IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

IN RE: TAKATA AIRBAG PRODUCTS LIABILITY LITIGATION **This Document Relates to:** **ECONOMIC DAMAGES TRACK CASES**	**MDL No. 2599** **Master File No. 15-2599-MD-MORENO** **S.D. Fla. Case No. 14-24009-cv-MORENO (Economic Loss Track)**

TOYOTA MOTOR CORPORATION,
TOYOTA MOTOR SALES U.S.A., INC., AND
TOYOTA MOTOR ENGINEERING & MANUFACTURING
NORTH AMERICA, INC.'S MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR ENTRY OF AN ORDER GRANTING FINAL
APPROVAL OF CLASS ACTION SETTLEMENT
AND ISSUANCE OF RELATED ORDERS

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INTRODUCTION

Defendants Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., and Toyota Motor Engineering & Manufacturing North America, Inc., (collectively referred to herein as the "Toyota Defendants" or "Toyota") respectfully request that this Court finally approve the class action settlement and find that it is "fair, reasonable, and adequate" as is required by Fed. R. Civ. P. 23(e).[1] This is an extraordinary settlement that delivers multifaceted relief to the Class, who are also Toyota's customers, including, but not limited to, an Outreach Program that is already being implemented by the Settlement Special Administrator, a claims program with a residual distribution, and a Customer Support Program. Toyota has agreed to pay the substantial sum of $278,500,000, minus the 10% Rental Car/Loaner Program credit, in return for a broad release of claims.

In this Court's well-reasoned, 19-page Order Preliminarily Approving the Class Settlement dated June 12, 2017 ("Preliminary Approval Order"), the Court evaluated the terms of the Settlement Agreement and preliminarily certified the class, as defined in the Settlement Agreement[2] for purposes of Settlement. *See* Docket No. 1799. This Settlement should be finally approved because the Settlement and more than satisfies the six factors set forth in *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984), after the successful dissemination of notice to the Class, and is not the product of collusion.

After conducting extensive discovery and engaging in substantial and extensive settlement negotiations, Toyota and Settlement Class Counsel,[3] acting on behalf of Plaintiffs and

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[1] The Toyota Settlement is one of four settlements currently preliminary approved by the Court as parts of Plaintiffs' Omnibus Motion for Preliminary approval. The other three Settling Automotive Defendants as part of that motion are the BMW, Mazda, and Subaru Defendants. *See* Orders Granting Preliminary Approval for BMW, Mazda, and Subaru, Docket Nos. 1798, 1800, and 1801.

[2] The essential terms of the settlement are summarized in this brief in support of Plaintiffs' Motion for Entry of an Order Granting Final Approval of Class Action Settlement and Issuance of Related Orders. The Settlement Agreement along with all exhibits and addenda sets forth in greater detail the rights and obligations of the parties. If there is any conflict between this Memorandum and the Settlement Agreement, the Settlement Agreement governs.

[3] All capitalized terms used in this Memorandum shall have the meanings assigned in the Settlement Agreement, unless otherwise defined herein.

the Class Members, executed a proposed Settlement Agreement to resolve the consumer economic loss class actions consolidated in this multi-district litigation proceeding. The economic loss class actions assert that certain automotive companies, including Toyota, manufactured, distributed or sold certain vehicles containing allegedly defective airbag inflators manufactured by Defendants Takata Corporation and TK Holdings, Inc. The inflators allegedly could, upon deployment, rupture and expel metal debris into the occupant compartment and/or otherwise affect the airbag's deployment, and that the Plaintiffs and Class Members sustained economic losses as a result of their purchase or lease of these vehicles. The lawsuits pursue claims, *inter alia*, for fraud, breach of warranty, and violations of various state consumer protection statutes.

Plaintiffs filed an unopposed motion for preliminary approval on May 18, 2017. *See* Docket No. 1724. On June 12, 2017, the Court granted preliminary approval of the settlement, appointed Epiq Systems, Inc. ("Epiq") as the Settlement Notice Administrator, appointed Patrick A. Juneau of Juneau David APLC as the Settlement Special Administrator, directed Epiq to commence the notice process, scheduled a final approval hearing for October 25, 2017 and issued related orders. *See* Docket No. 1799, Preliminary Approval Order.

The comprehensive notice plan implemented soon thereafter, and consistent with the Preliminary Approval Order, reached more than 95% of the class. *See* Docket No. 2030-1, Declaration of Cameron R. Azari, Esq. ("Azari Decl.") ¶ 9.

BACKGROUND

A. PLAINTIFFS' ALLEGATIONS AND CLAIMS

This MDL consolidates numerous class action suits brought by consumers alleging, among other things, that certain automotive companies, including Toyota, manufactured, distributed, or sold certain vehicles containing allegedly defective airbag inflators manufactured by Defendants Takata Corporation and TK Holdings, Inc. The suits further allege that upon deployment, the Takata inflators at issue, which use phase-stabilized ammonium nitrate ("PSAN") as the main propellant, can rupture and expel metal debris into the occupant compartment and/or otherwise affect the airbag's deployment, and that the plaintiffs sustained economic losses as a result of the purchase or lease of these vehicles. The MDL also includes personal injury cases and economic loss cases brought by recyclers of automotive parts, neither of which are involved in the settlement for which final approval is now being sought. This Court

established two tracks for the litigation: an economic loss track and a personal injury track. The Second Amended Consolidated Class Action Complaint in the Economic Loss Track ("SACCAC") was filed on June 15, 2015 (Docket No. 579).

B. MOTION PRACTICE, DISCOVERY AND SETTLEMENT NEGOTIATIONS

Motion practice and discovery have proceeded simultaneously for more than two years since the SACCAC was filed. On July 17, 2015, Toyota filed a motion to dismiss the SACCAC (Docket No. 614). On the same day, Toyota and three other Automotive Defendants filed a joint motion to stay this Action based on the primary jurisdiction of the National Highway Traffic Safety Administration (Docket No. 610), and joined the other Automotive Defendants in a Motion to Dismiss Automotive Recyclers Association's Claims (Docket No. 609). The Court denied the primary jurisdiction motion on September 22, 2015. *See* Docket No. 737. The Court granted in part the Motion to Dismiss the Automotive Recyclers Association Claims on March 11, 2016 (Docket No. 981). Oral argument on all other pending motions to dismiss was held on October 23, 2015.

On September 21, 2016, this Court entered an Order granting in part and denying in part Toyota's motion to dismiss Plaintiffs' SACCAC. *See* Docket No. 1202.

Notwithstanding the pendency of motions to dismiss, the parties began discovery almost immediately and have engaged in extensive discovery for more than two years. The parties exchanged initial disclosures. Toyota served interrogatories and document requests on each of the named Plaintiffs who alleged that they owned Toyota or Lexus vehicles.[4] Plaintiffs served interrogatories and nearly 150 document requests on each Automotive Defendant, including each of the three Toyota entities named as defendants, who responded separately. To date, Toyota has produced nearly one million pages of documents. Docket No. 1986 at 13. A number of discovery motions and related disputes have been litigated before the Special Discovery Master. Moreover, Toyota has deposed ten named plaintiffs and fact witnesses and produced six Toyota employees for Rule 30(b)(6) and individual depositions. *Id.* Plaintiffs and the settling Defendants also collectively deposed 12 witnesses from Defendant Takata. The parties also have

[4] This included one owner of a Pontiac Vibe who was asserting claims against Toyota. The Vibe was manufactured by NUMMI, a now-defunct joint venture between Toyota and General Motors Corporation.

retained and engaged in substantial consultation with experts on liability and damages issues in an effort to prepare for class certification, summary judgment, and trial proceedings.

