

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

| | | |
|----------------------------------|---|----------------------------|
| IN RE NEW MOTOR VEHICLES |] | |
| CANADIAN EXPORT ANTITRUST |] | MDL DOCKET No. 1532 |
| LITIGATION |] | |

PROCEDURAL ORDER

At my request, the Clerk’s Office distributed to the lawyers in this case a draft letter to the Federal Trade Commission from the Court requesting that the FTC file an amicus brief addressing issues raised by the proposed settlement agreements and the proposed settlement class in this case. Counsel for the plaintiffs and counsel for Nissan North America, Inc. responded. I attach as exhibits the original draft letter, the lawyers’ responses and the final letter I am sending to the FTC.¹

1. I have adopted most of the changes in the draft proposed by the plaintiffs’ counsel.

2. Nissan has asked me to solicit the views of certain law professors as well, and to do so on the same schedule as for the FTC. I am not comfortable singling out particular law professors at this time, but the parties are free to request that law professors submit amicus briefs and I will probably entertain a reasonable number of such submissions. Nissan also indicates that the FTC and the New York Attorney General previously investigated the matters that are the

¹ In this filing I have not attached the letter’s enclosures, which are already available under other docket entries.

subject of this litigation. I have no independent knowledge of those investigations but if the FTC decides to file an amicus brief, I will consider forwarding to the FTC a stipulation by the parties regarding any prior investigation.

3. The plaintiffs have asked me to reconsider sending the letter to the FTC in light of the First Circuit's recent approval of a *cy pres* component in a settlement, and in light of the California State Court litigation schedule for a parallel class action there. Although I have no desire to complicate Judge Kramer's management of his class action, I still would like the views of the FTC and possibly others on the complex issues I have enumerated in my letter.

Accordingly, I **DENY** the plaintiffs' request that I not send the letter.

SO ORDERED.

DATED THIS 11TH DAY OF DECEMBER, 2009

/s/D. Brock Hornby
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

**U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 2:03-MD-1532-DBH**

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**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

D. BROCK HORNBY
DISTRICT JUDGE

156 Federal Street
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November __, 2009

Willard K. Tom, General Counsel
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: In re New Motor Vehicle Canadian Export Antitrust Litigation,
D. Me. Docket No. 2:03md1532

Dear Mr. Tom:

The plaintiffs have asked me to approve settlements with two defendants in an MDL consumer antitrust lawsuit in which all other defendants have been dismissed or have obtained summary judgment.¹ In the lawsuit the plaintiffs alleged that auto manufacturers had conspired illegally to enforce policies that restricted Canadian new vehicle exports into the United States, see Fourth Amended Complaint (attached)², thereby lessening price competition in the United States, and that dealer associations helped carry out the agreement. The Court of Appeals for the First Circuit vacated earlier class certifications that I entered. The proposed distribution of proceeds to a settlement class in these circumstances raises complex and novel issues. Since there are no longer any adversaries in the case and since class notice will cost a huge amount before objectors have an opportunity to be heard, I could benefit greatly from an informed outside point of view at this stage. I request that the Federal Trade Commission consider filing an amicus brief addressing the issues related to the implementation of the settlement provisions, and the distribution of funds.

¹ Motion is attached. Certain revisions appear in an attached Reply filed in response to objections filed by the non-settling defendants.

² Later the plaintiffs filed a Fifth Amended Complaint.

Background

In 2006, the plaintiffs entered into two separate settlements—one with the defendant Toyota Motor Sales USA, Inc. for \$35 million and one with the defendant Canadian Automobile Dealers Association (“CADA”) for \$700,000. The Settlement Agreements are attached. These are the only two settlements that the plaintiffs achieved. They placed the settlement funds in interest-bearing accounts now worth over \$37 million. In August 2009, after earlier litigation class certifications had been vacated and after I entered summary judgment for all the other remaining defendants, the parties amended these two settlement agreements with respect to the ending date of the settlement class period and the duration of injunctive provisions. The amendments are attached. The proposed Settlement Class is made up of approximately 55.6 million persons who purchased or leased a new vehicle from a U.S. dealer between January 1, 2001, and December 31, 2006, if it was manufactured by the any of the defendants who were originally sued.

