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LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST

JUSTIN BAUER, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

TOYOTA MOTOR SALES U.S.A., INC., and
DOES 1-10, inclusive,

Defendants.

CASE NO. BC375017

**[PROPOSED] ORDER CONDITIONALLY
CERTIFYING SETTLEMENT CLASS
AND APPROVING SETTLEMENT**

Date: 12/22/09

Time: N/A

Dept: 324

Judge: Hon. Emilie H. Elias

Filing Date: July 27, 2007

1 On December 22, 2009, the parties presented for preliminary approval an agreement by which
2 they propose to settle this litigation (the "Settlement Agreement"). The Court has reviewed and
3 considered the moving papers and supporting declaration and exhibits, and has presided over the
4 parties' settlement conferences, and has reviewed and considered the proposed Settlement
5 Agreement, which is expressly incorporated by reference herein. For good cause appearing and,
6 subject to a final determination by the Court as to the fairness, reasonableness, and adequacy of the
7 Settlement Agreement, the Court finds as follows:¹

8 This action was filed by plaintiff Justin Bauer on July 27, 2007, seeking declaratory relief and
9 alleging Defendant Toyota Motor Sales, U.S.A., Inc. ("TMS") engaged in unlawful, unfair,
10 fraudulent and deceptive practices in violation of California's Unfair Competition Law (Cal. Bus. &
11 Prof. Code §§ 17200, *et seq.*) and California's Consumers Legal Remedies Act (Cal. Civ. Code
12 §§ 1750, *et seq.*), breached express warranties, and violated California's Song-Beverly Consumer
13 Warranty Act (Cal. Civ. Code §§ 1790, *et seq.*). Each of these claims is based on Plaintiff's
14 allegations that TMS failed to disclose and actively concealed from consumers that the windshields
15 of Model Year 2004-2006 Scion xB vehicles ("Class Vehicles") are affected by design and
16 manufacturing defects that cause the windshields to have an inordinate propensity to crack with little
17 or no impact by road debris or other objects normally encountered while driving.

18 TMS contests each and every claim and contention alleged by the plaintiff in this action,
19 denies and continues to deny any wrongdoing or legal liability arising out of any conduct alleged in
20 this action, and is prepared to defend this action.

21 This action has been vigorously litigated for over two years, and the parties have engaged in
22 discovery, including vehicle examinations and the exchange of documents.

23 Plaintiff, the proposed class, and TMS have been represented in this action by experienced
24 and qualified attorneys.

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27
28 ¹ All words with initial capital letters used in this Order have the meaning ascribed to them in
the Settlement Agreement, which is incorporated herein by reference.

1 Following investigation, discovery, and arm's length negotiations with respect to the merits of
2 each side's claims and defenses, including settlement conference sessions with this Court, the parties
3 reached a settlement of the action embodied in the Settlement Agreement.

4 For good cause appearing and, subject to a final determination by the Court as to the fairness,
5 reasonableness, and adequacy of the Settlement Agreement, the Court orders as follows

6 **APPROVAL OF THE SETTLEMENT**

7 1. The Settlement Agreement and all exhibits thereto, and the settlement set forth therein,
8 are preliminarily approved as fair, reasonable and adequate.

9
10 **APPROVAL OF THE SETTLEMENT CLASS, CLASS COUNSEL, CLASS
REPRESENTATIVE, AND SETTLEMENT ADMINISTRATOR**

11 2. For good cause shown, the Court concludes that a class should be certified for
12 settlement purposes only. The class will consist of all residents of the United States, the District of
13 Columbia or any U.S. territory who are or were a registered owner or lessee of a 2006 MY Scion xB
14 on or before the date of this Order.

15 3. Excluded from the class are (a) persons who purchase or lease a 2006 MY Scion xB
16 after the date of this order; (b) TMS and its subsidiaries, affiliates, officers, directors and employees;
17 (c) persons who have claimed personal injuries as a result of the alleged windshield condition; (d)
18 persons who have filed separate, non-class legal actions against TMS asserting claims relating to the
19 alleged windshield condition; (e) persons who have pursued a claim against, and reached a verdict
20 against or settled with TMS from individual claims substantially similar to those alleged in this action
21 relating to the alleged windshield condition; and (f) persons who validly opt out of the settlement by
22 timely filing a valid Request to Opt Out.

