due process. *See also Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir. 2012) ("To comport with due process, the notice provided to absent class members must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

As described above, the extraordinary notice provided to Class Members, combined with the opportunity to object and appear at the Fairness Hearing, fully satisfies due process in order to obtain personal jurisdiction over a Rule 23(b)(3) class. *See Phillips Petroleum Co.*, 472 U.S. at 811-12 (finding that the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing absentees with an opportunity to be heard or an opportunity to exclude themselves from the class).

B. Notice Satisfied the Requirements of Rule 23(c) and (e) and Due Process

The extensive notice disseminated to the Class and the contents of that notice, as reviewed and approved by this Court, easily satisfy the requirements of Rules 23(c)(2)(B) and 23(e)(1), due process and any and all other requirements of the United States Constitution and the Second Circuit. Under Rule 23(e)(1) and 23(c)(2)(B), the Court must direct the best notice that is practicable under the circumstances in a reasonable manner to all Class Members who would be bound by the proposed Settlement. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 58 (E.D.N.Y. 2019) (The best notice practicable under the circumstances includes "individual notice to all members who can be identified through reasonable effort.")(citing FED. R. CIV. P. 23).

Furthermore, pursuant to Rule 23(c)(2)(B), the notice used here "clearly and concisely state[d] in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)" as well as providing other important information to Class Members. In addition, pursuant to Rule 23(e)(1), notice was disseminated in "a reasonable manner to all class members who would be bound by the proposal" and complied with the Court's Preliminary Approval Order.

Here, the methods of dissemination and contents of the notice more than satisfy Rule 23's notice requirements that the notice should be reasonably calculated to apprise interested parties of the pendency of the class action and afford them an opportunity to present their objections. *See Wal-Mart Stores, Inc.*, 396 F.3d at 114 ("There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings."). As already discussed, here, Class Notice was accomplished through a combination of Direct Mail Notice, Publication Notice, notice through the settlement website, Long Form Notice, and social media notice. *See* Settlement Agreement, Dkt. 162, pp. 25-30. This notice informed Class Members of the terms of the settlement, their rights and options, including the right to object or request exclusion, applicable dates and deadlines, and the binding effect of the settlement, if finally approved.

1. There Was Widespread Dissemination of the Notice

As discussed above, the Class Notice, previously approved by this Court, was fully implemented by the Settlement Notice Administrator. Notice was accomplished through a combination of techniques, including CAFA Notice to appropriate state and federal government officials. The use of overlapping notice techniques afforded Class Members several different opportunities to learn of the Settlement and exercise their rights. The Settlement Notice Administrator estimated that "nearly 99% of Class Members" were reached an "estimated 3.2 times." *See* Finegan Decl. at ¶ 35.

To comply with the Court's Preliminary Approval Order, the Court-appointed Settlement Notice Administrator mailed over 6.4 million of the Court-approved Direct Mail Notice. *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 182 (S.D.N.Y. 2014) (finding that best notice practicable under the circumstances include individual postcard notice to all class members who could be identified through reasonable effort); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 476 (S.D.N.Y. 2013) (finding that best notice practicable under the circumstances included first-class mail to each respective class member at his or her last known address with re-mailing of returned Notices for which new addresses could be located).

In addition to the Direct Mail Notices, the Court-approved Publication Notice was published within the United States in magazines which have a total circulation of over 2.5 million with over 17.8 million readers. Finegan Decl. at ¶ 15. The magazines and newspapers in U.S. Territories also have a combined circulation of over 562,000. Finegan Decl. at ¶ 19.

The Settlement Notice Administrator also posted internet banner ads on leading websites. Moreover, the stand-alone official settlement website allows Class Members to obtain details about the Settlement, their rights, dates and deadlines, as well as access to the Claim Form. The website

address, https://www. https://www.toyotafuelpumpssettlement.com, was prominently displayed in the Long Form Notice, Direct Mail Notice, and Claim Form. As of December 2, 2022, over 346,000 users have visited the settlement website. *See* Finegan Decl. at ¶ 32.

Finally, the Settlement Notice Administrator established and maintains a toll-free telephone number where information about the Settlement is available to callers. The automated and interactive telephone response system prompts the caller through an IVR that provides detailed Settlement information and key terms of the Settlement. *Id.* As of November 30, 2022, the toll-free telephone number has received 15,962 calls, of which, 2,044 callers requested to speak with a live operator. *Id.* at ¶ 33.

