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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

No. 8:10ML2151 JVS (FMOx)

**ORDER RE: MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

THIS DOCUMENT RELATES TO:  
ALL ECONOMIC LOSS CASES.

1 To more fully articulate the bases for its ruling, the Court issues this Order in  
2 addition to the concurrently filed Order Granting Preliminary Approval of Class  
3 Settlement, Provisionally Certifying Settlement Class, Directing Notice to the  
4 Class and Scheduling Fairness Hearing.<sup>1</sup>

5  
6 Named Plaintiffs identified in the Third Amended Economic Loss Cases  
7 Master Consolidated Complaint, on behalf of themselves and others similarly  
8 situated (collectively, “Plaintiffs”) apply by Ex Parte Application (“Application”) for  
9 preliminary approval of a proposed class action settlement. (Docket No 3342.)  
10 Plaintiffs represent that their Application is unopposed. For the following reasons,  
11 Plaintiffs’ Application is granted, and the Court hereby provisionally certifies a  
12 national settlement class and grants preliminary approval of the proposed  
13 settlement.

14  
15 I. Background

16  
17 This action arises out of Plaintiffs’ purchase or lease of vehicles designed,  
18 manufactured, distributed, marketed and sold by Defendants Toyota Motor  
19 Corporation dba Toyota Motor North America, Inc. (“TMC”), and its subsidiary,  
20 Toyota Motor Sales, U.S.A., Inc. (“TMS”) (collectively, “Toyota” or  
21 “Defendants”). At issue are various makes and models of Toyota, Lexus, and  
22 Scion vehicles (“Subject Vehicles”) equipped with an Electronic Throttle Control  
23 System (“ETCS”). (Ex. 10.)<sup>2</sup> Plaintiffs allege, and Defendants deny, that a defect

24  
25 <sup>1</sup> The concurrently filed Order is the Plaintiffs’ Proposed Order (Docket No. 3342-1 at 151-165), with the Court’s minor edits.

1 or defects in the Subject Vehicles make them susceptible to incidents of sudden,  
2 unintended acceleration (“SUA”). A putative class of Plaintiffs seeks damages for  
3 diminution in the market value of their vehicles in light of alleged defects in those  
4 vehicles.

5  
6 After extensive fact and expert discovery and substantial motions practice by  
7 the parties, the parties seek approval of a proposed Settlement Agreement on  
8 behalf of the class. On an expedited basis, the parties seek (and the Court herein  
9 grants) preliminary approval of the proposed settlement.

10  
11 II. Class Certification for Purposes of Settlement

12  
13 Subject to exclusion of certain persons affiliated with or employed by  
14 Toyota, the parties’ counsel, and the Court,<sup>3</sup> the parties request that the Court  
15 provisionally certify the following Settlement Class:

16  
17 [A]ll persons, entities or organizations who, at any time  
18 as of or before the entry of the Preliminary Approval  
19 Order, own or owned, purchase(d), lease(d) and/or

20  
21 <sup>2</sup> All citations to exhibits refer to exhibits attached to the present  
22 Application. The Settlement Agreement is an unenumerated Exhibit to the present  
23 Application, and it is therefore referred to as the “Settlement Agreement.” (See  
Docket No. 3342-1 at 1-56.)

24 <sup>3</sup> Also excluded are certain family members of such persons. (Settlement  
25 Agreement § I(13) (defining “class”).)

1 insure(d) the residual value, as a Residual Value Insurer,  
2 of all Subject Vehicles equipped or installed with an  
3 ETCS (as listed in Exhibit 10) distributed for sale or  
4 lease in any of the fifty States, the District of Columbia,  
5 Puerto Rico and all other United States territories and/or  
6 possessions.

7  
8 (Settlement Agreement § I(13) (defining “class”).)

9  
10 The Court may certify a settlement class only if all four prerequisites of Rule  
11 23(a) of the Federal Rule of Civil Procedure and the requirements of at least one  
12 subsection of Rule 23(b) are met.

