E-Filed 1/6/12

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CARIN and GEORGE EDWIN MILLIGAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TOYOTA MOTOR SALES, U.S.A., INC., *et al.*,

Defendants.
_______________________________________/

No. C 09-05418 RS

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND GRANTING AWARD OF ATTORNEYS' FEES, COSTS, AND INCENTIVE PAYMENTS TO CLASS REPRESENTATIVES

I. INTRODUCTION

Plaintiffs filed this class action against Toyota and several domestic affiliates on behalf of all current and former owners and lessees of 2001-2003 model RAV4 vehicles equipped with automatic transmissions, alleging a manufacturing defect in the engine control module (ECM). Pursuant to a settlement agreement entered into by the parties, the Court previously granted preliminary approval of the proposed class settlement. Plaintiffs now seek final certification of the class, final approval of the settlement, and separately, move for an award of attorneys' fees, expenses, and incentive payments for the named plaintiffs. In consideration of the briefs, the arguments raised at the fairness hearing, and for the reasons stated below, plaintiffs' motions are granted.

II. BACKGROUND

This action arises out of an alleged manufacturing defect in the ECM of 2001-2003 Toyota RAV4s that causes a condition called "harsh shift" and possible transmission failure. Allegedly, many RAV4 owners and lessees were obliged to replace their ECMs and/or automatic transmissions as a result of the defect. The named plaintiffs, Carin and George Milligan and Damashata Washington, are current owners of class vehicles who paid out-of-pocket to have their ECM and/or transmission repaired. They filed this suit as a class action on November 17, 2009.

The suit proceeded until, in the course of mediation, Toyota disclosed that it was negotiating with the California Air Resource Board (CARB) to settle related claims. Thereafter, Toyota entered into a memorandum of understanding (MOU) with CARB to provide reimbursement for out-of-pocket repair expenses, and to extend its warranty from 8 years/80,000 miles to 10 years/150,000 miles (whichever runs first) for the benefit of current owners and lessees only. On March 18, 2011, after further negotiations, the parties entered into a settlement agreement, subject to the Court's final approval. Under the terms of the agreement, Toyota stipulated to certification of a proposed class encompassing all persons in the U.S. and Puerto Rico "who currently own or lease or who previously owned or leased a model-year 2001-2003 Toyota RAV4 vehicle with automatic transmissions," with limited exceptions. The settlement extends a right of reimbursement to *prior* owners and lessees, and puts into place class settlement procedural protections for all owners and lessees. Although the settlement agreement also purports to provide a warranty extension of 10 years/150,000 miles to all class members, the CARB MOU already provided this benefit to current owners and lessees, and of course, *prior* owners and lessees receive no benefit from this supposed concession because they no longer possess their vehicles.[1]

On May 18, 2011, pursuant to the plaintiffs' motion and after a hearing on the matter, the Court: (1) granted preliminary approval of the settlement agreement, (2) granted preliminary certification of the class, (3) named the individual plaintiffs as representatives and their attorneys as class counsel, and (4) approved a procedure for notifying the class members of the proposed settlement. In accordance with that procedure, the class administrator obtained the names and last-known addresses of all identifiable class members, and on September 9, 2011, sent 613,960 of them

[1] The warranty extension is not transferrable by a prior owner or lessee.

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pre-hearing notices of the settlement by first class mail, at Toyota's expense.[2] The class administrator also established a "voice interactive" hotline to inform class members of the proposed settlement, and a website (http://www.RAV4ECMsettlement.com) to provide class members with information about the hearing, claims process and administrator, settlement agreement, and final approval order.[3]

Class members who wished to exclude themselves from the settlement were directed to send a written request to the class administrator within 45 days of the date the notice was mailed. To be effective, written requests for exclusion were required to include: (1) the class member's name and address; (2) model and year of vehicle and approximate date of purchase; (3) whether the class member still owns the vehicle; (4) an express request to be excluded; and if possible, the VIN of their class vehicle. Class members who failed to complete this procedure would be bound by the settlement and barred from participating in pending or future litigation. As of November 17, 2011, plaintiffs' counsel represents that 364 class members have opted out.