Settlement Class Counsel and Toyota's Counsel began settlement negotiations in early 2016. Among other things, the Parties discussed their respective views of the law and facts and potential relief for the proposed Class, and exchanged several settlement proposals and counter-proposals among themselves. After months of negotiations, the settlement discussions eventually expanded to include additional automobile manufacturer Defendants, including BMW, Mazda, and Subaru. Ultimately, however, these negotiations ended in an impasse in late 2016.

In early 2017, Settlement Class Counsel and Toyota's Counsel resumed settlement negotiations. On March 21, 2017, Plaintiffs and Toyota reached a preliminary settlement agreement and signed a Memorandum of Understanding memorializing the Settlement's essential terms. Over the next six weeks, Plaintiffs engaged in settlement discussions with the other automobile manufacturer defendants, ultimately reaching agreements with BMW, Mazda, and Subaru. The parties then engaged in intensive negotiations of the specific terms of each settlement, and Plaintiffs, Toyota, BMW, Mazda, and Subaru ultimately signed Settlement Agreements on May 17, 2017.[5]

Toyota denies any and all wrongdoing alleged in the consolidated Actions, but nevertheless considers it desirable to enter into this Settlement in order to avoid the burden, expense, risk and uncertainty of continuing to litigate the Claims.

C. SETTLEMENT TERMS

The Settlement Agreement includes certain Toyota, Lexus, Scion, and Pontiac Vibe[6] vehicles (collectively, the "Subject Vehicles") distributed for sale or lease in the United States, Puerto Rico and United States territories or possessions. *See* Docket No. 1724-4, Settlement Agreement, Ex. 9.

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[5] Subsequent to the execution of the Settlement Agreements with Toyota, BMW, Mazda, and Subaru, all of which were preliminarily approved on June 12, 2017, Honda and Nissan have also executed their own Settlement Agreements with Plaintiffs. *See* Docket Nos. 1971, 2013. The Nissan preliminary approval hearing occurred on September 6, 2017. *See* Docket No. 2013.

[6] The Vibe recalls are being administered and performed by General Motors.

Under the proposed Settlement Agreement, Toyota has agreed to provide the following relief: (1) an Outreach Program of 33% of the Settlement Fund (or approximately $92 million), which encourages owners and lessees of Subject Vehicles to participate in the Takata Airbag Inflator Recalls; (2) a Rental Car/Loaner Program for owners and lessees of certain Subject Vehicles; (3) an Out-Of-Pocket claims process to reimburse Class Members for certain reasonable out-of-pocket expenses related to the Takata Airbag Inflator Recalls; (4) a residual distribution to the Class; and (5) a Customer Support Program that provides prospective coverage for repairs and adjustments needed to correct defects, if any, in materials and workmanship of (i) the Takata PSAN inflators contained in the driver or passenger front airbag modules of Subject Vehicles or (ii) replacement driver or passenger inflators installed pursuant to the Takata Airbag Recall in the Subject Vehicles. *See id.* at § III. Details on each of these types of relief and the claims process are included in the Settlement Agreement. *See generally* Docket No. 1724-4, Settlement Agreement.

D. THE COURT PRELIMINARILY APPROVED THE SETTLEMENT AND NOTICE WAS DISSEMINATED TO THE CLASS

In the Court's Preliminary Approval Order, the Court found that "the Settlement was reached in the absence of collusion, and is the product of informed, good-faith, arm's-length negotiations between the Parties and their capable and experienced counsel." *See* Docket No. 1799, Preliminary Approval Order, at 8. The Court further found that the Settlement is "within the range of reasonableness and possible judicial approval." *Id.*

The Court concluded that the proposed manner of the notice set forth in the Settlement Agreement constitutes the best notice practicable under the circumstances and complies with due process. *Id.* at p. 9. The Court further approved the form, substance, and requirements of the: Direct Mail Notice (Docket No. 1724-4, Settlement Agreement Ex. 2); Long Form Notice (Docket No. 1724-4, Settlement Agreement Ex. 6); Publication Notice (Docket No. 1724-4, Settlement Agreement Ex. 8); and the Registration/Claim Form (Docket No. 1724-4, Settlement Agreement Ex. 12). Docket No. 1799, Preliminary Approval Order, at 2, 9. The Court subsequently ordered that "[t]he Settlement Special Administrator and Settlement Notice Administrator shall implement the Notice Program, as set forth in the Settlement." *Id.* at 9. The Court also issued related orders.

In light of the Court's Preliminary Approval Order, the Settlement Notice Administrator began disseminating notice on July 26, 2017. The notice consisted of Direct Mail notice, a website, a toll-free phone number, internet banner ads, radio ads, and Publication Notice including: a press release, digital and social media, newspapers, magazines, and CAFA Notice to appropriate state and federal government officials. *See* Docket No. 2030-1, Azari Decl. ¶¶ 8, 11.

1. <u>The Notice Program Has Successfully Informed Class Members</u>

The notice program was exceptionally comprehensive and thorough. It provided interlocking methods that aimed to reach each Class Member directly using reasonably available address information, and also to provide multiple alternative forms of disseminated notice through which Class Members could learn of the settlement or obtain further information about their rights. The program followed well-recognized and established procedures for class action notice, exceeding the usual practices and requirements in its scope and reach. Thus, the procedure for providing notice and the content of the class notice constituted the best practicable notice to Class Members.

2. <u>CAFA Notice Has Been Disseminated.</u>

On May 26, 2017, the Notice Administrator sent, by first class certified U.S. Mail, the notice mailing package to fifty-seven (57) Attorneys General. *See* Docket No. 2030-1, Azari Decl. ¶ 11. Each of the packages contained a cover letter and CD-ROM containing the: (i) Settlement Agreement; (ii) Complaint; (iii) First Amended Complaint; (iv) SACCAC; (v) Order Regarding Future Amended Complaint; (vi) Order Granting in Part and Denying in Part Toyota's Motion to Dismiss; and (vii) Draft Escrow Agreement and Guaranty. *See id.*

<u>LEGAL STANDARD</u>

"Settlement 'has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources, and achieve the speedy resolution of justice.'" *Wilson v. EverBank*, No. 14-CIV-22264-BLOOM/VALLE, 2016 WL 457011, at *6 (S.D. Fla. Feb. 3, 2016) (quoting *Turner v. Gen. Elec. Co.*, No. 2:05-cv-186-FTM-99DNF, 2006 WL 2620275, at *2 (M.D. Fla. Sept. 13, 2006)) (alteration omitted). "For these reasons, 'there exists an overriding public interest in favor of settlement, particularly in class actions that have the well-

deserved reputation as being most complex.'" *Id.* (quoting *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005)).