13  
14 A. Rule 23(a) Prerequisites<sup>4</sup>

15  
16 The Rule 23(a) prerequisites are:

- 17  
18 (1) the class is so numerous that joinder of all members is impracticable;  
19 (2) there are questions of law or fact common to the class; (3) the claims  
20 or defenses of the representative parties are typical of the claims or  
21

22  
23 <sup>4</sup> Separately, the Court also finds that the class meets the ascertainability  
24 requirement developed in the case law. Parkinson v. Hyundai Motor American,  
25 258 F.R.D. 580, 594 (C.D. Cal. 2008); Evans v. IAC/Interactive Corp., 244 F.R.D.  
568, 574 (C.D. Cal. 2007).

1 defenses of the class; and (4) the representative parties will fairly and  
2 adequately protect the interests of the class.

3  
4 Fed. R. Civ. P. 23(a). If these prerequisites are satisfied, a class action may be  
5 maintained if the Court finds that the questions of law or fact common to class  
6 members predominate over any questions affecting only individual members, and  
7 that a class action is superior to other available methods for fairly and efficiently  
8 adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

9  
10 1. Numerosity

11  
12 Rule 23(a)(1) requires that “the class [be] so numerous that joinder of all  
13 members is impracticable.” Fed. R. Civ. P. 23(a)(1). The numerosity requirement  
14 demands examination of the specific facts of each case and imposes no absolute  
15 limitations. General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330  
16 (1980). Nevertheless, Plaintiffs must show some evidence of or reasonably  
17 estimate the number of class members. Schwartz v. Upper Deck Co., 183 F.R.D.  
18 672, 681 (S.D. Cal. 1999). Here, the parties estimate that the settlement class is  
19 comprised of more than 16 million members. (See, e.g., § II(A)(5).)<sup>5</sup>

20  
21 On this record, the numerosity requirement is satisfied.

22  
23  
24 <sup>5</sup> Otherwise undesignated paragraph citations are to the parties’ proposed  
25 Settlement Agreement.

1                   2.     Commonality

2  
3             Rule 23(a)(2) requires questions of law or fact common to the class. Fed. R.  
4 Civ. P. 23(a)(2). This requirement is permissively construed. Hanlon v. Chrysler  
5 Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). “The existence of shared legal issues  
6 with divergent factual predicates is sufficient, as is a common core of salient facts  
7 coupled with disparate legal remedies . . . .” Id. Nevertheless, a common question  
8 “must be of such a nature that it is capable of classwide resolution — which means  
9 that the determination of its truth or falsity will resolve an issue that is central to  
10 the validity of each of the claims in one stroke.” Wal-Mart Stores, Inc. v. Dukes,  
11 131 S. Ct. 2541, 2551 (2011).

12  
13             Here, the commonality requirement is satisfied. The class members’ claims  
14 all arise from allegations regarding a common defect. Moreover, the class  
15 members’ claims derive from similar or identical warranties and are based on  
16 common advertisements and representations regarding their vehicles.

17  
18                   3.     Typicality

19  
20             Rule 23(a)(3) requires that “the claims or defenses of the representative  
21 parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).  
22 “Under the rule’s permissive standards, “representative claims are ‘typical’ if they  
23 are reasonably co-extensive with those of absent class members; they need not be  
24 substantially identical.” Hanlon, 150 F.3d at 1020. The danger against which this  
25

1 requirement is meant to guard is whether “absent class members will suffer if their  
2 representative is preoccupied with defenses unique to it.” Ellis v. Costco  
3 Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011). To meet the typicality  
4 requirement, Plaintiffs must show that: (1) “other members have the same or  
5 similar injury”; (2) “the action is based on conduct which is not unique to the  
6 named plaintiffs”; and (3) “other class members have been injured by the same  
7 course of conduct.” Id.

8  
9 Here, all the class members allege they have suffered the same injuries based  
10 on a common course of Toyota’s conduct. The Class Representatives’ claims are  
11 thus typical of the class.

