UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NED SIMERLEIN, JAMES ECKHOFF, MARICEL LOPEZ, CRAIG KAISER, JOHN F. PRENDERGAST, RAYMOND and ROSARIO ALVAREZ, KAREN EASON, JENNIFER SOWERS, JENNIFER FRANKLIN, JORDAN AMRANI, CRYSTAL GILLESPIE, MELISSA STALKER, DILLEN STEEBY, PAUL McMILLIN, JOSEPH C. HARP Jr., and JAMES and MELISSA JUGO TINNEY, individually and on behalf of all others similarly situated, v. TOYOTA MOTOR CORPORATION, TOYOTA MOTOR NORTH AMERICA, INC., TOYOTA MOTOR SALES, USA, INC., TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC. and TOYOTA MOTOR MANUFACTURING, INDIANA, INC.	CASE NO. 3:17-CV-01091-VAB MAY 10, 2019

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ENTRY OF AN ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Defendants Toyota Motor Corporation, Toyota Motor North America, Inc., Toyota Motor Sales, U.S.A., Inc., Toyota Motor Engineering & Manufacturing North America, Inc. and Toyota Motor Manufacturing, Indiana, Inc. (collectively, "Toyota") respectfully request that this Court finally approve the class action Settlement[1] that was preliminarily approved on January 14, 2019, and find that it is "fair, reasonable and adequate" as is required by Fed. R. Civ. P. 23(e). The proposed Settlement delivers comprehensive, multi-faceted relief to the Class, and includes:

(1) a Customer Confidence Program that will:

(a) provide prospective coverage, in the form of a defined extension of the applicable new car warranty, for repairs provided at no cost that are related to internal functional concerns of certain listed sliding door parts that impede the closing and opening operations of the sliding door in manual and power modes;

(b) provide a Loaner Vehicle, if requested, to eligible Class Members whose Subject Vehicles are undergoing a repair pursuant to the Customer Confidence Program that exceeds four hours to complete; and

(c) offer Class Members one Sienna Sliding Door Functional Inspection at no cost to Class Members within a year of the Court entering the Final Order and Final Judgment; and

(2) reimbursements to Class Members who previously paid for reasonable out-of-pocket expenses incurred to repair a condition that is covered by the Customer Confidence Program, is not otherwise reimbursed, and is incurred prior to the Initial Notice Date.

[1] All capitalized terms shall have the meaning ascribed to them in the Settlement Agreement unless otherwise specified herein.

The proposed Settlement should be finally approved, pursuant to Rule 23, including the Amendments thereto, because the Settlement more than satisfies the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), reversed on other grounds, after the successful dissemination of notice to the Class. *See McArthur v. Edge Fitness, LLC*, No. 3:17-CV-1554 (RMS), 2019 WL 718540 (D. Conn. Feb. 20, 2019) (using the *Grinnell* factors to analyze a proposed Class Action for final approval after the publication amendments to Rule 23).

After engaging in over one year of active litigation, the Parties began to explore the option of a global settlement and engaged in intense arm's length negotiations for over a year which involved extensive confirmatory discovery including an informal confirmatory interview conducted by Class Counsel of one of Toyota's engineers knowledgeable about the Sienna vehicles and parts at issue. Toyota and Class Counsel, acting on behalf of Plaintiffs and the Class Members, then executed a Settlement Agreement to resolve this Action and the Related Action which allege that certain Toyota Sienna vehicles equipped with power sliding rear doors were defective. Toyota denies any and all wrongdoing alleged in the Second Amended Complaint but nevertheless considered it desirable to enter into this proposed Settlement with a broad Release in order to avoid the burden, expense, risk and uncertainty of continuing to litigate the claims.

On January 14, 2019, the Court preliminarily approved the Settlement, conditionally certified the proposed Class for settlement purposes only, appointed the Class Representatives, appointed Class Counsel, approved the Direct Mail Notice and the Long Form Notice, appointed Jeanne C. Finegan of Heffler Claims Group ("Heffler") as the Settlement Notice Administrator, appointed Patrick A. Juneau and Thomas Juneau of Juneau David, APLC as Settlement Claims Administrators, issued a preliminary injunction, scheduled a final approval hearing for June 4, 2019, and set various settlement-related dates and deadlines. *See* Preliminary Approval Order,

Dkt. No. 107. The Notice Program was then implemented, consistent with the Preliminary Approval Order. The Notice Program reached an estimated 97 percent of the Class Members, on average more than five times, which exceeded the Settlement Notice Administrator's previous estimate. *See* Declaration of Jeanne C. Finegan, APR dated May 9, 2019 ("Finegan Decl."), Dkt. No. 122-2, at ¶ 4.

I. BACKGROUND

A. Plaintiffs' Allegations and Claims

Plaintiff Ned Simerlein filed a class action complaint against the "*Simerlein* Defendants" asserting that 2011-2016 Toyota Sienna vehicles equipped with power sliding rear doors were defective. Toyota refers the Court to its Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, Approval of Class Notices, and Orders on Related Settlement Issues ("Preliminary Approval Memorandum") for a more complete discussion of Plaintiffs' claims and requests for damages and the related *Combs* action. *See* Preliminary Approval Memorandum, Dkt. No. 88, at pp. 3-4.

B. Motion Practice, Confirmatory Discovery and Settlement Negotiations

For over one year, the parties engaged in active litigation. Among other things, Toyota challenged the pleadings in both the Action and Related Action through several months of motion practice.[2]

In October of 2017, the parties began to explore the option of a global settlement of all claims alleged in the Action and Related Action on a parallel track to the litigation. The parties engaged in extensive arm's length negotiations for over a year. Class Counsel and Toyota's

[2] On September 25, 2018, the Court denied Toyota's motion to dismiss without prejudice to refiling the motion at a later date. The motion to dismiss in the *Combs* action in the Central District of California is still pending.

counsel conducted multiple face-to-face meetings in New York on November 20, 2017, December 21, 2017, February 8, 2018, May 10, 2018, June 22, 2018, and October 2, 2018. In the initial stages of negotiations, the parties retained Patrick A. Juneau to serve as a neutral third-party mediator. The parties extensively negotiated the terms of the Settlement Agreement from May through October of 2018, and held negotiations on attorneys' costs and fees in November of 2018. These considerable efforts included numerous telephone conferences and other communications.