Class members were also invited to object to the class settlement by sending written objections to the administrator, and serving them on the class counsel and Toyota. The objection was to include the same identifying details concerning the class member and the relevant class vehicle, as well as a statement of the position that the objector wishes to assert in opposition to the settlement, and copies of any relevant documents. The same 45-day deadline applied to objectors. As of November 17, 2011, class counsel reports that 67 class members have filed objections to the settlement terms.

Subsequent to the fairness hearing, the Court requested supplemental briefing to clarify the amount in reimbursements Toyota has paid. Since Toyota entered into the CARB MOU, it has paid out a total of $9,750,997.16 in reimbursement for repairs to 4,611 claimants. The majority of those payments were made before the class notice in this case was sent out on September 9, 2011. Since class members received notice of the proposed class settlement evaluated here, Toyota has paid out $2,209,583.81 on 962 claims.

III. DISCUSSION

[2] According to plaintiffs, 6% of these were returned as undeliverable.
[3] The website received 45,191 unique visits.

A. Class certification

Where the parties reach a proposed settlement prior to class certification, the court must review the agreement and approve "both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). In certifying a class for settlement purposes, review of the proposed class is "of vital importance," as the court lacks the opportunity to make adjustments to the class, as it ordinarily would when a case is fully litigated. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). To be certified, the proposed class settlement must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3). Rule 23(a) provides that a class action is available only where: (1) the class is so numerous that joinder is impracticable; (2) common question of law or fact exist; (3) the claims or defenses of the representative parties are typical of the class; and (4) the representative parties will fairly and adequately protect the class interests. Additionally, Rule 23(b)(3) requires the court to find that common question of law or fact predominate over the questions of individual class members and that a class action is the superior method for fair and efficient adjudication.

1. Numerosity and commonality

With a proposed class numbering in the hundreds of thousands, there can be no question that the class members are sufficiently numerous to frustrate efficient joinder. Rule 23(a)(1) is thus satisfied. There are also, undoubtedly, questions of law and fact common to all. The commonality requirement of Rule 23(a)(2) is construed less rigorously than the "predominance" requirement of Rule 23(b)(3). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In essence, the former merely requires some "questions of fact and law which are common to the class," whereas the latter requires that "questions of law or fact common to class members [must] predominate over any questions affecting only individual members." *See* Fed. R. Civ. P. 23. Thus, for purposes of Rule 23(a)(2), a perfect identity of facts and law is not required. Instead, relatively minimal commonality will do. *Hanlon*, 150 F.3d at 1019. ("a common core of salient facts coupled with disparate legal remedies within the class" is sufficient). Here, there can be no serious question that all claimed injuries flowed from a common source – the allegedly defective ECMs. This factual commonality is sufficient to fulfill the condition of Rule 23(a)(2).

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2. Typicality

The representative plaintiffs' claims must also be typical of those advanced by the class. Fed. R. Civ. P. 23(a)(3). This stricture, like the commonality requirement, is applied permissively. Typicality is satisfied so long as the representative class members' claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Put another way, the test for typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp,* 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

Here, the representative plaintiffs and the class members all either purchased or leased a 2001-2003 RAV4 with an automatic transmission that was allegedly amendable to failure due to a common manufacturing defect. In other words, all class members have been injured by the same alleged course of conduct – conduct which is not unique to the named plaintiffs – and all members have suffered similar injuries. *Id.* Granted, not every class member has suffered an exactly identical injury. In this respect, the terms of the settlement are relevant to evaluating the proposed class' typicality. *See Amchem Prods., Inc.*, 521 U.S. at 619 ("[s]ettlement is relevant to a class certification").

