

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

KING AND SPALDING LLP
John P. Hooper (*pro hac vice*)
jhooper@kslaw.com
Jacqueline Seidel (*pro hac vice*)
jseidel@kslaw.com
1185 Avenue of the Americas
New York, NY 10036
Telephone: 212-556-2220
Facsimile: 212-556-2222

BOWMAN AND BROOKE LLP
Vincent Galvin (SBN 104448)
Vincent.galvin@bowmanandbrooke.com
1741 Technology Drive, Suite 200
San Jose, CA 95110
Telephone: 408-279-5393
Facsimile: 408-279-5845

*Counsel for Toyota Motor North
America, Inc., Toyota Motor Sales,
U.S.A., Inc., Toyota Motor Engineering
& Manufacturing North America, Inc.*

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

***In re ZF-TRW Airbag Control Units
Products Liability Litigation***

Case No: 2:19-ml-02905-JAK-MRW

**TOYOTA DEFENDANTS’
MEMORANDUM OF LAW
RESPONDING TO OBJECTIONS**

1 **I. INTRODUCTION**

2 Defendants Toyota Motor Sales, U.S.A., Inc., Toyota Motor Engineering &
3 Manufacturing North America, Inc., and Toyota Motor North America, Inc.
4 (collectively, “Toyota” or the “Toyota Defendants”) file this Supplemental
5 Memorandum of Law in order to respond to the objections received. The single
6 objection received as to the settlement relief should be overruled and found meritless
7 by this Court because the Objection: (i) does not comply with the procedural
8 requirements to submit objections; (ii) contains arguments against the Settlement
9 that are utterly meritless¹; and (iii) was filed by professional objector counsel.

10 Over 8.3 million postcard and email notices were sent out by the Settlement
11 Notice Administrator and only two² timely objections have been received: (i)
12 Rebecca Kochenderfer (“Kochenderfer Objection”); and (ii) Diane Haase and John
13 Kress (“Haase/Kress Objection”). The fact that there are only two objections weighs
14 strongly in favor of finally approving the Settlement as Class Members
15 overwhelmingly approve of the Settlement. As Judge Olguin previously stated, “the
16 absence of a large number of objections to a proposed class action settlement raises
17 a strong presumption that the terms of a proposed class settlement action are
18 favorable to the class members.” *See Jonsson v. USCB, Inc.*, No. 13-cv-8166
19 (FMO)(SH), Dkt. # 83, at 11 (C.D. Cal. May 28, 2015) (quotation omitted). The
20 Haase/Kress Objection – filed by serial objectors’ counsel – should not prevent the
21 final approval of a settlement that is clearly “fair, reasonable, and adequate” and
22 satisfies the requirements of Rule 23(e).

23
24
25

26 ¹ Toyota will not address the Kochenderfer Objection, as it only objects to Attorneys’
27 Fees and Expenses.

28 ² One person who submitted an objection, Daniel Sivilich, later opted out, so there
are only two current objections.

1 **II. THE OBJECTION FILED BY SERIAL OBJECTOR COUNSEL IS**
2 **MERITLESS AND SHOULD BE OVERRULED**

3 Many courts have overruled or stricken objections filed by Steve A. Miller,
4 John C. Kress, and Jonathan E. Fortman, counsel for objectors Diane Haase and
5 John Kress. Judge Olguin of this District found that they are “serial” objectors “who
6 are well-known for routinely filing meritless objections to class action settlements
7 for the improper purpose of extracting a fee rather than to benefit the Class.”
8 *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d. 877, 890 (C.D. Cal. 2016).

9 Furthermore, the Haase/Kress Objection should be overruled because the
10 objection does not comply with the Court-approved procedural requirements for
11 submitting objections. Finally, the Haase/Kress Objection misunderstands the terms
12 of the Settlement and the various benefits provided by the Settlement.