Courts have approved notice plans in settlements that have employed similar notice methods to those used here. *See, e.g.*, *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 186 (S.D.N.Y. 2012) (holding that notice plan that included a combination of direct mail notice, website with information about the settlement, and publication notice which included national editions of newspapers and electronic newswires constituted the best practicable notice under the circumstances); *In re Glob. Crossing Sec. & Case ERISA Litig.*, 225 F.R.D. 436, 450 (S.D.N.Y. 2004) (finding that notice which included direct mailing, newspapers, notice materials on websites-including a website designed to inform potential class members about the settlement-and a toll-free phone number "sufficient information for class members to understand the proposed partial settlement and their options" and was "best notice practicable under the circumstances").

2. The Notices Provided Class Members with the Required Information in a Comprehensive, Clear and Readily Understandable Format

The notices provided all reasonably identifiable Class Members with a clear and succinct description of the Class and the terms of the preliminarily approved Settlement in plain, easily

understood language that complies with the Federal Judicial Center's illustrative notices. *See Varacallo v. Mass. Mut. Ins. Co.*, 226 F.R.D. 207, 225-26 (D.N.J. 2005); *see also* Federal Judicial Center's illustrative notices at www.FJC.gov; Preliminary Approval Order, ¶ 12. As a result, Class Notice clearly informs Class Members of the relevant aspects of the litigation and Settlement and their rights under the Settlement. *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 450. The Court should therefore affirm that the notice provided was the best practicable notice under the circumstances and satisfied due process.

C. The Class Action Fairness Act Notice Favors Final Approval

Notice under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, has been satisfied. In a class action settlement, CAFA requires that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]" 28 U.S.C. § 1715(b). A court is precluded from granting final approval of a class action settlement until CAFA notice requirements are met. 28 U.S.C. § 1715(d) ("An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under [28 U.S.C. § 1715(b)]").

Kroll Notice Media timely and properly caused the required CAFA Notice to be sent, and as of December 7, 2022, more than 90 days passed from "the dates on which the appropriate Federal office and the appropriate State official [were] served." *See* 28 U.S.C. § 1715(d); *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). At this time, there have been no substantive requests or responses from state and federal officials on this matter.

D. The Reaction of the Class to the Proposed Settlement Is Overwhelmingly Favorable

Per the Court's Preliminary Approval Order, Class Members had until December 2, 2022 to either opt out or comment on, or object to the proposed Settlement. As of December 7, 2022, Kroll Notice Media has only received 103 requests for exclusion. *See* Neylon Decl., at ¶ 5. The second of the nine *Grinnell* factors considers the reaction of the class to a proposed settlement. *See Grinnell*, 495 at 463. As of the date of this memorandum of law, the Court, Class Counsel, and Toyota counsel have only received two timely and compliant objections. *See* Dkt. Nos. 169 (Sivilich) and 170 (Kovel).

Where, as here only two timely objections have been received, the "reaction of the class weighs strongly in favor of the settlement." *See Rosi v. Aclaris Therapeutics, Inc.*, slip op. 2021 WL 5847420, at *5 (S.D. N.Y. Dec. 9, 2021) (citing *Wal-Mart Stores*, 396 F.3d at 119 ("[T]he favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in [the] *Grinnell* inquiry.")); *Wal-Mart Stores, Inc.*, 396 F.3d at 118 (noting eighteen objections out of five million individuals notified of settlement and stating that "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.") (quoting 4 NEWBERG § 11.41). In fact, the objections that were raised are unavailing in light of the overall benefit to the Class and should be overruled.