#### 12 13 4. Fair and Adequate Representation

14  
15 Rule 23(a)(4) requires that the representative party “fairly and adequately  
16 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “This requirement is  
17 grounded in constitutional due process concerns: ‘absent class members must be  
18 afforded adequate representation before entry of a judgment which binds them.’”  
19 Evans, 244 F.R.D. at 578 (quoting Hanlon, 150 F.3d at 1020). Representation is  
20 fair and adequate if (1) the named plaintiff and his counsel are able to prosecute the  
21 action vigorously and (2) the named plaintiff does not have conflicting interests  
22 with the unnamed class members. Lerwill v. Inflight Motion Pictures, Inc., 582  
23 F.2d 507, 512 (9th Cir. 1978).

1 The Court is satisfied that the representation is fair and adequate. On the  
2 present record, the Court can discern no conflict of interest between the Class  
3 Representatives and the class members. Class counsel have litigated the present  
4 class action on behalf of the class with competence and zeal.

5  
6 Accordingly, the Court must consider whether the proposed Settlement  
7 Class falls within one of the subsections of Rule 23(b). Plaintiffs contend that the  
8 settlement class may be certified under (b)(3) of Rule 23. As set forth below, the  
9 Court agrees.

10  
11 B. Rule 23(b)(3)

12  
13 Certification is appropriate under Rule 23(b)(3) when the Court finds (1) the  
14 questions of law or fact common to class members predominate over any questions  
15 affecting only individual members, and (2) that a class action is superior to other  
16 available methods for fairly and efficiently adjudicating the controversy. Fed. R.  
17 Civ. P. 23(b)(3). Rule 23(b)(3) focuses on the relationship between the common  
18 and individual issues. Hanlon, 150 F.3d at 1022.

19  
20 When considering class certification for settlement purposes only, the Court  
21 “need not inquire whether the case, if tried, would present intractable management  
22 problems” under Rule 23(b)(3)(D). Amchem Prods., Inc. v. Windsor, 521 U.S.  
23 591, 620 (1997).



1 a. The Predominance Inquiry

2  
3 Relevant to the issue of predominance, Rule 23(b)(3) requires that “the court  
4 find[] that the questions of law or fact common to class members predominate over  
5 any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). The  
6 predominance inquiry tests whether proposed classes are sufficiently cohesive to  
7 warrant adjudication by representation. Amchem, 521 U.S. at 594. It “focuses on  
8 the relationship between the common and individual issues.” Local Joint  
9 Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244  
10 F.3d 1152, 1162 (9th Cir. 2001). Stated otherwise, “[w]hen common questions  
11 present a significant aspect of the case and they can be resolved for all members of  
12 the class in a single adjudication, there is clear justification for handling the dispute  
13 on a representative rather than on an individual basis.” Hanlon, 150 F.3d at 1022.  
14 “Implicit in the satisfaction of the predominance test is the notion that the  
15 adjudication of common issues will help achieve judicial economy.” Zinser v.  
16 Accufix Research Institute, Inc., 253 F.3d 1180, 1189 (9th Cir. 2001) (internal  
17 quotation marks and citation omitted).

18  
19 The Court must rest its examination on the legal or factual questions of the  
20 individual class members. Hanlon, 150 F.3d at 1022. “To determine whether  
21 common issues predominate, this Court must first examine the substantive issues  
22 raised by Plaintiffs and second inquire into the proof relevant to each issue.”  
23 Jimenez v. Domino’s Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006).

1 “There is no definitive test for determining whether common issues  
2 predominate, however, in general, predominance is met when there exists  
3 generalized evidence which proves or disproves an [issue or] element on a  
4 simultaneous, class-wide basis, since such proof obviates the need to examine each  
5 class members’ individual position.” Galvan v. KDI Distrib., Inc., SACV 08-0999  
6 JVS (ANx), 2011 WL 5116585, at \*8 (C.D. Cal. Oct. 25, 2011) (alteration in the  
7 original) (internal quotation marks and citation omitted).

8  
9 Here, the common issue that predominates is whether the Subject Vehicles  
10 have a common defect or defects. The same evidence is relevant to all class  
11 members claims. Another common issue that predominates involves Toyota’s  
12 representations regarding their vehicles, upon which many class claims are based.

13  
14 The Court finds that the predominance requirement is met.

