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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN RE: TOYOTA MOTOR CORP. UNINTENDED ACCELERATION MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	Case No. 8:10ML2151 JVS (FMOx) MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR IMPOSITION OF APPEAL BONDS UNDER FEDERAL RULE OF APPELLATE PROCEDURE 7
This Document Relates To: ALL ECONOMIC LOSS CASES	Date: October 21, 2013 Time: 1:30 p.m. Place: Courtroom 10C Judge: Hon. James V. Selna

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Plaintiffs, by Class Counsel, respectfully request that, pursuant to Rule 7 of the Federal Rules of Appellate Procedure, this Court impose appeal bonds in an amount of $536,326.00 on each of the fourteen (14) sets of objectors who have appealed the Settlement. These bonds are appropriate under Ninth Circuit law because there is a substantial likelihood that the Objectors will lose their appeals and be subject to costs. Therefore, their appeals will serve no purpose other than to delay the distribution of the benefits of the Settlement.

I. INTRODUCTION

On December 26, 2012, after discovery was nearly complete and the parties had engaged over 40 expert witnesses and taken over 200 depositions, and after over a year of arm's-length negotiations supervised by Settlement Special Master Patrick J. Juneau, the parties announced a settlement valued in excess of $1.375 billion (the "Settlement"). In granting final approval, this Court held the Settlement value represented "a signification portion" of what Plaintiffs could have received if they prevailed on the merits[1] and concluded that "class counsel have achieved exceptional results for the class."[2] The Settlement has resulted in nearly 850,000 claims.[3]

As this Court found, the response of the Class has been "overwhelmingly supportive of the settlement."[4] Plaintiffs sent over 22 million Short Form Notices to Class members to advise them of the opportunity to exclude themselves from the

[1] Order Regarding Proposed Class Action Settlement ("Approval Order"), Dkt. No. 3804, at 30.

[2] Order Re Motion for Attorneys' Fees, Reimbursement of Expenses, and Compensation to Named Plaintiffs ("Attorney Fee Order"), Dkt. No. 3802, at 9.

[3] *See* Second Decl. of Markham Sherwood Re: Notice and Administration of Settlement, Dkt. No. 3734, ¶ 5.

[4] Approval Order, at 29.

Settlement or object. Fewer than 100 objections were received, and approximately 2,000 class members elected to opt out.

Despite the remarkable recovery the Settlement achieved for the Class, fourteen (14) groups of appellants seek to hold up this Settlement and appeal this Court's Approval Order and/or Attorney Fee Order. Without exception, the objections filed by these appellants were rejected by this Court. Indeed, in both its Approval Order and Attorney Fee Order, the Court exhaustively considered every type of objection lodged by the Objectors, and, in each and every case, found them to be without merit. Several Objectors are represented by counsel who have made a living of extracting attorneys' fees from class counsel for doing nothing but objecting to, and then appealing, class action settlements. And one of the Objector groups had the unmitigated gall to ask this Court to award them $8.25 million in attorneys' fees, over $9,000 in litigation costs and $6,000 in "objector compensation" for an objection this Court held "added no gloss to the problem which the parties had already identified and were themselves prepared to resolve as data became available."[5] In short, none of these Objectors made any meaningful contributions to the settlement process and a number of them are undoubtedly appealing the rejection of their objections not to benefit the interests of any portion of the Class or the Class as a whole, but instead to be paid off to go away.

Despite their clear lack of merit, the appeals of the Court's orders overruling the objections will delay the distribution of settlement proceeds to the approximately

[5] Tentative Order Denying Motion for Attorneys' Fees, Reimbursement of Expenses, and Objector Compensation, Berman Decl., Ex. C at 6. All exhibits are attached to the Declaration of Steve W. Berman in Support of this Motion ("Berman Decl.").

22 million members of the Class. To ensure that these Objectors are able to pay costs when they are inevitably unsuccessful in their appeals, the Court should require each appealing objector to post an appeal bond in the amount of $536,326.00. As set forth below, these amounts are appropriate under the Federal Rules of Appellate Procedure and Ninth Circuit case law based on the likelihood that the Objectors' appeals will fail on the merits.

II. BACKGROUND

A. The Litigation

This litigation involved claims that defects in certain vehicles manufactured by Toyota ("Subject Vehicles") make them susceptible to incidents of sudden, unintended acceleration ("SUA"). Plaintiffs sought damages for the diminution in market value of their vehicles in light of the vehicles' alleged defects.

B. The Settlement

As this Court has found,[6] the Settlement consists of four primary components: (1) cash payments totaling $250 million for the diminution of resale value of certain vehicles due to the alleged defects ("Alleged Diminished Value Fund"); (2) installation by Toyota dealers of a brake-override system ("BOS") for certain eligible vehicles, and cash payments totaling another $250 million in lieu of such installation to most of the remaining Subject Vehicles ("Cash-in-Lieu of BOS Installation Fund"); (3) establishment by Toyota of a Customer Support Program ("CSP") under which Toyota will effectively provide a form of extended warranty coverage for repairs and adjustments to certain components of the Subject Vehicles for a number

[6] *See* Approval Order, Dkt. No. 3804, at 4.

of years, valued at $475 million; and (4) establishment by Toyota of an Automobile Safety and Education Fund to which Toyota will contribute $30 million.