Federal Rule of Civil Procedure 23 sets forth that "the claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). A court must conduct a three-step inquiry to determine whether to approve a class action settlement. *Cifuentes v. Regions Bank*, No. 11 CV 23455 FAM, 2014 WL 1153772, at *4 (S.D. Fla. Mar. 20, 2014) (Moreno, J.). First, the Court must determine whether adequate notice was provided to the class. *Id.* Second, the Court must find that the requirements of Rule 23 have been satisfied for certification of a settlement class. *Id.* Finally, the Court must determine whether the settlement "is fair, adequate, and reasonable." *Id.*

When assessing whether a settlement agreement is "fair, adequate, and reasonable," a court first must determine that the settlement was not the result of fraud or collusion. *Bennett*, 737 F.2d at 986; *see also Leverso v. S. Trust Bank of Ala., N.A.*, 18 F.3d 1527, 1530 n.6 (11th Cir. 1994). The court then evaluates the following factors: "(1) the likelihood of success at trial; (2) the range of possible recovery and the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (3) the complexity, expense and duration of litigation; (4) the substance and amount of opposition to the settlement; and (5) the stage of proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986; *see also Leverso*, 18 F.3d at 1530 n.6. "The settlement must stand or fall as a whole." *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1120 (11th Cir. 1995) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977)) (quotation marks omitted).[7] That is, the Court is "not free to delete, modify or substitute provisions of the settlement." *Id.* at 1119–20 (quoting *Cotton*, 559 F.2d at 1333) (quotation marks omitted).

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

ARGUMENT

A. This Court Has Jurisdiction to Consider and Rule on the Settlement

1. The Court Has Original Jurisdiction Over All Claims

This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because the SACCACalleges that, in the aggregate, Plaintiffs' claims and the claims of the other members of the Settlement Class exceed $5,000,000 exclusive of interest and costs, and at least one Plaintiff and one Defendant are citizens of different states. *See* Docket No. 579, SACCAC ¶ 40;[8] *see also Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006) ("Under CAFA, federal courts now have original jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states)." (citing 28 U.S.C. § 1332(d)(2))). In addition, the existence of original jurisdiction authorizes this Court to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining state law claims. *See* 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action ... that they form part of the same case or controversy under Article III.").

2. The Court Has Personal Jurisdiction Over All Class Members

This Court has personal jurisdiction over the Plaintiffs, who are parties to this class action and have agreed to serve as representatives for the Class. The Court also has personal jurisdiction over absent Class Members because due process-compliant notice has been provided to the Class. The court in *In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d 1330, 1341 (S.D. Fla. 2011), citing to *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 811–12 (1985), held that a court properly exercises personal jurisdiction over absent, out-of-state class members where the court and the parties have safeguarded absent class members' right to due process.

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[8] On July 14, 2017, Plaintiffs filed a Third Amended Consolidated Class Action Complaint that, among other things, sought to reassert certain dismissed claims and add new counts. Docket No. 1895. That Complaint does not assert any new causes of action on behalf of consumer plaintiffs against the Toyota Defendants. Accordingly, while the status of that complaint has been the subject of ongoing motions practice and other court activity, the operative complaint for purposes of the Toyota Settlement is the SACCAC.

Here and as described above, the extraordinary notice provided to Class Members, when combined with the opportunity to object and appear at the Fairness Hearing, fully satisfies due process in order to obtain personal jurisdiction over a Rule 23(b)(3) class. *See Phillips Petroleum Co.*, 472 U.S. at 811–12 (finding that for a Rule 23(b)(3) class, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class).

B. The Parties Have Complied with the Class Action Fairness Act

Notice under the Class Action Fairness Act or "CAFA," 28 U.S.C. § 1715, has been satisfied. In a class action settlement, CAFA requires that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]" 28 U.S.C. § 1715(b). A court is precluded from granting final approval of a class action settlement until CAFA notice requirements are met. 28 U.S.C. § 1715(d) ("An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under [28 U.S.C. § 1715(b)]").

Here, pursuant to the Settlement Agreement, on May 26, 2017, the Settlement Notice Administrator timely and properly caused the notice to be sent to the Attorney General of the United States, the Attorneys General of all fifty (50) states and the District of Columbia, and the Attorneys General for the five territories and parties of interest in this litigation informing them of this proposed Settlement. *See* Docket No. 2030-1, Azari Decl. ¶ 11. By the date of the Fairness Hearing, more than 90 days will have passed from "the dates on which the appropriate Federal office and the appropriate State official [were] served." *See* 28 U.S.C. § 1715(d). Toyota has, therefore, complied with CAFA's notice requirement. *See, e.g.*, *Demsheck v. Ginn Develop. Co.*, No. 3:09-CV-335-J-25TEM, 2014 WL 11370089, at *1 (M.D. Fla. Mar. 5, 2014) (finding defendants substantially complied with CAFA's notice requirement where CAFA notices were sent at least 90 days before issuance of an order granting final approval of the settlement and where the parties had not received any objections from state or federal officials); *Eufaula Drugs, Inc. v. TDI Managed Care Servs., Inc.*, No. 2:05-cv-293-MEF, 2009 WL

4067731, at *2 (N.D. Ala. Nov. 23, 2009) (finding "full compliance" with CAFA's notice requirement where "more than ninety (90) days [had] elapsed since the service of . . . notices on the appropriate State officials and the Attorney General of the United States" and "[n]either the Attorney General of the United States nor any appropriate State official ha[d] served a written objection to the Settlement").

C. <u>Rule 23(c) Notice Requirements Are Satisfied</u>

The extensive notice disseminated to the Class and the contents of that notice, as reviewed and approved by this Court, easily satisfy the requirements of Rules 23(c)(2)(B) and 23(e)(1), due process and any and all other requirements of the United States Constitution.

According to Rule 23(c)(2)(B), the Class Members in the instant Action were provided with the "best notice that is practicable under the circumstances, including individual notice" of particular information. *See also Martinez v. FMS, Inc.*, No. 3:07-cv-1157-J-34MCR, 2009 WL 10670235, at *5 (M.D. Fla. Apr. 24, 2009). Pursuant to Rule 23(c)(2)(B), the notice used here "clearly and concisely state[d] in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)" as well as providing other important information to Class Members. In addition, pursuant to Rule 23(e)(1), notice was disseminated in "a reasonable manner to all class members who would be bound by the proposal" and complied with the Court's Preliminary Approval Order. *See, e.g.*, Docket No. 1799, Preliminary Approval Order at 9–10.

Here, the methods of dissemination and contents of the notice more than satisfy Rule 23's requirements that the notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [class] action and afford them an opportunity to present their objections." *Braynon v. Nationstar Mortgage, LLC*, No. 14-CV-20726-GOODMAN, 2015 WL 6872519, at *5 (S.D. Fla. Nov. 9, 2015) (quoting *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)); *Almanazar v. Select Portfolio Servicing, Inc.*, No. 1:14-cv-22586-FAM, 2016 WL 1169198 (S.D. Fla. Mar. 25, 2016) (Moreno, J.) (holding that notice plan that included a combination of direct mail notice, publication notice, Internet advertisements, a toll-free telephone number, and a website with information about the

settlement was "reasonably calculated" to provide notice to Settlement Class Members and "constituted the best practicable notice under the circumstances"); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-CV-60649-GOODMAN, 2015 WL 5449813, at *4 (S.D. Fla. Sept. 14, 2015) (same).

Specifically, here, the various methods of notice described in Section (D) above informed Class Members of the terms of the Settlement, their rights and options, including the right to object or request exclusion, applicable dates and deadlines, and the binding effect of the Settlement, if finally approved.