15  
16 b. The Superiority Requirement

17  
18 Relevant to the issue of superiority, Rule 23(b)(3) requires that “ the court  
19 find[] . . . that a class action is superior to other available methods for fairly and  
20 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). This  
21 requirement is broken down into non-exclusive factors that include:

22  
23 “(A) the class members’ interests in individually  
24 controlling the prosecution or defense of separate actions;

1 (B) the extent and nature of any litigation concerning the  
2 controversy already begun by or against class members;  
3 (C) the desirability or undesirability of concentrating the  
4 litigation of the claims in the particular forum; and (D)  
5 the likely difficulties in managing a class action.

6  
7 Fed. R. Civ. P. 23(b)(3)(A)-(D).  
8

9 A class action is the superior method for managing litigation where common  
10 issues will reduce litigation costs and promote greater efficiency, and where no  
11 realistic alternative to class resolution exists. Valentino v. Carter-Wallace, Inc., 97  
12 F.3d 1227, 1234-35 (9th Cir. 1996). This superiority inquiry requires a  
13 comparative evaluation of alternative mechanisms of dispute resolution. Hanlon,  
14 150 F.3d at 1023.

15  
16 Even where there is a common nucleus of fact regarding a defendant's  
17 conduct, "[i]f each class member has to litigate numerous and substantial separate  
18 issues to establish his or her right to recover individually, a class action is not  
19 'superior.'" Zinser, 253 F.3d at 1192.  
20

21 A consideration of the four factors clearly establishes the class action as a  
22 superior method of adjudication. Given the extreme complexity of proof as to the  
23 alleged defect, and given the relatively low value of recovery per Subject Vehicle  
24 in this action, the first and third factors favor class adjudication. There is little  
25

1 incentive to generate the costly and time-consuming expert evidence needed to  
2 assert the claims at issue here in an individual action.

3  
4 The second factor favors class adjudication because the litigation regarding  
5 the nationwide class claims have already been concentrated in the present multi-  
6 district litigation.

7  
8 The fourth factor essentially may be expressed as whether class adjudication  
9 is superior to the alternative, which in this case would be individual suits by the  
10 class members against Toyota. Class adjudication of this matter is clearly superior  
11 to the alternative consisting of millions of individual lawsuits. On this issue, the  
12 Court echoes the observations made by the Court in In re Napster, Inc. Copyright  
13 Litig., C MDL-00-1369 MHP, 2005 WL 1287611, at \*9 (N.D. Cal. June 1, 2005).  
14 There, the court noted the “logistical difficulties” in adjudicating class claims that  
15 numbered in the tens of thousands, but nevertheless correctly observed that “the  
16 case management problems that may arise upon certification of the class must be  
17 compared to the alternative method of adjudicating the parties’ claims: that is,  
18 thousands of actions by individual class members.” Id. Here, the Court is faced  
19 with class adjudication of millions of claims, and finds wisdom in the words of the  
20 In re Napster court that when contrasted to the alternative, “a class action is clearly  
21 the most efficient and in all likelihood the most equitable method for resolving the  
22 parties’ dispute.” Id.

1 The Court finds that the Rule 23(b)(3) conditions have been satisfied for the  
2 purposes of provision class certification. Accordingly, the Court provisionally  
3 certifies the Settlement Class.

4  
5 **III. Preliminary Approval of Class Action Settlement**

6  
7 **A. Settlement Terms**

8  
9 The proposed Settlement consists of cash payments for claims based on  
10 diminution of value due to the alleged defects, installation of a brake-override  
11 system (“BOS”) for certain eligible vehicles<sup>6</sup> and cash payment in lieu of such  
12 installation to the remaining Subject Vehicles, establishment by Toyota of a  
13 Customer Support Program, and establishment by Toyota of an Automobile Safety  
14 Research and Education Fund.

15  
16 More specifically, a Qualified Settlement Fund (the “Fund”) will be  
17 established for payments to class members in the amount of \$500 million.<sup>7</sup>

18  
19 \_\_\_\_\_  
20 <sup>6</sup> This subset of the Subject Vehicles is referred to as “BOS-Eligible  
21 Vehicles.” (§ I(3) & Ex. 11 (list of BOS-Eligible Vehicles).)

