

1 STEVE W. BERMAN (*pro hac vice*)
2 (WA SBN 12536)
3 E-mail: steve@hbsslaw.com
4 HAGENS BERMAN SOBOL
5 SHAPIRO LLP
6 1918 Eighth Avenue, Suite 3300
7 Seattle, WA 98101
8 Telephone: (206) 623-7292
9 Facsimile: (206) 623-0594

MARC M. SELTZER
(CA SBN 054534)
E-mail: mseltzer@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

FRANK M. PITRE (CA SBN 100077)
E-mail: fpitre@cpmlegal.com
COTCHETT, PITRE & MCCARTHY
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

*Co-Lead Plaintiffs' Counsel for
Economic Loss Cases*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Case No. 8:10ML2151 JVS (FMOx)

**PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR AN
AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES,
AND COMPENSATION TO NAMED
PLAINTIFFS**

THIS DOCUMENT RELATES TO:

ALL ECONOMIC LOSS CASES

Date: June 14, 2013
Time: 9:00 a.m.
Place: Courtroom 10C
Judge: Hon. James V. Selna

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1 **I. INTRODUCTION**

2 Few objections have been made to Plaintiffs’ Class Counsel’s petition for an
3 award of attorneys’ fees, reimbursement of expenses, and payment of additional
4 compensation to the Named Plaintiffs. Of the 76 objections filed, only 20 of the
5 objections, which are made on behalf of 30 objectors, relate to the fee request – and
6 this is from a universe of 22,623,077 Class Members who were mailed the Short
7 Form Notice. This very small number of fee objections, nine of which were filed by
8 “serial” or “professional” objector counsel, constitutes additional evidence supporting
9 the fairness and reasonableness of the requested fee. The Court should reject the
10 objections and approve the fee request.
11

12 **II. THE REQUESTED FEE IS REASONABLE**

13 As outlined in Plaintiffs’ opening brief in support of the fee petition, the \$200
14 million attorneys’ fee award that Plaintiffs’ Class Counsel request represents **12.3**
15 **percent** of the total value of the \$1,632,000,000 Settlement. If just the \$757,000,000
16 total cash component of the Settlement is considered, fees are **26.4 percent** of the
17 monetary benefits.¹ Either way, the fees requested are reasonable.
18

19 These percentages compare favorably to the Ninth Circuit’s 25% benchmark,
20 taking into consideration the overall results achieved for the Class, the risks and
21 complexity of the litigation, the skill required and quality of work performed by
22 counsel, the three-and-a-half year duration of the litigation, the contingent nature of
23
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27 ¹ Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Final Approval of
28 Class Action Settlement (“Opening Br.”) (Dkt. No. 3556), at 7-8.

1 the fee, the financial burden shouldered by Plaintiffs, the reaction of the Class to the
2 Settlement (there are few objections), and the lodestar cross-check.²

3 These percentages also compare favorably with fee awards made in similar
4 cases. For example, and as demonstrated by Professor Fitzpatrick's comprehensive
5 class action fee survey, from 2006-2007 the most common fee percentages awarded
6 by all federal courts in class actions were 25%, 30%, and 33%. Nearly two-thirds of
7 the awards were between 25% and 35%, with a mean award of 25.4% and a median
8 award of 25%.³ For 111 settlements in the Ninth Circuit where the percentage-of-
9 the-fund method was used, the most common percentages were also 25%, 30%, and
10 33%, with the vast majority of awards also between 25% and 35%, and a mean of
11 23.9% and median of 25%.⁴

12
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14 This Court, in employing the 25% of the common fund benchmark, has
15 already preliminarily approved Plaintiffs' fee request given the magnitude of the
16 Settlement's cash and non-monetary benefits, remarking that the "the amount of fees
17 sought by Plaintiffs' counsel falls well within the 25% benchmark"⁵

18 Nonetheless, several objectors contend that the fee request is excessive.⁶
19 Notably, not a single objector submitted an expert declaration or provided any
20

21 ² Opening Br. at 7-24.

22 ³ Declaration of Brian T. Fitzpatrick in Support of Plaintiffs' Motion for an
23 Award of Attorneys' Fees (Dkt. No. 3564) ("Fitzpatrick Decl."), ¶ 20.

24 ⁴ *Id.*; see also *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002)
25 (28% of \$96,885,000 settlement fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373,
379 (9th Cir. 1995) (33% fee award); *Mark v. Valley Ins. Co.*, 2004 U.S. Dist.
LEXIS 20602, at *3-6 (D. Or. Oct. 6, 2004) (30% fee award).

26 ⁵ Dkt. No. 3344 at 23.

27 ⁶ See Objection Nos. 5, 15, 18, 19, 21, 22, 26, 37, 46, 48, 53, 58, 64, 65, 66, 67,
28 73, 75. Objection numbers refer to the Table of Objectors filed as Appendix A to
Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Final Approval
of Class Action Settlement, which is being filed contemporaneously herewith.

1 evidence undermining the conclusions reached by Plaintiffs' Class Counsel and their
2 nationally recognized expert that the fee request was reasonable. We address the
3 issues invoked by these objectors below.

4 **A. The Fee Percentage Should Not be Adjusted Downward as a Result of the**
5 **Magnitude of the Settlement**

6 Labeling the Settlement results a "mega-fund," certain objectors contend that
7 the percentage awarded should be much lower than the 25 percent benchmark
8 because the value of the Settlement is so high.⁷ But the Ninth Circuit has expressly
9 *rejected* a rule that fee percentages should decline as settlement sizes increase.⁸
10 Instead, courts are directed to take into consideration all of the circumstances of the
11 case in order to reach a reasonable percentage. And although size of the fund may be
12 considered, it is not dispositive.⁹ For example, the court in *Vizcaino* considered the
13 exceptional results achieved for the class, the risk presented by the case, the
14 contingent nature of the fee, and the length of the case and upheld a fee award of 28
15 percent of the \$96,885,000 settlement fund.¹⁰

16
17
18 Importantly, and as additional evidence that fees should not decline the higher
19 the settlement fund becomes, there have been many class settlements throughout the
20 country where settlement values were hundreds-of-millions of dollars or more and
21 where the courts awarded fees *above* 25 percent of the common fund. Some
22 examples:
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25 ⁷ See Objection Nos. 5, 18, 64, 67.