23 4. The Court provisionally finds that the class satisfies the requirements of California
24 Code of Civil Procedure section 382 and Civil Code section 1781 within the context of this
25 settlement. Specifically, the Court finds that (1) the class is ascertainable, and a well-defined
26 community of interest exists among the class members; (2) in light of the parties' settlement of this
27 matter, questions of law and fact common to the class members predominate over issues affecting
28 only individual members; (3) class representative Justin Bauer's claims are typical of those of the

1 class; and (4) class representative Justin Bauer has adequately represented the interests of all class
2 members and Mr. Bauer has been represented by capable and experienced counsel. Certification of
3 the class is also efficient and in the interests of judicial economy.

4 5. This Court may take settlement into account when assessing the propriety of
5 certification. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801, 1807 n.19 (1996). Further,
6 courts are “urged to exercise pragmatism and flexibility in dealing with class actions.” *Cartt v.*
7 *Superior Court*, 50 Cal. App. 3d 960,970 n.16 (1975). Accordingly, issues that might preclude
8 certification in a litigation context may be inapplicable in a settlement context. *See Dunk*, 48 Cal.
9 App. 4th at 1807 n.19.

10 6. The Court finds that a nationwide Settlement Class is appropriate and the Settlement
11 Class is hereby conditionally certified for settlement purposes only.

12 7. Certification of the settlement class shall not be deemed or construed to be an
13 admission or evidence of any violation of any statute or law or any liability or wrongdoing by TMS
14 or of the truth of the claims or allegations alleged in the Class Action or otherwise

15 8. The Court provisionally appoints Fazio | Micheletti, LLP, 2410 Camino Ramon, Suite
16 315, Bishop Ranch Business Park, Building 6, San Ramon, California, 94583 as Class Counsel and
17 provisionally appoints Plaintiff Justin Bauer to serve as the representative of the Settlement Class.

18 9. The Court provisionally appoints as Settlement Administrator Rosenthal & Company
19 LLC (“Rosenthal”), 75 Rowland Way, Suite 250, Novato, CA 94945.

20
21 **APPROVAL OF CLASS NOTICE AND PLAN FOR DISTRIBUTION**

22 10. The Court finds that the manner of notice specified in the Settlement Agreement and
23 the form and content of the Class Notice specified and attached to the Settlement Agreement will
24 provide the best practicable notice to members of the class. The Court finds that the proposed
25 method of dissemination of Class Notice set forth in the Settlement Agreement, which includes
26 mailing the proposed Short Form Notice by first-class mail to the identified class members, with the
27 clear instructions on how to obtain the Long Form Notice, meets the requirements of due process and
28 California Rule of Court 3.769(f) and is reasonably calculated, under the circumstances, to apprise all

1 class members of the relevant facts regarding this settlement and its consequences, including its
2 binding effect, the right to opt out, the right to object and the right to appear at the Fairness Hearing
3 (discussed below).

4 11. TMS is hereby ordered to disseminate Class Notice to the Settlement Class as follows:

- 5 a. TMS will provide R.L. Polk & Co. ("Polk") with VIN numbers of all MY 2006
6 Scion xB vehicles. Polk will then perform a vehicle history search with each
7 state's DMV, and work with the claims administrator and the national change of
8 address databases to identify all owners and prior owners of the specified VINs.
9 All persons so identified will be sent the Short Form Notice and receipt of such
10 notice will be deemed presumptive proof of membership in the Settlement Class.
- 11 b. The Short Form Notice as described in and attached to the Settlement Agreement
12 shall be disseminated by the Settlement Administrator by first-class mail to
13 persons and entities who fall within the Settlement Class definition who are
14 identified by Polk as set forth in the Settlement Agreement. The Short Form
15 Notice shall also be sent by the Settlement Administrator by first-class mail to
16 each settlement class member whose identity becomes known to the administrator
17 after the initial mailing. If any Short Form Notice is returned along with an
18 advisory identifying a forwarding address, the Settlement Administrator shall
19 cause the Short Form Notice to be mailed to the forwarding address. If no
20 forwarding address is available, the Settlement Administrator will attempt to
21 obtain an updated address by conducting an address search using LexisNexis'
22 "Accurint" databases.
- 23 c. The dissemination of the Short Form Notice shall commence by April 26, 2010.
- 24 d. The Short Form Notice shall also be published in one weekday edition of the USA
25 Today.
- 26 e. The contents of the Long Form Notice as described in and attached to the
27 Settlement Agreement shall also be posted on the Internet on a website maintained
28 by the Settlement Administrator. The Long Form Notice shall remain posted on

1 that website through December 31, 2010. The web address shall be provided on
2 the Short Form Notice.