Toyota and CADA entered into the Settlement Agreements in February 2006 and September 2006, respectively. At that time I had already dismissed the plaintiffs’ federal antitrust damages claims because of Illinois Brick, but a federal injunctive claim remained, along with state law antitrust and consumer protection claims. In March 2006, I certified a nationwide federal injunctive class under Fed. R. Civ. P. 23(b)(2), see In re New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 1532, 2006 U.S. Dist. LEXIS 10240 (D. Me. Mar. 10, 2006), and in March 2007, I certified twenty state damage classes under Fed. R. Civ. P. 23(b)(3), see In re New Motor Vehicles Canadian Exp. Antitrust Litig., 241 F.R.D. 77 (D. Me. 2007). In 2008, the Court of Appeals for the First Circuit vacated and remanded all the state class certification orders, for reconsideration after discovery was complete. It dismissed altogether the plaintiffs’ federal injunctive relief claims for lack of case or controversy because of later changes in the United States/Canadian exchange rates. See In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008). The plaintiffs subsequently obtained my permission to dismiss without prejudice their claims under the laws of California and are pursuing those claims in California state court where, I understand, a class has been certified. The plaintiffs renewed their motion for class certification of the other nineteen state damage classes, and the defendants moved for summary judgment on the state law claims. On July 2, 2009, I granted the defendants’ joint summary judgment motion on the basis that the plaintiffs were unable to prove antitrust or other causation. That ruling mooted the plaintiffs’ renewed class certification motion. See In re New Motor Vehicles Canadian Export Antitrust Litig., 632 F. Supp.2d 42 (D. Me. 2009). On August 24, 2009, final judgment entered in favor of the non-settling, non-bankrupt defendants, dismissing them from the MDL action. See Order Granting Final Judgment in Favor of Non-Settling, Non-Bankrupt Defendants (attached). The plaintiffs have not appealed that decision and the time for filing that appeal has passed.

The Difficulties and Challenges Posed by the Settlements and Plan of Distribution

Thirty-seven million dollars is a lot of money, but not if it is to be divided among 55+ million (or even 11+ million claimants, as the plaintiffs propose and as I discuss below), and not given subtractions proposed as essential to administering the settlement or to recompensing the plaintiffs' lawyers fairly for what they have done. They propose to spend \$2.4 million to \$6.9 million in administering the distribution of settlement funds (the amount depends on the number of claims), which includes \$1.76 million for notice to the class. The lawyers plan to seek their own past costs and expenses of up to \$10 million, and attorney fees of up to 25% of the gross settlement fund. In addition, they propose a cy pres fund to start at \$500,000. All those subtractions would result in a net settlement fund of approximately \$10.3 million to \$14.8 million.³

Thus, the ultimate payments will be modest—indeed de minimis compared to the purchase or lease price of a new vehicle. Class action experience teaches that most potential claimants will not bother to file a claim, particularly when the stakes are so low. (The plaintiffs propose that Class Members with a recognized claim amount of \$5 or less not receive a check.) In other words, administering these settlements promises to raise serious issues for the public's perceptions of fairness and of who really benefits from class action lawsuits. I believe that the FTC could perform a valuable service by providing its independent and informed views on how to deal with this dilemma. It could also serve as an example for other cases.

I identify specific issues as follows:

1. Can or should a settlement class be certified? There is no longer any adversary to challenge what the plaintiffs propose. But the First Circuit vacated the earlier class certification orders. Do the plaintiffs now have enough under Rule 23 standards as interpreted by Amchem to obtain settlement class certification? If a settlement class is not certified, what happens to the settlement money?

2. If a settlement class is certified, what should be its scope? When Toyota settled, a larger number of states were still in play and the proposed class period was much longer. Ultimately, damage classes were certified for only 20 states, and the class period was shortened. But the First Circuit vacated even those certifications, and a separate class action is now proceeding in California state court. Should the fact that only Toyota and CADA have settled while all other defendants were dismissed or achieved summary judgment affect the scope of the class – for example, only Toyota purchasers or lessees? The plaintiffs do not propose any such limitation, presumably because the theory of their claim was a conspiracy among all manufacturers that would affect the pricing of all vehicles. But the plaintiffs do assert that the amount of money

³ They also propose incentive awards in the amount of \$750.00 to each of the 46 named plaintiffs who gave deposition testimony during the litigation. Whether I ultimately determine that such awards are appropriate or not, they do not materially affect the net proceeds.

recovered, balanced against the cost of administering so many claims, rules out a monetary distribution to all class members. In their proposed plan of distribution, the plaintiffs therefore propose to limit monetary recovery to a narrower group of purchasers/lessees who, they conclude, have the strongest claims against the defendants, viewed as of the time that parties first entered into the settlement agreements. That narrower group would be approximately 11.4 million purchasers and lessees who purchased or leased a new vehicle from one of the defendants between January 1, 2001 and April 30, 2003 and resided at the time of purchase or lease in one of 20 states which the Court at one time certified state-wide damage classes.⁴ Distribution to this narrower class, they suggest, is economically justified and warranted by the facts. Is it?

3. The plaintiffs propose that I include injunctive relief, and that relief was part of their settlement agreements. Can I do that, now that the First Circuit found no case or controversy on the federal injunctive relief issue? Is the proposed injunctive relief of any significance, beyond contributing to the claim for attorney fees?

4. Given the huge number of eligible claimants, notice and administration promise to be very expensive. Is it justifiable to incur those costs, given that the payout will be so small and that many class members will not make a claim even if notified? Is there any alternative?