1. <u>There Was Widespread Dissemination of the Notice</u>

As discussed above, the Settlement Notice Administrator fully implemented the notice program previously approved by this Court. Notice was accomplished through a combination of the Direct Mail Notice, Publication Notice, notice through the settlement website, Long Form Notice, social media notice, radio advertisements, and other appropriate notice, including CAFA Notice to appropriate state and federal government officials. The use of overlapping notice techniques afforded Class Members several different opportunities to learn of the Settlement and exercise their rights. The Settlement Notice Administrator estimated that the notice reached more than 95% of the Settlement Class Members at least 4 times. *See* Docket No. 2030-1, Azari Decl. ¶ 9.

a. Direct Mail Notice

Immediately after the issuance of the Preliminary Approval Order, the Settlement Notice Administrator requested the data of potential Class Members from R.L. Polk & Co. From July 14, 2017 to August 4, 2017, R.L. Polk & Co. provided a list of all the current and former owners of the Subject Vehicles. *See id.* ¶ 15. The Settlement Notice Administrator de-duplicated this data, updated the address information to find the most likely current address for each potential Class Member, and imported this data into the master database in preparation for the mailing. *See id.* ¶ 16.

The Direct Mail Notice informs potential Class Members of the proposed settlement, including their potential remedies and the informative website. As of August 25, 2017,

approximately 10,744,900 Direct Mail notices were mailed. *See id.* ¶ 16 . Of those, 392,742[9] notices were forwarded and/or re-mailed. *See id.* ¶ 32.

Courts have determined that notification via first-class mail is the best practicable means of notice. *See, e.g.*, *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 179 (5th Cir. 1979) (finding that "where class members were sufficiently identified to receive adequate notice by mail, . . . such notice was the best notice practicable in the circumstances and [complied] with Rule 23(c)(2) of the Federal Rules of Civil Procedure"); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (finding that sending a summary postcard notice by U.S. Mail was "the 'best practicable notice'" under the circumstances and "was sufficient to satisfy the requirements of due process"); *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 836 (W.D. Pa. 1995) (determining that notification via first-class mail is an "ideal" form of notice).

b. Publication Notice Has Occurred

In addition to the hundreds of thousands of Class Notices mailed, the Court-approved Publication Notice was published in nationally circulated magazines. The combined circulation of these magazines is approximately 38.3 million, and the combined readership is approximately 165.8 million. *See* Docket No. 2030-1, Azari Decl. ¶ 36. The Publication Notice (on sale date) of the mainstream magazines and U.S. Territory Newspapers were between July 28, 2017 and August 25, 2017. *Id.* ¶ 36-38. Notice was placed on the following:

(i) Mainstream magazines

- *Better Homes & Gardens*, which was available on newsstands on August 15, 2017.
- *Parade*, which was available on newsstands on July 30, 2017.
- *People*, which was available on newsstands on July 28, 2017.
- *People en Espanol*, which was available on newsstands on August 4, 2017.

[9] This number is the combined remailings for the four (4) Settling Automotive Defendants.

- *Sports Illustrated*, which was available on newsstands on August 2, 2017.
- *Car and Driver*, which was available on newsstands on August 8, 2017.
- *Motor Trend*, which was available on newsstands on August 25, 2017.

(ii) U.S. Territory Newspapers

- *Virgin Islands Daily News* (published on July 29, 2017)
- *Saipan Tribune* (published on July 28, 2017)
- *Samoa News* (published on July 31, 2017)
- *Pacific Daily News* (published on July 31, 2017)
- *El Nuevo Dia* (published on July 29, 2017)
- *Primera Hora* (published on July 29, 2017)

See Docket No. 2030-1, Azari Decl. ¶¶ 36–38.

The Settlement Notice Administrator also posted Internet banner ads on leading websites from July 26, 2017 through August 29, 2017. *See id.* ¶ 39–45 . As a result of these ads, approximately 306.6 million adult impressions were generated over this period. *Id.* ¶ 45. In addition to the traditional digital banner notice program outlined above, the Notice Program included a hyper-targeted banner campaign that began on July 26, 2017 and will continue to run through the month of September. *See id.* ¶ 46. Approximately 54.3 million behaviorally targeted adult impressions were generated by these Banner Notices during the approximately two-month period. *Id.* ¶ 50. Banner notices were provided on the following:

- *Conversant Ad Network*
- *Conversant Mobile Ad Network*
- *Facebook*
- *Pandora* (banner ads)
- *Pandora* (30-second audio spots)
- *Pulpo - Spanish Ad Network*
- *Yahoo Ad Network*

- *Instagram - Mobile*

See Docket No. 2030-1, Azari Decl. ¶¶ 39–51.

c. Website and Toll-Free Telephone Number Were Set Up

Pursuant to the terms of the Settlement Agreement, the Settlement Notice Administrator created a dedicated website and telephone number. The website is www.autoairbagsettlement.com.[10] The website contains several informational tabs and can be readily viewed on mobile devices. Persons who visit the website can review settlement documents, look at frequently asked questions, submit claims, or call the toll-free telephone number. There is also a Spanish language option on the website. As of September 4, 2017, the website had received 1,164,169 visits from 926,048 unique users, with 6,138,094 website pages presented. *See id.* ¶ 59.

As of September 4, 2017, there have been 132,248 calls to the toll-free number and live operators have handled 52,748 incoming calls. *See id.* ¶ 60.

d. Radio Ads Were Aired

In addition to the Direct Mail Notice, Website, and toll-free telephone number, radio ads were aired to potential Class Members in their homes and vehicles. Specifically, the Settlement Notice Administrator purchased 30-second radio spots nationwide on AM and FM stations covering a variety of music formats such as Country, Rock 'n' Roll, Oldies, Top 40, and/or R&B. Additionally, the Radio Notice also aired as 30-second spots on appropriate Spanish language stations in Spanish. As a result of these efforts, 119 total 30-second spots were aired between July 31, 2017 and August 13, 2017. *See id.* ¶ 34.

e. Above Notice Program Meets the Requirements of Due Process

Courts have approved notice plans in settlements that have employed similar (but less robust) notice methods to those used here. *See, e.g.*, *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 691 (S.D. Fla. 2011) (finding that notice to the class was "reasonable under Rule 23(e)" and "the best practicable under Rule 23(c)(2)(B)" where notice consisted of direct mailing

[10] To facilitate locating the case website, sponsored search listings were acquired on the three most highly-visited internet search engines: Google, Yahoo! and Bing. When search engine visitors search on common keyword combinations, such as "Airbag Class Action," "Takata Airbag Lawsuit," or "Toyota Airbag Litigation," the sponsored search listing display at the top of the page prior to the search results or in the upper right hand column. *See* Docket No. 2030-1, Azari Decl. ¶ 52.

to identifiable class members, publication in a national newspaper, a website with information about the settlement, and a toll-free telephone hotline for class members to call and ask questions); *In re Checking Account Overdraft Litigation*, 275 F.R.D. 654, 662-63 (S.D. Fla. 2011) (approving notice program consisting of direct-mail notice, publications in *People*, *Sports Illustrated*, and *TV Guide* magazines, Internet and social media advertising, a settlement website, and a toll-free settlement hotline); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (notice program consisting of postcard sent via first-class United States mail to last known address of class members, publication in a national newspaper, settlement website, and toll-free hotline "was sufficient to satisfy the requirements of due process").