13 **A. The Haase/Kress Objection Is Lawyer-Driven and Filed by**
14 **Professional Objectors That Other Courts Have Repeatedly**
15 **Rejected.**

16 This Court should follow what many other federal courts have done with these
17 counsel for the Haase/Kress Objection, namely overrule or strike the objection.
18 Other cases where these lawyers have objected include, but are not limited, to the
19 following:

- 20 • Finding the objection meritless as it had been made “with an improper
21 motive (to extract a fee and not to benefit the Class):” *Roberts v.*
22 *Electrolux Home Products, Inc.*, No. 13-cv-2239 (CAS)(VBK), 2014
23 WL 4568632, *15 (C.D. Cal. 2014);
- 24 • Rejecting the arguments raised by Mr. Miller as “specious: *In re New*
25 *Motor Vehicles Canadian Exp. Antitrust Litig.*, MDL No. 1532, 2011
26 U.S. Dist. LEXIS 40843, *29-30 n.22 (D. Me. Apr. 13, 2011)”;

- 1 • Rejecting as “speculative” Mr. Miller’s objection that the requirements
2 for filing a claim were too complicated: *In re Am. Int’l Grp., Inc. Sec.*
3 *Litig.*, No. 04-cv-08141-DAB, 2012 U.S. Dist. LEXIS 13784, *9-10 ;
- 4 • Overruling objections by Mr. Kress and Mr. Fortman: *In re Lawnmower*
5 *Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997
6 (E.D. Wis. 2010) ;
- 7 • Overruling objections by Mr. Fortman on behalf of objector John Kress:
8 *In re Pre-Filled Propane Tank Mktg. & Sales Practices Litig.*, MDL No.
9 2086, 2010 U.S. Dist. LEXIS 106888 (W.D. Mo. Oct. 4, 2010).³

10 Mr. Miller also often files objections in different cases on behalf of the same
11 clients, calling into the question the legitimacy of those objections. *See, e.g.*,
12 *Blessing v. Sirius XM Radio Inc.*, No. 09-cv-10035, ECF No. 167 (S.D.N.Y. Sept.
13 14, 2011) (on behalf of Jeannine Miller); *In re Lawnmower Engine Horsepower*
14 *Marketing & Sales Practices Litig.*, MDL No. 1999, ECF No. 272 (E.D. Wis. June
15 22, 2010) (same); *Nakash v. Vidia Corp.*, No. 08-cv-04312-JW, ECF No. 325 (N.D.
16 Cal. Jan. 14, 2011) (same); *In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig.*,
17 MDL No. 1897, ECF No. 194 (C.D. Cal. Feb. 19, 2010) (same); *CLRB Hanson*
18 *Inds., LLC v. Google, Inc.*, No. C 05-03649 JW PVT, ECF No. 326 (N.D. Cal. July
19 10, 2009) (same).

20 The Haase/Kress Objection should be overruled as it has been filed by
21 attorneys who are professional objectors. This Court should heed the warning of a
22 sister federal court in this state: “courts across the country, (including in the Ninth
23 Circuit), have repeatedly turned aside [professional objectors’] efforts to upend
24

25
26 ³ Other cases where Plaintiffs have objected not listed above include *In re Groupon,*
27 *Inc., Marketing and Sales Practices Litig.*, No. 11-2238 (S.D. Cal.) (attorney
28 Maureen Connors and her relative Aileen Connors served as objectors; Kessinger,
Miller, Fortman, and Kress served as counsel); and *In re TFT-LCD (Flat Panel)*
Antitrust Litig., No. 07-1827 (N.D. Cal.) (objector Kelly Kress represented by
attorneys Miller, Fortman, and John Kress).

1 settlements.” *Brown v. Hain Celestial Grp., Inc.*, No. 11-cv-03082 (LB), 2016 WL
2 631880, at *10 (N.D. Cal. Feb. 17, 2016) (citations omitted).