1. Alleged Diminished Value Fund.

The Settlement provides that Toyota pay $250 million to be allocated as cash payments for diminished value to Class members who, from September 1, 2009 to December 31, 2010, took certain actions with regard to a Subject Vehicle.[7]

2. BOS Installation and Cash-in-Lieu of BOS Installation Fund.

In addition, as part of the Settlement, Toyota will offer to install a BOS in more than 3.55 million Subject Vehicles.[8] This part of the Settlement was valued at approximately $400 million. Class members who own Subject Vehicles not eligible for BOS installation will receive a cash payment in lieu of such installation, and Toyota will contribute an additional $250 million to the Cash-in-Lieu of BOS Installation Fund for this purpose.[9]

3. Customer Support Program ("CSP").

The Settlement also provides that Toyota will implement a CSP to effectively provide a form of extended warranty coverage for repairs and adjustments to certain components of the Subject Vehicles for a number of years.[10] This program was valued in excess of $475 million.[11]

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[7] Settlement Agreement § II(A)(2).

[8] *Id.* § II(A)(3).

[9] *Id.* § II(A)(4).

[10] *Id.* § II(A)(5).

[11] Approval Order, Dkt. No. 3804, at 6 and n.10.

4. Safety and Education Fund.

Finally, Toyota agreed to contribute $30 million to fund automobile safety research and education related to issues in the litigation.[12]

C. Preliminary Approval

On December 28, 2012, the Court granted preliminary approval of the Settlement.[13] After preliminary approval, the parties amended two terms of the proposed settlement agreement relating to the circumstances under which any excess in each of the two cash funds might flow into each other.[14] Under the initial terms of the Settlement, funds distributed out of the Alleged Diminution Value Fund and the Cash-in-Lieu of BOS Installation Fund were to be distributed pursuant to a sliding scale that gave a greater percentage of recovery (100%) to those Class members who resided in states that do not require manifestation of a defect, the smallest percentage of recovery (30%) to those Class members residing in states that do require manifestation, and a middle percentage (70%) to those Class members residing in states where the law is unclear. But in their Reply brief, based on new information regarding the claim filing rates, Plaintiffs outlined changes to the plan of allocation of the two cash settlement funds under which the distinction between Class members residing in "manifestation-required" states and those not residing in such states would be eliminated, allowing all Class members to be paid 100% of their claims amounts.[15]

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[12] Settlement Agreement § II(A)(6).

[13] *See* Dkt. Nos. 3344 and 3345.

[14] *See* Dkt. No. 3424.

[15] *See* Dkt. No. 3731.

D. Final Approval

1. Settlement approval.

At a June 14, 2013 fairness hearing, Plaintiffs outlined further details to the proposed changes to the Settlement Agreement's Allocation Plan. Specifically, the parties anticipated that all claimants would be reimbursed at 100 percent of the calculated value of their claims, regardless of jurisdiction, that there would be sufficient funds to reimburse Toyota for the costs of class administration, and that the remaining funds would be distributed to those non-claimant Class members who could be identified. Importantly, spillover *cy pres* contributions would be ***eliminated***, and where Class members failed to cash settlement checks, their share of settlement funds would be escheated pursuant to applicable state law. The parties later memorialized this plan in a Second Amendment to the Settlement Agreement.[16]

The Court considered at length the proposed Settlement and objections to it and found it to be fair, reasonable and adequate. Although the Court so found, it nevertheless held the motion for final approval in abeyance to consider supplemental briefing after additional details regarding allocation of the settlement funds became available.[17]

Thereafter, on July 12, 2013, the parties filed their Joint Statement in Support of Amendment No. 2 to Settlement Agreement and for Final Settlement Approval.[18]

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[16] *See* Dkt. No. 3883-1.

[17] *See* Approval Order, Dkt. No. 3804. The Court noted that it was "unsurprising" that the Allocation Plan had not been finalized because the case involved millions of Class members and the deadline for claims submission had not yet passed. *Id.* at 13.

[18] *See* Dkt. No. 3883.

After considering the supplemental briefing and additional argument during the July 19, 2013 hearing, the Court issued a 48-page order granting final approval.[19]

2. Approval of Attorneys' Fees and Costs.

On the same day that the Court granted final approval of the Settlement, it also granted Plaintiffs' motion for approval of attorneys' fees and expenses. As set forth below, in so doing, the Court rejected all of the objections filed to that award.

E. The Objections

1. The appealed objections.

Fourteen (14) different sets of Objectors filed Notices of Appeal of either final approval or the award of attorneys' fees. Some Objectors have likewise appealed miscellaneous orders related to the Settlement and/or their objections thereto. Those Objectors are: (1) Roger Allen Snyder and Linton Stone Weeks ("Snyder Objectors"); (2) Clarence Morrison; (3) Dennis Gibson and Laura Cozby ("Gibson Objectors"); (4) Robert Bandas and Victoria Serafino ("Bandas Objectors"); (5) Angela Boles, Wayne Harris and Julie Rainwater ("Barnow Objectors"); (6) Housan Huang and Amelia Ranieri ("Huang Objectors"); (7) Green Taxi; (8) David Carpenter, Vondell Tyler, Jill Piazza, Betty Piazza and Stephen Piazza ("Carpenter Objectors"); (9) Falls Auto Gallery and Tracy Sivillo ("Falls Auto Objectors"); (10) Gary Guerrerio and Rebecca Guerrerio ("Guerrerio Objectors"); (11) Erich Neumann; (12) Sydna Lucey; (13) Lin T. Ly and Maggie Strohlein ("Ly Objectors"); and (14) Candice Collins, Eileen Roberts and J.V. Patel ("Collins Objectors"). A

[19] Order Granting Motion for Final Approval of Class Action Settlement, and Granting Motion for Attorneys' Fees, Reimbursement of Expenses and Compensation to Named Plaintiffs, Dkt. No. 3933 ("Final Approval Order") at 6-7.

table summarizing the underlying objections[20] is attached as Exhibit A to the Berman Declaration.