5. What are the standards for determining reasonable attorney fees in a case like this? Overall, the plaintiffs' lawyers failed to achieve success in this lawsuit; all defendants except for Toyota and CADA escaped liability. On the other hand, the settlements with Toyota and CADA could be viewed as exceptional success given the long odds. And should the attorneys be allowed to recover all their costs and disbursements for the entire litigation from these settlements with only two defendants?

6. Does cy pres have any legitimate role to play? The plaintiffs propose that a fund in the initial amount of \$500,000, which under certain circumstances can grow to \$1 million, be set aside for a cy pres program designed to benefit all Class Members, particularly given that many class members will receive no monetary recovery. But cy pres remedies are often harshly criticized. See, e.g., Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis* (Florida Law Review forthcoming)(attached). I do not know what an appropriate cy pres program would be for this case.

7. The proposed class is defined to include purchases and leases in California. A parallel class action based on California law is pending in California Superior Court, County of San

⁴ An estimated 11,352,900 individuals stand to benefit from the monetary recovery. The eligible plaintiffs must have resided in one of the twenty states which the Court at one time certified state-wide damage classes: Arizona, Arkansas, California, Idaho, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Tennessee, Vermont, West Virginia and Wisconsin.

Francisco. Automobile Antitrust Cases I and II, Judicial Council Coordinated Proceeding (“JCCP”) Nos. 4298, and 4303 (Kramer, J.). The California claims in this court have now been dismissed without prejudice. How can a notice in this case adequately explain to California purchasers or lessees the consequences for what they might recover in that state case if they make a claim in this federal case?⁵ There may be similar issues for other states where state court lawsuits were stayed pending the outcome of this MDL lawsuit.

Conclusion

I respectfully request that the Federal Trade Commission consider filing an amicus brief addressing issues such as these and any other issues that you identify with the settlements. I know that the FTC has previously used amicus briefs to assist “courts’ consideration of important consumer protection cases,” to urge “adoption of legal principles that promote consumer welfare” and to address “important competition policy issues under consideration in court proceedings.” Federal Trade Commission Strategic Plan Fiscal Years 2006-2011 at 15, 16, 31. As the principal agency tasked with antitrust market oversight and protection of individual consumers your agency’s expert views about the issues facing me in this case would be invaluable. The FTC’s insight is especially critical here because, as noted above, the posture of the case is no longer adversarial. Even if it were, the parties could not provide me with insight about the broader ramifications of a settlement of this sort, insights that the Federal Trade Commission may be able to provide because of its broad exposure to these kinds of cases.

I request that you respond by **[date, approximately 30 days]** as to whether the Federal Trade Commission will entertain the request. If you are disposed to entertain the request, then I invite you to propose a schedule for doing so.

Very truly yours,

D. Brock Hornby

dlh
enclosures

⁵ It appears that there is CAFA jurisdiction in the Nebraska case, which will require CAFA notice to the Nebraska plaintiffs.



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December 1, 2009

VIA ELECTRONIC MAIL

Honorable D. Brock Hornby
United States District Court, District of Maine
156 Federal Street
Portland, ME 04101

Re: *In re New Motor Vehicles Canadian Export Antitrust Litigation*, MDL 1532

Dear Judge Hornby:

I write as Chair of the MDL Plaintiffs' Executive Committee on behalf of the MDL plaintiffs in response to the Court's request for comments on its draft letter to the Federal Trade Commission ("FTC"). I have been in contact with counsel for the coordinated plaintiffs in the California state court action and other pending state actions, and have shared with them a draft of this letter. The Court's draft letter requests the FTC's input regarding the proposed settlements with Toyota and CADA. Attached herewith is a redlined version of the Court's draft with plaintiffs' suggestions. However, for the reasons set forth below, we respectfully request the Court reconsider the necessity of sending the letter request to the FTC.

First, a significant consideration is how an invitation for FTC amicus briefing will complicate the California State Court litigation schedule. That schedule includes coordination of the Toyota and CADA settlement notice with the forthcoming notice of pendency in the California State Court action. At an October 27, 2009 case management conference, Judge Kramer set a schedule for briefing on defendants' planned summary judgment motions and related evidentiary motions, with several days of hearings in May and June of 2010.¹ As the Court is aware, Judge Kramer certified the California class, and defendants' writ of mandamus was denied by the California Court of Appeal. Judge Kramer has set a schedule with the

¹ Relevant pages from a transcript of that conference accompany this letter.