26 ⁸ *Vizcaino*, 290 F.3d at 1047 ("We did not adopt this observation [the increase-
27 decrease rule] as a principle governing fee awards."); see also Fitzpatrick Decl.,
28 ¶¶ 21-24.

⁹ *Id.*

¹⁰ *Id.* at 1047-50.

- 1 • *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009)
2 (33.3% of \$510 million).
- 3 • *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *7-8
4 (N.D. Cal. Apr. 3, 2013) (28.5% award from the \$571 million in round-two
5 settlements).
- 6 • *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla.
7 2006) (31.33% of \$1.075 **billion**).
- 8 • *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D.
9 Fla. 2011) (30% of \$410 million).
- 10 • *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. July 16,
11 2001) (34% of \$365 million).
- 12 • *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *1 (E.D. Pa. June
13 2, 2004) (30% of \$202 million).
- 14 • *In re Apollo Group Inc. Secs. Litig.*, 2012 WL 1378677, at *9 (D. Ariz.
15 Apr. 20, 2012) (33% of \$145 million).
- 16 • *In re Combustion, Inc.*, 968 F. Supp. 1116, 1142 (W.D. La. 1997) (36% of
17 \$127 million).
- 18 • *Kurzwell v. Philip Morris Cos.*, 1999 WL 1076105, at *1 (S.D.N.Y. Nov.
19 30, 1999) (30% of \$123 million).
- 20 • *In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa.
21 2000) (30% of \$111 million).
- 22 • *In re Prison Realty Secs. Litig.*, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn.
23 Feb. 9, 2001) (30% of \$104 million).

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Objectors Ranieri and Huang cite empirical evidence gathered by Theodore Eisenberg and Geoffrey Miller showing a general trend that fee percentage decreases as settlements become very large.¹¹ Yet Professor Eisenberg has noted that “[e]ven

¹¹ Objection No. 18 at 6 (citing Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 JOURNAL OF EMPIRICAL LEG. STUD. 248 (2010)).

1 in ‘mega-cases’ (settlements in the hundreds of millions of dollars), *fees of 25-30%*
2 *of the class recovery are observed.*”¹²

3 Courts and commentators have rightly criticized the notion that fees should
4 decrease as the size of the settlement increases.¹³ For example, in *Allapattah Servs.,*
5 *Inc. v. Exxon Corp.*, the court awarded fees of 31.33% of the \$1.06 billion settlement
6 fund and held that decreasing a fee percentage solely in light of a large settlement
7

8 is *antithetical* to the percentage of the recovery method
9 adopted by the Eleventh Circuit in *Camden*, the whole
10 purpose of which is to align the interests of Class Counsel
11 and the Class by rewarding counsel in proportion to the
12 result obtained. By not rewarding Class Counsel for the
13 additional work necessary to achieve a better outcome for
14 the class, the sliding scale approach creates the perverse
15 incentive for Class Counsel to settle too early for too
16 little.^[14]

17 Professor Fitzpatrick also highlights the “obviously perverse” incentives
18 created by an increase-decrease rule:

19 Consider the following example: if courts award class
20 action attorneys 30% of settlements if they are under \$100
21 million but only 20% of settlements if they are over \$100
22 million, then rational class action attorneys will prefer to
23 settle cases for \$90 million (*i.e.*, a \$27 million fee award)
24 than \$125 million (*i.e.*, a \$25 million award). Such
25 incentives are obviously perverse.^[15]

26 ¹² Declaration of Professor Geoffrey Miller, *In re Checking Account Overdraft*
27 *Litig.*, No. 1:09-md-02036-JLK, Dkt. No. 1885-9 (S.D. Fla. Sept. 16, 2011) (citing
28 cases) (emphasis added) (*see* Ex. E to the Declaration of Steve W. Berman in
Support of Plaintiffs’ Reply Memorandum in Support of Plaintiffs’ Motion for Final
Approval of Class Action Settlement and Plaintiffs’ Motion for an Award of
Attorneys’ Fees, Reimbursement of Expenses, and Compensation to the Named
Plaintiffs (“Berman Reply Decl.”)).

¹³ *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001).

¹⁴ 454 F. Supp. 2d at 1213 (emphasis added) (citation omitted); *see also Williams*
v. GE Capital Auto Lease, 1995 U.S. Dist. LEXIS 19179, at *32 (N.D. Ill. Dec. 19,
1995) (“Without significant counsel fees to encourage the pursuit of these claims, the
public policy to induce compliance with the law would be disserved.”).

¹⁵ Fitzpatrick Decl., ¶ 23.

1 Invoking the deterrence of wrongdoing rationale of the class action device, Professor
2 Fitzpatrick argues that class attorneys must be given sufficient incentives to pursue
3 cases and that “these incentives are blunted for the very cases offering the greatest
4 deterrence (*i.e.*, larger cases) when courts award lower fee percentages as settlements
5 become larger.”¹⁶
6

7 Applying the multi-factor, holistic approach demanded by the Ninth Circuit in
8 *Vizcaino* and other cases, it is clear that the attorneys’ fee request is reasonable. With
9 respect to the results achieved, the \$500 million in cash that will be distributed to the
10 Class reflects substantial percentages of recoverable damages (42% for the Alleged
11 Diminished Value Fund and 25% for the Cash-in-Lieu-of-BOS Fund); over 3.5
12 million Class Members will be eligible to have BOS installed, an important safety
13 enhancement that, when reduced to monetary terms, is valued at almost \$400 million;
14 all Class Members who currently own their Subject Vehicles will have five critical
15 vehicle parts covered for up to 10 years or 150,000 miles under the Customer Support
16 Program (“CSP”), which is a benefit conservatively valued at \$475 million; and all
17 Class Members will benefit from the \$30 million initial contribution to the
18 Automobile Safety Research and Education Fund.
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21 Other factors support the requested fee. As demonstrated by the NASA and
22 NHTSA investigations, this Court’s rulings on multiple motions, the sheer number of
23 motions filed, documents produced, number of depositions taken, and the length of
24 the docket, the litigation has been extraordinarily risky and complex. Any number of
25 issues highlighted in Plaintiffs’ opening brief¹⁷ could still spell the death knell for
26

27 ¹⁶ *Id.*

28 ¹⁷ *See* Opening Br. at 12.