2. The Court fully and completely considered all of the objections being appealed.

After careful consideration, the Court overruled all of the objections filed by the Objectors.[21]

a. The Court found objections to the release to be without merit.

Certain of the Objectors challenged the scope of the release. In granting final approval of the Settlement, the Court noted the "broad release provision," but found that "the Settlement Agreement expressly preserves each class member's claims for personal injury, wrongful death or actual physical property damage arising from an accident involving a Subject Vehicle."[22] It found that "to the extent that a Plaintiff has been damaged based on an alleged actual incident of SUA, the proposed settlement does not apply to his or her claims arising from that incident. Such claims are not extinguished by the proposed settlement, and any Plaintiff may continue to

[20] This table is substantially similar to the table prepared by Class Counsel and utilized by the Court in considering the objections in the first instance. *See* Table of Objectors, Appendix A to Plaintiffs' Reply Mem. in Supp. of Plaintiffs' Mot. for Final Approval of Class Action Settlement, Dkt. No. 3731-1. It has been amended only to delete objections that have not been appealed and include subsequent filings by the same objectors.

[21] Exhibit B (attached to the Berman Decl.) is a Table of Information Relevant to Imposition of Appeal Bond. One column of that Table contains Objection Codes for each category of objection alleged by each Objector. The following discussion of the Court's consideration of those categories of objections mirrors the Objection Codes used in the Table and defined in the Legend below the Table.

[22] Approval Order, Dkt. No. 3804, at 10 (citing Settlement Agreement § VI(C)).

pursue recovery on an individual basis."[23] In addition, the Court rejected claims that gas mileage claims were released by the Settlement, and that Plaintiffs had improperly included a waiver of the rights provided for by California Civil Code § 1542.[24]

b. The Court found objections to the certification of the Settlement Class to be without merit.

Certain of the Objectors challenged the certification of the Settlement Class, or claimed that it should be amended. In granting preliminary approval, the Court certified the Class,[25] and, in granting final approval, held that "[n]othing has changed in the five-month period between that preliminary class certification and today that suggests to the Court that the class should be decertified."[26]

c. The Court found objections to the adequacy of the Notice to be without merit.

Certain Objectors objected to various aspects of the Notice. Among other sources, the settlement administrator used current address data gathered from computerized account information from Departments of Motor Vehicles in the United States using Vehicle Identification Number patterns of the Subject Vehicles.[27] Notices were mailed to more than 22 million people.[28] Another approximately

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[23] *Id.* at 35.

[24] *Id.* at 41. The Court also addressed objections that the release would apply to overlapping issues in the Hybrid Brake MDL, but none of those objections are being appealed.

[25] *See* Order Re: Motion for Preliminary Approval of Class Action Settlement, Dkt No. 3344, at 3-13.

[26] Approval Order, Dkt. No. 3804, at 12.

[27] Declaration of Markham Sherwood, Dkt. No. 3559, ¶¶ 6-9.

[28] *Id.* at ¶ 10.

15,000 notices were sent to owners of fleet vehicles.[29] After the settlement administrator performed address searches and re-mailed notices returned for bad addresses, the settlement administrator obtained a 97% successful delivery rate.[30] The settlement administrator also set up a settlement website and a toll-free telephone number,[31] and the parties mounted an aggressive paid media campaign.[32] Based on these efforts, the Court concluded that Class members had been afforded "hundreds of millions of opportunities to be exposed to the Summary Settlement Notice," and that the Notice therefore met the requirements of both Fed. R. Civ. P. 23(e)(1) and due process of law.[33] The Court also rejected objections that changes to the Allocation Plan required additional direct notice to the Class.[34]

d. The Court found objections to the Plan of Allocation to be without merit.

The Objectors challenged various aspects of the Plan of Allocation, all of which were soundly rejected by the Court. The Court noted that claimants would be "paid 100 percent of the calculated value of their claims"[35] and that non-claimants would share the residual value of the two funds, the total value of which was expected to exceed $350 million.[36] The Court noted that distribution of those funds was made feasible because of the availability of reliable data, which had been

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[29] *Id.* at ¶ 11.

[30] *Id.* at ¶ 14.

[31] *Id.* at ¶¶15-17, 22

[32] Declaration of Katherine Kinsella, Dkt. No. 3561, ¶¶ 13-17.

[33] Approval Order, Dkt No. 3804, at 14-5.

[34] *Id.* at 15 n.15.

[35] Final Approval Order, Dkt No. 3933, at 5.