2. The Notices and Claim Form Provided Class Members with the Required Information in a Comprehensive, Clear and Understandable Format

The notices and Claim Form provide all reasonably identifiable Class Members with a clear and succinct description of the Class and the terms of the preliminarily approved Settlement. *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104-05 (5th Cir. 1977) (explaining that notice is sufficient where it adequately describes the substantive claims and "contain[s] information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment"). The Court previously approved the form of the notice. *See* Preliminary Approval Order at 9. The contents of the notice packages are substantially similar to those notice packages previously approved in other consumer fraud cases. *See, e.g.*, *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1342 (S.D. Fla. 2011) (granting final approval of class action settlement where the notice package "defined the Settlement Class, described the release as well as the amount and method and manner of proposed distribution of the Settlement proceeds, . . . informed Settlement Class Members of their rights to opt-out or object, the procedures for doing so, and the time and place of the Final Approval Hearing, . . . that a class judgment would bind [Settlement Class Members] unless they opted out, and told them where they could obtain more information, such as access to a full copy of the Agreement").

The notices contain all of the information necessary to apprise Class Members of the terms of the settlement, dates and deadlines, their rights and options, and what the Court is being asked to do. The notices clearly inform Class Members, in plain, easily understood language that

complies with the Federal Judicial Center's illustrative notices. *See, e.g.*, *Chimeno-Buzzi v. Hollister Co.*, No. 14-23120-Civ-COOKE/TORRES, 2015 WL 9269266, at *4 (S.D. Fla. Dec. 18, 2015); Federal Judicial Center's illustrative notices at www.FJC.gov; Preliminary Approval Order at 9–10 (Docket No. 1799). As a result, Class Notice clearly informs Class Members of the relevant aspects of the litigation and Settlement and their rights under the Settlement, including: (i) the definition of who is a Class Member; (ii) the terms and benefits of the Settlement Agreement and how the Settlement would provide relief to the Class Members; (iii) the binding effect of any judgment on those persons who are Class Members; (iv) the right of Class Members to request exclusion (opt out) from the Class and the procedures and deadlines for doing so; (v) the right of Class Members to object to any aspect of the Settlement and/or to appear at the Fairness Hearing and the procedures and deadlines for doing so; (vi) the date, time, and location of the Fairness Hearing; (vii) how to obtain additional information; and (viii) fees and expenses requested by Settlement Class Counsel. *See Chimeno-Buzzi*, 2015 WL 9269266, at *4; *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1342.

The Court should affirm that the notice provided was the best practicable notice under the circumstances and satisfied due process, Rule 23, and all other requirements because Class Notice provided Class Members with the information required by Rule 23, and because notice was disseminated in such a way as to reach the overwhelming majority of the Class not just once, but multiple times. *See Saccoccio*, 297 F.R.D. at 691 (granting final approval of settlement where "the Settlement Administrator mailed 1.4 million notice packets . . . apprising [class members] of the settlement, identifying the class, notifying them of the nature of the actions and the class claims, providing that class members may enter appearance through counsel if they choose, notifying them of the binding effect of the settlement and steps that must be taken to ensure recovery, and alerting them to their rights to be excluded from the settlement and the deadline to do so"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1342 (finally approving class action settlement agreement after finding "that the Notice approved previously was fully and properly effectuated and was sufficient to satisfy the requirements of due process because if described 'the substantive claims . . . [and] contained information reasonably necessary to [allow Settlement Class Members to] make a decision to remain a class member and be bound by the final judgment.'" (quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d at 1104–05)).

D. <u>The Settlement Is Not A Product of Collusion</u>

To finally approve the Settlement, the court must find that "there was no fraud or collusion in arriving at the settlement." *Bennett*, 737 F.2d at 986. Such a finding is readily supported by the facts of this case.

"There is a presumption of good faith in the negotiation process." *Saccoccio*, 297 F.R.D. at 692. Here, the Settlement Agreement is a product of arms-length negotiations between the Parties after engaging in more than two years of discovery and lengthy settlement negotiations beginning in early 2016. In granting Preliminary Approval, the Court carefully scrutinized the settlement and concluded that "the Settlement was reached in the absence of collusion, and is the product of informed, good-faith, arm's-length negotiations between the Parties and their capable and experienced counsel." *See* Docket No. 1799, Preliminary Approval Order at 8 (citing *Manual for Complex Litigation*, Third, § 30.42 (West 1995)); *see also Saccoccio*, 297 F.R.D. at 692 ("Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion.").

As noted above, the parties have engaged in lengthy, substantial, and adversarial discovery. Plaintiffs served interrogatories and nearly 150 document requests on each Automotive Defendant, including each of the three Toyota entities named as defendants, who responded separately. In response to those requests, Toyota produced nearly one million pages of documents. Docket No. 1986 at 13. A number of discovery motions and related disputes have been litigated before the Special Discovery Master. Moreover, Toyota has deposed ten named plaintiffs and fact witnesses and produced six Toyota employees for Rule 30(b)(6) and individual depositions. *Id.* As this Court has previously recognized, "where the case proceeds adversarially, this counsels against a finding of collusion." *Saccoccio*, 297 F.R.D. at 692 (citing *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001)); *see also Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988) (record showed no evidence of collusion where "that the parties conducted discovery and negotiated the terms of settlement for an extended period of time"), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

In its Preliminary Approval Order, the Court also noted that Settlement Class Counsel "have dedicated substantial resources to the prosecution of the Action" and "have vigorously and competently represented the Class Members' interests." Docket No. 1799 at 5-6. Indeed, the extraordinary relief Plaintiffs and the Class have obtained - including Toyota's agreement to pay

a total of $278,500,000.00, less a 10% credit for a Rental Car/Loaner Program, to create a common fund to benefit the class—"is itself evidence that the parties have negotiated in good faith at arm's length." *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 470 (S.D. Fla. 2002). Finally, the Settlement Agreement provides that no unclaimed funds will revert to Defendants. *See, e.g.*, Docket No. 1724-4, Settlement Agreement § III.E.3 ("Any funds remaining in the Settlement Fund after making the payments … shall be distributed to all Class Members on a *per capita* basis, unless it is administratively unfeasible, in which case such funds shall be distributed *cy pres*, subject to the agreement of the Parties, through their respective counsel, and Court approval.").

In short, there are no signs of collusion in the negotiation of the Settlement.

E. The Settlement Is Fair, Adequate, and Reasonable

Once the Court has concluded that the settlement was not the product of collusion, the Court must consider whether the settlement is "fair, adequate and reasonable." *Bennett*, 737 F.2d at 986. When evaluating the fairness of a settlement, courts within the Eleventh Circuit generally weigh the following five factors:

1. The likelihood of success at trial;
2. The range of possible recovery and the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable[11];
3. The complexity, expense, and duration of litigation;
4. The stage of proceedings at which the settlement was achieved; and
5. The substance and amount of opposition to the settlement.

Id.; *see also Leverso*, 18 F.3d at 1530 n.6.