22 <sup>7</sup> The Settlement Agreement provides for allocation among the class  
23 members, for pro rata reductions in the event of a shortfall of funds, and for  
24 disposition of the remaining funds in the event of a surplus of funds.  
25 (§§ II(A)(2)(a)-(c) & (4)(a)-(c).) Protocols for this allocation are set forth in the  
record. (Ex. 16.) Notably, allocation is expressed in percentage terms and varies  
among states based on the laws of those states. (*Id.*) Overall, at one end of the  
spectrum, receiving the largest cash payments, are class members in states that

1 (§§ II(A)(1), (2) & (4).) This Fund first includes \$250 million allocated to cash  
2 payments for diminished value for class members who took certain actions in a  
3 sixteen-month period of time, from September 1, 2009, to December 31, 2010.

4 (§ II(A)(2).) These actions include sale by class members of a Subject Vehicle,  
5 return of a leased Subject Vehicle before lease termination, possession of a Subject  
6 Vehicle that was declared a total loss, or payment as a residual value insurer on a  
7 leased Subject Vehicle due to lease termination before the lease termination date.

8 (Id.) Also included are class members who returned a leased Subject Vehicle  
9 before the lease termination date where that class member made a report to the  
10 National Highway Traffic and Safety Administration (“NHTSA”) of alleged  
11 unintended acceleration. (Id.) A plan for allocating these funds is to be made part  
12 of notice to the class. (§ II(A)(2)(a).) If the total calculated allocation will exhaust  
13 the Fund, payments to class members will be reduced pro rata. (§ II(A)(2)(b).) If  
14 the Fund exceeds the total calculated allocation, the excess will be divided equally  
15 between satisfying costs of class administration and the Safety and Education  
16 Fund. Once all the costs are satisfied, then any remaining excess will be paid to  
17 the Safety and Education Fund. (§ II(A)(2)(c).)

18 \_\_\_\_\_  
19 clearly do not require manifestation of a defect to support a defect claim. (Id.) At  
20 the other end of the spectrum are class members in states that clearly require  
21 defects to be manifested, who will receive the smallest cash payments (Id.) Class  
22 members in a state where the law is unclear as to this requirement will receive cash  
23 payments in between the two ends of the spectrum. (Id.)

24 In the allocation provisions, the Settlement Agreement clearly recognizes the  
25 central significance of the manifestation issue and its impact on the viability of the  
claims of class members. The issue of manifestation under the laws of two states,  
Florida and New York, is discussed at length in the Court’s previous Order. (See  
Docket No. 2496 at 8-30.)

1 Second, as part of the Settlement, approximately 2.7 million Subject  
2 Vehicles will have a BOS installed.<sup>8</sup> Class members who own Subject Vehicles  
3 not eligible for BOS installation will receive a cash payment in lieu of such  
4 installation, and an additional \$250 million contribution to the Fund will be made  
5 for this purpose. (§ II(A)(4).)

6  
7 Unlike many common-fund settlements, the face amount of \$500 million is  
8 not illusory: The full amount will be paid in one fashion or another.

9  
10 Third, Toyota will implement a Customer Support Program to effectively  
11 provide a form of extended warranty coverage for repairs and adjustments to  
12 certain components of the Subject Vehicles for a number of years.<sup>9</sup> (§ II(A)(5).)

13  
14 Finally, Toyota will contribute \$30 million to fund automobile safety  
15 research and education related to issues in the litigation. (§ II(A)(6).) “The fund  
16 will be divided between university-based automobile/transportation research  
17 institutes and education/information programs for automobile drivers.” (Id.)

18  
19 \_\_\_\_\_  
20 <sup>8</sup> Toyota has previously offered installation of a brake-override system to  
21 another 3.2 million Subject Vehicles, and certain other Subject Vehicles already  
22 have a system that performs a similar function. (§ II(A)(3).)

23 <sup>9</sup> The mileage and term limitations of the Customer Support Program are  
24 more fully described in the Long Form Notice. (Ex. 4 § C(8)(d).) “The covered  
25 parts are the (i) engine control module; (ii) cruise control switch; (iii) accelerator  
pedal assembly; (iv) stop lamp switch; and (v) throttle body assembly.” (Id.)