[36] *Id.* at 6.

improved by updates done during the class notice process.[37] Finally, the Court approved the use of state escheatment procedures where non-claimant Class members did not cash settlement checks.[38]

In response to objectors who claimed that the parties had inappropriately valued or weighed the claims of Class members based on their residence in a manifestation state, the Court found that "the parties struck an appropriate balance."[39] The Court therefore concluded that "[o]bjections based on the distinctions made in the Allocation Plan regarding the manifestation requirement lack merit. Moreover, the revised Allocation Plan will in all likelihood eliminate the discounts for class members who file claims."[40] The Court likewise rejected the claims of some Objectors that the Allocation Plan's identification of Ohio and Pennsylvania as non-manifestation states was at odds with the law of the case.[41]

e. The Court found objections to the BOS component of the Settlement to be without merit.

In granting final approval, the Court found that "[c]lass members eligible for BOS installation are to receive a specific remedy, sought from the outset of this litigation, that is likely to increase the safety of their vehicles and/or their confidence in the safety of their vehicles."[42] The Court fully considered all objections to the

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[37] *Id*.

[38] *Id.*

[39] Approval Order, Dkt. No. 3804, at 46.

[40] *Id.*

[41] *Id.* at 46-47.

[42] *Id.* at 20.

BOS and the Cash-in-Lieu-of-BOS Installation Fund, and found that all of them "lack merit."[43]

Specifically, the Court found that BOS installation provides real benefit to the Class because it remedies floor mat entrapment, a known condition connected to SUA.[44] The Court further rejected the claim that the cash payments offered were insufficient to allow Class members to install a BOS because the flat rate was derived by expert analysis and supported by common sense since a BOS is "just a software update rather than installation of new parts or new systems in an existing vehicle."[45] The Court further held that the exclusion of certain vehicles from eligibility for BOS installation made sense because those vehicles were either not subject to floor mat entrapment or lacked the capacity to accept the BOS installation without also replacing the engine control module at enormous cost.[46]

f. The Court found objections to the CSP component of the Settlement to be without merit.

The Court found that "[t]he CSP provides significant coverage, benefits 16.1 million class members, and is valued in excess of $475 million."[47] Specifically, the Court held that objections that complained the CSP had no real value "lack merit" because the program "provides specific, identifiable parts and systems subject to repair and adjustments."[48] It further found Plaintiffs' expert valuation of the program at approximately $475 million to be "a helpful and reliable expert opinion,

[43] *Id.* at 39.
[44] *Id.* at 36-37.
[45] *Id.* at 38.
[46] *Id.*
[47] *Id.* at 21.
[48] *Id.* at 39.

and no evidence to the contrary has been presented."[49] Finally, the Court rejected arguments that the failure of the parties to include a term to compensate Class members for ***past*** repairs rendered the Settlement unreasonable. Instead, the Court concluded "such a term inviting review of past repairs to over 16 million class vehicles would be difficult, if not impossible, to implement, and would serve to multiply individual disputes rather than resolve them on a classwide basis."[50]

g. The Court found the characterizations of the Safety and Education Fund as a *cy pres* distribution to be without merit.

Many of the appealing Objectors filed objections to the Safety and Education Fund, claiming that it was a *cy pres* distribution. The Court soundly rejected these characterizations, finding "the initial $30 million contribution ***is not a cy pres contribution.***" [51] "It is not made in lieu of any payments to the class. Instead, it is simply one part of a multi-part settlement of complex litigation that the Court must consider as a whole."[52]

h. The Court rejected complaints about the claims process as without merit.

The Court further rejected objections that claimed that no claims process should be required because, although the data used by the claims administrator to provide notice was reliable, it required refinement during the class notice period. Further, the Court found that completing the claim form was "not onerous."[53]

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[49] *Id.* at 39.
[50] *Id.* at 40.
[51] *Id.* at 31 (emphasis added).
[52] *Id.* at 32.
[53] *Id.* at 44.

i. The Court rejected objections to the attorneys' fees award as without merit.

Under the Settlement, Toyota agreed to pay Class Counsel, separately from the settlement funds, an award of $200 million in fees plus up to $27 million in expenses incurred prior to the Fairness Hearing.[54] The Court entered a separate Order Regarding Motion for Attorneys' Fees, Reimbursement of Expenses, and Compensation to Named Plaintiffs.[55] In that Order, after noting the Ninth Circuit's benchmark of 25% of a common fund as a benchmark for attorneys' fees,[56] the Court found that the requested fee award represented approximately 12.3 percent of the total settlement value.[57]

The Court then considered the factors set out by the Ninth Circuit for determining the reasonableness of a proposed fee award. On the first factor – the results achieved – the Court noted that "class counsel have achieved exceptional results for the class"[58] and "obtained these benefits for the class while facing tremendous risks."[59] On the second factor – the risks and complexity of the litigation – the Court found that Class Counsel "faced an extremely difficult path."[60] On the third factor – the skill of counsel – the Court found that, "[t]hroughout this litigation, class counsel has consistently demonstrate[d] extraordinary skill and effort," and that, despite facing "numerous challenges," they led a "massive discovery effort . . .

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[54] Settlement Agreement § VII(A).

[55] *See* Attorney Fee Order, Dkt. No. 3802.

[56] *Id.* at 4.

[57] *Id.* at 7.

[58] *Id.* at 9.

[59] *Id*.