In assessing the *Bennett* factors, the Court "should be hesitant to substitute [its] own judgment for that of counsel." *In re Smith*, 926 F.2d 1027, 1028 (11th Cir. 1991). The Court should also be mindful of the "overriding public interest in favor of settlement." *Cotton v. Hinton*, 559 F.2d 1328, 1331 (5th Cir. 1977). "The ultimate decision by the judge involves balancing the advantages and disadvantages of the proposed settlement as against the

[11] Although *Bennett* lists these two factors separately, courts frequently combine them in analyzing whether a class action settlement is fair, adequate, and reasonable. *See, e.g.*, *Saccoccio*, 297 F.R.D. at 693; *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 541 (S.D. Fla. 1988). Accordingly, this brief analyzes these factors together.

consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009).

1. The Likelihood of Success at Trial.

Where, as here, "success at trial is not certain for the Plaintiff," the first *Bennett* factor—likelihood of success at trial—weighs in favor of a finding that the settlement is fair, adequate and reasonable. *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 WL 10167232, at *6 (S.D. Fla. Oct. 7, 2013); *see also Ass'n for Disabled Americans, Inc.*, 211 F.R.D. at 468 (approving class action settlement where "given Defendant's numerous significant defenses, the complexities of the case, and the developing nature of the law [governing Defendant's claims], the outcome of a trial on the merits is extremely uncertain"); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 539 (S.D. Fla. 1988) (approving class action settlement where "the plaintiff's success at trial could not be guaranteed"). Plaintiffs here would first have to jump the hurdle of class certification of their claims under numerous different states' laws, which would be hotly contested by Toyota, and would likely generate an appeal.[12] Toyota would strenuously argue that a nationwide litigation class or statewide litigation subclasses cannot be certified here. For one, the significant variations in state laws governing Plaintiffs' claims would preclude certification of a nationwide litigation class and would likely preclude any statewide classes. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1261 (11th Cir. 2004) ("It goes without saying that class certification [of a litigation class] is impossible where the fifty states truly establish a large number of different legal standards governing a particular claim."), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 696-97 (N.D. Ga. 2008) (denying certification of a nationwide litigation class due in part to variations of state law governing the plaintiffs' unjust enrichment claims); *Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 229 (S.D. Fla. 2002) ("[W]hen a survey of the various deceptive trade practices laws is done, it becomes clear that a class action trial in this case would be wholly unmanageable [because of the] patchwork of rules and standards reflecting the diverse policy judgments of lawmakers in fifty states.");

[12] Class certification will also likely be contested by BMW, Mazda, and Subaru, which would also likely generate appeals whether by Plaintiffs or the other Settling Automotive Defendants.

Dubose v. First Sec. Sav. Bank, 183 F.R.D. 583, 588 (M.D. Ala. 1997) (declining to certify nationwide class due in part to variations in state laws governing fraud claims).

Even assuming any classes were certified, if this case did not settle, Plaintiffs would be left with the formidable task of proving their remaining claims in the face of strong defenses that Toyota would raise in the context of a motion for summary judgment and, if that motion were not granted, at trial.[13] Additionally, if the other Settling Automotive Defendants do not settle and all of the Automotive Defendants go to trial, subject to this Court's order, Plaintiffs would have to pursue their claims in either separate trials for each of the Automotive Defendants or face the task of pursuing a multi-state claim and multi-defendant mass trial.

For the claims governed by Florida law, Toyota would argue that there is no evidence that Toyota knew of the alleged defect at the time of manufacture and sale of Plaintiffs' and the Settlement Class Members' vehicles, which is fatal to their statutory and common law fraud claims. *See, e.g.*, *Matthews v. Am. Honda Motor Co.*, No. 12-60630-CIV, 2012 WL 2520675, at *3 (S.D. Fla. June 6, 2012) ("Florida courts have recognized that a FDUTPA claim is stated where the defendant *knowingly* fails to disclose a material defect that diminishes a product's value." (emphasis added)); *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 707 (Fla. 3d DCA 2006) (knowledge of undisclosed material fact required for common law fraudulent concealment); *see also* Docket No. 614 at 14 n.13 (collecting cases under various states' statutes and common law). Toyota would also argue that Plaintiffs' and the Class's warranty claims fail as a matter of Florida law because the warranty period set forth in the New Vehicle Limited Warranty has long expired for many of the Subject Vehicles. *See, e.g.*, *Speier-Roche v. Volkswagen Grp. of Am., Inc.*, No. 14-20107-CIV, 2014 WL 1745050, at *8 (S.D. Fla. Apr. 30, 2014). And Toyota would argue that Takata's deception as to the safety of its inflators—as reflected by its guilty plea to a count of wire fraud in connection with testing results provided to Toyota and other automobile manufacturers—absolves Toyota of any liability to Plaintiffs and Settlement Class Members. *See* Docket No. 1407 (discussing plea and attaching Plea

[13] As noted above, Toyota moved to dismiss the SACCAC in its entirety. *See* Docket No. 614. As a result of this motion, the Court has already dismissed a number of Plaintiffs' counts and trimmed back the scope of the case. For example, the Court dismissed all of the California counts, including, among others, violations of the: (i) Song-Beverly Consumer Warranty Act; (ii) Unfair Competition Law; (iii) Consumer Legal Remedies Act; and (iv) False Advertising Law. *See* Docket No. 1202.

Agreement); *see also, e.g.*, *Singer v. I.A. Durbin, Inc.*, 348 So. 2d 370, 372 (Fla. 3d DCA 1977) ("Since a person usually has no reason to foresee the criminal acts of another, it is generally held that an intervening criminal act breaks the chain of causation . . . .").

A similar analysis would need to be undertaken under the various other state laws that govern certain Plaintiffs' and Settlement Class Members' claims. *See* Docket No. 1202 at 5-9 (finding the state of purchase of each Class Members' vehicles governs his or her claims). Such an analysis would show that the claims of certain Plaintiffs and Settlement Class Members are subject to unique defenses depending on which state's law governs. For example, Toyota would argue that Pennsylvania's economic loss doctrine bars Plaintiffs' and Settlement Class Members' tort claims governed by Pennsylvania law. *See, e.g.*, *eToll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 14 (Pa. Super. Ct. 2002) ("[A] claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.").

Given the uncertainty in the outcome if this case were litigated, and the amount of time it would take to recover even if Plaintiffs and the Settlement Class were to prevail, the first *Bennett* factor strongly weighs in favor of finding that the settlement is fair, adequate, and reasonable.

2. The Range of Possible Recovery and the Point on or Below the Range of Recovery at Which the Settlement Is Fair, Adequate, and Reasonable Favor Approval.

In evaluating the second and third *Bennett* factors (*i.e.*, the range of possible recovery and the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable), "the focus is on the possible recovery at trial." *Lipuma*, 406 F. Supp. 2d at 1322-23 (citing *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981)). "The Court's role is not to engage in a claim-by-claim, dollar-by-dollar evaluation, but to evaluate the proposed settlement in its totality." *Id.* at 1323 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106–07 (2d Cir. 2005)).

As explained above, whether Plaintiffs would succeed at trial is far from certain. Accordingly, "the range of possibility [were the parties to continue to litigate this case] spans from a finding of non-liability to a varying range of monetary and injunctive relief." *See* *Saccoccio*, 297 F.R.D. at 693. The Settlement avoids this uncertainty and confers an excellent recovery for Plaintiffs and the Settlement Class Members. *See Lipuma*, 406 F. Supp. 2d at 1323 (holding that the court "should consider the vagaries of litigation and compare the significance of

immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation," noting that "it has been held proper to take the bird in the hand instead of a prospective flock in the bush" (quotation marks omitted)). Furthermore, the Settlement begins conferring some of the agreed-upon benefits now, not after many additional years of protracted litigation. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Complex litigation—like the instant case—can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive."); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d 891, 932 (E.D. La. 2012), *aff'd* 2014 WL 103836 (5th Cir. Jan. 10, 2014) ("Even assuming litigation could obtain the results that this Settlement provides, years of litigation would stand between the class and any such recovery. Hence, this second factor weighs strongly in favor of granting final approval to the Settlement Agreement.").