- 3 f. TMS, through the services of the Settlement Administrator, shall maintain a toll
4 free telephone number. The toll free number will be included in the Short Form
5 Notice.
- 6 g. TMS shall pay all costs related to the administration of the Settlement Agreement,
7 including all costs related to the preparation, distribution, and administration of all
8 forms of Class Notice, the costs of the physical preparation of individual notice
9 (including duplication and printing) and the charges of the Settlement
10 Administrator.
- 11 h. This Court authorizes the parties to make minor revisions to the class notice as
12 they may jointly deem necessary or appropriate without the necessity of further
13 Court action or approval.
- 14 i. To facilitate obtaining the names and addresses of Settlement Class members for
15 the purpose of providing Class Notice, this Court requests that the California
16 Department of Motor Vehicles and each of the other states' agencies responsible
17 for vehicle-registration data comply with the request of the parties and/or their
18 agent(s) for the release of the names and current addresses of Settlement Class
19 Members. The information released by these agencies shall be used solely and
20 exclusively for the purpose of providing notice of class action settlement in the
21 above-entitled action.

22 **EXCLUSION FROM THE CLASS**

23 12. Persons who wish to be excluded from the class must submit a written Request to Opt
24 Out, as described in the Settlement Agreement, by sending it by U.S. mail to the claims administrator
25 at address. Any Request to Opt Out must be postmarked on or before June 30, 2010. Persons
26 submitting a Request to Opt Out must (i) set forth his/her full name and current address, (ii) identify
27 the model year of his/her vehicle as well as the Vehicle Identification Number of his/her vehicle, and
28 (iii) specifically state his/her desire to be excluded from the Settlement Class.

1 the factual and legal grounds therefor, and (v) provide copies of any other
2 documents that the objector wishes to submit in support of his/her position.

3 d. Only Settlement Class Members may object to the Settlement Agreement.

4 17. Any Settlement Class Member may appear at the Fairness Hearing, in person or by
5 counsel, and be heard on their objection to the proposed settlement and to show cause why the
6 settlement or any aspect of it should not be approved; provided, however, that all objecting
7 Settlement Class Members must file with the Clerk of the Superior Court of Los Angeles, 600 S.
8 Commonwealth Avenue, Los Angeles, California 9005 and serve upon TMS and Class Counsel, a
9 Notice of Intention to Appear at the Fairness Hearing by June 30, 2010. The Notice of Intention to
10 Appear must include copies of any papers, exhibits, or other evidence that the Settlement Class
11 Member (or his/her counsel) will present to the Court in connection with the Fairness Hearing. Any
12 Settlement Class Member who does not provide a Notice of Intention to Appear in compliance with
13 the deadline, or who has not filed an Objection in compliance with the deadline, shall be precluded
14 from being heard at the Fairness Hearing.

15 **THE FAIRNESS HEARING**

16 18. On or before May 28, 2010, the parties shall file their memoranda and declarations in
17 support of Final Approval of the Settlement Agreement.

18 19. TMS has agreed to pay Class Counsel's reasonable fees and litigation expenses up to
19 and not to exceed \$300,000, and an incentive award to Plaintiff Justin Bauer in the amount of \$6,500,
20 and Class Counsel shall file a motion for judicial approval of this aspect of the Settlement Agreement
21 on or before May 28, 2010. TMS shall pay any incentive award and any award of attorney fees and
22 costs approved by the Court within fifteen (15) business days following the Effective Date of
23 Settlement.

24 20. On or before July 7, 2010, the parties shall file their response to objections, if any, that
25 have been timely served in accordance with the instructions set forth herein.

26 21. A Fairness Hearing will be held on July 15, 2010, at 1:45 p.m., before this Court,
27 Department 324, at the Los Angeles Superior Courthouse, 600 S. Commonwealth Avenue, Los
28 Angeles, California 90005. At the Fairness Hearing, the Court will determine, among other things:

1 (i) whether the terms of the Settlement are fair, reasonable, and adequate and should be approved by
2 the Court; (ii) whether the Court should enter a Final Order approving the Settlement and dismissing
3 the claims against Toyota; and (iii) whether the Court should approve the application for attorneys'
4 fees and reimbursement of costs and incentive award to the named Plaintiff that will be filed by Class
5 Counsel.

6 22. If the Settlement Agreement is finally approved, the Court shall enter a Final Order
7 Approving Settlement and Judgment of Dismissal dismissing (with prejudice as to plaintiff Justin
8 Bauer and settlement class members, and without prejudice as to others) this Action. The Final Order
9 shall be fully binding with respect to all Settlement Class Members who did not timely and validly
10 request exclusion from the class as set forth in the Settlement Agreement.

11 **OTHER PROVISIONS**

12 23. All proceedings in this action are stayed until further order of the Court, except as may
13 be necessary to implement the Settlement Agreement and to comply with this Order.