[60] *Id.* at 10.

to investigate and support their factually complex claims."[61] On the fourth factor – the contingent nature of the fee – the Court noted that Class Counsel had expended at least 165,930 hours and over $27 million in litigation costs at the risk of receiving "no compensation whatsoever."[62] On the fifth factor – the awards in similar cases – the Court cited to an empirical study conducted by Plaintiffs' expert as well as cases cited by Class Counsel to conclude that fee awards in cases involving similar settlement values further supported the proposed fee award.[63] On the last factor – reaction of the class – the Court noted that there had only been 77 objections to the Settlement and only 20 of those related to the proposed fee award.[64] Finally, the Court conducted a lodestar cross-check, which yielded a multiplier of 2.87, which the Court held was "within the range approved by courts within this Circuit" and warranted under the circumstances of the case.[65]

The Court then rejected each and every objection to the attorneys' fee award. First, the Court concluded that the award was not excessive and that none of the Objectors provided an expert declaration or any other evidence in support of their claim that it was.[66] The Court then rejected the claim that the fee award should be lower because this was a "megafund" case, explaining "there is no rule in the Ninth Circuit that requires a court to decrease the percentage of a fee award as the size of

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[61] *Id.* at 12.

[62] *Id.* at 13.

[63] *Id.* at 13-14; Declaration of Brian T. Fitzpatrick in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Dkt. No. 3564.

[64] Attorney Fee Order, at 14.

[65] *Id.* at 15.

[66] *Id.* at 16.

the settlement increases."[67] Further, the Court held that the non-cash components of the Settlement could and had been reasonably valued.[68] The Court also rejected claims that the multiplier was too high because, particularly in light of the risks Plaintiffs assumed in this litigation, the multiplier was well within the range accepted by the Ninth Circuit.[69]

The Court denied requests to appoint a Special Master or give Objectors access to Class Counsel's billing records because there was no basis for such requests and because the Court was entitled to rely on summaries.[70] The Court then rejected claims that there had been any collusion in the negotiation of the attorneys' fee award because (i) the award was reached "after many months of arm's length negotiations supervised by the Court-appointed Settlement Special Master, Patrick Juneau"; (ii) the results of the settlement were "excellent for the class;" and (iii) the parties had reached their agreement regarding attorneys' fees and costs separate from the rest of the Settlement Agreement.[71] Finally, the Court held that objections claiming that Class Counsel did not disclose the specific amount of attorneys' fees and costs that they would request as "not true."[72]

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[67] *Id.* at 17 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 18.

[71] *Id.* at 19.

[72] *Id.*

j. The Court rejected objections to the incentive awards as without merit.

As part of the Settlement Agreement, Toyota further agreed that Class Counsel could petition the Court for incentive awards of up to $100 per hour per Plaintiff and per Class Representative, with a minimum $2,000 award.[73] The Court rejected objections that claimed (i) the notice did not properly disclose the specific amount of each award; (ii) the amount of the awards created a conflict of interest with the remainder of the Class; and (iii) the awards were excessive.[74]

k. The Court rejected each and every objection by the Barnow Objectors, and rejected their attempt to seek fees for purportedly improving the Settlement.

In its Final Approval Order, the Court specifically addressed – and rejected – the additional arguments put forth by the Barnow Objectors in their original and supplemental objections related to the alleged under-compensation of floor mat-related expenses. First, the Court held that to the extent the Barnow Objectors believed the Settlement left their floor mat-related expenses uncompensated, they were afforded the opportunity to opt out.[75] The Court further held that the Objectors' position was "simply wrong" because floor mat issues were addressed by a separate recall, which had no expiration date, under which Toyota offered replacement floor mats.[76] In addition, the Court held that the Objectors' argument "overlooks the fact that the BOS installation is specifically intended by the parties to remedy floor mat

[73] Settlement Agreement § VII(E).

[74] Attorney Fee Order, Dkt. No. 3802, at 25-30.

[75] Final Approval Order, Dkt. No. 3933 at 9.

[76] *Id.* at 10.

entrapment."[77] Finally, the Court rejected the Barnow Objectors' argument that the use of state escheatment procedures was a form of spillover *cy pres* contributions.[78]

In addition to rejecting the validity of the Barnow objections, the Court likewise rejected their request for $8.25 million in attorneys' fees, $9,225.51 in litigation costs, and $6,000 in objector compensation. The Court held that the premise for such a request – that the Barnow Objectors added value to the settlement and to the Class – was "not supported by the record but rather contradicted."[79] Specifically, the Court rejected as "unfounded speculation" the Barnow Objectors' claim that it was their work that eliminated the *cy pres* component of the Settlement. The Court concluded that "the objection added no gloss to the problem which the parties had already identified and were themselves prepared to resolve as data became available. Therefore, the Objectors' counsel's contention that they should be credited with adding value to the settlement of the class claims is wholly unsupported by the record."[80]

l. The Court rejected all objections incorporated by reference.

The Court properly struck those portions of any objections that purported to incorporate the objections raised by others.[81] If those struck objections are appealed, they will not be deemed properly preserved for the record.[82]

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[77] *Id*.

[78] *Id.* at 10-11.

[79] Berman Decl., Ex. C (Tentative Order Denying Motion for Attorneys' Fees, Reimbursement of Expenses, and Objector Compensation). The Court entered this as a final order at a hearing on August 19, 2013. *See* Hearing Tr. at 25:23-24 ("Accordingly, the Tentative is going to be the Order of the Court.").

[80] *Id.* at 6-7.