3 **B. Haase/Kress Objection Should be Overruled as It Does Not**
4 **Comply with the Settlement Agreement and Preliminary Approval**
5 **Order**

6 The Haase/Kress Objection should be stricken as it is deficient and does not
7 comply with the Settlement Agreement and the Court’s Preliminary Approval
8 Order. The Long Form Notice and the FAQ Page at the Settlement website, which
9 the Haase/Kress Objection refers to, set forth the requirements to file an objection,
10 which includes the following:

- 11 • File a notice of appearance with the Court before the deadline to submit
12 objections;
- 13 • Include a statement of the nature of the objection;
- 14 • Include the caption of each case in which the objector has made such
15 objection; and
- 16 • File a sworn declaration attesting to his or her representation of each
17 Class Member on whose behalf the objection is being filed, and specify
18 the number of times during the prior five-year period that the lawyer or
19 their law firm has objected to a class action settlement.

20 See Long Form Notice at question 29; FAQ Page at 29 at
21 <https://www.airbagcontrolunitsettlement.com/home/faqs2/>; Settlement Agreement
22 at VI.A. Counsel for objectors did not comply with three of these four requirements,
23 and the only one requirement complied by counsel for objectors was to file a notice
24 of appearance before the deadline to submit objections.

25 Failure to comply with procedural requirements for submitting objections is
26 sufficient reason to deny them. See *In re Yahoo! Inc. Customer Data Security Breach*
27 *Litigation*, 16-MD-02752-LHK, 2020 WL 4212811, at *14 (N.D. Cal. July 22, 2020)
28 (“The Court need not consider these noncompliant objections.”); see also *Chavez v.*

1 *PVH Corp.*, No. 13-CV-01797-LHK, 2015 WL 9258144, at *3 (N.D. Cal. Dec. 18,
2 2015) (explaining that court may reject “procedurally improper” objections on that
3 basis alone); *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 WL
4 4610764, at *12 (N.D. Cal. Aug. 28, 2013) (overruling objections that were
5 submitted because these objections “fail[ed] to comply with the procedural
6 requirements for objecting to the Settlement”).

7 **III. THE PARTIES DO NOT NEED TO DISCLOSE THE IDENTITY OF**
8 **A FUTURE CY PRES BENEFICIARY**

9 Objectors argue, *without any legal support*, that the parties “should be
10 required” to disclose the identity of *cy pres* beneficiaries prior to final approval.
11 However, Objectors conveniently overlook the fact that the design of the settlement
12 considered that there may be no *cy pres* beneficiary to identify in the first place, and
13 would only be identified if it is administratively infeasible to distribute amounts to
14 Class Members.

15 just because the Objectors would prefer to know the *cy pres* recipient now,
16 does not mean that the Settlement is not fair, adequate and reasonable.

17 The Settlement provides for any funds remaining in the Settlement Fund to be
18 distributed *cy pres*, subject to the agreement of the Parties, through their respective
19 counsel, and Court approval. *See* Settlement Agreement § III.C. The Settlement
20 Fund is also non-reversionary, so all available funds will be distributed to Class
21 Members, unless administratively unfeasible. This assumes there are sufficient
22 funds to redistribute to the Class, which is subject to the number of eligible claims
23 submitted to the Settlement, with a claim period that still has several years to run.
24 *Id.* It may be that future events determine that a *cy pres* will not even be required.

25 In the event that there are any funds remaining, *the Parties would return to*
26 *the Court to approve the proper cy pres recipient.* *See* Dkt. # 815, 816 (emphasis
27 added). As stated by the Court in its Preliminary Approval Order, “At the hearing
28 it was explained that this approach is warranted because it may cost more than the

1 amount of any distributions to Class Members to send them.” *See* Preliminary
2 Approval Order, Dkt. # 770, at p. 20.