Honorable D. Brock Hornby
December 1, 2009
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expectation that the California notice of pendency will be coordinated with notice from the MDL of the Toyota/CADA settlements, and that the California notice and opt-out periods will occur *before* he makes substantive rulings. The plaintiffs believe that coordination of the notices will provide the clearest explanation of the relationship of the California case and the MDL proceedings and the Toyota/CADA settlements. Defendants in the California action want the benefit of *res judicata* by dissemination of the notice of pendency before Judge Kramer makes any determination on their planned motions for summary judgment. To accommodate the schedule established by Judge Kramer, notice to the California class would have to be disseminated by late February or early March of 2010. It is likely to be several months at least before the FTC would provide any input, even if it is inclined to do so. Consequently, if approval by this Court of notice of the Toyota/CADA settlements is delayed by amicus briefing, it is likely that Judge Kramer would be forced to delay the current schedule on summary judgment.

Second, the scope of, and perhaps even the necessity for FTC involvement may be affected by the very recent decision by the First Circuit Court of Appeals in *In Re Pharmaceutical Industry Average Wholesale Price Litigation*, No. 09-1196 (First Circuit, November 19, 2009) (“*AWP*”). There, the court addressed the *cy pres* issues that appear to be of concern to this Court. Of significance is (i) the First Circuit’s affirmance of Judge Saris’ approval of the plan to distribute a portion of overall settlement proceeds via *cy pres*, noting the general acceptance of the wisdom of *cy pres* in a class action settlement “when it is economically infeasible to distribute money to class members” and (ii) affirmance of the approval of a settlement class that is broader than the litigated class, in recognition of the fact that settling defendants bargained for “total peace.”

Plaintiffs have set forth a detailed plan of allocation and distribution of the settlement funds. We have recognized throughout the difficulty in actually distributing the \$37 million. For all the reasons stated in our application the proposed plan merits consideration by the settlement class. However, to the extent You Honor views distribution as economically infeasible, and would favorably consider an alternative plan, and in light of the new First Circuit guidance on *cy pres*, we suggest a conference with the Court should be scheduled to discuss *AWP* and its implications for alternative distribution plans in this case, including *cy pres*.

The First Circuit’s *AWP* decision is also instructive on the import of viewing settlements as of the time they were entered. The Court is of course very familiar with the proposed Toyota/CADA settlements, which were entered into in 2006 when the posture of this case was very different. At that time, issues relating to class certification, claims for injunctive relief and merits determination were wholly unresolved. The Court deferred consideration of the settlements pending resolution of then outstanding issues in the litigation. Now, three years later and with the benefit of hindsight, we know that the First Circuit has articulated rigorous

Honorable D. Brock Hornby
December 1, 2009
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evidentiary standards at the class certification stage for proving antitrust impact as set out in its decision vacating Your Honor's class certification determinations and dismissing the injunctive claim as mooted by the unforeseen swing in the currency exchange rates. However, the proposed settlements should be viewed in the context of the litigation risks as the parties perceived them in 2006, when many issues were unresolved and uncertain. At the time these settlements were negotiated, the settling parties could not know what the ultimate resolution of those risks would be.

The First Circuit emphasizes that where a settling defendant bargains for "total peace," the district court may approve a settlement class that is more expansive than that which was sought in litigation. Here, Toyota and CADA each bargained for, and obtained, settlements of all the federal and state cases against them, as to all claims then pending, for a class period that ran to the "present" (which meant into 2006, as the Toyota and CADA settlements were reached in February 2006 and September 2006, respectively). In light of the *AWP* decision, there appears to be no question but that a class action settlement class may be larger – in terms of class period, legal claims and geographic reach – than that which was sought in litigation.

Particularly in light of subsequent unfavorable developments for the class, the \$37 million obtained in these settlements was an excellent result, fully worthy of Court approval as fair, reasonable and adequate. One question that the Court proposes to ask the FTC is: "If a settlement class is not certified, what happens to the settlement money?" To be clear, if these Settlements are not approved, or if the Court materially modifies the settlement agreements, the agreements permit any settling party to rescind the agreement. *See* Toyota Agr. ¶ 22; CADA Agr. ¶ 22. If Toyota and CADA were to do so, the agreements call for the settlement proceeds to be returned in their entirety to the settling defendant, assuring the settlement classes receive nothing. Toyota Agr. ¶ 18; CADA Agr. ¶ 18. If, on the other hand, the settlements are approved, there will be measurable benefits both direct and indirect to the members of the proposed settlement class. The settling defendants Toyota and CADA also will receive the "total peace" they bargained for; and they will not have to face ongoing litigation in California and other states where live actions remain, as the releases contemplated by the settlements end all related state court litigation as to Toyota and CADA.

In light of the above consideration and the new decision in *In Re Pharmaceutical Industry Average Wholesale Price Litigation*, the plaintiffs request the Court schedule a conference as soon as practicable to discuss issues relating to these settlements and the approval process.

Thank you for your consideration of these important issues. We, of course, remain available to address any issues or concerns the Court may have as we work to conclude this final chapter of the MDL litigation.

