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CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
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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: 8:10 ML2151 JVS (FMOx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
OBJECTIONS OF ALLEN ROGER  
SNYDER AND LINTON STONE  
WEEKS TO CY PRES  
PROVISIONS OF CLASS ACTION  
SETTLEMENT**

THIS DOCUMENT RELATES TO:

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

ALL ECONOMIC LOSS CASES

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1 **I. INTRODUCTION**

2 The Ninth Circuit has instructed the District Courts to scrutinize the *cy pres*  
3 provisions of class action settlements with particular care. In order to avoid the  
4 “many nascent dangers to the fairness of the distribution process,” the Court of  
5 Appeals requires that there be “a driving nexus between the plaintiff class and the  
6 *cy pres* beneficiaries.” *Dennis v. Kellogg Co.* 697 F.3d 858, 865 (9<sup>th</sup> Cir. 2012),  
7 quoting *Nachsin v. AOL, LLC* 663 F.3d 1034 at 1038 (9<sup>th</sup> Cir. 2011). More  
8 specifically, any *cy pres* remedy must be “guided by (1) the objectives of the  
9 underlying statute(s) and (2) the interests of the silent class members” and must not  
10 benefit a group “too remote from the plaintiff class.” *Id.* at 865, quoting *Six*  
11 *Mexican Workers v. Ariz. Citrus Growers* 904 F.2d 1301, 1308-09 (9<sup>th</sup> Cir. 1990).

12 As demonstrated below, the *cy pres* provisions of the proposed class action  
13 settlement in this matter do not satisfy these exacting standards and cannot  
14 withstand judicial scrutiny. Two of the leading experts on automobile safety issues  
15 in this country, Clarence Ditlow of the Center for Auto Safety and A. Benjamin  
16 Kelley a former high-ranking official with the U.S. Department of Transportation  
17 and the Insurance Institute for Highway Safety, have examined the settlement’s  
18 proposed Automobile Safety Research and Education Fund in detail. They have  
19 concluded that the proposed expenditure of at least \$15 million for driver education  
20 and information projects as a *cy pres* remedy would not further the objectives of the  
21 underlying claims or benefit absent class members.

22 Under the circumstances, Class Members Allen Roger Snyder and Linton  
23 Stone Weeks object to the *cy pres* provisions of the proposed class action  
24 settlement. The Court should not approve the settlement unless these provisions are  
25 modified to conform to the Ninth Circuit’s standards. The parties could easily  
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1 fashion an appropriate *cy pres* remedy furthering the interests of the underlying  
2 statutes and class members. They should be required to do so.

3 **II. ARGUMENT**

4 **A. The Claims In This Case Are Predicated Upon An Automobile**  
5 **Defect And Have Nothing To Do With Driver Behavior or**  
6 **Education Issues**

7 The Long Form Notice provided to class members in connection with the  
8 proposed settlement aptly summarizes the nature of this action. “The class action  
9 lawsuit claims that certain Toyota, Scion and Lexus vehicles equipped with  
10 electronic throttle control systems (ETCS) are defective and can experience  
11 acceleration that is unintended by the driver. As a result, the lawsuit pursues claims  
12 for breach of warranties, unjust enrichment, and violations of various state  
13 consumer protection statutes, among the other claims.” Long Form Notice ¶ 2.

14 In their complaint, plaintiffs allege that Toyota promised its ETCS “would  
15 operate safely and reliably. This promise turned out to be false in several material  
16 respects. In reality, Toyota concealed and did not fix a serious quality and safety  
17 problem plaguing all ETCS cars – the vehicles had a propensity to run away or  
18 accelerate contrary to the driver’s intent that was greater in vehicles without  
19 ETCS.” Amended Master Complaint, ¶ 2. They further allege that “[d]espite  
20 notice of the SUA defect in ETCS vehicles, Toyota did not disclose to consumers  
21 that its vehicles – which Toyota for years had advertised as ‘safe’ and ‘reliable’ –  
22 were in fact not as safe or reliable as a reasonable consumer expected due to the  
23 heightened risk of unintended acceleration.” *Id.*, ¶ 9. According to plaintiffs,  
24 Toyota sought to avoid liability for sudden unintended acceleration (“SUA” or  
25 “UA”) by misrepresenting its cause as driver error. “Toyota has sent tens of  
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1 thousands of letters to UA victims falsely claiming that their UA event was caused  
2 by driver error.” *Id.*, ¶ 363.