Over the course of several months, the parties also conducted extensive confirmatory discovery. Toyota produced over 100,000 pages of documents related to issues in the litigation, and on November 8, 2018, Toyota produced one of its engineers knowledgeable about the Sienna vehicles and parts at issue for an informal confirmatory interview by Class Counsel. The Parties' confirmatory discovery addressed the factual and legal issues in the litigation, including important concepts, technical matters, and terms that are addressed by the Settlement.

C. Settlement Terms

Toyota has agreed to provide substantial relief to Class Members, subject to the terms and conditions detailed in the proposed Settlement Agreement. *See* Preliminary Approval Memorandum, Dkt. No. 88, at pp. 5-9. Relief includes a multi-faceted Customer Confidence Program, a streamlined out-of-pocket expense claim reimbursement process, and other terms.[3] *See id.*

In return for the relief provided in the proposed Settlement Agreement, the Class has agreed to release and discharge Toyota from any and all claims that were, could have been, or may be

[3] The Settlement Agreement also provides that Class Counsel will make an application for an award of attorneys' fees in the amount of $6,500,000.00 and for reimbursement of their out-of-pocket costs and expenses in an amount not to exceed $500,000.00. *See* Settlement Agreement § VIII.B. Further, the Settlement Agreement provides that Class Counsel may petition the Court for service awards of up to $2,500.00 per Class Representative for bringing the Action or Related Action and for their time in connection with the Action or Related Action. *See id.* § VIII.C.

asserted in this Action, the Related Action, or that relate to the Subject Vehicles' sliding doors and/or associated parts. *See id.* § VII.

1. Customer Confidence Program

For Class Members who still own or lease their Subject Vehicles, the Customer Confidence Program provides prospective coverage for repairs free of charge to the following sliding door parts that are related to internal functional concerns that impede the closing and opening operations of the sliding door in manual and power modes:

(i) Sliding Door Cable Sub-Assembly for All Subject Vehicles. The duration of prospective coverage for the sliding door cable sub-assembly will begin following the date of Final Order and Final Judgment and run for ten (10) years from the date of First Use of the Subject Vehicle.

(ii) Sliding Door Center Hinge Assembly for All Subject Vehicles. The duration of prospective coverage for the sliding door center hinge assembly will begin following the date of Final Order and Final Judgment and run for ten (10) years from the date of First Use of the Subject Vehicle.

(iii) Fuel Door Pin and Fuel Door Hinge for All Subject Vehicles. The duration of prospective coverage for the fuel door pin and hinge will begin following the date of Final Order and Final Judgment and run for ten (10) years from the date of First Use of the Subject Vehicle.

(iv) Sliding Door Front Lock Assembly. For model year 2017–2018 Subject Vehicles and for certain model year 2016 Subject Vehicles to which the current Warranty Enhancement Program ZH4 does not apply, the duration of prospective coverage for the sliding door front lock assembly will begin following the date of Final Order and Final Judgment and run for ten (10) years from the date of First Use. For model

year 2011–2015 Subject Vehicles and for certain model year 2016 Subject Vehicles to which the Warranty Enhancement Program ZH4 applies, the current Warranty Enhancement Program ZH4, which is applicable for nine years from the Subject Vehicle's date of First Use, will be extended by one additional year.

(v) Sliding Door Rear Lock Assembly. For model year 2016–2018 Subject Vehicles and for certain model year 2015 Subject Vehicles to which the current Warranty Enhancement Program ZH5 does not apply, the duration of prospective coverage for the sliding door front lock assembly will begin following the date of Final Order and Final Judgment and run for ten (10) years from the date of First Use. For model year 2011–2014 Subject Vehicles and for certain model year 2015 Subject Vehicles to which the Warranty Enhancement Program ZH5 applies, the current Warranty Enhancement Program ZH5, which is applicable for nine years from the Subject Vehicle's date of First Use, will be extended by one additional year.

(vi) G04 Recall Remedy Kit for Model Year 2011–2016 Subject Vehicles. The G04 Recall Remedy Kit is subject to a one-year replacement part warranty under the terms of the G04 Recall. Pursuant to this Agreement's Customer Confidence Program, this one-year warranty will be extended an additional one year – for a total of two years – from the date the G04 Recall Remedy was or is performed. If the G04 Recall Remedy was performed more than one year prior to the date of entry of the Final Order and Final Judgment, then the Customer Confidence Program will provide an additional one year of coverage for the G04 Recall Remedy Kit from the date of entry of the Final Order and Final Judgment.

See Settlement Agreement, at Section III.A.

While Toyota has no obligation to implement the Customer Confidence Program until the occurrence of the Final Effective Date, per the Settlement Agreement terms, Toyota is actively working on, and intends to, pre-implement the Customer Confidence Program prior to the Final Effective Date.

Another component of the Customer Confidence Program is the Sienna Sliding Door Functional Inspection that provides Class Members who have a concern about their Subject Vehicles' sliding doors to have their Subject Vehicles' sliding doors inspected by an authorized Toyota Dealer at no cost to them, pursuant to the terms of the proposed Settlement Agreement. Each Subject Vehicle is eligible for one such Sienna Sliding Door Functional Inspection within one year from the date of entry of the Final Order and Final Judgment. Pursuant to this paragraph and upon a Class Member's request to an authorized Toyota Dealer to inspect a Subject Vehicle's sliding doors, the Toyota Dealer will inspect the Subject Vehicle's sliding doors based on an Inspection Protocol that is detailed in Section III.A.3. of the proposed Settlement Agreement.

2. Out-Of-Pocket Expense Claim Reimbursement

For Class Members who previously incurred out-of-pocket expenses to repair a condition that is covered by the Customer Confidence Program that were not otherwise reimbursed and were incurred prior to the March 1, 2019 (*i.e.*, the Initial Notice Date), Toyota has agreed to reimburse, pursuant to the conditions listed in the proposed Settlement Agreement, those who complete and timely return a Claim Form during the Claim Period. *See* Settlement Agreement, at Section III.B.

D. This Court Preliminarily Approved the Settlement and Notice Was Successfully Disseminated to the Class

This Court held that the "proposed settlement is fair, reasonable, adequate, and in the best interest of the class." *See* Preliminary Approval Order, Dkt. No. 107, at p. 21. In so holding, this Court determined that the "parties have vigorously litigated this case, and were engaged in

extensive arms-length settlement discussions" conducted by their "highly experienced counsel." *Id.*, at pp. 21, 27. The Court also found that "the parties have shown that the Court will likely be able to approve the proposal under Rule 23(e)(2) and certify the class for purposes of judgment on the proposal, the Court 'must direct notice in a reasonable manner to all class members who would be bound by the proposal[.]'" *Id.*, at p. 29 (citing FED. R. CIV. P. 23(e)(1)(B)).