1 Plaintiffs' case if the Settlement is not approved. And this is not a case where a
2 quick settlement was reached. To the contrary, the litigation has been prosecuted for
3 over three-and-a-half years, longer than the average and median times to reach class
4 action settlements.¹⁸

5
6 Further, and unlike many cases cited by objectors where the percentage fee
7 requested would have resulted in high lodestar multipliers,¹⁹ the 2.87 multiplier here
8 is quite reasonable. It also compares favorably to the 3.65 multiplier approved by
9 the Ninth Circuit in *Vizcaino*²⁰ and is below the "the 3-4 range [that is] common in
10 lodestar awards for lengthy and complex class action litigation."²¹

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12 Whether viewed as 12.3% of the total value of the Settlement or 26.4% of the
13 cash components, the requested fee is more than reasonable under the foregoing
14 authorities and the specific circumstances of this case. Certainly, the results
15 achieved do not warrant a fee as low as the 4% or 7%, as some objectors advocate.²²
16 The Court should reject demands that the fee be lowered only because Plaintiffs and
17 their counsel achieved a tremendous result for the Class.

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¹⁸ Fitzpatrick Decl., ¶ 15.

23 ¹⁹ See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir.
24 2005) (affirming fee award of over \$220 million with a resulting lodestar multiplier
25 of 3.5 in case where the district court rejected counsel's request for a fee of
\$609,012,000).

26 ²⁰ See 290 F.3d at 1051.

27 ²¹ *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995);
28 see also *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706 (E.D. Pa. 2001)
(finding multipliers of 4.5-8.5 within the reasonable range).

²² See Objection Nos. 18, 64.

1 **B. The Non-Economic Aspects of the Settlement are Appropriately Valued**
2 **and Considered**

3 Several objectors assert that the non-cash aspects of the Settlement should not
4 be considered at all in determining the Settlement's value for purposes of evaluating
5 the fee request or should not be accorded the value that Plaintiffs assign.²³ These
6 objections are easily rejected.

7 The Ninth Circuit mandates that, if non-cash benefits can be reasonably
8 valued, they should be considered in determining the value of the settlement.²⁴ That
9 is certainly the case here, where non-cash benefits of substantial value are being
10 provided through BOS installation and operation of the CSP.

11 The BOS to be installed as part of the Settlement will automatically reduce
12 engine power when the brake pedal and the accelerator pedal are applied
13 simultaneously under certain driving conditions, thereby providing an important
14 safety enhancement.²⁵ Reduced to monetary terms, the BOS benefit provides an
15 aggregate value to the Class of \$399,334,685 based on an average retail cost of
16 \$111.50 to have the BOS installed if Class Members were to pay for it themselves
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22 ²³ See Objection Nos. 5, 21, 46, 65, 66, 67.

23 ²⁴ *Staton v. Boeing Co.*, 327 F.3d 938, 973-74 (9th Cir. 2003) (value of non-
24 monetary benefits may be considered as part of the value of a common fund for
25 purposes of applying the percentage method of determining fees if the non-monetary
benefits can reasonably be valued); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029
(9th Cir. 1998) (same).

26 ²⁵ See, e.g., NHTSA Notice of Proposed Rulemaking, 73 Fed. Reg. 22638, 22639
27 (April 16, 2012) ("We believe brake-throttle override would prevent most crashes
28 where a stuck or trapped accelerator pedal was to blame because, with a BTO
system, the driver would be able to maintain control through normal application of
the vehicle's brakes.").

1 outside the Settlement.²⁶ No objector presents any expert or other testimony
2 challenging this valuation.

3 Objectors Bandas and Serafino state that \$111.50 is the price that Toyota
4 would charge for the BOS installation and is not a retail valuation.²⁷ This is false, as
5 it is the average price that independent dealers selling a variety of automobile brands
6 would charge, thereby establishing the retail value of the benefit.²⁸ These same
7 objectors, in addition to Objectors Howell and Morrison,²⁹ also contend that the BOS
8 installation benefit is illusory because Toyota was already offering it outside of the
9 Settlement. This assertion is also incorrect. Toyota is offering to install BOS on
10 approximately 3,031,477 Subject Vehicles that have not previously been offered
11 BOS, and BOS will be installed on these vehicles only if the Settlement is approved.
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13
14 Turning to the CSP, approximately 16,145,000 Subject Vehicles will be
15 eligible for this benefit. By estimating the market price for hypothetical extended
16 service contracts that are equivalent to the CSP's benefits for each model year,
17 Plaintiffs' valuation expert, Kirk Kleckner, has concluded that the CSP provides an
18 aggregate benefit to the Class of approximately \$475,000,000.³⁰ No objector
19 presents any expert or other testimony challenging this valuation.
20

21 Nonetheless, Objectors Neumann, Howell, and Morrison complain that the
22 CSP has no value because Toyota cannot be trusted to exercise discretion in deciding
23

24 ²⁶ Declaration of Michael Bonne Regarding the Retail Cost of Installing a Brake
Override on Subject Vehicles (Dkt. No. 3557) ("Bonne Decl."), ¶ 10.

25 ²⁷ Objection Nos. 5 and 67 at 6.

26 ²⁸ Bonne Decl., ¶ 8.

27 ²⁹ See Objection No. 66 at 5.

28 ³⁰ Declaration of Kirk D. Kleckner Regarding Valuation of Customer Support
Program (Dkt. No. 3558) ("Kleckner Decl."), ¶¶ 8-11.

1 whether the coverage afforded by the CSP will be provided to a particular future
2 claimant,³¹ and Objector Guerriero contends that the CSP has “zero” value until it
3 can be determined – at the end of the CSP coverage period for all vehicles – how
4 many Class Members actually sought the coverage.³² Both positions are obviously
5 incorrect. Courts frequently approve class action settlements providing extended
6 warranty programs and, in doing so, find that such programs result in substantial
7 benefits to the class.³³

9 The aggregate monetary benefits provided by the BOS installation and CSP
10 components of the Settlement have been reasonably valued by experts in opinions
11 that remain unrebutted.³⁴ These objections should be rejected, and the value to the
12 Class of the BOS installation program and CSP should be considered in evaluating
13 the reasonableness of the fee request.