As described in the Settlement Agreement, Toyota has agreed to pay a total of $278,500,000, less a 10% credit for a Rental Car/Loaner Program, to create a common fund to benefit the class. The benefits provided by this fund are substantial. They include: (1) an Outreach Program that encourages owners and lessees of Subject Vehicles to participate in the Takata Airbag Inflator Recalls; (2) a Rental Car/Loaner Program for owners and lessees of certain Subject Vehicles; (3) an Out-Of-Pocket claims process to reimburse Class Members for certain reasonable out-of-pocket expenses related to the Takata Airbag Inflator Recalls; (4) a residual distribution to Class Members; and (5) a Customer Support Program that provides prospective coverage for repairs and adjustments needed to correct defects, if any, in materials and workmanship of (i) the Takata PSAN inflators contained in the driver or passenger front airbag modules of Subject Vehicles or (ii) replacement driver or passenger inflators installed pursuant to the Takata Airbag Recall in the Subject Vehicles. *See* Docket No. 1724-4, Settlement Agreement § III.

Even if Plaintiffs and Settlement Class Members could theoretically recover additional relief if they were to prevail on every claim at trial, "[t]he Settlement eliminates a substantial risk that the Class would walk away empty-handed" at the conclusion of the trial and any appeals. *See Fabricant v. Sears Roebuck & Co.*, No. 98-1281-Civ., 2002 WL 34477904, at *3 (S.D. Fla. Sept. 18, 2002); *see also Cifuentes v. Regions Bank*, 2014 WL 1153772, at *5 (approving settlement that "represent[ed] approximately 35% of the maximum damages potentially

recoverable by the Class"); *Saccoccio*, 297 F.R.D. at 693 ("Even assuming that the monetary figure represents only 12.5% of Plaintiff's damages … this recovery would still be adequate."); *In re Checking Account*, 830 F. Supp. 2d at 1346 (characterizing settlement recovery range between 9% and 45% of total anticipated recovery as an "exemplary result"). Indeed, "compromise is the essence of a settlement," and "'inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (quoting *Milstein v. Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y. 1972)). Accordingly, this factor also weighs in favor of granting final approval.

3. The Complexity, Expense, and Duration of the Case.

If this class action were to proceed, it would undoubtedly continue to be a costly and lengthy process for all Parties, particularly for Plaintiffs who would have to litigate against multiple Automotive Defendants (not including Takata). This MDL involves millions of Class Members and multiple legal claims and defenses. Indeed, the 439-page SACCAC asserted 106 total counts against Defendants. Docket No. 579. Considerable time and resources have already been expended in this litigation, as reflected by the almost two thousand docket entries filed to date. As the Court recently noted, its various orders on Defendants' motions to dismiss Plaintiffs' SACCAC alone "spann[ed] almost two years." Docket No. 1919. If this case were to proceed as a litigation class on a statewide or nationwide basis, it would require an enormous outlay of time, money, and energy from the Court and the Parties, above and beyond the considerable amount that has already been expended. The Parties would have to undertake additional discovery, obtain additional experts, and submit briefing on class certification and summary judgment to address all of Toyota's defenses and arguments—all of which would have to be tailored to the individual requirements of the different state laws that the claims implicate. The sprawling, nationwide scale of this Action—and the material state-law differences implicated by Plaintiffs' claims—injects significant complexity (and uncertainty) into the case if it continues to be litigated. *See Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *3 (S.D. Fla. Jan. 31, 2008) ("A trial on the merits of this action would involve complex questions of law and fact, including, preliminarily, a substantial question as to whether the case could be fairly and properly managed and tried as a nationwide class action given that it concerns [putative class members] from forty-six states.").

Further, if Plaintiffs were to obtain class certification of a litigation class that was upheld on appeal and defeat a motion for summary judgment, pretrial and trial preparation would be necessary to continue to prosecute this Action, which would be time consuming, uncertain and expensive, especially in light of the multiple defendants that may have to be tried in multiple actions. Considerable expense, time, complexity, and uncertainty would also be associated with litigating post-trial motions and the near-certain appeal following a final judgment. For instance, in *Hall v. Bank of America, N.A.*, No. 1:12-cv-22700-FAM, 2014 WL 7184039 (S.D. Fla. Dec. 17, 2014), this Court held that the "complexity, expense, and duration of the litigation" factor was met because the case involved "a putative class action on behalf of in excess of one million borrowers" and "even if plaintiffs were to prevail, [the] class certification proceeding, a class trial and the appellate process could go on for years." *Id*. at *4.

Here, the putative class is several times larger than the one at issue in *Hall*, the outcome is similarly highly contingent, and the same protracted proceedings of class certification, trial, and appeals would remain. Accordingly, this factor weighs heavily in favor of approving the settlement. *See Saccoccio*, 297 F.R.D. at 694 (approving class action settlement where "[t]he parties have already expended significant energy and money litigating this case and propounding discovery, and, absent settlement, would have had to expend significant resources in litigating a protracted trial and appeal"); *Cifuentes*, 2014 WL 1153772, at *5 (approving class action settlement upon finding that "[h]ad this case proceeded to trial (and, presumably, appeal), . . . the costs would have proliferated considerably" and "the case would have taken much longer"); *Access Now v. Cunard Line Limited, Co.*, No. 00-7233-CIV, 2001 WL 1622015, at *2 (S.D. Fla. Oct. 31, 2001) (complexity, expense, and duration factor met where, as here, "[t]his matter has already required the parties to retain experts in a variety of fields," "[t]he parties have spent a considerable amount of time and money in analyzing the factual and legal issues the case presents," and "[the] matter will clearly lead to a protracted and expensive trial as well as a possible appeal").

Instead of all of this uncertainty, the Settlement Agreement provides substantial, immediate and tangible benefits to the Class, negating the need for continued litigation of this complex matter.

4. The Stage of the Proceedings at which Settlement was Achieved.

"The stage of the proceedings at which a settlement is achieved is evaluated to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324. This factor readily weighs in favor of approving the Settlement.

For over two years prior to reaching a settlement, the Parties engaged in extensive litigation and discovery. Among other things, Toyota filed both a motion seeking to stay this litigation and a motion to dismiss the SACCAC. As described more fully above, the Parties began to explore the option of a global settlement of all claims in March of 2016. Toyota has produced nearly a million pages of documents in this litigation. Docket No. 1986 at 13. Moreover, Toyota has deposed ten named plaintiffs and fact witnesses and has produced six employees for depositions. *Id.*

Settlement negotiations began in early 2016. Among other things, the Parties discussed their respective views of the law and facts and potential relief for the proposed class. After several months of discussions, negotiations broke down and ended in an impasse in late 2016. Throughout that time, the parties continued to litigate this action and further develop their respective cases. Then, in early 2017, Settlement Class Counsel and Toyota's Counsel resumed settlement discussions and ultimately reached the Settlement that they now present to the Court for approval. In light of these efforts, the Court previously determined that the Settlement was "the result of informed, good-faith, arm's length negotiations between the Parties and their capable and experienced counsel." *See* Docket No. 1799, Preliminary Approval Order at 2.