This Court noted that the proposed notice to the Class "meets the requirements of Federal Rule of Civil Procedure 23(c) and due process, fairly apprises the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings, and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto." *Id.* at p. 30. The Court subsequently ordered that "notice be disseminated to the Class beginning on March 1, 2019." *Id.*

The Class Action Settlement Administrator began disseminating notice on March 1, 2019 and the notice was substantially completed by March 30, 2019. *See* Finegan Decl., at ¶ 4.[4] The Settlement Notice Administrator has reported that all of the elements of the Notice Program as set forth in the Preliminary Approval Order have been completed and an estimated 97 percent of the Class Members were reached on average, more than five times, which exceeded the Settlement Notice Administrator's previous estimate. *See id.*, at ¶ 4.

1. **Direct Mail Notice**

Pursuant to the terms of the proposed Settlement Agreement and the Preliminary Approval Order, beginning on March 1, 2019, Heffler sent Direct Mail Notices by U.S. First Class postage

[4] In addition to Direct Mail Notice, the Notice includes Publication Notice including: short-form notice in nationally circulated magazines (with Spanish language sub-headlines), territorial newspaper in Spanish and English, a press release, Class Action Fairness Act Notice to appropriate state and federal government officials, internet banner notifications, mobile and app advertising specifically targeted to reach Class Members, social media through Facebook, Twitter, Instagram and Pinterest, search words and terms on Google AdWords; an informational website, and a toll-free telephone number line. *See* Finegan Decl., at ¶ 12.

prepaid mail to 1,299,946 Class Members that were reasonably and readily identified by R.L. Polk & Co ("Polk"). *See id.*, at ¶¶ 15-16.[5]

As of April 15, 2019, Heffler had identified 45,414 Direct Mail Notices that were undeliverable as addressed. *See id.*, at ¶ 18. Of these, the United States Postal Service provided updated addresses for 10,691 records. *Id.* The addresses were updated in Heffler's master database and Direct Mail Notices were promptly re-mailed by Heffler to the forwarding addresses. *Id.* For the remaining 34,723 Direct Mail Notices identified as undeliverable without a forwarding address, Heffler conducted address searches to attempt to locate new addresses for these Class Members. *See id.*, at ¶ 19. Heffler was successful in locating a new address for 19,478 of them. *Id.* Direct Mail Notice was promptly re-mailed by Heffler to all of these newly found addresses. *Id.*

2. **Publication Notice**

1. Magazine and Newspapers

Publication Notice was published in *People Magazine*, which is a nationally circulated magazine, with an estimated circulation of 3,031,829. *See id.*, at ¶ 22. *People Magazine* was selected based on the highest coverage and index against the target audience characteristics and on previous inclusion in Toyota brand marketing. *See id.* The Publication Notice was published one time as a half-page, black and white ad on March 15, 2019. *See id.*, ¶ 23.

Because the Class includes people, entities, and organizations in Puerto Rico and all other United States territories and/or possessions, notice was also disseminated in the U.S. Territories.[6]

[5] Heffler initially sent a list of the subject VINs to Polk. *See id.*, at ¶ 14. From January 25, 2019 to March 13, 2019, Polk provided Heffler with lists of all of the current and former owners or lessees of the Subject Vehicles. *See id.* Heffler performed a duplicate analysis on the returned names and addresses and found 5,616 Class Members that were associated with 6 or more VINs (223,314 VINs in total). *See id.*, at ¶ 15. Heffler then sent one notice containing a list of all associated VINs to each of these Class Members, leaving 1,299,946 Class Members who were each sent Direct Mail Notice. *See id.*

[6] The Class is defined to include all persons, entities or organizations who, at any time as of March 1, 2019, own or

Id., at ¶ 25. This notice included a combination of local newspapers and digital outreach through local newspaper web properties. *Id.* Additionally, the press release was distributed to news outlets in the U.S. Territories. *Id.* The press release was distributed twice between March 5, 2019 and March 20, 2019 to the following newspapers: *Guam Pacific Daily News, Marianas Variety, Puerto Rico El Vocero*, *The San Juan Daily Star*, *Samoa Observer*, and *The Virgin Islands Daily News*. *Id.*

2. Internet Advertisements

According to the Settlement Notice Administrator, nearly 94 percent of the target group of potential Class Members use the Internet. *Id.*, at ¶ 27. In compliance with the Court's Preliminary Approval Order, over 102 million online impressions were served to this target group of potential Class Members across approximately 4,000 pre-vetted websites, multiple exchanges, and the social media platforms Facebook, Instagram, Pinterest and Twitter. *Id.* at ¶ 28. This effort exceeded the original projections of serving 59 million impressions. *See* Declaration of Jeanne C. Finegan, APR, dated December 10, 2018, Dkt. No. 85-8, at ¶ 28. Online display ads were served in both English and Spanish. *See* Finegan Decl., at ¶ 28.

3. Social Media

The Notice Program effort also included four social media platforms: Facebook, Instagram, Twitter, and Pinterest. *Id.*, at ¶ 33. Social media ads were served both in the U.S. and the U.S. Territories. *Id.*, at ¶ 34. Specifically, Facebook and Instagram targeting included those who are typical owners of Sienna vehicles. *Id.* Further, the program retargeted users who clicked to visit the Settlement website. *Id.* Keyword targeted was used on Twitter and Pinterest. *Id.*, at ¶¶ 35-36.

owned, purchase(d) or lease(d) Subject Vehicles distributed for sale or lease in any of the fifty States, the District of Columbia, Puerto Rico, and all other United States territories and/or possessions. *See* Settlement Agreement, at ¶ II.J.