Honorable D. Brock Hornby
December 1, 2009
Page 4

Respectfully Submitted,

/s/ Joseph J. Tabacco
Joseph J. Tabacco, Jr.
Todd A. Seaver

cc: Defendants' Liaison Counsel
MDL Executive Committee
Plaintiffs' Steering Committee

Enclosed: Pls' redline of Court's (draft) letter to FTC;
October 27, 2009 Transcript of conference
before the Honorable Richard A. Kramer

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

D. BROCK HORNBY
DISTRICT JUDGE

156 Federal Street
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November __, 2009

Willard K. Tom, General Counsel
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: In re New Motor Vehicle Canadian Export Antitrust Litigation,
D. Me. Docket No. 2:03md1532

Dear Mr. Tom:

~~In an MDL consumer antitrust lawsuit, the~~ The plaintiffs have asked me to approve settlements with two defendants entered into before ~~in an MDL consumer antitrust lawsuit in which all other~~ defendants ~~were~~ have been dismissed or have obtained summary judgment.¹ In the lawsuit the plaintiffs alleged that auto manufacturers had conspired illegally to enforce policies that restricted Canadian new vehicle exports into the United States, see Fourth Amended Complaint (attached)², thereby lessening price competition in the United States, and that dealer associations helped carry out the agreement. The Court of Appeals for the First Circuit vacated earlier class certifications that I entered. The proposed distribution of proceeds to a settlement class in these circumstances raises complex and novel issues. Since there are no longer any adversaries in the case and since class notice will cost a huge amount before objectors have an opportunity to be heard, I could benefit greatly from an informed outside point of view at this stage. I request that the Federal

¹ Plaintiffs' settlement papers are ~~Motion is~~ attached. Certain revisions appear in an attached Reply filed in response to objections filed by the non-settling defendants. In addition, I enclose my Decision and Order Granting Summary Judgment, dated July 2, 2009.

² Later the plaintiffs filed a Fifth Amended Complaint.

Trade Commission consider filing an amicus brief addressing the issues related to the implementation of the settlement provisions, and the distribution of funds.

Background

The litigation commenced in February 2003. In 2006, the plaintiffs entered into two separate settlements—one with the defendant Toyota Motor Sales USA, Inc. for \$35 million and one with the defendant Canadian Automobile Dealers Association (“CADA”) for \$700,000. Both Toyota and CADA agreed to injunctive provisions that bar them from engaging in the types of conspiratorial acts and restraints of trade that were the focus of the lawsuit. The Settlement Agreements are attached. They are “global” settlements which seek to resolve claims against Toyota and CADA in this federal MDL and in the various state courts where parallel actions are pending. These are the only two settlements that the plaintiffs achieved. They placed the settlement funds in interest-bearing accounts now worth over \$37 million. In August 2009, after earlier litigation class certifications had been vacated and after I entered summary judgment for all the other remaining defendants, the parties amended these two settlement agreements with respect to the ending date of the settlement class period and the duration of injunctive provisions. The amendments are attached. The proposed Settlement Class is made up of approximately 55.6 million persons who purchased or leased a new vehicle from a U.S. dealer between January 1, 2001, and December 31, 2006, if it was manufactured by ~~the~~ any of the defendants who were originally sued. In the event the settlements do not obtain final approval, the settlement agreements provide for the settlement monies to revert to Toyota and CADA and for the litigation to proceed in the federal and state courts as against Toyota and CADA. The settlement agreements are silent on how funds are to be allocated and distributed.

Toyota and CADA entered into the Settlement Agreements in February 2006 and September 2006, respectively. At that time I had already dismissed the plaintiffs’ federal antitrust damages claims because of Illinois Brick, but a federal injunctive claim remained, along with state law antitrust and consumer protection claims. In March 2006, I certified a nationwide federal injunctive class under Fed. R. Civ. P. 23(b)(2), see In re New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 1532, 2006 U.S. Dist. LEXIS 10240 (D. Me. Mar. 10, 2006), and in March 2007, I certified twenty state damage classes under Fed. R. Civ. P. 23(b)(3), see In re New Motor Vehicles Canadian Exp. Antitrust Litig., 241 F.R.D. 77 (D. Me. 2007). In 2008, the Court of Appeals for the First Circuit vacated and remanded all the state class certification orders, for reconsideration after discovery was complete. It dismissed altogether the plaintiffs’ federal injunctive relief claims for lack of case or controversy because of later changes in the United States/Canadian exchange rates had, at the time of the appeal, at least temporarily caused the threat of imminent harm to subside. See In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008). The plaintiffs subsequently obtained my permission to dismiss without prejudice their claims under the laws of California in light of the fact that a parallel, coordinated class action was pending and are pursuing those claims in California state court where, I understand, a class has been certified. The plaintiffs

renewed their motion for class certification of the other nineteen state damage classes, and the defendants moved for summary judgment on the state law claims. On July 2, 2009, I granted the defendants' joint summary judgment motion on the basis that the plaintiffs were unable to prove, on a class-wide basis as they had proposed to do, antitrust or other causation. That ruling mooted the plaintiffs' renewed class certification motion. See In re New Motor Vehicles Canadian Export Antitrust Litig., 632 F. Supp.2d 42 (D. Me. 2009). On August 24, 2009, final judgment entered in favor of the non-settling, non-bankrupt defendants, dismissing them from the MDL action. See Order Granting Final Judgment in Favor of Non-Settling, Non-Bankrupt Defendants (attached). The plaintiffs have not appealed that decision and the time for filing that appeal has passed.