For example, class members whose vehicles have not yet suffered the alleged defect will benefit, under the terms of the settlement, from an extended warranty. On the other hand, class members who have already sold or traded in their defective vehicle at a reduced value could only derive benefit from compensatory damages. Arguably, there would be greater typicality if the settlement here provided for varying remedies. *See, e.g., Castillo v. Gen. Motors Corp.*, No. 07-2142, 2008 WL 8585691, at *4 (E.D. Cal. Sept. 8, 2008) (noting that "not all class members experienced problems with their transmissions and, of the class members who did, not all incurred the same amount of damages," but overlooking these differences because "the settlement's provision for an individualized determination of damages cures the lack of typicality with respect to damages"). Ultimately, however, the standard for typicality is relatively low, and an individualized

assessment of damages is not necessarily required. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("[t]he amount of damages is invariably an individual question and does not defeat class action treatment"), *and West v. Circle K Stores, Inc.*, No. 04-0438, 2006 WL 1652598, at *7-8 (E.D. Cal. June 13, 2006) ("individual issues regarding damages will not, by themselves, defeat certification under Rule 23(b)(3)"). The typicality test requires only that class members' claims are reasonably co-extensive in the sense that they are the result of a common course of conduct by the defendant. *Hanon*, 976 F.2d at 508. Here there is no question that the class members' claims meet this test, and therefore typicality is satisfied under Rule 23(b)(3).

3. Adequacy of representation

The named plaintiffs must be deemed capable of adequately representing the interests of the entire class, including absent class members. *See* Fed. R. Civ. P. 23(a)(4) (requiring "representative parties [who] will fairly and adequately protect the interests of the class"). The adequacy inquiry turns on: (1) whether the named plaintiff and class counsel have any conflicts of interest with other class members; and (2) whether the representative plaintiff and class counsel vigorously prosecuted the action on behalf of the class. *Hanlon*, 150 F.3d at 1020 (citing *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir. 1978)). In practice, courts have interpreted this test to encompass a number of factors, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Brown v. Ticor Title Ins.*, 982 F.2d 386, 390 (9th Cir. 1992) (quoting *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.,* 693 F.2d 847, 855 (9th Cir. 1982)). Examining the class for conflicts of interest is "especially critical" when "a class settlement is tendered along with a motion for class certification." *Hanlon*, 150 F.3d at 1020.

Here, there is arguably some cause for concern given that the litigation settled relatively early, immediately after Toyota disclosed that it had entered into an understanding with a regulatory agency which provided an adequate remedy to the named plaintiffs.[4] In addition, it is evident that not all class members will derive benefits from the remedies provided by the settlement, suggesting

[4] In supplemental briefing, the parties confirmed that the named plaintiffs are current owners of the class vehicle, and paid out-of-pocket for repair costs. Therefore, their claims for reimbursement were almost certainly covered by the CARB agreement.

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the possibility of some intra-class conflict. *See, e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 800-801 (3d Cir. 1995) (questioning adequacy of representation where settlement offers remedies tailored to named plaintiffs' injury that are of no value to other class members). In particular, those who sold or traded in their vehicle after an ECM or transmission failure without first repairing it – because the value of the vehicle barely exceeded the cost of repairs[5] – will not derive any benefit from the settlement's provision of reimbursement for out-of-pocket repair costs, or a warranty extension. However, as plaintiffs point out, individuals whose claims may not be remedied by the settlement are free to exempt themselves from the class. Moreover, as noted above, differences directed to damages do not necessarily defeat class certification, and must be considered in the larger context of the class' interests. *Barrack*, 524 F.2d at 905. In the main, however, all class members shared an overarching interest in recovering from Toyota for the alleged defect. The settlement cannot be expected to countenance every class members' claims exactly equally.