1           B.     Fair, Reasonable and Adequate to the Class

2  
3           Rule 23(e) requires the district court to determine whether a proposed  
4 settlement is fundamentally “fair, adequate, and reasonable.” Fed. R. Civ. P.  
5 23(e)(2). Thus, the Court initially determines whether the proposed settlement  
6 seems fair on its face and is worth submitting to the class members.

7  
8           To determine whether a settlement agreement meets this standard, a district  
9 court must “balance a number of factors[, including,] the strength of the plaintiffs’  
10 case; the risk, expense, complexity, and likely duration of further litigation; the risk  
11 of maintaining class action status throughout the trial; the amount offered in  
12 settlement; the extent of discovery completed and the stage of the proceedings; the  
13 experience and views of counsel; the presence of a governmental participant; and  
14 the reaction of the class members to the proposed settlement.” Hanlon, 150 F.3d at  
15 1026.

16  
17           District courts must also be aware of the potential for negotiators and class  
18 representatives to be influenced by their own self interests rather than the interests  
19 of the class as a whole. Staton v. Boeing Co., 327 F.3d 938, 960 (9th Cir. 2003).  
20 Even so, the Court’s role is “limited to the extent necessary to reach a reasoned  
21 judgment that the agreement is not the product of fraud or overreaching by, or  
22 collusion between, the negotiating parties, and that the settlement, taken as a  
23 whole, is fair, reasonable and adequate to all concerned.” Officers for Justice v.  
24  
25



1 Civil Serv. Comm'n of City & County of San Francisco, 688 F.2d 615, 625 (9th  
2 Cir. 1982).

3  
4 After reviewing the Settlement Agreement and supporting Exhibits, the  
5 Court finds that the terms compare favorably to the uncertainties associated with  
6 further litigation. See Nat'l Rural Telecomm. Coop. v. DirectTV, Inc., 221 F.R.D.  
7 523, 526 (C.D. Cal. 2004). The Court has made significant legal rulings on, among  
8 other things, Plaintiffs' constitutional standing in the absence of sustaining a SUA  
9 event,<sup>10</sup> the viability of certain state-law theories of recovery in the absence of a  
10 manifestation, and numerous state common-law and statutory theories. (E.g.,  
11 Docket Nos. 1478, 1623 & 2496.) Some of these rulings have been favorable to  
12 Plaintiffs, some have been favorable to Toyota. Were the parties to proceed to a  
13 fully litigated result, virtually any outcome would face the risk of uncertainty upon  
14 appellate review of these rulings.

15  
16 "In most situations, unless the settlement is clearly inadequate, its  
17 acceptance and approval are preferable to lengthy and expensive litigation with  
18 uncertain results." Nat'l Rural Telecomm., 221 F.R.D. at 526 (internal quotation  
19 marks and citations omitted). Thus, settlement will likely serve the interests of the  
20 class members better than litigation.

21  
22  
23 \_\_\_\_\_  
24 <sup>10</sup> This issue is currently subject to review on the Court's certification of the  
25 question to the Ninth Circuit for interlocutory appeal pursuant to 28 U.S.C.  
§ 1292(b). (See Docket No. 1623.)

1           Accordingly, the Court concludes preliminarily that the proposed Settlement  
2 is fair, reasonable, and adequate.

3  
4           As part of the Motion for Final Approval of the settlement, Plaintiffs are  
5 directed to submit a reasoned estimate of liability assuming that Plaintiffs prevailed  
6 on all their claims. The Court recognizes that any such estimate may contain  
7 subjective, or even somewhat speculative, components, but nevertheless the Court  
8 concludes that such a benchmark will assist the Court is making a final assessment  
9 whether the Settlement is fair, reasonable and adequate.