After litigating this case for two-plus years, engaging in extensive discovery, and settlement negotiations that lasted an entire year, the parties here clearly had "sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324; *see also Saccoccio*, 297 F.R.D. at 694 (approving class action settlement where "[c]lass counsel ha[d] spent over 1.5 years litigating against [the defendants], and during that time ha[d] propounded discovery, including deposing witnesses and reviewing documents . . . as to satisfy itself as to its probability of success on the merits, the possible range of recovery, and the likely expense and duration of the litigation"); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (stage of litigation at which settlement was reached favored final approval where "settlement negotiations

did not begin until after class counsel had substantively litigated the [case], taken several key depositions, and reviewed thousands of documents"). Thus, this factor also supports approval of the Settlement.

5. The Substance and Amount of Opposition to Settlement.

Pursuant to the Preliminary Approval Order, Toyota is submitting its memorandum in support of final approval of this class action settlement prior to the objections and opt-out deadline. Toyota will submit a brief responding to timely filed objections to the Settlement no later than October 11, 2017, as expressly permitted by the Preliminary Approval Order. *See* Docket No. 1799 at 19.

F. This Court Should Issue a Permanent Injunction

The rights and interests of the Class Members and the jurisdiction of this Court will be impaired if Class Members who have not opted out of the Class proceed with other actions alleging substantially similar claims to those asserted in this Action and/or those claims that are resolved and/or released pursuant to the Settlement Agreement. Numerous federal courts have recognized their power to enjoin class members who did not opt out of a settlement from filing or continuing to prosecute state court actions that would interfere with the implementation of a finally approved class action settlement. *See, e.g.*, *Almanazar*, 2016 WL 1169198, at *8 (granting permanent injunction); *Hall*, 2014 WL 7184039, at *14 (same); *see also Gilbert v. Suntrust Banks, Inc.*, No. 15-80415-Civ-Brannon, 2016 WL 4429655, at *2 (S.D. Fla. July 29, 2016); *Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV-GOODMAN, 2016 WL 1529902, at *30 (S.D. Fla. Apr. 13, 2016); *Legg v. E-Z Rent A Car, Inc.*, No. 6:14-cv-1716-Orl-40DAB, 2015 WL 12839191, at *3 (M.D. Fla. Sept. 25, 2015); *In re American Honda Motor Co., Inc. Dealership Relations Litig.*, 315 F.3d 417, 441-42 (4th Cir. 2003); *In re Diet Drugs*, 282 F.3d 220, 235 (3d Cir. 2002); *Williams v. General Electric Capital Auto Lease, Inc.*, 159 F.3d 266, 275 (7th Cir. 1998). The fact that Settlement Class Members have been afforded an opportunity to opt out of the Settlement justifies the issuance of an injunction to aid the Court in its management of the Settlement. *See Adams v. S. Farm Bureau Life Ins. Co.*, 493 F.3d 1276, 1291 (11th Cir. 2007).

The Court should issue a permanent injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and the exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283. Courts may issue a permanent injunction pursuant to the "necessary in aid of" exception to the Anti-Injunction Act.

28 U.S.C. § 2283. This exception allows a federal court to effectively prevent its jurisdiction over a settlement from being undermined by pending parallel litigation in state courts. *Juris v. Inamed Corp.*, 685 F.3d 1294, 1339 (11th Cir. 2012) ("[T]he 'in aid of its jurisdiction' exception [may] be used 'to enjoin parallel state class action proceedings that might jeopardize a complex federal settlement and state *in personam* proceedings that threaten to make complex multidistrict litigation unmanageable."); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880–82 (11th Cir. 1989); *In re Asbestos School Litig.*, No. 83-0628, 1991 WL 61156, *2 (E.D. Pa. Apr. 16, 1991); *aff'd mem.*, 950 F.2d 723 (3d Cir. 1991). In addition, another exception to the Anti-Injunction Act permits courts to issue injunctions where it is necessary "to protect or effectuate [a court's] judgment[]," such as where a court has finally approved a class action settlement. *Juris*, 685 F.3d at 1340; *In re Asbestos School Litig.*, No. 83-cv-0628, 1991 U.S. Dist. LEXIS 5142, at *3 (E.D. Pa. Apr. 16, 1991), *aff'd mem.*, 950 F.2d 723 (3d Cir. 1991).

This Court also has the authority to issue the requested injunction under the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act permits this Court to issue "all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act permits a federal district court to protect its jurisdiction by enjoining parallel actions by class members that would interfere with the court's ability to oversee a class action settlement. *See Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1068 (11th Cir. 2001) ("[A] district court has the authority under the [All Writs] Act to enjoin a party to litigation before it from prosecuting an action in contravention of a settlement agreement over which the district court has retained jurisdiction."); *Rosner v. United States*, 517 F. App'x 762, 766 (11th Cir. 2013); *In re Linerboard Antitrust Litig.*, 361 F. App'x 392, 396 (3d Cir. 2010). The Court may issue an injunction as soon as the litigation reaches the settlement stage in order to effectuate a final settlement. *See Faught v. Am. Home Shield Corp.*, 660 F.3d 1289, 1292–93 (11th Cir. 2011); *In re Mexico Money Transfer Litig.*, Nos. 98-C-2407 and 98-C-2408, 1999 WL 1011788, at *3 (N.D. Ill. Oct. 19, 1999). The present circumstances warrant the Court's issuance of a permanent injunction pursuant to the All Writs Act and the exceptions to the Anti-Injunction Act. *See, e.g.*, *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. 2:97-CV-11441-RDP, 2010 WL 11506713, at *50-*54 (N.D. Ala. May 19, 2010); *see also In re Managed Care Litig.*, No. 00-1334-MD, 2009 WL 413510, at *7–*8 (S.D. Fla. Feb. 19, 2009) (Moreno, J.) (recognizing Court's "broad authority" to enforce injunctions under All Writs Act and enjoining

post-settlement claims brought in Hawaii state court because "[the] Hawaii Plaintiffs could have simply opted out of the settlement and pursued their claims in Hawaii, but they did not do so"). Accordingly, this Court should issue a permanent injunction in order to prevent those Settlement Class Members who did not opt out of the Settlement from interfering with the implementation of the Settlement and jeopardizing the rights and interests of the Settlement Class Members and this Court's jurisdiction.

CONCLUSION

This settlement is more than "fair, reasonable and adequate," as required by Rule 23(e). In addition, the extraordinary relief provided in this settlement readily satisfies the *Bennett* factors. In light of the arguments above, Toyota respectfully requests that the Court enter an Order granting final approval, pursuant to Federal Rule of Civil Procedure 23(e), to the Parties' proposed class action settlement and providing such other and further relief as the Court deems reasonable and just.

Dated: September 8, 2017

Respectfully submitted,

s/ Robert M. Brochin

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record via transmission of Electronic Filing generated by CM/ECF and by first class U.S. Mail, postage prepaid, to the Attorneys' General of the 50 States, District of Columbia, and U.S. Territories and Possessions.

s/ Robert M. Brochin
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