Although, as noted, the parties also settled this case relatively early in litigation, in all other respects, the record suggests that the representative plaintiffs and class counsel have fairly and adequately represented the class members' interests. The representative parties conducted pre-litigation investigation into the relevant manufacturing defect, performed initial and post-settlement confirmatory discovery of documents from Toyota and CARB, as well as two 30(b)(6) depositions, interviewed over 100 potential class members, and engaged in two days of adversarial ADR negotiations with Toyota over the scope of appropriate relief. Negotiations were overseen by a qualified mediator, the discussions were, by all accounts, conducted at arms-length. There is absolutely no evidence of collusion between the parties in arriving at the proposed settlement. Furthermore, the record leaves no doubt as to the fact that counsel for both plaintiffs and defendants are highly qualified and experienced. As a result, there is sufficient evidence to conclude that the representative parties fairly and adequately represented absent class members, notwithstanding slight differences among some class members' interests, and the relatively quick resolution of the case.

[5] As several objectors note, the value of the vehicle at the time of failure was, for many, around $10,000, whereas the cost of having a transmission replaced ranges from $2,000 to $6,000.

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4. Predominance of common issues

Finally, the proposed class settlement must comply with Rule 23(b)(3), which requires that: (1) common questions must "predominate over any questions affecting only individual members"; and (2) class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Supreme Court has interpreted these prerequisites to mean that the proposed class must be "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1011 (citing 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc*. § 1778 (2d ed. 1986)).

Here, a common nucleus of operative fact dominates the case. Granted, to the extent class members may possess slightly different claims or remedial options under state substantive law, plaintiffs' counsel must be prepared to show that the class is protected by a relatively homogenous body of product liability, contract, and consumer protection laws. Such variation is routine, however, and ordinarily is insufficient to derail class certification. The same is true for variation within the class as far as damages are concerned. *Barrack*, 524 F.2d at 905; *Circle K Stores*, 2006 WL 1652598, at *7-8. Accordingly, the first element of Rule 23(b)(3) is met.

As for the "superiority" requirement, this is plainly a case where recovery on an individual basis would be infeasible due to litigating costs. *See Zinser v. Accufix Res. Institute, Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) ("[w]here damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action"). Plaintiffs' counsel emphasizes the familiar array of risks, and heavy costs, attendant to litigation of individual claims. The non-exhaustive factors identified by Rule 23(b)(3) support the same conclusion: the interests of class members in individually controlling the litigation in the form of separate actions is clearly outweighed by the administrative efficiency of the class action mechanism. *See* Fed. R. Civ. P. 23(b)(3)(1)-(4). In all these respects, the proposed class action is paradigmatic. *Accord Hanlon*, 150 F.3d at 1023.

Accordingly, the proposed class meets Rule 23's requirements, and certification is appropriate. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), the Court hereby certifies, for settlement purposes only, the following class:

> All persons in the United States, including the Commonwealth of Puerto Rico, who currently own or lease or who previously owned or leased a model-year 2001-2003 Toyota RAV4 vehicle with automatic transmissions ("Class Vehicle"). Excluded from the Settlement Class are the following: a) officers and directors of Toyota (as defined below) b) the Judge to whom this case is assigned and any member of the Judge's immediate family; and c) persons who have submitted a timely and valid request for exclusion from the Settlement Class.

B. Fairness of the settlement

A court may approve a settlement that is binding on class members "only after a hearing," and upon finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Consistent with other Circuits, the Ninth Circuit has held that "the dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court-designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e)." *Hanlon*, 150 F.3d at 1026. At the same time, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited" to the extent necessary to determine that the agreement is fair, reasonable, and adequate. *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Although the burden of demonstrating the soundness of the settlement rests with the party advocating its approval, some courts presume a settlement to be fair so long as there has been sufficient discovery, and arms-length negotiations by experienced and capable counsel, requirements that are met here.[6] *Knight v. Red Door Saloons, Inc.*, No. 08-01520, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009) (citing *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 528 (C.D. Cal. 2004)).

[6] That presumption loses its force, however, if there are signs of intra-class conflicts that undermine the assumption that "the lawyers actually negotiating really were doing so on behalf of the *entire* class." *In re Gen Motors Corp.*, 55 F.3d at 797. Here, however, for the reasons articulated above, it appears that no significant intra-class conflicts interfered with representation.