The Difficulties and Challenges Posed by the Settlements and Plan of Distribution

Thirty-seven million dollars is a lot of money, but not if it is to be divided among 55+ million (or even 11+ million claimants, as the plaintiffs propose and as I discuss below), and not given subtractions proposed as essential to administering the settlement or to recompensing the plaintiffs' lawyers fairly for what they have done. They propose to spend \$2.4 million to \$6.9 million in administering the distribution of settlement funds (the amount depends on the number of claims), which includes \$1.76 million for notice to the class. The lawyers plan to seek their own past costs and expenses of up to \$10 million, and attorney fees of up to 25% of the gross settlement fund. In addition, they propose a cy pres fund to start at \$500,000. All those subtractions would result in a net settlement fund of approximately \$10.3 million to \$14.8 million.³ Thus, the ultimate payments will be modest—indeed de minimis compared to the purchase or lease price of a new vehicle. Class action experience teaches that most potential claimants will not bother to file a claim, particularly when the stakes are so low. (The plaintiffs propose that Class Members with a recognized claim amount of \$5 or less not receive a check.) In other words, administering these settlements promises to raise serious issues for the public's perceptions of fairness and of who really benefits from class action lawsuits. I believe that the FTC could perform a valuable service by providing its independent and informed views on how to deal with this dilemma. It could also serve as an example for other cases.

I identify specific issues as follows:

1. Can or should a settlement class be certified? There is no longer any adversary to challenge what the plaintiffs propose. But the First Circuit vacated the earlier class certification orders. Do the plaintiffs now have enough under Rule 23 standards as interpreted by Amchem to obtain settlement class certification? If a settlement class is not certified, what happens to the settlement money?

³ They also propose incentive awards in the amount of \$750.00 to each of the 46 named plaintiffs who gave deposition testimony during the litigation. Whether I ultimately determine that such awards are appropriate or not, they do not materially affect the net proceeds.

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the long odds. And should the attorneys be allowed to recover all their costs and disbursements for the entire litigation from these settlements with only two defendants?

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Conclusion

I respectfully request that the Federal Trade Commission consider filing an amicus brief addressing issues such as these and any other issues that you identify with the settlements. I know that the FTC has previously used amicus briefs to assist "courts' consideration of important consumer protection cases," to urge "adoption of legal principles that promote consumer welfare" and to address "important competition policy issues under consideration in court proceedings." Federal Trade Commission Strategic Plan Fiscal Years 2006-2011 at 15, 16, 31. As the principal agency tasked with antitrust market oversight and protection of individual consumers your agency's expert views about the issues facing me in this case would be invaluable. The FTC's insight is especially critical here because, as noted above, the posture of the case is no longer adversarial. Even if it were, the parties could not provide me with insight about the broader ramifications of a settlement of this sort, insights that the Federal Trade Commission may be able to provide because of its broad exposure to these kinds of cases.

⁵ It appears that there is CAFA jurisdiction in the Nebraska case, which will require CAFA notice to the Nebraska plaintiffs.

Willard K. Tom, General Counsel
Office of General Counsel
Federal Trade Commission
November __, 2009
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I request that you respond by **[date, approximately 30 days]** as to whether the Federal Trade Commission will entertain the request. If you are disposed to entertain the request, then I invite you to propose a schedule for doing so.

Very truly yours,

D. Brock Hornby

dlh
enclosures

Daniel L. Goldberg
Direct Phone: 617.951.8327
Direct Fax: 617.345.5042
daniel.goldberg@bingham.com

December 1, 2009

VIA ELECTRONIC AND FIRST CLASS MAIL

The Hon. D. Brock Hornby
United States District Court for the District of Maine
Edward T. Gignoux Courthouse
156 Federal Street
Portland, ME 04101

***Re: In re New Motor Vehicle Canadian Export Antitrust
Litigation, Civil Action No. 03-md-1532***

Your Honor:

This firm represents Nissan North America, Inc. ("Nissan USA"), a prevailing defendant in the above-referenced action. Pursuant to the request from your office of November 20, we are writing to offer Nissan USA's comments concerning your draft letter to the General Counsel of the Federal Trade Commission ("FTC"):

Your draft letter, and the careful questions that are posed therein, raise important public policy issues, including whether settlement approval can or should be granted. While certain past Commissioners of the FTC have taken a particular interest in the settlement of consumer class actions, it is not clear whether the current Commission shares that focus. Nissan USA therefore suggests that the Court also consider soliciting input from well-respected academics who have conducted extensive scholarly research into class actions and class settlements. For example, the Court might consider requesting amicus input from Professor Martin Redish of Northwestern University School of Law, whose work is cited in your letter. Others to consider include Professor Susan Koniak at Boston University School of Law and Professor George Cohen at University of Virginia School of Law. *See, e.g.,* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051 (1996). Nissan USA has not contacted any of the scholars named above with respect to this suggestion. Given their serious academic interests, however, Nissan USA anticipates that they would welcome the opportunity to be of assistance to the Court in dealing with the novel and important issues you have raised in your draft letter.