3. **Press Release and News Mention Monitoring**

A press release was issued on March 1, 2019 in English and Spanish across PR Newswire's U.S.1 newsline and to the U.S. Territories. *See id.*, at ¶ 37. Heffler monitored various media channels for subsequent news articles and various social mentions as a result of the press release efforts. *Id.* As of May 6, 2019, there were 323 pick-ups of the press release. *Id.*

4. **Website and Toll-Free Telephone Number**

Pursuant to the Court's Preliminary Approval Order, an informational, interactive Settlement website www.ToyotaSiennaDoorSettlement.com was launched on February 26, 2019 to enable potential Class Members to obtain information about the proposed Settlement and obtain and/or submit a Claim Form(s). *See id.*, at ¶ 38. Importantly, the Settlement website served as a "landing page for the banner advertising," where Class Members could continue to obtain further information about the litigation and the proposed Settlement, their rights and important deadlines, and download or review Settlement-related documents, including, but not limited to, the Settlement Agreement, Long Form Notice, Claim Form, Preliminary Approval Order, and the Unopposed Motion For Entry Of An Order Preliminarily Approving Class Settlement, Directing Notice To The Class And Scheduling Fairness Hearing. *Id.* at ¶ 39.

The Settlement website allows Class Members to complete and submit Claim Forms online, including uploading supporting documents. *Id.* The website address was prominently displayed in the Direct Mail Notice, the Long Form Notice, the Publication Notice and Claim Form, and is accessible 24-hours a day, 7-days a week. *Id.* As of May 6, 2019, 48,351 users had visited the website, with 55,684 sessions and over 84,874 page views. *Id.*

Additionally, on March 1, 2019, Heffler established and continues to maintain a 24-hour toll-free telephone line where callers may obtain information about the proposed Settlement and the litigation. *See id.*, at ¶ 40. As of May 6, 2019, 4,736 people have called the toll-free line. *Id.*

II. 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 Plaintiffs' Second Amended Complaint alleges that, in the aggregate, Plaintiffs' claims and the claims of the other members of the Class exceed $5,000,000 exclusive of interest and costs; and members of the class members are citizens of states other than Toyota's home state. *See* Second Am. Complaint, Dkt. No. 80, at ¶ 14; *see also Boelter v. Advance Magazine Publishers Inc.*, 210 F. Supp. 3d 579, 590–91 (S.D.N.Y. 2016) ("CAFA provides the federal district courts with original jurisdiction to hear a class action if the class has more than 100 members, the parties are minimally diverse, and the matter in controversy exceeds the sum or value of $5,000,000.") (citing *Standard Fire Ins. v. Knowles*, 133 S. Ct. 1345, 1348 (2013)). 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 Plaintiffs and All Class Members

This Court has personal jurisdiction over the subject matter and Parties to this proceeding in light of Toyota's express waiver of its challenge to personal jurisdiction under Fed. R. Civ. P. 12 for purposes of settlement only.

3. **Notice Satisfied the Requirements of Rule 23(c) and (e) and Due Process**

Under Rule 23(e)(1), the Court must direct notice in a reasonable manner to all Class Members who would be bound by the proposed Settlement. In approving the Notice Program, the Court found that the content of the notices "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)." *See* Preliminary Approval Order at p. 29 (citing FED. R. CIV. P. 23(c)(2)(B)). The Settlement Notice Administrator reports that all of the elements of the notice requirements set forth in the Preliminary Approval Order were completed and has reached an estimated 97 percent of the targeted class members, with an average frequency of more than five times. *See* Finegan Decl., at ¶ 4. Thus, the procedure for providing notice and the content of the Notice Program constituted the best practicable notice to Class Members. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 185 (S.D.N.Y. 2012) ("Where there is compliance with Rule 23(c)(2)(B), the requirements of due process are satisfied.").

Here, the methods of dissemination and contents of the Notice Program more than satisfy Rule 23's requirements that the notice should be "the best practicable under the circumstances, … include[ ] all of the content necessary as a matter of law, and accordingly adequate under Rule 23 [and] due process." *In re IMAX Sec. Litig.*, 283 F.R.D. at 186 (holding that notice plan that included a combination of direct mail notice, website with information about the settlement, and publication notice which included national editions of newspapers and electronic newswires constituted the best practicable notice under the circumstances); *In re Glob. Crossing Sec. &*

ERISA Litig., 225 F.R.D. 436, 450 (S.D.N.Y. 2004) (finding that notice which included direct mailing, newspapers, notice materials on websites-including a website designed to inform potential class members about the settlement-and a toll-free phone number "sufficient information for class members to understand the proposed partial settlement and their options" and was "best notice practicable under the circumstances").[7]

Specifically, here, the various methods of notice informed Class Members of the terms of the proposed 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.

B. **The Class Action Fairness Act Notice Favors Final Approval**

Notice under the Class Action Fairness Act ("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)]").

On December 21, 2018, Heffler timely and properly caused the required CAFA Notice to be sent to the United States Attorney General and all "Appropriate" Federal and State Officials.

[7] The notices clearly inform Class Members, in plain, easily understood language that complies with the Federal Judicial Center's illustrative notices. *Varacallo v. Mass. Mut. Ins. Co.*, 226 F.R.D. 207, 225-26 (D.N.J. 2005); Preliminary Approval Order at pp. 29-30.

See Finegan Declaration, at ¶ 20. None of the foregoing CAFA Notices were returned as undeliverable. *Id.* As of March 22, 2019, more than 90 days passed from "the dates on which the appropriate Federal office and the appropriate State official [were] served." *See* 28 U.S.C. § 1715(d); *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 JG VVP, 2015 WL 6964973, at *8 n.24 (E.D.N.Y. Nov. 10, 2015) (holding the granting of final approval in abeyance until the 90-day CAFA notice period expires). At this time, there have been no substantive requests or responses from state and federal officials on this matter.

C. The Motion for Final Approval Should be Granted Because of the Fairness, Reasonableness, and Adequacy of the Proposed Settlement

The claims of a certified class may be settled only with court approval, and the Court may approve a settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). "Ultimately, the approval of the proposed settlement of a class action is entrusted to the discretion of the trial court." *In re Greenfield Online Sec. Litig.*, No. 3:07-cv-01118, 2008 WL 4640680 (D. Conn. Oct. 20, 2008) (citing *In re Public Offering Sec. Litig.*, 243 F.R.D. 79, 83 (S.D.N.Y. Feb. 28, 2007)).

Effective December 1, 2018, Rule 23(e)(2) was amended to provide:

> (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;[8]
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;

[8] The factor "the class representatives and class counsel have adequately represented the class" will be addressed in Plaintiffs' brief in support of final approval of the class action settlement.