3 As the specific allegations of the complaint demonstrate, this lawsuit is not  
4 about defective drivers or driver error caused UA. Indeed, driver error is Toyota’s  
5 defense to responsibility for the defects in its vehicles. All of plaintiffs’ claims are  
6 predicated upon the premise that vehicles equipped with ETCS are defective, that  
7 the defect causes UA and that Toyota has refused to accept responsibility for and  
8 concealed the defect.

9 Plaintiffs vigorously dispute Toyota’s assertion that driver error causes UA  
10 and contend that Toyota has concealed the truth from consumers. For example,  
11 they allege that even after the Toyota UA recalls in 2009 and 2010, “SUA events  
12 kept occurring, even in vehicles that did not have floor mats and vehicles that were  
13 not subject to the sticky pedal recall. In 2010 there were 14,000 UA customer  
14 complaints investigated by Toyota, most of these vehicles had supposedly been  
15 ‘fixed’ by the sticky pedal and floor mat recalls. For 99% of these UA complaints  
16 Toyota concluded ‘NTF,’ i.e., no trouble found and has wrongfully blamed the  
17 incidents on driver error, and thus has not fixed the cause of the UA in these  
18 vehicles.” *Id.*, ¶ 10. Furthermore, plaintiffs allege that “Toyota has not disclosed  
19 that for the period after the recalls through January 2011 over 300 complaints of  
20 SUA have been filed with NHTSA.” *Id.*, at ¶ 362.

21 The Amended Master Complaint is replete with allegations that Toyota  
22 concealed information on UA from the National Highway Traffic Safety  
23 Administration (“NHTSA”) prior to the recalls. See e.g., *Id.* ¶¶ 188-97. In fact,  
24 NHTSA fined Toyota \$16.375 million over the sticky pedal recall on April 19, 2010  
25 (<http://www.nhtsa.gov/PR/DOT-71-10>) and an additional \$16.375 million over the  
26 trapped floor mat recall on December 20, 2010 ([27  
28  
3](http://www.nhtsa.gov/PR/DOT-</a></p></div><div data-bbox=)

1 216-10). In both cases, Toyota violated the National Traffic and Motor Vehicle  
2 Safety Act by knowing about the defects and failing to do timely recalls.

3 Declaration of Clarence Ditlow In Support of Objections of Allen Roger Snyder  
4 and Linton Stone Weeks to Cy Pres Provisions of Class Action Settlement ¶ 3.

5 Moreover, the complaint sets forth numerous examples of vehicle related  
6 failure modes that cause UA in Toyota vehicles. *Id.*, ¶¶ 364-378. Plaintiffs do not  
7 allege that driver error caused UA in Toyota vehicles or that a lack of driver  
8 education contributed to UA. Indeed, the Complaint highlights the tragic Saylor  
9 UA crash that killed four people in a 2009 Lexus ES 350. The driver, Mark Saylor,  
10 was a 19-year veteran of the California Highway Patrol who was a highly trained  
11 and experienced driver. *Id.*, ¶¶ 268-275.

12 **B. The *Cy Pres* Provisions of the Proposed Settlement Provide for the**  
13 **Expenditure of At Least \$15 Million On Driver Education and**  
14 **Information Programs**

15 Section II (A)(6) of the Settlement Agreement creates a \$30 million *cy pres*  
16 fund for an Automobile Safety Research and Education Program (hereinafter  
17 “Research and Education Program”). Settlement Agreement Exhibit 16; Plaintiffs’  
18 Memorandum in Support of Plaintiffs’ Motion for Final Approval Of Class Action  
19 Settlement (hereinafter “Plaintiffs’ Memorandum”), at 20-24. The Research and  
20 Education Program has three parts: (1) an \$800,000 consumer study on defensive  
21 driving techniques and proper use of vehicle safety systems, (2) a \$14.2 million  
22 driver education media campaign, and (3) a \$15 million research program into  
23 active safety features, vehicle control, and driver attention. Plaintiffs’  
24 Memorandum at 20-24. The initial \$30 million funding for the Research and  
25 Education Program may be augmented through additional contributions from the  
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1 undistributed portions of the Alleged Diminished Value Fund and the Cash-In-Lieu  
2 of BOS Fund to be established by the settlement. *Id.* at 18, 20.