[81] Approval Order, Dkt. No. 3804, at 33 n.30.

F. Appeal Costs and Additional Administrative Costs

As set forth in the Berman Declaration,[83] Plaintiffs conservatively estimate that Class Counsel will incur $11,326.00 in copying and binding costs for each appeal pursued by an Objector. These costs are conservative because, as one example, they only include the costs of filing of one motion for summary disposition and/or sanctions, which is understated given the lack of merit of these appeals.

In addition, for each additional month the settlement funds remain open, the claims administrator incurs significant costs and expenses, including such items as maintaining the post office box and toll-free number, updating the website, and responding to Class member inquiries (which increase as more time passes). Based on the claims administrator's experience in settlements of similar size and/or complexity, additional incremental administrative costs caused by the delay will run approximately $525,000.[84] Because this estimate assumes a 12-month delay, but

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[82] *See Khademi v. South Orange Cty. Cmty. College Dist.*, 194 F. Supp. 2d 1011, 1027 (C.D. Cal. 2002) ('"A judge is the impartial umpire of legal battles, not a party's attorney. He is neither required to hunt down arguments the parties keep camouflaged, nor required to address perfunctory and undeveloped arguments . . . . To the extent that Defendant failed to develop any additional argument[s] or provide any legal support for them, it has waived them.' . . . 'Judges are not like pigs, hunting for truffles buried in briefs.'") (internal citations omitted); *accord United States v. Alonso*, 48 F.3d 1536 (9th Cir. 1995) ("Appellate courts frequently refuse to address issues that appellants fail to develop in their briefs. The Court of Appeals for the First Circuit, for example, has refused to address an issue merely 'adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation,' in violation of Rule 28(a)(5). . . . '[N]otice pleadings do not suffice for appellate briefs.'") (citations omitted).

[83] *See id.* at ¶ 2.

[84] *See* Declaration of Markham Sherwood in Support of Plaintiffs' Motion for Imposition of Appeal Bonds Under Federal Rule of Appellate Procedure 7 ("Sherwood Bond Decl."), ¶ 3.

appeals to the Ninth Circuit take an average of 15.5 months to be resolved,[85] this estimate is likewise conservative.

III. ARGUMENT

A. Requiring an Appeal Bond is Appropriate

Rule 7 of the Federal Rules of Appellate Procedure provides that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal."[86] The determination of the amount of a bond imposed under Rule 7 is left to the discretion of the district court.[87]

In addition to the costs permitted under Rule 39 of the Federal Rules of Appellate Procedure,[88] this Court has held that the administrative costs associated with the delay in implementing a settlement (as long as they do not include attorneys' fees) are properly included in a Rule 7 bond because "distribution of the settlement proceeds will be unnecessarily delayed until the appeal is exhausted."[89]

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[85] *See* Berman Decl., Ex. D (Table B-4A: U.S. Courts of Appeals – Median Time Intervals in Months for Merit Terminations of Appeals Arising From the U.S. District Courts, by Circuit, During the 12-Month Period Ending September 30, 2012).

[86] *See also Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 954-55 (9th Cir. 2007).

[87] *See* Fed. R. App. P. 7, 1979 Advisory Committee notes ("The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.").

[88] *See* Fed. R. App. P. 39(e) (itemizing (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal).

[89] *See* Order Granting Class Plaintiffs' Motion to Require Appeal Bond, *In re Broadcom Corp. Secs. Litig.*, Case No. 02-275, at 6 (Dec. 5, 2005) (approving Rule 7

As set forth in the attached Declaration of Plaintiffs' Claims Administrator, Objectors' appeals will cause the Class to incur several types of administrative costs associated with the delay such as remaining in contact with Class members, sending notices to apprise the Class of Objectors' appeals and keep them informed about the status of the appeal, monthly fees for maintaining the settlement website and providing phone support to answer inquiries. Those expenses are estimated to be approximately $525,000.

B. All of the Factors the Ninth Circuit Requires this Court to Consider Support the Imposition of a Bond

Neither Rule 7 nor the Ninth Circuit has provided explicit guidance regarding the factors to be considered in deciding whether the imposition of an appeal bond is appropriate. However, in applying Ninth Circuit authority, district courts in this Circuit have articulated three potentially relevant factors: (i) appellant's financial ability to post a bond; (ii) the risk the appellant would not pay the costs if the appeal

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bond that included $517,700 in delay costs); *see also Miletak v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 125426, at *6-7 & n.5 (N.D. Cal. Aug. 27, 2012) (awarding an appeal bond including administrative costs "to continue to service and respond to class members' needs pending the appeal" under Rule 7); *In Re Wal-Mart Wage & Hour Empl. Practices Litig.*, 2010 U.S. Dist. LEXIS 21466, at *18 (D. Nev. Mar. 8, 2010) ("The Court further finds that the four Objectors [represented by the Carpenter Objectors' attorney, John Pentz] should be required to file [an] appeal bond sufficient to secure and ensure payment of costs on appeals which in the judgment of this Court are without merit and will almost certainly be rejected by the Ninth Circuit Court of Appeal. While it is difficult to calculate with mathematical precision the duration of Objectors' appeal, or the administrative costs and interest costs to the potentially more than 3 million class members, or other costs reasonably incurred under Rule 39 of the Federal Rules of Appellate Procedure, the Court finds the sum of $ 500,000 per Objector to be reasonable."); *but see Schulken v. Washington Mut. Bank*, 2013 U.S. Dist. LEXIS 48175, at *23 (N.D. Cal. Apr. 2, 2013) (declining to award administrative delay costs in a Rule 7 appeal bond where plaintiff did not "concretely identify the basis for their $10,000 estimate, nor clearly distinguish the projected costs from those that could be claimed as attorney's fees").

loses; and (iii) an assessment of the likelihood that appellant will lose the appeal and be subject to costs.[90] All three of these factors weigh in favor of assessing an appeal bond here.

a. There is no evidence that Objectors are unable to post a bond, and serial objectors should be presumed to be financially able to pay.