15 **C. The Lodestar Multiplier is Reasonable, and There Should Be No Lodestar**
16 **Audit**

17 As described in Plaintiffs’ opening brief, the fee requested would result in a
18 lodestar multiplier of 2.87, which is at the low-to-median end of the range of
19 multipliers that courts regularly approve as fair and reasonable.³⁵ Plaintiffs’ reported
20

21 ³¹ Objection No. 46 at 2; Objection No. 66 at 6-7.

22 ³² Objection No. 65 at 16-18

23 ³³ See, e.g., *In re Sony Corp. SXRDRear Projection TV Mktg., Sales Practices &*
24 *Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 87643, at *26-27, *31-34 (S.D.N.Y. Aug.
25 24, 2010); *Vaughn v. American Honda Motor Co.*, 627 F. Supp. 2d 738, 747 (E.D.
26 Tex. 2007); *O’Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 306
(E.D. Pa. 2003).

27 ³⁴ Objection No. 21 states that the only economic benefit to the Class is
28 \$250,000,000, but this objector fails to explain his rationale.

³⁵ See, e.g., *Vizcaino*, 290 F.3d at 1051-52 (affirming fee award where the
lodestar multiplier was 3.65 and including table of common multipliers); *Steiner v.*
American Broad. Co., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming fee award
where the lodestar multiplier was 3.65); *Kakani v. Oracle Corp.*, 2007 U.S. Dist.

1 lodestar of \$69,706,936 is unaudited but is based on detailed time reporting from
2 participating counsel submitted to the Court by sworn declaration consistent with the
3 Court's order relating to time and expenses.³⁶ And the lodestar continues to increase,
4 and the multiplier continues to decrease, as counsel continue working on obtaining
5 final approval, responding to objections, and handling a plethora of routine
6 settlement administration issues that arise almost daily.
7

8 Objectors Bandas and Serafino contend that a 2.87 multiplier is excessive.³⁷
9 But they provide no analysis of the work done in the case and the risks taken and fail
10 to account for those many cases demonstrating that a multiplier of 2.87 is at the low-
11 to-median end of the range of multipliers that courts regularly approve as fair and
12 reasonable.
13

14 Two objectors demand that the Court appoint an auditor or Special Master to
15 audit all of Plaintiffs' counsels' time and expense records.³⁸ One objector demands
16 that he be given direct access to these materials.³⁹ These demands should be
17 rejected, because the lodestar cross-check is not intended to result in satellite fee
18 litigation.⁴⁰ The "second major litigation" that these objectors wish to pursue would
19

20
21 LEXIS 95496, at *11 (N.D. Cal. Dec. 21, 2007) (summarizing *Vizcaino* table to
22 conclude that a 1.0 to 4.0 multiplier is "typically awarded in common-fund cases");
23 *In re Critical Path, Inc. Secs. Litig.*, 2002 U.S. Dist. LEXIS 26399, at *32-33 (N.D.
24 Cal. June 18, 2002) (3.2-3.7 multiplier in a case that settled quickly and at "the low
25 end of reasonableness," criticisms that do not apply here); *see also* Fitzpatrick Decl.,
26 ¶¶ 25-26.

27 ³⁶ Opening Br. at 22-23; Opening Br. Appendix A; Berman Decl., ¶¶ 129-35;
28 Order Re Time and Expense Reporting for Plaintiffs' Counsel (Dkt. No. 483).

³⁷ See Objection Nos. 5, 67 at 11-12.

³⁸ See Objection Nos. 9, 18.

³⁹ Objection No. 15, ¶ 5.

⁴⁰ See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (holding that a request for attorneys' fees should not result in a "second major litigation").

1 undermine a principal advantage of the percentage-of-the-recovery approach, to wit,
2 decreasing the burden imposed on courts by eliminating a detailed and time-
3 consuming lodestar analysis and assuring that the beneficiaries do not experience
4 undue delay in receiving their share of the settlement.⁴¹ Consequently, courts hold
5 that, when used as a cross-check, the lodestar calculation can be based on time and
6 expense summaries in lieu of detailed records.⁴² In other words, the Court's inquiry
7 into the lodestar is not as focused and detailed as it would otherwise be for an award
8 primarily determined under a lodestar method. This "spot check" lodestar inquiry is
9 consistent with the percentage-of-the-recovery's goal of focusing on the benefit
10 conferred on the class and not on a complex and time-consuming "review [of] the
11 time records of a multitude of attorneys in order to determine the necessity and
12 reasonableness of every hour expended"⁴³

15 **D. The Extraordinary Amount of Work and Risk Associated with This**
16 **Litigation Support the Requested Fee**

17 Objectors Howell and Morrison, incredibly, assert that Plaintiffs did little
18 work in the litigation and that the case was not risky. They state that "[t]his case is
19 most obviously unique for how quickly Toyota settled the case"; that there was
20 "limited dispositive motion practice"; the case was not complex because Plaintiffs
21 just "piggyback[ed]" off of NHTSA, which did all of the "heavy lifting;" and that
22 counsel assumed only "modest risk" because Toyota "essentially admitted liability"
23

24 ⁴¹ See, e.g., *Gerstein v. Micron Tech., Inc.*, 1993 U.S. Dist. LEXIS 21215, at *14
25 (D. Idaho Sept. 10, 1993); see also Fitzpatrick Decl., ¶¶ 10-11.

26 ⁴² See, e.g., *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*,
148 F.3d 283, 332 n.107 (3d Cir. 1998).

27 ⁴³ *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire*
28 *Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (quoting *Camden I Condo. Ass'n, Inc. v.*
Dunkle, 946 F.2d 768, 774 (11th Cir. 1991)).

1 and engaged in recalls.⁴⁴ What is most obvious is that these assertions are so
2 factually incorrect that the objection should be considered completely frivolous and
3 harassing.

4 The factual record clearly demonstrates the tremendous effort that went into
5 litigating this case and the extraordinary risk that Plaintiffs and their counsel faced
6 (and still face). The case began in November of 2009. The proposed Settlement was
7 reached three-and-one-half years later, longer than usual. The average and median
8 times in which settlements were reached in consumer class actions are under three
9 years, and the average and median times to reach settlement in all cases were slightly
10 over three years.⁴⁵ So much for the assertion that Toyota settled the case quickly.