3 Although all three parts of the Research and Education Program are  
4 questionable, the first two would provide for the expenditure of at least \$15 million  
5 on driver education and information projects that appear to have been selected by  
6 Toyota and that cannot be justified under the Ninth Circuit’s *cy pres* jurisprudence.  
7 These components relate to Toyota’s defenses, not plaintiffs’ claims, would be an  
8 inappropriate use of *cy pres* funds, and should be rejected by the Court.

9  
10 **C. The *Cy Pres* Provisions Fail To Comply With Ninth  
Circuit Standards And Should Not Be Approved**

11 The Ninth Circuit has issued repeated and specific directives that *cy pres*  
12 remedies must bear a close nexus to the class’s claims and be reasonably certain to  
13 benefit the class. *Dennis*, 697 F.3d at 865-866; *Nachshin*, 663 F.3d at 1038-39. A  
14 *cy pres* remedy is acceptable only if distribution of funds to class members is too  
15 burdensome or costly to be reasonably practicable. *See Dennis*, 697 F.3d at 865;  
16 *Nachshin*, 663 F.3d at 1038. Even then, “[t]o ensure that the settlement retains some  
17 connection to the plaintiff class and the underlying claims, ... a *cy pres* award must  
18 qualify as ‘the next best distribution’ to giving the funds directly to class members.”  
19 *Dennis*, 697 F.3d at 865; accord *Nachshin*, 663 F.3d at 1038.

20 In the class action settlement approval process, District Courts must  
21 scrutinize *cy pres* provisions for compliance with the “next best” choice  
22 requirement. “When selection of *cy pres* beneficiaries is not tethered to the nature  
23 of the lawsuit and the interests of the silent class members, the selection process  
24 may answer to the whims and self interests of the parties, their counsel, or the  
25 court.” 697 F.3d at 866. The policies of the laws underlying the plaintiffs’ claims,  
26 and “the interests of the silent class members,” (*Dennis*, 697 F.3d at 865) remain  
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1 paramount considerations—not the *defendant’s* interests. After all, if settlement  
2 funds were put to their *best* use and distributed to the class members, the defendant  
3 could not veto expenditures by the class members that were not in its interests. The  
4 defendant has no more legitimate interest in determining the “next best” use than in  
5 dictating how class members could use funds they received directly. Therefore, any  
6 “*cy pres* award must be ‘guided by (1) the objectives of the underlying statute(s)  
7 and (2) the interests of the silent class members,’ ... and must not benefit a group  
8 ‘too remote from the plaintiff class.’” *Dennis*, 697 F.3d at 865, quoting *Nachshin*,  
9 663 F.3d at 1038, and *Six Mexican Workers*, 904 F.2d at 1308.

10 The *cy pres* provisions of the proposed settlement in this case conflict  
11 directly with the controlling precedents establishing and applying these principles.  
12 Consequently, they cannot be approved.

13 First, the *cy pres* provisions do not further the objectives of the underlying  
14 statutes. Plaintiffs’ claims are predicated upon warranty and consumer protection  
15 statutes. The relevant purposes of these statutes are to protect consumers from  
16 defective products, require manufacturers to remedy product defects, prohibit the  
17 concealment of defects and compel manufacturers to honor their promises to  
18 consumers. These purposes would not be furthered by Parts 1 and 2 of the  
19 Research and Education Program. Ditlow Decl. ¶¶ 17-21; Declaration of A.  
20 Benjamin Kelley In Support Of Objections of Allen Roger Snyder and Linton Stone  
21 Weeks To Cy Pres Provisions of Class Action Settlement ¶¶ 5-7.