There is no evidence that any of the Objectors here are unable to post a bond. Twelve (12) of the fourteen (14) Objectors are represented by counsel. Moreover, attorneys Palmer, Pentz, Edward Cochran, Miller, Fortman, Kress, George Cochran, Cannata, and Weinstein, who, respectively, represent six of the fourteen sets of Objectors (the Ly Objectors, Carpenter Objectors (Pentz and Edward Cochran), Guerriero Objectors (Miller, Fortman and Kress), Huang Objectors (George Cochran) and Falls Auto Objectors (Cannata), and Collins Objectors (Weinstein), routinely represent objectors challenging class action settlements.[91] Those Objectors have evidenced an ability to pay an appeal bond.[92]

b. There is a substantial risk, particularly with out-of-state objectors, that Objectors will not pay the costs if their appeals are unsuccessful.

There is a substantial risk that Objectors will not pay the costs if their appeals are unsuccessful. Ninth Circuit courts have recognized that collecting costs from

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[90] *See Schulken*, 2013 U.S. Dist. LEXIS 48175, at *13 (citing cases).

[91] *See* Appendix B to Plaintiffs' Reply Brief in Support of Motion for Final Approval, Dkt. No. 3731.

[92] *See Schulken*, 2013 U.S. Dist. LEXIS 48175, at *14 (noting the serial class action objector had evidenced financial ability to pay appeal bond).

out-of-state appellants may be difficult,[93] and 13 of the 14 Objectors are out-of-state.[94]

c. There is a substantial likelihood that Objectors will lose their appeals and be subject to costs.

Finally, as made clear in the discussion above, there is a substantial likelihood that Objectors will lose their appeals and be subject to costs. In considering every objection being appealed, the Court found them all to be "without merit." Particularly given this Court's meticulous review of every aspect of the Settlement and each category of objection lodged to the Settlement,[95] and the discretion that review will be afforded,[96] it is virtually impossible that the Ninth Circuit will deem any of these appeals to have merit. Indeed, given that certain of these Objectors' motive in filing their objections, it is more likely that the Ninth Circuit will see these Objectors as more concerned with exerting leverage for their own benefit than attempting to improve any aspect of the Settlement for other Class members.[97]

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[93] *See, e.g.*, *Schulken*, 2013 U.S. Dist. LEXIS 48175, at *15 (citing cases).

[94] Only the Ly Objectors reside in California. *See* Berman Decl., Ex. B.

[95] *See Miletak v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 125426, at *5 (imposing $60,000 appeal bond where court thoroughly considered objections and found them to be "meritless").

[96] *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("We have repeatedly stated that the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is 'exposed to the litigants, and their strategies, positions and proof.'" (citation omitted)); *see also id.* at 1027 ("The district court's final determination to approve the settlement should be reversed 'only upon a strong showing that the district court's decision was a clear abuse of discretion.'" (citation omitted)).

[97] *Cf. Torrisi v. Tuscan Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir. 1993) (characterizing objectors as "spoilers" when only 20 of 113,000 class members objected and only two appealed the settlement's approval); *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir. 1989) (imposing sanctions and recognizing, outside of

C. There Is Likewise a Substantial Likelihood that the Objectors Appealing Orders Ancillary to Final Approval Will Lose Those Appeals and Be Subject to Costs

1. The Barnow Objectors will be subject to costs on their additional appeals.

a. Appeal of the denial of their motion to be paid $8.25 million in attorneys' fees.

The Barnow Objectors are appealing this Court's refusal to award them $8.25 million in attorneys' fees, $9,225.51 in litigation costs, and $6,000 in objector compensation. There is virtually no likelihood that this determination will be overturned on appeal.

Whether to award an objector fees out of a common fund for improving a settlement is within the Court's discretion.[98] Objectors who do not substantially enhance the benefits to the class are not entitled to an award of attorneys' fees for their unsuccessful efforts.[99] Objectors are entitled to attorneys' fees only in the event they demonstrate that they (i) conferred some substantial benefit on the class or (ii) substantially improved the settlement under consideration.[100] The Court found that the Barnow Objectors did neither, and it is highly unlikely that the Ninth Circuit will overturn the careful fact findings of the Court that presided over this litigation and oversaw the Settlement's full procedural history.

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class action context that "parties may use the costs of defending meritless appeals to coerce reductions in amounts properly awarded").

[98] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002).

[99] *Vizcaino*, 290 F.3d at 1052.

[100] *Cohorst v. BRE Props., Inc.*, 2012 U.S. Dist. LEXIS 78010, at *3 (S.D. Cal. June 5, 2012).

b. Appeal of the denial of their *ex parte* motion to serve discovery.

