

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

**DAVID PULKRABEK, BARBARA
RAINEY, ANDREW SCHWAB, WESLEY
DICKMAN, and WHITNEY DICKMAN,
on their own behalf and on behalf of a class
of similarly situated individuals,**

Plaintiffs,

v.

TOYOTA MOTOR SALES, U.S.A., INC.,

and

**TOYOTA MOTOR NORTH AMERICA,
INC.,**

Defendants.

Civil No. 2:20-cv-00036-JRG-RSP

District Judge Rodney Gilstrap
Courtroom
Magistrate Judge Roy S. Payne

**PLAINTIFFS' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY APPROVAL**

Pursuant to the statements made by the Court at the Preliminary Approval Hearing dated on September 17, 2021, Plaintiffs submit this Second Supplemental Brief in support of their Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 65). Filed concurrently is the Joint Stipulation Regarding Settlement Agreement and Exhibits A-H which includes the revised Settlement Agreement, Revised Long Form Notice, Revised Proposed Preliminary Approval Order, and Revised Proposed Final Order.

I. REVISED DOCUMENTS

For purposes of clarifying Plaintiffs' allegations and the scope of the proposed class action Settlement, Plaintiffs have filed a Third Amended Complaint (Dkt. No. 89), and the Parties have submitted the following documents:

- (i) Revised Settlement Agreement (Dkt. No. 90-1);
- (ii) Revised Long Form Notice (Dkt. No. 90-3);
- (iii) Revised Proposed Preliminary Approval Order (Dkt. No. 90-5); and
- (iv) Revised Proposed Final Order (Dkt. No. 90-7).

The Third Amended Complaint (Dkt. No. 89) addresses the Court's instruction at the Preliminary Approval Hearing to "amend [the] pleadings to reflect this different theory about the defect." (Transcript of September 17, 2021 Preliminary Approval Hearing 6:17-18). These edits include removing allegations related to the Actual Capacity of the Subject Vehicles' fuel tank. "Actual Capacity," for purposes of this Settlement Agreement and its exhibits, as asserted by plaintiffs in *In Re Toyota RAV4 Hybrid Fuel Tank Litigation*, Case No. 3:20-cv-00337 (N.D. Cal.), means the actual amount of liquid fuel that exists in a fuel tank after an owner or lessee of the Subject Vehicle fills the fuel tank at a gasoline station under normal operating conditions.

The Settlement Agreement and its Exhibits have been edited from the versions submitted on June 21, 2021 in order to incorporate the claims included in the Third Amended Complaint and

to carve out the claims that the Objectors raised at the Preliminary Approval Hearing in the Release.

In the Settlement Agreement (Dkt. No. 90-1), revisions have been made to incorporate a new paragraph in the Procedural History section, to include the filing of the Third Amended Complaint and the claims raised therein. *See* Dkt. No. 90-1 at Section I.16. Additionally, there is a new footnote at the end of the new paragraph discussing the Third Amended Complaint stating that “This Settlement Agreement does not resolve or provide a release for claims related to Actual Capacity of the Subject Vehicles’ fuel tanks, included in the cases consolidated in *In re Toyota RAV4 Hybrid Fuel Tank Litig.*, No. 3:20-cv-00337 (N.D. Cal.)” Dkt. No. 90-1 at 5, fn. 2.

Additionally, the Release has been edited to include carve outs for claims related to Actual Capacity. Dkt. No. 90-1 at VII.B and VII.F. Section VII.B now states “Notwithstanding the foregoing, Class Representatives and Class Members are not releasing claims for personal injury, wrongful death, or actual physical property damage arising from the Subject Vehicle, nor are Class Representatives and Class Members releasing claims related to Actual Capacity of the Subject Vehicles’ fuel tanks.” Dkt. No. 90-1 at VII.B. Section VII.F now states “Notwithstanding the foregoing, Class Representatives and Class Members are not releasing claims related to claims of Actual Capacity of the Subject Vehicles’ fuel tanks.” Dkt. No. 90-1 at VII.F. These edits directly address the issues raised by Objectors’ counsel at the Preliminary Approval Hearing.

Edits have been made to the Long Form Notice consistent with the edits made to the Settlement Agreement. Just as was done in the Settlement Agreement, the procedural history section of the Long Form Notice has been edited to include the filing of the Third Amended Complaint and the claims raised therein. *See* Dkt. No. 90-3 at Section 2. (“What is the lawsuit about?”) The end of the Long Form Notice contains an exact copy of Section VII (Release and

Waiver) in the Settlement Agreement. As such, there are edits to Sections B and F of the Release section of the Long Form Notice. *See id.* at Appendix A.

In the Proposed Preliminary Approval Order, edits have been made to reflect the claims of the Third Amended Complaint rather than the Second Amended Complaint. *See* Dkt. No. 90-5 at ¶ 3.b. Additionally, edits have been made to make clear that Class Members who do not properly exclude themselves will be bound to the newly revised Release which carves out claims of Actual Capacity. *See id.* at ¶ 17.

Finally, edits have been made in the Proposed Final Order to carve out language in the Release section to include “. . . nor are Class Representatives and Class Members releasing claims related to the Actual Capacity of the Subject Vehicles’ fuel tanks.” *See* Dkt. No. 90-7 at ¶ 15.

II. CONCLUSION

Based on the foregoing and the reasons stated in the Motion for Preliminary Approval (Dkt. No. 65), Plaintiffs’ Reply in Support of their Motion for Preliminary Approval (Dkt. No. 77), Plaintiffs’ Supplemental Brief in Support of their Motion for Preliminary Approval (Dkt. No. 81), revised Settlement Agreement (Dkt. No. 90-1), Revised Long Form Notice (Dkt. No. 90-3), Revised Proposed Preliminary Approval Order (Dkt. No. 90-5), Revised Proposed Final Order (Dkt. No. 90-7), and the Joint Stipulation Regarding Settlement Agreement (Dkt. No. 90), where Objectors stipulated they were withdrawing their objection, the Settlement should be preliminarily approved.

Dated: October 14, 2021

Respectfully submitted,

By: *s/ Bonner C. Walsh by permission*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 14, 2021, a copy of the foregoing document was electronically filed with the United States District Court, Eastern District of Texas, via the Court's CM/ECF filing system, which will send notification of such filing to counsel of record, on October 14, 2021.

*s/ Bonner C. Walsh by permission
Charles Everingham IV*

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