22 The driver education and information projects envisioned have nothing to do  
23 with the claims in this case. They relate to driver behavior – Toyota’s defense—  
24 and not the underlying statutory claims. *Dennis* indicates that the objective that  
25 supposedly will guide this *cy pres* remedy—educating users about driver safety—is  
26 not linked to the claims in this case, which relate not to drivers’ lack of education or  
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1 training, but to automobile defects that even educated users cannot anticipate and  
2 prevent. *Dennis* holds that it is not enough to identify a link between class claims  
3 and a *cy pres* distribution at a high level of generality, such as whether both concern  
4 “food” (as in *Dennis*) or “automobiles” (as in this case). An appropriate *cy pres*  
5 remedy should be “dedicated to protecting consumers from, or redressing injuries  
6 caused by” the wrongful conduct at issue. *Dennis*, 697 F.3d at 866-867. Research  
7 on automobile defects would meet that criterion. *See Nachshin*, 663 F.3d at 1041  
8 (noting that organizations focused on “fraud, predation, and other forms of online  
9 malfeasance” would have been acceptable *cy pres* recipients). Providing funding  
10 for projects focused on “educating” or “informing” drivers would not. Although  
11 projects addressing automobile defects, of course, might not serve Toyota’s  
12 commercial and public-relations interests, they would be appropriate *cy pres*  
13 remedies in this case.

14         Second, the proposed *cy pres* remedy provided by Parts 1 and 2 would not  
15 further the interests of or benefit absent class members. The class consists of  
16 current and former owners and lessees of Toyota vehicles with defective electronic  
17 throttle control systems prone to UA. These class members have an interest in  
18 investigating and addressing defects in automobiles, particularly defects in  
19 electronic control systems. However, nothing suggests that their interests would be  
20 advanced by driver education and information. Moreover, as detailed in the Ditlow  
21 and Kelley Declarations they would not benefit from the proposed projects. Ditlow  
22 Decl. ¶¶ 8-19; Kelley Decl. ¶ 8-9.

23         The absent class members would benefit from research into defects in  
24 electronic control systems as unintended acceleration continues to plague Toyota  
25 vehicles even after the safety recalls intended to prevent unintended acceleration.  
26 Amended Master Complaint ¶¶ 10, 361, 362. To the extent the safety research in  
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1 Part 3 of the proposed *cy pres* remedy provides any benefit to absent class  
2 members, it would be far in the future and does nothing to eliminate electronic  
3 defects that can cause unintended acceleration. In contrast, the Ditlow Declaration  
4 outlines a Safety Research Program on electronic control systems that would both  
5 improve electronic control systems in motor vehicles and help eliminate electronic  
6 defects that cause unintended acceleration. Ditlow Decl. ¶¶ 20-21, Attachment A.

7 Finally, the proposed *cy pres* remedy would further the interests of Toyota by  
8 shifting the blame for unintended acceleration from the vehicle to the driver. This  
9 completely ignores this lawsuit, which is based on Toyota covering up defects in  
10 the electronic throttle control system by blaming the driver. Of the \$30 million in  
11 the *cy pres* fund for the Research and Education Program, not one dollar goes  
12 toward research in to the core issue in this litigation, defects in the electronic  
13 throttle control systems of Toyota motor vehicles.

### 14 **III. STATEMENT OF INTENTION TO APPEAR**

15 Objecting Class Members Allen Roger Snyder and Linton Stone Weeks  
16 intend to appear, through counsel, at the final approval hearing in this matter.

### 17 **IV. CONCLUSION**

18 The *cy pres* provisions of the proposed settlement fail to satisfy the standards  
19 established by the Ninth Circuit. These provisions appear to advance the interests  
20 of Toyota. They certainly do not further the objectives of the underlying statutes or  
21 benefit absent class members. Under the circumstances, the Court should decline to  
22 approve the settlement in its current form.

23  
24 Dated: May 10, 2013

CHAVEZ & GERTLER LLP

25  
26 By:



27 Mark A. Chavez