The Barnow Objectors are likewise appealing the Court's July 5, 2013 denial of their *ex parte* request to serve "limited discovery" in support of their objection.[101] It is virtually impossible that the Court's order will be overturned on appeal. As an initial matter, discovery by objectors is generally disfavored,[102] and whether to allow such discovery is committed to the Court's discretion.[103] In considering an objector's request for discovery, courts generally consider three factors: (i) the nature and amount of previous discovery; (ii) whether there is a reasonable basis for the discovery requests; and (iii) the number and interests of objectors.[104]

Here, there is a substantial likelihood that the Ninth Circuit will find that the Court properly exercised that discretion. Prior to the announcement of the Settlement, discovery was nearly complete. As a single measure, the parties had taken over 200 depositions. Second, there was no reasonable basis for the Barnow Objectors' "limited" discovery because the primary purpose of it was to support their request for $8.25 million in attorneys' fees, not to benefit some or all of the Class

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[101] *See* Dkt. No. 3868 (order denying motion).

[102] *See* MANUAL FOR COMPLEX LITIGATION § 21.643 (4th ed. 2009) ("Discovery [by objectors] should be minimal and conditioned upon a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel.") (emphasis added).

[103] *In re Wells Fargo Mortgage-Backed Certificates Litig.*, 2011 U.S. Dist. LEXIS 131788, at *13 (N.D. Cal. Nov. 14, 2011) ("Class members who object to a class action settlement do not have an absolute right to discovery.") (citations omitted).

[104] *Wells Fargo*, 2011 U.S. Dist. LEXIS 131788, at *14 (citation omitted).

members.[105] As the Court found, that request "added no gloss to the problem which the parties had already identified and were themselves prepared to resolve as data became available."[106] The remainder of the Barnow Objectors' "limited discovery" was to pursue their objection that the BOS part of the Settlement purportedly failed to compensate Class members for floor mat-related issues, which the Court has similarly found to be "simply wrong."[107] Finally, no other Objectors supported the Barnow Objectors' discovery requests and, even if they had, those interests would pale in comparison to the interests of the 22 million remaining Class members.

2. Lucey will be subject to costs on her appeal of the Court's denial of her motion to allow her late objection.

Lucey seeks to appeal this Court's denial of her motion for leave to file a late objection.[108] Lucey had claimed that, even though she was mailed two notices to her current address,[109] despite the fact that Class members had been afforded "hundreds of millions of opportunities to be exposed to the Summary Settlement Notice," and that the Notice therefore met the requirements of both Fed. R. Civ. P. 23(e)(1) and due process of law,[110] she never received notice of the Settlement.

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[105] *See* Barnow Objectors' discovery requests, Dkt. No. 3842-1, Request for Production No. 2 (seeking "[a]ll [documents] by and between Co-Lead Class Counsel, Toyota's Counsel and/or the Special Master regarding modifications and/or amendments to the Allocation Plan originally set forth in the December 26, 2012 Economic Loss Class Action Settlement").

[106] Berman Decl., Ex. C at 6.

[107] Final Approval Order, Dkt. No. 3933, at 10.

[108] *See* Motion to Allow Late Filed Objection, Dkt. No. 3906.

[109] *See* Declaration of Markham Sherwood Re: the Lucey Motion to Allow Late Filed Objection, Dkt. No. 3890, ¶¶ 3-4.

[110] Approval Order, Dkt. No. 3804, at 14-15.

There is virtually no likelihood that the Ninth Circuit will find merit in this appeal. Whether to consider an objection filed after the deadline is within the Court's discretion.[111] Moreover, even if the Court erred in denying Lucey's motion, she suffered no prejudice, as the Court also held that Lucey's position was "similar to those raised by other Objectors" that were previously addressed by the Court.[112]

3. The Ly Objectors will be subject to costs on any appeal related to their purported inability to engage in ECF filing.

The Ly Objectors' Notice of Appeal states that "[o]bjectors also appeal any order by this court or CACD administrative rule or action that has prevented them or their attorney from ECF filing in this case."[113] There is nothing in the record that indicates the Ly Objectors ever raised such an objection with the Court. Therefore, it was waived.[114] In addition, the Ly Objectors' statement simply makes no sense since, subject to certain exceptions, this Court's Local Civil Rules ***require*** ECF filing in all civil cases.[115]

IV. CONCLUSION

While objectors can serve an important role in improving aspects of a settlement, unfortunately all of the Objectors who are appealing this Settlement do not fit this categorization. In order to ensure that Objectors can pay costs when the

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[111] *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 U.S. Dist. LEXIS 154288, at *7-8 (N.D. Cal. Dec. 27, 2011) (refusing to consider objection mailed but not filed by the objection deadline); *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *35 n.9 (C.D. Cal. June 10, 2005) (refusing to consider untimely objection received via U.S. mail 10 days after the deadline for objections).

[112] Final Approval Order, Dkt. No. 3933, at 8.

[113] Dkt. No. 3680.

[114] *See supra* n.82.

[115] *See* C.D. Cal. L.R. 5-4.1.

Ninth Circuit properly rejects their appeals, Plaintiffs respectfully request that this Court impose appeal bonds in the amount of $536,326.00 against each of the Objectors.

DATED: September 19, 2013

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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 September 19, 2013.

s/ Steve W. Berman
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