14 24. If either TMS or Plaintiff so elects, and either (a) preliminary approval of the
15 Settlement Agreement and the Settlement described herein or the Final Judgment and Order is not
16 obtained from the Court in substantially the form attached to the Settlement Agreement; or (b) the
17 Court fails to grant final approval to the Settlement; or (c) the Final Order and Judgment is reversed
18 or modified on appeal; then this Settlement Agreement shall be null and void, shall have no further
19 force and effect, and shall not be offered in evidence or used in any litigation for any purpose,
20 including the existence, certification, or maintenance of any purported class. The canceling and
21 terminating party may make such election only by furnishing written notice of an intent not to
22 proceed with the terms and conditions of this Settlement Agreement to the other party within five
23 (5) days of the event constituting the basis for the election to terminate.

24 25. In the event of such election, this Settlement Agreement and all negotiations,
25 proceedings, documents prepared, and statements made in connection herewith shall be without
26 prejudice to the Parties, shall not be deemed or construed to be an admission or confession by any
27 Party of any fact, matter, or proposition of law, shall not be used in any manner for any purpose, and
28 all Parties to the Class Action shall stand in the same position as if this Settlement Agreement had not

1 been negotiated, made or filed with the Court. If the Settlement Agreement is terminated, any and all
2 orders entered by the Court pursuant to the provisions of the Settlement Agreement shall be vacated
3 *nunc pro tunc*. No reduction by any court of any award of attorneys' fees and/or expenses to Class
4 Counsel shall be a basis for terminating this Settlement Agreement.

5 26. In the event this Settlement Agreement is not approved by the Court or the Settlement
6 is terminated or fails to become effective in accordance with its terms, all orders entered as of the
7 date on which this Settlement was executed shall become operative and fully effective, as if the
8 proceedings relating to this Settlement had not occurred.

9 27. In the event that more than 250 Settlement Class Members request exclusion from the
10 Settlement Class, TMS may elect to terminate this Settlement Agreement by so notifying Class
11 Counsel and the Court, not less than five (5) days prior to the Fairness Hearing. Class Counsel shall
12 have the right to contact Settlement Class Members who file exclusion requests and to challenge the
13 timeliness and validity of any exclusion request, as well as the right to request the withdrawal of any
14 exclusion filed in error and any exclusion which a present or former Settlement Class Member wishes
15 to withdraw for purposes of participating in the Settlement. The Court shall determine whether any
16 of the contested exclusions is valid.

17 28. Notwithstanding the foregoing, in the event that the Court determines that the
18 proposed Class Notice is insufficient, TMS will modify the manner in which Class Notice is prepared
19 and/or distributed in a manner that satisfies the Court's criteria. A ruling that the proposed Class
20 Notice is insufficient shall not constitute valid grounds to terminate this Settlement Agreement.

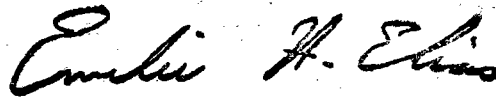
21 29. Neither the settlement nor the Settlement Agreement shall be interpreted as an
22 admission of any liability or wrongdoing by TMS or an admission of the strength or weakness of the
23 claims asserted in this action. This Settlement Agreement shall not be offered or be admissible in
24 evidence by or against TMS or the Released Parties, or cited or referred to in any other action or
25 proceeding for any purpose, except (1) in any action or proceeding brought by or against the Parties
26 to enforce or otherwise implement the terms of this Settlement Agreement, or (2) in any action
27 involving Plaintiff, Settlement Class Members, Released Parties, or any of them, to support a defense
28

1 of res judicata, collateral estoppel, release, or other theory of claim preclusion, issue preclusion, or
2 similar defense.

3 30. This order is without prejudice to TMS' right to oppose the certification of the same or
4 any other class for any purpose on any grounds, including TMS' challenge to Class Counsel.
5 Likewise, this order shall be without prejudice to the right of Plaintiff and/or Class Counsel to engage
6 in additional discovery, including formal discovery related to merits and certification issues, in
7 conjunction with the same or any other class for any purpose. Further, certification shall not
8 constitute, in this or any other proceeding, an admission by TMS of any kind or a determination that a
9 class or subclass for trial purposes is proper. In the event the settlement is not finally approved, or
10 the settlement is otherwise terminated or rendered null and void, the certification of the class shall be
11 automatically vacated and shall not constitute evidence or a determination that the requirements for
12 certification of a class for trial purposes, in this or any other action, are satisfied or not satisfied.

13
14 **IT IS SO ORDERED.**

15 DATED: 1-4-10



16
17 Hon. Emilie H. Elias
18 California Superior Court Judge