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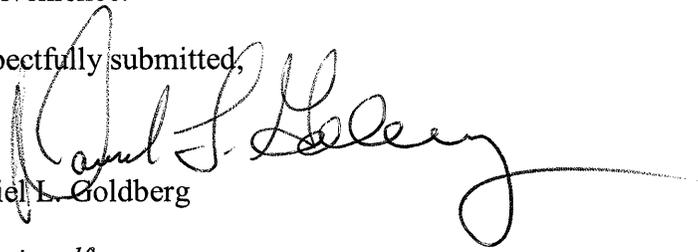
The Hon. D. Brock Hornby
December 1, 2009
Page 2

In addition, Nissan USA has strong views with respect to some of the broad public policy considerations raised by the Toyota and CADA settlements and your letter. Nissan USA regards these issues as sufficiently important that it would consider offering its views to the Court as an amicus. We therefore respectfully suggest that, if you solicit input from the FTC or others and set a target date for that input, that date also be a target date for any submissions by others interested in the issues presented.

Finally, we offer a minor suggestion to the draft letter in order to ensure that the purpose of your letter to the FTC is not misconstrued. The current FTC General Counsel, who only recently rejoined the FTC, should be made aware of the prior investigations of the matters in this case by both the FTC and the New York Attorney General's Office, and the decision by each to close their investigations with no action taken. To that end, we respectfully suggest that language be added to the end of the first paragraph of the draft to the following effect: "As you may be aware, several years ago, both the FTC and the New York Attorney General investigated the matters that are the subject of this litigation. I understand that those investigations were long ago closed without any action being taken. This letter is intended solely as a request for the submission of an amicus brief to aid the Court in consideration of issues relating to the Toyota and CADA settlements."

We appreciate the opportunity to comment on the Court's draft letter to the FTC. To the extent that we can provide any further input or assistance, we remain available at the Court's convenience.

Respectfully submitted,


Daniel L. Goldberg

cc: Cliff Ruprecht, Esq. (*each via pdf*)
William Kayatta, Esq.
Todd Seaver, Esq.

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

D. BROCK HORNBY
DISTRICT JUDGE

156 Federal Street
Portland, Maine 04101
(207) 780-3280

December 11, 2009

Willard K. Tom, General Counsel
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: In re New Motor Vehicle Canadian Export Antitrust Litigation,
D. Me. Docket No. 2:03md1532

Dear Mr. Tom:

In an MDL consumer antitrust lawsuit, the plaintiffs have asked me to approve settlements with two defendants entered into before all other defendants were dismissed or obtained summary judgment.¹ In the lawsuit the plaintiffs alleged that auto manufacturers had conspired illegally to enforce policies that restricted Canadian new vehicle exports into the United States, see Fourth Amended Complaint (attached)², thereby lessening price competition in the United States, and that dealer associations helped carry out the agreement. The Court of Appeals for the First Circuit vacated earlier class certifications that I entered. The proposed distribution of proceeds to a settlement class in these circumstances raises complex and novel issues. Since there are no longer any adversaries in the case and since class notice will cost a huge amount before objectors have an opportunity to be heard, I could benefit greatly from an informed outside point of view at this

¹ Plaintiffs' settlement papers with one defendant, Toyota Motor Sales USA, are enclosed. Certain revisions appear in an enclosed Reply filed in response to objections filed by the non-settling defendants. I have not enclosed the other settlement (CADA), but it is available on ECF. I enclose my Decision and Order Granting Summary Judgment, dated July 2, 2009.

² Later the plaintiffs filed a Fifth Amended Complaint.

stage. I request that the Federal Trade Commission consider filing an amicus brief addressing the issues related to the implementation of the settlement provisions, and the distribution of funds.