In evaluating settlements, district courts are to consider a number of factors, including: "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. The settlement as a whole is evaluated for overall fairness and the decision to approve or reject the settlement is within the sound discretion of the court. *Id.* Notably, district courts lack the ability to "delete, modify, or substitute certain provisions" of the settlement agreement at its discretion; instead, the settlement must be approved or rejected in its entirety. *Officers for Justice*, 688 F.2d at 630.

1. Strategic litigation considerations

The first several factors include what might be described, collectively, as strategic litigation considerations. These considerations include: the strength of the plaintiffs' case, the attendant costs and risks of further litigation, the amount in settlement, the extent of discovery and motion practice, the views of counsel, and the presence of a government litigant. Generally, settlements that are consummated later in litigation are presumed to be better informed by the factual and legal circumstances of the case. Likewise, the weaker the merits of plaintiff's case, the less concern there is that an early settlement may reflect collusion between the parties.

Here, the class members' case appears to be relatively strong in many respects. At the time of settlement, Toyota had already distributed a technical bulletin advising of the alleged ECM defect, and settlement with CARB, a government agency, appeared imminent. On the other hand, class counsel emphasizes that, absent settlement, Toyota would likely oppose plaintiffs at every step of litigation. Consistent with this position, plaintiffs note that Toyota has already filed (and subsequently held in abeyance) a motion to dismiss, in which it contends that it may not be held liable for ECM failures that occurred outside the warranty period because it had no duty to disclose the alleged defect, which it characterizes as not "safety-related." It is, granted, somewhat difficult to evaluate the relative strength of the parties where, as here, that settlement occurred so early in

mediation, and before any substantial motion practice.[7] *In re Gen. Motors Corp.*, 55 F.3d at 814 (where case was settled shortly after filing and before briefing of the merits, "the inchoate stage of case development reduces our confidence that the proceedings had advanced to the point that counsel could fairly, safely, and appropriately decide to settle the action"). On the other hand, plaintiffs' counsel must be credited for resolving this litigation as expeditiously as possible, thereby minimizing their own fees and additional litigation expenses. It is apparent from the record, moreover, that plaintiffs' counsel has engaged in significant pre- and post-settlement investigation and discovery, ensuring that the proposed resolution is fair and reasonable in light of all the relevant circumstances.

Notwithstanding some of plaintiffs' claims, the amount in settlement cannot be determined with a great deal of confidence here. Because Toyota already agreed to provide reimbursements for out-of-pocket repair expenses and a warranty extension to all current owners and lessees under the CARB MOU, these benefits cannot be wholly credited to this particular settlement.[8] Although plaintiffs insist that they cannot easily distinguish between claims for reimbursement filed under the CARB agreement, and those filed pursuant to the settlement in this case, it is clear that a significant portion of the $9.7 million recovered by claimants was paid out by Toyota pursuant to the CARB MOU. As plaintiffs conceded in supplemental briefing, Toyota reimbursed more than 3,600 of roughly 4,600 total claims *before* the class notice in this case was even sent out, on September 9, 2011. In addition, because prior owners and lessees receive no benefit from the agreed-upon warranty extension, the only concrete benefits provided by the settlement are: (1) reimbursement for out-of-pocket repair expenses incurred by prior owners and lessees (current owners and lessees were covered by the CARB MOU), and (2) certain procedural protections, including the appeals process overseen by the class administrator, attendant to the settlement process. That said, to the extent that the benefits of the proposed settlement agreement are overshadowed by the preexisting CARB MOU, the representative parties certainly bear no fault. Toyota entered into negotiations with CARB after plaintiffs' filed this action, and without plaintiffs' immediate knowledge.

[7] As plaintiffs note, they have briefed, but not argued, Toyota's motion to dismiss.
[8] Plaintiffs maintain that the filing of this action acted as a catalyst, compelling Toyota to enter into the CARB understanding, however this argument is somewhat speculative.