11 The claim that Toyota “essentially admitted liability” is equally fatuous.
12 Toyota continues to deny that its vehicles suffer from any defects, that it engaged in
13 any wrongful conduct or violated any law, and that any Plaintiff and Class Member
14 has been damaged. Moreover, Toyota’s litigation strategy was nothing short of
15 scorched earth. It spared no expense in its efforts to fight discovery and defeat
16 Plaintiffs’ claims. Toyota filed three rounds of dismissal motions and two appeals
17 (which are still pending) and fought discovery almost every step of the way.
18
19
20

21 The work done by Plaintiffs and their counsel, in part, reflects Toyota’s
22 intransigence. The metrics demonstrating the enormous efforts expended by all
23 parties are clear:

- 24 • *Written discovery*: Plaintiffs served seven sets of requests for admissions,
25 one set of contention interrogatories, 11 sets of regular interrogatories, and
26

27 ⁴⁴ Objection No. 66 at 4, 8-9.

28 ⁴⁵ Fitzpatrick Decl., ¶ 15.

1 23 sets of requests for production.⁴⁶ Toyota served four sets of contention
2 interrogatories to 27 Plaintiffs, one general set of regular interrogatories to
3 all Plaintiffs, one set of regular interrogatories to 81 specific Plaintiffs,
4 three sets of requests for production, and one set of requests for
admissions.⁴⁷ Approximately 339 third-parties were served with
subpoenas.⁴⁸

- 5 • *Document discovery*: Documents were produced by the Toyota defendants
6 and several third parties, including, but not limited to, NHTSA, Denso (a
7 part supplier partially owned by Toyota), the Toyota North American
8 Quality Advisory Panel, Exponent, and over 250 Toyota dealerships.
9 Toyota documents alone were produced from over 500 custodial and non-
10 custodial sources.⁴⁹ Plaintiffs' Class Counsel implemented a
11 comprehensive search and coding system to review and organize these
12 documents by issue. More than 2.3 million documents were produced and
13 searched for relevance by attorney reviewers.⁵⁰
- 14 • *ESI discovery*: Toyota produced hundreds-of-thousands of records from
15 structured databases, including customer complaints and warranty records
16 relating to unintended acceleration and used by Plaintiffs' statistical and
17 technical experts.⁵¹ Toyota also produced the software source code for
18 certain engine control units, which was reviewed by Plaintiffs' experts.⁵²
- 19 • *Expert discovery*: The parties engaged in extensive discovery of expert
20 witnesses, designating 43 primary and rebuttal experts. Plaintiffs' Class
Counsel designated 23 experts, who each produced at least one expert
report and, in some instances, multiple reports. Toyota disclosed 20
experts, most of whom produced expert reports. Many of these witnesses
were experts in highly complex and technical subject matters such as
software and electrical engineering.⁵³ Plaintiffs' Class Counsel spent
considerable time consulting with the technical and economic experts.
- *Depositions*: 218 depositions were taken in this litigation. The deponents,
some of whom were deposed more than once, included Plaintiffs (38),

21 ⁴⁶ Berman Declaration filed in support of Plaintiffs' opening brief (Dkt. No. 3565)
22 ("Berman Decl."), ¶ 45.

23 ⁴⁷ *Id.*, ¶ 46.

24 ⁴⁸ *Id.*, ¶ 47.

25 ⁴⁹ *Id.*, ¶ 48. Obtaining discovery from Toyota was difficult, necessitating a
26 blizzard of meet-and-confers and motions to compel. *See id.*, ¶¶ 49-50, 69-70.

27 ⁵⁰ *Id.*, ¶ 52. Many of the documents produced were in Japanese and needed to be
28 translated. *Id.*, ¶ 53.

⁵¹ *Id.*, ¶ 55.

⁵² *Id.*, ¶ 57.

⁵³ *Id.*, ¶¶ 59-66.

1 Toyota witnesses (86), third-party witnesses (4), absent class members who
2 had “other similar incidents,” referred to as “OSIs” (28), and experts (35).⁵⁴

- 3 • *Tutorial*: In order to assist the Court with technical issues, the parties
4 submitted extensive briefing regarding the proper scope, content, format,⁵⁵
5 and timing of a technical tutorial, which was held on December 9, 2011.
6 • *Discovery motions*: Over forty motions relating to discovery disputes were
7 filed with the Court or Special Masters (and sometimes both).⁵⁶

8 And Plaintiffs hardly piggy-backed off NHTSA. Had they done so, this case
9 would have ended shortly after it began given NHTSA’s conclusion that, in their
10 limited analysis of the ETCS, they could not find a specific software defect in the
11 ETCS that explained the reports of UA in the NHTSA database. Plaintiffs retained
12 and paid a phalanx of technical experts who worked for years to determine whether
13 defects existed.

14 As to additional risks, they are legion. Below are just a few:

- 15 • *Standing*: Toyota has appealed the Court’s standing ruling, and if the
16 Ninth Circuit rules that no Plaintiff or Class Member has standing to pursue
17 any claim unless the alleged defects actually manifested in UA in their
18 Subject Vehicles, the case will be gutted. The only Plaintiffs and Class
19 Members with standing to pursue claims will be those who actually
20 experienced a UA, who are but a small fraction of the total number of
21 Subject Vehicle owners.
22 • *Arbitration*: If Toyota wins its pending appeal of the Court’s order denying
23 arbitration, reversal will kill this litigation, forcing individual consumers to
24 file for arbitration, something that no individual Class Member could
25 afford to do given the enormous costs of marshaling the evidence necessary
26 to prove a claim against Toyota.
27 • *Preemption*: The Ninth Circuit or even the Supreme Court could reverse
28 the Court’s ruling finding no preemption, thereby derogating any and all
forms of injunctive and equitable relief sought by Plaintiffs. Gone would
be the BOS installation and Customer Support Program benefits that
Plaintiffs have garnered in the Settlement.

⁵⁴ *Id.*, ¶¶ 63-64.

⁵⁵ *Id.*, ¶¶ 71-72.

⁵⁶ *Id.*, ¶¶ 69-70.