3 There have already been 272,716 claims submitted, with more claims to be
4 received during the more than three more years left in the ongoing claims period;
5 with all of the claims to be reviewed for eligibility, as per the Settlement Agreement.
6 *See* Second Supplemental Declaration of Jeanne C. Finegan, APR, on Settlement
7 Class Notice Program Progress and Opt Outs and Objections Dated October 30,
8 2023 at ¶¶ 3-4. With this many claims received to date and several more years to
9 go to submit claims, the parties may not even have funds remaining for *cy pres*. The
10 Class would have an opportunity to address a potential *cy pres* recipient(s), if any,
11 at a later date, assuming there are funds remaining. The settlement website will
12 regularly provide further updates about the settlement. *See*
13 <https://www.airbagcontrolunitsettlement.com/> (“Please visit his website regularly
14 for further updates about the settlement.”)

15 **IV. THE SETTLEMENT PROVIDES SIGNIFICANT RELIEF**

16 Objectors’ argument that the relief provided is inadequate is equally meritless.
17 The Toyota Defendants posit that the relief provided is more than sufficient to satisfy
18 Rule 23(e)’s fairness, reasonableness, and adequacy standard. As noted by the Court
19 in its Preliminary Approval Order, “the Settlement Agreement offers substantial
20 compensation to Class Members.” *See* Preliminary Approval Order, Dkt. # 770 at
21 p. 21. For the reasons stated in Defendants’ Brief in Support of Motion for Final
22 Approval (“Defendants’ Brief”) at Sections II.C through II.E (Dkt. # 816), the
23 amount offered in this settlement reflects the sufficiency of the relief provided here.
24 *See Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195 (N.D. Ill.
25 1981) (“By definition, a fair settlement need not satisfy every concern of the plaintiff
26 class, but may fall anywhere within a broad range of upper and lower limits.”).

27 As previously argued in Defendants’ Brief, this Settlement is the result of hard-
28 fought, arm’s length negotiations between experienced class action counsel, taking

1 into consideration the strength of Plaintiffs’ case and enormous complexity, as well
2 as both the risk and expense of maintaining the action through trial. Objectors
3 acknowledge that the payments may be up to \$250 per Class Member. *See*
4 Haase/Kress Objection at p. 8, Dkt. # 827.

5 Objectors’ claim that there is no consideration for the release of claims with
6 Unrecalled Vehicles is inaccurate. *Id.* Unrecalled Vehicles are being provided with
7 consideration in return for their release, with the ability to submit a request for a
8 Residual Distribution claim. *See* Settlement Agreement § III.C. Additionally, the
9 FAQ section of the Settlement website, which Objectors refer to in their objection,
10 even contains links for Class Members to register for a Residual Distribution,
11 something that is conveniently omitted by Objectors’ counsel. *See*
12 <http://airbagcontrolunitsettlement.com/home/faqs2/> (“Even if there is no ZF-TRW
13 ACU recall for your Subject Vehicle(s), you may still submit a claim for a Residual
14 Distribution payment under the Settlement. All Class Members may submit a
15 Residual Distribution claim, regardless of whether their Subject Vehicle was
16 recalled.”) Furthermore, Unrecalled Vehicles may also be eligible to take part in the
17 Settlement Inspection Protocol. *See* Settlement Agreement § III.E, Exhibit 3.

18 **V. THIS IS NOT A “COUPON” SETTLEMENT**

19 Finally, the Haase/Kress Objection erroneously posits that the Outreach
20 Program, Future Rental Car Reimbursement, Loaner Vehicle and Outreach
21 Program, and Extended New Parts Warranty are tantamount to a coupon settlement.
22 These components of the settlement do not involve “coupons,” because Class
23 Members are not required to purchase any additional product or service from Toyota
24 to receive these benefits. While the Class Action Fairness Act (CAFA) does not
25 define “coupon”, its legislative history indicates that coupons were intended to cover
26 certificates or discounts towards an additional purchase of the defendant’s
27 product/service. *See* Pub. L. 109-14, at 15 (February 28, 2005) (“These settlements
28 include many so-called ‘coupon settlements’ in which class members receive