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment;[9] and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

The 2018 Committee Notes recognize that, prior to the December 1, 2018 amendment (the "Amendment"), each circuit had developed its own list of factors to be considered in determining whether a proposed class action settlement was fair, reasonable and adequate. *See* Fed. R. Civ. P. 23(e)(2), Advisory Committee Notes. The goal of the Amendment is not to displace any such factors. *See id*. Rather, according to the Committee Notes, the Amendment is intended to direct the parties to present the settlement to the court in terms of a shorter list of core concerns by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal. *See id*; *see* also *Huffman v. Prudential Insurance Company of America*, No. 2:10-cv-05135, 2019 WL 1499475, at *3 (E.D. Pa. Apr. 4, 2019).

Notwithstanding the Amendment to Rule 23, courts in the Second Circuit have continued to apply the nine factors set forth in *Grinnell* in determining final approval of class settlements.[10] *See McArthur v. Edge Fitness, LLC*, No. 3:17-CV-1554 (RMS), 2019 WL 718540 (D. Conn. Feb.

[9] Footnote 4, *supra*, discusses the attorney fees. A full discussion on fees is included in Plaintiffs' memorandum of law in support of final approval of the Settlement.

[10] The Grinnell factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. 495 F.2d at 463. The discussion of the eighth and ninth factors are combined in Section II.C.4.8, *infra.*

20, 2019); *Cruz v. Sal-Mark Restaurant Corp.*, No. 1:17-CV-0815 (DJS), 2019 WL 355334, *4 (N.D.N.Y. Jan. 28, 2019); *Caballero v. Senior Health Partners, Inc.*, Nos. 16-CV-00326 (CLP) and 18-CV-02380 (CLP), 2018 WL 6435900 (E.D.N.Y. Dec. 7, 2018). As is fully explained below, the proposed Settlement should be finally approved when measured against the factors enumerated in *Grinnell*. *See In re Warner*, No. 06 Civ. 11515(WHP), 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008); *Long v. HSBC USA Inc.*, No. 14 Civ. 6233(HBP), 2015 WL 5444651, at *3 n.2 (S.D.N.Y Sept. 11, 2015).

1. **Public Policy Strongly Favors Class Action Settlements**

The Second Circuit has long recognized "the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (internal quotation marks omitted); *In re Prudential Sec. Inc. Ltd P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions."). "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. Sp.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006).

The standard employed in the Second Circuit for the evaluation of a proposed settlement is clear: "Before such a settlement may be approved, the district court must determine that a class action settlement is fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000) (citing Fed. R. Civ. P. 23(e)(2)). "We have recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. Such a presumption is consistent with the strong judicial policy in favor of

settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *Wal-Mart Stores*, 396 F.3d at 116; *In re PaineWebber Ltd P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

In assessing a settlement, a court should neither substitute its judgment for that of the parties who negotiated the settlement, nor conduct a mini-trial on the merits. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); s*ee also In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (court should not substitute its "business judgment for that of counsel, absent evidence of fraud or overreaching"); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003) ("absent evidence of fraud or overreaching, courts consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of [class] counsel").

Rather, in determining if a proposed settlement is fair, reasonable and adequate, courts in this Circuit look to the nine factors enumerated in *Grinnell*. *See Edwards v. North American Power and Gas LLC*, No. 3:14-CV-01714, 2018 WL 3715273, *10 (D. Conn. Aug. 3, 2018) (J. Bolden); *In re Warner*, 2008 WL 5110904, at *2; *Long v. HSBC USA Inc.*, No. 14 Civ. 6233(HBP), 2015 WL 5444651, at *3 n.2 (S.D.N.Y Sept. 11, 2015). In finding that a settlement is fair, not every factor must weigh in favor of settlement; "rather the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003). In this case, and as is discussed in more detail below, it is clear that the proposed Settlement is entitled to the strongest presumption of fairness. Accordingly, the Court should grant final approval to the Settlement.

2. **The "Presumption of Fairness" Is Warranted Because the Proposed Settlement is the Product of Serious, Informed, Non-Collusive and Arm's Length Negotiations**

Even under the more rigorous standard governing final approval, where a settlement has been negotiated at arm's length by experienced, informed counsel, there is a presumption that it is

fair and reasonable. *See Wal-Mart Stores*, 396 F.3d at 117 ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery."). "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240(CM), 2007 U.S. Dist. LEXIS 57928, at *12 (S.D.N.Y. July 27, 2007).

A court may also consider whether the settlement was reached with the assistance of a judicial officer or other experienced neutral. *See Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012) (noting involvement of "an experienced and well-known employment and class action mediator," which was "a strong indicator of procedural fairness"); *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (noting that settlement was "facilitated by a respected mediator").

Here, there should be little doubt that the proposed Settlement between the Toyota and the Class was the product of serious, informed, non-collusive negotiations. The Settlement was negotiated by experienced, informed counsel for over a year where the Parties thoughtfully considered each other's positions and diligently worked to reach a resolution of this matter. Given counsel's experience, the negotiations took place at arm's length, were adversarial, and included the involvement of Patrick A. Juneau, a highly-experienced class action mediator.[11] *See* Affidavit of Patrick A. Juneau, Dkt. No. 87. The fact that the Settlement was prompted by an experienced mediator is further evidence that the Settlement Agreement was the product of serious, informed, non-collusive negotiations. *See Morris*, 859 F. Supp. 2d at 618.

[11] Among many distinctions, Mr. Juneau has served as the court appointed Special Master in numerous federal and state cases including the following complex and multi-party matters, including, among others, in the "Deepwater Horizon" Multi-District Litigation. *See In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 Section J (E.D. La.).

In addition, the material terms of the Settlement Agreement were not agreed to until Toyota provided Class Counsel ample opportunity to thoroughly review, research, investigate and analyze the matter, which included, Toyota's production of over 100,000 pages of documents related to issues in the litigation, providing a Toyota engineer knowledgeable about the Sienna vehicles and parts at issue for an informal confirmatory interview by Class Counsel, and the Parties' participation in numerous in-person and telephonic meetings. Due to these efforts, Class Counsel had an unfettered opportunity to develop the facts concerning Toyota's potential liability, defenses and potential likelihood of success. Because the Parties were willing to share significant information about this matter during their negotiations, the Parties were capable of making – and did make – well-informed decisions regarding the proposed Settlement.