Background

The litigation commenced in February 2003. In 2006, the plaintiffs entered into two separate settlements—one with the defendant Toyota Motor Sales USA, Inc. for \$35 million and one with the defendant Canadian Automobile Dealers Association (“CADA”) for \$700,000. Both Toyota and CADA agreed to injunctive provisions that bar them from engaging in the types of conspiratorial acts and restraints of trade that were the focus of the lawsuit. The Settlement Agreements are attached. They are “global” settlements that seek to resolve claims against Toyota and CADA in this federal MDL and in the various state courts where parallel actions are pending. These are the only two settlements that the plaintiffs achieved. They placed the settlement funds in interest-bearing accounts now worth over \$37 million. In August 2009, after earlier litigation class certifications had been vacated and after I entered summary judgment for all the other remaining defendants, the parties amended these two settlement agreements with respect to the ending date of the settlement class period and the duration of injunctive provisions. The amendments are attached. The proposed Settlement Class is made up of approximately 55.6 million persons who purchased or leased a new vehicle from a U.S. dealer between January 1, 2001, and December 31, 2006, if it was manufactured by any of the defendants who were originally sued. In the event the settlements do not obtain final approval, the settlement agreements provide for the settlement monies to revert to Toyota and CADA and for the litigation to proceed in the federal and state courts as against Toyota and CADA. The settlement agreements are silent on how funds are to be allocated and distributed.

Toyota and CADA entered into the Settlement Agreements in February 2006 and September 2006, respectively. At that time I had already dismissed the plaintiffs’ federal antitrust damages claims because of Illinois Brick, but a federal injunctive claim remained, along with state law antitrust and consumer protection claims. In March 2006, I certified a nationwide federal injunctive class under Fed. R. Civ. P. 23(b)(2), see In re New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 1532, 2006 U.S. Dist. LEXIS 10240 (D. Me. Mar. 10, 2006), and in March 2007, I certified twenty state damage classes under Fed. R. Civ. P. 23(b)(3), see In re New Motor Vehicles Canadian Exp. Antitrust Litig., 241 F.R.D. 77 (D. Me. 2007). In 2008, the Court of Appeals for the First Circuit vacated and remanded all the state class certification orders, for reconsideration after discovery was complete. It dismissed altogether the plaintiffs’ federal injunctive relief claims for lack of case or controversy because, it said, changes in the United States/Canadian exchange rates had, at the time of the appeal, caused the threat of imminent harm to subside. See In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008). The plaintiffs subsequently obtained my permission to dismiss without prejudice their claims under the laws of California in light of the fact that a parallel, coordinated class action was pending in California state court where, I understand, a class has now been certified. The plaintiffs renewed their motion for class

certification of the other nineteen state damage classes, and the defendants moved for summary judgment on the state law claims. On July 2, 2009, I granted the defendants' joint summary judgment motion on the basis that the plaintiffs were unable to prove, on a class-wide basis as they had proposed to do, antitrust or other causation. That ruling mooted the plaintiffs' renewed class certification motion. See In re New Motor Vehicles Canadian Export Antitrust Litig., 632 F. Supp.2d 42 (D. Me. 2009). On August 24, 2009, final judgment entered in favor of the non-settling, non-bankrupt defendants, dismissing them from the MDL action. See Order Granting Final Judgment in Favor of Non-Settling, Non-Bankrupt Defendants (attached). The plaintiffs have not appealed that decision and the time for filing that appeal has passed.

The Difficulties and Challenges Posed by the Settlements and Plan of Distribution

Thirty-seven million dollars is a lot of money, but not if it is to be divided among 55+ million (or even 11+ million claimants, as the plaintiffs propose and as I discuss below), and not given subtractions proposed as essential to administering the settlement or to recompensing the plaintiffs' lawyers fairly for what they have done. They propose to spend \$2.4 million to \$6.9 million in administering the distribution of settlement funds (the amount depends on the number of claims), which includes \$1.76 million for notice to the class. The lawyers plan to seek their own past costs and expenses of up to \$10 million, and attorney fees of up to 25% of the gross settlement fund. In addition, they propose a *cy pres* fund to start at \$500,000. All those subtractions would result in a net settlement fund of approximately \$10.3 million to \$14.8 million.³ Thus, the ultimate payments will be modest—indeed de minimis compared to the purchase or lease price of a new vehicle. Class action experience teaches that most potential claimants will not bother to file a claim, particularly when the stakes are so low. (The plaintiffs propose that Class Members with a recognized claim amount of \$5 or less not receive a check.) In other words, administering these settlements promises to raise serious issues for the public's perceptions of fairness and of who really benefits from class action lawsuits. I believe that the FTC could perform a valuable service by providing its independent and informed views on how to deal with this dilemma. It could also serve as an example for other cases.

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⁵ This article is available at <http://www.law.northwestern.edu/searlecenter/issues/index.cfm?ID=70>.

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Willard K. Tom, General Counsel
Office of General Counsel
Federal Trade Commission
December 11, 2009
Page 6

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I request that you respond by January 29, 2010, as to whether the Federal Trade Commission will entertain the request. If you are disposed to entertain the request, then I invite you to propose a schedule for doing so.

Very truly yours,

A handwritten signature in black ink that reads "D. Brock Hornby". The signature is written in a cursive, slightly slanted style.

D. Brock Hornby

dlh
enclosures