1. The Number of Class Members Requesting Exclusion is Extremely Small

Here, of the over 6 million Direct Mail Notices that have been sent, only 103 individuals have timely sought exclusion from the Class. *See* Neylon Decl., ¶ 5. The Second Circuit has upheld final approval of a class action settlements where there were proportionally more objections and opt-outs than there are in this case. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 86–87 (2d Cir. 2001) (noting 72 people out of a class of nearly 28,000 people requested exclusion from the settlement); *see also Simerlein v. Toyota Motor Corp.*, No. 17-CV-1091, 2019 WL 2417404, at *19–20 (D. Conn. June 10, 2019) (finding that receiving sixty-eight exclusions out of 1,299,946 class members strongly supported approval); *Edwards v. North Am. Power and Gas LLC*, No. 3:14-CV-01714, 2018 WL 3715273 at *10-11 (D. Conn. Aug. 3, 2018) (approving settlement where there were 17 opt outs out of a class of 491,126, which is the same percentage of opt outs in the Action); *Sykes v. Harris*, No. 09 Civ. 8486 (DC), 2016 WL 3030156, at *12 (S.D.N.Y. May 24, 2016) (approving settlement where "a miniscule number" of plaintiffs — 38 individuals out of a potential 215,000 class members — requested exclusions); *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d at 197 (S.D.N.Y. 2012) (approving settlement where "fewer than 1% of the tenants who received notice opted out of the lawsuit, and an even smaller percentage objected."). Here, the percentage of persons seeking exclusion is less than 0.002%, an incredibly low percentage, which favors approval.

2. The Objections Filed by Pro Se Objectors Should be Overruled, Especially as One Objector Does Not Have Standing and Two Are Untimely and Non-Compliant

Despite the significant Class Notice, the Parties have only received two timely and complaint objections to this settlement, which, upon further analysis, is in fact just one objection. "'The fact that the vast majority of class members neither objected nor opted out is a strong indication' of fairness." *Willix v. Healthfirst, Inc.*, No. 07 CIV. 1143 ENV RER, 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)); *In re Lloyd's Am. Tr. Fund Litig.*, No. 96 CIV-1262 RWS, 2002 WL 31663577, at *23 (S.D.N.Y. Nov. 26, 2002), aff'd sub nom. *Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) ("Out of the approximately 1,350 Class Members, only 239-or less than 18 percent-have submitted objections. This relatively low number of objections itself supports approval of the settlement."). It is the nature of class action litigation that a settlement may not satisfy every class member. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 761 (E.D.N.Y. 1984), aff'd 818 F.2d 145 (2d Cir. 1987).

In stark contrast to the objectors' claims of an inadequate settlement, the settlement provides immediate, substantial and real benefits to the Class. Thus, these objections should be overruled and this settlement should be finally approved as fair, reasonable, and adequate, pursuant to Federal Rule of Civil Procedure 23.[5]

[5] To the extent Toyota has not explicitly responded herein to any portion of the objections, Toyota states that those remaining arguments are unavailing and respectfully requests that the Court overrule any and all remaining objections and finally approve the settlement as fair, reasonable and adequate.

Objector Sivilich argues that there is no need for the class action as Toyota informed him of the recall and replaced the fuel pump in a timely fashion AT NO COST" to him. *See* Sivilich Objection, Dkt. No. 169, ¶ 1. Mr. Sivilich does not appear to have any issue with the Settlement benefits, but rather believes that the class action should not include class members without their permission or prior knowledge of their case. *Id*., ¶ 2. This is irrelevant to the court's consideration of the fairness, reasonableness, and adequacy of the Settlement under Rule 23. *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 249 (E.D.N.Y. 2010) (citing *Glass v. UBS Fin. Servs., Inc.*, No. C–06–4068, 2007 WL 221862, at *7–8 (N.D. Cal. Jan. 26, 2007)) (finding that the fact that several class members objected to class action settlements in general was irrelevant to determining the fairness, reasonableness and adequacy of the settlement). Mr. Sivilich's recourse is to opt out, which he states in his objection that he has done so. *Id*., ¶ 3; *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."). Because Mr. Sivilich has no issues with the Settlement itself, and is in fact no longer a Class Member as he opted-out, his objection should be overruled. *Ferrick v. Spotify USA Inc.*, No. 16-CV-8412 (AJN), 2018 WL 2324076, at *7 (S.D.N.Y. May 22, 2018) ("If an individual opts out of a settlement, he no longer has standing to challenge the settlement.").

Objector Kovel claims that Class Members should be compensated for their lost time and inconvenience spent getting the repair. *See* Kovel Objection, Dkt. No. 170 at p. 1. Merely disliking a settlement is not sufficient under Rule 23. Objector Kovel does not provide arguments as to why the current terms of the Settlement are unfair, unreasonable or inadequate. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 761; *Browning*, 2007 WL 4105971, *5 (finding

that the "settlement, as a product of compromise, typically offers less than a full recovery"). As such, Objector Kovel's objection should also be overruled. Furthermore, objector Kovel could have opted out of the settlement, but did not do so. *See Eisen*, 2014 WL 439006, *8.