3. **The Proposed Settlement Treats Class Members Equitably, Has No Obvious Deficiencies and Does Not Improperly Grant Preferential Treatment to the Named Plaintiffs or Segments of the Class**

The proposed Settlement does not provide "unduly preferential treatment of class representatives or segments of the class." Manual for Complex Litigation 4th § 21.632, at 321. As a preliminary matter, a class need not provide the exact same settlement to every class member in order for a court to approve a settlement. *See Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 237-42 (E.D.N.Y. 2010) (granting final approval to class settlement where different groups within the class received varying amounts of relief); *Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 351 (E.D.N.Y. 2010) ("Unless the court reviewing settlement finds stark conflicts of interest, a settlement which contains class members who may recover different amounts is acceptable."); *In re Veeco Instruments Inc. Sec. Litig*, 05-MDL-165, 2007 WL 4115809, at *13 (S.D.N.Y. Nov. 7, 2007) ("[T]here is no rule that settlements benefit all class members equally."). In considering whether to approve the proposed Settlement, the Court should also consider whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D);

see also Becker v. Bank of New York Mellon Trust Company, N.A., No. 11-6460, 2018 WL 6727820 at *7, (E.D. Pa. Dec. 21, 2018) (finding that allocating settlement proceeds to class members based on their shares of the bonds satisfied this factor).

Here, there is no basis to believe that there are obvious deficiencies in the proposed Settlement or that certain Class Members received preferential treatment. The proposed Settlement Agreement provides a valuable Customer Confidence Program that offers prospective coverage for repairs to certain sliding door parts related to internal functional concerns that impede the closing and opening operations of the sliding door, one Sliding Door Functional Inspection – at no cost to the Class Member – for the first year following the date of entry of the Final Order and Final Judgment, and reimbursements to Class Members who previously paid for out-of-pocket expenses incurred to repair a condition that is covered by the Customer Confidence Program, is not otherwise reimbursed and is incurred prior to the Initial Notice Date. *See* Settlement Agreement, at Section III.A. In return for this relief, Class Members are releasing potential claims against the Released Parties named in the Settlement Agreement. *Id.* § VII.[12]

4. **The Proposed Settlement Falls Within the Range of Final Approval**

1. The Complexity, Expense and Likely Duration of the Litigation Weigh in Favor of Settlement

Litigation of this Action and the Related Action through trial would be complex, costly, risky, uncertain, and long. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). Courts have consistently held

[12] Moreover, the proposed Settlement Agreement grants Class Counsel the right to petition the Court for service awards of up to $2,500.00 per Class Representative. *See* Settlement Agreement § VIII.C. This award is within the Court's discretion and, thus, will not be unreasonable in light of the Class Representatives' roles in this case. *See Jermyn v. Best Buy Stores, L. P.*, No. 08 Civ. 214 (CM), 2012 WL 2505644, at *8 (S.D.N.Y. June 27, 2012) ("Courts in this district and elsewhere routinely approve incentive awards of the type sought here.").

that, unless the settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *See TBK Partners, Ltd. v. W. Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456, 460 (2d Cir. 1982).

This case is no exception. As discussed above, the Parties have engaged in extensive informal discovery. To engage in contested discovery and motion practice in this action – which would include extensive written discovery, numerous fact and expert depositions, contested motions for class certification and summary judgment – would be a costly and time-consuming process for the Parties and the Court. Settlement, on the other hand, permits a prompt resolution of this action that provides certain relief to the Class. This result will be accomplished years earlier than if the case proceeded to judgment through trial and/or appeals. Settlement therefore will "grant relief to all class members without subjecting them to the risks, complexity, duration and expense of continuing litigation." *In re AOL Time Warner, Inc. & ERISA Litig.*, No. 02 Civ. 5575, 2006 U.S. Dist. LEXIS 78101, at *24 (S.D.N.Y. Sept. 28, 2006).

2. Reaction of the Class to the Proposed Settlement Is Overwhelmingly Favorable

Per the Court's Preliminary Approval Order, Class Members had until May 3, 2019 to either opt out or comment on, or object to the proposed Settlement. As of May 6, 2019, Heffler has only received 45 requests for exclusion. Finegan Decl., at ¶ 41. As of the date of this memorandum of law, the Court, Class Counsel, and Toyota counsel have only received two objections. *See* Dkt. Nos. 119 and 120. The opt out requests and objections will be discussed in Toyota's reply brief that is due on or before May 24, 2019.

3. The Stage of the Proceedings and the Amount of Discovery Completed Weigh in Favor of Settlement

Sufficient discovery has occurred for Plaintiffs to have sufficient information on the merits to allow the Parties to responsibly resolve the litigation. *See Parker v. Time Warner Ent't Co.,*

L.P., No. 98-CV-04265 (ILG) (JMA), 2009 WL 1940791, at *3 (E.D.N.Y. July 6, 2009). Formal discovery is not a perquisite, and the focus should be on whether the Parties had adequate information about their claims. *See Kemp-DeLisser v. Saint Francis Hosp. and Med. Ctr.*, No. 3:15-CV-1113 (VAB), 2016 WL 6542707, *8 (D. Conn. Nov. 3, 2016) (J. Bolden) (finding that this factor weighed in favor of final approval despite no formal discovery, as the parties engaged in settlement negotiations and Class Counsel conducted extensive investigation into the facts, circumstances and legal issues before agreeing to the Settlement); *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004). Toyota produced over 100,000 pages of internal Toyota documents concerning the issues in this litigation. The effort made by counsel on both sides confirms that the Parties are sufficiently well-apprised of the facts of this litigation, and the strengths and weaknesses of their respective cases, to negotiate and finalize an acceptable settlement. *See Torres v. Gristede's Operating Corp.*, Nos. 04-CV-3316, 08-CV- 8531, 08-CV-9627 (PAC), 2010 U.S. Dist. LEXIS 139144, at *16 (S.D.N.Y. Dec. 21, 2010) ("The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating."); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 ("[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . but an aggressive effort to ferret out facts helpful to the prosecution of the suit.").

4. The Risks of Establishing Liability Support Settlement

Even in cases where establishing liability appears to be a near certainty, courts recognize the inherent risks of submitting any claim to a jury. *See, e.g., McBean v. City of New York*, 233 F.R.D. 377, 387 (S.D.N.Y. 2006) (noting that "while it appears likely that plaintiffs would be able to establish liability at trial, things change"). As recognized in *In re Metropo. Life Ins. Co. Sales Practices Litig.*, MDL 1091, 1999 WL 33957871, at *28 (W.D. Pa. Dec. 28, 1999), and in language

equally applicable here, there are a "number of ... potential legal and factual obstacles that plaintiffs would [face] if this litigation [were to proceed] to a trial on the merits." The proposed Settlement avoids the potential downsides if this Action and the Related Action were to continue as litigations. *In re Cendant Corp. Litig.*, 264 F.3d 201, 237 (3d Cir. 2001). Here, while Toyota is confident (and Plaintiffs are likely equally confident) that their position is correct, there is no assurance that a jury would agree. There are simply too many variables that could affect the outcome of a trial to provide any guarantee of establishing Toyota's liability.

