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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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I. INTRODUCTION

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

II. THE REQUESTED FEE IS REASONABLE

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

These percentages compare favorably to the Ninth Circuit's 25% benchmark, taking into consideration the overall results achieved for the Class, the risks and complexity of the litigation, the skill required and quality of work performed by counsel, the three-and-a-half year duration of the litigation, the contingent nature of

[1] Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Opening Br.") (Dkt. No. 3556), at 7-8.

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

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

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

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

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[2] Opening Br. at 7-24.

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

[4] *Id.*; *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002) (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).

[5] Dkt. No. 3344 at 23.

[6] *See* Objection Nos. 5, 15, 18, 19, 21, 22, 26, 37, 46, 48, 53, 58, 64, 65, 66, 67, 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.

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

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

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

Importantly, and as additional evidence that fees should not decline the higher the settlement fund becomes, there have been many class settlements throughout the country where settlement values were hundreds-of-millions of dollars or more and where the courts awarded fees ***above*** 25 percent of the common fund. Some examples:

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[7] *See* Objection Nos. 5, 18, 64, 67.

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

[9] *Id.*

[10] *Id.* at 1047-50.

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

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)).

in 'mega-cases' (settlements in the hundreds of millions of dollars), ***fees of 25-30% of the class recovery are observed***."[12]

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

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

Professor Fitzpatrick also highlights the "obviously perverse" incentives created by an increase-decrease rule:

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

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[12] Declaration of Professor Geoffrey Miller, *In re Checking Account Overdraft Litig.*, No. 1:09-md-02036-JLK, Dkt. No. 1885-9 (S.D. Fla. Sept. 16, 2011) (citing 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.

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

Applying the multi-factor, holistic approach demanded by the Ninth Circuit in *Vizcaino* and other cases, it is clear that the attorneys' fee request is reasonable. With respect to the results achieved, the $500 million in cash that will be distributed to the Class reflects substantial percentages of recoverable damages (42% for the Alleged Diminished Value Fund and 25% for the Cash-in-Lieu-of-BOS Fund); over 3.5 million Class Members will be eligible to have BOS installed, an important safety enhancement that, when reduced to monetary terms, is valued at almost $400 million; all Class Members who currently own their Subject Vehicles will have five critical vehicle parts covered for up to 10 years or 150,000 miles under the Customer Support Program ("CSP"), which is a benefit conservatively valued at $475 million; and all Class Members will benefit from the $30 million initial contribution to the Automobile Safety Research and Education Fund.

Other factors support the requested fee. As demonstrated by the NASA and NHTSA investigations, this Court's rulings on multiple motions, the sheer number of motions filed, documents produced, number of depositions taken, and the length of the docket, the litigation has been extraordinarily risky and complex. Any number of issues highlighted in Plaintiffs' opening brief[17] could still spell the death knell for

[16] *Id.*

[17] *See* Opening Br. at 12.

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

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

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

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[18] Fitzpatrick Decl., ¶ 15.

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

[20] *See* 290 F.3d at 1051.

[21] *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995); *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.

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

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

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

The BOS to be installed as part of the Settlement will automatically reduce engine power when the brake pedal and the accelerator pedal are applied simultaneously under certain driving conditions, thereby providing an important safety enhancement.[25] Reduced to monetary terms, the BOS benefit provides an aggregate value to the Class of $399,334,685 based on an average retail cost of $111.50 to have the BOS installed if Class Members were to pay for it themselves

[23] *See* Objection Nos. 5, 21, 46, 65, 66, 67.

[24] *Staton v. Boeing Co.*, 327 F.3d 938, 973-74 (9th Cir. 2003) (value of non-monetary benefits may be considered as part of the value of a common fund for 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).

[25] *See, e.g.*, NHTSA Notice of Proposed Rulemaking, 73 Fed. Reg. 22638, 22639 (April 16, 2012) ("We believe brake-throttle override would prevent most crashes 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.").

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

Objectors Bandas and Serafino state that $111.50 is the price that Toyota would charge for the BOS installation and is not a retail valuation.[27] This is false, as it is the average price that independent dealers selling a variety of automobile brands would charge, thereby establishing the retail value of the benefit.[28] These same objectors, in addition to Objectors Howell and Morrison,[29] also contend that the BOS installation benefit is illusory because Toyota was already offering it outside of the Settlement. This assertion is also incorrect. Toyota is offering to install BOS on approximately 3,031,477 Subject Vehicles that have not previously been offered BOS, and BOS will be installed on these vehicles only if the Settlement is approved.

Turning to the CSP, approximately 16,145,000 Subject Vehicles will be eligible for this benefit. By estimating the market price for hypothetical extended service contracts that are equivalent to the CSP's benefits for each model year, Plaintiffs' valuation expert, Kirk Kleckner, has concluded that the CSP provides an aggregate benefit to the Class of approximately $475,000,000.[30] No objector presents any expert or other testimony challenging this valuation.

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

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

[27] Objection Nos. 5 and 67 at 6.

[28] Bonne Decl., ¶ 8.

[29] *See* Objection No. 66 at 5.

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

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

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

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

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

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

[32] Objection No. 65 at 16-18

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

[34] Objection No. 21 states that the only economic benefit to the Class is $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.

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

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

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

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

[36] Opening Br. at 22-23; Opening Br. Appendix A; Berman Decl., ¶¶ 129-35; 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").

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

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

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

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

[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).

[43] *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire 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)).

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

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

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

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

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

[44] Objection No. 66 at 4, 8-9.

[45] Fitzpatrick Decl., ¶ 15.