It is the nature of class action litigation that a settlement may not satisfy every class member. *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").

Objectors Kennedy and Aggers did not properly object to the Settlement as, not only were the objections untimely, but the objections also failed to comply with the requirements set out in the Court's Preliminary Approval Order. As an initial matter, despite the requirement that the objections must be ***received*** by the Clerk of the Court by November 25, 2012, Dkt. No. 167, ¶ 27, p. 16, and, based on the lack of entries for these objections on the docket in this Action, the objections were ***never*** received by the Clerk of the Court.[6] These objections were also not received by Toyota's Counsel. Instead, the Settlement Notice Administrator received the objections on December 6, 2022. Neylon Decl. at ¶ 6. Furthermore, the objections fail to meet the requirements outlined in the Preliminary Approval Order.[7] *Compare* Dkt. No. 182, Exhibit B *with* Dkt. No. 167.

---

[6] The Long Form Notice states, as a response to question 16 ("How do I tell the Court if I do not like the settlement?"), that "To object, you must file electronically or mail to the Clerk of the Court a written objection **signed by you** saying that you object to the settlement in Cheng, et al., v. Toyota Motor Corp., et al., Case No. 1:20-cv-00629-WFK-JRC (E.D.N.Y.), to the Clerk of Court (identified below) so that it is received or filed no later than **November 25, 2022** and copies must be mailed to the attorneys listed in the section below." (Emphasis in original).

[7] The Objectors also failed to provide responses as to (i) "[w]hether the objection applies only to the objector, to a specific subset of the Class or to the entire Class and all grounds for the objection, accompanied by any legal support for the objection known to the objector or his or her counsel and any documents supporting the objection;" and (ii) whether the Class Member has made any objection before and, if they have, "[t]he number of times the objector has objected to a class action settlement within the five (5) years preceding the date that the objector files the objection, the caption of each case in which the objector has made such objection, and a copy of any orders related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case." *Compare* Dkt. No. 182, Exhibit B *with* Dkt. No. 167.

The Kennedy Objection also does not properly provide information on the Class Member's vehicle, does not note that the objection is, in fact, an objection, nor does it include a telephone number, e-mail address, nor a handwritten signature as are required by the Preliminary Approval Order. *Compare* Dkt. No. 182, Exhibit B *with* Dkt. No. 167.

As to the substance of these non-compliant objections, neither Objector Kennedy nor Objector Aggers present any arguments as to why Settlement is unfair, unreasonable or inadequate. Objector Kennedy is only seeking additional monetary benefits for him alone, *see* Dkt. No. 182, Exhibit B, and as already discussed, wanting a different settlement amount is not a proper basis to object to the Settlement. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 761; *Browning*, 2007 WL 4105971.

Objector Aggers also is demanding a fuel pump replacement. *See* Dkt. No. 182, Exhibit B. However, assuming he is a Class Member, he is eligible to obtain the applicable relief provided by the Settlement, if warranted. *See* Dkt. No. 162. Additionally, Objector Aggers mentions personal injury, which is specifically carved out of the release in the Settlement Agreement. Dkt. No. 162, Section VII.B. ("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)…."). Furthermore, Objectors Kennedy and Aggers also could have opted out of the settlement, but did not do so. *See Eisen*, 2014 WL 439006, *8. Therefore, both objections by Objector Kennedy and Aggers should be dismissed.

III. CONCLUSION

For the foregoing reasons and the arguments made in the Memorandum of Law in Support for Entry of an Order Granting Final Approval of Class Action Settlement, Toyota respectfully requests that the Court overrule the one remaining objection, finally approve the Settlement as fair,

reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23, and issue related relief including a permanent injunction.

Dated: New York, New York
December 9, 2022

Respectfully submitted,

/s/ John P. Hooper

John P. Hooper
Eric F. Gladbach
Jessica K. Shook
KING & SPALDING, LLP
1185 Avenue of the Americas, 34th Floor
New York, New York 10036-2601
Phone: (212) 556-2100
Email: jhooper@kslaw.com
Email: egladbach@kslaw.com
Email: jshook@kslaw.com

Counsel for Defendant Toyota Motor North America, Inc. and Toyota Motor Corporation

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 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