- 1 • *Aggregate damages*: Defendants’ experts hotly contested Plaintiffs’
2 expert’s proof of aggregate damages, including assertions that price
3 variations unrelated to alleged UA cannot be separated on a class-wide
4 basis from alleged UA price impacts; the prices for some vehicles actually
5 appreciated during the so-called damage period; and no average or other
6 single measure of price effect can be used to determine impact for each and
7 every Class Member.
- 8 • *Bellwether and class certification risks*: There is a substantial risk that the
9 Court would not certify classes for consumers in many states and that the
10 Court will ultimately find that common issues do not predominate for
11 issues encompassing defect identification, aggregate damages, and
12 exposure to advertising. If the bellwether trial were lost, the prospect of
13 Plaintiffs succeeding in the remaining states would be dim. And even if the
14 bellwether trial resulted in a partial or full verdict in favor of the bellwether
15 classes, Plaintiffs in other states would still have to prove their entitlement
16 to Rule 23 certification, and Toyota would undoubtedly and vigorously
17 contest each and every bellwether class certification motion.

18 This case settled after the class certification motions were prepared (even if
19 not filed), shortly before the close of fact discovery and the filing of Fed. R. Evid.
20 702 motions, after the initial round of expert discovery was completed, and before
21 the filing of summary judgment motions. Objectors Howell and Morrison offer no
22 evidence supporting their objection, and no rebuttal to the actual facts presented
23 above and in Plaintiffs’ opening brief. The objection is frivolous.

24 **E. Contributions Made to the Automobile Safety Research and Education
25 Fund Should Not Adversely Affect the Fee Award**

26 A number of objectors believe that the Safety Research and Education Fund
27 reflects adversely on Plaintiffs’ fee request. Green Taxi believes that fees should be
28 reduced to some unspecified amount because of “the improper use of *cy pres* to
divert \$30 million” from the Class.⁵⁷ Objectors Roberts, Patel, and Collins contend
that fees should not be awarded at all because the attorneys purportedly breached

⁵⁷ Objection No. 36 at 3.

1 fiduciary duties by agreeing to contribute money to the Safety Research and
2 Education Fund in *cy pres*.⁵⁸

3 These objections fundamentally misunderstand the purpose of the \$30 million
4 funding, which is not a *cy pres* use of funds. Federal courts deploy the *cy pres*
5 doctrine in lieu of direct distribution of damages to class members “where the proof
6 of individual claims would be burdensome or distribution of damages costly.”⁵⁹ But
7 the \$30 million initial contribution to the Safety Research and Education Fund is not
8 made in lieu of direct distribution of damages to Class Members, who have been
9 identified and will be receiving money directly from the Settlement proceeds –
10 whether by filing valid claims or being provided checks directly under the Parties’
11 contemplated amendment to the Allocation Plan. The \$30 million contribution is an
12 independent, separately negotiated Settlement benefit made on behalf of all Class
13 Members in order to further an objective of the lawsuit to make driving vehicles with
14 ETCS safer. Importantly, it also provides a benefit to Class Members who sold or
15 traded-in their Subject Vehicles outside of the damage period, and who otherwise
16 would receive no direct cash benefits under the Settlement despite being subject to
17 the release of claims.⁶⁰ The objectors overlook this integral purpose of the \$30
18 million initial contribution in mistakenly characterizing the \$30 million contribution
19 as a *cy pres* use of funds.
20
21
22
23
24

25 ⁵⁸ Objection No. 64 at 14-15.

26 ⁵⁹ *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Nachshin v.*
AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011)).

27 ⁶⁰ It can hardly be considered a breach of fiduciary duty to provide a benefit to
28 Class Members who provide a release of claims but receive no direct cash payment
based on Plaintiffs’ expert’s modeling.

1 This also provides a reason why the \$30 million should be included in the
2 valuation of the cash part of the Settlement, contrary to Objection Nos. 46 and 75.
3 Furthermore, and contrary to Objections Nos. 15, 46, and 48, it is wholly appropriate
4 for any unclaimed monies – however little will be left – to eventually be contributed
5 to the Safety Research and Education Fund. The identified uses of the money in all
6 respects satisfy Ninth Circuit standards for *cy pres* contributions.⁶¹ And this supports
7 the Settlement’s provision providing for the contribution of any unawarded
8 attorneys’ fees and costs to the Safety Research and Education Fund.⁶²

9
10 **F. The Agreed Fee Amount was not Collusive**

11 Citing *In re Bluetooth Headset Prods. Liab. Litig.*,⁶³ Objector Guerriero
12 contends that no fees should be awarded because Toyota’s separate agreement to pay
13 fees and costs is an alleged collusive “clear sailing” agreement.⁶⁴ While the Court
14 should, of course, examine whether plaintiff’s counsel are to receive a
15 disproportionate distribution of the settlement and whether fees not awarded revert to
16 defendants rather than to the class,⁶⁵ it is clear here that the three *Bluetooth* factors,
17 which Guerriero misconstrues, support Plaintiffs’ request.
18

19
20 Toyota’s agreement to separately pay fees and costs, if approved by the Court,
21 is not collusive. First, the Settlement is the result of serious, informed, non-collusive

22
23 ⁶¹ See Section IV.G of Plaintiffs’ Reply Memorandum in Support of Plaintiffs’
24 Motion for Final Approval of Class Action Settlement, filed contemporaneously
herewith.

25 ⁶² The following objections want any unawarded fees to be distributed directly to
26 the Class instead of contributed to the Safety Research and Education Fund: 15, 46,
27 48.

28 ⁶³ 654 F.3d 935, 946-47 (9th Cir. 2011).

⁶⁴ Objection No. 65 at 31-32.

⁶⁵ *In re Bluetooth*, 654 F.3d at 947.

1 negotiations conducted in good faith. The parties actively engaged in many rounds
2 of arm's-length negotiations for over a year-and-a-half, including 10 in-person
3 mediation sessions and countless phone calls. These efforts were conducted under
4 the supervision and assistance of the Court-appointed Settlement Special Master,
5 Patrick Juneau. The parties worked long and hard to reach a resolution of this
6 matter. This prolonged process reflects the vigor with which both sides represented
7 their interests, including those of the Class as whole.⁶⁶

9 Second, the end result speaks for itself – a Settlement valued at over \$1.63
10 billion. The Settlement is fair, appropriate, and in the best interests of the Class
11 Members.