10  
11           C.    Adequate Notice

12  
13           Adequate notice is critical to court approval of a class action settlement.  
14 Hanlon, 150 F.3d at 1025; see Fed. R. Civ. P. 23(e)(1)(B). For any class certified  
15 under Rule 23(b)(3), the court must direct to class members the best notice that is  
16 practicable under the circumstances, including individual notice to all members  
17 who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). The  
18 notice must clearly and concisely state in plain, easily understood language:

- 19  
20           (i)    the nature of the action;
- 21  
22           (ii)   the definition of the class certified;
- 23  
24           (iii)  the class claims, issues, or defenses;

- 1 (iv) that a class member may enter an appearance through an attorney if  
2 the member so desires;  
3  
4 (v) that the court will exclude from the class any member who requests  
5 exclusion;  
6  
7 (vi) the time and manner for requesting exclusion; and  
8  
9 (vii) the binding effect of a class judgment on members under Rule  
10 23(c)(3).  
11

12 Id.  
13

14 To be sure, providing adequate notice to a settlement class with more than  
15 16 million members is a Herculean task. Nevertheless, on the current record, the  
16 Court concludes that the parties have presented a plan and allocated the resources  
17 necessary to accomplish this task.  
18

19 The parties propose multiple methods of providing notice. First, aided by a  
20 pre-existing database, the Settlement Administrator designated by the parties will  
21 send by first class mail to each identified class member one of two Short Form  
22 Notices. (§ III(B), Exs. 12-13.) Second, a Summary Settlement Notice will be  
23 published in a number of newspapers, magazines, and/or other media. (§ III(C),  
24 Ex. 8.) Anticipated paid media placements are extensive, and summarized in the  
25

1 Kinsella Declaration.<sup>11</sup> (Ex. 9 ¶ 16.) Third, a Long Form Notice will be made  
2 available (via download of documents in .pdf format) from a website established  
3 by the Settlement Administrator to inform class members of the terms of the  
4 proposed settlement, their rights, and important deadlines.<sup>12</sup> (§§ III(D)-(E), Ex. 4.)  
5 The Long Form Notice provides information on the terms of the Settlement, the  
6 class members' opt-out rights and how to exercise them, the class members' rights  
7 to object to the proposed settlement and how to exercise them, the requests for  
8 incentive awards to named class representatives, and the requests for attorney fees  
9 and expenses. (§ II(E)(1), Ex. 4.)  
10

11 The Court has reviewed the parties' Proposed Notices and finds these  
12 notices clearly and concisely state the required information. The Court concludes  
13 that the parties' proposal that includes multiple methods of providing class  
14 settlement notice is designed to and can be implemented in a manner to provide  
15 actual notice to the overwhelming majority of class members. Mailed Short Form  
16

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17 <sup>11</sup> Similar notifications appearing on internet banners are expected to reach  
18 over 313 million views over a five-week period. (Kinsella Decl. ¶ 19.)

19 <sup>12</sup> Claim Forms will also be made available in the same manner.  
20 (§ III(E)(2), Exs. 2-3.) It is not entirely clear from the Settlement Agreement that  
21 Claims Forms will be provided by mail to class members upon request, but a close  
22 examination of the relevant documents suggest the parties so intend. The  
23 Settlement Agreement requires that the Long Form Notice be mailed to any class  
24 member who so requests in writing or by telephone. (§ III(E)(3).) The Long Form  
25 Notice, in turn, identifies Claim Forms as its Appendices B-C. (Ex. 4 at 18.)

Nevertheless, in the event provision of Claim Forms by mail upon written or  
telephone request is not what the parties intend, the Court orders that Claim Forms  
must be provided in this manner.

1 Notices, coupled with a widely published Summary Settlement Notice, and  
2 establishment of a website to further disseminate settlement information will reach  
3 millions of class members as well as can be reasonably expected in these  
4 circumstances.<sup>13</sup>

5  
6 Therefore, the Court finds the notice plan is adequate and will direct notice  
7 be provided in accordance with the parties' Settlement Agreement and supporting  
8 Exhibits.

9  
10 D. Class Representative Incentive Awards

11  
12 Plaintiffs will seek approval of incentive awards to Class Representatives, to  
13 be paid by Toyota. (§ VII(E).) Plaintiffs will seeks incentive awards of up to \$100  
14 per hour for each Class Representative's time, subject to a \$2,000 minimum award.  
15 (Id.)