Recognizing these significant limitations on the value conferred by the settlement on the class, it is nonetheless clear that the settlement represents a fair, reasonable, and adequate resolution of the class' claims. As plaintiffs' counsel emphasizes, if the settlement were rejected and litigation were to proceed, the case could take years to resolve, and to an uncertain end. The fact that the benefits provided by the settlement are largely duplicative of those provided by the preexisting CARB agreement does not necessarily suggest that the settlement is inadequate. Rather, it is apparent from the record that class counsel made extra efforts to ensure that the settlement is acceptable from the perspective of absent class members, notwithstanding the fact that case was settled relatively early in litigation. Accordingly, the posture of the case favors approval of the proposed settlement.

2. Class members' objections

The objections received from class members also tend to support the conclusion that the proposed class settlement merits approval. As noted, it is unclear how many claims have actually been filed pursuant to the class settlement, however, Toyota has paid reimbursement on 962 claims since the class notice was sent. At the same time, some 364 individuals opted out of the settlement, and 67 filed objections.[9] Emphasizing the total number of class notices sent, plaintiffs characterize this as an excellent result, and in urging the Court to overrule the received objections, they caution that it is not appropriate to second-guess whether a settlement marginally more favorable to absent class members might have been obtained. As the Ninth Circuit has instructed: "Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

The most frequent objection (from 45 class members) is that the 10 year/150,000 mile warranty extension provides insufficient relief. This argument is unpersuasive. Of course, settlement involves some line-drawing, and "full compensation is not a prerequisite for a fair settlement." *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 579 (D. N.J. 2010). Moreover, Toyota would likely resist any further extension of the warranty on the grounds that additional miles

[9] No objectors appeared at the fairness hearing conducted on December 1, 2011.

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and years of usage diminish the probability that subsequent ECM failure is due to a manufacturing defect, rather than ordinary wear and tear. Accordingly, these objections should be overruled.

At least 16 class members have objected to the narrow form of relief available under the settlement. As noted, the remedy provided by the settlement is effectively limited to the provision of an appeals process, and reimbursement for repairs paid for out-of-pocket by prior owners and lessees. Admittedly, the settlement provides no benefit to those who lost or sold their vehicle – even if they can document the ECM failure and the sale or trade-in price. The settlement also does not provide compensatory damages for those class members who suffered incidental losses, in the form of a replacement vehicle or the loss of employment. Objectors who raised these concerns could have simply opted out of the settlement. Without doubting the strength of their particular claims, diminution in value cases face significant obstacles regarding proof. Here, it was reasonable for the parties to focus on enhanced warranty benefits and the provision of monetary compensation for class members who could document out-of-pocket repair costs. *See, e.g., Vaughn v. Am. Honda Motor Co.*, 627 F. Supp. 2d 738, 749 (E.D. Tex. 2007) ("[i]t does not make the settlement unfair or unreasonable that the class has to release speculative claims for diminution in value"). Therefore, these objections are also overruled.

The few, remaining objections reflected in the record lack merit, do not counsel in favor of rejecting the proposed settlement, and like the foregoing objections, are hereby overruled.[10] Because the proposed class settlement is the result of arm's length negotiations, and deemed to be fair, reasonable, and adequate from the perspective of the class, it must be granted final approval. Plaintiffs' motion is therefore granted.

C. Attorneys' fees, expenses, and incentive payments

Plaintiffs have also made the requisite showing that an award of attorneys' fees, costs, and incentive payments is warranted in this case.[11] Reasonable fees and costs are available to class counsel under the California Legal Remedies Act (CLRA). Cal. Civ. Code § 1780(e). *Kim v.*

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[10] Likewise, several other objections – such as one class members' plea for punitive damages – are unwarranted. Other concerns about the settlement as applied to particular cases may be properly resolved through the reimbursement and appeals process.

[11] Under the settlement agreement, Toyota does not oppose plaintiffs' motion for attorneys' fees, expenses, and incentive payments. Nor have any objectors opposed the request.