12 Turning to the third *Bluetooth* factor, although Toyota has agreed to separately
13 pay any award of attorneys' fees and expenses up to a maximum of \$200 million and
14 \$27 million, respectively, there are structural protections associated with that
15 agreement. The attorneys' fees and expenses were not negotiated until *after* the
16 parties had agreed on all principal terms of the Settlement and did not influence the
17 course of negotiations regarding the Settlement benefits to the Class.⁶⁷ The amount
18 requested represents approximately 12.3% of the total value of the \$1,632,000,000 –
19 a very reasonable request given the risks of the case and the results achieved. And if
20 the Court elects to award less than \$200 million in fees and up to \$27 million in
21 expenses, Toyota has agreed to pay the remainder to the Safety Research and
22
23
24

25 ⁶⁶ Berman Decl., ¶¶ 78-87.

26 ⁶⁷ *Id.*, ¶ 121; *see also* Agreement at 32 (“After agreeing to the principal terms set
27 forth in this Settlement Agreement, Plaintiffs’ Class Counsel and Toyota’s
28 Negotiating Counsel negotiated the amount of Attorneys’ Fees and Expenses that,
following application to the Court and subject to Court approval, would be paid as
the fee award and costs award to plaintiffs’ counsel.”).

1 Education Fund for the benefit of the Class; the remainder will not revert back to
2 Toyota.⁶⁸ The Guerriero objection is easily rejected.

3 **G. The Notice Properly Advised Class Members of the Specific Attorneys’
4 Fee and Cost Reimbursement Request and of the Compensation
5 Requested for the Named Plaintiffs**

6 Falls Auto Gallery and Tracy Sivillo object on the basis that the notice
7 purportedly did not disclose the specific amount of attorneys’ fees and costs that
8 would be sought and that the notice misled Class Members when it explained that the
9 attorneys’ fee payment would not reduce cash payments to the Class.⁶⁹ Not true.
10 The notice clearly stated: “Class Counsel will ask the Court for attorneys’ fees not to
11 exceed \$200 million, plus up to an additional \$27 million in costs and expenses.”
12 And that is exactly what Class Counsel requested in their fee petition, which was
13 filed on April 23, 2013 – well before the May 13 objection deadline.
14

15 And the notice did not mislead when it informed Class Members that “Toyota
16 will separately make the payments that the Court orders up to the amounts identified
17 in this paragraph after the settlement is finally approved These payments will
18 not reduce the value of the settlement benefits made available to Class Members.”
19 The payment of any attorneys’ fees and costs approved by the Court will, in fact, not
20 reduce any benefits to the Class.
21

22 Objector Neumann complains that the amount of incentive awards requested
23 by the Plaintiffs was “hidden” because the notice did not disclose the specific
24 amount of each award that would be sought.⁷⁰ But the notice disclosed exactly how
25

26 ⁶⁸ *Cf. Bluetooth*, 654 F.3d at 947 (adversely characterizing fee reverters to the
27 defendant as depriving the class of that full potential benefit).

28 ⁶⁹ Objection No. 15.

⁷⁰ See Objection No. 46.

1 Plaintiffs would calculate and request such awards: “Class Counsel will ask for
2 payments to each of the Plaintiffs and Class Representatives of \$100 per hour, with a
3 minimum of \$2,000 award, for their time invested in connection with the Actions.”
4 The notice also explained that the “Court may award less than these amounts.” And
5 the specific amount sought by each Plaintiff was specified in Plaintiffs’ fee petition
6 filed on April 23rd, well before the objection deadline. Nothing was hidden.

8 Furthermore, Courts routinely approve incentive awards to compensate named
9 plaintiffs for the services they provided and the risks they incurred during the course
10 of the class action litigation.⁷¹ In some cases, the awards have been substantial.⁷²
11 The Named Plaintiffs and Class Representatives deserve the awards that they have

15 ⁷¹ See *Staton*, 327 F.3d at 977 (holding that “... named plaintiffs ... are eligible
16 for reasonable incentive payments. The district court must evaluate their awards
17 individually, using ‘relevant factors includ[ing] the actions the plaintiff has taken to
18 protect the interests of the class, the degree to which the class has benefitted from
19 those actions, [and] the amount of time and effort the plaintiff expended in pursuing
20 the litigation’”); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 490
(E.D. Cal. 2010) (“Courts routinely approve incentive awards to compensate named
21 plaintiffs for the services they provide and the risks they incurred during the course
22 of the class action litigation.”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205
23 F.R.D. 369, 400 (D.D.C. 2002); see also *In re Southern Ohio Correctional Facility*,
24 175 F.R.D. 270, 272-73 (S.D. Ohio 1997) (collecting cases in which awards to
25 named representatives were approved).

26 ⁷² See, e.g., *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at
27 *18-19 (S.D. Cal. June 1, 2010) (\$25,000 awarded to named plaintiff based on
28 plaintiff’s efforts and excellent litigation results); *Ingram v. Coca-Cola Co.*, 200
F.R.D. 685, 694 (N.D. Ga. 2001) (approving service awards of \$300,000 to each
named plaintiff for the services they provided to the class by responding to
discovery, participating in the mediation process, and taking the risk of stepping
forward on behalf of the class); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp.
at 299 (approving \$50,000 participation award to plaintiffs); *In re Revco Sec. Litig.*,
1992 U.S. Dist. LEXIS 7852, at *21-23 (N.D. Ohio May 5, 1992) (awarding
\$200,000 to a named plaintiff); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 203-04
(S.D.N.Y. 1997) (awarding \$85,000 to a named plaintiff); *In re Dun & Bradstreet
Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (awarding
\$55,000 each to two named plaintiffs); *Brotherton v. Cleveland*, 141 F. Supp. 2d
907, 914 (S.D. Ohio 2001) (awarding \$50,000 to the class representative).

1 requested. They worked hard, and the Settlement would not exist without their
2 efforts.⁷³

3 **H. Miscellaneous Fee Objections Should Also be Rejected**

4 A number of miscellaneous objections to the fee request have been raised,
5 which, in the interests of brevity, will be discussed only briefly below.

6
7 **1. There is no relationship between the fee requested here and the
8 personal injury cases.**

9 Oddly, Objectors Bandas and Serafino contend that Plaintiffs' Class Counsel
10 are "using this class to subsidize the more speculative personal-injury litigation
11 where class fees are not available" ⁷⁴ Of course, these objectors do not present
12 any supporting evidence, nor could they. The Court has ruled that "[o]nly time spent
13 on matters common to all claimants in MDL 2151 ("Common Benefit Time") will be
14 considered in determining fees," and that "[i]n general, time will not qualify as
15 Common Benefit Time unless it relates to tasks that have been assigned by Co-Lead
16 Counsel."⁷⁵ Accordingly, the lodestar reported only pertains to work qualifying as
17 "Common Benefit Time" under the Court's Order re Time and Expense Reporting
18 for Plaintiff's Counsel.⁷⁶ Indeed, most firms that will participate in any fee award in
19 this case are not even pursuing personal injury cases.