1 nothing more than promotional coupons to purchase more products from the
2 defendants.”). CAFA also expressly envisions that a “coupon” is something to be
3 “redeemed.” 28 U.S.C. § 1712(a). As CAFA’s legislative history reflects, “a coupon
4 settlement is one where the relief constitutes ‘a discount on another product or
5 service offered by the defendant in the lawsuit’”. See *True v. American Honda*
6 *Motor Co.*, 749 F. Supp. 2d 1025, 1069 (C.D. Cal. 2010) (citing *Fleury v. Richemont*
7 *North America, Inc.*, No. C-05-4525 EMC, 2008 WL 3287154, at *2 (N.D. Cal.
8 Aug. 6, 2008)). There is nothing in the Settlement that a Class Member can or must
9 redeem or purchase, nor does Objector Haase indicate what she believes what must
10 be purchased, in order to take advantage of the of the Outreach Program, Future
11 Rental Car Reimbursement, Loaner Vehicle or Extended New Parts Warranty.

12 Relief components in this settlement are similar to relief that has been
13 approved and successfully implemented in other class action settlements. See, e.g.,
14 *In re Takata Airbag Products Liability Litigation*, No. 1:15-md-02599-FAM at Dkt.
15 # 4350 (S.D. Fl. Oct. 13, 2022); *McCarthy v. Toyota Motor Corporation*, No. 8:18-
16 cv-201-JLS-KES (C.D. Cal. Feb. 3, 2023)
17 (<https://www.toyotapriusinvertersettlement.com/home/faqs2/>); *Cheng v. Toyota*
18 *Motor Corporation*, No. 1:20-cv-629-JRC (E.D.N.Y. Dec. 20, 2022)
19 (<https://www.toyotafuelpumpssettlement.com/home/faqs2/>); *In re Takata Airbag*
20 *Products Liability Litigation*, No. 1:14-cv-24009-FAM (S.D. Fl. Nov. 1, 2017);
21 (<https://www.autoairbagsettlement.com/en/Toyota/Faq>).

22 **VI. CONCLUSION**

23 For the foregoing reasons and the arguments made in the Memorandum of Law
24 in Support of Final Approval of Class Settlement and Supplemental Memorandum
25 of Law in Support of Final Approval, Toyota respectfully requests that the Court
26 overrule as meritless the two objections, finally approve the Settlement as fair,
27 reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23, and issue
28 related relief including a permanent injunction.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: October 30, 2023

KING & SPALDING LLP

By: /s/ John P. Hooper

John P. Hooper (pro hac vice)
jhooper@kslaw.com
Jacqueline Seidel (pro hac vice)
jseidel@kslaw.com
1185 Avenue of the Americas
New York, NY 10036
Telephone: 212-556-2220
Facsimile: 212-556-2222

BOWMAN AND BROOKE LLP
Vincent Galvin (SBN 104448)
vincent.galvin@bowmanandbrooke.com
1741 Technology Drive, Suite 200
San Jose, CA 95110
Telephone: 408-279-5393
Facsimile: 408-279-5845

*Counsel for Toyota Motor North America,
Inc., Toyota Motor Sales, U.S.A., Inc.,
Toyota Motor Engineering & Manufacturing
North America, Inc.*

CERTIFICATE OF SERVICE

1
2 I hereby certify that on October 30, 2023, I electronically filed the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification
4 of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and
5 I hereby certify that I have mailed the foregoing document or paper via the United
6 States Postal Service to the non-CM/ECF participants indicated on the Electronic
7 Mail Notice List.

8 I certify under penalty of perjury under the laws of the United States of
9 America that the foregoing is true and correct. Executed on October 30, 2023.

10
11 /s/ Jason Bush
12 Jason Bush

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28