Euromotors West/The Auto Gallery, 149 Cal. App. 4th 170, 178-79 (2007) (fees mandatory under CLRA for prevailing plaintiff). Where a defendant pays the fees separately pursuant to a fee-shifting statute like the CLRA, the "lodestar" method is preferred. *See In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556–57 (2009). The lodestar is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Id*. In determining a reasonable rate, the court is to consider the "'experience, skill and reputation of the attorney requesting fees.'" *Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir. 1996). The court also considers "the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The court may then enhance the lodestar by applying a multiplier to take into account the contingent nature and risk associated with the action, as well as other factors such as the degree of skill required and the result achieved for the class. *Serrano v. Priest*, 20 Cal.3d 25, 49 (1977). Courts also allow recovery of pre-settlement litigation costs in the context of class action settlements. *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).

Here, class counsel's accounting, documented in extensive declarations accompanying its motion, evidences the significant financial burden entailed by prosecuting a case such as this. While recognizing that the benefits flowing from the proposed settlement here are somewhat limited due to the intervening effect of the CARB MOU, it is clear from the record that the hours expended by plaintiffs' counsel and the requested fees are reasonable, given the tasks that were accomplished, and taking into consideration the "experience, skill and reputation of the attorney[s] requesting the fees." *Trevino*, 99 F.3d at 924. Specifically, plaintiffs seek approval of an $830,000 payment from Toyota for attorneys' fees, including $23,380 for out-of-pocket litigation expenses and $806,620 in attorneys' fees. In total, the five firms representing plaintiffs have spent over 1,600 hours on the litigation, representing a lodestar amount of $824,951 (not including fees). The fee request therefore falls slightly below the lodestar amount (the fractional multiplier is 0.98).

The requested amount was negotiated in mediation, after the settlement agreement was consummated on behalf of the class, and payment of fees will not reduce the class' recovery. The amount requested represents compensation to class counsel for pre-litigation investigation into the relevant manufacturing defect; initial and post-settlement confirmatory discovery of documents

from Toyota and CARB; several depositions and interviews of over 100 potential class members; drafting of the complaint, and briefing of defendants' motion to dismiss; and preparation for, and participation in, mediation. Since the Court preliminarily approved the settlement, counsel has coordinated with Toyota and the claims administrator to complete various administrative tasks necessary to effectuate notice. Class counsel also expects to spend several hundred additional hours assisting class members to file claims and negotiate reimbursements, subsequent to final approval. Because the hours expended and the hourly rates are reasonable, the requested award of attorneys' fees and costs is hereby granted.

Plaintiffs' request for reimbursement of expenses totaling $23,380 is also reasonable. Throughout the course of this litigation, class counsel incurred out-of-pocket costs including: (1) filing fees; (2) copying, mailing, faxing and serving documents; (3) conducting depositions and obtaining deposition transcripts; (4) conducting computer research; (5) travel to depositions, hearings, and mediation sessions; (6) expert fees; and (7) mediation expenses. Based on a review of plaintiffs' counsel's expense reports, it is evident that the requested costs are relevant to the litigation and reasonable in amount. Accordingly, the request for an award of costs is also granted.

Finally, plaintiffs request incentive awards of $5,000 to Damashata Washington and $5,000 to Carin and George Edwin Milligan. Trial courts have discretion to award such incentives payments to class representatives. *In re Mego Fin'l Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). Here, the record indicates that Ms. Washington and Mr. and Mrs. Milligan each spent time reviewing documents and consulting with counsel about the claims in this case and were prepared to maintain their involvement throughout the course of the litigation. In light of these facts, each class representative's contribution to the litigation and settlement process was sufficient to warrant an incentive payment award, and it is hereby granted.

V. CONCLUSION

For the reasons set forth above, plaintiffs' motions for class certification, final approval of the settlement, and for attorneys' fees, expenses, and incentive payments for the named plaintiffs, are hereby granted.

IT IS SO ORDERED.

Dated: 1/6/12

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California