20
21 **2. The Court's lead counsel selection process supports the fee request.**

22 Objectors Bandas and Serafino confusingly assert that "this is not a normal
23 case meriting a 25% fee . . . because the Court unfairly disadvantaged the class in its
24

25
26 ⁷³ Berman Decl., ¶ 137.

27 ⁷⁴ Objection No. 5 at 10; Objection No. 67 at 9.

28 ⁷⁵ Order Re Time and Expense Reporting for Plaintiffs' Counsel (Dkt. No. 483).

⁷⁶ *Id.* at 4-7.

1 selection of lead counsel” by not “insisting on a reduced rate” and competitive
2 bidding.⁷⁷ There is no requirement in the Ninth Circuit that courts entertain
3 competitive bids when selecting lead counsel, and it is not a factor that courts are
4 directed to consider in determining a reasonable fee award.⁷⁸ Moreover, the Court
5 carefully chose Plaintiffs’ Class Counsel after considering 75 applications and
6 holding a hearing. There were many well-qualified candidates, and the Court chose
7 Plaintiffs’ Class Counsel believing that counsel would best represent the interests of
8 the Class. The Court also reappointed counsel on an annual basis after requiring that
9 they re-apply.⁷⁹ There is nothing in that selection process that reflects adversely on
10 the fee request.
11

12
13 **3. Any fee award should not await completion of the claims process.**

14 Two objections assert that any fee award should await completion of the
15 claims process so that the Court can consider the number of claims made.⁸⁰ These
16 objections are mooted given that virtually all monies will be paid out to Class
17 Members under the Parties’ amended distribution plan.

18
19 **4. Attorneys’ fees and costs are considered part of the total cash value
of the Settlement.**

20 Objection No. 48 asserts that the \$200 million in fees, if awarded, should not
21 be counted as part of the overall cash value of the Settlement. However, the Ninth
22 Circuit and other courts have held that, in determining the value of the settlement,
23 courts consider any attorneys’ fee and cost payments made pursuant to the settlement
24

25 ⁷⁷ Objection No. 5 at 10; Objection No. 67 at 9.

26 ⁷⁸ See, e.g., *Vizcaino*, 290 F.3d at 1050 (competitive bidding not listed as one of
factors considered).

27 ⁷⁹ Berman Decl., ¶¶ 6-7.

28 ⁸⁰ See Objection Nos. 9, 65.

1 terms with the defendant.⁸¹ Including the attorneys' fees and costs for purposes of
2 determining the Settlement's total value is especially appropriate because any
3 reduction by the Court in the attorneys' fees Toyota agreed to pay will be added to
4 the Safety Research and Education Fund.⁸²

5
6 **5. The full amount of the \$500 million cash funds should be considered
in setting the fee.**

7
8 Objector Neumann contends that the fee is excessive because not all of the
9 \$500 million in cash will be distributed to Class Members.⁸³ This is not true. Most,
10 if not all, of the money will be distributed to Class Members under the Parties'
11 amended distribution plan and, in any event, it is appropriate for the *cy pres* uses of
12 any remaining funds to be considered in setting the fee (as discussed above).

13 **III. CONCLUSION**

14
15 From the beginning of this litigation, Plaintiffs and their attorneys have faced
16 determined adversaries represented by experienced counsel. With no assurance of
17 success, Plaintiffs and Plaintiffs' Class Counsel pursued this litigation and obtained a
18 Settlement valued at more than \$1.63 billion. The Settlement reflects Plaintiffs'
19 Class Counsel's efforts in the face of significant risk. Accordingly, we respectfully
20 submit that the Court should approve the fee application and award Plaintiffs' Class
21 Counsel \$200,000,000 in fees and \$27,000,000 in litigation expenses and provide the
22 requested awards for the Named Plaintiffs and Class Representatives.

23
24
25 ⁸¹ See, e.g., *Staton v. Boeing*, 327 F.3d at 972-74; *Hartless v. Clorox Co.*, 273
26 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 Fed. Appx. 716 (9th Cir. 2012);
Johnston v. Comerica Mortg. Corp., 83 F.3d 241, 246 (8th Cir. 1996); *9-M Corp. v.*
Sprint Commc'ns Co. L.P., 2012 U.S. Dist. LEXIS 161578, at *6-8 (D. Minn.
27 Nov. 12, 2012); Fitzpatrick Decl., ¶ 9.

28 ⁸² Fitzpatrick Decl., ¶ 8.

⁸³ Objection No. 46 at 5.

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3 HAGENS BERMAN SOBOL SHAPIRO LLP
4

5 By: /s/ Steve W. Berman

6 Steve W. Berman

7 HAGENS BERMAN SOBOL SHAPIRO LLP

8 1918 Eighth Avenue, Suite 3300

9 Seattle, WA 98101

10 Telephone: (206) 623-7292

11 Facsimile: (206) 623-0594

12 E-mail: steve@hbsslaw.com

13 By: /s/ Marc M. Seltzer

14 Marc M. Seltzer, Bar No. 054534

15 SUSMAN GODREY L.L.P.

16 1901 Avenue of the Stars, Suite 950

17 Los Angeles, CA 90067-6029

18 Telephone: (310) 789-3100

19 Facsimile: (310) 789-3150

20 E-mail: mseltzer@susmangodfrey.com

21 *Co-Lead Counsel for Economic Loss Plaintiffs*

22 By: /s/ Frank M. Pitre

23 Frank M. Pitre, Bar No. 100077

24 COTCHETT, PITRE & MCCARTHY

25 840 Malcolm Road, Suite 200

26 Burlingame, CA 94010

27 Telephone: (650) 697-6000

28 Facsimile: (650) 697-0577

E-mail: fpitre@cpmlegal.com

*Lead Counsel for Non-Consumer Economic Loss
Plaintiffs*

PROOF OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on June 3, 2013.

/s/ Steve W. Berman

Steve W. Berman

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