In their Second Amended Class Action Complaint, Plaintiffs have sought redress on a class-wide basis alleging that certain Toyota Sienna vehicles equipped with power sliding rear doors were defective in violation of several statutes including the Connecticut Unfair Trade Practices Act, the Alabama Deceptive Trade Practices Act, California Consumer Legal Remedies Act, (iv) the California Unfair Competition Law; (v) the Florida Deceptive and Unfair Trade Practices Act; (vi) the Illinois Consumer Fraud and Deceptive Business Practices Act; (vii) the Indiana Deceptive Consumer Sales Act; (viii) the Kentucky Consumer Protection Act; (ix) the Maine Unfair Trade Practices; (x) the Missouri Merchandising Practices Act; (xi) the New York General Business Law; (xii) the Oregon Unlawful Trade Practices Law; (xiii) the Pennsylvania Unfair Trade Practices and Consumer Protection Law and common law counts including breach of express warranty, breach of implied warranty, unjust enrichment, fraudulent omission under various state laws, and the Magnuson-Moss Warranty Act. *See* Second Am. Complaint, at ¶13, Dkt. No. 80. Each of these statutes has various standards, and it is impossible to know exactly how a jury will find on one, much less all, of the remaining counts.

Additionally, Toyota has several arguments in favor of a motion to dismiss or for summary judgment of these claims.[13] For example, Plaintiff has failed to state a claim of breach of express warranty as he does not claim that the alleged defect ever manifested in his vehicle, let alone that the defect manifested during the warranty period. *Abraham v. Volkswagen of Amer., Inc.*, 795 F.2d 238, 249 (2nd Cir. 1986) (explaining that it is a universally accepted proposition that a defect that does not manifest itself until after the expiration of the express warranty does not give rise to a breach of express warranty claim); *see also Licul v. Volkswagen Grp. of Am.*, Inc., No. 13-61686, 2013 WL 6328734, at *2 (S.D. Fla. Dec. 5, 2013) (it is axiomatic that where an alleged defect arises outside of the warranty coverage period, an actionable claim for breach of warranty does not lie). Furthermore, under Connecticut law, Plaintiff cannot demonstrate vertical privity which is a necessary element of his MMWA claim. *TD Props., LLC v. VP Bldgs., Inc.*, 602 F. Supp. 2d 351, 362 (D. Conn. 2009) ("[i]n Connecticut, privity of contract is required" for a MMWA claim); see also Abraham, 795 F.2d at 241 (holding that "implied warranty claims brought under the Magnuson-Moss Act are subject to state law privity rules"). Additionally, Plaintiff does not allege a single specific, allegedly false or misleading statement that was made to him about his purchase of his vehicle which defeats his Connecticut Unfair Trade Practices Act claim. *Estate of Axelrod v. Flannery*, 476 F. Supp. 2d 188, 192 (D. Conn. 2007). Another extraordinary hurdle precluding liability is Plaintiff's obligation to establish Toyota had knowledge of and failed to disclose the alleged sliding-door defects prior to his purchase of his vehicle. *See, e.g.*, *Hudson River Cruises*,

[13] Toyota filed a motion to dismiss the original Complaint, Dkt. No. 45. The Parties agreed to adjourn the argument in order to discuss potential settlement. If the Action is not resolved through settlement, Toyota would raise these arguments, among others, in a motion to dismiss the Second Amended Complaint. Similarly, Toyota has a motion to dismiss pending in the Related Action. *See Combs, et al. v. Toyota Motor Corporation, et al., Case No. 2:17-cv-04633-VAP-AFM (C.D. Cal.)*, Dkt. No. 52. In the Related Action, after several stipulations to delay the argument on the motion to dismiss, the court took the hearing off the calendar. *See id.*, Dkt. Nos. 71, 72. The Related Action is currently stayed pending the final approval of the settlement in the instant Action. *See id.*, Dkt. No. 72.

Inc. v. Bridgeport Drydock Corp., 892 F. Supp. 380, 387 (D. Conn. 1994) (granting judgment for defendant on CUTPA claim predicated on "fail[ure] to advise of the need to subcontract" where defendant had not "realized" need for subcontractors when contract was made); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 833 (S.D. Tex. 2005) (denying CUTPA claim because "one cannot be held liable for failing to disclose something one did not know").

Taking these risks into account, the certain benefits of the proposed Settlement are preferable to the uncertainty, delay and risks of continuing with this litigation, including, but not limited to, trial.

5. The Risks of Establishing Damages Also Support Settlement

The need for the Class Members to prove their right to damages and non-monetary relief entails considerable risk. Despite Plaintiffs' request in their Second Amended Complaint for "damages, restitution and punitive damages," *see* Second Am. Complaint, Dkt. No. 80, at ¶ 13. Toyota is prepared to argue that the Class Members were not harmed at all as a result of the alleged misrepresentation and the previously available warranties are sufficient. For example, if California law prevails for this Action, courts "have struck down damages models…for failing to account for other factors that may drive consumer preferences." *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, No. ML132438PSGPLAX, 2017 WL 2559615, at *11 (C.D. Cal. June 7, 2017).

In contrast to the risk of no damages, the proposed Settlement provides for prospective relief, including providing coverage for repairs to certain parts related to internal functional concerns that impede the closing and opening of the sliding door in manual and power modes. It is not merely a "risk" but a certainty that this relief could not be obtained as the result of a trial. *See Banyai v. Mazur*, 00 Civ. 9806, 2008 WL 5110912, at *4 (S.D.N.Y. Dec. 2, 2008) (noting, as a component of the risk involved, that continued litigation could not have brought about the benefits obtained by settlement).