16  
17 Such awards are typically made. As the Ninth Circuit observed in  
18 Rodriguez v. West Publishing Corp., 563 F.3d 948 (9th Cir. 2009):

19  
20  
21 \_\_\_\_\_  
22 <sup>13</sup> Notice need not actually reach every single class member; instead, the  
23 notice need only be “‘reasonably calculated, under all the circumstances, to apprise  
24 interested parties of the pendency of the action and afford them an opportunity to  
25 present their objections.’” Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994)  
(quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314  
(1950)).

1 [i]ncentive *awards* are fairly typical in class action cases. . .[,] are  
2 discretionary, and are intended to compensate class representatives for  
3 work done on behalf of the class, to make up for financial or  
4 reputational risk undertaken in bringing the action, and, sometimes, to  
5 recognize their willingness to act as a private attorney general.

6  
7 Id. at 958-59 (emphasis in original) (citations omitted).

8  
9 E. Attorney Fees and Costs

10  
11 The Court may also award reasonable attorney fees. Here, the parties  
12 negotiated the amount of attorney fees after agreeing to the other principal terms of  
13 the proposed settlement. (§ VII(A).) Payment of \$200 million in attorney fees will  
14 be made with funds that are separate and apart from the Qualified Settlement Fund.  
15 (Id.) An additional payment will be made to Plaintiffs’ counsel for expenses, up to  
16 \$27 million. (Id.)

17  
18 In the Ninth Circuit, “25% of the common fund as a benchmark award for  
19 attorney fees.” Hanlon, 150 F.3d at 1029. Generally, this benchmark award is  
20 “adjusted, or replaced by a lodestar calculation, when special circumstances  
21 indicate that the percentage recovery would be either too small or too large in light  
22 of the hours devoted to the case or other relevant factors.” Six (6) Mexican  
23 Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

1 Here, cash payments total \$500 million. Other elements of the proposed  
2 settlement, including BOS installation on BOS Eligible Vehicles (valued at \$406  
3 million), establishment of the Customer Support Program (valued at \$200 million)  
4 and the Automobile Safety Research and Education Fund (\$30 million) bring the  
5 value provided to the class members by the proposed settlement to over \$1.1  
6 billion.<sup>14</sup> On this estimate, the amount of fees sought by Plaintiffs' counsel falls  
7 well within the 25% benchmark, and the Court preliminarily approves it.

8  
9 As part of the Final Approval process, Plaintiffs' counsel shall submit a  
10 lodestar calculation for purposes of comparison and validation.

11  
12  
13 **IV. Scheduling**

14  
15 In consideration of the parties' proposal, the Court adopts the schedule set  
16 forth in the concurrently filed Order Granting Preliminary Approval of Class  
17 Settlement.

18  
19  
20  
21 \_\_\_\_\_  
22 <sup>14</sup> Indeed, if one added the value of the requested fees to the value of the  
23 Settlement to approximate the equivalent of a total common fund, a \$200 million  
24 fee request would be on the order of 15 percent ( $\$200 \text{ million} / (\$1.1 \text{ billion} + \$200 \text{ million}) = 15.38 \text{ percent}$ ). Accord, Arizona Citrus Growers, 904 F.2d at 1311  
25 (upholding attorney fee award expressed as 25 percent of the total fund for settlement).

1 V. Conclusion

2

3 For the foregoing reasons, the Application is granted. The Court hereby  
4 provisionally certifies the settlement class and grants preliminary approval of the  
5 proposed settlement.

6

7 Further proceedings on this issue shall be conducted in accordance with this  
8 Order.

9

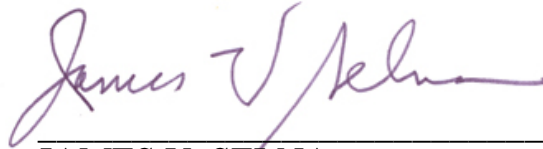
10 **IT IS SO ORDERED.**

11

12

13 DATED: December 28, 2012

14



15

JAMES V. SELNA  
UNITED STATES DISTRICT JUDGE

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