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

- *Document discovery*: Documents were produced by the Toyota defendants and several third parties, including, but not limited to, NHTSA, Denso (a part supplier partially owned by Toyota), the Toyota North American Quality Advisory Panel, Exponent, and over 250 Toyota dealerships. Toyota documents alone were produced from over 500 custodial and non-custodial sources.[49] Plaintiffs' Class Counsel implemented a comprehensive search and coding system to review and organize these documents by issue. More than 2.3 million documents were produced and searched for relevance by attorney reviewers.[50]

- *ESI discovery*: Toyota produced hundreds-of-thousands of records from structured databases, including customer complaints and warranty records relating to unintended acceleration and used by Plaintiffs' statistical and technical experts.[51] Toyota also produced the software source code for certain engine control units, which was reviewed by Plaintiffs' experts.[52]

- *Expert discovery*: The parties engaged in extensive discovery of expert 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),

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

[47] *Id.*, ¶ 46.

[48] *Id.*, ¶ 47.

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

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

[51] *Id.*, ¶ 55.

[52] *Id.*, ¶ 57.

[53] *Id.*, ¶¶ 59-66.

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

- *Tutorial*: In order to assist the Court with technical issues, the parties submitted extensive briefing regarding the proper scope, content, format, and timing of a technical tutorial, which was held on December 9, 2011.[55]

- *Discovery motions*: Over forty motions relating to discovery disputes were filed with the Court or Special Masters (and sometimes both).[56]

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

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

- *Standing*: Toyota has appealed the Court's standing ruling, and if the Ninth Circuit rules that no Plaintiff or Class Member has standing to pursue any claim unless the alleged defects actually manifested in UA in their Subject Vehicles, the case will be gutted. The only Plaintiffs and Class Members with standing to pursue claims will be those who actually experienced a UA, who are but a small fraction of the total number of Subject Vehicle owners.

- *Arbitration*: If Toyota wins its pending appeal of the Court's order denying arbitration, reversal will kill this litigation, forcing individual consumers to file for arbitration, something that no individual Class Member could afford to do given the enormous costs of marshaling the evidence necessary to prove a claim against Toyota.

- *Preemption*: The Ninth Circuit or even the Supreme Court could reverse 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.

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[54] *Id.*, ¶¶ 63-64.

[55] *Id.*, ¶¶ 71-72.

[56] *Id.*, ¶¶ 69-70.

- *Aggregate damages*: Defendants' experts hotly contested Plaintiffs' expert's proof of aggregate damages, including assertions that price variations unrelated to alleged UA cannot be separated on a class-wide basis from alleged UA price impacts; the prices for some vehicles actually appreciated during the so-called damage period; and no average or other single measure of price effect can be used to determine impact for each and every Class Member.

- *Bellwether and class certification risks*: There is a substantial risk that the Court would not certify classes for consumers in many states and that the Court will ultimately find that common issues do not predominate for issues encompassing defect identification, aggregate damages, and exposure to advertising. If the bellwether trial were lost, the prospect of Plaintiffs succeeding in the remaining states would be dim. And even if the bellwether trial resulted in a partial or full verdict in favor of the bellwether classes, Plaintiffs in other states would still have to prove their entitlement to Rule 23 certification, and Toyota would undoubtedly and vigorously contest each and every bellwether class certification motion.

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

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

A number of objectors believe that the Safety Research and Education Fund reflects adversely on Plaintiffs' fee request. Green Taxi believes that fees should be 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.

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

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

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[58] Objection No. 64 at 14-15.

[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)).

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

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

F. The Agreed Fee Amount was not Collusive

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

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

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[61] *See* Section IV.G of Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, filed contemporaneously herewith.

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

[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.

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

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

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

[66] Berman Decl., ¶¶ 78-87.

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

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

G. The Notice Properly Advised Class Members of the Specific Attorneys' Fee and Cost Reimbursement Request and of the Compensation Requested for the Named Plaintiffs

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

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

Objector Neumann complains that the amount of incentive awards requested by the Plaintiffs was "hidden" because the notice did not disclose the specific amount of each award that would be sought.[70] But the notice disclosed exactly how

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

[69] Objection No. 15.

[70] *See* Objection No. 46.

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

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

[71] *See Staton*, 327 F.3d at 977 (holding that "… named plaintiffs … are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing 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 plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002); *see also In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272-73 (S.D. Ohio 1997) (collecting cases in which awards to named representatives were approved).

[72] *See, e.g., Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at *18-19 (S.D. Cal. June 1, 2010) ($25,000 awarded to named plaintiff based on 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).

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

H. Miscellaneous Fee Objections Should Also be Rejected

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

1. There is no relationship between the fee requested here and the personal injury cases.

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

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

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

[73] Berman Decl., ¶ 137.
[74] Objection No. 5 at 10; Objection No. 67 at 9.
[75] Order Re Time and Expense Reporting for Plaintiffs' Counsel (Dkt. No. 483).
[76] *Id.* at 4-7.

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

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

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

4. Attorneys' fees and costs are considered part of the total cash value of the Settlement.

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

[77] Objection No. 5 at 10; Objection No. 67 at 9.

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

[79] Berman Decl., ¶¶ 6-7.

[80] *See* Objection Nos. 9, 65.

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

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

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

III. CONCLUSION

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

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[81] *See, e.g.*, *Staton v. Boeing*, 327 F.3d at 972-74; *Hartless v. Clorox Co.*, 273 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. Nov. 12, 2012); Fitzpatrick Decl., ¶ 9.

[82] Fitzpatrick Decl., ¶ 8.

[83] Objection No. 46 at 5.

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PROOF OF SERVICE

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

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