6. The Risks of Maintaining the Class Action Through the Trial Support Settlement

Plaintiffs face the risk of adverse rulings or findings if the action is maintained through trial. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) ("If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome.") (internal citation omitted). If the case proceeds on a litigation basis, Toyota expects to argue that individual questions preclude certification of a litigation class and that a litigation class is not manageable or a superior method to resolve Plaintiffs' claims. Should the Court certify the Class for litigation purposes, Toyota would likely move to decertify, forcing another round of briefing. Toyota may also seek permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). In other words, the risk, expense, and delay permeate such a process, and a settlement eliminates those possibilities. *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 476 (S.D.N.Y. 2013).

7. The Ability of the Defendants to Withstand a Greater Judgment

Class Members are receiving substantial value through the proposed Settlement, including (a) a Customer Confidence Program, and (b) reimbursement of certain out-of-pocket expenses. Whether the Plaintiffs and the Class Members could possibly obtain a judgment worth a greater amount does not need to be determined as, in these circumstances, "this is not a significant factor." *See Ayzelman v. Statewide Credit Servs. Corp.*, 242 F.R.D. 23, 28 (E.D.N.Y. 2007). Where the other *Grinnell* factors weigh in favor of approval, "this factor alone does not suggest the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.2d 78, 86 (2d Cir. 2001). "The fact that a defendant is able to pay more tha[n] it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *Parker*, 2009 WL 1940791, at *14 (quoting *In re PaineWebber*, 171 F.R.D. at 129). It is well established that "a defendant is not required to 'empty its coffers'

before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008) (citing *McBean*, 233 F.R.D. at 388).

8. Range of Reasonableness of the Proposed Settlement in Light of the Best Possible Recovery and all the Attendant Risks of Litigation[14]

The eighth and ninth *Grinnell* factors weigh in favor of settlement as the proposed Settlement amount and all of the benefits provided by the proposed Settlement is reasonable. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'") (internal citation omitted). The final two *Grinnell* factors require that this Court determine whether the instant Settlement falls within this 'range of reasonableness.'" *McBean*, 233 F.R.D. at 388. The eighth factor considers the reasonableness of the proposed Settlement compared with the best possible recovery; the ninth considers the reasonableness of the proposed Settlement considering all the risks of proceeding with the litigation. *Grinnell*, 95 F.2d at 463. Applying these factors to the Settlement in this case provides ample support for final approval: the proposed Settlement is not only reasonable but superior to any realistic outcome at trial.

Toyota agreed to provide (1) a Customer Confidence Program that will provide prospective coverage for repairs to certain door parts that are related to internal functional concerns of those parts that impede the closing and opening operations of the sliding door in manual and power modes, a Loaner Vehicle, if requested, to eligible Class Members whose Subject Vehicles are

[14] These factors have been combined.

undergoing a repair pursuant to the Customer Confidence Program, as well as one Sienna Sliding Door Functional Inspection at no cost to Class Members within a year of the Court finally approving the proposed Settlement; and (2) full reimbursement to Class Members who previously paid for reasonable out-of-pocket expenses incurred to repair a condition that is covered by the Customer Confidence Program, is not otherwise reimbursed, and is incurred prior to the Initial Notice Date. *See* Settlement Agreement § III. These are substantial benefits being provided to the Class. Thus, the proposed Settlement fits within the range of final approval and is certainly reasonable considering the risks identified above. *See In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Practices and Prods. Liab. Litig.*, No. 09-MD-2102, 2010 WL 3422722 (S.D.N.Y. Aug. 24, 2010) (finding that final approval of the settlement was appropriate where the settlement provided a warranty extension and fulfillment and claim process); *In Re Canon Inkjet Printer Litig.*, No. 14-cv-3235 (E.D.N.Y. June 24, 2015), Dkt. #51 (granting final approval of the settlement where the settlement provided a warranty extension, cash payment or voucher). Accordingly, all nine of the *Grinnell* factors weigh in favor of final approval.

III. THE 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 class action settlement. *See, e.g., Edwards v. North American Power & Gas LLC*, 2018 WL 3715273 at *18 (J. Bolden) (permanently barring and enjoining class members from prosecuting any released claims against the released persons as a permanent injunction was necessary to protect the Court's

authority to effectuate the Settlement Agreement and protect its judgments); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 333 (2d Cir. 1985) (holding that a permanent injunction was appropriate where "the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district judge required full control."); *In re Diet Drugs*, 282 F.3d 220, 235 (3d Cir. 2002). Settlement Class Members are afforded an opportunity to opt out of the proposed Settlement which justifies 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). Courts in this Circuit have routinely found that Courts can bar and permanently enjoin all Class Members, except those who have timely and validly opted-out of the Settlement, from participating in any other individual class lawsuit against the Releasees concerning the Released Claims. *See, e.g., In re Milos Litig.*, No. 08 Civ. 6666(LBS)(KNF), 2011 WL 6015705 at *3 (S.D.N.Y. Sept. 8, 2011); *Silva v. Little Fish, Corp.*, No. 10-CV-7801, 2012 WL 2458214 at *3 (S.D.N.Y. May 1, 2012); *Spicer v. Pier Sixty LLC*, No. 08 Civ. 10240(PAE), 2012 WL 4364503 at *5 (S.D.N.Y. Sept. 14, 2012). The Court should issue a permanent injunction pursuant to the exceptions of 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. *In re PaineWebber Ltd. P'ships Litig.*, No. 94 CIV. 8547 SHS, 1996 WL 374162, at *2 (S.D.N.Y. July 1, 1996) ("Injunctive relief may be considered necessary in aid of a federal court's jurisdiction when designed to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.) (internal quotations removed); *In re Joint E. & S. Dist. Asbestos*

Litig., 134 F.R.D. 32, 38 (E.D.N.Y. 1990); *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."). Another exception to the Anti-Injunction Act permits 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. *See In re Baldwin-United Corp.*, 770 F.2d at 333; *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 In re Baldwin-United Corp.*, 770 F.2d at 335; *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."); *In re Linerboard Antitrust Litig.*, 361 F. App'x 392, 396 (3d Cir. 2010). Accordingly, this Court should issue a permanent injunction to prevent those Settlement Class Members who will not opt out of the Settlement from interfering with the enforcement of the Settlement and jeopardizing the rights and interests of the Settlement Class Members and this Court's jurisdiction.

IV. CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Motion be granted, and the Court enter an order granting final approval to the proposed Settlement and permanently enjoining Class Members who did not opt out of the Settlement from filing or continuing to prosecute actions that would interfere with the implementation of the proposed Settlement.

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Respectfully submitted,
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